THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case No: 1196/2023

In the matter between:

NANDIPHA MAGUDUMANA **APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS,
FREE STATE **FIRST RESPONDENT**

MINISTER OF POLICE **SECOND RESPONDENT**

CAPTAIN TIEHO JOBO FLYMAN **THIRD RESPONDENT**

PRESIDING MAGISTRATE N O **FOURTH RESPONDENT**

HEAD OF BIZZAH MAKHATE
CORRECTIONAL CENTRE: KROONSTAD **FIFTH RESPONDENT**

MINISTER OF HOME AFFAIRS **SIXTH RESPONDENT**

Neutral Citation: *Magudumana v Director of Public Prosecutions, Free State and Others* (1196/2023) [2025] ZASCA 62 (16 May 2025)

Coram: ZONDI DP and MAKGOKA, KATHREE-SETILOANE JJA and GORVEN and MOLOPA-SETHOSA AJJA

Heard: 7 November 2024

Delivered: 16 May 2025.

Summary: Criminal law – whether the appellant was arrested and abducted in Tanzania by members of South African Police Service – matter decided on respondents' version – appeal dismissed.

Pleadings – matter to be decided on notice of motion and founding affidavit – impermissible to make out case in reply – case on pleadings not made out.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Loubser J, sitting as court of first instance):

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

JUDGMENT

Zondi DP (Kathree-Setiloane JA and Gorven and Molopa-Sethosa AJJA concurring):

Introduction

[1] This appeal concerns the circumstances of the appellant's arrest in Tanzania and her transportation from that country to South Africa. The question is: where did the members of the South African Police Service (SAPS) arrest the appellant? Was it at Lanseria Airport, in South Africa or in Tanzania? If the members of SAPS arrested the appellant whilst she was in Tanzania, that arrest would be unlawful and the appellant would be entitled to be released from custody since the Republic of South Africa (South Africa) may not exercise its policing powers in a sovereign state.

Background facts

[2] The appellant was, at some stage at least, the girlfriend of the convicted and sentenced rapist and murderer, Mr Thabo Bester (Mr Bester), who was serving his sentence at the Mangaung Correctional Centre in Bloemfontein before his escape from that facility in about May 2022. Several suspects linked to the escape were arrested and are facing charges in the Bloemfontein Magistrates' Court (the magistrates' court), including defeating the administration of justice, violating a body, aiding an escape from prison, corruption, and arson. The appellant was one of these suspects. She surreptitiously left South Africa. Some months later she was located in Tanzania and brought back to South Africa. Before her arrest in Tanzania, the appellant was a fugitive from justice and a warrant for her arrest had been issued. She

subsequently appeared before the Bloemfontein Magistrate who authorised the warrant for her detention at the Bizzah Makhathe Correctional Centre in Kroonstad.

[3] On 19 May 2023, the appellant brought an urgent application in the Free State Division of the High Court (the high court) in which she cited the Director of Public Prosecutions, Free State (the DPP), the Minister of Police, Captain Tieho Jobo Flyman, the Presiding Magistrate (the magistrate), the Head of Bizzah Makhate Correctional Centre: Kroonstad (the Head of the Kroonstad Correctional Centre) as first, second, third, fourth and fifth respondents respectively. In that application the appellant sought an order:

(a) declaring that her apprehension, arrest and abduction in Tanzania was performed by members of the SAPS on or about 7 April 2023 and her subsequent transportation to South Africa and purported arrest and detention pursuant thereto, were wrongful and unlawful;

(b) declaring that her arraignment before the magistrate under case number 20A/113/23 was a nullity and setting aside those proceedings in so far as they related to her;

(c) declaring that the orders and warrants issued by the fourth respondent authorising the Head of Kroonstad Correctional Centre to detain the appellant, are null and void; and

(d) declaring that the appellant was entitled to be released from detention and directing the Head of Kroonstad Correctional Centre to immediately do so.

High court findings

[4] The high court found that the appellant's deportation constituted a disguised extradition which is inconsistent with the Constitution and International Law. This notwithstanding, relying on *S v Mahala and Another* (*Mahala*)[1] and *S v December* (*December*),[2] it found that the appellant's removal from Tanzania was not unlawful since she had willingly acquiesced to her transportation back to South Africa. According to the high court the appellant had given informed and enforceable consent as required in *Mohamed and Others v President of the Republic of South Africa*

[1] *S v Mahala and Another* 1994 (1) SACR 510 (A); [1994] 4 All SA 198 (A).

[2] *S v December* 1995 (1) SACR 438 (A).

(Society for the Abolition of the Death Penalty in South Africa and Another Intervening) (*Mohamed*).[3] It found that the appellant was aware, at the time of being handed over, of the charges that could be levelled against her upon her arrival in South Africa, yet she, nevertheless, consented to her removal from Tanzania, and return to South Africa, because she wanted to be with her children. The high court dismissed her application with costs including those of two counsel where so employed. The appeal lies against these orders with leave of this Court.

The parties' submissions

[5] There is a material factual dispute between the parties as to the arrest of the appellant in Tanzania and the circumstances under which she was returned to South Africa. The appellant alleges that on 6 April 2023 she was arrested in Tanzania and forcibly abducted by members of the SAPS. On the evening of 12 April 2023, she was blindfolded and taken to an airport by the said members. From there two uniformed SAPS members took her in a kombi to an aircraft and ordered her to board. She sat in the aircraft flanked by members of the South African Defence Force and SAPS. The aircraft flew the appellant to Lanseria airport in Johannesburg and from there she was taken to the Bloemfontein magistrates' court, for the first appearance.

[6] The appellant states in her founding papers that she was not found to be an illegal immigrant by any court in Tanzania, and nor was she deported by any such court to South Africa. She contends that her arrest and deportation from Tanzania to South Africa amounted to an illegal abduction and that her extradition from Tanzania was not in accordance with the Extradition Act 67 of 1962 (the Extradition Act) or the Southern African Development Community Protocol on Extradition concluded in 2002 (SADC Extradition Protocol). Both South Africa and Tanzania are parties to this Protocol.

[7] The appellant maintains that she should have been surrendered to South Africa in terms of the Tanzanian Law of Extradition Act 15 of 1965. And since no extradition

[3] *Mohamed and Others v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (2) SACR 66; 2001 (7) BCLR 685.

hearing took place in any Tanzanian court her extradition was not authorised by the Minister of International Affairs of Tanzania.

[8] The respondents deny that the appellant was arrested in Tanzania by members of the SAPS, and that she was abducted from that country. According to the respondents, the appellant's arrest in Tanzania and her return to South Africa occurred as follows. On 8 April 2023, members of the SAPS received information that Mr Bester and the appellant had been apprehended in the city of Arusha in Tanzania by the Tanzanian authorities. At the time, a warrant for the arrest of the appellant had already been issued in South Africa, and she and Mr Bester were therefore wanted fugitives. A multi-departmental delegation was assembled in Pretoria to travel to Tanzania to deal with the matter. This delegation consisted of high-ranking police officers, a member of Interpol, a member of the South African Department of Home Affairs (the Department of Home Affairs), a member of Correctional Services and a Deputy Director of Public Prosecutions (the South African delegation).

[9] This delegation then flew to Tanzania on 9 April 2023 and arrived at Arusha late that night. The following day they met with the Tanzanian authorities who informed them that Mr Bester and the appellant were not legally present in Tanzania as they had entered, and remained there, without legal documentation. The Tanzanian authorities further informed them that, once the identity of Mr Bester and the appellant had been confirmed, the Government of Tanzania would advise on the further handling of the matter. The South African delegation informed the Tanzanian authorities that the South African Government had not initiated any extradition processes as it was waiting to be apprised of the decision of the Tanzanian Government in the matter. If the decision was that the extradition route should be followed, then the South African Government would initiate such a process.

[10] Some members of the South African delegation then visited Mr Bester and the appellant at the facility where they were detained under the control of the Tanzanian Tourist and Diplomatic Police Division. After their identity and nationality were confirmed, the appellant and Mr Bester were offered consular and legal services by the South African Department of International Relations and Cooperation. They declined the offer. On 12 April 2023, the Tanzanian officials informed the South African

delegation that their government had declared the appellant and Mr Bester prohibited immigrants in terms of the Tanzanian immigration laws and that it had decided to deport them. The South African delegation was also informed that, since South Africa was the country of origin of the appellant and Mr Bester, they would be handed over by the Tanzanian authorities to the South African High Commission (the High Commission) in Tanzania to facilitate their removal from that country.

[11] Seeing that the Tanzanian Ministry of Home Affairs would not cover the appellant and Mr Bester's deportation costs, the High Commission engaged the officials of the Department of Home Affairs to facilitate the removal of Mr Bester and the appellant from Tanzania. Those officials flew to Tanzania in a chartered aircraft to receive the appellant and Mr Bester from the High Commission officials. Members of the SAPS accompanied the officials of the Department of Home Affairs on the flight to provide security to them, since Mr Bester was considered extremely dangerous. The respondents maintain that members of the SAPS did not travel to Tanzania to arrest the appellant.

[12] The Department of Home Affairs aircraft landed in Tanzania late in the evening of 12 April 2023. At the airport, the appellant and Mr Bester were handed over to the High Commission by the Tanzanian Ministry of Home Affairs. Shortly thereafter, the High Commission handed them over to an immigration official of the Department of Home Affairs, and they were flown back to South Africa in its aircraft. The aircraft departed the airport in Tanzania shortly after midnight the same evening. The next day, 13 April 2023, the aircraft landed at Lanseria airport in Johannesburg and the appellant was arrested by members of the SAPS upon her arrival.

