THE *INTERDICTUM DE HOMINE LIBERO EXHIBENDO* AND THE QUESTION WHETHER IT IS INCUMBENT ON A PEACE OFFICER TO CONSIDER LESS INVASIVE MEANS TO SECURE ATTENDANCE AT COURT BEFORE EFFECTING AN ARREST

National Commissioner of Police v Coetzee
2013 1 SACR 358 (SCA)

1 Facts (as indicated by the Supreme Court of Appeal)

1 1 Court a quo

The respondent was flagged down by a Tshwane Metro Police Officer on the afternoon of Sunday 15 November 2009. With him in the vehicle were his wife, his son and his son's girlfriend. The respondent declined to stop. The Metro Police gave chase and with reinforcements managed to stop and arrest him. At the police station where he was detained he was given a form "SAPD 14A" with the heading "Notice of rights in terms of the Constitution". In terms of the form, he was being detained for failing to comply with an instruction of a "traffic officer", "*crimen injuria*" and driving an "unlicensed and unregistered motor" (para 1).

The respondent's wife engaged the services of an attorney and later that evening approached the Gauteng North High Court (per Du Plessis AJ) to try and secure the release of the respondent. No notice of motion was placed before the court but in an affidavit supporting the application for release, she asserted that if the honourable court decided to grant bail, she could afford R500.00. Despite the wording of the supporting affidavit, counsel for the respondent indicated that what was before court was not a bail application but a request for the court to consider an *interdictum de homine libero exhibendo* (para 2). The respondent's attorney testified orally that his client was arrested for "negligent and reckless driving" and that the normal procedure was that "one gets a fine of R500 or R1000" (para 4).

The court ordered the immediate release of the respondent (para 2.1) and ordered the applicants to, *inter alia*, provide written reasons as to why the respondent was not given bail, or an opportunity to apply for bail, and why he was not given an opportunity to pay a fine. The reasons had to be presented to the same court on 17 November 2009 (para 2.2).

On the return day it was argued on behalf of the respondent that his arrest and detention were unlawful, and that the court correctly ordered his immediate release. The court confirmed the order (para 4).

1 2 Judgment a quo *(delivered 11 October 2010)*

The court in an earlier finding held that it had no doubt that the respondent, his wife and his attorney requested the police to grant bail, and that the people responsible refused to grant bail or release the respondent (para 8).

In dealing with the lawfulness of the arrest, the court referred to sections 35(1)(f) and 35(2)(d) of the South African Constitution, 1996. In terms of section 35(1)(f), everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit. Section 35(2)(d) provides that everyone who is detained has the right to challenge the lawfulness of the detention in person before a court, and if unlawful, to be released. The court explicated that the provisions in the Criminal Procedure Act 51 of 1977 (hereafter CPA) must be considered against the backdrop of these provisions. The court commented that arrest was the most drastic method to secure a person's attendance at trial and that it should be confined to serious cases. The court also referred to *S v More* 1993 2 SACR 606 (W) in holding that an arrest should only be effected where it is likely that a summons or written notice to appear will be ineffective (para 6).

The court held that none of the offences in respect of which the respondent had been detained was an offence referred to in Schedule 1 to the CPA and, therefore, the arrest could only have been in terms of section 40(1)(a) of the CPA (s 40(1)(a) provides that a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence). The court added that in light of the provisions of the Constitution and section 59 of the CPA (police bail), an arrestee who qualifies for bail in terms of section 59 has the right to be considered for section 59 bail as soon as possible (para 7).

Referring to *Louw v Minister of Safety and Security* 2006 2 SACR 178 (T), the court also held that if it was preferable to secure the presence of an accused before court by way of a summons, that procedure should be followed. The court furthermore held that an arrest without any rational, reasonable basis should not occur indiscriminately and that, no matter how severe the alleged offence may be, the person to be arrested is still presumed innocent and whose rights to freedom, dignity and fair treatment should be upheld. The court concluded that the arrest was unlawful (para 7).

Immediately hereafter the court held as follows: "As I have mentioned above, those responsible for consideration of granting the applicant bail refused to do so. It follows that the applicant was held unlawfully, and detained unlawfully at the . . . [p]olice [s]tation" (para 8).

