THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-reportable

Case No: 114/2018

In the matter between:

MINISTER OF SAFETY AND SECURITY **FIRST APPELLANT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND APPELLANT**

and

MARIUS SCHUSTER **FIRST RESPONDENT**

DARRYL CAMPHER **SECOND RESPONDENT**

Neutral citation: *Minister of Safety and Security & another v Marius Schuster & another* (114/2018) [2018] ZASCA 112 (13 September 2018)

Coram: Cachalia, Majiedt, Willis, Mathopo and Schippers JJA

Heard: 28 August 2018

Delivered: 13 September 2018

Summary: Arrest and detention – whether warrants of arrest obtained – whether further detention after court appearance lawful – appeal upheld – costs – appeal decided on the facts – general rule applies.

ORDER

On appeal from: The Eastern Cape Division of the High Court, Grahamstown (Lowe and Smith JJ sitting as the court of appeal from the magistrate's court):

1 The appeal is upheld, with costs, including the costs of two counsel.

2 The order of the Eastern Cape Division of the High Court, Grahamstown is set aside and the following substituted therefor:

'(a) The appeal is upheld with costs.

(b) The order of the Regional Court of the Eastern Cape held at Port Elizabeth (the magistrate's court) is set aside and the following substituted therefor:

'The plaintiffs' claims are dismissed, with costs.'

JUDGMENT

Willis JA (Cachalia, Majiedt, Mathopo and Schippers JJA concurring):

Introduction

[1] This appeal is concerned with the alleged unlawful arrest and detention of the respondents. In the civil action for damages in the Port Elizabeth Regional Court, the magistrate found in favour of the respondents, who had been the plaintiffs in the action before her. The appellants thereupon appealed to the Eastern Cape Division of the High Court, Grahamstown, which dismissed the appeal with costs. The appeal before us is with the leave of this court. The appellants are, respectively, the Minister of Safety and Security and the National Director of Public Prosecutions (NDPP).

[2] The respondents alleged that they had been unlawfully arrested, without a warrant of arrest, on a charge of robbery on 10 January 2013. Their claim was for damages arising not only from their alleged unlawful arrest but also their continued detention at the St Alban's prison until 30 January 2013.

An Outline of the Issues

[3] The arrest of the respondents on the day in question is common cause. Their case was set out in the particulars of claim as follows:

'On or about the 10th of January 2013 at approximately 01h30 and at 38A Renecke Street, Helenvale, Port Elizabeth, the Plaintiffs were arrested, *without a warrant*, on a charge of Robbery, by members of the South African Police Service.' (Emphasis added.)

Later, in the particulars of claim, it is alleged that:

'After the Plaintiffs' arrest, *without a warrant*, [they were] detained arbitrarily and without just cause at the Gelvandale police station on the said charge under Gelvandale case 306/08/2012.' (Emphasis added.)

There was no application, at any stage, to amend these allegations.

The appellants alleged that the arrests were lawful, having been authorised by warrants issued on 21 November 2012.

[4] Immediately after the arrest on 10 January 2013, the respondents were taken to the Gelvandale Police Station until they were brought to court later that same day, at approximately 08h30. At the time, the respondents, who did not have the benefit of legal representation, indicated to the court that they intended to apply for bail. The respondents were remanded in custody until 21 January 2013, when the bail hearing was scheduled to be heard. On the remand date they abandoned their bail application, electing to have an expeditious trial because, previously, bail on the same charges had been refused. The matter was then postponed for trial on 29 January 2013, with the respondents remaining in custody. They were acquitted on 30 January 2013 and had therefore been in custody from 10 to 30 January 2013.

[5] The respondents had previously been arrested in August 2012 in connection with the same offence. After an initial bail application, they were denied bail. In October 2012, the case against them was withdrawn as the complainant did not attend court on the date of trial. The respondents were then released, but on 23 October 2012, the prosecutor in the matter asked the investigating officer to ascertain from the complainant whether he still wished to proceed with the case. In November 2012 the police managed to establish contact with the complainant. He confirmed that he indeed wished to do so. Between November 2012 and the arrest

of the respondents on 10 January 2013, the evidence was that Constable January, looking for the respondents, made several unsuccessful visits to their home, because he had considered bringing them to court without a warrant of arrest. He left several messages for them to report to the Gelvandale Police Station, but they did not act thereupon.

