# VONNISSE

## DOES REMAND IN CUSTODY BY A COURT FOLLOWING AN UNLAWFUL ARREST RENDER THE SUBSEQUENT DETENTION LAWFUL?

***Minister of Safety and Security v Tyokwana***
**2015 1 SACR 597 (SCA)**


**OPSOMMING**

**Maak 'n bevel vir uitstel in aanhouding deur 'n hof nadat 'n persoon onregmatig in hegtenis geneem is, sy verdere aanhouding regmatig?**

In hierdie saak het die respondent die appellant suksesvol in die hoë hof vir skade weens onregmatige arrestasie en aanhouding, kwaadwillige vervolging en aanranding gedagvaar. Die respondent is vir meer as 20 maande aangehou aangesien die saak telkemale uitgestel is voordat hy uiteindelik vrygespreek is. Die appellant het ten opsigte van die aanhouding geappelleer en aangevoer dat die onregmatige aanhouding tot 'n einde gekom het toe die landdros die respondent se verdere aanhouding gelas het. Die Hoogste Hof van Appèl het aanvaar dat selfs indien die arrestasie onwettig was, die hof wettiglik ingevolge artikel 50(1) van die Strafproseswet die verdere aanhouding van 'n gearresteerde persoon kan gelas. Die hof wys egter daarop dat 'n bevel ingevolge artikel 50(1) nie outomaties die verdere aanhouding regmatig maak nie. Dit hang van die feite van elke geval af. Die Hoogste Hof van Appèl bevind dat die polisie opsetlik die aanklaer en die landdros mislei het met die gevolg dat daar inbreuk gemaak is op die respondent se reg tot vryheid en sekuriteit. Die skrywer wys daarop dat die Hoogste Hof van Appèl nie 'n nuwe rigting ingeslaan het nie maar ook voorsiening gemaak het vir die situasie waar die hofproses misbruik is. Die polisie se plig tot eerlikheid, openlikheid en integriteit word ook bespreek. Daar word geargumenteer dat die Hoogste Hof van Appèl se benadering in lyn met ons basiese begrip van geregtigheid is. Die skrywer wys daarop dat die Hoogste Hof van Appèl se steun op die respondent se reg tot vryheid en sekuriteit problematies is maar dat artikel 34 tot die redding kom. Daar word geargumenteer dat daar in die onderhawige geval ook inbreuk op die aangehoudene se reg op effektiewe regsbystand was en dat die respondent sy aanhouding ingevolge artikel 35(2)(d) kon betwis het.


### 1 Facts

During October 2007 the respondent and two of his colleagues washed a police vehicle at a police station as part of their community service. A warrant officer to whom the vehicle was allocated arrested the respondent for allegedly stealing a firearm from the cubbyhole of the vehicle. The respondent was detained and assaulted by the warrant officer (paras 2 and 7). The respondent denied any involvement in the theft (para 2). Two days later the respondent made his first appearance in court, represented by an attorney. The respondent pleaded guilty and was convicted on three counts. The case was postponed to 19 October 2007 for sentencing. The court ordered that the respondent remain in custody.

On 19 October, the respondent's attorney withdrew and the case was postponed to 5 November 2007 to enable the respondent's new attorney to get instructions. The court again ordered that the respondent remain in custody (para 3). On 5 November the respondent through his new attorney changed his plea to one of not guilty in terms of section 113 of the Criminal Procedure Act 51 of 1977 (CPA). The case was postponed to 6 November 2007 with the respondent to remain in custody. On 6 November, the case was postponed to 19 December 2007. The magistrate again ordered the respondent's further detention (para 4). On 19 December 2007, the respondent's application for bail was refused and the case was remanded for trial. The trial only commenced on 20 July 2009. The respondent was acquitted on all charges after being detained for more than 20 months.

