IH Case No 97/1993

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER Appellant

and

EBRAHIM ISMAIL EBRAHIM Respondent

COURT : VAN HEERDEN, SMALBERGER, FH GROSSKOPF, NIENABER and HARMS JJA

HEARD : 7 November 1994

DELIVERED : 22 November 1994

JUDGMENT

VAN HEERDEN JA

On 15 December 1986 the respondent was abducted from his home in Swaziland by two men ("the abductors"). He was taken across the border between that country and South Africa where he was handed over to members of the National Intelligence Services. They took the respondent by car to Pretoria where he was arrested the following morning by the South African Police ("the SAP"). Thereafter he was detained by the police in terms of s 29 of the Internal Security Act 74 of 1982 ("the Act"). On 14 May 1987 he was released from such detention and immediately arrested on a charge of high treason. On that day he appeared in the Pretoria magistrates' court on that charge as well as other related charges. The case was postponed and the respondent kept in custody until he was tried on those charges in a Transvaal circuit court. The trial commenced on 3 August 1987 before Daniels J.

Since a certificate precluding the granting of bail had been issued by the Attorney-general under s 30 of the Act, the respondent remained in custody until 16 January 1989 when he was found guilty of high treason and sentenced to 20 years' imprisonment. He served that sentence up to 26 February 1991. The reason for his release will appear shortly.

From the date of his first appearance in the magistrates' court the respondent maintained that because of his abduction no South African court had jurisdiction to try him. Before he pleaded to the charges against him in the circuit court the respondent in effect raised a special plea of lack of jurisdiction. This was dismissed by Daniels J. On appeal this court found that the plea should have been upheld and set aside the respondent's conviction and sentence : S v Ebrahim 1991 (2) SA 553 (A). It was held that because the respondent had been abducted from Swaziland by agents of the South African State :

> "Dit volg dat die Verhoorhof ooreenkomstig ons geldende gemenereg geen regsbevoegdheid gehad het om die saak teen die appellant [the present respondent] te bereg nie." (At p 584 I.)

It was this decision that led to the respondent's release from prison on 26 February 1991.

During 1987 the respondent had instituted action against the appellant, the Minister of Defence and the Minister of Justice in the Transvaal Provincial Division. His particulars of claim were later amended, the main claim being one for damages suffered in consequence of his abduction, arrest and detention during the period 15 December 1986 to 26 February 1991. At the

commencement of the trial a statement of agreed facts and of questions to be answered by the trial court (Els J) was handed in. It suffices, however, to set out the contents of paragraphs 1 and 2 of the minutes of the pre-trial meeting in terms of rule 37(1):

> 1. ADMISSIONS
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> In terms of Ebrahim vs State 1991 (2) SA 553 AD, the Defendants concede the unlawfulness of the Plaintiff's arrest and detention in terms of S 29 of Act 74 of 1982 from 16 December 1986 to the 14 May 1987. The First Defendant [the present appellant] concedes that he is liable to the Plaintiff in damages in respect thereof. 2. MERITS
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> On the merits the question to be determined is whether the Plaintiff's detention from 14/5/87 to 26/2/91 was unlawful and if so, whether one or more of the Defendant's should be held liable in damages therefor."

From the evidence given at the trial it appeared that the SAP had no knowledge of the respondent's abduction and detention until shortly before he was arrested on the morning of 16 December. It also appeared that the abductors were part-time paid informers of the National Intelligence Services ("NIS") who had not been specifically authorised to abduct the respondent from

his home in Swaziland. At the conclusion of the trial counsel for the respondent conceded that the action against the Ministers of Defence and Justice had to fail but argued that the respondent was liable for damages in respect of the abduction, arrest and the full period of his detention. This argument was upheld by Els J who made the following orders :

> "1. The first defendant [the present appellant] is liable for damages resulting from the unlawful abduction and transportation of the plaintiff [the present respondent] and for the full period of the incarceration of the plaintiff, that is from 16 December 1986 up to his release on 26 February 1991.
>
> 2. First defendant is ordered to pay plaintiff's costs of this portion of the proceedings.
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> 3. Plaintiff is to pay the costs of second and third defendants [the Ministers of Defence and Justice].
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> 4. Costs so ordered to include costs of two counsel."

Subsequently the trial judge granted the appellant leave to appeal to this court.

Els J held that the appellant was liable in respect of the abduction, arrest and detention until 14 May 1987 because members of the SAP "associated

themselves and ...thereby formed a common purpose with the abductors and

members of the NIS with the unlawful abduction and transportation of the plaintiff." As regards the detention from the date of the respondent's first appearance in the magistrate's court until his release from prison on 26 February 1991, he found that that detention was a likely consequence of the original wrongs. Hence the fact that the detention had been authorised by courts of law did not break the chain of factual causation.

After the defendants in the court a quo had closed their case, the present respondent applied for, and obtained, leave to call Mr Louw, the Director-general of the NIS. The reasons for this application are not immediately apparent. Be that as it may, Louw testified that during the late evening of 15 December 1986 one of the abductors phoned the NIS. His message was that he had abducted the respondent who was then under his physical control. He offered to deliver the respondent to the NIS against payment of an amount of money. Louw then authorised an expedition to meet with the abductors and their prisoner on the South African side of the border, and to take the respondent to the SAP in Pretoria. As already indicated, that authorization was

put into effect by members of the NIS.

