THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1037/18

In the matter between:

THE MINISTER OF POLICE **FIRST APPELLANT**

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND APPELLANT**

and

RUVERN MULLER **RESPONDENT**

Neutral citation: *The Minister of Police & another v Muller* (1037/18) [2019] ZASCA 165 (29 November 2019)

Coram Ponnan, Plasket and Mbatha JJA and Koen and Eksteen AJJA

Heard: 4 November 2019

Delivered: 29 November 2019

Summary: Arrest for inability to account for possession of goods suspected of being stolen – arrest wrongful and unlawful – remand in custody by Magistrate at first appearance in court – whether police liable for further detention after remand.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Revelas J and Msizi AJ sitting as court of appeal):

1 The appeal succeeds in part.

2 The order of the court a quo is set aside and replaced with the following:

'(a) The appeal against the decision of the magistrate in the respect of the arrest and initial detention is dismissed.

(b) The magistrate's order pertaining to interest is amended to read:

'Interest is payable on the aforesaid amount at the prescribed rate of 9% from the date of judgment to the date of payment.'

(c) The first appellant's appeal against the decision of the magistrate in respect of the further detention is upheld.

(d) The respondent is ordered to pay the first appellant's costs of the appeal.'

JUDGMENT

Eksteen AJA (Ponnan, Plasket and Mbatha JJA and Koen AJA concurring):

[1] The respondent, Mr Ruvern Muller (Muller), sued the first appellant (the Minister) for damages arising from his alleged unlawful arrest and ensuing detention (initial detention), and the Minister and the second appellant (the NDPP), jointly and severally, for damages arising from his further detention after his first appearance in court (further detention). He was successful in the Magistrate's Court, Port Elizabeth and was awarded R50 000 for the arrest and initial detention and R150 000 for the further detention. An appeal by the Minister and the NDPP to the High Court, Grahamstown was dismissed. The appeal to this court is against the merits of Muller's

claim and is with special leave. There is no appeal against the quantum of the award. After the granting of special leave Muller abandoned his judgment against the NDPP who has accordingly played no role in the appeal.

[2] In issue before us are:
(a) The lawfulness of the arrest which was effected without warrant, and the initial detention; and,
(b) The Minister's liability for damages flowing from the further detention which occurred on the authority of a remand order by the magistrate.

[3] The saga commenced on 27 November 2013 when employees of the Minister received information from the Crime Intelligence Gathering Unit that there was a South African Police Service (SAPS) bulletproof vest (vest), which was suspected to have been stolen, at 1 Akkerhof Flats, Sidwell, Port Elizabeth. This is the home of Muller, who is a senior official in the Nelson Mandela Bay Metropolitan Fire Department. Akkerhof is a residential complex notorious for its association with crime.

[4] Warrant officers Van Zyl and Van der Merwe, both members of the Port Elizabeth Flying Squad, proceeded to Akkerhof to investigate. At the apartment they met Muller's son, Jason, and a young woman, Ms Baatjies. Van der Merwe identified himself and enquired whether they knew of a stolen SAPS vest in the apartment. Jason acknowledged that there was a vest on the veranda and he identified it to the police. Both Jason and Baadjies declared that the vest had been brought to the apartment a while before by one Jason Uithaler (Uithaler).

[5] At the trial Muller explained that Uithaler 'sort of lived with (him)'. He went on to say that 'on many occasions he was out and not sleeping there or not available during the day, but he stayed, lived with me. He used to come wash there and his clothing and items were there.' It is apparent from the evidence that Uithaler did not occupy a room in the apartment but, when he stayed over he slept on the couch in the living room.

[6] Muller arrived at the apartment shortly after the discovery of the vest and he advised that he was the lessee of the apartment. When he was confronted with the

discovery of the vest in the apartment he confirmed that Uithaler had brought it there. The vest was contained in a blue cover. The cover was opened and the vest removed. The zip on the front of the vest was then opened which revealed police insignia and a police serial number on the inside of the vest. It was clearly a SAPS issued vest and Van Zyl suspected that it had been stolen.

[7] A subsequent search of the premises also revealed a marked police pepper spray which Van der Merwe found in a drawer. Muller was arrested for being in possession of the vest which Van Zyl suspected had been stolen. He, as the arresting officer, disavowed any reliance on the pepper spray for his decision to arrest. His explanation of the reason for the arrest made no reference to it. Nothing further need be said of the pepper spray.