The respondent instituted action in the Eastern Cape High Court against the appellant for damages due to unlawful arrest and detention, malicious prosecution and assault by a member of the South African Police Service (SAPS). Sandi J in the court *a quo* found for the respondent on all the grounds. With regard to the question whether the appellant ought to be held liable for the whole period of the respondent's detention, the appellant submitted that the unlawfulness of the respondent's detention ceased at his first appearance in court when the magistrate ordered his continued detention. Alternatively, if it was found that the detention remained unlawful after his first appearance, then the detention became lawful after the magistrate refused respondent's application for bail on 19 December 2007. The respondent argued that if the arrest was unlawful it followed that the whole period of detention was unlawful (para 12). The court *a quo*, relying on *Mthimkhulu v Minister of Law and Order* 1993 3 SA 432 (E), held the appellant liable for damages for the whole period of detention. In *Mthimkhulu* 438C–F the court held as follows:

> "I do not see how the mere fact that the further detention of the plaintiffs occurred pursuant to an order made by the magistrate in terms of s 50(1) of Act 51 of 1977 can render such detention lawful where the arrest, which resulted in such detention being ordered, was unlawful. The prior arrest of a person is a prerequisite to the provisions of the subsection coming into effect. If such arrest is unlawful, it is not a valid arrest. Whatever occurs pursuant to such arrest is therefore, in my view, invalid and unlawful" (para 33).

In his judgment, Sandi J indicated that he was aware of the judgement in *Isaacs v Minister van Wet en Orde* 1996 1 SACR 314 (A) but that that judgment had been overtaken by the Constitution, 1996 (the Constitution) and other judgements (para 34). The appellant only appealed against this part of the order by the court *a quo* (para 17). The appeal was with leave of the court (para 1).

## 2 Questions before the Supreme Court of Appeal (SCA)

Is the lawful arrest of a person a prerequisite for section 50(1) of the CPA to come into effect? Does remand in custody by a court following an unlawful arrest render the subsequent detention lawful? Ought the appellant in the circumstances to be held liable for damages for the full period of the respondent's detention?

## 3 The appellant's argument

The appellant contended that the unlawfulness of the respondent's detention ceased when the magistrate ordered his continued detention. The appellant relied on *Isaacs* in which the Appellate Division found that a detainee's continued

detention pursuant to an order of court in terms of section 50(1) was lawful, notwithstanding that the arrest was unlawful (para 32). The appellant also pointed out that *Isaacs* had not been overruled by the SCA or the Constitutional Court (para 34).

## 4 Judgment

With regard to the question whether a lawful arrest was a prerequisite for section 50(1) of the CPA to come into effect, the court indicated that the SCA in *Isaacs* had already found that the dictum in *Mthimkhulu* 438C–F was incorrect (*Isaacs* 323i–j). In *Isaacs* the appellant had also argued that section 50(1) only applied to someone who had been legally arrested. It followed that if the arrest was illegal, section 50(1) did not apply and any order for continued detention could not lawfully be made (*Isaacs* 322g). The court in *Isaacs* did not agree and found that where section 50(1) referred to someone "who is arrested", it was not limited to a lawful arrest. It included someone who, in an attempted exercise of powers of arrest, was brought under the control of the arrestor (*Isaacs* 323h–i) (paras 36–37).

A prior lawful arrest is therefore not a prerequisite for section 50(1) to come into effect, and an unlawful arrest does not preclude an arrested person from being remanded lawfully in terms of section 50(1). Put differently, a court can lawfully order the continued detention of an arrested person in terms of section 50(1) even though the arrest was unlawful. However, the court pointed out that it was not held in *Isaacs* that an order for continued detention in terms of section 50(1) will *automatically* render such further detention lawful (para 38). The question whether the remand in custody rendered his subsequent detention lawful or not, depended on the facts of the case (para 39).

The court gave an account of the germane facts and held that because the warrant officer and the investigating officer had failed to inform the prosecutor and the magistrate of the true facts, the latter were not given a proper opportunity to apply their minds as to whether the respondent should be remanded in custody or be afforded bail. It was inconceivable that, had they known the true facts, the prosecutor would have proceeded with the prosecution, or that the magistrate would have refused bail (para 39(a)–(d)). The court also found the prosecution, and its continuation, to be malicious and aimed at depriving the respondent of his liberty. As such, it constituted a wrongful and improper use of the court process to deprive the respondent of his liberty (para 39(e)).