2 Judgment (per Mpati P, Cloete, Ponnan, Bosielo and Petse JJA concurring; delivered 16 November 2012)

The Supreme Court of Appeal took issue with many of the findings, conclusions and comments of the court *a quo*. The court found that there was no evidence before it that the respondent, his wife or his attorney ever asked anyone responsible for bail, to consider bail, or to consider release on warning (para 8). The court also found that the finding by the court *a quo* that those responsible for considering bail refused to grant bail, was without foundation (para 10).

In the next paragraph the court held as follows (para 11):

> "To justify its decision to release the respondent, the court *a quo* invoked the *interdictum de homine libero exhibendo*, a remedy used to protect the liberty of the

> subject from being restrained unlawfully by the state. As has been mentioned above, the court found that the arrest of the respondent was unlawful, hence the order for his release. I have already held that finding to have been without foundation because no request was ever made to a police official for the respondent's release on bail."

The court then referred to the conclusion reached by the court *a quo* that the respondent's detention was unlawful because those responsible for considering bail refused to do so. The court found it difficult to comprehend "how a refusal by a police officer to grant bail" could render an otherwise lawful arrest and subsequent detention unlawful. The court explained that a peace officer was entitled to arrest an accused without a warrant in terms of section 40(1)(a) of the CPA. Counsel before the Supreme Court of Appeal had also not argued that the peace officer could not arrest the respondent nor was the lawfulness of the arrest an issue before the court *a quo*. It was the detention that was in issue "although the court in the course of its judgment said that the arrest of a person without a warrant 'may not necessarily be the right procedure to follow' ". "It was never the respondent's case that his arrest was unlawful" (para 12). (The court had already indicated earlier that the court *a quo* may have confused the arrest of the respondent with his subsequent detention (para 7).)

The court nevertheless agreed with the court *a quo* that arrest, being the most drastic method of securing attendance at court, "ought to be confined to serious cases" where such person faces a relatively serious charge. The court proceeded as follows:

> "Indeed that is what is desirable. But where a peace officer does effect a lawful arrest in terms of section 40(1)(a) of the Criminal Procedure Act for what may not be considered to be a serious offence, as may be the position in the present instance, the arrest, or subsequent detention, does not become unlawful, thereby entitling a high court to order the release of the arrested person, merely because a summons, or notice to appear in court, would have been equally effective in ensuring his or her attendance at court, or because bail has been refused" (para 13).

The court listed the jurisdictional facts necessary for an arrest under section 40(1)(a) as: "(i) [T]he arrestor must be a peace officer, (ii) an offence must have been committed or there must have been an attempt to commit an offence, and (iii) in his or her presence." The court held that the arresting officer was not required to conduct a hearing before effecting an arrest. Whether an arrestee should be released, and if so, subject to which conditions, is for a later person to decide "and that is the safeguard to the arrestee's constitutional rights". Once the jurisdictional requirements are satisfied the peace officer has the discretion to arrest or not. This discretion must be exercised properly. "But the question as to whether in this case [the peace officer] exercised his discretion does not arise. That issue was not raised before the court *a quo* and the court never considered it" (para 14).

The court indicated that section 50(1)(b) and (c) of the CPA made provision for the procedure to be followed where bail had not been granted, "whether or not it was requested and refused". In terms of section 50(1)(b), "[a] person who is in detention as contemplated in paragraph (a), shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings". Section 50(1)(c) provides as follows (para 15):

> "Subject to paragraph (d), if such an arrested person is not released by reason that –
> (i) no charge is to be brought against him or her; or bail is not granted to him or her in terms of section 59 . . . or 59A . . . he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after arrest."

The best the court *a quo* could accordingly have done, assuming that its finding that bail was sought and refused was correct, was to issue a *mandamus* directing the responsible police official to reconsider bail, or that the respondent be brought before a lower court on the next Monday. The *interdictum de homine libero exhibendo* could only be invoked where the detention was *ab initio* unlawful (para 15).

