THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 329/17

In the matter between:

BRYAN JAMES DE KLERK **APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

Neutral citation: *De Klerk v Minister of Police* (329/17) [2018] ZASCA 45 (28 March 2018)

Coram: Shongwe ADP, Leach and Majiedt JJA and Rogers and Hughes AJJA

Heard: 8 March 2018

Delivered: 28 March 2018

Summary: Delictual claim – Unlawful arrest and detention – what constitutes unlawful arrest – whether the Minister of Police is liable for the further detention after the suspect has been remanded to custody by the court is fact-based – the purpose of arrest is to bring the arrested person to court.

ORDER

On appeal from: Gauteng Division, Pretoria (Tokota AJ sitting as court of first instance):

1 The appeal is upheld with costs.

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

'(a) The defendant is ordered to pay the plaintiff the sum of R30 000 for general damages.

(b) The defendant is ordered to pay interest *a tempore morae* on the sum of R30 000 from date of summons.

(c) The defendant is ordered to pay the plaintiff's costs of suit.'

JUDGMENT

Shongwe ADP (Majiedt JA and Hughes AJA concurring)

[1] This appeal concerns a delictual damages claim resulting from an alleged unlawful arrest and detention. The appellant, Mr Bryan James de Klerk, was arrested on a charge of assault with intent to do grievous bodily harm on 21 December 2012 and appeared in court on the same day. He was remanded in custody at Johannesburg prison until he was released on 28 December 2012 after the complainant withdrew the complaint. On 23 October 2014, the appellant issued summons against the Minister of Police claiming damages for unlawful arrest and detention and malicious prosecution in the sum of R1 million. The high court dismissed the claim with costs and the subsequent application for leave to appeal suffered the same fate. The appeal is with leave of this court.

[2] The facts are largely common cause, save for the lawfulness or otherwise of the arrest and the quantum of the damages. The appellant testified that the complainant owed him money for services rendered. He went to the complainant's office on 11 December 2012, to demand his money and an altercation ensued when it became apparent that the appellant was not going to get his money. They manhandled each other. In the scuffle, the complainant grabbed him and he held the complainant back. He pushed the complainant against the wall causing him to bump into the frame of a wall picture. The glass broke and cut the complainant's back. The cuts to the complainant's back were sutured and a medical report was issued. He reported the incident to the police who opened a docket for assault with intent to do grievous bodily harm.

[3] On 20 December 2012 the appellant received a voice message on his telephone to go to the police station to discuss the complaint against him. On 21 December 2012 he attended at the Sandton police station and met a detective, Ms Ndala, who explained the allegations against him and asked him if he was willing to make a statement, but the appellant elected to make a statement in court. While at the police station, the appellant called his attorney, but was unable to get hold of him. He was placed under arrest and within an hour or so he was taken to court. Ms Ndala indicated, in writing that she had no objection against bail of R1 000. The appellant's version is that he was never given an opportunity to make a statement in response to the allegations against him. In court the appellant was remanded in custody to the Johannesburg prison (commonly known as Sun City). As indicated earlier, on 28 December 2012, the complainant withdrew the charges and the appellant was released from prison. I shall now deal with the findings of the court a quo, the application of the law to the particular facts of this case and my conclusion.

[4] The particulars of claim clearly delineate the cause of action as an unlawful arrest and detention without a warrant and malicious prosecution. In para 7 of the judgment of the court a quo, it characterised the appellant's case as: 'It appears that the primary basis upon which it is alleged that the arrest was unlawful is because it took place without a warrant'. Counsel for the respondent conceded that no *ratio decidendi* is apparent in the judgment. What appears to be a ratio is what is said in para 24 of the judgment namely that: 'Furthermore I find that the members of the police acted reasonably in the circumstances of this matter and I am unable to criticise them. In my view any criticism against them would not be justifiable.'

[5] The appellant contended that the court a quo erred in not considering that there were no objective facts in evidence underpinning any reasonable suspicion that an offence referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977 (the Act) had been committed. He contended further that the absence of a warrant made the arrest unlawful because assault with intent to do grievous bodily harm is not one of the offences referred to in Schedule 1. It was common cause that at the time of the appellant's arrest, the police were acting within the course and scope of their employment with the respondent (the Minister). Consequently, as their employer, the respondent was vicariously liable for their wrongful acts. It was also common cause that the respondent bore the onus to prove the lawfulness of the arrest.

[6] The respondent relied on the provisions of s 40(1)*(b)* of the Act which authorizes a peace officer to effect an arrest without a warrant. The respondent conceded that assault with intent to do grievous bodily harm is not one of the offences referred in Schedule 1 but argued that the assault in the present instance a dangerous wound was inflicted.

[7] The court a quo reasoned that the police were entitled to arrest without a warrant for 'any offence, except the offence of escaping from lawful custody in circumstances other than circumstances referred to immediately hereunder, the punishment whereof may be a period of imprisonment exceeding six months without the option of a fine'. This approach overlooked the fact that the respondent did not plead nor canvass this in evidence. The court a quo *mero motu* raised it, without asking the parties to address it on the subject. The appellant argued that it amounted to a hearing by ambush and referred to *Molusi & others v Voges N O & others* 2016 (3) SA 370 (CC) para 28 where Nkabinde J observed that:

'The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert [Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA)] the Supreme Court of Appeal held:

"A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case."'

