THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 827/13
Reportable

In the matter between:

MINISTER OF SAFETY AND SECURITY **APPELLANT**

and

VUYOLWETHU TYOKWANA **RESPONDENT**

Neutral citation:	*Minister of Safety and Security v Tyokwana* (827/13) [2014] ZASCA 130 (23 September 2014)
Coram:	Brand, Tshiqi, Saldulker JJA and Fourie and Mathopo AJJA
Heard:	25 August 2014
Delivered:	23 September 2014

Summary: Delictual claim ─ Unlawful arrest, detention and malicious prosecution ─ Police aware that no evidence available upon which the respondent could be successfully prosecuted ─ Police failed to inform prosecutor and the court of lack of evidence ─ As a result the appellant refused bail and remanded in custody until acquittal 22 months later ─ Detention unlawful and in breach of right to freedom in terms of s 12(1)*(a)* of the Constitution ─ Orders of magistrate not rendering detention lawful ─ Appellant liable to compensate respondent for full period of detention.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Sandi J sitting as court of first instance)

The appeal is dismissed with costs, including the costs of two counsel, where employed.

JUDGMENT

Fourie AJA (Brand, Tshiqi, Saldulker JJA and Mathopo AJA concurring):

[1] This is an appeal against the part of the order of the Eastern Cape High Court, Grahamstown (Sandi J), declaring the appellant liable to compensate the respondent for such damages as he may have suffered as a consequence of his unlawful arrest, detention and subsequent malicious prosecution by members of the South African Police Service (the SAPS), acting within the course and scope of their employment with the appellant. The appeal is with the leave of the court a quo.

[2] On 2 October 2007 the respondent, a 19-year old male, as well as Messrs Hanise and Bokisa, washed motor vehicles at the Kenton-on-Sea police station as part of their community service sentences. One of the vehicles was a police vehicle which had been allocated to Warrant Officer Kani (Kani) of the Kenton-on-Sea police. In the course of the afternoon, Kani arrested the respondent for the theft of his (Kani's) firearm which had allegedly been stolen from the cubbyhole of Kani's vehicle. The respondent denied any involvement in the theft of the firearm, but was detained in the cells at the Kenton-on-Sea police station.

[3] On 4 October 2007 the respondent appeared in the local magistrates' court, represented by an attorney. A plea of guilty was tendered on his behalf on three counts, ie the theft of a firearm; the unlawful possession thereof and the unlawful

possession of fifteen rounds of ammunition. He was convicted and the case was postponed to 19 October 2007 for sentence. The magistrate ordered the respondent's further detention. On 19 October 2007 the respondent's attorney withdrew and the case was postponed to 5 November 2007 at the request of the respondent's new attorney, to enable him to obtain instructions. The magistrate ordered the respondent's further detention.

[4] On 5 November 2007 the respondent's new attorney applied, in terms of s 113(1) of the Criminal Procedure Act 51 of 1977 (the CPA), for the correction of the respondent's plea of guilty to one of not guilty, on the basis that 'beskuldigde beweer hy was beïnvloed om skuldig te pleit en omdat hy bang was'. The magistrate recorded a plea of not guilty, postponed the case to 6 November 2007, and ordered the respondent's further detention. On the latter date a further postponement was ordered, to 19 December 2007, with the respondent to remain in custody.

[5] On 19 December 2007 the magistrate refused the respondent's application for bail and the matter was remanded for trial with the respondent to remain in detention. It is not evident what the cause of the subsequent delay was, but the trial only commenced on 20 July 2009, when the respondent was acquitted on all charges.

[6] On 1 October 2009 the respondent issued summons against the appellant for the payment of damages suffered as a consequence of the events of 2 October 2007 and their aftermath. The action was defended and it was ordered that the issue of liability be determined first. In the event, the trial proceeded before Sandi J. The heads of damages comprising the respondent's claim are set out hereunder.

Wrongful and unlawful assault

[7] The nature of the assault perpetrated on the respondent by different members of the SAPS at Kenton-on-Sea is detailed in the particulars of claim. In its plea the appellant denied any assault on the respondent. However, at the commencement of

the trial, the appellant formally admitted that:

'On 2 October 2007 and at the Kenton-on-Sea police station warrant officer Kani hit the plaintiff on his head thereby causing the injuries on his head and the bruising on his shoulders as listed in the J88 that Sister Rijkers prepared on 11 October 2007.'