The court also cautioned against the temptation to impose duties on police officers under the guise of protecting rights in the Bill of Rights which existing law, in this case the CPA, does not impose. Noting that the same applies where an arrested person has not been charged, the court quoted the following passage from *S v Baleka* 1986 1 SA (T) 361 374H–375A with approval:

> "The Supreme Court has inherent powers under the common law, exercised particularly by way of the *interdictum de homine libero exhibendo*, to protect the liberty of the subject, and to ensure that interference by the State with individual liberty does not go beyond the proper exercise of the State's lawful powers. Nevertheless, when a person has lawfully been arrested and charged with the commission of an offence, the question of his right to apply for his release on bail pending his trial or the outcome thereof, is a question which is exhaustively governed by statutory provisions. No room remains for the exercise of the court's inherent common law powers in that respect, save, perhaps, to the extent that such powers can be exercised within the framework set by the statutory provisions" (para 16).

3 Appeal to the Constitutional Court

Although the respondent framed the application for leave to appeal in terms of the finding on the costs order and findings pertaining to the arrest and detention, leave was sought only against the costs order. On 29 August 2013 the Constitutional Court refused leave to appeal on the basis that it could not be said that the costs in issue arose from proceedings involving a constitutional matter, or an issue connected with a constitutional matter over which the court has jurisdiction in terms of section 167(3)(b) of the Constitution.

4 Discussion

Unfortunately many of the findings, conclusions and comments by the court *a quo* and the Supreme Court of Appeal are susceptible to criticism, and do not contribute to clarify an important part of the criminal process. As a thorough discussion of all these issues is not possible in a publication of this nature, I only point out some of the inaccuracies, before dealing with the *interdictum de homine libero exhibendo* and the question whether it is incumbent on a peace officer to consider less invasive means to secure attendance at court before affecting an arrest.

As far as the judgment of the court *a quo* is concerned, the court found that the people responsible to grant bail refused to grant bail or release, and that those responsible for considering bail refused to do so. These findings are not compatible. If the people responsible refused to grant bail or release, they considered bail or release, and refused such. They cannot also have refused to consider bail.

To make matters worse, the Supreme Court of Appeal found that there was no evidence before it that the people responsible for granting bail were ever asked to consider bail or release, and that there was no foundation in the finding of the court *a quo*, that those responsible for considering bail, refused to grant bail.

As will be seen below when the *interdictum de homine libero exhibendo* is discussed, the fact whether the people responsible considered but refused bail or release, or refused to consider bail, is crucial in determining the legal position of the detained person.

In dealing with the lawfulness of the arrest, the court *a quo* referred to sections 35(1)(f) and 35(2)(d) of the Constitution. Section 35(1)(f) is the primary provision governing bail and sets the tone and parameters within which all other provisions regarding bail must function. Section 35(2)(d) provides a detained person with the right to challenge the lawfulness of his detention, and if unlawful, to be released. These provisions, therefore, provide no guidance in deciding whether an arrest was executed lawfully or not.

With respect to the judgment of the Supreme Court of Appeal, the court in paragraph 11 held as follows:

> "As has been mentioned above, the court [*a quo*] found that the arrest of the respondent was unlawful, hence the order for his release. I have already held that finding to have been without foundation because no request was ever made to a police official for the respondent's release on bail" (para 11).

This comment does not make sense. It is incomprehensible how the fact that a request was not made to a police official for release on bail proves that the arrest was not unlawful.

Paragraph 12 of the judgment muddies the water even further. The court referred to the conclusion reached by the court *a quo* that the respondent's detention was unlawful because *those responsible for considering bail refused to do so*. The court found it difficult to comprehend how *a refusal by a police officer to grant bail* could render an otherwise lawful arrest and subsequent detention unlawful. The court does not seem to appreciate that there is a difference between refusing to consider bail, and refusing bail, and that this difference is crucial in the present discussion. Perplexingly the court also now understands that a refusal to grant bail will not influence the lawfulness of the arrest, but does not understand that the fact that a request was not made for bail, also cannot influence the lawfulness of the arrest.