[8] The evidence of Ms Ndala under cross-examination was that she was entitled to arrest the appellant without a warrant because she suspected that he had committed an offence referred to in Schedule 1 of the Act. The respondent's plea also averred that the arrest was effected in terms of s 40(1)*(b)* of the Act which reads thus:

'40 Arrest by peace officer without warrant

A peace officer may without warrant arrest any person –

…

whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escape from lawful custody.'

[9] It is common cause that Schedule 1 does not include assault with intent to do grievous bodily harm. It lists an offence of 'assault when a dangerous wound is inflicted'. Therefore one of the jurisdictional facts is absent. It cannot be said that Ms Ndala entertained a reasonable suspicion that the listed offence had been committed. It is trite that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds (see *Duncan v Minister of Law and Order* 1986 SA (2) 805 (AD) at 818 G-J). The learned Judge in *Duncan* stated further that 'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; ie, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohamed v Duke* [1948] 1 All SA ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.'

[10] In his plea the respondent did not rely on the relevant part of Schedule 1, quoted above. Nothing was said about whether or not the wound inflicted was dangerous. There was no evidence by the respondent that an investigation was carried out to ascertain the nature and extent of the wound. It was pointed out in *R v Jones* 1952 (1) SA 327 (E) at 332D-F that the concept 'a dangerous wound' is not capable of easy definition. The court held that 'by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ'; (see also: *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) at 409e-h). The respondent's lack of entertaining a suspicion resting on reasonable grounds is further exacerbated by the fact that the medical report (J88) which was presented before the court a quo was illegible and the original could not be

located, for unexplained reasons. The court a quo impermissibly speculated that '[e]ven though the injuries were not legible in [the] J88 presented in court they must have been legible in the original J88.'

[11] What is clear is that the arresting officer relied on the statement by the complainant and the J88 only, when she made the decision to arrest. Clearly, seen objectively, that was insufficient. The arresting officer failed to investigate further the circumstances of the assault itself, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. The nature and the seriousness of the wound was never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in these circumstances was not lawfully permissible. In my view the respondent failed to establish the jurisdictional facts, in particular that the appellant committed an offence referred to in Schedule 1. I find that the appellant succeeded to prove that the discretion was exercised in an improper manner. (See *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) at para 46 and *Duncan* at 819B-D). I will now deal with the second cause of action, the unlawful detention. The malicious prosecution claim seems to have been abandoned as it was not argued before us.

[12] The appellant claims that he was unlawfully detained for eight days, hence the claim in the amount of R500 000 for general damages. I am of the view that the appellant was unlawfully detained for not more than two hours. The evidence shows that he arrived at the Sandton police station after eight in the morning and that by ten am he had appeared in court and had been remanded in custody. I am of the view that what happened in court and thereafter cannot be placed before the doorstep of the respondent. My view is

fortified by what Harms DP said in *Sekhoto* at paras 42, 43 and part of para 44. For completeness sake I prefer to quote the text fully:

'[42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.

[43] The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging ─ and in some cases stringent ─ statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes save to mention that the Act requires a judicial evaluation to determine whether it is in the interests of justice to grant bail, that in some instances a special onus rests on a suspect before bail may be granted and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.

[44] *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.* It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. ...' (Emphasis added.)

[13] The appellant alleged that '[t]he members of the SAPS [respondent] wrongfully failed and/or unreasonably refused to release the plaintiff [appellant]

on bail; [a]s a result of the foregoing the plaintiff's further detention was unlawful'. It is incorrect that the police refused to release the appellant on bail, the arresting officer in fact recommended that the appellant may be released on bail of R1000, which recommendation was in writing and formed part of the content of the docket. In her evidence the arresting officer, Ms Ndala, said that on the first appearance, cases are usually postponed with no bail fixed. In my view, what the arresting officer thought or believed was irrelevant as it was the duty of the presiding officer to address the question of further detention or the fixing of bail. In terms of s 35(1)*(e-f)* of the Constitution, 'everyone has the right at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and to be released from detention if the interests of justice permit, subject to reasonable considerations'.

[14] It is well established that the purpose of arrest is to bring the suspect to court for trial. I agree with what Harms DP said in *Sekhoto*, that the arresting peace officer has a limited role in the process that takes place in court. In my view presiding officers in courts of first appearance must ensure that the rights in s35(1)*(e-f)* of the Constitution are not undermined. It is imperative for a presiding officer to enquire from the prosecution why it is necessary to further detain a suspect. In that enquiry the reasons for further detention will emerge as to whether or not it is in the interests of justice to further detain or release the suspect. This I say, mindful of the provisions of s 12(1) of the Constitution which deals with freedom and security of the person and the right not to be deprived of freedom arbitrarily or without just cause. Failure to enquire at the first appearance of the reasons for further detention is clearly a contravention of the above constitutional imperatives and therefore the further detention of a suspect without just cause would be arbitrary and unlawful. In my view the police cannot be held liable for the further detention, even if the arrest is found

to have been unlawful. What is critical is that, the justice department would be responsible and liable for the further detention because of its failure to observe the constitutional rights of a detained person.

