CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 124/12
[2013] ZACC 29

In the matter between:

JACK COETZEE Applicant

and

NATIONAL COMMISSIONER OF POLICE First Respondent

MINISTER OF SAFETY AND SECURITY Second Respondent

Heard on : 21 May 2013
Decided on : 29 August 2013

JUDGMENT

NKABINDE J (Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Mhlantla AJ, Skweyiya J and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal the decision of the Supreme Court of Appeal on costs awarded against the applicant, Mr Jack Coetzee.[1] Also before us is

[1] *National Commissioner of Police and Another v Coetzee* [2012] ZASCA 161; 2013 (1) SACR 358 (SCA) (Supreme Court of Appeal judgment). It is worth mentioning that the applicant framed his application to this Court in terms of the finding on the costs order as well as other findings made pertaining to his arrest and detention. It must be emphasised that what may be appealed against is only the order made by the court a quo.

an application for condonation for the late filing of this application. The appeal before the Supreme Court of Appeal by the National Commissioner of Police and the Minister of Safety and Security[2] (respondents) was against a costs order made by the North Gauteng High Court, Pretoria[3] (High Court) in an urgent bail application.

Factual background

[2] The bail application was a sequel to the arrest and detention of the applicant by Tshwane Metropolitan Police (Metro Police) officers on Sunday, 15 November 2009 at approximately 17h00. The applicant allegedly failed to stop at a roadblock when the Metro Police officers signalled to him that he should. He alleged that he suspected that the individual police officer who attempted to stop him was not a genuine Metro Police officer. He therefore refused to stop and drove through a red traffic light. A number of Metro Police officers gave chase and forced his vehicle off the road. The applicant was arrested and thereafter detained at the Pretoria West Police Station. At the police station he was charged with "[failing] to comply with instruction of traffic officer, *crimen injuria* and driving unlicensed and unregistered motor vehicle".[4]

[3] The applicant's attorney, Mr Riaan Meyer (Mr Meyer), was given the phone number of someone whom he thought was the investigating officer. The person who answered the phone allegedly refused to identify himself, refused to grant bail and cut

[2] These respondents, instead of the State, are cited as such in the transcript of the urgent bail application and consistently in the subsequent proceedings. It is not clear from the record on what basis the two respondents were cited as parties during the bail proceedings.

[3] *Coetzee v National Commissioner of Police and Others* [2010] ZAGPPHC 155; 2011 (2) SA 227 (GNP) (High Court judgment).

[4] Id at para 9.

the call short. Attempts by Mr Meyer to get the assistance of the prosecutor were in vain.

High Court bail application

[4] On the same day of the applicant's arrest, Mr Meyer launched an urgent bail application before du Plessis AJ in the High Court. Affidavits by the applicant's wife and Mr Meyer were filed in support of the bail application. The applicant's wife explained the applicant's personal circumstances and said that she could afford to pay the sum of R500 if the Court decided to release the applicant on bail. Mr Meyer stated, among other things, that he had contacted someone he thought was the investigating officer and asked why he did not grant the applicant bail, and the latter responded that he was off duty and proceeded to end the call.[5] He said that he had asked the person (whom he seemingly thought was a member of the South African Police Services (SAPS)) why he did not offer the applicant bail, bearing in mind the powers granted to him under the Criminal Procedure Act.[6]

[5] At the bail hearing, the applicant was represented by counsel. There was a dispute about whether the applicant had requested bail from the arresting officer as opposed to the investigating officer. Mr Meyer testified on behalf of the applicant. The Station Commissioner, Superintendent Malema, who had been contacted by Mr Meyer, also testified. Superintendent Malema stated that when Mr Meyer

[5] As will become apparent later in the judgment, it emerged that the investigating officer was only appointed to investigate the case after the hearing of the urgent application in the High Court and the subsequent release of the applicant.