In the light of Louw's evidence counsel for the appellant contended that the inference drawn in S v Ebrahim, supra, is not borne out by the facts which emerged in casu. and that the respondent had in truth not been abducted by agents of the South African State. However, Louw's evidence, which had not been led in S v Ebrahim. does indeed confirm that inference. I have already set out the gist of what was said by one of the abductors, and the irresistible deduction is that at that stage the abductors and the respondent were still in Swaziland. Likewise the only reasonable inference is that they remained in Swaziland until Louw's instruction that the respondent should be taken over the border, where he would be taken into custody by the NIS, was conveyed to the abductors. Hence, when they gave effect to that instruction they were indeed acting as agents of the NIS and thus of the South African State.

Counsel for the appellant argued, however, that since the SAP was not a party to what occurred before the respondent was taken by the NIS from a locality in Pretoria to the headquarters of the security branch in that city, the SAP could not be held liable in respect of the abduction and the respondent's

detention by the NIS. There is, however, no question of police liability in this case. I am not unmindful of the fact that the respondent cited as defendants three different Ministers, as is provided for by s 2 of the State Liability Act 20 of 1957, but in law the real defendant throughout was the State. In so far as the court a quo held the appellant liable for the damages suffered by the respondent as a result of his abduction from Swaziland, his arrest and his detention up to 14 May 1987, the appellant was so held liable as a nominal representative of the State. The fact that the SAP did not take part in, or authorise, the abduction and the respondent's forcible removal to Pretoria, is thus in law of no consequence. Cf Marais v Pongola Sugar Milling Co Ltd 1961 (2) SA 698 (N) 700 D - E, and Die Regering van die Republiek van Suid-Afrika v S.A.N.T.A.M. Versekeringsmaatskappv Bpk 1964 (1) SA 546 (W). It is therefore open to question whether the court a quo should have ordered the respondent to pay the costs of the Ministers of Defence and Justice.

In view of what has been said above and the paragraphs of the minutes of the pre-trial conference which I have quoted, the appeal cannot succeed in respect of the period commencing with the conveyance of Louw's instruction to

the abductors until 14 May 1987. As regards the abduction from the appellant's

home to an unknown locality in Swaziland and his detention by the abductors until the instruction was received, it may be that because of para 2 of the pre-trial minutes the appellant's liability in respect thereof was not an issue in the court a quo, and that in any event the abductors' unauthorised conducts was in law ratified by agents of the State, I find it unnecessary, however, to express a firm view. I say so because, as will appear, the State is also liable to compensate the respondent for his unlawful detention from 14 May 1987 until his release on 26 February 1991, and because the few hours in question form such an infinitesimal portion of the respondent's unlawful detention for more than four years, that it is truly a case of de minimis non curat lex.

I turn to the only substantial question which the court a quo was called upon to resolve, viz whether the defendants in that court should have been held liable for the damages suffered by the respondent consequent upon his detention from 14 May 1987 to 26 February 1991. In submitting that the appellant should not have been held so liable, counsel stressed the following facts. From 15 May to 3 August 1987 the respondent was detained at prisons and other places of

detention pursuant to magisterial warrants. From the latter date the respondent remained in custody whilst his trial before Daniels J proceeded. And from 16 February 1989, when he was found guilty of treason and sentenced, until 26 January 1991 the respondent was a prisoner serving the sentence imposed upon him.

Counsel's argument may be thus summarised. The SAP had no further control over the respondent once he had been charged by the Attorney-general. Moreover, his detention until his release was authorised by judicial decisions. There was consequently a clear break between, on the one hand, the respondent's detention in terms of s 29 of the Act and, on the other, "the surrender of the Respondent by the South African Police to the Courts and the due process of Law."

Counsel rightly conceded that by virtue of the decision in R v Ebrahim. supra, neither the magistrates concerned nor Daniels J had jurisdiction to try the respondent or to commit him to detention. That being so, the various orders - in the wide sense of the word - made against the respondent during the period in question were not merely voidable but void and deprived of legal efficiency.

See Suid-Afrikaanse Sentrale Koöbperatiewe Graanmaatskappv Bpk v Shifren 1964 (1) SA 162 (O) 164, and Tödt v Ipser 1993 (3) SA 577 (A) 589 C - D. In the result the respondent remained in unlawful detention after his re-arrest on 14 May 1987.

There is no doubt that on an application of the "but for" test that detention was causally connected with the respondent's re-arrest (and also the abduction from Swaziland and his original arrest and detention). Had the respondent not been abducted and arrested he would have remained a free man and thus would not have been detained at all. And had he not been unlawfully re-arrested he would not have been brought before the courts; would not have been detained pending the outcome of the charges preferred against him, and would not have been convicted and sentenced with resultant imprisonment.

The remaining question is whether, from the angle of legal causation, the original arrest and the re-arrest were linked sufficiently closely to the respondent's continued detention during the period under consideration. I have little doubt that they were. Indeed, it appears to me that the link was very real. The re-arrest flowed from the original arrest and the purpose of both was to

eventually bring the respondent before the courts so that he might ultimately be convicted and sent to prison. This purpose was achieved and the responsible police officers must have foreseen that the respondent might be detained until so sentenced. Hence the roles of the Attorney-general and the courts in the whole process constituted no more than contributory links in the chain of causation.

The decision of this court in Tödt provides some analogous support for the above conclusion. It was there held that the plaintiff had been unlawfully arrested and detained although the arrest was effected pursuant to an order made by a magistrate. This court reasoned that because the order was void there was no interposition of a judicial act which would have rendered the plaintiff's arrest and detention " 'the act of the law not the act of the defendant' " (at p 589 G-H).

The appeal is dismissed with costs.

VAN HEERDEN JA

AGREED : SMALBERGER JA
F H GROSSKOPF JA
NIENABER JA
HARMS JA