As well, the Supreme Court of Appeal in paragraph 12 found that the lawfulness of the arrest was never an issue before the court *a quo*, and that it was never the case of the respondent that his arrest was unlawful. This does not seem to be the case. The Supreme Court of Appeal itself, in its recounting of the facts, indicate that it was argued on behalf of the respondent in the court *a quo* that the arrest and detention were unlawful. The Supreme Court of Appeal judgment also recounts in some detail how the court *a quo* dealt with the lawfulness of the arrest in its judgment.

In paragraph 14 the Supreme Court of Appeal held that the jurisdictional facts necessary for an arrest under section 40(1)(a) of the CPA were: "(i) [T]he arrestor must be a peace officer, (ii) an offence must have been committed or there must have been an attempt to commit an offence, and (iii) in his or her presence." This is misleading as section 40(1)(a), being the statutory provision authorising the arrest, is only the first pillar upon which a lawful arrest is based.

The second pillar is that the arrestor must exercise physical control over the arrestee (s 39(1) CPA). The third pillar is that the arrestee must be informed of the reason for his arrest (s 35(2)(a) Constitution and s 39(2) CPA). The fourth pillar is that the arrestee must be taken to the appropriate authorities as soon as possible (s 50(1) CPA). See also Joubert *et al Criminal procedure handbook* (2011) 118.

It now remains to consider the findings, conclusions and comments by the respective courts with regard to the *interdictum de homine libero exhibendo* and the question whether a peace officer is required to consider less invasive means to secure attendance at court before effecting an arrest.

In the court *a quo*, counsel for the respondent relied on the *interdictum de homine libero exhibendo* to secure the release of his client. Leaving aside for a moment the inconsistencies and sometimes imperfect application of the legal principles, some findings and comments by the court *a quo* are consistent with the granting of the remedy. (However, see my further discussion below where I indicate that the application should have been brought in terms of s 35(2)(d) of the Constitution.) The court held that an arrestee who qualifies for police bail had the right to be considered for police bail as soon as possible (para 7). It also found that the people responsible for considering bail refused to do so (para 8). Based on this the court found that the continued detention of the respondent was unlawful and accordingly released the respondent (*ibid*).

With regard to the judgment on appeal (the relevant paras being 15 and 16 discussed above), the first point to note is that the *interdictum de homine exhibendo* has been taken up in section 35(2)(d) of the Constitution (see also *S v Mbele* 1996 1 SACR 212 (W) and Currie and De Waal *The Bill of Rights handbook* (2005) 768). Section 35(2)(d) provides that "[e]veryone who is detained, including every sentenced prisoner, has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released."

The respondent, therefore, should have sought relief in terms of section 35(2)(d) of the Constitution, as section 35(2)(d) forms the basis of this remedy in contemporary South Africa.

The understanding of the principles in this important phase of the criminal process by the Supreme Court of Appeal, including the explanation with regard to when, or under which circumstances, a detainee may avail himself of this remedy, can furthermore not be supported. In this respect the Supreme Court of Appeal again failed to appreciate the difference in the legal position when bail had been requested and refused, and when the responsible people refused to consider bail.

Section 50(1)(b) provides that a person who is in detention shall be informed of his right to institute bail proceedings as soon as reasonably possible. Section 50(1)(c) provides that if bail is considered in terms of section 59 (police bail) or section 59A (prosecutor bail) and refused, he must be brought before a lower court as soon as reasonably possible, but not later than 48 hours after arrest. This represents the lawful powers of the state and the procedure to be followed when a person is arrested and charged for the commission of an offence. In such event the question of the detainee's release on bail or warning is governed by the relevant statutory provisions, and because the detention is lawful, securing release in terms of section 35(2)(d) will not be possible.

However, if the state does not exercise its powers properly, for example the detained person is not charged within 48 hours after arrest, or the police or prosecution refuses to consider release in circumstances when they are obliged to do so, the continued detention becomes unlawful. Once the detention has become unlawful the detainee will not only be able to challenge it, but also secure his release in terms of section 35(2)(d).

To require that the detention had to have been unlawful *ab initio* for the remedy to be available does not make any good sense. It would mean that as long as the arrest was lawful the state could detain an individual, not comply with the lawful process, that is, refuse to consider police bail or release when applicable and/or not bring the detainee before court within the prescribed time frame, without the detainee being able to secure his release from unlawful custody. There is also no indication in section 35(2)(d) that the detention had to have been unlawful *ab initio*, as found by the Supreme Court of Appeal.