[8] In consequence of the arrest Muller was taken to the Algoa Park Police Station where he was detained and a warning statement taken from him. Later that afternoon Muller's daughter traced Uithaler and brought him to the police station in the hope of securing Muller's release. Although Uithaler spoke to a police official, the content of their conversation is not known and no statement was minuted from Uithaler. Much later, however, on 13 December 2013 a statement was taken from Uithaler in which he declared that the vest was his and that he had discovered it in a bin while scratching through old motor parts. He denied that Muller was aware of the presence of the vest.

[9] The docket, containing statements from Van Zyl and Van der Merwe together with Muller's warning statement, was forwarded to the prosecutor the following morning. In addition to the statements the docket contained a 'bail information form and address verification' completed by one Constable Burton. He confirmed that he had verified Muller's address and recommended that he be released on bail of R500. On receipt of the docket Ms Du Toit, the screen prosecutor, perused the docket before the first court appearance and satisfied herself that a prima facie case existed against Muller. During her evidence at the trial she alluded to the affidavit which had belatedly been taken from Uithaler and which had not been in the docket when she received it. She opined that the content of the affidavit would not have changed her view of the merit of the charge. Du Toit, however, amended the bail proposal and instructed that Muller may be released on warning. The court prosecutor assigned to deal with the

matter did not peruse the entire docket prior to the first hearing but observed the instruction not to oppose the release of Muller on warning. She proceeded on this basis.

[10] The magistrate, however, as she was bound to do, conducted an inquiry to satisfy herself of the propriety of his release. She posed questions relating to Muller's previous convictions. When Muller indicated that he had a previous conviction for rape she ruled that the matter should be referred to the bail court. The bail court was however congested and was unable to hear an application on that day. She accordingly remanded the matter to 2 December 2013. There was some debate in argument before us as to the purpose of the remand. The form completed by the magistrate, which forms an annexure to the charge sheet, records:

'Accused warned ito Sec 60(11)(B)(a),(c) + (d) Act 51/77

Accused understands & states he has a pc for rape (20 years) suspended sent. imposed.

pp 2/12/2013 court 26 ~~Bail R~~___'

Below this inscription the magistrate recorded the remand to be in custody and marked the letters 'FBA' on the pro-forma document. The abbreviation 'FBA', we were advised from the bar, refers to 'Formal Bail Application'.

[11] On 2 December 2013 Muller made a formal bail application and was released on bail of R300. The matter was remanded thereafter from time to time until ultimately it was withdrawn.

Arrest and initial detention

[12] The plaintiff was arrested for an alleged contravention of s 36 of the General Laws Amendment Act 62 of 1955 (the Act). He was advised accordingly and, as recorded earlier, detained until his first appearance in court on 28 November 2013.

[13] Section 36 of the Act provides:

'**Failure to give a satisfactory account of possession of goods** –

Any person who is found in possession of any goods, other than stock or produce as defined in section *one* of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account

of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'

[14] It is trite that the Minister bears the onus to justify the arrest and initial detention.[1] In this regard the Minister pleaded:

'5.1.2 The said offence was committed in a matter that entitles the arrest of the plaintiff without a warrant of arrest in terms of s 40(1)(b) and in the alternative s 40(1)(e) of the Criminal Procedure Act, 1977 in that:

(a) The arresting officer reasonably suspected the plaintiff of having committed an offence of being in possession of suspected stolen property; and in the alternative

(b) The arresting officer found in possession of the plaintiff a South African Police bullet proof vest and pepper spray[2] which he reasonably suspects to be stolen property or property dishonestly obtained, and whom the arresting officer reasonably suspects of having committed an offence.

5.1.3 The plaintiff was arrested with the intention to bring him to justice.'

[15] The said provisions of the Criminal Procedure Act[3] (CPA) provide:

'1. A peace officer may without a warrant arrest any person –

. . .

(*b*) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

. . .

. . .

(*e*) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect of such thing;

. . .'