[13] The respondents point out in their answering affidavits that, at the time the appellant was handed over to the Department of Home Affairs immigration official by the High Commission official in Tanzania, she did not offer any resistance or protest. Not only that, but the appellant informed all and sundry that she wanted to return to South Africa to her children. The respondents deny that the appellant was at any stage blindfolded or that members of the SAPS played any role in the hand over.

[14] In the replying affidavit, the appellant adds that whilst she was in custody in Tanzania, she instructed Advocate Gwakisa Sambo, to provide legal assistance to her. She also introduces an additional layer to her cause of action. She avers for the first time, that her return from Tanzania and transportation to South Africa was an extradition disguised as a deportation, which she avers is not a lawful mechanism for the return of a wanted fugitive such as herself. The appellant contends that the South African delegation colluded with the Tanzanian authorities to secure her forcible return to South Africa to evade the extradition procedures provided for in the SADC Extradition Protocol.

[15] That this was the case, the appellant argues, is borne out by the fact that when the Tanzanian authorities asked the South African delegation if they had prepared the necessary extradition documents, it informed the Tanzanian authorities that it had not, because 'South Africa's action would need to be informed by the decision taken by the Government of Tanzania on the matter.' To extradite her, proceeded the argument, the South African Government did not have to get the permission of, or direction from, the Tanzanian Government. She contends that she was forcibly placed on the Department of Home Affairs aircraft without being afforded a choice as to how she should leave or where she should go. She denies that she did not object when the High Commission official handed her over to the Department of Home Affairs official, and that she had indicated at the time that she wanted to return to South Africa to her children.

Issues

[16] The appeal raises the following issues:

(i) Was the appellant arrested in Tanzania by members of the SAPS or the Tanzanian authorities?

(ii) Did the appellant make out a case on the papers that her handing over by the Tanzanian Ministry of Home Affairs to the South African High Commission and her transportation by the respondents to South Africa was part and parcel of a disguised extradition in breach of the law?

(i) Was the appellant arrested in Tanzania by members of the SAPS or the Tanzanian authorities?

[17] The debate on this aspect at the hearing of the appeal was whether the appellant had made out a case for the relief she sought. Counsel for the appellant, relying on *Zealand v Minister for Justice and Constitutional Development*,[4] submitted that it was sufficient for the appellant simply to plead that she was unlawfully arrested and brought to South Africa, and once that was established the respondents bore the burden to justify the deprivation of her liberty.[5] In *Zealand* the Constitutional Court explained the rationale for this approach as follows:[6]

'This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.' (Footnotes omitted)

[18] This approach was recently affirmed by the Constitutional Court in *Mahlangu and Another v Minister of Police*,[7] *(Mahlangu)* in which it stated:

'It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that an interference

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[4] *Zealand v Minister for Justice and Constitutional Development* and Another 2008 (2) SACR 1 (CC); [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (*Zealand*).
[5] *Zealand* para 24, as referred to recently by this Court in *Syce and Another v Minister of Police* [2024] ZASCA 30; 2024 (2) SACR 1 (SCA) para 49.
[6] *Zealand* para 25. See also reference to the dictum quoted in para 25 in *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC) paras 14 and 122.
[7] *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (*Mahlangu)*, quoting and confirming in para 29 *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA); 2006 JDR 0720 (SCA) para 6.

has occurred. Once this has been established, the deprivation is prima facie unlawful, and the defendant bears an onus to prove that there was a justification for the interference.'[8]

[19] It is clear from *Zealand* and *Mahlangu* that the onus shifts only once the identity of the party alleged to have acted unlawfully has been established. The appellant's case against the respondents was still-born as she failed to establish that she was arrested in Tanzania by members of the SAPS. The case before this Court that the Minister of Police was called upon to answer was that members of the SAPS arrested and abducted the appellant in Tanzania.

[20] The appellant's case against the respondents was answered in detail by the Minister of Police and the Minister of Home Affairs in the answering affidavits deposed to Mr Shibiri and Mr Matthews, respectively. The respondents' version was that the appellant was arrested together with Mr Bester in Tanzania by the Tanzanian authorities for being '[unlawfully] present within the Republic of Tanzania.' On 12 April 2023, the Tanzanian authorities reported to the South African delegation that their government had taken a decision to deport Mr Bester and the appellant since it had declared them prohibited immigrants. The Tanzanian authorities then handed the appellant over to the High Commission official who, in turn, handed her over to the South African Immigration official at Kilimanjaro airport in Tanzania. The appellant offered no resistance or protest. In fact, the appellant expressed the desire to return to South Africa to her children.

[21] Since the appellant was seeking final relief in the matter, in terms of the principles laid down in *Plascon-Evans v Van Riebeeck Paints Pty (Ltd)*,[9] this had to be decided on the Minister of Police's version since his evidence shows clearly that SAPS did not take any action against the appellant until her arrest at Lanseria airport. The version put forward on behalf of the Minister of Police and the other respondents could not be said to be far-fetched or clearly untenable in that it and can be rejected merely on papers. The version of the Minister of Police is that members of the SAPS were not

[8] *Mahlangu* para 32.
[9] *Plascon-Evans v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 at 634E-635C; [1984] 2 All SA 366 (A) at 367-368.

involved in her arrest in Tanzania or her removal from that country. There is no reason to reject this version. If the SAPS arrested her in Tanzania as claimed by the appellant, why would it be necessary for the SAPS to arrest her again when she landed at Lanseria airport on 13 April 2023? In fact, the evidence is that the appellant was arrested at Lanseria airport not by the members of the SAPS who formed part of the South African delegation to Tanzania, but by the SAPS members investigating the case, concerning Mr Bester's escape, from the Mangaung Correctional Centre. The investigating team was waiting at Lanseria airport for the arrival of the Department of Home Affairs aircraft from Tanzania and had not travelled to Tanzania. There was no attack on the lawfulness of the arrest of the appellant at Lanseria airport. She disavowed that the arrest had taken place there and founded her application foursquare on her arrest by members of the SAPS in Tanzania.

[22] There was nothing sinister about the presence of members of the SAPS on the aircraft that went to Tanzania. According to the Department of Home Affairs, the services of the SAPS were enlisted because Mr Bester was regarded as extremely dangerous. The Department of Home Affairs therefore gave a reasonable explanation for the SAPS presence on the aircraft that was despatched to Tanzania. Thus, the onus never shifted to the Minister of Police since the evidence shows clearly that members of the SAPS were never involved in any actions against the appellant before her arrest at Lanseria airport.

[23] As far as the appellant's case against the Department of Home Affairs is concerned, in my view the appellant failed to make out a case against it at all in the founding papers. The relief sought by the appellant in her urgent application has been set out above. It is necessary to sketch the sequence of events which led to the hearing of the matter in the high court on an urgent basis. The founding papers were issued on 19 May 2023. The appellant cited as respondents the first to fifth respondents herein. The entire thrust of her case was that members of the SAPS effected her arrest in Tanzania as well as her transport from that country to the Lanseria airport in South Africa. As a result, the relief sought was aimed foursquare at the Minister of Police and the other four cited respondents and no-one else. It is clear that if members of the SAPS had arrested her in Tanzania, such arrest and any subsequent actions on their

part would have been unlawful since the SAPS had, and has, no jurisdiction to arrest or act against persons outside South Africa.

[24] No mention was made of employees of the Department of Home Affairs or of the Minister of that department. They were not cited as respondents. On the contrary, on 15 May 2023, attorneys representing the appellant wrote to the Director General of that department requiring certain information and documents concerning the involvement, if any, of members of the department in the actions in Tanzania by 16:00 that day. The Director General responded on the same day to the effect that a request should be made under the Promotion of Access to Information Act 2 of 2000. The appellant's attorneys wrote by letter dated 22 May 2023 responding to a letter from the Director General of the previous day (which letter was not included in the record). It refers to myriad issues raised by the Director General and states, among other things, that instructions would be taken on making a joinder application. The Director General responded the following day noting that the Minister of Home Affairs had not been joined as a respondent in the matter then set down for 26 May 2023. An undertaking was required that the Minister be joined and a reasonable opportunity be given to file affidavits. This letter was responded to the following day and contained the following material statements:

(a) 'The application . . . does not seek any relief against the Department of Home Affairs.'

(b) '. . . we see no need for you to be joined as a Respondent . . .'

(c) '. . . our client's version is that she was unlawfully arrested by members of the South African Police in Tanzania and transported back to South Africa. It is our client's version that no documentation ever existed or was shown to her nor was she taken to the SA Consulate.'

(d) 'You are welcome, and invited should you elect to do so, to join the proceedings as a respondent. We will not join you for the reasons stated.'

[25] It can thus be seen that the clear intention of the appellant was to proceed only against the respondents already cited in the matter. A refusal to join the Minister of Home Affairs is entirely inconsistent with seeking any relief against him. It is noteworthy that paragraph (a) above remained the position until the appellant's heads of argument, without more, submitted that amended relief would be sought which

included the Minister of Home Affairs in the declaration sought in paragraph (a) referred to in paragraph 3 of this judgment.

[26] The Minister of Home Affairs then launched an application to join the application as the sixth respondent and set it down for 26 May 2023, the date on which the urgent application was to be heard. On that day, an order was granted by consent joining him and directing the filing of further affidavits and heads of argument in the matter and adjourning it for hearing on the opposed roll on 1 June 2023. The sixth respondent delivered an answering affidavit on 29 May 2023 and the appellant delivered a composite reply to the two answering affidavits on 30 May 2023.