The indication by the Supreme Court of Appeal, that a *mandamus* directing the responsible police official to reconsider bail could be obtained where bail was sought and refused, also appears to be ill-considered. It has been held repeatedly that an accused cannot be allowed to repeat the same application based on the same facts. It constitutes an abuse of process (see eg *S v Acheson* 1991 2 SA 805 (NmHC) 821G–J; *S v Vermaas* 1996 1 SACR 528 (T) 531e–f; *S v Mpofana* 1998 1 SACR 40 (Tk) 44).

However, in the unlikely event that the circumstances have changed in the remaining hours before the detainee appears in court for the first time, and the responsible person refused to consider release based on the new circumstances, a *mandamus* ordering the responsible person to consider a new application based on changed circumstances could provide relief.

As far as the question of the consideration of less drastic measures to ensure attendance at court is concerned, the applicable findings and comments in the judgments are interwoven with other findings and comments, and the legal principles are sometimes imperfectly applied as has already been shown. Hence I repeat the applicable parts for easy reference.

The court *a quo* commented that arrest was the most drastic measure to secure a person's attendance at trial and, as such, should be confined to serious cases. In referring to the decision in *S v More* 1993 2 SACR 606 (W), the court held that an arrest should only be effected where it is likely that a summons or written notice to appear will be ineffective.

The court also referred to *Louw v Minister of Safety and Security* 2006 2 SACR 178 (T) in holding that if it was preferable to secure the presence of an accused before court by way of a summons, that procedure should be followed. The court furthermore held that an arrest without any rational, reasonable basis should not occur indiscriminately and that no matter how severe the alleged offence may be, the person to be arrested is still presumed innocent and whose rights to freedom, dignity and fair treatment should be upheld. The court concluded that the arrest was unlawful.

The Supreme Court of Appeal explained that a peace officer was entitled to arrest an accused without a warrant in terms of section 40(1)(a) of the CPA. The court nevertheless agreed with the court *a quo* that arrest, being the most drastic

method of securing attendance at court, "ought to be confined to serious cases" where such person faces a relatively serious charge. The court proceeded as follows:

> "Indeed that is what is desirable. But where a peace officer does effect a lawful arrest in terms of section 40(1)(a) of the Criminal Procedure Act for what may not be considered to be a serious offence, as may be the position in the present instance, the arrest, or subsequent detention, does not become unlawful, thereby entitling a high court to order the release of the arrested person, merely because a summons, or notice to appear in court, would have been equally effective in ensuring his or her attendance at court, or because bail has been refused."

The Supreme Court of Appeal listed the jurisdictional facts necessary for an arrest under section 40(1)(a), indicating that the arresting officer was not required to conduct a hearing before effecting an arrest. Whether an arrestee should be released and, if so, subject to which conditions, is for a later person to decide "and that is the safeguard to the arrestee's constitutional rights". Once the jurisdictional requirements are satisfied the peace officer has the discretion to arrest or not. This discretion must be exercised properly.

The court also cautioned against the temptation to impose duties on police officers under the guise of protecting rights in the Bill of Rights which existing law, in this case the CPA, does not impose.

The judgment of the Supreme Court of Appeal in this respect came at the tail end of a number of decisions which dealt with the question whether there must not have been less invasive means available in order to bring a suspect to court before an arrest will be regarded as lawful (see *Tsose v Minister of Justice* 1951 3 SA 10 (A) 17G–H where the Appellate Division in the pre-constitutional era signalled disapproval of arrest where there was no urgency and the suspect had a fixed and known address. The court held that there was no rule of law that required that the less invasive means of bringing a person to court should be used when it would be equally effective. See also *Louw v Minister of Safety and Security* 2006 2 SACR 178 (T) (discussed above) followed in *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W); *Le Roux v Minister of Safety and Security* 2009 2 SACR 252 (KZP); *Ramphal v Minister of Safety and Security* 2009 1 SACR 211(E); *MVU v Minister of Safety and Security* 2009 2 SACR 291 (GSJ); and *Charles v Minister of Safety and Security* 2007 2 SACR 137 (W) (criticising *Louw*)).

