



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 047/2024

In the matter between:

LIZELLE SCHREUDER N O

APPELLANT

and

MINISTER OF POLICE

FIRST RESPONDENT

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

SECOND RESPONDENT

NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS

THIRD RESPONDENT

OFFICER THABETHE

FOURTH RESPONDENT

Neutral citation: *Lizelle Schreuder N O v Minister of Police and Others*
(047/2024) [2026] ZASCA 52 (14 April 2026)

Coram: MOLEFE, SMITH and KEIGHTLEY JJA and VALLY and
KGANYAGO AJJA

Heard: 03 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website,

released to SAFLII. The date and time for hand-down is deemed to be 14 April 2026 at 11h00.

Summary: Delict – unlawful arrest and detention – Child Justice Act 75 of 2008 – minor arrested and detained as adult – absence of knowledge of minority status not a requisite for unlawfulness – impaired mental capacity – associated violations of right to freedom and security of the person not justified – joint liability of Ministers and National Director of Public Prosecutions for unlawful conduct of employees.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Barit AJ sitting as court of first instance):

- 1 The appeal is upheld with costs on an attorney and client scale, including the costs of two counsel.
- 2 The order of the high court is set aside and replaced by the following order:
'1 The first defendant is liable to compensate the plaintiff for all proven damages suffered by Sunnyboy Nene as a result of his unlawful arrest on 12 February 2013 and his subsequent detention up and until 3 May 2013.
- 2 The first, second and third defendants are liable, jointly and severally, to compensate the plaintiff for all proven damages suffered by Sunnyboy Nene as a result of his unlawful detention from 14 February 2013 to 3 May 2013.
- 3 The first, second and third defendants, jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the action to date, insofar as it relates to liability, to be calculated and taxed on a scale as between attorney and client, which costs included the costs attendant on the appointment of two counsel, on Scale C and Scale B respectively, where so employed.'

JUDGMENT

Keightley JA (Molefe and Smith JJA and Vally and Kganyago AJJA concurring):

Introduction

[1] This matter concerns the consequences of a systemic failure of the criminal justice system in respect of a highly vulnerable accused person, Sunnyboy Nene (Mr Nene), who was a minor at the time of his arrest and detention. Mr Nene also has a significantly impaired mental capacity. Magnifying these failings, the court seized with his delictual claim for damages, the Gauteng Division of the High Court, Pretoria (the high court), not only dismissed his action without proper appreciation of the facts and legal principles concerned but, inexplicably, of its own volition, granted a punitive costs order against him. The high court subsequently refused an application for leave to appeal. Leave having been granted on petition, it falls to this Court to set matters to rights.

[2] The appellant is Lizelle Schreuder, an advocate, who is Mr Nene's appointed curator ad litem (the curator). She instituted a civil claim, on his behalf, against the respondents for damages arising out of his alleged unlawful arrest and detention (the civil claim).

[3] The first defendant in the civil claim, and the first respondent in this appeal, is the Minister of Police; the second defendant and second respondent in this appeal is the Minister of Justice and Correctional Services (the Minister of Justice) and the third defendant and third respondent is the National Director of Public Prosecutions (the NDPP). These three respondents are sued in their representative capacities, representing the South African Police Service (the SAPS), the Department of Correctional Services (the DCS) and the National Prosecuting Authority (the NPA), respectively. The fourth defendant in the civil claim, and the fourth respondent in this appeal, is Detective Zulilwe Jack Thabethe (Det Thabethe), who is employed in

the SAPS, and who was the investigating officer assigned to Mr Nene's criminal case at all relevant times.

[4] The curator averred in the civil claim that Mr Nene, a 'visibly immature' minor, with a visibly severely impaired mental capacity, was arrested by members of the SAPS in Montana on 12 February 2013, on suspicion of the attempted robbery of a handbag. In addition to pleading that the arrest itself had been unlawful, the curator averred that, despite his age, immaturity and impaired mental capacity, Mr Nene had been unlawfully detained by officials of the DCS in the adult section of Newlock Prison, Pretoria (Newlock) and Weskoppies Psychiatric Hospital (Weskoppies) from mid-February 2013 to 3 May 2013.

[5] The curator pleaded that while in detention and in the custody of the DCS, Mr Nene had been physically and sexually assaulted and raped by inmates. Further, that he had suffered severe mental and emotional trauma. During his detention, Mr Nene was brought to court on several occasions but, on each occasion he was remanded in custody despite his age, mental incapacity and physical condition. Although Mr Nene's aunt and legal guardian had approached the NDPP on 30 April 2013 and requested his release into her custody on the basis that he was a minor and severely mentally handicapped, the senior prosecutor refused her request without the production of a birth certificate. It was averred in the particulars of claim that Mr Nene was only released to her on 3 May 2013. The curator pleaded that the charges against Mr Nene were only withdrawn on 24 July 2013.