[27] No application was ever brought to amend the relief sought to include relief against the sixth respondent. The matter was argued based on the original relief sought against the first five respondents only. That position obtained even during the hearing of the appeal before us. For the first time, in the heads of argument of the appellant, it was submitted that, on appeal, this Court should grant the following order: '2.1 It is declared that the applicant's apprehension and arrest in Tanzania by officials of the second and sixth respondents, as well as her subsequent forced return to the South Africa is inconsistent with the Constitution of South Africa, 1996, unlawful and invalid.' In addition, the heads of argument indicated that a costs order would be sought against, inter alia, the sixth respondent. Even during the appeal, no substantive application was brought to amend the notice of motion to include any order against the sixth respondent. The submission in the heads clearly indicated that the initial paragraph of the notice of motion would no longer be sought and that amended relief would be sought.

[28] This occasioned some robust debate between the bench and counsel for the appellant. The latter was unable to point to any authority that, without any application to that effect, relief could be sought on appeal against a party against whom no relief had previously been sought. Nor have I found any such authority. Counsel relied on matters where amended relief was granted against a party from whom relief had previously been sought, especially where a constitutional breach had been established. In particular, the appellant called in aid paragraph 18 of the matter of *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty)*

Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae) (*Modderfontein*):

'In the light of the aforegoing, it is not surprising that, at the hearing before De Villiers J, Modderklip and Agri SA accepted that the unconditional removal of the occupiers was not a viable option. Instead, they proposed an order in two parts: the first was a declaratory order relating to the State's constitutional obligations towards not only Modderklip but also the occupiers, and the second part was a *mandamus* requiring the State to submit to Court a comprehensive plan to solve the problems of Modderklip and the occupiers. In the Court below, the State objected to the new direction, wishing to hold Modderklip to the relief originally sought. This objection was overruled by De Villiers J (at para [52]), correctly so. If a constitutional breach is established, this Court is (as was the Court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued. That much is apparent from the course the litigation took in *Carmichele* and *Bannatyne* and why the further *amici,* the Nkuzi Development Association, the Community Law Centre and the Programme for Land and Agrarian Studies (University of the Western Cape), were admitted to the proceedings.'[10]

[29] I respectfully agree with, and am clearly bound by, this *dictum*. Where relief has been sought against cited parties and it has been established that they committed a constitutional breach, it is entirely appropriate and indeed obligatory that the original relief sought be amended to address the breach. That would fall under the customary prayer that further or amended relief would be sought. There is ample authority that this is competent and, indeed, necessary. A court should do so *mero motu* if the party concerned does not itself request amended relief. As mentioned in *Modderfontein*, this was spelled out in *Fose v Minister of Safety and Security*:[11]

'Courts should not be overawed by practical problems. They should "attempt to synchronise the real world with the ideal construct of a constitutional world" and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach. *Fose v Minister of Safety and Security* held that -

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[10] *Modderfontein Squatters, Greater Benoni CC v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the RSA v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae)* [2004] ZASCA 47; 2004 (6) SA 40 (SCA); 2004 (8) BCLR 821; [2004] 3 All SA 169 para 18 (*Modderfontein)*. References omitted. Approved in *Commando and Others v City of Cape Town and Another* [2024] ZACC 27; 2025 (3) SA 1 (CC); 2025 (3) BCLR 243 (CC) para 32.

[11] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

"(a)ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."
(In para [19].)
"I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."
(In para [69].)'[12]

[30] The difficulty in the present matter is not that a party against whom some relief had been sought was proved to have committed a constitutional breach and was, as a result, confronted with amended relief at a late stage in proceedings, even on appeal. In the present matter, the appellant, despite the Minister of Home Affairs having joined as a respondent, at no point indicated that her previous express view that relief would only be sought against the first five respondents, had changed. Nor did she at any stage seek to amend that relief to include relief against the Minister of Home Affairs.

[31] The appellant sought to justify the new relief sought on the basis that a constitutional breach had been established in the deprivation of her liberty. In support, she relied on the matter of *Zealand* where it was held:
'[24] There is another, more important reason why this court should rule in the applicant's favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead

[12] *Modderfontein* para 42. References omitted. Referred to with approval in *Thint (Pty) Ltd v NDPP; Zuma v NDPP* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (2) SACR 421; 2008 (12) BCLR 1197 fn 174.

that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.

[26] Even if the applicant can be said to have altered his cause of action (which I do not accept to be the case), no prejudice will be suffered by the respondents if this court decides the case as it has now been presented.'[13]

[32] Once again, those principles are well-established. What is of cardinal importance, however, is that, for the onus to shift to a party, it must be established that *that party* is the one responsible for the constitutional breach. In this regard, the *dicta* in question makes it clear that 'once the claimant establishes that an interference has occurred, the burden falls upon *the person causing that interference* to establish a ground of justification'[14] and, as regards the *rei vindicatio*, '[t]he simple averment of the plaintiff's ownership and the fact that his or her property is held *by the defendant* was sufficient'[15] and that this Court accordingly correctly concluded that 'it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held *by the defendant*.'[16] (Emphasis added.) In the present matter, therefore, before any onus shifted to the Minister of Home Affairs, it was necessary to prove that he was 'the

[13] *Zealand* paras 24-26. References omitted.
[14] Ibid para 25.
[15] Ibid para 25.
[16] Ibid para 25.

person causing that interference' or that the appellant was 'being held by the [Minister of Home Affairs].' No such averments appear in the founding affidavit or are included as the relief sought in the Notice of Motion. There was simply no case which the Minister of Home Affairs was obliged to meet. As such, no onus shifted to the Minister of Home Affairs for him to discharge. The only averments, by way of argument, appear in the replying affidavit which, if relief was to be based on it, should have been framed as a supplementary founding affidavit so that the Minister of Home Affairs had the opportunity to respond. In *Zealand*, it was made clear that, even if amended relief was considered against the party alleged to have breached the constitutional right, prejudice should be considered before such relief could be granted.

[33] In the present matter, had such an amendment have been sought, or had the replying affidavit been styled a supplementary founding affidavit, the Minister of Home Affairs may well have sought to depose to a further affidavit. Since neither of these was done, if any relief is granted against the Minister of Home Affairs, as requested in the appellant's heads of argument, the Minister of Home Affairs will be prejudiced by not being afforded *audi alteram partem*.

[34] It is no answer to this that the Minister of Home Affairs could have sought to respond to the replying affidavit by applying to deliver a further affidavit. This was neither offered by the appellant in reply, nor, as mentioned, did the appellant apply to amend the relief sought which would also have given the Minister of Home Affairs an opportunity to respond and outline any prejudice occasioned to him if amended relief was to be considered.

[35] The recent matter of *DB v CB*[17] is instructive. It is necessary to quote extensively from the majority judgment:

'[44] The purpose of pleadings is to define the issues for the other party and for the court. The court is called upon to adjudicate the disputes that arise from the pleadings and those disputes alone. There are instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and which is necessary for the determination of the matter, provided its consideration on appeal involves no unfairness to the other party against whom it

[17] *DB v CB* [2024] ZACC 9; 2024 (5) SA 335 (CC); 2024 (8) BCLR 1080 (CC).

is directed. It is, however, impermissible for a court to decide issues falling outside the pleadings, without determining issues of fairness and prejudice. It is impermissible for a party to plead a particular case and seek to establish a different case at the trial.

[45] This principle is equally applicable, and perhaps more so, to appeals. A party should generally not be allowed to argue new issues on appeal that were not raised or considered by the lower court. There are exceptions and circumstances when a party may be allowed to rely on an issue which was not covered in the pleadings. In *Slabbert* the Supreme Court of Appeal articulated these circumstances:

“This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said: However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.”

[46] This Court in *Notyawa* expressed its disapproval of a litigant changing its case as the matter proceeded through the various courts. It said:

“Before us this finding was not challenged, but the applicant changed tack. The consequential relief was no longer sought, but he submitted that a live controversy between the parties remained. This related to what further consequential remedy, in the form of a claim for damages, might be available to the applicant. This would be pursued in different proceedings. This change in strategy cannot avail the applicant, not least because the point is being raised for the first time in this Court. *There was nothing to prevent the applicant from seeking an amendment to the relief he sought in the High Court*. Yet there is no explanation why he did not do so, nor why this Court should do so as a court of first instance. That this should not readily be countenanced was recently re-affirmed by this Court in *Tiekiedraai*. There is no reason to do so here.”
[Emphasis added.]

[47] The question of unfairness and prejudice must be considered where a party raises an issue for the first time on appeal. What might be “unfair” was considered by this court in *Barkhuizen*, albeit in a slightly different context, where the court noted that:

“Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.”

[48] It also noted that:

"The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point."

[49] An appeal court can deal with an issue that was not raised in the lower courts and not considered by the lower courts. However, this can only be done in exceptional circumstances. A court will not entertain a new issue on appeal where it causes prejudice or unfairness to the other party.'[18]

[36] In the present matter, the following is clear. The pleadings define the issues and, in the case of application papers, the Notice of Motion and founding affidavit must contain the case to be met by the respondents. No mention was made of the Minister of Home Affairs in those documents. As was the case in *Notyawa*, referred to in *DB v CB*, '[t]here was nothing to prevent the applicant from seeking an amendment to the relief [she] sought in the High Court. Yet there is no explanation why [she] did not do so, nor why this Court should do so as a court of first instance.' Amended relief on appeal should 'not readily be countenanced'. Unfairness must be considered if such relief is sought. If 'its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point.' The latter *dictum* must mean that, if there is unfairness, no discretion arises to consider the point. If there is no unfairness, a court must still exercise a discretion whether to allow amended relief or not.

