IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41499/2018

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes
(Signature) 24/6/2022 (Date)

In the matter between:

THE MINISTER OF POLICE **Applicant**

and

ZAKHELE MANYONI **Respondent**

In re:

ZAKHELE MANYONI **Plaintiff**

and

THE MINISTER OF POLICE **First Defendant**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Second Defendant**

Application for leave to appeal in a damages claim for unlawful arrest and prolonged detention of more than eight months.

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] This is an application for leave to appeal against my judgment dated 12 April 2021. The very short background is that I upheld the respondent's main claim based on unlawful arrest against the applicant, the Minister of Police, and awarded damages. I made no finding in respect of the respondent's alternative claim for malicious prosecution, and made no order in respect of his alternative claim against the National Director of Public Prosecutions. Unsurprisingly, the second defendant, the National Director of Public Prosecutions, does not seek leave to appeal.

Leave to appeal: the test

[2] In argument, the applicant expressly limited its appeal as one that has to be evaluated in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.[1] The applicant's argument was that this test is the same test that had applied under the Common Law. This submission, with respect, is incorrect.

[3] The law pertaining to section 17(1)(a)(i) of the Superior Courts Act is summarised in *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020) para 4-6, a judgment by a full court. It is now required that there must be a measure of certainty that another court will differ from my judgment for leave to appeal to be granted. This is more than "*just a mere possibility that another court …, will, not might, find differently on both facts and law*", as set out in *Fair-Trade Independent Tobacco Association,* and in the judgments referred to therein.

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[1] "Leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success".

[4] Hence I will apply herein the test as set out in *Fair-Trade Independent Tobacco Association* in considering the four themes in the application for leave to appeal.

The first theme: the apportionment argument

[5] At trial, the defendants made common cause and were represented by one legal team. That team now acts for the applicant only. A major part of the argument before me was that the applicant believes that if I made an award, I was obliged to make an order apportioning blame between the Minister of Police and the National Director of Public Prosecutions, the other defendant. I refer to this submission herein as "*the apportionment argument*". It was my impression that the apportionment argument formed the basis for the applicant informing me that it intends to take this matter to the Constitutional Court, if necessary.

[6] The applicant denied in the plea that the respondent's detention after 22 May 2017 was unlawful, and pleaded that this was so as he was detained in terms of a court order. As reflected in my original judgment, with respect, this is not our law. The applicant pleaded no apportionment of any award to be made against it if I were to reject the pleaded defence. It also could not have done so, as it made common cause with the second defendant. Thus, the apportionment argument was not pleaded. Assuming (but not making such a finding) that I must still consider the argument, I address it in what follows.

[7] At the outset, in its heads of argument, the applicant seeks leave to appeal to the Supreme Court of Appeal ("*the SCA*") as I allegedly misapplied *De Klerk v Minister of Police* 2020 (1) SACR 1 (CC). With respect, I do not follow the reasoning why this would mean that any leave to appeal must be to the SCA.

[8] The pleaded contention that a detention in terms of an order by a magistrate is lawful detention thereafter, with respect is not our law. The argument was rejected as a universal principle in *De Klerk*. I did address it in my judgment under legal causation in paragraphs 25-32. *De Klerk* did <u>not</u> find that a separate delict was required for the police's liability to continue from date of detention in terms of a court order. To the contrary, the majority judgment

rejected the view that the court dealt with two delicts (paragraph 19 and 23). See paragraph 1:

> "… *The main issue for determination is whether the Minister of Police (the respondent) is liable to compensate Mr de Klerk (the applicant) for the entire period of his detention following his unlawful arrest, including the period following his first appearance in court. Related questions are whether the unlawful detention of the applicant ceased when the Magistrate ordered his further detention and whether the Magistrate's order rendered the subsequent harm caused by his detention too remote (for the purposes of legal causation) from the unlawful arrest*."