[8] In her J88 medical report Sister Rijkers, who examined the respondent on 2 October 2007, noted three lacerations on the right side of his head, one on the left side of the head, four on the forehead and two at the back of the head. All of these lacerations were sutured. In addition, she noted bruising on both shoulders in the post-scapula area, as well as a slight swelling of the left knee.

[9] I should add that, in his evidence in the high court, Kani explained that he hit the respondent with a broomstick on the head, while the respondent testified that Kani, inter alia, used a knobkierie to assault him. In view of the appellant's admission that the respondent had been assaulted it is not necessary, for present purposes, to dwell on this issue. I will in due course in evaluating the evidence, refer to the nature and extent of the assault perpetrated on the respondent.

Wrongful and unlawful arrest

[10] It is common cause that Kani, acting within the course and scope of his employment with the appellant, arrested the respondent on 2 October 2007, without a warrant of arrest. As justification for the arrest the appellant relies on s 40(1)*(b)* of the CPA, which provides that a peace officer, such as Kani, may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the CPA. The crime of theft is one of the offences listed in Schedule 1. To succeed with this defence the appellant is required to establish that Kani entertained a suspicion based on reasonable grounds that the respondent had committed a Schedule 1 offence.

[11] Suspicion, by definition, means absence of certainty. As was explained in *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H, it 'is a state of conjecture or surmise where proof is lacking. . . . Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end'.

Wrongful and unlawful detention

[12] If the arrest of the respondent was unlawful it would follow that his subsequent detention was also unlawful. However, the appellant submitted that such unlawful detention would, in any event, have ceased on 4 October 2007, when the magistrate ordered the respondent's further detention. Alternatively, the appellant submitted that, if it is found that the respondent's detention remained unlawful even after 4 October 2007, such unlawful detention ceased on 19 December 2007 when the magistrate dismissed the respondent's application for bail.

Malicious prosecution

[13] It is common cause that Kani, acting within the course and scope of his employment with the appellant, instigated the criminal proceedings against the respondent. The prosecution failed upon the acquittal of the respondent on 20 July 2009. To succeed with the claim for malicious prosecution, the respondent has to prove the absence of reasonable and probable cause for the prosecution and that Kani instigated the legal process with malice or *animo iniuriandi*. See *Minister for Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) para 8.

[14] With regard to the absence of reasonable and probable cause for the prosecution, the following was said in *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 136A-B:

'When it is alleged that a defendant had no reasonable cause for prosecuting, I understand this to mean that he did not have such information as would lead a reasonable man to conclude that the plaintiff had probably been guilty of the offence charged; if, despite his having such information, the defendant is shown not to have believed in the plaintiff's guilt, a subjective element comes into play and disproves the existence, for the defendant, of reasonable and probable cause.'

[15] In *Relyant Trading (Pty) Ltd v Shongwe and Another* [2007] 1 ALL SA 375 (SCA) para 5, this court held that, 'although the expression "malice" is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*'. In this regard *animus iniuriandi* means that the defendant, while being aware of the absence of reasonable grounds for the prosecution, directs his or her will to prosecuting the plaintiff. If no

reasonable grounds exist, but the defendant honestly believes either that the plaintiff is guilty, or that reasonable grounds are present, the second element of *animus iniuriandi*, namely consciousness of wrongfulness, will be lacking. See J Neethling, J M Potgieter and P J Visser Neethling's *Law of Personality* 2ed (2005) at 125 and *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 105B-C.

[16] In *Minister for Justice and Constitutional Development v Moleko*, supra, at para 64, this court said the following with regard to the element of *animus iniuriandi*:

'The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*).'

Discussion

[17] In his order, Sandi J declared the appellant liable to pay the respondent's damages 'in respect of assault, unlawful arrest, detention and malicious prosecution'. As I have earlier indicated, the appeal is not directed at the order in respect of the assault perpetrated on the respondent. With regard to the detention of the respondent, it is not clear from the order whether the learned judge a quo held the appellant liable for the entire period of the respondent's detention. However, the court a quo subsequently clarified this aspect when granting the appellant leave to appeal, inter alia, on the ground whether or not the appellant is liable for the respondent's 'entire period of detention'.