The court reiterated that a policeman who arrested a person has a duty to give a fair and honest account of the facts to the prosecutor, leaving it to the prosecutor to decide whether to prosecute or not (para 40, referring to *Prinsloo v Newman* 1975 1 SA 481 (A) 492G 495A and *Minister for Justice and Constitutional Development v Moleko* 2009 2 SACR 585 (SCA) para 11). The court also repeated that the police had a clear duty to advise the prosecutor of any known facts that are relevant to the exercise by the presiding officer of his discretion to grant bail (para 40, referring to *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2002 1 SACR 79 (CC) para 63).

In this case, the warrant officer and the investigating officer did not give a fair and honest account of the facts to the prosecutor, or bring the relevant circumstances to the attention of the magistrate. On the contrary, they wilfully misled the prosecutor and the magistrate with the result that the respondent remained

in custody until his acquittal (para 41). This caused the respondent's constitutional right to freedom and security in terms of section 12 of the Constitution to be violated unjustifiably and unreasonably (para 42). This breach of section 12(1)(a) was found sufficient to establish delictual liability on the part of the appellant for the full period of the respondent's detention (para 44).

## 5 Discussion

Since the decision in *Isaacs* it has generally been accepted that even though the arrest may have been unlawful, the unlawfulness of the detention ceased when a magistrate ordered the continued detention of the accused in terms of section 50(1) of the CPA (see, eg, Joubert *Criminal procedure handbook* (2014) 128).

On a cursory reading of the "flynote" it at first appears that the SCA had made an about-turn in this regard. However, the court did not announce a new direction. Instead the court built on the precedent set in *Isaacs* while also making provision for the anomalous situation where the court process is abused.

Police officials are duty-bound to be honest, open and forthcoming when providing information upon which a prosecutor or magistrate must act (see *Prinsloo*, *Moleko* and *Carmichele supra*; *Van Heerden v Minister van Veiligheid en Sekuriteit* 2014 2 SACR 346 (NCK) and *Woji v Minister of Police* 2015 1 SACR 409 (SCA); see also the Code of Conduct (COC) that is signed by every member of the SAPS. In terms of the COC police officials *inter alia* commit themselves to create a safe and secure environment for all the people of South Africa by acting with integrity, upholding and protecting the fundamental rights of every person, and acting in a manner that is impartial, honest and transparent. The COC was announced by the Minister of Safety and Security in terms of section 24 of the South African Police Service Act 68 of 1995, and published in GN R529 in *GG* 27642 of 10 June 2005).

The principle of honesty, openness and integrity has also been emphasised repeatedly in other common law jurisdictions and has long since been considered as being of critical importance in the fair operation of the criminal justice system (see, eg, the decision by the Court of Appeals of Georgia in *Clemons v State* 257 Ga App 96 574 SE 2d 535 98 with regard to information supplied to the presiding officer, and Schedule 2 "Standards of Professional Behaviour" to the Police (Conduct) Regulations 2012, issued under s 50 of the Police Act 1996 (UK)).

Under Australian law the courts have moreover held that as a matter of law police officers have the duty to be scrupulously careful and fair (see, eg, the decision of the High Court of Australia in *R v Lee* 82 CLR 133; [1950] ALR 517; 1950 WL 39667; [1950] HCA 25; 24 ALJ 223 and the Supreme Court of Victoria in *R v Laracy* 180 A Crim R 19; 2007 WL 4965636; [2007] VSC 19; [2009] ALMD 2996) and must take every precaution reasonably available to guard against any miscarriage of justice that may occur (see, eg, the decision of the Federal Court of Australia in *Grbic v Pitkethly* 38 FCR 95; 65 A Crim R 12; 110 ALR 577; 1992 WL 1289094 and the Supreme Court of South Australia in *R v Crawford* [2015] SASCFC 112; 2015 WL 5026923).

In the present case the police wilfully misled the prosecutor and the magistrate with the result that the respondent remained in custody until his acquittal. The SCA accepted that even though the arrest was unlawful, the continued detention of an arrested person may be lawfully ordered in terms of section 50(1).