[6] 51 of 1977.

contacted him, he indicated that he was sleeping, said that he did not know who the investigating officer was and that he had no information in that regard. The following exchange then took place between the Court, applicant's counsel and two witnesses (Superintendent Malema and Mr Meyer), as transcribed at the bail application:

"AJ [Court]:	Why he is not given bail or pays the fine?
SUP Malema:	Confusion is caused by this thing of "RTO" [Administrative Adjudication of Road Traffic Offences Act 46 of 1998].
AJ [Court]:	Do you know any information about the Metro police who is involved? Can you tell any reason why this man is held over night?
SUP Malema:	There is no reason.
AJ [Court]:	Sup you are here because I asked you to come its an order that I gave, no information can be given.
ADV:	This is not a schedule 7, police must exercise lawfully, I submit the arrest was unlawfully on the basis that there is physical address; he should not have been kept overnight.
AJ [Court]:	I intend to give a rule nisi, order his release all relevant parties must give reasons: Who do you think should come and explain?
ATT [Meyer]:	Metro police did the arrest; police should exercise their discretion in terms of 341. They kept on the process that makes them liable; cost is part of the rule [nisi].
AJ[Court]:	Sup I am going to release this man drive with them so that this man can be released, reasons must be given why they did not allow him to pay fine or get bail, the person who is responsible for the arrest."

[6] Applicant's counsel submitted that the offence was not a Schedule 7 offence[7] and that "police must exercise [the discretion to arrest] lawfully". He argued that "the

[7] Schedule 7 of the Criminal Procedure Act, which deals with "lesser offences" when compared to those contemplated in Schedule 1, includes public violence, culpable homicide, bestiality, assault involving the infliction of grievous bodily harm, any offence relating to extortion, fraud, forgery or uttering if the amount of value involved in the offence does not exceed R20 000, and any conspiracy, incitement or attempt to commit

arrest was [unlawful] on the basis that [the applicant has a] physical address" and that the applicant "should not have been kept overnight."

[7] The High Court ordered (a) the applicant's release with immediate effect, and (b) the respondents to provide: (i) written reasons why the applicant was not given bail or an opportunity to apply for bail and to pay a fine, which reasons were to be presented to the Court on the return day, 17 November 2009; (ii) the names of the station commander of the Pretoria West Police Station who was on duty during the evening of 15 November 2009, as well as the name of the investigating officer; and (iii) reasons why the aforementioned investigating officer and station commander should not be held personally liable for the costs of the bail application.[8]

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any offence referred to in the schedule. Schedule 1 offences include, inter alia, sedition, public violence, murder, rape, sexual assault, robbery, kidnapping and childstealing.

[8] The Order reads:

> "1. The respondents are ordered to immediately release the applicant from custody at the Pretoria West Police Station, or any other place where the applicant may be held.
>
> 2. The respondents are called up to provide written reasons why the applicant was not given bail or an opportunity to apply for bail, and why the applicant was not given an opportunity to pay a fine for the alleged contravention committed, which reasons shall be presented to the above Honourable Court and judge, in the urgent court on 17 November 2009.
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> 3. The respondents are ordered to provide this Court on 17 November 2009 with the names of the station commander of the Pretoria West Police Station that was on duty during the evening of 15 November 2009, as well as the name of the investigating officer of the applicant.
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> 4. The respondents are further ordered to provide reasons why the investigating officer and the station commander aforesaid, should not be held personally liable for the costs of this application."

On the return day of the rule nisi (interim order)

[8] Further affidavits were lodged by the assigned investigating officer employed by the SAPS,[9] Detective Constable Mandla Steven Mtsweni, on the return day, 17 November 2009. He explained that the matter was allocated to him on the morning of Monday 16 November 2009, after the applicant's release had been ordered.[10] Constable Mtsweni also confirmed that the phone number that was given to the applicant's wife belonged to the Metro Police officer, Constable Frans Moosa Sivayi, who was responsible for the applicant's arrest.[11] Based on the information in the SAPS occurrence book, Constable Sivayi denied any knowledge of the applicant, his wife or Mr Meyer asking for bail.[12] Constable Sivayi confirmed the evidence of Constable Mtsweni and maintained that he "was well within his rights to have arrested the applicant and [detained] him."[13]

[9] During oral argument the respondents submitted that the arrest was lawful. Those who were called to appear on the return day were ordered to provide reasons why no members of the SAPS considered the request for bail and why no action was

[9] The investigating officer was appointed on 16 November 2009, after the order releasing the applicant had been issued.

[10] High Court judgment at para 10.