[18] At the outset, it is necessary to emphasise the finding of the court a quo that Kani, who was the only witness to testify on behalf of the appellant, was a poor witness whose evidence falls to be rejected. A reading of the record illustrates the unreliability of Kani as a witness. In fact, the submission on behalf of the respondent that he was a serial liar, is fully justified. Not only was his evidence riddled with untruths and improbabilities, but he persisted in changing his ground and when confronted with material discrepancies in his evidence, he habitually resorted to the feeble excuse of having been 'under stress'. Also, the appellant has not attacked the credibility of the respondent and his witnesses, especially where their evidence differs from or is contradicted by Kani.

[19] It is not necessary to analyse Kani's evidence in any great detail to illustrate his unreliability, but the following instances may be highlighted:

(a) In his police statement Kani denied having assaulted the respondent. This denial was repeated in the appellant's pleadings. However, when faced with objective evidence of Kani's vicious assault upon the respondent, it was, at the onset of the trial, admitted that the respondent had been assaulted.

(b) Kani belatedly admitted to having inflicted the injuries reflected in the J88 medical report of Sister Rijkers, but in evidence denied any further assault upon the respondent. However, during cross-examination, he conceded that, in addition to the ten sutured lacerations identified by Sister Rijkers, the respondent had sustained at least three other lacerations which had to be sutured, as well as an abrasion under the left eye.

(c) In his evidence in the magistrates' court, Kani testified that the respondent had told him (Kani) that he had been injured in an assault in the township, while the injuries to the respondent's head and face were occasioned by Kani himself. To this should be added the evidence of the respondent that Kani had instructed him to give this false version in his evidence to the magistrate.

(d) Kani's evidence as to the absence of extensive bloodstains on the respondent and his clothing, is gainsaid by the undisputed evidence of the respondent's parents and the witness Fogarty.

(e) Kani's version as to the events which gave rise to the charge which he preferred against the respondent, is so improbable that it can safely be rejected out of hand. He also changed and adapted this version whenever it suited him during his evidence. In particular, it is difficult to extract a coherent version of Kani's regarding the chronology and timing of the events.

(f) On Kani's version he locked and activated the alarm of his vehicle when he went into his office, yet the respondent is alleged to have removed Kani's firearm from the cubbyhole of the locked vehicle with the alarm inexplicably and improbably failing to go off. However, when testifying in the magistrates' court, Kani said that he had left the vehicle open to enable the inside to be cleaned.

(g) Kani's version of the alleged pointing out of the firearm by the respondent is not only seriously unconvincing, but contradicted by the statements obtained from Hanise and Bokisa. In his written statement and in the official occurrence book, Kani

recorded that his firearm was found ‘under the seat’ in the toilet, but according to his testimony in the high court, it was found under the outlet pipe leading to the wall of the toilet.

[20] It follows from the aforegoing, that there is barely any aspect of Kani’s evidence that remains unscathed, with the result that it is incapable of credence and was correctly rejected by the court a quo.

[21] In his evidence the respondent denied all knowledge of the alleged theft of Kani’s firearm. He described the vicious assault upon him by Kani and other members of the police, in an attempt to coerce him to admit to the theft of the firearm. In his warning statement he expressly stated ‘ek het nie die vuurwapen gesteel nie’.

[22] When testifying, the respondent gave a graphic account of the prolonged assault to which he was subjected by Kani and at least three other members of the SAPS stationed at Kenton-on-Sea. He was dealt numerous blows to the head with Kani’s knobkierie; he was forced to the ground on two occasions with the policemen then stomping and standing on his chest and neck; he was hit with a police baton; he was kicked in the area of his genitals and his testicles were forcefully squeezed; he was hit with a fist which caused a wound to his eye; his eyes were sprayed with pepper spray; he was hosed down with cold water; he was forced into a scalding hot shower; boiling water was poured over his feet, and so the sad tale continued. There is no reason to doubt this evidence of the respondent, as Kani’s admission that he had dealt the respondent 14 blows to the head and the evidence of the respondent’s parents, serve as corroboration of the vicious assault perpetrated on him.