However, in view of the facts of the case, the court held that an order of a court for continued detention in terms of section 50(1) did not *automatically* render such further detention lawful.

This appears to be in line with the tenets of due process. Where an arrested person appears before a court and the court satisfies itself on the facts that further detention is apposite, it satisfies our rudimentary sense of justice. However, this approach will not satisfy our rudimentary sense of justice under all circumstances.

It stands to reason that because the police contrived to deny the accused his liberty, the prosecutor and the magistrate were precluded from properly performing their duties to oppose or grant bail on the facts. This resulted in a failure of the system which was designed to afford due process. Under such conditions, the fact that a magistrate ordered the continued detention cannot make any further detention lawful. The question whether the remand in custody rendered the subsequent detention lawful or not, was therefore subject to whether the system functioned properly.

However, the assertion by the SCA that police officials were duty-bound to give a fair and honest account of the facts to the prosecutor and court when release is deliberated as a matter of constitutional due process in terms of section 12 of the Constitution, is problematic.

Once again, the error made by the Constitutional Court in erecting a conceptual wall between the right to freedom and security in section 12, and the criminal procedure rights of persons once arrested, detained or accused in terms of section 35 of the Constitution is evident. In *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC), the court held that the primary, though not necessarily the only purpose of section 11(1) of the interim Constitution, was to ensure the protection of physical liberty and physical security of the individual. However, the court accepted that section 11(1) had a residual content and that it may in appropriate cases protect fundamental freedoms not enumerated elsewhere in chapter 3.

In *De Lange v Smuts* 1998 3 SA 785 (CC) the Constitutional Court read the present section 12(1) in much the same way as it read the former section 11(1) in *Ferreira*. The court indicated that the right to freedom and security of the person primarily protected an individual's physical integrity. The right to freedom functions 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 follows that because the right to be released from custody is specifically catered for in section 35(1)(f) of the Constitution, the residual right to procedural fairness in terms of section 12 will not be activated when the right to the release of an arrested person is adjudicated.

It appears that, subsequent to these decisions, the courts have had a change of heart and have torn down the wall (see, eg, *S v Dhlamini; Sv Dladla; Sv Joubert; Sv Schietekat* 1999 7 BCLR 771 (CC) and the case under discussion). This "new" approach is correct. Using section 12 as a generic and residual due process right ensures structural and conceptual similarity in the analytical process that would allow for the transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this conceptual structure could then easily be assimilated into an analysis of criminal procedure rights.

However, because the Constitutional Court has not specifically deliberated the interaction between sections 12 and 35 subsequent to *Ferreira* and *De Lange*, these decisions must be followed (for an in-depth discussion of this topic see ch 6 "The possible reliance of an applicant for bail proceedings under Canadian and South African law on a residual right to procedural fairness in terms of section 7 of the Canadian Charter and section 12 of the Final Constitution respectively" of my LLD thesis *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform* available at http://bit.ly/1P1epHu).

However, it has been confirmed in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 2 BCLR 167 (CC) that the "access to courts" provision in section 34 of the Bill of Rights is able to perform the due process seepage into the criminal process that the Constitutional Court in *Ferreira* and *De Lange supra* erroneously denied the freedom and security clause in section 12.

Section 34 provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial journal". An applicant for the release from custody therefore has a fundamental right to be treated fairly.

Section 35(2)(b) of the Constitution furthermore provides that everyone who is detained has the right "to choose, and to consult with, a legal practitioner, and to be informed of this right promptly". Although section 35(2)(b) only provides for the "right to consult with" a legal representative, I submit that the drafters of the Constitution meant to confer the right to be assisted by a legal practitioner upon everyone who is detained. Section 73 of the CPA also provides that someone who is arrested, with or without a warrant, shall subject to any law relating to the management of prisons, be entitled to assistance by his legal advisor as from the time of his arrest. It has furthermore been accepted by our courts that the right to legal assistance includes the right to effective assistance (see, eg, *S v Charles* 2002 2 SACR 492 (E); *S v Halgryn* 2002 2 SACR 211 (SCA); *S v Mofokeng* 2004 1 SACR 349 (W); *S v Saloman* 2014 1 SACR 93 (WCC) and *S v Ndlanzi* 2014 JDR 0606 (SCA)).