[6] The curator averred that the relevant officials of the SAPS, the prosecution service and the DCS had failed in their legal duties, among other things, to investigate Mr Nene's age; to comply with the requirements of the Child Justice Act

75 of 2008 (the CJA); to secure and safeguard his mental and physical well-being while in detention; to ensure that he was detained in a facility appropriate to his age and impaired mental capacity; and to ensure that he received appropriate care and supervision to accommodate him in these respects. Consequently, she claimed an amount of R500 000 in damages from the defendants, jointly and severally, for Mr Nene's unlawful arrest and detention from 12 February 2013 to 3 May 2013.

In the high court

[7] Subsequent to an agreed separation of issues, the matter served before the high court for trial on the merits of the civil claim. Four witnesses testified in defence of the claim on behalf of the SAPS, including the fourth respondent, Det Thabethe. Two prosecutors, who were involved in the criminal prosecution of Mr Nene, testified on behalf of the NDPP. No witnesses appeared for the DCS. All the respondents denied liability.

[8] The high court found that Mr Nene had been lawfully arrested. As to his detention, it found that although it was common cause that Mr Nene had been 17 years of age at the time, none of the parties, including his legal aid attorneys, had any reason to question that he was a major. Consequently, they could not have treated him as a minor until his aunt produced his birth certificate on 3 May 2013, establishing his age.

[9] The high court found further that Mr Nene was detained under a lawful warrant of detention issued by a court and his detention was thus lawful. Regarding the nature of his care while in detention, the high court found that there was no cause for complaint: he was identified as mentally challenged and was correctly referred

to the district surgeon, and later a mental institution, for assessment. The claim against all the respondents was dismissed with costs on an attorney and client scale.

[10] The judgment of the high court is devoid of any explanation for this punitive costs order. It was only in its judgment dismissing the curator's application for leave to appeal that the high court provided its reasons: the curator had sought costs on a punitive scale; hence, reasoned the high court, 'what is good for the goose is good for the gander' and it was reasonable to burden the curator with the same punitive costs that she had sought against the respondents.

Facts

[11] It is not in dispute that prior to his arrest Mr Nene lived with his aunt and guardian, Ephi Nonhlahla Motala (Ms Motala), in Atteridgeville. On the morning of 8 February 2013, Mr Nene left his home to attend the Zodwa School for Mentally Handicapped Learners in Atteridgeville, as was his routine. However, he did not return on the bus from school in the afternoon. Ms Motala reported him missing at the Atteridgeville police station. She received no feedback from the SAPS. The next time she saw Mr Nene was on 28 April 2013 at Weskoppies after she followed up on a report from a former fellow inmate that he had been incarcerated at Newlock.

[12] It is unknown how Mr Nene came to be at the scene of the alleged crime on 12 February 2013 in Montana, which is 50 kms away from Atteridgeville. The arrest followed after the complainant in the matter reported an attempted theft of a handbag to the SAPS. She reported that she had been walking to work in the early morning when she saw two males. One attempted to grab her handbag. The SAPS were called to the scene after a private security officer, who was alerted by the complainant's

employer, apprehended two men, one of whom was Mr Nene. It was reported that they had run away from the scene of the alleged crime.

[13] The two arresting officers took Mr Nene and the other suspect to the police station and processed them. Warrant Officer David Layani Ringani (WO Ringani) claimed that both suspects appeared to be in their normal senses. However, Mr Nene was 'very shy' and 'terrified'. He did not want to speak to WO Ringani. WO Ringani could not recall if Mr Nene had told him his age. He did not enter the date of birth, recorded as 6 June 1985, in the docket. This would have made Mr Nene 27 years old. It was WO Ringani who read Mr Nene his rights. He did so in English. When he requested Mr Nene to place his signature on the Notice of Rights document, he made some scratches on the page because, according to WO Ringani, he was 'so shy'. WO Ringani recorded Mr Nene's name on the docket as 'Sanele Kunene'.

[14] The second arresting officer, Sergeant Celia Makuluselwa Thungwani (Sgt Thungwani), made an entry in the occurrence book shortly after the arrest. She also listed his name as Sanele Kunene and his age as 18 years. According to her, Mr Nene gave her this information. She could not recall what language she had used when she spoke to him. She said that he appeared 'alright' to her.