[15] In the present instance, the police recommended bail and took the suspect to court within two hours of his arrest. It is the complainant who set the law in motion by reporting a case of assault, the police were doing their job by taking the suspect to court. In my view, the circumstances of this case are distinguishable from *The Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA). In *Tyokwana* the complainant was a policeman who suspected and accused Tyokwana of stealing his service firearm, while Tyokwana was busy washing the policeman's vehicle. In para 39 of *Tyokwana*, Fourie AJA said: 'I believe that the question, whether the orders of the magistrate remanding the respondent [Tyokwana] 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 learned judge then proceeded to mention the peculiar facts. He mentioned, amongst others, that the complainant knew that there was simply no evidence upon which Tyokwana could be successfully prosecuted and he was aware that the initial statements of the state witnesses were obtained under duress and that they were false. And further that Tyokwana had been seriously assaulted at the hands of the police. What is also striking is that at no stage did this Court in *Tyokwana* refer to *Sekhoto*. It only referred to and distinguished *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A) on which the Minister relied. In *Isaacs*, this Court found that a detainee's continued detention, pursuant to an order of court remanded in custody in terms of s 50(1) of the Act was lawful, notwithstanding the fact that it had followed upon the detainee's unlawful arrest. In *Isaacs* at (323i-j) this court held that *Mthimkhulu and another v Minister of Law and Order* 1993 (3) SA 432 (E) at 438C-F was wrongly decided. *Mthimkhulu* expressed a view

contrary to mine in this matter. Therefore the decision in *Tyokwana* is distinguishable on the facts – it cannot be authority for the proposition that the further detention of the appellant by the court, in this case, was unlawful because the arrest was unlawful. I am of the view that the respondent cannot be held liable for what transpired in court just because the arrest was unlawful. To do so would be legally untenable and would be contrary to well established precedent in this court, to which I have referred. I shall now deal with the question of quantum.

[16] The respondent can only be held liable for the detention of two hours until the appellant appeared in court. The amount of damages is limited to the detention for two hours. The appellant was called telephonically to report at the police station. When he did, the allegations against him were explained and, upon being asked if he wished to make a statement, he declined and elected to make one in court. He spent about two hours or so in the police station, he was never locked up in a holding cell. He was almost immediately transported to court, where he was called to appear in a very short time after his arrival. Even he was surprised that he was called before other suspects whom he found there. Everything went so fast he himself could not believe it.

[17] It is not as if the appellant was falsely framed with assault charges. It was the complainant who withdrew the charges and not the state. In my view the suffering was minimal. The deprivation of liberty and freedom in this case was highly technical in that the police failed to obtain a warrant of arrest. It has to be borne in mind that, as was said in *Tsose v Minister of Justice* 1951 (3) SA 10 (A) at 17H, 'there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective'. The arrest and methodology used is fact based. As compensation for the appellant, a sum of R30 000 would be appropriate in the circumstances.

[18] With regard to costs, although the total quantum awarded is far below the jurisdiction of the high court, the matter concerned the unlawful deprivation of the appellant's liberty and he was justified in approaching the high court. I therefore would uphold the appeal with costs.

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

1 The appeal is upheld with costs.

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

'(a) The defendant is ordered to pay the plaintiff the sum of R30 000 for general damages.

(b) The defendant is ordered to pay interest *a tempore morae* on the sum of R30 000 from date of summons.

(c) The defendant is ordered to pay the plaintiff's costs of suit.'

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J B Z Shongwe

Acting Deputy President

Supreme Court of Appeal

Rogers AJA (Leach JA concurring)

[20] I agree with Shongwe ADP that the appellant's arrest was unlawful but I disagree with his assessment of damages. In my view it is not correct, in the circumstances of this particular case, to disregard the appellant's detention from the time of his appearance in court on 21 December 2012 to his release on 28 December 2012.

[21] In regard to the unlawfulness of the arrest, the court a quo's judgment is not a model of clarity but it seems to have found the arrest lawful on the basis

(a) that, in terms of s 40(1)*(b)* of the Criminal Procedure Act read with Schedule 1, a warrantless arrest is permissible inter alia in respect of any offence for which a punishment exceeding six months' imprisonment without the option of a fine may be imposed; and (b) that assault with intent to cause grievous bodily harm (the offence with which the appellant was charged) was an offence for which such a punishment could be imposed. Perhaps because this justification for the arrest was not pleaded or the subject of any argument below, the court a quo was not alerted to this court's decision in *Areff v Minister van Polisie* 1977 (2) SA 900 (A) where it was held (at 913B) that the part of Schedule 1 on which the court a quo relied applied only to statutory offences.

[22] Accordingly, and on appeal, the respondent's counsel did not rely on the court a quo's reasoning. The respondent's counsel also conceded, correctly, that assault with intent to cause grievous bodily harm is not an offence for which a warrantless arrest is permissible. The respondent's counsel instead argued that in terms of Schedule 1 a warrantless arrest is permissible in the case of 'assault, when a dangerous wound is inflicted' and that this was such a case. For several reasons, the argument cannot succeed:

(a) First, this justification for the arrest was not pleaded.