Based on this, it may also be argued successfully that because the true facts were not presented to the court, counsels' ability to assist the applicant effectively in obtaining his release was severely impaired. Defence counsel can hardly develop appropriate strategic or tactical options without having access to the true facts. I therefore submit that under the circumstances the SCA was correct in holding the appellant liable for damages for the full period of the respondent's detention.

In conclusion, I am furthermore of the view that the misconduct by the police, and the resultant ineffective assistance by counsel to the applicant for release, could have been the proper subject of a claim to be released in terms of section 35(2)(d) of the Constitution. This is a good example where the accused is held unlawfully, and the normal court processes will not suffice in providing the detainee with the necessary protection.

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 the detention is unlawful, to be released (see my discussion in "The *interdictum de*

*libero homine 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)" 2014 *THRHR* 492 497ff where I argue that the writ of *habeas corpus* and the *interdictum de libero homine exhibendo* have been replaced by a claim in terms of section 35(2)(d)).

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## THE *MANDAMENT VAN SPOLIE*, THE RESTITUTION OF UNLAWFUL POSSESSION AND THE IMPACT OF THE CONSTITUTION, 1996

***Ngqukumba v Minister of Safety and Security***
**2014 5 SA 112 (CC)**

**OPSOMMING**

**Die *mandament van spolie*, die herstel van onregmatige besit en die impak van die Grondwet, 1996**

Gedurende 2014 het die Konstitusionele Hof in 'n eenparige uitspraak in *Ngqukumba v Minister van Veiligheid en Sekuriteit* gelas dat die polisie, wat onregmatiglik 'n motorvoertuig in beslag geneem het, die voertuig aan die eienaar daarvan moes teruggee hangende 'n ondersoek na die feite en meriete rakende die regmatige besit daarvan. In beginsel het die regsvraag verband gehou met 'n aansoek vir 'n *mandament van spolie* in 'n geval waar die applikant aansoek gedoen het vir die herstel van sy besit van 'n motorvoertuig waarvan met die onderstelnommer gepeuter is en waarvan die oorspronklike enjinnommer afgevyl is, en op welke voertuig die polisie beslag gelê het kragtens sekere bepalings van die Nasionale Padverkeerswet 93 van 1996. In hul bespreking van die beginsels van die *mandament*, bevestig die Konstitusionele Hof dat die kernbasis van die *mandament*, die herstel van besit, voor enigiets anders, van die onregmatige besitsontneming van 'n voorwerp aan die besitter vereis. Die doel van die *mandament* is gevolglik die herstel van besit in gevalle waar besit van iemand ontneem is, anders as wat die reg toelaat en dat persone, insluitende die regering, regtens beperk word om nie die reg in eie hande te neem sonder om regmatige stappe te doen nie. Met verwysing na onlangse gesag bevestig die hof dat die mandament aanwending vind, selfs teen die polisie, waar hulle onregmatig op goedere, soos die voertuig in die onderhawige geval, beslag gelê het. Die feit dat die saak gehandel het oor 'n voorwerp waarvan die besit vermoedelik onregmatig kon wees, was nie vir die hof deurslaggewend nie aangesien die hof nie bereid was om op die meriete van die saak in te gaan nie. In die bepaalde omstandighede kom die hof tot die slotsom dat die relevante artikels van die Padverkeerswet, vir sover moontlik, op 'n harmonieuse wyse saamgelees moet word met die vereistes van die *mandament*. Die hof bevind dat niks in die vermelde bepalings van die wet daarop gerig is om die gemenereg te verander nie en dus nie die normale aanwending van die *mandament* uitsluit of verander nie. Volgens die hof is sodanige aanslag nie alleen in lyn met die bepalings van artikel 39(2) van die Grondwet nie, maar voldoen dit ook aan ander bepalings van die Handves van Regte asook die funderende beginsels en waardes waarop die huidige Suid-Afrikaanse grondwetlike model gebaseer is. Met die *Ngqukumba*