[37] In *DB v CB*, the majority in the Constitutional Court held that the issue in question could not be dealt with on appeal to it. This was dealt with as follows:

'In any event, and if it can be said that the ousting issue arose on the pleadings, the expansion of the issues was impermissible for a number of reasons. First, the issues had not been properly covered by the pleadings. Secondly, and crucially, the question of unfairness or prejudice was not considered by the High Court or the Supreme Court of Appeal. Thirdly, as mentioned, the matter was presented as a stated case in the Regional Court. The respondent did not have an opportunity to present evidence as to the facts and circumstances surrounding the conclusion of the prenuptial agreement. Such evidence may have been relevant to the question whether the agreement was a donation that fell outside the ambit of s 7 of the Divorce

[18] Ibid paras 44-49.

Act. Although neither party raised the question of prejudice, a court is enjoined to consider this question in determining whether an issue can be raised for the first time on appeal. Fourthly, no reason has been advanced by the applicant as to why he could not amend his pleadings. Fifthly, both the High Court and the Supreme Court of Appeal failed to exercise their discretion as to whether they should consider the new issue on appeal. It would thus not be in the interests of justice to grant leave to appeal on the ousting issue.'[19]

[38] As has been said, there would be unfairness in the failure to extend *audi alteram partem* to the Minister of Home Affairs. This is one of the fundamental tenets of the Rule of Law. Although it is not possible to specify the prejudice which might result, some of the considerations set out above apply. At the very least, in the light of the avowed intent of the appellant to proceed only against the first five respondents, the Minister of Home Affairs would be prejudiced if relief were to be granted against him when this was nowhere foreshadowed prior to receipt of the appellant's heads of argument and in the absence of a formal application to amend even on appeal. That being the case, no discretion arises in the present matter for this Court to allow the amended relief sought. For these reasons, no relief should be granted against the Minister of Home Affairs, regardless of the outcome of the rest of the appeal.

(ii) Did the appellant make out the case on the papers that her handing over by the Tanzanian Ministry of Home Affairs to the South African High Commission and her transportation by the respondents to South Africa was part and parcel of a disguised extradition in breach of the law?

[39] The second leg of the appellant's argument was that her arrest in Tanzania and handing over by the Tanzanian Ministry of Home Affairs to the South African High Commission official and her removal from Tanzania, were part and parcel of a disguised extradition. The appellant contends that there was collusion between South Africa and Tanzania to secure her deportation to South Africa in order to evade the procedures for extradition. It was submitted on behalf of the appellant that because her deportation was a disguised extradition it was unlawful and a South African court should therefore have declined to exercise jurisdiction. But, as mentioned above, the case made out against the Minister of Police was that members of the SAPS arrested

[19] Ibid par 53.

the appellant in Tanzania and that they were involved in forcing the appellant to board the aircraft and return to South Africa. The factual disputes in this regard must be determined in favour of the Minister of Police. And, as set out above, no relief against the Minister of Home Affairs is competent. As such, it is unnecessary to consider the law concerning disguised extraditions and its application in this matter.

[40] In the light of the conclusion I have reached, it is not necessary to have regard to evidence on the question whether or not the appellant returned to South Africa voluntarily.

[41] In conclusion, I find that the appellant was not arrested in Tanzania by members of the SAPS and therefore the appellant failed to show that the police acted unlawfully. The overwhelming evidence is that the appellant and Mr Bester were arrested by the Tanzanian authorities for having violated the immigration laws of that country. When she arrived at Lanseria airport, she was lawfully arrested by members of the SAPS.

Order

[42] In the result I make the following order:
The appeal is dismissed with costs, including the costs of two counsel where so employed.

D H ZONDI
DEPUTY PRESIDENT

Makgoka JA (dissenting):

[43] I have read the judgment prepared by the Deputy President (the first judgment), which has admirably set out the background facts. They are therefore not regurgitated in this judgment. Regrettably, I disagree with the first judgment's conclusion to dismiss the appeal, and the reasoning underpinning it. I would uphold the appeal.

[44] The first judgment rests on three findings. First, that the appellant did not make a case for disguised extradition in the founding affidavit but in her replying affidavit, and therefore, the argument should not be considered. Second, because the appellant had failed to establish that she was arrested by the SAPS in Tanzania, this is dispositive of the matter, and it is not necessary to consider whether the appellant's deportation to South Africa was lawful. Third, that because the appellant did not amend her notice of motion to seek relief against the Minister of Home Affairs, no order should be made against the Minister.

[45] I do not agree with these conclusions. As to the first, I endeavour to demonstrate that the appellant did not make a new case in the replying affidavit, but that the unlawful disguised extradition argument arises fairly from the founding affidavit. In addition, I make the point that the unlawful disguised extradition is a point of law, which can be raised at any stage, even during an appeal, subject to certain provisos.

[46] As to the second, I am of the view that despite not having been arrested by the SAPS, consideration should also be given to the lawfulness of: (a) the handing over of the appellant by the Tanzanian authorities to the South African authorities; (b) the South African authorities' detention of the appellant upon such hand-over; and (c) the transportation of the appellant back to South Africa, where she was arrested upon arrival and subsequently prosecuted. In my view, these questions are inextricably linked. None of them can be considered in isolation.

[47] As to the third, in constitutional matters where a violation of human rights is established, a court should not be constrained by procedural missteps in seeking to give effective relief to vindicate rights. As I demonstrate in this judgment, the Department of Home Affairs officials engaged in an unlawful disguised extradition by deporting the appellant to South Africa without following the extradition process. It is this conduct that must be declared unlawful and invalid, to the extent of its inconsistency with the Constitution. Section 172(1)(*a*) of the Constitution enjoins us to so. We do not have residual discretion not to. Section 172(1)(*b*) permits us to make a consequential order 'that is just and equitable.' This, we must do, unbound by any procedural imperfections. If, as I find, the officials of the Department of Home Affairs

acted unlawfully, there can be no conceivable prejudice to the Minister of Home Affairs were an order of declaration, and related relief, made against him.

The pleadings

[48] As mentioned in the first judgment, the Minister of Home Affairs was initially, not a party to the application in the high court. In her founding affidavit, the appellant alleged that the SAPS unlawfully abducted her from Tanzania and deported her to South Africa. In the answering affidavit on behalf of the first, second and third respondents (the Justice cluster respondents), this was denied. It was stated that the Department of Home Affairs was the one instrumental in the deportation of the appellant, and that the Justice cluster respondents' role was limited to providing escort to the Department of Home Affairs officials. Based on these allegations, the Minister of Home Affairs joined the proceedings as the sixth respondent. The allegations by the Justice cluster respondents about the role of the Department of Home Affairs constituted a sufficient basis for the Minister of Home Affairs, as the executive head of that department, to join the proceedings.

[49] It is understandable why the appellant did not initially join the Minister of Home Affairs. She had encountered several officials from South Africa after she had been arrested in Tanzania. It is safe to assume that she neither knew which department each of them represented, nor who played what role in her deportation. This was only clarified in the answering affidavit on behalf of the Justice cluster respondents. Nothing turns on the fact that the appellant had declined to join the Minister of Home Affairs. The fact of the matter is that the Minister subsequently became a party to the proceedings, and an answering affidavit was deposed on his behalf. As I will demonstrate later, it is in that affidavit that the unlawful conduct of the Department of Home Affairs officials in the deportation of the appellant, was laid bare.

New case in the replying affidavit?

[50] In my view, the complete answer to this is that the high court has already decided it, and there is no cross-appeal to disturb it in this Court. After the appellant's delivery of her replying affidavit, the Minister of Home Affairs applied to strike out the appellant's assertion of disguised extradition from the replying affidavit (the application to strike out). The Minister complained that the appellant had sought to make a new

case in the replying affidavit. The high court held that the appellant's assertions in her replying affidavit were merely a refinement of what she had averred in her founding affidavit. It consequently dismissed the application.

[51] There is no cross-appeal against the high court's order dismissing the application to strike out. Appeals to this Court are regulated by rule 16(1)(*a*) and (*b*) of the Superior Courts Act 10 of 2013[20] (Superior Courts Act) and rule 7(2) and (3) of the Rules of this Court.[21] Referring to their predecessors, (s 20(1)*(b)* of the Supreme Court Act, and Rule 5(3) of the Rules of this Court) this Court in *Publications Control Board v Central News Agency* (*Publications Board*)[22] said the following of the provisions:

'The combined effect of these provisions is that if a respondent in an appeal wishes to achieve a variation of the judgment or order in the Court a quo he shall lodge a notice of his cross-appeal setting forth therein full particulars of the variation which he seeks . . .The terms "judgment" and "order" in the statute and Rule of Court do not embrace every decision or ruling of a court. These terms are confined to decisions granting "definite and distinct relief."'

[52] There is no debate that the order of the high court dismissing the application to strike out is 'definite and distinct relief' envisaged in *Publications Board*. By submitting that the unlawful disguised extradition should not be considered by this Court, the respondents attacked the order of the high court dismissing the application to strike out, and sought its variation on appeal. This was not open to any of the respondents without leave to cross-appeal having been granted. It follows that this Court does not have jurisdiction to consider them afresh.

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[20] Superior Courts Act 10 of 2013.- Section 16 thereof reads as follows: '(1) Subject to section 15(1), the Constitution and any other law—

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted—

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal . . .'

[21] The relevant sub-rules read:

'(2) A respondent in a civil appeal who intends to cross-appeal shall, within one month after receipt of the appellant's notice of appeal, lodge a notice of the cross-appeal with the registrar and with the registrar of the court a quo.

(3) Every notice of appeal and cross-appeal shall —

(a) state what part of the judgment or order is appealed against;

(b) state the particular respect in which the variation of the judgment or order is sought . . .'