[9] Thus the police would remain liable after an unlawful arrest unless the damages are too remote (paragraph 24 to 47, especially paragraph 28, and also see paragraph 65). Even where the magistrate erred in not releasing the detained person on bail at the first hearing (see paragraph 33), the police could remain liable (the result of the judgment). The magistrate's error does not break the chain of causation (see paragraphs 33, 34, 35 and 45). The court expressly held that our law is not that the applicant is necessarily not held liable for loss arising from the post-court appearance detention of the detained person (paragraphs 36 and 45). "… *liability should be determined in accordance with the principles of legal causation, including constitutionally infused considerations of public policy*" (paragraph 47 and also see paragraph 63). The question simply formulated is "*did* the *wrongful act of Constable Ndala in arresting the applicant legally cause the harm arising from his detention for a further seven days after his first court appearance? The determination of legal causation is based on the consideration of the various traditional factors already discussed, including direct consequences, reasonable foreseeability, and the presence of a novus actus interveniens. The implications of these factors must then be tested against constitutionally-infused considerations of public policy*" (paragraph 65). "… *In establishing a delictual claim, a plaintiff needs to prove that the unlawful, wrongful conduct of the police (i.e. the arrestor) factually and legally caused the harm (post-court hearing deprivation of liberty). The plaintiff does not need to establish, necessarily, the unlawfulness of the harm (i.e. that the detention after remand was itself unlawful). The plaintiff need only establish that the harm was not too remote from the unlawful arrest.* …" (paragraph 60).

[10] The applicant's argument with respect is also against the law as set out in *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10 (14

May 2021). In that case, the appellants had not applied for bail after their arrest. The court held that even that fact does not break the chain of causation following upon an unlawful arrest. The trial court in *Mahlangu* held that the Minister of Police's liability ceased once the magistrate made an order for further detention during the first court appearance. That was the applicant's pleaded case before me. The full court dismissed the appeal and *inter alia* held that holding only the Minister of Police liable would ignore the important role played by the prosecutor and the Court when taking decisions on the further detention of the detained persons. The SCA was split on the matter.[2] The majority held that a further unlawful act by the police would be required after the unlawful arrest to hold the Minister of Police liable for the whole period of detention. As no such further unlawful conduct was established, the Minister of Police was not liable for detention after the second court appearance as the false confession was not the legal cause for the detention beyond the second court appearance.[3]

[11] *Mahlangu* dealt with a case where the police knew that the confession was obtained under torture, and withheld the information from the prosecutor. The police knew that there was no evidence for a successful prosecution. The Constitutional Court in paragraph 42 formulated the issue as a matter of legal causation. The court asked if public policy would dictate that the inclusion of the false confession in the docket, accompanied by the silence of the police about it throughout the detention of the appellants, "*is too remote for delictual liability to attach to the police and, vicariously, to the Minister beyond the second court appearance*". The court held that public policy does not dictate that such damages would be too remote to recover from the Minister of Police. "*The unlawful continued concealment by the police of the fact that the confession was obtained illegally therefore provides the applicants with a basis for holding the Minister delictually liable for the full detention period*" (paragraph 45). The court further held that the applicants' failure to apply for bail did not constitute "*an intervening act breaking the chain of legal causation*" (paragraph 48).

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[2] *Mahlangu and Another v Minister of Police* [2020] 2 All SA 656 (SCA).

[3] I pause to mention that the respondent relied on this judgment before me. I referred to it in paragraph 31 of my judgment. I was, at stage, bound by the majority decision.

[12] The difference between *Mahlangu* and the case before me is that the police knew that the confession was false. In the case before me, I made no finding that the police knew that the statement in opposing bail (that there was a pending case against the respondent for having had escaped from custody), was false. It is common cause that the statement was untruthful, an incorrect rendition of the contents of the police records. The false statement by the police meant that the bail hearing could only have had one result, and the mere fact of a court appearance was no reason not to hold the police liable for the whole period of detention.

[13] In my view, my judgment is in accordance with both *Mahlangu* and *De Klerk.* I dealt with the real issue, legal causation, identified in both judgments as the issue post-appearance in court. I gave my reasons why the damages are not too remote.

[14] I also disagree with the argument that I am obliged, *mero motu*, to apply an apportionment between the applicant and its co-defendant (simply as result of the National Director of Public Prosecutions being a co-defendant, sued in the alternative) in terms of *De Klerk*. That judgment in paragraph 85 makes it clear that the only contemplated apportionment would be in terms of the Apportionment of Damages Act 34 of 1956, an apportionment between joint wrongdoers.

[15] The respondent did what any plaintiff may do, he decided which claims to pursue from amongst more than one possible cause of action. The respondent selected two claims, and pleaded them in the alternative (unlawful arrest, alternatively malicious prosecution). This is entirely permissible. See Uniform Rule 10(3).[4] The application for leave to appeal was argued as if these facts did not exist.