[11] Id. He completed all the relevant documents which included the SAPS 3M Form (the crime docket), the SAPS 3MB documents (the statement), the preamble to the statement, the SAPS Form 21 (a report on the investigation of the crime dated 15 November 2009) and the SAPS 6 checklist (see in this regard High Court judgment at para 15).

[12] High Court judgment at paras 11-2.

[13] Id at para 14.

taken by them or the station commander on duty at the time pertaining to the applicant's position.[14]

[10] The High Court delivered a judgment on 11 October 2010, approximately 11 months from the return day. It remarked that the "application was urgently brought on the basis that an arrest was unlawful and that [the Court] should release the applicant in terms of the common law."[15] The Court held that there was no doubt that the applicant, his wife and Mr Meyer had requested bail and that it had been refused.[16] Having made these findings regarding the bail application, the High Court went further and discussed, at length, the lawfulness of the arrest and the law pertaining thereto. It dealt with section 35(1)(d) and (f) as well as section 35(2) of the Constitution[17] and held that the provisions of the Criminal Procedure Act[18] regarding arrest should be considered against the background of these constitutional provisions.[19] Relying on certain authorities[20] the Court concluded that the arrest and detention were unlawful.[21]

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[14] Id at para 19.

[15] Id at para 1.

[16] Id at para 20.

[17] Id at paras 28-9.

[18] The provisions of the Criminal Procedure Act referred to include section 40. Section 40 provides for arrest by a peace officer without a warrant. It provides, in relevant part:

> "(1) A peace officer may without warrant arrest any person—
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> (a) who commits or attempts to commit any offence in his presence;
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> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than an offence of escaping from lawful custody".

[19] High Court judgment at para 30.

[20] For example, *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T).

[21] High Court judgment at paras 21 and 50-1.

[11] The High Court cited various authorities including *Swartbooi and Others v Brink and Others* as a justification for its costs order.[22] It then ordered certain members of the SAPS and one Metro Police officer to pay the costs of the applicant as well as the costs of the respondents *de bonis propriis* (from personal funds), on the scale of attorney and own client.[23] The Court reasoned that the applicant's constitutional rights had been violated by the unlawful arrest and detention. It further remarked:

> "For the public . . . to be forced to pay for the actions of wilful, *mala fide* and arrogant public officials, who have without hesitation breached the Constitution, the fundamental rights of the applicant, and who have acted in violation of their obligations of the Constitution, is simply not acceptable.
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> . . .
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> Any public official who knows that he would be ordered personally to pay costs of any court application or litigation flowing from his unlawful actions, instead of the taxpayer having to carry such a burden, and such an official not suffering any consequences therefrom, will think twice before acting in the manner and fashion those responsible in this matter had acted.
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> . . .

[22] [2003] ZACC 25; 2006 (1) SA 203 (CC); 2003 (5) BCLR 502 (CC).

[23] The High Court order reads:

> "1. The following persons shall pay the costs of the applicant as well as the costs of the first and second respondent *de bonis propriis* on the scale of attorney and own client:
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> 1.1 the station commander of the Pretoria West Police Station: Senior Superintendent Moodley;
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> 1.2 Superintendent Klopper of the Pretoria West Police Station;
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> 1.3 Captain Nhlazo of the Pretoria West Police Station;
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> 1.4 Inspector Dulebu of the Pretoria West Police Station;
>
> 1.5 Tshwane Metro Police Constable Frans Moosa Sivayi.
>
> 2. In the event, and only in the event of all execution steps having been taken, finalised and exhausted against the abovementioned officials, the first and second respondents shall be ordered to pay any further outstanding costs of the applicant on a scale of attorney and own client."

> [T]he time has come to order such public officials, not only to right the wrong that has been caused, and not only to avoid the taxpayer to fund their unlawful frolics . . . but also to act as a deterrent to public officials in future, to grant an order in terms of which all the costs of the litigation caused should be carried by those responsible. . . . Because senior superintendent Moodley, his assistant, superintendent Klopper, Captain Nhlazo and inspector Dulebu, as well as Metro Police constable Mandla Steven Ntsweni had been joined as respondents to the proceedings, because they were represented by counsel and also because they opposed the relief sought and even argued that the arrest and detention was lawful, I have no hesitation to come to the conclusion that a costs order can and should be made against them. They infringed upon the constitutional right of the applicant not to be detained unlawfully, and therefore his right to freedom, and also did not act in accordance with their constitutional obligations and imperatives as set out in the Constitution.
>
> I also take further into account that they did not play open cards with this court. I have already explained above their approach to the court and their approach to disclosure of all the relevant facts to this court. In my view this is an important factor that weighs heavily against the persons referred to above. They should never have opposed the matter, they should not have attempted to argue that the arrest and detention was in fact lawful, and they should never have attempted to justify their actions. The simple fact that they had attempted to do so illustrates the high-handed arrogance with which they have acted and with which they acted in this court."[24]