[23] The respondent was detained in the police cells, with Kani continuing to put pressure on him to admit to the theft of the firearm. On the morning of his first appearance in the magistrates’ court, Kani convinced the respondent that he should plead guilty, by promising the respondent that he would then let him go free. Kani, however, reneged on this undertaking. Kani accompanied the respondent to the magistrates’ court where he (Kani), ironically, was on duty as the court orderly.

[24] Apart from the forced admission of guilt extracted from the respondent by viciously assaulting him, the appellant relies on information obtained by Kani from Hanise and Bokisa, prior to the respondent's arrest, that they had seen the respondent removing the firearm from Kani's vehicle. Hanise deposed to an affidavit to that effect at 16h20 on 2 October 2007, while Bokisa deposed to a similar affidavit the next day. However, the evidence strongly suggests that the police (and in particular Kani) obtained this evidence from Hanise and Bokisa by forceful means.

[25] It is recorded in the occurrence book kept at the Kenton-On-Sea police station, that at 17h35 on 2 October 2007 the respondent and Hanise were booked into the cells while 'both have various wounds on body and head, sustained before detention'. There is no suggestion in the evidence that the respondent or Hanise had sustained any injuries prior to their detention on 2 October 2007. On the contrary, the overwhelming probability is that they sustained their respective injuries during the course of the afternoon of 2 October 2007, at the Kenton-On-Sea police station, after Kani had established that his firearm was missing.

[26] The answer as to the cause of the injuries sustained by the respondent and Hanise, was provided by Hanise in his evidence at the trial in the magistrates' court, namely:

'Hulle (the police) het ons aanhoudelik aangerand, vir die hele dag, want hulle vra vir ons waar die vuurwapen is. . . . Ons sê vir hulle dat ons nie kennis dra van die vuurwapen nie.'

This evidence was confirmed by the respondent in his testimony in the high court, as well as the contents of two subsequent affidavits deposed to by Hanise and Bokisa, in which they confirmed that their injuries were caused by the police assaulting them, in their quest to find someone to blame for the disappearance of Kani's firearm.

[27] I should add that, in his evidence in the magistrates' court, Hanise denied seeing the respondent steal the firearm. Furthermore, Hanise and Bokisa have subsequently sued the appellant for the payment of damages suffered as a consequence of injuries sustained by virtue of being assaulted by members of the Kenton-On-Sea police. Therefore, the overwhelming probability is that the information and affidavits initially obtained from Hanise and Bokisa, blaming the

respondent for the theft of Kani's firearm, were extracted from them by forceful means by Kani and his fellow police officers.

[28] At all material times, Kani was aware that Hanise and Bokisa had been subjected to assaults in order to obtain their co-operation to provide statements falsely implicating the respondent. He was also aware that any admission or pointing out by the respondent was only brought about by the continuous brutal assaults perpetrated on him. In these circumstances, the court a quo correctly concluded that the appellant had failed to establish that Kani did, at the time of the arrest of the respondent, entertain a suspicion based on reasonable grounds that the respondent had committed a Schedule 1 offence. Therefore, the arrest was unlawful.

[29] In instigating the prosecution of the respondent, Kani was fully aware of the absence of any credible evidence linking the respondent to the theft of the firearm. Yet, he submitted a false statement denying any assault and duress on the respondent, while failing to inform the presiding magistrate that the respondent had been subjected to a brutal and sustained assault by the police and that his visible injuries were in consequence of this assault. In fact, he persuaded the respondent to provide a false version as to the origin of his injuries to the magistrate. In these circumstances, Kani was not only aware of the absence of reasonable grounds for the prosecution, but could not have had any honest belief that the respondent was guilty. Yet, he wrongfully persisted with and actively encouraged the prosecution of the respondent, reckless as to the consequences of his conduct.

[30] In the court a quo, Kani conceded that, when Hanise and Bokisa deposed to their later affidavits on 9 October 2007, it was clear that their initial statements, implicating the respondent, were false. He conceded that they were the only two witnesses who could implicate the respondent in the criminal case against him for the theft of the firearm, yet he took no steps to advise the prosecutor that, in the circumstances, there was no point in pursuing the prosecution against the respondent. In view thereof, his instigation of the respondent's prosecution and his perpetuation thereof, was malicious.