[22] *Publications Control Board v Central News Agency* Ltd 1977 (1) SA 717 (A) at 745A.

[53] Recently, this Court has had to consider its jurisdiction to entertain appeals in which leave was not properly granted, or not granted at all. In *Hanekom N O v Nuwekloof Private Game Reserve Farm Owners Association*[23] special leave to appeal had been granted by this Court against an order of two Judges who had considered an appeal against an adjudicator's decision under the Community Schemes Ombud Service Act 9 of 2011. This Court held that the two Judges had sat as a court of first instance, and therefore, leave to appeal should have been sought from them, instead of this Court. Accordingly, it held that the special leave to appeal granted by it was erroneous and that it had no jurisdiction. The appeal was accordingly struck off the roll. *Minister of Police v Nontsele*[24] concerned an appeal in which the respondent sought to challenge an order against which no leave to cross-appeal had been granted. It was held that a cross-appeal cannot be entertained in the absence of leave to appeal having been granted.

[54] The upshot of these decisions is that this Court has no jurisdiction to question the correctness of the high court's order dismissing the application to strike out, without leave to cross-appeal having been granted, either by the high court or this Court. By declining to consider the issue, the first judgment is effectively, but without expressly saying so, overruling the order of the high court.

[55] The significance of this is two-fold. First, once the high court's conclusion is ignored, as the first judgment does, the respondents are relieved of the burden to explain the lawfulness of taking the appellant into their custody from the Tanzanian authorities; and keeping her in detention until her transportation to South Africa. Second, the dismissal of the application to strike out enabled the high court to conclude that the respondents engaged in an unlawful disguised extradition. The approach adopted in the first judgment nullifies that conclusion. That, with respect, this Court does not have jurisdiction to do without the necessary leave to cross-appeal the high court's findings having been granted.

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[23] *Hanekom N O and Others v Nuwekloof Private Game Reserve Farm Owners Association* [2024] ZASCA 154; 2025 (2) SA 128 (SCA).

[24] *Minister of Police v Nontsele* [2024] ZASCA 137; [2025] 1 All SA 44 (SCA).

[56] I now consider how the high court disposed of the argument that the appellant introduced a new case in the replying affidavit. This is how it resolved the issue:

'I do not think that there is much merit in the objection to the applicant's reliance on an unlawful disguised extradition in the form of deportation, which appears in her replying affidavit. This is so because she had already alleged in her founding affidavit that no documentation existed to show that there was an extradition. She also mentioned there that none of the procedures for making an extradition request had been followed. It therefore appears that the reference to a disguised extradition in the replying affidavit was nothing more than the use of refined technology to say the same thing that she has already intimated in her founding affidavit. The objection in this respect cannot succeed.'[25]

[57] The high court was correct in its conclusion. On a proper analysis of the pleadings, the appellant did not raise a new issue in the replying affidavit. Its approach finds support in a recent decision of the Constitutional Court in *Botha v Smuts (Botha)*[26] where a similar issue was considered. There, the first respondent had posted on a social media platform, a picture of the applicant, his child, the location of his business and residential address, to highlight what he considered to be animal cruelty taking place on the applicant's farm. In his founding affidavit, the applicant alleged that the publication posed a threat to the security of his family, and a threat of commercial harm to his businesses. In his replying affidavit, he asserted that the publication violated his right to privacy. The respondent objected, alleging that the right to privacy issue was a new cause of action raised only in the replying affidavit.

[58] Writing for the majority, Kollapen J pointed out that in asserting his right to privacy in the replying affidavit, the applicant had relied substantially on the same facts advanced in the founding affidavit, '[and] formally invoked his right to privacy by name.'[27] He further held that the basis for asserting the right to privacy had been laid in the notice of motion and founding affidavit, and the replying affidavit 'directly clarified his reliance on his right to privacy'.[28] Kollapen J further explained:

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[25] High Court judgment para 22.

[26] *Botha v Smuts and Another* [2024] ZACC 22; 2025 (1) SA 581 (CC); 2024 (12) BCLR 1477 (CC) (*Botha*).

[27] Ibid para 53.

[28] Ibid para 55.

'[P]rior to the filing of the replying affidavit, the issue of privacy had been raised by [the applicant] even though not as elegantly or directly as would have been desired, perhaps because the application was launched as one of urgency. Notwithstanding, [the first respondent] knew that the case he was required to meet included a privacy challenge and he responded to that in his answering affidavit. The privacy case was squarely and properly before the High Court for determination.'[29]

[59] In a concurring majority judgment, Chaskalson AJ agreed with Kollapen J. He held that there would be no prejudice to the first respondent in allowing the applicant to recast his case in this respect. Chaskalson AJ reasoned that there was no suggestion that had the applicant pertinently pleaded his complaint as a privacy issue, the respondents would have answered it differently. This was because:

'Any facts potentially relevant to the re-characterised privacy complaints would have been equally relevant to the originally pleaded complaints of a threat to security at [the applicant's] family home and a threat of commercial harm to his businesses . . .' .[30]

[60] Based on the above considerations, the majority considered the right to privacy issue even though it was not expressly asserted in the founding affidavit, but only in the replying affidavit.

[61] In the present case, there is similarly no mention of the phrase 'disguised extradition' in the appellant's founding affidavit. However, the appellant's complaint remained consistent that she was unlawfully deported from Tanzania to South Africa. She said that this was so because: (a) no documentation existed to show that there was an extradition; and (b) none of the procedures for making an extradition request had been followed. These averments would fairly sustain an assertion that her deportation was a disguised extradition. In other words, the facts upon which the appellant averred that she was unlawfully returned to South Africa, are the same as would be for the assertion that her deportation was an unlawful disguised extradition.

[62] Put differently, there is no suggestion by any of the respondents that had disguised extradition been expressly mentioned in the founding affidavit, they would

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[29] Ibid para 57.

[30] Ibid para 215.

have framed their answering affidavit differently. All that the appellant did in the replying affidavit was simply to draw a legal conclusion from the conduct of the respondents, and pin a label to it as a 'disguised extradition'.

[63] Furthermore, even if the disguised extradition point constitutes a new case in the replying affidavit, it is a point of law which can be advanced even if not specifically mentioned in the papers, provided: (a) it arises from the facts;[31] and (b) no prejudice occurs to the other party.[32] As to (a), the appellant has averred that her deportation from Tanzania to South Africa was unlawful because extradition procedures were not followed. In its judgment, the high court observed that counsel for the appellant had 'dealt extensively with the legal principles in question [of extradition and deportations] . . . '.[33]

[64] The high court accordingly devoted some effort to establishing whether the deportation of the appellant to South Africa was lawful. The issue therefore arises squarely from the papers, and the high court dealt with it. Similarly, in this Court, both in their heads of argument and in oral submissions, counsel for the appellant addressed the issue. We exhaustively debated the merits of the argument with counsel. As to prejudice, none of the respondents has asserted any, were the issue to be considered by this Court. I discern none.

[65] In any event, the respondents could have sought leave to file a supplementary affidavit to answer what they considered to be a new point raised in the replying affidavit. In *Pretoria Portland Cement Company Ltd v Competition Commission*[34] this

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[31] *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509E-510B; *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 404D-G; *Minister of Justice v Nationwide Truck Hire (Pty) Ltd* 1981 (4) SA 826 (A) at 833G *in fin*; *Cabinet for the Territory of South West Africa v Chikane and Another* 1989 (1) SA 349 at 360F-G; *F v Minister of Safety & Security and Others* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC); (2012) 33 ILJ 93 (CC); 2013 (2) SACR 20 (CC) para 128; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (4) SA 325 (CC); 2023 (5) BCLR 527 (CC) para 277.

[32] *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285G.

[33] High Court judgment para 25.

[34] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* [2002] ZASCA 63; 2003 (2) SA 385 (SCA) para 63. See also *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TkS) at 550F; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) paras 51 and 71.

Court held that a party under similar circumstances was entitled to do so. This was affirmed by the Constitutional Court in *Botha*.[35] None of the respondents sought such leave. The Department of Home Affairs elected to apply for the striking out of the appellant's reference to disguised extradition. As mentioned, that application was dismissed.

[66] It must also be emphasised that the rule against a new case being made in the replying affidavit,[36] is not immutable. Our courts have relaxed the rule where the interests of justice demand it. In *Smith v Kwanonqubela Town Council,*[37] this Court explained that the rule against a new matter in reply is not absolute and should be applied with a fair measure of common sense when it found that the new matter raised in reply before it provided no material advantage to the applicant.[38]

[67] In *Betlane v Shelly Court CC*,[39] the Constitutional Court relaxed the rule to allow a new legal argument raised in the replying affidavit on the basis that the applicant did not have legal representation when the founding affidavit was drafted. In *My Vote Counts v Speaker of the National Assembly*,[40] the Constitutional Court summarised the position on the issue thus:

'It is, in any event, imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument. The exception, of course, is that a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party.'[41] (Footnote omitted.)

[68] Significantly, a new legal point can even be raised on appeal. In *Barkhuizen v Napier*,[42] the Constitutional Court said the following about it:

'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its

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[35] *Botha* para 56.

[36] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H.

[37] *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA).

[38] Ibid para 15.

[39] *Betlane v Shelly Court CC* [2010] ZACC 23; 2011 (1) SA 388 (CC); 2011 (3) BCLR 264 (CC).

[40] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC).

[41] Ibid para 177.

[42] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point.'[43] (Footnote omitted.)