[16] Irrespective of which subsection the Minister chooses to rely on, the arresting officer is required to harbour a reasonable suspicion that an offence has been

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[1] *Minister of Law and Order & others v Hurley & another* 1986 (3) SA 568 (A) at 589 E-F; See also *Zealand v Minister of Justice and Constitutional Development & another* [2008] ZACC 3; 2008 (4) SA 458 (CC).

[2] Notwithstanding the plea, Van Zyl confirmed in evidence that he did not rely on the discovery of the pepper spray or any suspicion in respect thereof for purposes of the arrest.

[3] Act 51 of 1977.

committed. The offence which Van Zyl contemplated is a contravention of s 36 of the Act. Section 36 of the Act requires that:
(a) the goods must be 'found in possession' of the suspect;
(b) there must be a reasonable suspicion that the goods have been stolen; and
(c) the suspect must be unable to give a satisfactory explanation of his possession.[4]

[17] The court a quo considered that it had not been established that Muller had been 'found in possession' of the vest. The phrase 'found in possession' is contained in numerous statutes which prohibit the possession of various objects or substances and has formed the subject of much debate. By virtue of the conclusion to which I have come it is not necessary to resolve this issue and I shall for purposes of this judgment, assume, in favour of the Minister, that Muller was 'found in possession' of the vest.

[18] The second requirement to be established is that there was a reasonable suspicion that the vest had been stolen. This may be briefly disposed of. It is not in dispute that the vest was in fact a SAPS issued article. It bore the insignia of SAPS on the inside. It is not an item which is commercially available to members of the public and is part of the police operational equipment. It is eminently reasonable for an employee of the Minister to suspect that goods found in the circumstances in which it was and marked with the police insignia are stolen.[5]

[19] I turn to the third requirement of s 36 of the Act. The inability to give a satisfactory account of the possession is an essential element of the offence created in s 36 of the Act.[6] An explanation is 'satisfactory' if (a) it is reasonably possible; and (b) shows that the suspect bona fide believed that his possession was innocent with reference to the purpose of the Act, namely the prevention of theft.[7] It is therefore required of the possessor to state where he obtained the goods and it must be clear from his statement that his possession was innocent in the sense that either the goods had not been stolen or that he honestly believed that it was not stolen or that he was

[4] C R Snyman: *Criminal Law* 6th ed (2015) at 515.
[5] Compare *S v Nader* 1963 (1) SA 843 (O) at 846 A-B.
[6] *Osman & another v Attorney General of Transvaal* 1998 (2) SACR 493 (CC) para 16.
[7] See *Nader* 1963 (1) SA 843 (O) at 848 F-G; *S v Mojaki* 1993 (1) SACR 491 (O) at 494 h-i; and *S v Aube* 2007 (1) SACR 655 (W) at 657-658.

entitled to possess it.[8] Both Baatjies and Jason said that Uithaler had brought the vest to the premises. Muller was not present when this explanation was elicited, however, he confirmed the truth of the explanation when confronted with its discovery. On the evidence at the disposal of Van Zyl it was not only reasonably possible but probably true. Muller testified that when he was confronted with the assertion that it was a police vest he protested that he did not know that. This accords with the warning statement taken from Muller later that evening in which he recorded that the vest belongs to Uithaler and he did not know that the vest was stolen. It accords too with Jason's spontaneous retrieval of the vest when asked. The manner in which the police insignia and serial number inside the vest came to be revealed is recorded earlier.

[20] Reverting to the provisions of s 40(1)(b) and (e) of the CPA, as recorded earlier, in order to carry out an arrest in terms of these provisions the arresting officer must harbour a reasonable suspicion that an offence had been committed. In *Mabona*[9] Jones J considered what was required for a suspicion to be reasonable in the context of s 40(1)(b) of the CPA. He recorded:

'. . . It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion.'

The same considerations apply in respect of s 40(1)(e).

[21] Had Van Zyl weighed up the explanation provided by Jason and Baatjies as confirmed by Muller upon his arrival he could only have come to the conclusion that it was probably true that Uithaler had brought the vest to the apartment. His own evidence that the insignia were only visible after the vest had been removed from the

[8] Snyman at 518.
[9] *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658E-H.

blue cover and opened up lends credence to Muller's explanation that he was unaware of the fact that the vest was SAPS property and therefore probably been stolen. There could be no conceivable reason to believe that this explanation was not reasonably possible. It is apparent from the explanation that Muller bona fide believed that he was entitled to possess it. As recorded earlier, no offence is committed unless the possessor is unable to give a satisfactory account of his possession. The account given by Muller clearly meets this standard. In the result the trial court and the court a quo correctly held that the arrest and initial detention were unlawful.