[16] Expanding on the above, if one has regard to the particulars of claim, the respondent first set out the pleaded facts from the date of his arrest to the date when the charges against him were withdrawn. He thereafter pleaded that the

[4] "Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action." (underlining added).

officials involved in this process acted within the course and scope of their employment with the defendants. Thereafter, the respondent pleaded why his arrest and detention was unlawful.

[17] Importantly, the respondent, as he was entitled to do, expressly picked the applicant as the principal defendant. He later, in his prayers sought relief (underlining added) "(a)*gainst the First Defendant alternatively against the Second Defendant alternatively against the First and Second Defendants jointly and severally* …" He thus expressly picked the applicant as the principal defendant. He pursued the claim against the National Director of Public Prosecutions as a claim in the alternative.

[18] With respect, it is wrong for the applicant to submit in its heads of argument that the respondent "… *has chosen to plead his cause of action to include the Minister of Police and National Director of Public Prosecuting Authority*" without reflecting that the claims against them were in the alternative.

[19] The respondent did pursue, in the alternative to the above claim for unlawful arrest, a claim for malicious prosecution. The alternative claim fell away when the main claim against the applicant succeeded. I did not address the alternative claim, and had no need to do so. I said so in my judgment paragraph 33. The argument before me was that I am obliged to find against the National Director of Public Prosecutions, or to exonerate it. Such a submission is contrary to the pleadings and with respect, legal principle. A court need not make academic findings.

[20] It does not detract from the above that as part of his pleadings, the respondent also pleaded that "*the police and the prosecution*" had failed to take certain steps once he was brought to court after his arrest. The respondent pleaded in paragraph 21.4 (it should have been numbered paragraph 22, underlining added):

> "*In failing to bring the true facts to the attention of the court and opposing bail the police alternatively the prosecution alternatively both the police and the prosecution acted wrongfully and unlawfully.*"

[21] This formulation is wide enough to cover a second delict after the unlawful arrest, but is an unnecessary complication as set out in *Mahlangu* and *De Klerk* and in the context of claims in the alternative. The importance of the averment is that it covers the reasons why remoteness of damages would not come into play.

[22] If the applicant believed that part of the damages (if awarded) needed to be paid by the National Director of Public Prosecutions, it had remedies available to it. The remedies are expressly referred to in *De Klerk*. Paragraph 82-84 of that judgment accepts the trite proposition that from amongst multiple wrongdoers, a plaintiff may select whom to proceed against. See too section 2(1) of the Apportionment of Damages Act. Paragraph 85 of *De Klerk* records that if the defendant seeks a contribution from another person, the *Apportionment of Damages Act* provides for the mechanism. That is trite too. That mechanism in this case is set out in section 2(6) and 2(7) of the Apportionment of Damages Act, as referred to in *De Klerk*. That remedy the applicant has not sought to apply to date. The submissions by the applicant, that the respondent is bound by its pleadings, is correct. So too is the applicant bound by its pleadings.

[23] Instead of seeking a contribution from a joint wrongdoer, one legal team represented the defendants (suggesting no conflict between them) and the defendants delivered a joint plea without seeking an apportionment.

[24] It is further alleged that I made the following error:

> "*The learned Judge further erred in his finding at paragraph 32 of the judgment, that the plaintiff bore the onus to show legal causation and succeeded*."

[25] That statement is not a fair summary of my judgment, paragraphs 18-32, especially paragraphs 24, 25, 27-29, and 32. It was never the applicant's case before me that the damages were too remote to be recovered.

<u>The second theme: the arrest was rational and lawful</u>

[26] I allegedly incorrectly found that the investigating officer acted irrationally and thus unlawfully in arresting the plaintiff. There really are two grounds for the submission:

[26.1] The first is that I allegedly understood the facts wrong. The applicant alleges that the complainant had pointed the respondent out as the man who was in her room, and the complainant's original statement (a statement that must have guided the investigating officer in his arrest), is not common cause;

[26.2] The second is that I erred in applying the rational test.