[15] A third officer, Constable Malagalar Sheketsi Phasha (Const Phasha), was involved in processing Mr Nene after his arrest. She interviewed him for purposes of obtaining a warning statement from him. Const Phasha said that she had spoken Sepedi to Mr Nene. The warning statement records that Mr Nene gave his answers in English. She recorded his name as 'Sonboy Kunene'. She stated that he had told her that he lived in Mamelodi, but could not give his residential address. Const Phasha circled the pro forma response indicating that during the interview, Mr Nene

‘was seemingly of sound mind’. She was not the author of the birth date, 6 June 1985, recorded in the docket. The warning statement reflects Mr Nene’s thumbprint instead of a signature because, according to Const Phasha, Mr Nene told her he could not write.

[16] What appears from the docket and documents placed in it at the time of Mr Nene’s arrest is that his identity was not certain: he was listed under different names, none of which was his correct name; there was a discrepancy about his age, with a date of birth indicating that he was either 27 or 18 years old; no identity number was listed; and Mr Nene’s address was simply listed as ‘Mamelodi’ which, apart from being incomplete, was inaccurate. Clearly Mr Nene was unable to give the officers this relevant information. Moreover, Mr Nene could not sign the Notice of Rights or the warning statement, appending, instead, a rudimentary mark on one and a thumbprint on the other. Despite this, the police officers appeared to have been satisfied that they could converse with him in English, which it must have been obvious to them was not his native language. In fact, his aunt testified at the trial that he is an isiZulu speaker.

[17] All of the SAPS officers testified that they had not noticed anything wrong with his mental capacity. This is astonishing given that when Mr Nene made his first appearance in court on 14 February 2013, the presiding magistrate immediately perceived that there was a problem with Mr Nene’s mental capacity, recording that he did not appear to be of sound mind. The presiding magistrate postponed the matter for the arresting officer to testify as to his state of mind. He also directed the investigating officer to take Mr Nene to the district surgeon for assessment, and recommended that he be sent for mental observation in terms of ss 77, 78 and 79 of

the Criminal Procedure Act 51 of 1977 (the CPA). Mr Nene was remanded in custody at Newlock pending the availability of a bed at Weskoppies.

[18] The investigating officer, Det Thabethe, accompanied Mr Nene to the district surgeon. In his testimony, he said that Mr Nene appeared normal and well at the time. The prosecutor instructed Det Thabethe to investigate Mr Nene's address. It is common cause that he took no steps to do so, taking the view that because Mr Nene could not provide him with the information, there was nothing further he could do. Det Thabethe also failed to comply with an instruction from the prosecutor on 4 April 2013 to obtain a report from the doctors treating Mr Nene at Newlock on his condition.

[19] Despite Det Thabethe's assertions that Mr Nene looked normal when he took him to the district surgeon, the latter's report told a completely different story. Dated 18 February 2013, and presented to the court when Mr Nene appeared on that date, the report described Mr Nene's condition as: 'not orientated, talking irrelevant'; poor intelligence; unable to understand the charges against him; unable to understand the implications of conviction; amnesia about the alleged offence; thought disorder; poor ability to concentrate; bad attention; emotional disturbance. The district surgeon's concluding remarks were: 'Not fit to stand trial. Not fit to give statement or instruct counsel. Cannot participate in trial proceedings.' He recommended an assessment and management by a mental health care provider.

[20] Mr Nene was remanded in custody at Newlock once again, there being no beds available at Weskoppies for observation in terms of ss 77 and 78 of the CPA. The first prosecutor in the matter, Noxolo Eva Mgiba (Ms Mgiba), confirmed that after perusing the docket she amended the charge to one of attempted theft. She said

that she had not noticed anything wrong with Mr Nene when he appeared in court. Surprisingly, after the district surgeon's report was produced she did not think to examine the veracity of the Notice of Rights and warning statement documents indicating that: Mr Nene had understood his rights; he had understood the charges against him and that he did not wish to make any statement until he appeared in court; and that he had been of sound mind when interviewed by the SAPS officers. When questioned why she had not done so, the prosecutor expressed the view that she was complying with her duty to the complainant by proceeding with the charges.

[21] During March, the DCS sent a letter to court saying that Mr Nene had been admitted to the hospital section at Newlock. He was currently psychotic and was unable to attend trial. The letter advised that he had been referred to a psychiatric doctor for further management. On several further occasions Mr Nene was unable to appear in court.

[22] On 4 April 2013, Zacharia Matlhatji (Mr Matlhatji) took over as the prosecutor in the case. He said that he had gone through the docket and was satisfied that the matter could be enrolled. Mr Nene was unable to appear in court after his second appearance. Mr Matlhatji tasked Det Thabethe to obtain a further medical report from the prison. He failed to do so. Mr Matlhatji conceded that it was not a happy situation to have a mentally disabled person accused of a minor offence detained in prison. However, he said he couldn't release him because of the absence of an address for Mr Nene. He stated that he had time and again raised the issue with Det Thabethe, with no luck. When asked under cross-examination why he had not done more to protect Mr Nene, Mr Matlhatji responded: 'He was not innocent. He appeared to Court like any other accused. He was not innocent.'