Further Detention

[22] Muller's case in respect of his further detention, as pleaded, against the Minister is:

'5.4 Subsequent to his first appearance before a magistrate on the 28th of November 2013, plaintiff was detained at the instance of the employees of both defendants, until he was granted bail and released from custody on the 2nd of December 2013.

6. The further detention of the plaintiff from the 28th of November 2013 until his release from custody on the 2nd of December 2013, was wrongful and unlawful in that:

> 6.1 the Investigating Officer and/or other unknown policemen involved in the investigation of the matter against the plaintiff:
>
> (i) knew or ought to have known, that no reasonable or objective grounds or justification existed for the plaintiff's further and subsequent continued detention;
>
> (ii) could have easily ascertained by the taking of simple investigative steps that no such grounds or justification existed, but failed to take any such steps;
>
> (iii) failed in his/their duty to inform that relevant Public Prosecutor/s dealing with the matter that there were no such grounds or justification and indeed no objective facts reasonably linking the plaintiff to the alleged offence of theft.
>
> (iv) failed to take any steps whatsoever to ensure that the plaintiff was released from detention as soon as possible.'

[23] Paragraph 6.1(iii) raises an issue of alleged police impropriety intruding into the prosecutorial process.[10] In this regard the court a quo held:

'When Jason Uithaler was brought to the Algoa Police Station shortly after [Muller's] arrest on 27 November 2013 . . . . the failure by the detective of the [Minister] to take a statement from

[10] *Compare Woji v Minister of Police* 2015 (1) SACR 409 (SCA).

Jason Uithaler and his failure to make a relevant entry in the police docket, and to inform the Prosecutor of the relevant facts, contributed substantially to the further detention of [Muller] until his eventual release.'

[24] The rationale for this conclusion is not explained nor is it readily apparent. Firstly, the factual averments in the explanation as set out in Uithaler's eventual statement that the vest belonged to, and had been brought to the apartment by him, were already before the screen prosecutor when she took the decision that a prima facie case existed. It is contained in Muller's warning statement. The suggestion that Muller was not aware of its presence is irreconcilable with Muller's evidence and the warning statement. Secondly, even after the statement was obtained the screen prosecutor was still of the view that the prima facie case remained undisturbed. The failure to obtain the said statement accordingly had no impact on the course of events. Thirdly, it is difficult to comprehend how the failure to make an entry in the occurrence book could have contributed to the unfortunate plight of Muller after the first appearance. In the circumstances no police impropriety intruding into the prosecutorial process was established.

[25] It is the essence of Muller's case that employees of the Minister failed to secure his release when it was within their power to do so. As recorded earlier Muller has abandoned his judgment against the NDPP and the appeal is therefore concerned only with the liability of the Minister for the further detention at the instance of his employees.

[26] Section 12(1)(a) of the Constitution guarantees the right of security and freedom of a person, which includes the right 'not to be deprived of freedom arbitrarily and without just cause'. Section 35(1) of the Constitution provides that anyone who is arrested for allegedly committing an offence has the right, amongst others—

'(d) to be brought before a court as soon as reasonably possibly, but not later than—

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expires outside ordinary court hours or on a day that is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reasons for the detention to continue, or to be released; and

(f) to be released from detention if the interest of justice permit, subject to reasonable conditions.'

The rights enshrined in s 35 of the Constitution are echoed in s 50 of the CPA.

[27] Even before the Constitution this court held in *Kader*[11] that:

'[I]t is the function of the judicial officer to guard against the accused being detained on insubstantial proper grounds, in any event, to ensure that his detention is not unduly extended.'

[28] This principle was further expounded by Harms DP in *Sekhoto*[12] where he stated:

'While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed.'