(b) Second, and perhaps because of (a), the question whether the wound suffered by the complainant was a 'dangerous wound', as that term has been interpreted in case law (a wound endangering life or limb), was not canvassed in the evidence. Such evidence as there was did not tend to show that the complainant's wounds amounted to 'dangerous wounds'. The J88 form, which might have shed some light on the subject, was illegible. A new point cannot be raised on appeal unless the court is satisfied that all the evidence bearing on it was ventilated.

(c) Third, the arresting officer, Ms Ndala, did not testify that she held the suspicion that the appellant had inflicted a 'dangerous wound'. The suspicion she held was that the appellant had committed assault with intent to cause grievous bodily harm. The suspicion justifying a warrantless arrest in terms of s 40(1)*(b)* is not an abstract reasonable suspicion but an actual suspicion. If the arresting officer did not hold the relevant suspicion, it is irrelevant that such a suspicion – if it had been held – would have been a reasonable one.

(d) Finally, even if Ms Ndala had suspected the appellant of inflicting a 'dangerous wound', the respondent did not discharge the onus of proving that the suspicion was reasonable.

[23] In regard to the assessment of damages, there are certain parts of the evidence to which I need to draw attention before examining the legal position. The appellant voluntarily attended at the police station after receiving a telephone call from an officer. At the police station he gave them the addresses where he resided and was employed. There is a factual dispute as to whether he was invited to give his side of the story. He testified that he was not asked. Ms Ndala testified that the appellant told her he would give his version in court. Be that as it may, while he was at the police station the appellant tried to contact a lawyer but was unable to do so.

[24] Shortly after his arrest he was taken to the Randburg court. He was placed in a holding cell with others but his case was quickly called. When asked what happened in court, he said it was very brief. The presiding officer told him he was going to prison. He asked her to explain and she repeated that he was going to prison. He was taken down again and transported to prison. Before being brought again before court, he was released pursuant to the withdrawal of the charge.

[25] Ms Ndala took the docket to the Randburg court but was not present when the appellant's case was called. Included in the docket was her recommendation that the appellant be granted bail of R1000. She was asked in cross-examination if she knew whether or not there had been a bail application. Her reply was: 'No, there is no bail application done in the first appearance. After the first appearance the case is postponed for seven days for a bail application.' She confirmed that, despite her recommendation for bail, she knew that he would not receive bail at his first appearance.

[26] In terms of s 50(1)*(c)* of the Criminal Procedure Act an arrested person against whom a charge has been brought and who has not been granted bail by the police must be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest. It was held in *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A) that the 'arrest' contemplated in this provision includes an unlawful arrest. *Isaacs* was, like the present matter, a case of damages for unlawful arrest and detention. And like the present matter, an issue in the assessment of damages was whether regard should be had to the claimant's detention after his first appearance in court. The claimant's counsel relied on only one ground for his contention that it should, namely that, because the arrest had been unlawful, the claimant's remand in custody by the court had been unlawful. That proposition was, as I have said, rejected.

[27] In *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA) this court clarified that *Isaacs* should not be understood as holding that an arrested person's detention in custody after his first appearance is automatically lawful. The unlawful arrest does not preclude a lawful remand in custody but by the same token not every remand in custody will be lawful (para 38). Having regard to the particular facts of the case, this court in *Tyokwana* held that the appellant's further detention was unlawful.

[28] Although in *Tyokwana* the further detention was found to be unlawful, the court did not consider whether the unlawfulness of the further detention was a necessary prerequisite for taking into account, when assessing damages for the unlawful arrest, the period of detention following the first judicial remand of the case. The point was not raised and the authorities bearing on it were not discussed. The unlawfulness of the detention following the first judicial remand would obviously be an essential element of a claim brought against the Minister of Justice for the wrongful conduct of the prosecutor or the magistrate. It is less obvious why, in a claim against the Minister of Police for unlawful arrest, the unlawfulness of the detention following the first judicial remand should be essential before one can take that period into account in assessing damages.

[29] Subject to the usual rules of delictual liability, a wrongdoer is liable for all the harmful consequences of his or her wrongful act. As will become apparent later, the content of the fault requirement may play a role in limiting liability but for the moment I shall focus on the elements of factual and legal causation. Factual causation is tested by asking whether the harmful consequence would have occurred but for the wrongful act. Legal causation (or remoteness of damage) places a policy-based limit on the factual consequences for which the wrongdoer is held liable.

[30] The test for legal causation is supple, consistent with its foundation of public policy. Before this supple test was authoritatively established, there were conflicting views as to how to test for legal causation, the main competing views being the direct consequences test and the foreseeability test (P Q R Boberg *The Law Delict* 439-448). This court has held that, in applying the supple test, a court should have regard to these and other tests but should not apply them dogmatically. In a recent affirmation of the approach, this court said the following in *Merchant Commercial Finance (Pty) Ltd v Katana Foods CC*

(1238/2016) [2017] ZASCA 191 (20 December 2017) para 22 (citation of authority omitted):

'Turning to the question of legal causation (or remoteness of damage as it is sometimes called), the issue is one to be determined by considerations of policy. It serves as a measure of control to ensure that liability is not extended too far. It recognises that liability should not be imposed where, despite the other elements of delictual liability being present, right-minded persons, including judicial officers, will regard it as untenable to do so. In determining whether damage is too remote, tests involving foreseeability, proximity, direct consequences, all of which are relevant, 'should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.'