[23] Neither Ms Mgiba nor Mr Matlhatji appeared to notice the discrepancy in the age ascribed to Mr Nene in the police documents and in the district surgeon's report. As I have mentioned, according to the police dockets, he was either 27 or 18 years of age. The district surgeon's report put Mr Nene's age at 37, which happened to be the same age as Mr Nene's co-accused, who was examined by the district surgeon at the same time. The prosecutors and the police assumed that Mr Nene was an adult without taking any steps to ascertain if this was accurate. In fact, he was only 17 years of age and thus a minor.

[24] Mr Nene remained in custody at Newlock until 23 April 2013 when he was transferred to Weskoppies after a bed became available. The only evidence available regarding Mr Nene's detention at Newlock is from his medical history file that was produced at trial. No DCS officers or medical staff who treated him testified.

[25] The medical file records that he was noted to be 'mentally ill' on admission to Newlock. However, he appears to have been placed in a normal cell, as the records indicate that on 15 February 2013 he was brought to the clinic by a fellow inmate because of his mental illness. The clinic staff member recorded that they were to be alerted if he caused trouble or if relatives came to visit him. A consultation was booked with a doctor for 22 February 2013, but the records indicate that Mr Nene 'didn't show up'. Later that day it was noted that he was dirty and unkempt but had shown no signs of aggression or violent behaviour thus far. He was referred to a doctor for assessment.

[26] Before Mr Nene was transferred to Weskoppies, the DCS records indicate that on several occasions he was found to be 'messaging on the floor with faeces', wetting himself, incoherent, drooling, giving poor responses to questions, psychotic, and not

stable. At one stage a doctor queried whether he was schizophrenic. He was given treatment as prescribed and he was assisted with showering and feeding. The high court found that Mr Nene had been kept in the hospital section at Newlock throughout his incarceration there. However, the medical records do not expressly support this finding and, as indicated earlier, no witnesses testified on behalf of the DCS at the trial. What is recorded is that on at least one occasion, on 24 March 2013, Mr Nene was ‘accosted in his cell’, implying, albeit not conclusively, that he was not in a hospital bed at the time.

[27] Mr Nene’s aunt, Ms Motala managed to track him down at Weskoppies hospital on 28 April 2013, four days after he had been admitted there. She testified that his hands were swollen and that he was ‘dripping saliva’. Weskoppies refused to release him into her custody as he was awaiting trial. Ms Motala saw Det Thabethe on 30 April 2013, and he accompanied her to the court. She spoke to the prosecutor, telling him Mr Nene was a minor. However, they would not release him into her care until she had produced his birth certificate. He was remanded back to Weskoppies on 30 April 2013, until he was released into Ms Motala’s custody on 3 May 2013.

[28] Despite being released from custody and his case being transferred to the child justice roll for purposes of a preliminary inquiry, the State persisted with the charges. On 25 May 2013, the Deputy Director of Public Prosecutions instructed that ‘the prosecution must proceed’ and that the prosecutor should request the court to act in terms of s 77(6) of the CPA, to ‘make a finding whether the accused is fit to stand trial and whether the accused committed the act in question’. This, notwithstanding that there was ample evidence that Mr Nene was a minor who was not fit to stand trial.

[29] Mr Nene was referred for assessment at Sterkfontein hospital, as a minor. The assessing psychiatrist reported on 1 July 2013 that: Mr Nene suffered severe intellectual disability; there were signs of possible recent sexual assault; he had acute stress disorder; he was not fit to stand trial and at the time of the offence he was both unable to appreciate the wrongfulness of his actions and to act in accordance with such an appreciation. The psychiatrist raised several concerns in his recommendations:

‘The accused was apparently missing/lost prior to commission of the alleged offence. He was also apparently sexually assaulted in the past two months. It is not clear from the prosecutor’s report what the circumstances and motive of the alleged offence were. It is therefore respectfully recommended that the following be considered in his future management:

1. Documentation of a sexual examination and blood tests (eg. HIV, Hepatitis, etc)
2. Referral to counselling services to address the problems encountered from the alleged sexual assault (viz. enuresis and hypervigilance)
3. Psychoeducation for his guardian
4. Placement at a training centre/protected employment
5. Ongoing supervision and monitoring’.