[12] The High Court dismissed the respondents' application for leave to appeal.

Supreme Court of Appeal

[13] The respondents successfully petitioned the Supreme Court of Appeal. In their notice of appeal they sought an order varying the decision of the High Court and replacing it with one discharging the rule nisi and ordering the applicant to pay the costs of the application. In upholding the appeal, the Supreme Court of Appeal found

[24] High Court judgment at paras 96-8 and 100.

that there was no evidence before the High Court that the applicant, his wife or Mr Meyer ever asked that he be granted bail or that he be released on warning.

[14] The Supreme Court of Appeal made observations on the invocation by the High Court of the *interdictum de libero homine exhibendo*, the common-law remedy used to release a person being unlawfully detained.[25] The Court remarked that it found it "difficult to comprehend how a refusal by a police officer to grant bail could render an otherwise lawful arrest and subsequent detention unlawful."[26] Having dealt with the jurisdictional facts necessary for an arrest under section 40 of the Criminal Procedure Act, the Court held that the interdict was inappropriate because it is a remedy employed only when the detention of the person seeking release was unlawful *ab initio* (from the beginning).[27]

[15] Regarding costs, the Supreme Court of Appeal expressed concern that "unprecedented punitive costs orders" were made at all and said that the High Court's reasoning in that regard was untenable.[28] The Supreme Court of Appeal upheld the appeal with costs including the costs of two counsel, set aside the order of the High Court and replaced it with an order dismissing the application with costs.

[25] This remedy is well-established in our law and is translated to mean "to produce in public (i.e. in court) and to make it possible to see and touch the man". The order or writ *de libero homine exhibendo* may be applied where a person has been unlawfully deprived of his or her freedom and is analogous to the writ of *habeas corpus ad subjiciendum* (*habeas corpus*) of the English Law. Latin for "that you have the body", the writ of *habeas corpus* originated as a means to protect individuals from illegal detention and is used to bring a prisoner or other detainee before the court to determine if the person's imprisonment or detention is lawful.

[26] Supreme Court of Appeal judgment at para 12.

[27] Id at para 15.

[28] Id at para 17.

In this Court

[16] The applicant sought leave to appeal the costs order awarded by the Supreme Court of Appeal on appeal. The nub of his challenge was that the principle, that persons unlawfully detained ought to be released, should be interpreted and understood in conjunction with his rights under section 35(1)(f) of the Constitution to be released from detention if the interests of justice permit,[29] to challenge the lawfulness of the detention and, if the detention is unlawful, to be released in terms of section 35(2)(d) of the Constitution.[30] The applicant argued that he was unlawfully arrested and detained. He challenged the correctness of the factual and legal findings made by the Supreme Court of Appeal[31] and took issue with the finding that the lawfulness of the arrest was never in dispute before the High Court. The applicant maintained that he brought an urgent application in the High Court "on the basis that the arrest was . . . unlawful." He contended that he was thus unlawfully detained and requested to be released in terms of the *interdictum de libero homine exhibendo*. The respondents opposed the application.

[29] Section 35(1)(f) provides:

> "Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions."

[30] Section 35(2)(d) provides:

> "Everyone who is detained, including every sentenced prisoner, has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released".

[31] He said that the findings that he at no point asked for bail, that the lawfulness of the arrest was never an issue before the High Court and that the question whether the arresting officer had properly exercised his discretion did not arise were incorrect.