[31] Even if the claimant satisfies the direct consequences test and the foreseeability test, there may be cases in which, for policy reasons, liability will be limited. So, for example, in *mCubed International (Pty) Ltd & another v Singer NO & others* [2009] ZASCA 6; 2009 (4) SA 471 (SCA) Brand JA said the following:

'31. But our courts have decided against a strict approach to the remoteness issue. Instead, it adopted what has been described as a 'flexible' or 'supple' test (see eg *International Shipping Co (Pty) Ltd v Bentley (supra)* 701A-F; *Smit v Abrahams* 1994 (4) SA 1 (A) 15E-G). This was elaborated upon as follows in *Fourway Haulage (supra)* para 34:

> "What Van Heerden JA said in that case [ie *S v Mokgethi* 1990 (1) SA 32 (A) at 40I-41D] is not that the 'flexible' or 'supple' test supersedes all other tests such as foreseeability, proximity or direct consequences, which were suggested and applied in the past, but merely that none of these tests can be used exclusively and dogmatically as a measure of limitation in all types of factual situations. Stated somewhat differently: the existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable."

32. Strict application of both the foreseeability test and the direct consequences test for remoteness in this case would therefore, in my view, lead to a result which is so unfair and unjust that it will be regarded as untenable. This is therefore a classic example of a situation

where a flexible approach is indicated. And in adopting that approach I find the loss too remote.'

[32] A moment's reflection will reveal that there are many cases where the act of a third party, itself having causal effect, intervenes between the act of the wrongdoer and the harmful consequence but where the wrongdoer is still held liable for the harmful consequence. This may be so whether the act of the third party is lawful or unlawful. For example, the wrongdoer who injures a person so that the victim requires surgery may be liable if the victim dies during the course of lawful surgery. Or a driver who negligently creates a dangerous situation may be liable for harm suffered by a victim even though the immediate cause of the victim's harm is a second driver who did not exercise reasonable care in the dangerous situation. One does not, in these cases, automatically conclude that the wrongdoer is not liable. Rather, one asks whether, in accordance with the well established requirements for delictual liability, the wrongdoer can be held responsible for the harmful consequence.

[33] There is no reason for not following the same approach in determining the harmful consequences of an unlawful arrest for which the police may be held liable. There is certainly no justification, in the constitutional era, for applying a stricter and less generous test. On the contrary, in applying the conventional tests, in particular those which are policy-based, regard must be had to the values of the Constitution and to the fact that s 12(1)*(a)* of the Constitution guarantees to everyone the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. In *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC), s 12(1)(a) was the foundation for a finding that detention pursuant to apparently valid court orders was unlawful.

[34] In *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) this court applied *Zealand* in circumstances where a police officer arrested a suspect and testified at his bail hearing. In consequence of the officer's evidence, the magistrate refused bail. In regard to the arrest, this court found that the officer had reasonable grounds for believing that the suspect had committed armed robbery, an offence for which a warrantless arrest was permissible. The arrest was thus lawful. When testifying at the bail hearing, however, the officer said that the suspect was among four men he had been able to identify on video footage of the robbery. In fact it was not possible to identify the suspect from the footage (though the officer, when arresting the suspect, had certain other information, not mentioned during the bail hearing, which fortified his suspicion).

[35] This court held that the officer had been under a public law duty not to violate the suspect's freedom, a duty the officer should have discharged either by not opposing bail or by placing all the available facts before the magistrate. He negligently breached this duty (the officer was absolved of malice). Since the officer's evidence was the factual cause of the magistrate's decision, and since his wrongful conduct was sufficiently closely connected to the subsequent detention to satisfy the requirement of legal causation, the Minister was held liable for the 13-month period of detention which followed the refusal of bail, such period of detention being regarded as unlawful for purposes of a delictual claim for damages (paras 28-32).

[36] Although the court in *Tyokwana* and *Woji* spoke of the further detention as being unlawful, it seems to me, with respect, that in a delictual claim for damages one is concerned with the lawfulness or otherwise of the conduct of the defendant rather than with the so-called lawfulness of the consequences flowing from such conduct. If a person dents my car by negligently driving into it, it is his driving, not the dent, which is unlawful. In *Woji*, for example, the

conduct of the magistrate was, for delictual purposes, lawful, since he made a decision within his jurisdiction in accordance with evidence placed before him. The conduct of the investigating officer, however, in negligently giving evidence which resulted in the suspect losing his liberty, was wrongful. In relation to the wrongful conduct of the officer, the detention which the suspect suffered in consequence of the judicial order was a harmful effect caused by, and not too remote from, the officer's wrongful conduct.

[37] It thus appears to me that the approach of Van Rensburg J in *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) was correct. There the plaintiff was arrested by the South African police and detained in South Africa for a few hours before being handed over to members of the Ciskeian police who took him into Ciskei (then regarded as an independent country) and detained him for about two months. It was conceded that the South African arrest was unlawful but it was argued that the South African police could not be held responsible for the detention after the plaintiff was handed to the Ciskeian police. The court rejected this argument. Van Rensburg J correctly directed himself to the requirements of factual and legal causation, holding that both were satisfied. He was also right to say that it was irrelevant whether the plaintiff's detention in the Ciskei was or was not lawful (706G-H). The point was that his detention in Ciskei arose out of the unlawful arrest and detention in South Africa (706F-H). The learned judge cited an unreported judgment by Howie J to similar effect (705H-706C).