[31] This brings me to the issue of the respondent's detention. The authority of the police to detain a person is inherent in the power of arrest. Therefore, if the arrest is unlawful, the resultant detention is similarly unlawful. What remains to be considered is whether or not the appellant ought to have been held liable for the full period of the respondent's detention, from 2 October 2007 to 20 July 2009.

[32] The appellant contends that the unlawful detention of the respondent ceased when the magistrate ordered his further detention. In this regard the appellant relies on the judgment in *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A), in which this court found that a detainee's continued detention pursuant to an order of court remanding him in custody in terms of s 50(1) of the CPA, was lawful notwithstanding the fact that it had followed upon his unlawful arrest.

[33] In the court a quo, Sandi J relied on the decision in *Mthimkhulu & another v Minister of Law and Order* 1993 (3) SA 432 (E), where Nepgen J held as follows at 438C-F:

'In any event, I do not see how the mere fact that the further detention of the plaintiffs occurred pursuant to an order made by the magistrate in terms of section 50(1) of Act 51 of 1977 can render such detention lawful where the arrest, which resulted in such detention being ordered, was unlawful. The prior arrest of a person is a prerequisite to the provisions of the subsection coming into effect. If such arrest is unlawful, it is not a valid arrest. Whatever occurs pursuant to such arrest is therefore, in my view, invalid and unlawful.'

However, in *Isaacs* at 323I-J, this court held that the dictum in *Mthimkhulu* at 438C-F was wrongly decided.

[34] In his judgment, Sandi J acknowledged that he was aware of the judgment in *Isaacs*, but added 'I think that this judgment has been overtaken by the Constitution and other judgments'. The learned judge did not elaborate on this view. As submitted on behalf of the appellant, the judgment in *Isaacs* has not been overruled by the Constitutional Court or this court.

[35] In *Isaacs* the appellant was wrongfully arrested and he contended, relying on the above dictum in *Mthimkhulu*, that, whatever occurs pursuant to an unlawful arrest, is invalid and unlawful. Therefore, the argument went, the subsequent

detention of the appellant by virtue of an order of court remanding him in custody in terms of s 50(1) of the CPA, was similarly unlawful.

[36] E M Grosskopf JA, writing for the court in *Isaacs*, defined the crucial issue which had to be decided, as follows at 321g:

'Die wesentlike vraag vir beslissing is dus of die appellant se onregmatige inhegtenisneming die gevolg gehad het dat sy aanhouding ingevolge die landdros se bevel van 22 Februarie ook onregmatig was.'

At 322g the learned judge of appeal summarised the submission on behalf of the appellant, as follows:

'Sy betoog is 'n jurisdiksionele een. Dit lui soos volg. Artikel 50(1) geld alleen ten opsigte van iemand wat "in hegtenis geneem" is. Hierdeur word bedoel n regsgeldige inhegtenisneming. Waar daar geen geldige inhegtenisneming was nie, kan art 50(1) nie toegepas word nie. Die verdere aanhouding en alles wat daarop volg is dan net so ongeldig as die oorspronklike gepoogde inhegtenisneming.'

[37] The learned judge of appeal further held as follows at 323h-i:

'Ek meen dus dat waar art 50(1) praat van iemand wat "in hegtenis geneem" is, dit nie beperk is tot 'n regmatige inhegtenisneming nie. Dit sluit iemand in wat, in 'n gepoogde uitoefening van arrestasie-bevoegdhede, onder die arresteerde[r] se beheer gebring is. Dit volg dat die aanval op die landdros se regsbevoegdheid in die onderhawige geval ongegrond is en dat die bevel vir die verdere aanhouding van die appellant binne sy regsbevoegdheid geval het en geldig was. Die blote feit dat die appellant se inhegtenisneming onregmatig was, kan nie daaraan afdoen nie.'

[38] To summarise, what was decided in *Isaacs*, is that the prior lawful arrest of a person is not a prerequisite to the provisions of s 50(1) of the CPA coming into effect. Put differently, it was held that the fact that the person may have been arrested unlawfully, does not preclude him or her from being remanded lawfully in terms of s 50(1) of the CPA. However, what was not held in *Isaacs*, is that an arrested person's continued detention by virtue of an order of court remanding him or her in custody in terms of s 50(1) of the CPA, will automatically render such continued detention lawful. This was not an issue that the court in *Isaacs* was called upon to adjudicate.