[27] In addition to these two main issues, several other points are taken, with no suggestion that the alleged errors would have had an impact on my finding that the investigating officer acted irrationally and thus unlawfully in arresting the plaintiff. I list these points taken:

[27.1] I allegedly erred in stating that the complainant advised the investigating officer that she would not be able to identify her assailant on 17 May 2017, as she made the statement on 6 May 2017. I made an error in recording the date, it occurred on a third date, 8 May 2017. It is an immaterial error, as the real issue is that the complainant advised the investigating officer that she would not be able to identify her assailant;

[27.2] I allegedly erred in not referring to the injuries found on the respondent's hand as recorded on a J88 form (after his arrest). It is with respect a non-issue, as the real issue is that the investigating officer took no steps (on his version) to compare the respondent's injuries with the injuries the complainant described in her statement to the police. Had he done so, he would have found a disconnect, but that is not the issue in testing the rationality of his earlier actions;

[27.3] In his heads of argument, the applicant's counsel took issue with the date of the call when the complainant called the investigating officer to inform him that she had learnt that the respondent had an injured hand. I recorded the date as 19 May 2017, the counsel avers that it was 18 May 2017. I assume, without having confirmed the fact, that I made an error. If so, it would be an immaterial error as the issue is that the call preceded the arrest;

[27.4] I recorded that the DNA evidence would later exonerate the respondent. I address it here, as I am not certain where the applicant wishes to further the point and as the chronology in the heads of argument suggests that I should do it here. The point taken in the application for leave was that "… *in actual fact, there are no DNA samples which were found and this was never the evidence by any witness in the criminal trial*". This is wrong. The evidence before the magistrate was that such evidence was collected at the scene, and the investigating officer testified that DNA evidence was collected. The point taken in argument was that the DNA evidence did not state that the respondent was not the perpetrator, only that the person's blood that was found was not identified as the respondent's. Hence, it was argued, the respondent was not exonerated afterwards. With respect, it is a non-issue.

[28] Reverting to the main issues, the first was that I allegedly understood the facts wrong. The first fact that I allegedly understood wrong, is that I erred in dealing with the injuries that the suspect sustained when committing the crime for which the plaintiff was arrested as common cause. I did not err:

[28.1] I based my findings on the injuries on the witness statement by the complainant. That statement was common cause and dealt with in evidence. The witness statement was explicit that the complainant bit the fingers of her assailant. On the evidence in her statement, she could only have referred to her assailant's fingers whom she experienced was trying to grab her tongue when she bit them. I still maintain that the injuries, known to the investigating officer at the time of the arrest were common cause;

[28.2] There has been no suggestion that the complainant changed her version prior to the arrest to one where her assailant did not have his fingers in her mouth, or not only having had his fingers in her mouth but also the rest of his hand (or other parts of his hand);

[28.3] In my view, the more that the applicant now seeks to distance itself from the witness statement by the complainant, the more irrational the arrest would become;

[28.4] The investigating officer (on his version) did not even consider the actual injuries (as later objectively shown on the J88 form) to determine if they accorded with the complainant's version and/or being in accordance with injuries caused by biting. It is now known what the injuries were, and on which parts of the hand they were. The investigating officer acted irrationally in effecting the arrest, and this is one reason for that finding, as set out in my judgment paragraph 14-15. The evidence was right before him, and he ignored it (on his version); and

[28.5] The applicant led no evidence about the various injuries recorded on the J88 form on the respondent's hand, especially which ones were of recent origin. It is of no moment, as in considering the rationality of the arrest that had already taken place, such evidence (even if it had been in favour of the applicant), would be irrelevant in assessing the rationality of the arrest. The investigating officer (on his version) did not even look at the hand.

[29] The second alleged factual error that I made is that I recorded the evidence incorrectly that the complainant only identified the respondent as a person with an injury to his hand after she received this information. My summary of the evidence was in accordance with the common cause fact that she earlier had told the investigating officer that she would be unable to identify her attacker.

[30] I made no error in my summary of the evidence. The only witness was the investigating officer who testified through an interpreter. Much of the evidence below is hearsay evidence, but it is the only evidence that the applicant placed before the court to justify the arrest and detention of the respondent:

[30.1] The investigating officer testified that when he and the complainant were on their way to the respondent's house, she told him that her attacker had shielded his face during the assault;

[30.2] During his evidence-in-chief, the investigating officer said that when they arrived at the respondent's house, the complainant identified him and said "*this was the suspect*". She identified him by having regard to his bandaged left hand. The investigating officer was asked by the defendants' counsel if the complainant said that the respondent was the person who was in her house, or "*what was she saying exactly*". The initial answer to those questions was that she said this was the person who was in my house. i.e. the respondent. This was however not the end of the matter, as the witness was then asked an obvious question, how could she have known that he was the person who was in her house as the perpetrator's face was covered with a balaclava.[5] The answer was that she was told by other people that the person with the features that she mentioned (described to them) is the respondent. What these features were, were not examined in evidence-in-chief. (In context, none had been described in the complainant's statement, who could not clearly see her attacker. "Features" could mean no more than a reference to an injury). It is wrong to ignore the explanation given (and the remainder of the evidence) and to argue that the complainant pointed out the respondent as the man who had attacked her in her room;