[38] The decision in *Thandani* was confirmed on appeal in *Minister of Law and Order v Thandani* 1991 (4) SA 862 (A). Joubert JA, in a terse judgment, said that although on the probabilities it seemed that the plaintiff's detention in Ciskei was unlawful, it was irrelevant to the plaintiff's case whether or not this was so (872A-B).

[39] I return now to the present case. In regard to the appellant's detention following the judicial remand, the test of factual causation is plainly established. But for the unlawful arrest, the appellant would not have been brought before the court and there would have been no occasion for the court to remand him in custody. As to legal causation, the direct consequences test is satisfied. It was a legal requirement, once the appellant was arrested, that he be brought before court. The court could only make one of two decisions – remand him in custody or grant him bail. Either of these outcomes would be a direct consequence of the arrest. As to foreseeability, each of the two possible consequences of the arrest would be foreseeable to the arresting officer. Indeed, Ms Ndala actually foresaw what would happen – that the appellant would be remanded in custody until his next appearance.

[40] Despite compliance with these two tests, there may be reasons of policy for not holding the police liable for further detention where a court has judicially considered whether the suspect should be granted bail and has come to a conclusion that the suspect should not be released. In jurisdictions where the direct consequences test prevails (or used to prevail), a court might treat an intervening judicial adjudication as breaking the causal chain between the arrest and further detention. *Harnett v Bond* [1924] 2 KB 517 (CA) and [1925] AC 669 (HL) was a remarkable case where a sane man was detained in various asylums for nine years. The question was whether the doctor who first caused him to be unlawfully detained could be held liable for the entire period of detention, even though the man was subjected to various subsequent assessments by other doctors. The trial judge directed the jury in accordance with the direct consequences test, advising them that it was open to them to hold that the failure by intervening doctors to appreciate that the claimant should not be further detained did not break the causal chain between the first doctor's unlawful act and the nine-year detention. This is what the jury held but the

Court of Appeal reversed the decision and the House of Lords confirmed the Court of Appeal's judgment. In the Court of Appeal Scrutton LJ expressed himself as follows (565):

'There is no doubt that the question whether damages are too remote is one of degree, and that it is very difficult to say exactly where the line is to be drawn. . .. Again there is no doubt that the action of a third party does not necessarily break the chain of causation and make subsequent damage too remote. . . .. But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding. It was on this principle that in *Lock v Ashton* it was decided that a defendant who had wrongfully taken a person into custody and brought him before a magistrate was not liable for the subsequent remand by the magistrate, which was a judicial act. Applying this principle I am clearly of opinion that the liability of either defendant for damages stops when the damages only continued by the independent act of a person under a legal duty to form an independent opinion.'

[41] The case cited by Scrutton LJ, *Lock v Ashton* (1848) 12 QB 871; [1848] ER 878, is an ancient decision though it was approved in *Diamond v Minister & others* [1941] 1 All ER 390. For two reasons, however, one must be cautious about looking to English cases for guidance on the question which arises in the present case. First, the English law relating to remoteness of damage is not the same as ours. Second, in English law unlawful arrest and detention (usually styled false imprisonment) is a species of the tort known as trespass, which has peculiar features of its own. These features affect the approach in Commonwealth jurisdictions whose common law is based on English law.

[42] To label an intervening act as a novus actus interveniens (language redolent of the direct consequences test of remoteness) is really to apply a value or policy judgment since it is impossible, by applying any absolute objective test, to say whether an intervening act 'breaks the causal chain' and is thus a novus actus interveniens. In *Harnett* the intervening acts did not break the chain

of factual causation. The court, though it did not say so in terms, was applying a policy-based limitation by regarding the intervening medical assessments as rendering the resultant detention too remote from the first wrongdoer's conduct. In their famous work on causation, Professors Hart and Honoré say that the distinction in such cases is not between voluntary and non-voluntary intervening acts but 'between routine and the independent exercise of a discretion' (H L Hart and Tony Honoré *Causation in the Law* 2 ed at 159).

[43] In South Africa liability for non-patrimonial damages for wrongful arrest and detention is governed by the actio iniuriarum, which is a general action relating to infringements of personality rights, of which liberty is one. The principles of liability are general but for reasons of policy some distinctions are drawn. For present purposes, the following two should be noticed:

(a) In the case of wrongful arrest it is not necessary that the arrester should have been aware of the wrongfulness of his or her action. The intention to arrest and detain suffices, so in a sense the liability is strict. Even if this position was initially adopted under the influence of English law, it can be justified on policy grounds (*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 154B-157B).