[6] Constable January, who arrested the respondents, said that he showed them the warrants for their arrest but did not hand over copies thereof to them when they were arrested on 10 January 2013. No original was produced at the civil trial. A copy of the warrant of arrest issued in respect of the second respondent, on 21 November 2012, was produced in reply to a request for further particulars but there was no copy of any warrant for the arrest of the first respondent. Constable January testified that he had applied for and obtained warrants for both of them. This was not challenged. The investigation diary, which is part of the police docket, also refers to the application for warrants for the arrest of both respondents in November 2012. The evidence showed that Constable January made an affidavit in support of the application for the warrants, took it to the prosecutor and thereafter went to a magistrate at New Courts, Port Elizabeth, where both warrants were issued. This is confirmed by the fact that the number '2' appears alongside the name of the second respondent, who was accused 2 in the trial. Constable January explained that the reason the police were able to produce only one warrant was most probably that the other had been lost when the respondents were placed in the cells. It is inherently plausible and credible in the circumstances of this case that the police applied for and obtained two warrants of arrest: the respondents were alleged to have committed the crimes together and lived at the same address.

[7] The second respondent did not testify. There was therefore no evidence to gainsay that of the State that a warrant for arrest had been issued. During the course of his evidence, the first respondent claimed that, upon their arrest, he asked for a copy of the warrant of arrest to be handed to him but this was not done. This allegation was not made in the pleadings and no amendment was sought in regard thereto. On appeal, the court a quo found that the only issue, in regard to the alleged unlawfulness of the arrest, was whether the respondents had asked for copies of the warrants of arrest.

[8] During the course of cross-examination a series of questions were put to Constable January, consecutively, reading as one:

Question: 'Al twee eisers het gevra "as jy 'n lasbrief het gee vir ons asseblief 'n "copy" daarvan, dat ons kyk daarna." Toe sê u "nee manne moenie worry nie, kom klim net in". Geen regte was verduidelik op die toneel nie Hulle het by die polisiestasie gekom en u het die kennisgewing van regte ingevul en vir hulle gesê om te teken?'

Answer: 'Nadat ek hulle regte vir hulle gelees het.'

The magistrate found that Constable January could not admit or deny that the respondents requested copies of their warrants of arrest, upon their arrest. This is not correct.

[9] The prosecutor, Ms Odea Rockman, testified in the trial. She confirmed that on 10 January 2013 she had requested that the matter be remanded with the accused being held in custody pending their bail application. She said that because armed robbery was listed in schedule 6 of the Criminal Procedure Act 51 of 1977 (the CPA), she had relied on the peremptory provisions of s 60(11)*(a)* of the CPA. She testified that the magistrate in the criminal trial had remanded both accused in custody.

[10] The magistrate in the civil trial awarded the respondents R50 000 each, with interest from the date of summons to the date of payment, for the unlawful arrest on 10 January 2013 and R250 000 each for their continuing detention until 30 January 2013, also with interest. Costs followed the result. As mentioned previously, the appellants then appealed to the court a quo. The court a quo dismissed the appeal with costs.

An Evaluation of the Issues

[11] The Constitutional Court's judgment in *Zealand v Minister for Justice and Constitutional Development & another* affirms that the onus naturally rests on the Minister to justify an arrested person's loss of liberty.[1] If one has regard to the principles and criteria set out in *Stellenbosch Farmers' Winery Group Ltd & another v*

[1] *Zealand v Minister for Justice and Constitutional Development & another* [2008] ZACC 3; 2008 (4) SA 458; 2008 (6) BCLR 601; 2008 (2) SACR 1 (CC) para 24.

Martell et Cie,[2] and especially the unchallenged evidence of Constable January and the record of events, the probabilities are that there were indeed warrants for the arrest of both the respondents. This was also the finding of the court a quo. Counsel for the respondents himself seemed, ultimately, constrained to agree as well.

[12] In *President of the Republic of South Africa & others v South African Rugby Football Union &* others, the duty to direct a witness' attention to the fact that he or she was not telling the truth on a particular point and to have a fair opportunity to respond was emphasised.[3] Indeed, the respondents' presentation of their case appears to have been 'all over the place', being made up as they went along. Given the manner in which the matter was dealt with by the respondents, it would be wrong to find that Constable January was asked for but did not produce the warrants of arrest. Both the magistrate and the court a quo erred in their finding in this regard. Accordingly, the arrest was not unlawful, either on the basis that it was effected without a warrant or, in terms of s 39(2) of the CPA, that when Constable January was asked to produce it he failed to do so.[4] Accordingly, the issues dealt with in *Minister van Veiligheid en Sekuriteit v Rautenbach*[5] do not arise in this case. So, too, the case is fundamentally distinguishable from *Baasden v Minister of Safety and Security*[6] and *Minister of Safety and Security v Tyokwana*,[7] to which we were referred.