[30.3] A little bit later the investigating officer testified, still in evidence-in-chief, that upon the respondent having been pointed out, he had to arrest the respondent as his features where those described by the complainant. No evidence was led that she had described any features to him. What these alleged features were, was again not examined in evidence-in-chief. It is a subtle change to the version that unidentified persons identified the respondent from the description of the complainant;

[30.4] Later, the investigating officer testified, still in evidence-in-chief, that he opposed the bail application as the police were awaiting the fingerprint results to see if there were other (criminal) cases

[5] Nothing turns on the formulation, as the evidence was that the assailant's face was partially covered.

outstanding against the respondent, and as the case was for serious charges of housebreaking and attempted rape. He hoped that they had a strong case, as the respondent was previously charged with housebreaking. He made no mention of placing value on the pointing out as the reason for opposing bail;

[30.5] Cross-examination then commenced. Under cross-examination, the investigating officer was first asked to address the complainant's original statement dated 6 May 2017. The statement reflected that the assailant was an unknown person, wearing a cap and with his face half-covered with a polo neck piece of clothing. In the struggle, he put his fingers in her mouth as if to pull out her tongue, and she bit his fingers. He did not respond to state that the complainant changed her version, or that he had no knowledge of her statement at the time of arrest;

[30.6] The investigating officer was thereafter asked to read from the investigating diary, the entry dated 8 May 2017, where the complainant advised the investigating officer that she could not identify the suspect if she were to see him again. He did not respond to state that the complainant changed her version;

[30.7] After being asked to deal with the discrepancies in the time of arrest in the official documents, the place of arrest in the plea, and his evidence about place and the time of the arrest, it was put to him that he recorded that the respondent had no visible injuries. His response was that the respondent had a bandage around his hand. He did not look at the injury, but asked what had injured the respondent "*on the fingers*";

[30.8] Thereafter, he was asked to explain what he meant by other people who identified the respondent. The investigating officer testified that the complainant called him and said that she had an idea of who had attacked her. He asked her about her statement that her attacker's face was covered. The complainant told him that she had told other

people what had happened to her. Those people said to her that the respondent had such injuries. The evidence also was that this was a comment not by a group of people, but by a single, unidentified male person. The conflict was not clarified. The investigating officer did not interview the person or persons, before or after the arrest. Thus, according to the complainant, she was told that the respondent had injuries to his hand. He did not look at the respondent's injuries when he arrested him;

[30.9] He followed up the results of the fingerprint analysis on 24 December 2017. He asked the complainant if she knew the person whose fingerprints were found in her room. He was surprised when the complainant said that she did not know that person, but that she knew it was the respondent who was in her room. He was surprised as it conflicted with her earlier version that she would not be able to identify the perpetrator. He thus always knew that she had not pointed out the respondent as the man who was in her room.

[31] I shortened the recordal of the evidence in the original judgment, but my summary is correct. I made no error. The positive averment by the applicant that the complainant pointed out the respondent as the person who was in her room, is incorrect and contrary to the evidence.

[32] The last issue is that I allegedly misunderstood the law and/or applied it incorrectly in finding that the arrest of the respondent was irrational. Three matters were raised:

[32.1] The applicant's criticism of my judgment as one where I allegedly misunderstood the test in evaluating the rationality of the arrest by apparently conflating that test and the test to obtain a conviction (in a criminal trial) wherein the standard of proof is beyond reasonable doubt. I did not make such an error;

[32.2] The applicant contends that I erred in comparing the facts in the present case with the facts in *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA). I addressed the

rationality test in my judgment paragraphs 11-14, and 16. I referred to case authority. As part of my judgment, I referred to *Swart* where the SCA found that it was irrational to arrest a suspected drunk driver on the facts of that case. The facts in that case included an arrest after a motorcar collision not involving another vehicle, and where someone, who appeared to be the driver, smelled of alcohol. The SCA held that such an arrest was irrational. I did not err in referring to *Swart*;

[32.3] It is alleged that my finding that the applicant failed to discharge the onus to show that the respondent's arrest was lawful, was "*not supported by any evidence*". I made the only finding a court could have made on the evidence.