(b) Where the claimant is detained pursuant to a valid judicial process at the instigation of an alleged wrongdoer who does not himself effect the arrest, it is in keeping with the policy of the law that animus iniuriandi in its full sense should be proved in order to hold the instigator liable. This means that the claimant must prove not only that the proceedings were instigated without reasonable and probable cause but that the defendant knew this to be so. Although, under the influence of English law, this is sometimes called malicious arrest (or malicious deprivation of liberty), the concept of 'malice' should be understood in accordance with the principles of the actio iniuriarum (J Neethling, J M Potgieter and P J Visser *Neethling's Law of Personality* 2 ed

124-125). (In the light of the Constitution and this court's decision in *Woji*, the common law position may now have been relaxed so that, at least in some circumstances, negligence will suffice. This is not a question on which I need express any opinion. In what follows, my references to the requirement of full animus iniuriandi must be read subject to this possible relaxation.)

[44] Where there is an unlawful arrest by a police officer followed by a judicial remand, one may appear to have a combination of (a) and (b). However in such a case the police officer already commits a wrongful act by arresting and detaining the suspect. One thus needs to balance the policy considerations underlying the requirement of full animus iniuriandi in case (b) with the general principle that the wrongdoer in case (a) should be liable for all those consequences of his or her wrongful act that are not too remote. In my view, that balance is appropriately struck by holding that an arresting officer is not liable for detention ordered by a court pursuant to a deliberative or considered judicial process unless the arresting officer has the full animus iniuriandi required for malicious deprivation of liberty. The requisite animus iniuriandi might be present at the time of the arrest or might come into existence afterwards. Either way, in such a case one is dealing with two wrongful acts, namely the wrongful arrest and the malicious deprivation of liberty (ie instigating the judicial detention). If the requirements for malicious deprivation of liberty are absent, the policy-based element of remoteness would exclude liability for harm caused by an intervening deliberative judicial process, even though further detention might be foreseeable and a direct consequence of the wrongful arrest.

[45] I have used the expression 'deliberative judicial process' because in my view there are no reasons of policy for disregarding, in the case of wrongful arrest, those harmful consequences which flow from the arrest mechanically or

as a matter of routine. In *Harnett* the court appears to have regarded the intervening decisions of the doctors as considered opinions (right or wrong) formed pursuant to a statutory duty. *Lock v Ashton* (1848) 12 QB 871; [1848] ER 878, the false imprisonment decision mentioned in *Harnett,* was also such a case; the magistrate remanded the plaintiff in custody after hearing witnesses. Only where a judicial officer has applied his or her mind to the question whether the suspect is entitled to bail does one have an intervening act which can be said, from the perspective of policy, to neutralise the harmful effect of the wrongful arrest.

[46] The decision of this court in *Minister of Safety and Security v Sekhoto & another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA), from which my colleague quotes in his judgment, is not in my respectful opinion contrary to the conclusion I have reached. That case was not concerned with the question whether the defendant could be held liable for detention following judicial remand but with whether the arrest itself was unlawful. In discussing the discretion which a peace officer has once the jurisdictional requirements for a warrantless arrest have been satisfied, Harms DP said that the purpose of the arrest is not so much to bring the accused to trial but to allow the court before whom the suspect must be brought to decide whether the suspect should be detained pending a trial. The rational exercise of the discretion to arrest thus requires the officer to assess whether the case is one where the court, rather than the police, should decide whether the accused should be detained pending his trial. Harms DP emphasised that the accused's further detention is 'within the discretion of the court' (para 42) and that the court's discretion 'requires a judicial evaluation to determine whether it is in the interests of justice to grant bail' (para 43). In my opinion it is this 'judicial evaluation' which, from the perspective of legal causation, renders subsequent detention too remote to be taken into account as a consequence of the unlawful arrest.

[47] It is the absence of an intervening evaluative act of this character that is the distinguishing feature of this case. We must have regard to the facts to determine whether, as a matter of policy, the liability of the police for this particular arrest should, in the absence of full animus iniuriandi, terminate with the particular judicial remand which occurred on 21 December 2012. True, in terms of s 60(1)*(c)* of the Criminal Procedure Act it was the duty of the magistrate, if the question was not raised by the appellant or the prosecutor, to ascertain from the appellant whether he wished the court to consider his release on bail. It is clear from the appellant's evidence that the question of bail was not raised by the prosecutor or by the magistrate. If the question of bail had been raised, it seems inconceivable that the appellant would not have been released, because there was in the docket a recommendation for release.

[48] It is thus apparent that there was no considered decision by the magistrate as to whether the appellant should be released on bail. On the evidence of the appellant (and there is no other evidence on the question), the prosecutor and the magistrate failed to comply with their duties. The appellant was not legally represented and was overwhelmed by the circumstances. The picture created by his evidence is of a high-volume remand court in which accused persons were brought up and down from the cells with great rapidity.

[49] As I have said, the appellant's detention following the judicial remand was a direct consequence of the arrest. Was it foreseeable to the arresting officer? We have the answer from her own mouth. Not only was it foreseeable; she did in fact foresee it. She knew that the Randburg court would not deal with the question of bail at the first appearance and that the appellant would be remanded in custody. In other words, she knew that at the first appearance the remand would be a routine or mechanical act rather than a considered judicial decision. She may not have 'wished' the appellant to be further detained but in

law she intended that result – a person is presumed to intend the natural consequences of his or her actions (*Warner Lambert SA (Pty) Ltd v Commissioner for the South African Revenue Service* [2003] ZASCA 59; (2003) 65 SATC 347 para 14). It is generally accepted that intended consequences, however strangely they may come about, can never be too remote to attract legal liability (Boberg op cit 440 and 450; *Thandani* supra in the court a quo at 705F-G). This is hardly a case where one can say that to hold the police liable for the full period of detention would be 'so unfair or unjust that it is regarded as untenable' (*mCubed* supra para 32). On the contrary it would in my opinion be unfair and unjust for the police not to be so liable on the facts of this particular case.