Lawfulness of the arrest

[30] It is a fundamental rule that every individual’s person is inviolable. In an action for unlawful arrest any infraction of this basic right is prima facie illegal. The defendant in the matter bears the onus of satisfying the court that the arrest was lawfully justified.¹ The Constitutional Court in *Zealand v Minister of Justice and Constitutional Development*² (*Zealand*) recognised that this is a principle well

¹ *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A); [1993] 2 All SA 232 (A) at 153D-H.

² *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (*Zealand*) para 25. See also *Bula and Others v Minister of Home Affairs and Others* [2011] ZASCA 209; [2012] 2 All SA 1 (SCA); 2012 (4) SA 560 (SCA) para 51 and *Arse v Minister of Home Affairs and Others* [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) para 5.

established under our common law, with subsequent recognition in s 12(1)(a) of the Constitution. That section guarantees the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily and without just cause.

[31] In the case of minors who are alleged to have committed offences, the CJA places additional constraints on the curtailment of their freedom through arrest and detention. One of the objects of the CJA is to ‘prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion’.³ The CJA also provides as a guiding principle that ‘all consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society’.⁴

[32] Section 5(2) of the CJA requires that a child over the age of 12 who is alleged to have committed an offence must, before their first appearance at a preliminary inquiry, be assessed by a probation officer.⁵ The assessment is designed to, among other things, establish whether the child may be a child in need of care; estimate the age of the child where this is uncertain; formulate recommendations regarding the release or detention of the child; and provide any other relevant information regarding the child which the probation officer may regard as being in his or her best interests.⁶

³ Section 2(d).

⁴ Section 3(a).

⁵ Preliminary inquiries are dealt with under Chapter 7 of the CJA. They are informal pre-trial procedures aimed at determining, among other things, whether the matter may be diverted before plea. A preliminary inquiry must be held in respect of every child who is alleged to have committed an offence, save in certain circumstances, which do not apply in this case.

⁶ Section 35.

[33] The CJA permits the arrest of a child who is accused of committing the offence of theft.⁷ The arresting officer must, in addition to informing the child of the allegations against them, and their rights, explain the procedures to be followed and notify the child's parents, an appropriate person or guardian of the arrest and must submit a written report to the presiding officer.⁸ As Mr Nene was charged with theft, this provision applied in his case.

[34] It is common cause that none of these safeguards were applied to Mr Nene when he was arrested, as he was dealt with as an adult. The high court found that the jurisdictional requirements for a lawful arrest, as provided in s 40(1) of the CPA had been satisfied: WO Ringani had reasonable grounds to suspect that Mr Nene had committed the offence. The high court also found that WO Ringani properly exercised his discretion to arrest Mr Nene, as the complainant also enjoyed the right to be protected by the law. For these reasons, the high court found, the arrest was justified.

[35] In making this determination, the high court failed to appreciate that the prima facie unlawfulness of Mr Nene's arrest could not be cured simply on an application of the requirements of s 40(1) of the CPA. Even if the high court was correct in finding that these requirements had been satisfied (and I make no finding in this regard), this did not render the arrest lawful. The fact is that Mr Nene was under the age of 18 at the time: he could not lawfully have been arrested without the additional requirements under the CJA having been satisfied too.

⁷ Section 20.

⁸⁸ Section 20(3).

[36] The right not to be deprived of freedom arbitrarily or without just cause under s 12(1)(a) of the Constitution protects against both procedural and substantive deprivations of liberty.⁹ As a minor, Mr Nene was entitled to an assessment by a probation officer when he was arrested, and he was entitled to the safeguard of his guardian or an appropriate person being informed. He was afforded neither of these protections. This failure had obvious substantive consequences for Mr Nene. Not only was he a minor, but he was quite obviously a person who, because of his additional mental disability, could not understand why he was being arrested, what the implications of his arrest were, and what his rights were in the circumstances. In other words, his immaturity as a minor, which is what the safeguards in the CJA are intended to remedy, was exacerbated by his mental disability. Had he been afforded access to a probation officer, they would have been able to put measures in place to ensure his protection from the ordeal to which he was subsequently subjected.

[37] The fact that the arresting officers did not know that Mr Nene was a minor is no justification and did not render his arrest lawful. Under our common law, in a delictual claim for unlawful arrest it is not necessary for the plaintiff to prove that the defendant had knowledge that the arrest was unlawful: liability may be imposed despite the wrongdoer's unawareness of the wrongful character of the act.¹⁰ This principle was confirmed by the Constitutional Court in *De Klerk v Minister of Police*¹¹ (*De Klerk*), in which that Court held that 'a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so.'

⁹ *Zealand* para 33.