Issues

[17] It is necessary to deal with two preliminary questions after which I will determine the merits – regarding the competency of the costs award by the Supreme Court of Appeal. The merits will be considered only if the jurisdictional requirements for granting leave to appeal are met. The first question relates to condonation of the late filing of this application and the second to whether leave to appeal should be granted. Before I deal with the preliminary issues, it needs to be stressed that although the applicant framed his application as relating to the finding on the costs order as well as other findings pertaining to his arrest and detention, the decision appealed against is only about the costs award. This was conceded during oral argument, and rightly so, since the application relates to the costs order and to nothing else. For this reason, nothing need be said about the correctness or otherwise of the Supreme Court of Appeal's findings regarding the applicant's arrest and detention.[32] I emphasise that the urgent application in the High Court was a bail application for the release of the applicant and that that bail application was not brought "on the basis that the arrest and detention were unlawful" as was stated by the High Court.[33]

Should condonation be granted?

[18] The applicant sought condonation for the delayed lodging of this application. He explained that he was not notified of the outcome of the proceedings in the

[32] Whilst the applicant sought "leave to appeal against a judgment and order that was granted by the Supreme Court of Appeal . . . in terms of rule 19(2) of the Constitutional Court rules, including certain findings that were made by that court", it is trite that an application for leave to appeal is aimed at the order itself. Indeed, as Mpati P pointed out in the judgment a quo, the appeal was against the costs order made by the High Court. See Supreme Court of Appeal judgment at para 1.

[33] High Court judgment at para 1.

Supreme Court of Appeal and that he had approached a different attorney for advice on the implications of the decision of the Supreme Court of Appeal. The respondents did not oppose the condonation application. The explanation proffered is satisfactory. The delay is short-lived[34] and the respondents have not been prejudiced thereby. I would therefore condone the delayed filing of the application for leave to appeal.

Should leave to appeal be granted?

[19] It is now settled that this Court will grant leave to appeal if a constitutional matter is raised or if the issue is connected with a decision on a constitutional matter[35] and it is in the interests of justice that the Court should hear the appeal.[36] For our purposes, the first question for determination is whether a matter of genuine constitutional import has indeed arisen. Differently put, whether the first jurisdictional requirement is met.

Does the case raise a constitutional matter?

[20] In deciding the question regarding this jurisdictional aspect, it is critical to appreciate the nature of the issue involved.[37] Also, merely labelling the litigation as

[34] The Supreme Court of Appeal judgment was delivered on 16 November 2012 and the application was lodged in this Court on 11 December 2012. In terms of Rule 19(2) of the Constitutional Court Rules the application for leave to appeal ought to have been lodged within 15 days of the order against which the appeal is sought. This means that the application was filed two days late.

[35] Section 167(3)(b) of the Constitution provides that the Constitutional Court may decide only constitutional matters, and issues connected with decisions on constitutional matters.

[36] Section 167(6) of the Constitution read with Rule 20 of the Constitutional Court Rules in relation to appeals from the Supreme Court of Appeal. See also *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31; 2010 (2) BCLR 99 (CC) at para 11.

[37] See *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 10 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*).

constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to raise a constitutional issue.[38] In *Biowatch*, this Court remarked:

> "The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This should not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future."[39]

[21] In *Stainbank v SA Apartheid Museum at Freedom Park and Another*,[40] the High Court had made an order for costs on the scale of attorney and own client against the applicant and, in the event of the applicant being unable to pay, costs *de bonis propriis* against the applicant's attorney on the same scale. In the application for leave to appeal against the competency of the costs awards, this Court, per Khampepe J, said:

> "[I]f the *issue* of bias is before us, a costs order arising therefrom would be connected with that *issue* and we would therefore have the requisite jurisdiction".[41] (Emphasis added.)

The Court held that the costs order was intricately interwoven with the bias challenge. It concluded that the costs order was therefore an issue connected with a decision on constitutional matters in terms of section 167(3)(b) of the Constitution.[42]

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[38] See *Biowatch* above n 37 at para 25 and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138, with the overarching principle of not discouraging the pursuit of constitutional claims.

[39] *Biowatch* above n 37 at para 25.

[40] [2011] ZACC 20; 2011 (10) BCLR 1058 (CC).

[41] Id at para 27.

[22] It is, therefore, important to appreciate the "nature of the proceedings"[43] or "the character of the ligation"[44] involved, and "the nature of the issues"[45] raised in each and every case in which costs awards are challenged. In what follows, I set out reasons why the costs award in this case does not raise a constitutional issue.