[13] There remains the question of whether the detention of the respondents, after they had been brought to court on 10 January 2013 until their acquittal on 30 January 2013, was unlawful. The point decided in *Isaacs v Minister van Wet en Orde*[8] that, where a person has been unlawfully arrested, his or her detention thereafter is unlawful, until such time as a magistrate, exercising a judicial function,

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[2] *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) para 5.
[3] *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 paras 61-64.
[4] Section 39(2) of the CPA reads as follows: 'The person effecting the arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.'
[5] *Minister van Veiligheid en Sekuriteit v Rautenbach* 1996 (1) SACR 720 (A).
[6] *Baasden v Minister of Safety and Security* [2014] ZAGPPHC 52; 2014 (2) SA SACR 163 (GP).
[7] *Minister of Safety and Security v Tyokwana* [2014] ZASCA 130; 2015 (1) SACR 597 (SCA).
[8] *Isaacs v Minister van Wet en Orde* [1995] ZASCA 152; [1996] 1 All SA 343 (A) at 323I-J. See also *Minister of Police & another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 14.

decides to order the continued detention of the person arrested, obviously does not arise. The anterior precondition of the unlawfulness of the arrest has been disposed of, in favour of the appellants.

[14] In *De Klerk v Minister of Police*,[9] the majority of this court referred to *Sekhoto* to hold that the Minister of Police could not be held responsible for a detention after the arrested person had been brought before court.[10] This court is mindful of the salutary duty, set out in *Carmichele v Minister of Safety and Security*,[11] of the prosecutor to put before the magistrate all facts which may be relevant to him or her in the exercise of that discretion.[12] Nevertheless, no matter what the facts that may have been put before the magistrate by the prosecutor on 10 January 2013, these would not have prevented the detention of the respondents until the formal bail hearing.

[15] The alleged offence, being robbery involving the use of a firearm, is indeed listed in schedule 6 of the CPA. Section 60(11)*(a)* of the CPA is cast in peremptory terms, requiring that an accused person be 'detained in custody' unless 'having been given a reasonable opportunity to do so he or she 'adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release'. In the interest of an expeditious trial, the respondents had abandoned their bail hearing. They therefore did not adduce any evidence to permit their release from detention. Correspondingly, no fault can be attributed to any representatives of the State in respect of the respondents being held in custody. The appeal must be upheld.

Costs

[16] Almost a century ago, in *Texas Co (SA) Ltd v Cape Town Municipality*,[13] Innes CJ explained the purpose of a costs award as follows:

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[9] *De Klerk v Minister of Police* [2018] ZASCA 45; [2018] 2 All SA 597; 2018 (2) SACR 28 (SCA) (*De Klerk*). See also *Minister of Safety and Security v Magagula* [2017] ZASCA 103 para 15 and *Minister of Police & another v Zweni* [2018] ZASCA 97 (*Zweni*) para 9.
[10] De Klerk para 12, referring to paras 42-44 of *Sekhoto*.
[11] See for example *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) (*Carmichele*).
[12] Id para 63.
[13] *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467.

'[C]osts are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'[14]

Generally, in civil litigation, costs follow the result. Relying on *Harrielall v University of Kwazulu-Natal*[15], counsel for the respondents submitted that we should depart from the general rule and apply the so-called *'Biowatch* principle'.[16] In terms of *Biowatch* and restated in *Harrielal*, unless the litigation is frivolous or vexatious, litigants who are unsuccessful in proceedings against organs of state should not be mulcted with costs in constitutional matters.[17]

[17] The appellants, the Minister and the NDPP, are organs of state. Although the respondents' claim lacked merit – indeed was marked by its slenderness – the litigation cannot be said to have been frivolous or vexatious.[18] What remains to be considered is whether the claim, based as it was on an alleged unlawful arrest and detention (ie deprivation of freedom), can be said to be a constitutional matter as contemplated in *Biowatch* and in *Harrielall*.