[69] On the footing that the disguised extradition argument arose from the papers and the high court dealt with it, we are enjoined to deal with it. Declining to do so goes against the authority of the Constitutional Court. In the context of a constitutional challenge, that court held in *S v Jordan*[44] that where the constitutionality of a provision is challenged on a number of grounds and the court upholds one such ground, it should also express its opinion on the other challenges. This is necessary in the event of the Constitutional Court declining to confirm the ground upheld by a lower court.[45]

[70] In *Spilhaus Property Holdings (Pty) Limited v MTN* (*Spilhaus*)[46] the Constitutional Court was more express in its criticism of this Court for disposing of a matter on one aspect, despite there being other contentious ones. Jafta J said:

'[T]he Supreme Court of Appeal itself has said that it is desirable, where possible, for a lower court to decide all issues raised in a matter before it. This applies equally to the Supreme Court of Appeal. This is more so where, as here, the final appeal court reverses its decision on the chosen limited point. This may impact on the fairness of an appeal hearing. Litigants are entitled to a decision on all issues raised, especially where they have an option of appealing further. The court to which an appeal lies also benefits from the reasoning on all issues.

The practice of choosing one point in disposing of an appeal in the Supreme Court of Appeal pre-dates the Constitution and arose at the time when that Court was the apex court. It may have been proper in the pre-constitutional era. That is no longer the case because appeals against decisions of the Supreme Court of Appeal lie to this Court which is now the apex court . . .'.[47] (Footnotes omitted.)

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[43] Ibid para 39.
[44] *S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC).
[45] Ibid para 21.
[46] *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks and Another* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).
[47] Ibid paras 44 and 45.

[71] For the reason that we are no longer the court of last instance, the appellant has the right to apply to the Constitutional Court for leave to appeal. Should such leave be granted, she would likely persist with her argument that, her deportation was an unlawful disguised extradition. The Constitutional Court would not have the benefit of this Court's view on the issue – the type of situation deprecated in *Spilhaus.*

[72] Lastly, I consider that the issues raised by the appellant, which implicate public international law and international human rights law, are '…too important for this case to be disposed of on [the] narrow basis' adopted in the first judgment.[48]

[73] For all of the above reasons, I conclude that the high court was correct to consider the appellant's disguised extradition argument. On the basis that there is no cross-appeal against this conclusion, the only issue before this Court is whether the high court was correct in its conclusion that the appellant consented or acquiesced in her deportation to South Africa. Before I come to that issue, I set out my reasoning for why I agree with the high court's conclusion that the appellant's deportation was an unlawful disguised extradition. I consider in turn, the following under this rubric: (a) the appellant's arrest and detention by the Tanzanian authorities; (b) the handing over of the appellant into the custody of the South African authorities; and (c) the appellant's alleged consent to be transported back to South Africa.

The appellant's arrest and detention by the Tanzanian authorities

[74] The appellant was lawfully arrested and detained by the Tanzanian authorities because she was in that country illegally. But she was also a fugitive from justice in South Africa. The legal mechanism through which a fugitive from justice can be handed over to the State which seeks her or his prosecution, is through extradition.

The extradition regulatory framework

[75] In the present case, the regulatory framework comprises the Tanzanian Extradition Act[49] and the Southern African Development Community Protocol on

[48] See the approach of Langa CJ in *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC) para 86.
[49] Tanzanian Extradition Act No. 15 of 1965 (Cap. 368 R.E 2002).

Extradition (the SADC Extradition Protocol). Both South Africa and Tanzania are signatories to the SADC Extradition Protocol. South Africa ratified the SADC Extradition Protocol on 14 April 2003 and the Protocol entered into force on 1 September 2006.[50]

[76] Section 5(1) of the Tanzanian Extradition Act provides:

'A requisition for the surrender of a fugitive criminal of any country who is in or suspected of being in Tanzania shall be made to the Minister by a diplomatic representative or consular officer of that country and, upon receipt of requisition, the Minister may, by order under his hand, signify to a magistrate that a requisition has been made and require the magistrate to issue his warrant for the arrest and detention of the fugitive criminal.'

[77] Article 6(1) of the SADC Extradition Protocol provides that an extradition request shall be made in writing, which together with 'supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties.' Article 6(2) prescribes the documents and information which must accompany the request. Article 10 of the SADC Extradition Protocol provides for urgent provisional arrest procedures.

Deportation vis-à-vis extradition

[78] In *Mohamed* the Constitutional Court pointed out that extradition and deportation serve distinct purposes. The differences were explained as follows:

'In principle there is a clear distinction between extradition and deportation. Extradition involves basically three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting state. Deportation is essentially a unilateral act of the deporting state in order to get rid of an undesired alien. The purpose of deportation is achieved when such alien leaves the deporting state's territory; the destination of the deportee is irrelevant to the purpose of deportation. One of the important distinguishing features between extradition and deportation is therefore the purpose of the state delivery act in question. . .'.[51] (Footnote omitted).

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[50] Government Notice 405, *Government Gazette* 35368 of 25 May 2012.

[51] *Mohamed* para 28.

[79] What the above exposition entails is that a State that seeks the handing over of a fugitive from justice from another State, must, ordinarily, do so through extradition. In the present case, it is common cause that Tanzania handed the appellant to South Africa, with full knowledge that the appellant was a fugitive from justice in South Africa. It therefore appreciated that upon handing over the appellant to the South African authorities, she was likely to stand trial in South Africa. It is common cause that the procedures referred to in both the Tanzanian Extradition Act and the SADC Extradition Protocol were not followed. On the respondents' own version, it was by agreement and cooperation between the authorities of both States that the appellant was handed over to the South African authorities, and subsequently transported to South Africa.

The handing over of the appellant into the custody of the South African authorities

[80] It is common cause that, having been arrested by the Tanzanian police, the appellant was later handed over to the South African authorities, who restrained and kept her in custody. She was subsequently transported to South Africa, where she was arrested upon arrival. The South African authorities had to have a lawful basis to justify their conduct. They explained it as follows. The Minister of Home Affairs contended that there was an agreement between Tanzania and South Africa in terms of which the appellant was handed over and deported to South Africa. For their part, the Justice cluster respondents submitted that the appellant consented to be transported back to South Africa.

[81] As to the agreement, Ms Neo Moroeng, the third secretary for the Consular and Immigration Services at the South African High Commission in Tanzania, explained how it was reached:

'The agreement between the Tanzanian authorities and the [South African] High Commission to deport [the appellant] and [Mr] Thabo Bester back to South Africa was reached at the premises of the High Commission. I am advised that once that happened, [the appellant] and [Mr] Thabo Bester, as a matter of international law, were regarded to have been in [the] custody of the High Commission on the South African soil.'

[82] According to the Department of Home Affairs, once the agreement was reached, the appellant was taken into custody in terms of s 41(1) of the South African Immigration Act 13 of 2002. That provision reads as follows:

'When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, when so requested by an immigration officer or police officer and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such immigration officer or a police officer may take such person into custody without a warrant, and if necessary detain him or her in a prescribed manner and place until such a person's prima facie status or citizenship is ascertained.'

[83] In a nutshell, the Minister of Home Affairs contended as follows. An agreement was reached at the South African High Commission in Tanzania for the deportation of the appellant after she had been declared a prohibited immigrant by the Tanzanian authorities. According to the Minister, this agreement was valid because the South African High Commission in Tanzania constitutes 'South African territory'. Based on that agreement, the Home Affairs officials took the appellant into their custody, exercising the powers contained in s 41 of the South African Immigration Act. They kept her in custody until she was later transported back to South Africa. The propositions propounded above, are all wrong.

[84] First, there is no procedure in international law in terms of which a fugitive from justice can simply be 'handed over' to the country in which they are sought for prosecution based on an agreement between States. That can only be achieved through an extradition process. In the present case, the appellant could only be handed over to South Africa after due process had been observed in terms of the Tanzanian Immigration Act, the Tanzanian Extradition Act and the SADC Extradition Protocol. The appellant was therefore, handed over by Tanzanian authorities to their South African counterparts without any legal basis. The agreement between Tanzania and South Africa is therefore unlawful.

[85] Second, in international law, diplomatic premises are not regarded as territories of their countries. As explained in *Santos v Santos*,[52] acts occurring there are regarded as taking place on the territory of the receiving State, and not on that of the sending State. Third, a plain reading of s 41 makes it clear that it only applies in South Africa, and not territorially. It is available to an immigration officer or a police officer who suspects a person in South Africa to be an illegal foreigner. It has nothing to do with a South African who is arrested in a foreign country for being in that country illegally, as was the appellant.

[86] The significance of the Department of Home Affairs admitting that it took the appellant into custody and detained her, is that the Minister of Home Affairs was burdened with the onus to justify the custody and detention. As explained in *Zealand*, in such circumstances, it was sufficient for the appellant to plead that being held in custody and detention by the South African authorities was unlawful. I have demonstrated that their attempt to do so by relying on the agreement reached with the Tanzanian authorities, and on s 41 of the South African Immigration Act, is misconceived. On their own version, the Justice cluster respondents were complicit in this. They supported the Department of Home Affairs in keeping the appellant in custody until she was deported to South Africa.

[87] Section 25(2)(*c*) of the Tanzanian Immigration Act[53] gives guidance on how the appellant should have been dealt with. It provides that:

'[A]ny person arrested under the provisions of subsection (1) shall without delay, be brought before a Magistrate, except that where such person has been declared a prohibited immigrant in Tanzania, he may, instead of being brought before a magistrate, be placed in custody until he boards a ship or aircraft or obtains any other means of transport conveying him to any place outside of Tanzania.'