On a rare occurrence, the Supreme Court of Appeal (per Harms DP, Nugent, Lewis and Bosielo JJA, and Pillay AJA) in *Minister of Safety and Security v Sekhoto* 2011 5 SA 367 (SCA), only three days after the judgment under discussion (19 November 2012), decided the same issue. The court held as follows:

> "While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in the process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be

> cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest" (para 44).

It appears that all the courts above are in agreement that it is not incumbent for the arresting peace officer to consider whether there are less invasive means available to bring a suspect to court where the arrestee is suspected of a serious offence.

However, *Louw*, the courts that followed *Louw*, the court *a quo* and the Supreme Court of Appeal in the matter under discussion, as well as the Supreme Court of Appeal in *Sekhoto*, are all in agreement that there will be instances, for example when a written notice or a summons will be effective to secure attendance, and particularly where the suspected offence is relatively trivial, that arrest ought not to be utilised to secure the presence of the suspect at court. The court *a quo* in the matter under discussion explained that there should be a rational reasonable basis for the arrest. In *Sekhoto* the Supreme Court of Appeal also indicated that the decision to arrest must be rational. The court held that there will be cases, particularly where the suspected offence is relatively trivial, where it would clearly be irrational to arrest.

It accordingly appears that the courts are in agreement that there are circumstances in which an arrest is not tenable, even though the CPA gives peace officers the right to arrest. It furthermore appears that the courts came to the conclusion based on the demands of the Bill of Rights.

Even so, the high courts and the Supreme Court of Appeal saw the legal requirements for effecting a lawful arrest differently. In the high courts "less invasive means" were formulated as a jurisdictional requirement for a valid arrest, and in the Supreme Court of Appeal the court found that once the jurisdictional facts required by section 40(1)(a) and (b) of the CPA for an arrest are present, the arresting peace officer has a discretion whether to exercise his powers of arrest (s 40(1) CPA provides that a peace officer "may" arrest when the requirements in the respective subsections have been met). This discretion has to be exercised properly. Yet, the peace officer does not have to arrest, and if the peace officer exercises his power to arrest, the arrest and subsequent detention do not become unlawful because there is an equally effective less invasive method available to bring the person to court (*Sekhoto* para 28; *Coetzee* paras 13–14).

This came about it would seem, due to the fact that the high courts failed to have proper regard to the legal principles and remedies available to give effect to the fundamental values in the Bill of Rights. Confirming this, the Supreme Court of Appeal in *Sekhoto* indicated that it was unclear whether the high courts used the indirect or direct application of the Bill of Rights to formulate "less invasive means" as a jurisdictional requirement for a valid arrest (para 14). Applying the legal principles the court found that it was unable to interpret section 40(1) to indicate that somewhere in the words there was an additional jurisdictional fact and, because legislation superseded the common law, one could also not change the meaning of the statute by developing the common law (para 22). As well, the court did not think that section 40(1)(a), interpreted properly, was unconstitutional. The courts were therefore not entitled to read anything into the clear text (para 24) (see also Currie and De Waal *The Bill of Rights handbook* (2005) chs 3 and 8).

Fortunately, a foray into the realm of the appropriate remedy for the infringement is not necessary. It is only when a fundamental right has been infringed,

and that infringement does not satisfy the test for a valid limitation of that right, that the question of the appropriate remedy for the infringement arises.

The conclusions reached by these courts assume that the right to freedom and security in section 12, and the other constitutional rights referred to by the courts (except for s 35(1) and (2)) in coming to this conclusion have application, and afford due process protection when one is arrested. Unfortunately, due to ill-fated drafting of these provisions, and foundational confusion in the interpretation and application of these provisions by the Constitutional Court, this is not the case.

As far as the presumption of innocence is concerned, it is only the effect of the presumption at trial which ensures that a conviction is not possible despite the existence of reasonable doubt about guilt, that is entrenched by section 35(3)(h) of the Constitution. Section 35(3)(h) has no application outside the trial context.