[18] Shorn of some rhetorical flourishes, this is an ordinary delictual claim for damages, one of many instituted in our courts daily. The central issues turned on narrow factual enquiries. First, in respect of the arrest – whether it had been effected with a warrant or not. Secondly, with regard to the detention – whether the prosecutor failed to place all relevant facts relating to bail before the magistrate. It did not involve any legal question, much less any constitutional principle. A brief overview of the history of this particular delict, which forms part of the personality

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[14] Id at 488.
[15] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (*Harrielall*).
[16] The principle emanates from *Biowatch Trust v Registrar*, *Genetic Resources & others* [2009] ZACC 114; 2009 (6) SA 232 (CC) (*Biowatch*).
[17] *Harrielall* paras 10-12.
[18] In *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) para 19, the Constitutional Court, relying *on Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D) at 608D-F, held what is vexatious litigation is that which is –
'"[F]rivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant". And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.'

rights, may be helpful in demonstrating why this is not a constitutional matter, as envisaged in *Biowatch* and *Harrielall*.

[19] At common law, the right to liberty has been recognised since time immemorial. It originates from the period of the *Usus Modernus Pandectarum* and was based on the *actio iniuriarum* in the Roman-Dutch law.[19] The law reports, both before and after our present constitutional dispensation are replete with instances of actions based on the wrongful deprivation of liberty, of which unlawful arrest and detention respectively are each a species.[20] We are not aware of any reported decision, and have not been referred to any, where an action of this type has been held to be a 'constitutional matter' as envisaged in *Biowatch* and in *Harrielall*.

[20] Unlawful arrest and detention infringes the right to bodily freedom (or *libertas)*, which was already recognized as long ago as 1895 in *The Queen v Sigcau*[21] as follows: '(t)he value of a man's personal liberty is far beyond any estimate in mere money'. Roman law recognized this right, as part of personality rights, as one of significant importance: '*libertas inaestimabilis res est'* (liberty is a thing beyond price).[22]

[21] The right to freedom of the person is also, importantly, entrenched as a fundamental right in the Bill of Rights in s 12(1)(*a*) and (*b*) of the Constitution. This court has held that where a statutory mechanism is available to vindicate constitutional rights, it must be used, provided it is constitutionally unobjectionable.[23] The same applies in respect of a well-established common law remedy, such as a delictual claim for damages for unlawful arrest and detention. Against this background, it may be helpful to analyse briefly the issues which were at stake in *Biowatch* and *Harrielall.*

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[19] J Voet *Commentarius Ad Pandectas* (1723) 48 2. (Translated by Sir Percival Gane in *The Selective Voet being the Commentary on the Pandects* (1955)).
[20] See for example *Liversidge v Anderson & another* [1942] AC 206 (HL); (1941) 3 All ER 338 (HL) and *Rossouw v Sachs* 1964 (2) SA 551 (A), which have been referred to with approval in numerous subsequent cases.
[21] *The Queen v Sigcau* (1895) 12 SC 283 at 285.
[22] D 50 17 106.
[23] *Jayiya v MEC for Welfare, Eastern Cape* 2004(2) SA 611 (SCA) para 9.

[22] *Biowatch* concerned the correctness of two adverse costs orders against the Biowatch Trust, an environmental watchdog. It sought information from the Directorate, Genetic Resources in the Department of Agriculture with regard to the generic modification of organic material. In *Biowatch*, the Constitutional Court enunciated the approach to be adopted in respect of costs orders in unsuccessful litigation against the state in constitutional matters as follows:

'In *Affordable Medicines* this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.

. . . .

The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and the state conduct is constitutional is placed at the correct door.'[24] (Footnotes omitted.)

[23] In *Harrielall* a student unsuccessfully challenged on review the decision of the University of KwaZulu-Natal not to admit her to its medical school. In dismissing Ms Harrielall's appeal, this court followed the general rule on costs, holding that the '*Biowatch* principle*'* did not apply as no constitutional issues were involved. The Constitutional Court disagreed on two grounds. First, it held that reviewing administrative action under the PAJA constitutes a constitutional issue. In

[24] *Biowatch*, paras 21-23.

determining Ms Harrielall's application for admission, the University exercised a public power. Secondly, the Constitutional Court noted that, in applying for admission to medical school, Ms Harrielall wanted to access further education for training as a medical doctor. The university's refusal of her application touched upon her right of access to further education in s 29(1)(*b*) of the Constitution.[25]

[24] It is important not to lose sight of the underlying rationale behind the '*Biowatch* principle', first enunciated in *Affordable Medicines* and confirmed in *Harrielall*.[26] The basis of the rationale is primarily to avoid deterring litigants who might wish to vindicate their constitutional rights. Moreover, constitutional litigation enhances – indeed magnifies – the general body of constitutional jurisprudence. Constitutional litigation also places the primary responsibility for ensuring that the law and state conduct conforms with the Constitution where it belongs: at the door of the state.[27] These considerations do not apply in the present case.