[23] As is evident from the transcript of the urgent bail application and the affidavits lodged by the applicant's wife and Mr Meyer on 15 November 2009, it cannot be gainsaid that the proceedings were for the release of the applicant on bail. The proceedings are criminal in nature. Needless to say, generally costs orders in such proceedings, where the matter relates directly to criminal proceedings instituted by the state, are not made.[46] However, costs orders in criminal proceedings are not always incompetent. For example, in a case of an unsuccessful appeal brought by the state, the court dismissing the appeal may order the state to pay the costs to which the respondent may have been put in opposing the appeal.[47] We are not engaged with

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[42] Id.

[43] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3, also cited with approval in *Biowatch* above n 37 at paras 7-8.

[44] *Biowatch* above n 37 at para 20.

[45] Id at para 16.

[46] See *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 44 and *Buchanan v Marais NO and Others* [1991] ZASCA 19; 1991 (2) SA 679 (A) at 684H-685B. See also *Harksen v President of the Republic of South Africa and Others* [2000] ZACC 29; 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC) at para 30 and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 59.

[47] Section 311(2) of Criminal Procedure Act provides:

> "If an appeal brought by the attorney-general or other prosecutor under this section or section 310 is dismissed, the court dismissing the appeal may order that the appellant pay the respondent the costs to which the respondent may have been put in opposing the appeal, taxed

such a case. Notably, no urgent application was ever brought on the basis that the arrest of the applicant was unlawful or for the applicant's release in terms of the common-law *interdictum de libero homine exhibendo*, as intimated by the High Court.[48]

[24] Other than relying on what the High Court stated in the opening paragraph of its judgment, it is not suggested by the applicant that his complaint in the urgent application was about the unlawfulness of his arrest and detention. In any event, any such suggestion would not be supported by the telling evidence, part of which is set out in [5] above. Moreover, counsel for the applicant asked Mr Meyer during the bail hearing what the basis of the application was, to which question he responded that the applicant's wife told him that they "came from [Hartebeespoort Dam] when the Metro Police told him to stop and he told them that he will stop at the nearest police station". The High Court then asked what the normal procedure to be followed was for the offences in question, to which Mr Meyer answered that it would be normal for the police to ask the applicant to pay a fine of R500 or R1000.

[25] It is indeed correct that the level of crime in our country "should not justify a departure from the democratic and constitutional principles . . . safeguarding the population from any excess use of power and deprivation of freedom by government

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according to the scale in civil cases of that court: Provided that where the attorney-general is the appellant, the costs which he is so ordered to pay shall be paid by the State."

[48] High Court judgment at para 1.

institutions and authorities."[49] However, having regard to the character of the litigation in the High Court and the manner in which the costs award was made by the High Court, it cannot be said that the costs in issue arose from proceedings in which a challenge against the excessive use of power or the deprivation of human dignity and freedom was made.

[26] It bears repeating that the question concerning the unlawfulness of the arrest was raised by the applicant's counsel for the first time during oral submissions at the urgent bail hearing and that became a clasp on which much of the reasoning of the High Court was pegged.

[27] Additionally, a challenge to the findings of the Supreme Court of Appeal on the basis that it was factually incorrect is neither a constitutional matter nor an issue connected with a decision on a constitutional matter.[50] In the circumstances of this case, the costs award in the urgent bail proceedings cannot be said to be connected with a decision on constitutional issues.

[28] I conclude that the costs award which is the subject of the appeal is not a constitutional matter or an issue connected with a decision on a constitutional matter over which this Court has jurisdiction under section 167(3)(b) of the Constitution. In the view I take of the matter, I consider that it is not necessary to determine whether the interests of justice warrant a hearing.

[49] High Court judgment at para 43.

[50] See *Boesak* above n 37 at para 15.

[29] Accordingly, I would refuse leave to appeal.

Order

[30] In the result, the following order is made:

1. Condonation is granted.

2. Leave to appeal is refused.

3. There is no order as to costs.

For the Applicant:	Advocate GC Muller SC and Advocate JJ Gerber instructed by Marius Coertze Attorneys.
For the Respondents:	Advocate SJ Maritz SC and Advocate TP Krüger instructed by the State Attorney.