[50] For reasons I have explained, I do not think it is necessary, in a delictual setting, to say that the detention following the judicial remand was 'unlawful' before one can conclude that it is a harmful effect for which the wrongful arrester can be held responsible. But if such a finding were necessary, I would be prepared to say that what happened in court on 21 December 2012 was unlawful and resulted in the appellant being deprived of his freedom arbitrarily and without just cause. On the appellant's evidence, what happened was a shocking violation by the prosecutor, the magistrate and indeed the investigating officer of their duties to ensure that the question of bail was properly considered at the appellant's first appearance. Detention in prison for a week is no small matter. Had the question of bail been considered by any of the officials concerned, it would immediately have been apparent that there was no justification not to grant the appellant bail in a modest amount. This was not a case where remand in custody pending further investigation could ever have been warranted.

[51] I thus consider that the appellant's damages should be assessed with reference to the full period of his detention. The period of detention was seven nights, extending into an eighth day. The appellant found the experience very distressing. At the holding cells in Randburg his cellphone was confiscated and he never saw it again. After he was remanded in custody, he was handcuffed and taken to prison in a bus. He found jail a very intimidating experience. He testified that he cried almost the whole time. His period of incarceration included Christmas and Boxing Day. This was the period during which his son was meant to have been with him. He paid R450 as protection money to a fellow prisoner who could make prison life more bearable.

[52] By agreement various documents relating to quantum were handed up in the court a quo without the need for oral evidence. Among these documents was a report by a clinical psychologist. According to the report, the appellant told the psychologist that he lost eleven kgs while in prison. Upon his release he was full of bites (presumably from fleas or lice) and did not sleep well for about two months. Whenever he applied for a job, there was a standard question as to whether he had ever been arrested, which made finding work difficult. He now feels completely intimidated by the police. The psychologist's impression was that the appellant was under-reporting the severity of persisting sequelae of the arrest and incarceration. The psychologist considered that the appellant had become socially withdrawn; was more anxious than before; and appeared to be suffering from mild depression.

[53] The psychologist recommended at least thirty psychotherapeutic consultations at a reasonable cost of R1000 per hourly session. An actuarial report, also handed in by agreement, gave the capitalised present value of this treatment at R30 248. During the appeal the respondent's counsel did not argue that, if we were to have regard to the entire period of detention, the cost of the

future treatment should not be awarded. These patrimonial damages are recoverable not under the actio iniuriarum but under the aquilian action. Although the appellant did not prove that Ms Ndala knew she was arresting him unlawfully, I am satisfied that she was negligent and that the respondent should be liable for the patrimonial damages

[54] In regard to non-patrimonial damages, the appellant's counsel referred us to two judgments emanating from the same division as the court a quo. In each case the period of detention was nine days (*Duma v Minister of Police & another* (41429/2011) [2016] ZAGPPHC 428 (13 June 2016); *Mokaedi v Minister of Police & another* (3503/2012) [2016] ZAGPPHC 405 (3 June 2016). Amounts of R300 000 and R250 000 respectively were awarded in 2016. Since judgment in the court a quo was delivered in 2016, these provide a fair range for the appellant's general damages. In *Mokaedi* Makgoka J, in moderating his award, took into account that the claimant, a warrant officer in the police, had been kept in a single cell with adequate bedding and that the main harm he had suffered was the deprivation of liberty. Although the appellant's detention was marginally shorter than in *Duma* and *Mokaedi*, the conditions of his incarceration were distinctly harrowing. I think an amount of R300 000 would be appropriate.

[55] Since the general damages and medical expenses have been expressed in the value of money as at the date of court a quo's judgment, mora interest should not run from an earlier date. In regard to costs, summons was issued in October 2014. With effect from 1 June 2014 the monetary jurisdiction of regional divisions of the magistrates' courts was increased from R300 000 to R400 000. The amount I would award falls within the increased jurisdiction of regional divisions. However, it was not unreasonable for the appellant to bring proceedings in the high court, given the nature of the claim and the uncertainty

as to the award of general damages. The respondent's counsel did not argue that we should award costs on the magistrate's court scale.

[56] I would thus make the following order:

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and replaced with an order in the following terms:

(i) The defendant is ordered to pay the plaintiff the amount of R330 248, together with interest at the prescribed rate from 7 September 2016 to date of payment.

(ii) The defendant is further ordered to pay the plaintiff's costs of suit, including the qualifying costs of the experts Trevor Reynolds (psychologist) and Johan Sauer (actuary).

O L Rogers

Acting Judge of Appeal

Appearances

For the Appellant:	S J Myburgh Instructed by: Pieter Nel Attorneys, Pretoria; Honey & Partners, Bloemfontein
For the first Respondent:	M S Phaswane (with him D D Mosama) Instructed by: The State Attorney, Pretoria; The State Attorney, Bloemfontein