[88] As a prohibited immigrant in Tanzania, in terms of the above provision, the appellant had to be kept in custody until she boarded a ship or aircraft to leave Tanzania. Section 25(2)(*c*) vested the appellant with a right, when leaving Tanzania, to decide her next destination. She had a choice not to return to South Africa, but to

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[52] *Santos v Santos* 1987 (4) SA 150 (W) at 152F-G; *Portion 20 of Plot 15 Athol 15 (Pty) Ltd v Rodrigues* 2001 (1) SA 1285 (W) at 1293C-E.

[53] Tanzanian Immigration Act (Cap. 54 R.E 2016).

go to any other country. However, by being handed over to South African authorities to transport her to South Africa, the appellant's right to choose her destination upon leaving Tanzania, was violated. The high court was not bothered by this. It held that if the appellant was aggrieved with that, 'she should approach the courts in Tanzania [as] [t]his court does not have any jurisdiction to decide such an issue.'

[89] It is correct that a South African court does not have jurisdiction to decide an issue which occurred in another country. But when a violation of entrenched rights forms part and parcel of the deportation or extradition of a person to be tried in our courts, it becomes our concern. In both *Mohamed* and *Minister of Home Affairs v Tsebe*,[54] the Constitutional Court underscored that South Africa cannot extradite or deport a person to a country where they face a real risk of the death penalty without first securing an assurance that the death penalty will not be carried out. By parity of reasoning, it should matter to a South African court where, in the process of extraditing or deporting a fugitive from another country to South Africa, their rights are violated. In the present case, the agreement between Tanzanian and South African authorities to deport the appellant to South Africa, violated her right to choose her destination upon leaving Tanzania, as provided for in s 25(2)(*c*) of the Tanzanian Immigration Act.

[90] This supports the view that her deportation was a disguised extradition. The very fact of the existence of an agreement between Tanzania and South Africa strengthens this view. As mentioned, cooperation between States is a non-dispensable feature of extradition, while unilateral action by a State is a feature of deportation. There are further pointers in the respondents' own versions that the appellant's 'hand over' was an extradition disguised as deportation. For example, Brigadier Richard Shibiri of the SAPS explained the purpose of including a member of the National Prosecution Authority in the South African delegation, as follows:

'Adv LM Mgiba's participation in the engagement as an NPA official was limited to ensuring that in the event the persons' identities were confirmed and *they were returned to South Africa, the State would be able to prosecute them* should that be necessary.' (Emphasis added.)

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[54] *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

[91] The identity of a person is immaterial when a person has to be deported. From the point of view of the deporting State, all that is necessary is for the deportee to depart from its jurisdiction. But the identity of a person is material where such a person is also a fugitive from justice. Such a person can only be surrendered to a country where they are sought for prosecution, by way of extradition.

[92] Furthermore, the respondents made it plain that if the appellant was correctly identified, she would be returned to South Africa for prosecution. If that was the purpose, she could only be legally brought back to South Africa through extradition. On that understanding, the South African delegation ought to have had an extradition request to Tanzania. This explains why the Tanzanian authorities enquired from them whether they had prepared such a request. They responded that they would be guided by Tanzania. This was misguided. A decision to seek extradition did not lie with what Tanzania intended to do. As a matter of international law, South Africa was enjoined to make an extradition request because it sought the presence of the appellant in its jurisdiction in order to prosecute her.

[93] On the facts, it is clear that the South African authorities went to Tanzania with only one purpose in mind – to take the appellant into custody for her to face prosecution. The composition of the South African delegation is revealing: high-ranking police officers, a member of Interpol, a Home Affairs official, a prison official and a prosecutor. The reason proffered for the delegation flying to Tanzania is that they needed to identify the appellant and Mr Bester. This is unconvincing. The identification could easily have been verified through the deoxyribonucleic acid (DNA), which would not have required the delegation's physical presence in Tanzania. To demonstrate this point, confirmation of the appellant's identity was verified through her fingerprints. There is no explanation of what role any of the people comprising the delegation played in this process.

[94] The result is that the South African authorities had failed to discharge the onus resting on them to establish the lawfulness of them taking the appellant into custody and detaining her until she was arrested upon arrival in South Africa. Their conduct was therefore unlawful.

The criminal court's jurisdiction

[95] In the circumstances, *S v Ebrahim* (*Ebrahim*)[55] commands that our courts will not exercise jurisdiction in a subsequent criminal trial. In that case, the appellant, an anti-apartheid activist who had fled South Africa while under a restriction order, was abducted from Swaziland by agents of the apartheid regime and transported back to South Africa, where he was handed over to the police. He was subsequently charged with treason. He challenged the jurisdiction of the court to try him because he had been unlawfully abducted from a foreign country. The trial court dismissed that application and ultimately convicted him of treason. On appeal, this Court undertook an exhaustive survey of Roman and Roman-Dutch common law, which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction. That, this Court found, constituted a serious injustice, and a court before which such a person was brought lacked jurisdiction to try him or her.

[96] The Court held that the above rules embodied several fundamental legal principles, including the promotion of human rights and the sound administration of justice. The State was bound by these rules and had to come to Court with clean hands. It was accordingly held that the trial court had lacked jurisdiction to try the appellant and his application should therefore have succeeded. Both the conviction and sentence were accordingly set aside.

[97] *Ebrahim* remains the lodestar, not only in our country but in other jurisdictions. For example, it was applied by the English apex court – the House of Lords, in *Bennett v Horseferry Road Magistrates' Court* (*Bennett*).[56] It also inspired a powerful dissenting opinion by Justice Stevens in the United States of America's Supreme Court in *United States v Alvarez-Machain*.[57]

[98] In *Bennett*, a New Zealand citizen who was in South Africa, was sought in the United Kingdom (UK) for fraud. He was arrested in South Africa. On the pretext that

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[55] *S v Ebrahim* 1991 (2) SA 553 (A); [1991] 4 All SA 356 (A).

[56] *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 3 All ER 138; [1994] 1 AC 42.

[57] *United States v Alvarez-Machain* 504 US 655 (1992).

he was being extradited to New Zealand, the South African police, in cooperation with their UK counterparts, flew him to the UK, where he was arrested by the UK police. When he was brought before the magistrate for trial, he challenged the court's jurisdiction on the basis that he was brought into its jurisdiction as a result of a disguised extradition or kidnapping. He pointed to the complicity between the UK police and the South African police to secure his presence within the jurisdiction to enable him to be arrested. His application having been dismissed, he approached the Divisional Court of the Queen's Bench Division (the High Court) for judicial review of the magistrates' court's decision. The High Court held that, despite the evidence of collusion between the UK police and the South African police in kidnapping the appellant and securing his removal from South Africa, the court had no jurisdiction to inquire into the circumstances by which he came to be within its jurisdiction. It accordingly dismissed his application for judicial review.

[99] On appeal to it, the House of Lords disagreed. It held that the maintenance of the rule of law prevailed over the public interest in the prosecution and punishment of crime where the prosecuting authority had secured the prisoner's presence by having him abducted from another state. Disregarding available procedures to secure his lawful extradition to the jurisdiction of the court from the state where he was residing, amounted to an abuse of process. For those reasons, the House of Lords concluded that the High Court in the exercise of its supervisory jurisdiction, had power to inquire into the circumstances by which a person was brought within the jurisdiction. If satisfied that it was in disregard of extradition procedures the court could stay the prosecution and order the release of the accused.

[100] In the present case, the high court, on the authority of *Ebrahim* and *Bennett*, held that Tanzania and South Africa's cooperation to deport the appellant constituted a disguised extradition. It reasoned:

'It is patently clear, on their own version, that the respondents willingly participated in the handing over event at the airport believing such handing over was done in terms of international law and in terms of the law in Tanzania. Moreover, the respondents were aware that the applicant was handed over for purposes of prosecution in South Africa. What they did

not realize, was that such handing over of the applicant was in fact an extradition without any process and not a deportation . . .'.[58]

[101] However, the high court nevertheless held that despite the finding of unlawful disguised extradition, the appellant had to be non-suited because she did not object to being transported back to South Africa. This is what the high court said:

'The answering affidavit on behalf of the Director of Public Prosecutions, the Minister of Police and of Captain Flyman, states that when the applicant was handed over at the airport by the South African High Commission to the officials of Home Affairs, she did not, be it verbally or otherwise, offer any resistance or protest. On the contrary, she informed all and sundry that she wanted to return to South Africa to her children, it is said in the affidavit.'[59]

[102] For that conclusion, the high court placed reliance upon *Mahala* and *December*. In *Mahala*, the two appellants were arrested by the Ciskeian Police[60] but were subsequently prosecuted and convicted of murder in South Africa. The trial court found that the first appellant had voluntarily agreed to travel with the South African Police (SAP) to South Africa where he was arrested. As to the second appellant, it was found that although arrested by the SAP in Ciskei, he had acquiesced in the SAP transporting him to South Africa, where he was arrested. The trial court accordingly held that the appellants had not been unlawfully abducted and that it had jurisdiction to try them. On appeal, this Court held that the trial court was correct in concluding that the appellants were neither unlawfully arrested in Ciskei, nor unlawfully abducted. As a result, it was concluded that there was no violation of public international law and/or South African law, or an infringement of the appellants' fundamental human rights.

[103] In *December*, the appellant was brought from Ciskei to South Africa to stand trial on charges of murder. This was done without either deportation or extradition proceedings. This Court found that the appellant was not forced to accompany the police but did so willingly because, at that stage, he had not been arrested. The Court

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[58] High Court judgment para 38.

[59] High Court judgment para 39.