¹⁰ *Hofmeyr* at 155G-H, citing *Smit v Meyerton Outfitters* 1971 (1) SA 137 (T) at 139C-D.

¹¹ *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) para 14.

[38] At best for the SAPS, the fact that they did not know Mr Nene was a minor might, in principle, be relevant to the question whether, because of this lack of knowledge, they may be able to avoid liability based on a consideration of what the legal convictions of the community require. However, on the facts of the case, this avenue is not open to them.

[39] The SAPS officers involved in Mr Nene's arrest and processing failed to capture his age accurately. None of them could account for the birth date recorded in the docket that calculated his age as 27 years. Sgt Thungwani, who recorded his age as 18 years, claimed that Mr Nene had given her this information. It is unlikely that this was so: Mr Nene had severe intellectual incapacity; he could not sign his name because he could not write; he could not give an address; and he even incorrectly told the arresting officers that he lived in Mamelodi (if, indeed, he provided this information).

[40] All the facts point to the SAPS officers simply assuming, without question, that he was an adult and processing him accordingly. They failed to apply their minds to the possibility that Mr Nene, whose photograph in the appeal record clearly depicts a young person, was under the age of 18 years. Their conduct undermined the objective outlined in s 2(d) of the CJA. Ignorance of his age in these circumstances cannot protect the Minister of Police from being held vicariously liable for the violation of his rights by the officers concerned.

[41] To make matters worse, the SAPS officers acted in circumstances where it must have been obvious to them that Mr Nene had mental challenges. Their evidence to the contrary is simply not credible. The presiding magistrate immediately noticed that something was amiss within two days of Mr Nene's arrest, and this was

subsequently confirmed by the district surgeon four days later. It is impossible that the SAPS officers could have missed these signs. They must have known that Mr Nene was incapable of understanding his rights and of meaningfully participating in the process of obtaining a warning statement. That he was so incapable was confirmed by the district surgeon. Such incapacity does not occur overnight. The SAPS officers' attempts to cover up their failings is to be deprecated.

[42] For these reasons, I find that the high court erred in finding that Mr Nene's arrest was lawful. There is no reason why liability should not follow and the Minister of Police be held liable for the damages flowing from Mr Nene's unlawful arrest.

The lawfulness of the detention

[43] The principles discussed above apply equally to the question of the lawfulness of Mr Nene's detention. The law required that he be accorded the safeguards applicable to his status as a minor. He was unlawfully detained as an adult from 12 February 2013 to his release into the custody of Ms Motala on 3 May 2013. Two related questions arise for consideration in this regard: first, whether there were any grounds to justify Mr Nene's detention; and, second, if not, which of the respondents should be held liable.

[44] Mr Nene appeared in court on 14 February 2013 after the prosecutor was satisfied that there was a prima facie case to answer and that the matter should be enrolled. He was remanded in custody by order of the presiding magistrate, as an adult, pending the district surgeon's assessment. His address was unknown at that stage, as he was unable to tell the SAPS officers where he lived. The prosecutor instructed Det Thabethe to make further investigations regarding Mr Nene's address which, as I noted earlier, he failed to do. From then on, with an unknown address,

and with the presiding officer having referred Mr Nene for observation under ss 77 and 78 of the CPA, Mr Nene continued to be detained in Newlock under orders issued by the presiding officer as if he was a run-of-the-mill accused.

[45] Contrary to the objectives detailed in s 12(d) of the CJA, Mr Nene was then brutally exposed to the adverse effects of the formal criminal justice system: he showed signs of psychosis, bed-wetting, faecal incontinence and severe distress. This was a person who, prior to his arrest and detention, was able to attend a school for children with special needs. The assertion that none of the role-players knew that he was a minor is not a ground justifying his unlawful detention after his first appearance at court. In any event, as I explained above, they took no reasonable steps to ascertain either his age or his address when it was clear that he was unable to provide coherent information regarding either.

[46] I have already expressed the view that the SAPS not only failed to capture his age properly, but ascribed different ages to him. None of the ascribed ages could meaningfully have been provided by Mr Nene, given his mentally disabled state. The SAPS officers concerned simply chose the easier path and assumed he was an adult. The docket they provided to the prosecutor was defective as regards not only the contradictory ages ascribed to him, but also his identity and the absence of a proper address. The fact that he could not provide an address was a crucial factor in his further detention as, without an address, his right to be released pending his trial was severely compromised. Despite this, no one seriously acted to find out where he lived.

[47] Mr Nene had already been reported to the police as missing by Ms Motala when he was arrested. However, the SAPS officers concerned did not think to check

missing persons reports. Faced with an arrestee who was obviously mentally compromised, this would have been the obvious first step to take. Had they done so, they could have tracked down Ms Motala, with the result that, as a minor, Mr Nene would have been released into her care, without being remanded in custody.