[39] I believe that the question whether the orders of the magistrate remanding the respondent in custody and refusing him bail, rendered his subsequent detention lawful or not, has to be answered with regard to the peculiar facts of this case. The salient facts are:

(a) Kani knew that there was simply no evidence upon which the respondent could be successfully prosecuted. He was aware that the initial statements of Bokisa and Hanise were obtained under duress and were false. He was also aware that the respondent, who had been subjected to a serious and sustained assault at the hands of the police, did not tell the truth to the magistrate, but, at Kani's insistence, misinformed the court as to the theft of the firearm and the origin of his injuries.

(b) The investigating officer, Warrant Officer Muller, was similarly aware of the subsequent statements of Bokisa and Hanise, recanting their original version, as well as the fact that the respondent had laid a charge of assault against Kani. He failed to bring this crucial evidence to the attention of the prosecutor or the magistrate.

(c) Kani and Warrant Officer Muller recommended that bail for the respondent be opposed, by completing a bail information form in which material untruths were recorded regarding the question whether the respondent would stand his trial or constitute a flight risk.

(d) Due to Kani and Muller's failure to inform the prosecutor and/or the magistrate of the true facts, the latter were not given a proper opportunity to apply their minds to the question whether or not the respondent should be remanded in custody or be granted bail. Had the prosecutor and the magistrate been apprised of all the relevant facts and circumstances, it is inconceivable that the prosecutor would have permitted the prosecution to proceed, or that the magistrate would have refused bail.

(e) The prosecution of the respondent and its perpetuation, particularly at the instance of Kani, was malicious and aimed at depriving the respondent of his liberty. It constituted a wrongful and improper use of the court process to deprive the respondent of his liberty.

[40] It has often been stressed by our courts, that the duty of a policeman who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not. See *Prinsloo and another v Newman* 1975 (1) SA 481 (A) at 492G and 495A and *Minister for Justice and Constitutional*

Development v Moleko, supra, at para 11. In *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC) para 63, it was held that the police has a clear duty to bring to the attention of the prosecutor any factors known to them relevant to the exercise by the magistrate of his discretion to admit a detainee to bail.

[41] It brooks no argument that Kani, as well as Muller, failed dismally to give a fair and honest statement of the relevant facts to the prosecutor and to bring all the relevant circumstances under the attention of the magistrate. On the contrary, they wilfully distorted the truth, thereby misleading the prosecutor and the magistrate with the result that the respondent was remanded in detention and refused bail, and remained in custody until his acquittal on 20 July 2009.

[42] In considering the respondent's delictual claim for damages pursuant to his wrongful detention, it is clear that his constitutional right to freedom and security of the person, as enshrined in s 12 of the Constitution, was unjustifiably and unreasonably violated by the employees of the appellant, and in particular by the malicious conduct of Kani. Section 12(1)*(a)* of the Constitution guarantees everyone the right to freedom and security of his or her person, including the right not to be deprived of his or her freedom without just cause.

[43] In *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC), a claim for delictual damages for wrongful detention was considered and it was held that the detention of the plaintiff for the entire period of his incarceration was unlawful, in that s 12(1)*(a)* of the Constitution was unjustifiably and unreasonably violated. In *Zealand* the continued detention of the plaintiff also followed upon court orders remanding him in custody. At para 52 the constitutional court concluded as follows:

'I can think of no reason why an unjustifiable breach of s 12(1)*(a)* of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention.'

[44] In my view, the respondent has shown that the circumstances in which the appellant's employees instigated and persisted with his prosecution, amounted to an unjustifiable breach of s 12(1)*(a)* of the Constitution. This is sufficient to establish

delictual liability on the part of the appellant for the full period of the respondent's detention from 2 October 2007 to 20 July 2009.

[45] It follows that the appeal falls to be dismissed. With regard to the costs of the appeal, this is a matter which justified the employment of two counsel.

[46] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel, where employed.

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P B Fourie
Acting Judge of Appeal

APPEARANCES:

For the appellant:	G H Bloem SC
	Instructed by:
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	The State Attorney, Bloemfontein
For the respondent:	I Smuts SC (with him G Dugmore)
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