[25] There is a second compelling reason why this is not a constitutional matter: the case turned solely on the facts, rather than on any novel or abstruse principle of law that has not yet been tested in the courts. In *Booysen v Minister of Safety and Security*[28] the Constitutional Court decided that it lacked the requisite jurisdiction to grant leave to appeal.[29] That decision was based on the principle, enunciated in earlier decisions of that court, that it will not entertain matters that turn only on facts in the application of established legal principles.[30] In this regard, the Constitutional Court referred to two of its earlier decisions, *Mankayi v Anglogold Ashanti Ltd*[31] and *Mbatha v University of Zululand.*[32] In *Mankayi* the Constitutional Court reaffirmed its earlier decision in *Boesak*[33] that a challenge on the sole basis that this court was wrong on the facts, is not a constitutional issue.[34] In a separate concurring judgment

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[25] *Harrielal*, paras 17-19.
[26] See also *Hotz and others v University of Cape Town* [2017] ZACC 10; 2018(1) SA 369 (CC) paras 22.
[27] *Biowatch* para 23.
[28] *Booysen v Minister of Safety and Security* [2018] ZACC 18.
[29] In terms of s 167(3)(*b*)(i) and (ii) of the Constitution the court's jurisdiction is limited to constitutional matters and matters that raise an arguable point of law of general importance that ought to be decided by the court.
[30] *Booysen* para 50-52.
[31] *Mankayi v Anglogold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC) (*Mankayi*).
[32] *Mbatha v University of Zululand* [2013] ZACC 43; 2014 (2) BCLR 123 (CC) (*Mbatha*).
[33] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC) para 12.
[34] *Mankayi* fn 35 para 12.

in *Mbatha,* Madlanga J held that 'what is in essence a factual issue' may not 'morph into a constitutional issue through the simple facility of clothing it in constitutional garb'.[35] That is indeed an eloquent discouragement of 'dressing up' when the occasion does not justify it.

[26] In summary: following well-established precedent, the present case is plainly not, in any useful sense, a 'constitutional matter'. Suing the police for damages for wrongful arrest and detention is not the same as testing one's constitutional rights. This case turned solely on the facts. To borrow, once again, from Madlanga J in *Mbatha*, 'where it is clear that the substance of the contest between parties is purely factual, it cannot be said to raise a constitutional issue purely because the applicant says it does'.[36] To apply the *'Biowatch* principle' in such cases would open the floodgates for opportunistic claims which may nevertheless fall short of being categorised as 'frivolous' or 'vexatious'. It would promote risk-free litigation. The potential consequences are deeply disturbing. To deprive the successful appellants, the Minister and the NDPP, and, by extension, the fiscus itself, of costs in the present matter would be unjust and inequitable. It would also lack a rational foundation. Costs must follow the result.

Order

[27] The following is the order of this court:

1 The appeal is upheld, with costs, including the costs of two counsel.

2 The order of the Eastern Cape Division of the High Court, Grahamstown is set aside and the following substituted therefor:

'(a) The appeal is upheld with costs.

(b) The order of the Regional Court of the Eastern Cape held at Port Elizabeth (the magistrate's court) is set aside and the following substituted therefor:

'The plaintiffs' claims are dismissed, with costs.'

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N P WILLIS

[35] *Mbatha* fn 36 para 222.
[36] *Mbatha* fn 36 para 22.

Judge of Appeal

APPEARANCES:

For the Appellants:	PJJ De Jager SC (with him, F Petersen) Instructed by: The State Attorney, Port Elizabeth c/o The State Attorney, Bloemfontein
For the Respondents:	JW Wessels Instructed by: Peter McKenzie Attorneys, Port Elizabeth c/o Huggett & Hendriks Inc, Bloemfontein