[29] In *Isaacs*[13]*,* this court was called upon to decide whether the unlawfulness of the arrest of the appellant had the result that his further detention after a remand by a magistrate was also unlawful. They answered this question in the negative. It does not follow that every remand order by a magistrate necessarily renders the further detention lawful. Where a magistrate exceeds his authority or fails to discharge his duties the Minister of Justice would ordinarily be liable for damages ensuing from his failure.[14]

[30] In *De Klerk,*[15] however, the Constitutional Court were divided on the effect of the order of remand on the liability of the police where the magistrate had failed to discharge his duty to the accused before him. De Klerk was unlawfully arrested on a charge of assault with intent to do grievous bodily harm. He was promptly brought before a court and the investigating officer recorded in the docket that she recommended that he be released on bail of R1 000. The court was, however, a

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[11] *Minister of Law and Order v Kader* [1990] ZASCA 111; 1991 (1) SA 41 (A) at 51A-C.
[12] *Minister of Safety and Security v Sekhoto* [2010] ZACC 141; 2011 (5) SA 367 at 383G-384A.
[13] *Isaacs v Minister of Law and Order* 1996 (1) SACR 314 (A).
[14] Compare Zealand.
[15] *De Klerk v Minister of Police* [2019] [ZACC] 32 (CC).

'reception court' only. She knew that at the first appearance the remand would be a routine or mechanical act rather than a considered judicial decision. De Klerk was accordingly not afforded an opportunity to apply for bail and was remanded in custody.

[31] Froneman J, writing the second judgment (with whom two other judges concurred) resonated the principles set out earlier herein and explained the effect of s 35 of the Constitution thus:

'Subsections 35 (1)(d) - (f) impose constitutional obligations on three different institutions of government: the police services, the National Prosecuting Authority and the Judiciary. The police carry the responsibility to ensure a criminal suspect is brought before a court as required by section 35(1)(d). This is an administrative function to be exercised within the broader executive authority of government. The decision to charge a suspect under section 35(1)(e) is one that falls under the authority and competence of the National Prosecuting Authority, an independent institution under the Constitution. The decision to release or detain a suspect falls within the independent judicial authority or competence of the Judiciary.'[16]

He considered therefore that the only constitutional responsibility which rested upon the arresting officer was to bring the arrestee to court timeously. Once this has been done the arresting officer had no further direct legal competence or authority to charge the applicant or decide on his release or further detention. He accordingly concluded that the Minister could not be held liable for De Klerk's further court ordered detention.

[32] Theron J, writing the main judgment (with whom 4 judges concurred) considered that the correct inquiry related not to the wrongfulness of the further detention, but to the causation of the harm (the further detention) flowing from the wrongful act (the arrest). She acknowledged that there is no reason why a deliberative judicial decision (in contra distinction to merely a failure to apply the mind) could not constitute a break in the chain of causation, however, she considered that the exercise of a proper judicial discretion should not always be considered sufficient to break the chain of causation.[17] On the particular facts of De Klerk the arresting officer had actual, subjective foresight that the proceedings in the 'reception court' would occur as they did, that De Klerk would not be considered for bail at all and that he would accordingly suffer the harm that he did. She held that a remand does not necessarily break the

[16] *De Klerk* para 132.
[17] *De Klerk* para 74.

causal chain where it was subjectively foreseen even though it is otherwise considered abnormal. The subjective foresight of the arrestor weighed heavily with her in reaching the conclusion which she did.[18]

[33] Mogoeng CJ (writing the third judgment), concurred in the judgment of Froneman J. He, however, responded to the reasoning in the main judgment and at para [154] he stated:

'. . . a constitutionally-prescribed first court appearance does constitute a new intervening act that must disrupt legal causation, and considerations of public policy and justice render it unreasonable to impute liability to the Police for a court's failure to fulfil its exclusive constitutional obligations.'

Finally, Cameron J (writing the second judgement) concurred in the result of the main judgment 'on the very particular facts of De Klerk's case'. He considered that where a court has given judicial consideration to whether to remand an arrestee, the police, as instigators of the detention, could not be liable.[19] On the particular facts of the case, however, he opined that no such evaluation had occurred.

[34] What emerges from the various judgments in *De Klerk* is that one half of the court considered that a deliberative judicial decision in respect of the further detention of the arrestee constitutes an intervening act which truncates the liability of the police for the wrongful arrest and detention. The remainder considered that it may do so, but not necessarily. Theron J summarised the applicable principles thus:

'The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since Zealand, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.'[20]

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[18] *De Klerk* para 79 - 81.
[19] *De Klerk* para 106.
[20] *De Klerk* para 62.