[48] What is even more concerning is that the docket provided to the prosecutor falsely stated that Mr Nene had been advised and understood his rights, that he had elected not to make a statement, that he understood the charge against him, and that he was mentally competent. These falsehoods contributed to the decision to enrol the matter and to set in motion Mr Nene's further detention. The failure by Det Thabethe to act in accordance with the prosecutor's instructions also materially contributed to Mr Nene's prolonged detention in Newlock. For these reasons, the Minister of Police cannot escape liability by contending that the prosecutor's decision to enrol the matter acted as an intervening factor: their conduct was directly linked to the ongoing violation on Mr Nene's right not to be deprived of his freedom arbitrarily and without just cause.

[49] The prosecutors in the matter, Ms Mgiba and Mr Matlhatji, did not query the discrepancies in the ages that appeared in the docket, nor the different names by which Mr Nene was identified. Nor, when they were alerted to Mr Nene's compromised mental capacity on 14 February 2013 by the presiding magistrate and on 18 February 2013 by the district surgeon's report, did they question whether the Notice of Rights and warning statement administered to Mr Nene on his arrest were reliable.

[50] The prosecutors failed to apply their minds properly to the question of whether it was in the interests of justice that the prosecution should continue. They ought to

have done so at the very least by 18 February 2013 when they received the district surgeon's report. Prosecutors are required to act with objectivity and in the public interest.¹² It is clear from their responses to questions when testifying that they favoured their duty to the complainant above their duty to ensure that justice be achieved overall. Mr Nene was not treated as if he were presumed innocent until proven guilty. On the contrary, Mr Matlhatji brazenly asserted that he did not regard Mr Nene as being innocent. It is indeed shocking that a public prosecutor could have been oblivious to one of the most fundamental constitutional principles governing criminal prosecutions, namely the presumption of innocence. While the duty to act objectively is owed to all accused persons by prosecution officers, in the case of young and vulnerable accused, like Mr Nene, the duty assumes even greater importance. The prosecutors failed Mr Nene, with disastrous consequences.

[51] The defence raised by the prosecution service is that Mr Nene's detention in Newlock from 14 February 2013 was lawful because it was ordered by the presiding magistrate. Linked to this, it contends that its prosecutors acted lawfully by complying with the order that Mr Nene be processed under ss 77 and 78 of the CPA. Given my criticism of their conduct, this defence cannot succeed: had they carried out their duties properly, it would have been obvious to them that there was no prospect of a successful prosecution of Mr Nene, and it would have been unnecessary for the court to invoke these sections and to keep Mr Nene in detention.

[52] The DCS also relied on the defence that its officials were acting under orders of the court to keep Mr Nene in detention. It argued that they acted lawfully in complying with the remand orders on pain of being found in contempt of court.

¹² *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) para 72.

[53] In *Zealand*, the Constitutional Court explained that the right under s 12(1)(a) of the Constitution requires that every encroachment must be ‘substantively justified by acceptable reasons’. Further, that ‘the mere fact that a series of magistrates issued orders remanding [a claimant] in detention is not sufficient to establish that the detention was not “arbitrary or without just cause”’.¹³ In terms of s 30(1) of the CJA, a presiding officer may only order the detention of a minor in a specified prison in certain circumstances. One is that the detention must be necessary in the interests of justice or for the safety and protection of the public or the minor.¹⁴ Another is that there is a likelihood that, if convicted, the minor could be sentenced to prison.¹⁵ In Mr Nene’s case, neither of these requirements were satisfied. Factually, he was a minor and the presiding officer’s remand orders were unlawful. Following *Zealand*, the DCS cannot, in this case, successfully assert that the detention in its facility after 14 February 2013 was lawful because of the existence of the remand orders.

[54] In principle, the DCS could argue that its conduct in detaining Mr Nene is not causally linked to the infringement of his rights. It could also argue that because it acted under court orders, its actions were not wrongful in the sense that the legal convictions of the community favour absolving the DCS of liability. Although not stated precisely in these terms, counsel for the DCS made submissions along similar lines. It was submitted that the DCS was not responsible for Mr Nene’s mental illness and that it had given him an appropriate standard of care while he was in custody at Newlock.

¹³ *Zealand* para 43.

¹⁴ Section 30(1)(d).

¹⁵ Section 30(1)(e).