Section 35(1) also does not provide that a person arrested for allegedly committing an offence has to be treated fairly (even though the arrestee is provided with certain enumerated procedural rights). Section 35(3) also is of no assistance in this regard. In terms of section 35(3), it is only an accused at trial that is entitled to be treated fairly.

In dealing with section 25 of the Interim Constitution, and section 35 of the Constitution, the Constitutional Court has furthermore rejected recourse to a general right contained elsewhere in the Bill of Rights, for example the right to freedom and security in section 11 of the Interim Constitution, and section 12 of the Constitution (*Ferreira v Levin NO Vryenhoek v Powell NO* 1996 1 SA 984 (CC) para 184; *De Lange v Smuts NO* 1998 3 SA 785 (CC) 794 paras 16ff), the right to access to information in section 23 of the Interim Constitution (*Shabalala v Attorney-General of the Transvaal* 1995 12 BCLR 1593 (CC) paras 32–36. Yet, the Court still indicated that s 25(3) should be read together with s 23 (see para 35), and the right of access to courts in s 34 of the Constitution (*S v Pennington* 1997 10 BCLR 1413 (CC) para 46. However, see also *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 2 BCLR 167 (CC)).

The Constitutional Court had thus erected a conceptual wall between these general rights and the rights of detained, arrested and accused persons in section 25 of the Interim Constitution, and section 35 of the Constitution. This prevented due process seepage from these sections to sections 25 and 35.

Following the argument in these cases, the right to human dignity in section 10 of the Constitution should also not afford protection when arrest is adjudicated.

However, as far as the right to freedom and security is concerned, the majority in *Ferreira* nevertheless accepted that the right to freedom and security in section 11(1) had a residual content and that it may, in appropriate cases, protect fundamental freedoms not enumerated elsewhere in the Bill of Rights (see paras 173–174). In *De Lange* the Constitutional Court read the present section 12(1) in much the same way as it read the previous section 11(1) in *Ferreira.* The court held that the right to freedom functioned as a "residual right, and may protect freedoms of a fundamental nature – especially procedural guarantees – not expressly protected elsewhere in the Bill of Rights" (para 16). It therefore follows that because the rights of a person arrested for allegedly committing an

offence are specifically catered for in section 35(1), the residual right to procedural fairness in terms of section 12 will not be activated when one's rights regarding arrest are adjudicated.

The approach by the prosecution and counsel for the respondents, as well as the unanimous court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC) in tearing down the wall, indicate that there may have been a change of heart. However, because the court in *Dlamini* did not specifically deliberate the interaction between sections 12 and 35, the previous decisions must be followed.

Once again, the error by the Constitutional Court in erecting a conceptual wall between the right to freedom and security and the rights of persons arrested, detained or accused is evident. Because of the foundational confusion in the interpretation and application of section 12 by the Constitutional Court, there is no constitutional principle of procedural fairness when arrest is adjudicated.

I accordingly submit that the foundational confusion in the interpretation and application of section 12 must be corrected. More specifically, the operation of section 12 as a general and residual due process right must be substantiated.

The utilisation of section 12 as a generic and residual "due process right" ensures structural and conceptual similarity in the analytical process that would allow for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this conceptual structure would then easily be assimilated into an analysis of criminal procedure rights.

Perhaps the most compelling reason for the existence and acceptance of a general "principle of fundamental justice" is the fact that provision cannot be made specifically for fairness at each occurrence that might present itself in the criminal justice process. This is presumably exactly the reason why an accused is guaranteed fair treatment at trial, apart from the specific enumerated rights in section 35(3) of the Constitution.

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THE CONTINUED IMPORTANCE OF COMMON LAW PRODUCT LIABILITY *EX DELICTO*

Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd
2011 4 SA 276 (SCA), [2011] 3 All SA 362 (SCA)

1 Introduction

The aim of this discussion is to emphasise the importance of the continual development of the Aquilian principles of product liability, notwithstanding the radical and wide-ranging changes brought about in this field by the Consumer Protection Act 68 of 2008 (hereafter "the CPA"). The ongoing relevance of Aquilian liability in the area of product liability is explicitly underlined by section 2(10) of the CPA itself where it is stated that "[n]o provision of this Act must be interpreted so as to preclude a consumer from exercising any rights afforded in terms of the common law".