[35] Reverting to the facts of the present matter. The investigating officer recommended in the docket that Muller should be released on bail of R500. No reason presents itself in the evidence to suggest that he could have anticipated that this would not occur. The screening prosecutor instructed that bail should not be opposed and recommended that Muller be released on warning. Her instruction to the court prosecutor in this regard manifests her anticipation that Muller would be released. The court prosecutor proceeded on this basis. The magistrate gave due consideration to the release of Muller and embarked upon an enquiry whether the interests of justice permitted his release, as envisaged in s 35(1)(f) of the Constitution. Section 60 of the CPA prescribes the approach which a court should take to determining whether the interests of justice permit the release of an accused person on bail. Section 60(11B)(*a*) provides that:

'In bail proceedings the accused, or his or her legal adviser, is compelled to inform the court whether—

(i) the accused has previously been convicted of any offence; and

. . . '

[36] The magistrate, in considering whether to release Muller, accordingly enquired into his previous convictions. Thus it emerged that he had previously been convicted of rape. By virtue of the formulation of schedule 5 to the CPA the admitted previous conviction, in the opinion of the magistrate, elevated the offence of which he was charged to a schedule 5 offence. Section 60(11)(*b*) of the CPA provides that where an accused person has been charged with an offence referred to in schedule 5 (but not in schedule 6) he or she shall be detained in custody until he or she is dealt with in accordance with law unless he/she, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interest of justice permit his release. In the circumstances it placed an onus on Muller to adduce evidence to satisfy the court, on a balance of probability, that the interests of justice permitted his release.

[37] The presiding magistrate ruled that a formal bail application would have to be heard in the bail court in order for Muller to adduce such evidence. Despite the best endeavours of the court prosecutor the bail court was unable to determine the matter on 28 November 2013. In these circumstances the magistrate postponed the matter

and ordered Muller's further detention until 2 December 2013 which was the first occasion that the bail application could be entertained.[21]

[38] In summary, the decision taken to prosecute Muller was taken by the screen prosecutor. She had before her all the relevant information to do so. At the first appearance the magistrate gave judicial consideration to Muller's release and remanded him in custody. That she was obliged to do in terms of s 60(11)(b) of the CPA. Neither the prosecutor nor the police had knowledge of Muller's previous conviction and accordingly could not have foreseen that he would be remanded in custody.

[39] In the circumstances the liability of the police for the wrongful and unlawful arrest and detention was truncated upon the remand order made at the first appearance. The appeal must therefore succeed in respect of the further detention.

Costs

[40] The appeal therefore succeeds in part. Each party has enjoyed a measure of success. A significant portion of the argument in the appeal was directed at the unsuccessful challenge to the findings in respect of the arrest and initial detention. On consideration I think, in the circumstances of this matter, it will be fair that each party pay its own costs. I therefore purpose to make no order for costs in the appeal.

[41] In the result:

1 The appeal succeeds in part

2 The order of the court a quo is set aside and replaced with the following:

> '(a) The appeal against the decision of the magistrate in the respect of the arrest and initial detention is dismissed.
>
> (b) The magistrate's order pertaining to interest is amended to read:
>
> 'Interest is payable on the aforesaid amount at the prescribed rate of 9% from the date of judgment to the date of payment.'

[21] Section 168 of the CPA empowers a court in criminal proceedings pending before it to adjourn the proceedings from time to time, if the court deems it necessary or expedient, to any date on the terms which the court may see fit and which is not inconsistent with the CPA. See also *Zealand* p 475D.

(c) The first appellant's appeal against the decision of the magistrate in respect of the further detention is upheld.
(d) The respondent is ordered to pay the first appellant's costs of the appeal.'

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J Eksteen

Acting Judge of Appeal

APPEARANCES:

For Appellant:	Adv F Pietersen
Instructed by:	The State Attonrney, Port Elizabeth
	The State Attorney, Bloemfontein
For Respondent:	Adv B J Pienaar SC
Instructed by:	Swarts Attorneys, Port Elizabeth
	Bezuidenhouts Inc, Bloemfontein