[60] Ciskei was one of the four 'independent' Bantustans created by the apartheid regime as 'countries', to further its policies of racial segregation. It attained 'independence' in 1981. The area was reintegrated into South Africa as part of the Eastern Cape Province after the democratic dispensation in 1994.

further held that there was no obligation on the police to explain the nature and details of extradition proceedings. Accordingly, it concluded that there was no unlawful or improper conduct on the part of any of the organs or functionaries of the South African State. Consequently, this Court found, that a South African court was not precluded from trying the appellant.

[104] In both *Mahala* and *December*, this Court distinguished *Ebrahim* on the basis that there was no evidence of prior unlawfulness on the part of the State functionaries when the consent to be transported to South Africa was secured. Both judgments have been trenchantly criticised in some academic writings.[61] Counsel for the appellant contended that they were wrongly decided, and urged us to overrule them on that basis. Because of the view I take that both cases are distinguishable as explained below, it is not necessary to embark upon the exercise to determine whether they should be overruled. Having said that, I must state that I harbour serious doubts about the reasoning and conclusion in both cases. In light of the constitutional prism through which the issue has to be considered, it is doubtful whether they align with our constitutional values.

[105] Be that as it may, *Mahala* and *December* established that where there is no finding of illegality, the principle enunciated in *Ebrahim* does not find application. Subject to what I have stated above, I accept for present purposes that the distinction was well made. In the present case, the high court found that the respondents had acted unlawfully by engaging in a disguised extradition. There is, therefore, illegality which preceded the handing over and the transportation of the appellant to South Africa. Accordingly, this case is distinguishable from both *Mahala* and *December*. To that extent, the reliance by the high court on the two cases was misconceived because it had found an illegality in the form of a disguised extradition.

The appellant's alleged consent to be transported back to South Africa

[106] As mentioned, the high court found that the South African authorities engaged in an unlawful disguised extradition. This is a pivotal finding. Once it was made, this

[61] See, for example, HA Strydom 'Abductions on foreign soil – again: *S v Mahala*' (1993) 9 *SAJHR* 308; J Dugard 'Abduction: Does the Appellate Division Care about International Law – *S v December*' 1995 (1) SACR 438 (A)' (1996) 12(2) *SAJHR* 324.

should have been the end of the matter, and the application ought to have been granted on that basis. Because of the view the majority take, the first judgment does not express a view about the correctness of this finding. In my view, the high court was undoubtedly correct in that conclusion. However, the high court went on to find that the appellant had consented to be deported to South Africa. It erred, in that regard, for, the findings of unlawfulness and consent are incompatible.

[107] As mentioned, the consent defence was relied upon by the Justice cluster respondents, but not by the Minister of Home Affairs. The Justice cluster respondents' stance was that they had no direct role in the arrest and the return of the appellant to South Africa. They maintained that their involvement was limited to escorting the Department of Home Affairs officials. If that is the case, the alleged consent could not have been made to the Justice cluster respondents, but only to the Department of Home Affairs officials.

[108] It is noteworthy that the Department of Home Affairs did not assert that case. Their stance, as discussed above, was that the basis for taking the appellant into their custody and for transporting her to South Africa, was their agreement with the Tanzanian authorities. A valid consent must be unequivocal. The very fact that the respondents provide contradictory bases upon which the appellant was deported to South Africa, shows, in my view, that the alleged consent was not unequivocal.

[109] At law, there are difficulties with the consent defence. There is no indication as to what exactly was conveyed to the appellant before the consent was made. As pointed out by the Constitutional Court in *Mohamed*, to be enforceable, consent must be 'fully informed' and one clearly showing that the person consenting 'was aware of the exact nature and extent of the rights being waived in consequence of such consent.'[62]

[110] A fully informed consent in the present case would have entailed the appellant being apprised of at least two things. The first would have been that there was a warrant of arrest pending against her, which would be executed upon her arrival in

[62] *Mohamed* para 62.

South Africa. This is because the alleged consent to be transported back to South Africa was pivoted on the appellant expressing a desire to be reunited with her children. If she was going to be arrested upon arrival in South Africa, reuniting with her children was not going to be accomplished.

[111] Second, the appellant should have been informed that there was an extradition process, which contained some safeguards for her protection. Those were aptly explained by Lord Griffiths in *Bennett* as follows:

'Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country, they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by . . .'[63]

[112] There is no suggestion that the appellant was informed of any of these. Had this been done, her response to being transported to South Africa might well have been different. In any event, I am of the view that a valid consent can only be made with *prior* and full knowledge of the rights being waived, and not after an infraction of such rights had occurred. In the present case, the alleged consent would have been made *after* the appellant had been unlawfully handed over to the South African delegation, for the sole purpose of being brought back to South Africa. She was already in an unlawful detention.

[113] What real choice, it may be asked, did the appellant have in those circumstances? On the common cause facts, it is safe to assume that had the appellant indicated to the South African authorities that she wished to go to any other country except South Africa, her wish would not have been respected. That would have defeated the expressly stated purpose of the South African delegation – to bring

[63] *Bennett* at 151.

her back to South Africa to face prosecution. Considered in this light, any consent made in such circumstances would be illusory and consequently, unenforceable.

Conclusion

[114] I find that the agreement between Tanzania and South Africa to hand over the appellant, and her subsequent detention by the South African authorities, were both unlawful. So was the appellant's subsequent transportation back to South Africa. The result is that the criminal court in which the appellant was subsequently prosecuted, lacked the jurisdiction to hear the case.

[115] Given the gravity of the allegations which led to the prosecution of the appellant, this finding will understandably evoke indignation from the public. But the State, as the repository of the rule of law, cannot be allowed to act unlawfully. In *Mohamed*, having made a similar finding against the State, the Constitutional Court remarked:

'That is a serious finding. South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the state lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in *Olmstead et al v United States*:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."[64] (Footnotes omitted.)

[116] During the hearing, counsel for the appellant abandoned the relief to declare 'unlawful and without legal effect' the warrant for arrest issued in respect of the appellant. Given that the majority of this Court dismisses the appeal, that point is of no consequence. But it is, for this judgment, because its effect would have been that the appellant's detention and prosecution being unlawful, she should be released from custody. To my mind, counsel's abandonment of the prayer was correctly made. The unlawful disguised extradition of the appellant has no bearing on the validity or otherwise of that warrant, which had been issued before the disguised extradition. Whether the warrant can still be executed in the light of the finding of an unlawful

[64] *Mohamed* para 68.

disguised extradition, is a matter for the office of the Director of Public Prosecutions to consider. If she is legally empowered to do so, she may still execute the warrant against the appellant. But that would not have been a matter for this Court to decide.[65]

[117] The order I would have made is different from what the appellant had sought in the notice of motion. There, she had sought an order against the SAPS on the basis that its members had abducted her from Tanzania. Given the turn the case took after the Minister of Home Affairs had joined to the proceedings, an order different from that sought in the notice of motion is appropriate. This is because the Department of Home Affairs, on its own version, took the appellant into custody from the Tanzanian authorities and facilitated her deportation to South Africa. The Justice cluster respondents admitted to having supported the Department of Home Affairs in that regard. As the high court found, the conduct of these respondents was unlawful. The order reflects this, and recognises that the case has evolved, as it happens not so infrequently in our courts. The totality of the evidence points to a different relief.

[118] In *Modder East Squatters v Modderklip Boerdery*[66] (*Modderklip*) the applicants, at the hearing in the high court, sought a different order to that which they originally sought in the notice of motion, as the original relief was no longer viable. The State, as a respondent, opposed this. The high court declined to hold the applicants to the originally sought relief. Endorsing the high court's ruling, Harms JA explained:

'In the court below the state objected to the new direction, wishing to hold Modderklip to the relief originally sought. This objection was overruled by De Villiers J (at para 52), correctly so. *If a constitutional breach is established, this court is (as was the court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or how it was presented or argued . . .*' .[67](Emphasis added.)

[119] Once a finding of a disguised extradition is made, the respondents have acted unlawfully. Accordingly, as mentioned, I am obliged by s 172(1)(*a*) of the Constitution

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[65] See similarly, *National Commissioner of Correctional Services and Another v Democratic Alliance and Others (with South African Institute of Race Relations intervening as Amicus Curiae)* [2022] ZASCA 159; 2023 (2) SA 530 (SCA); 2023 (1) SACR 492 (SCA); [2023] 1 All SA 39 (SCA); para 60.
[66] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] ZASCA 47; [2004] 3 All SA 169 (SCA).
[67] Ibid para 18.

to declare their conduct unlawful. The appellant is entitled to effective relief, unbound by what she originally sought in her notice of motion. To borrow from *Modderklip*, the appellant should not 'be bound to the formulation of the relief originally sought', or how the case was presented.

Order

[120] Had I commanded the majority, I would have made the following order:

1 The appeal is upheld with costs, including costs of two counsel to be paid by the first, second, third, and sixth respondents, jointly and severally, the one paying the others to be absolved.

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

'1 It is declared that the applicant's hand-over by the Tanzanian authorities to the officials of the South African High Commission in Tanzania and/or the officials of the second and sixth respondents, and the subsequent deportation of the applicant to South Africa, were unlawful;

2 It is declared that the fourth respondent, under case number 20A/113/23, lacked the jurisdiction to try the applicant;

3 The fifth respondent is ordered to forthwith release the applicant from the Bizzah Makhate Correctional Centre where she is being held in custody and detention;

4 The first, second, third and sixth respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved.'

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T MAKGOKA

JUDGE OF APPEAL

APPEARANCES

For the appellant:	A Katz SC and K Perumalsamy
Instructed by:	Machini Motloung Attorneys, Bloemfontein
For the first, second, third, fourth and fifth respondents:	N Snellenburg SC and M Mazibuko
Instructed by:	State Attorney, Bloemfontein.