The third theme: the affidavit by the investigating officer in opposing bail was incorrectly dealt with

[33] The first point is that I allegedly erred in finding "*that the police lied about the record of SAP69*". I made no such finding. The second point is that "*the case of escape from lawful custody appears in the record*". It does not. I dealt with this in my judgment in paragraph 20. The third point is that "*it was not the plaintiff's case that the police misled the Court with an intention to unlawfully keep the plaintiff in custody*". It was very much the plaintiff's case that the police, in failing to bring the true facts to the attention of the court and opposing bail acted wrongfully and unlawfully. The addition of "*with an intention to unlawfully keep the plaintiff in custody"* has been introduced by the applicant. It did not form part of my findings, or the case of the respondent. The fourth point is that "*the investigating officer reasonably relied on a report that appeared on the Crime Administration System and informed the Magistrate in good faith of what was contained in the record*". The report does not bear out this version. I dealt with this in my judgment in paragraph 20.

[34] The investigating officer was cross-examined on the opposition to the granting of bail, and his affidavit used therein. He declared that there was a pending Krugersdorp case against the respondent for escaping from custody. The investigating officer made no enquiries about the entry on the so-called profile

upon which he relied. The profile reflected under its status that the entry was cancelled, there was no such pending case. The investigating officer conceded to this in cross-examination. That the statement is false, is irrefutably clear from the evidence. It is immaterial to the question if the court had been provided with correct information to determine the application for bail if the investigating officer was merely negligent in reading the report on which his affidavit was based, or if he acted intentionally. The line of re-examination was whether errors in the so-called profile were common, but reliability did not address the fact that there was no current case for escaping from custody, as set out in his affidavit opposing bail.

[35] The fifth point is that the magistrate could have had reasons not mentioned by him for refusing bail. The fact is he refused bail based on the false affidavit. I dealt with this in my judgment in paragraph 20-22. The sixth point is that the false affidavit was not expressly pleaded. That is true, in that it was a general statement made that the police failed to bring the true facts to the attention of the court in opposing bail, but the matter was fully canvassed in the evidence and the affidavit was addressed in re-examination.

The fourth theme: damages were incorrectly awarded

[36] The last issue in any appeal would be if I correctly calculated the damages that I awarded. The issues raised in the application for leave to appeal were:

[36.1] I allegedly erred in accepting the plaintiff's evidence about his loss of income. The statement that "*no evidence was led in respect of these loss of earnings*" is contrary to the facts of the matter. I dealt with the evidence presented about the loss of income by the respondent in detail in my judgment in paragraphs 5.4 and 55;

[36.2] The general damages I awarded are "*excessive and startlingly disproportionate to awards made in similar cases*". This contention I address next.

[37] Having provided me with not one comparable case in argument, having read my judgment referring to several such comparable cases in paragraphs 56-70.11, the applicant persists to make the baseless submission that the award

for general damages "*is excessive and startlingly disproportionate to awards made in similar cases*". I dealt with this aspect comprehensively (with no assistance from the applicant) and the applicant takes no issue with a single finding I made. I awarded R600 000.00 as at 24 January 2018 in case of about eight-and-half months of detention. The Constitutional Court in *Mahlangu* (a judgment that became available after mine), awarded R550 000.00 to the first appellant (who was tortured) and R500 000.00 to the second appellant in a case with a comparable period of unlawful detention. The appellants were released from custody on 10 February 2006. The court Constitutional Court awarded interest from the date of the High Court decision, 26 September 2014. If the damages were awarded as at 2014, my award is in a similar amount to the amount awarded by the Constitutional Court.

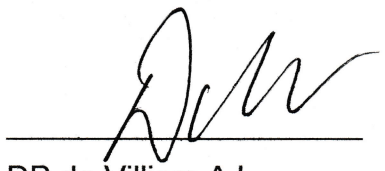
Conclusion

[38] In my view, the application for leave to appeal, has to fail. In my view, it is premised on incorrect recordals of fact and incorrect submissions on law, and there is no measure of certainty that another court will differ from my judgment.

[39] Costs should follow the result.

[40] Accordingly, I make the following order:

1. The application for leave to appeal is dismissed with costs.



DP de Villiers AJ

Heard on: 21 May 2021

Delivered on: 24 June 2021 by uploading on CaseLines

On behalf of the Applicant:	Adv M Mhambi
Instructed by	State Attorney
On behalf of the Respondent:	Mr L Naidoo
	Loagan Naidoo Attorney