[55] I am not persuaded by these submissions. As mentioned earlier, prior to entering Newlock, Mr Nene lived at home and attended a special needs school. When he was admitted to Newlock it was noted on his file that he suffered a mental illness. Despite this, he was admitted to an ordinary cell, only being brought to the clinic section of the prison by a fellow inmate. Contrary to the submissions made by counsel from the bar, there is no evidence that he was kept throughout in the hospital section of the prison. The records show that he was given medication, seen by doctors, and assisted with feeding and bathing at times. However, they do not indicate whether this was done on an ‘in-patient’ or ‘out-patient’ basis.

[56] Even if Mr Nene was admitted to the hospital section, what is clear is that Mr Nene’s condition did not stabilise. He was, on many occasions, recorded as being in a terrible state: messing with his own faeces and sleeping in a wet bed. There can be no doubt that his detention in prison exacerbated whatever underlying mental conditions existed. The DCS called no witnesses to satisfy the court that they did everything reasonable necessary to alleviate his obvious suffering. There was no explanation why the relevant DCS officers did not think fit to contact a social service provider to assist in either tracking down Mr Nene’s family or making recommendations to the court as to alternative detention arrangements.

[57] Consequently, the security of Mr Nene’s person and dignity was violated on a continuous basis throughout the period of his detention. He was assaulted at least once in his cell. There are reports of injuries consistent with sexual assault. This Court was advised at the hearing of the appeal that the question of whether Mr Nene was in fact raped is to stand over for determination in the second part of the trial. Nonetheless, the report of injuries consistent with the possibility of such an outcome adds to the overall picture demonstrating that the DCS failed in its duty to protect

the security of his person. I conclude that the DCS cannot escape liability for the damages suffered by Mr Nene consequent on his unlawful detention.

Allocation of liability

[58] It follows from my above findings that the high court erred in absolving the respondents of liability for Mr Nene's unlawful arrest and detention. The question remains as to how that liability should be allocated.

[59] The SAPS officers were responsible for Mr Nene's unlawful arrest and his detention up to 14 February 2013 when he made his first appearance at court. Thereafter, in my view, the Minister of Police, the Minister of Justice and the NDPP should be held jointly liable for his unlawful detention from 14 February 2013 to his release. The relevant officials of each of these respondents all contributed to the harm to Mr Nene's rights under s 12(1)(a) of the Constitution in such a manner that it is not possible to allocate liability for the harm separately between them. The fair and just outcome is to hold them jointly and severally liable.

[60] As far as the fourth respondent, Det Thabethe is concerned, it was submitted on behalf of the curator that his conduct in failing to follow the instructions of the prosecutor to conduct further investigations to ascertain Mr Nene's address warranted him being held personally liable as a joint wrongdoer. I agree that Det Thabethe's conduct deserves censure. He appears to have simply washed his hands of the case once Mr Nene was remanded to prison and ordered by the court to be assessed under ss 77 and 78 of the CPA. However, I do not believe it would be just, in the circumstances, to hold him personally liable, in addition to the vicarious liability attaching to his employer. In truth, he was not the only public official who

acted reprehensibly in the treatment of Mr Nene. The whole criminal justice system failed him. The ultimate responsibility lies with the executive heads responsible.

[61] On the question of costs, the curator seeks that these be awarded on a punitive scale. In my view, punitive costs are justified in this case. The conduct of all the officials concerned was reprehensible. In addition to Mr Nene being a minor at the time he passed through their hands, he was obviously extremely vulnerable. He was simply processed through the criminal justice system with no regard to his individual needs and to his dignity. What is astonishing is that none of the respondents offered any form of recognition that he had been badly treated at their hands, let alone to apologise for what he went through. Instead, they closed ranks and tried to defend the indefensible. Such conduct is thoroughly deserving of this Court's censure in the form of an attorney and client costs award.

Order

[62] I make the following order:

- 1 The appeal is upheld with costs on an attorney and client scale, including the costs of two counsel.
- 2 The order of the high court is set aside and replaced by the following order:
 - ‘1 The first defendant is liable to compensate the plaintiff for all proven damages suffered by Sunnyboy Nene as a result of his unlawful arrest on 12 February 2013 and his subsequent detention up and until 3 May 2013.
 - 2 The first, second and third defendants are liable, jointly and severally, to compensate the plaintiff for all proven damages suffered by Sunnyboy Nene as a result of his unlawful detention from 14 February 2013 to 3 May 2013.
 - 3 The first, second and third defendants, jointly and severally, the one paying the other to be absolved, are directed to pay the costs of the action to date,

insofar as it relates to liability, to be calculated and taxed on a scale as between attorney and client, which costs included the costs attendant on the appointment of two counsel, on Scale C and Scale B respectively, where so employed.’

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances:

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For 1st & 4th Respondents:

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For 2nd Respondent:

T W G Bester SC

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For 3rd Respondent:

J F Barnardt SC

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