

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

**Case No.: 575/09
576/09**

Date heard: 11 – 24 November 2010

Date delivered: 1 April 2011

“REPORTABLE”

In the matters between:

ELWYN DANIEL BOTHA

Plaintiff/Excipient

and

THE MINISTER OF SAFETY AND SECURITY N.O.

First Defendant

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT N.O.**

Second Defendant

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA N.O.**

Third Defendant

**THE NATIONAL PROSECUTING AUTHORITY OF
SOUTH AFRICA**

Fourth Defendant

AND

MORNE YANNICK JANUARY

Plaintiff/Excipient

and

THE MINISTER OF SAFETY AND SECURITY N.O.

First Defendant

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT N.O.**

Second Defendant

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA N.O.**

Third Defendant

**THE NATIONAL PROSECUTING AUTHORITY OF
SOUTH AFRICA**

Fourth Defendant

J U D G M E N T

TSHIKI, J:

SUMMARY

Both plaintiffs have sued the defendants for unlawful arrest and detention. The subject of this exception taken by the first defendant against the plaintiffs' particulars of claim is that they lack averments necessary to sustain a claim or that they are vague and embarrassing. Defendants have contended that our common law does not include a duty on the police official investigating the case to inform the relevant prosecutor that there were no grounds or justification for the plaintiffs' continued detention and indeed no objective facts reasonably linking the plaintiffs to the murder charge against them. It is their further contention that there is no legal duty on the investigator outside of placing a fair and honest statement of the relevant facts before the prosecutor to make representations regarding the grounds or justification for the further detention of the plaintiffs. The Court held that there is a Constitutional duty on the police officers and public prosecutor(s) who are handling the case to ascertain the reasons for the further detention of the suspect and the prosecutor has to place such reasons or lack thereof before Court.

The Court held that the plaintiffs' particulars of claim do not lack averments necessary to sustain a claim and are not vague and embarrassing. Exception was dismissed with costs.

A) INTRODUCTION

[1] Both plaintiffs in case no's 575/2009 (Botha) and 576/2009 (January) were, on 16 March 2008 arrested without a warrant on a charge of murder and were detained in custody until their first appearance in Court on 19 March 2008. On the latter date they were both remanded in custody to 18 April 2008 when, on that date, Mr Botha was released on bail and the charges were withdrawn against Mr January. They are both suing the same defendants for delictual damages arising out of their alleged unlawful arrest and detention up to 19 March 2008 and further detention until their release on 18 April 2008.

Plaintiffs' initial arrest and detention was effected by a policeman and their further detention from 19 March to 18 April 2008, having been applied for by the prosecutor, was authorised by the Magistrate before whom they appeared in Court.

[2] The allegations made by the plaintiffs in the above two matters are almost identical and are directed against the same defendants. The exception by the first defendant to the plaintiffs' particulars of claim in each case is based on the same grounds. Therefore, I have been requested by the parties to prepare one judgment in respect of the two matters and I agree that there would be no prejudice to anyone if I prepare and write one judgment in respect of the two applications. In any event, it would be convenient and cost effective for the parties if I do so.

B) EXCEPTIONS

[3] The controversy between the plaintiffs and the first and fourth defendants arise, and the exceptions relate, to the plaintiffs' allegations regarding the second detention from 19 March 2008 to 18 April 2008. With regards to the second detention, plaintiffs seek to hold the first and fourth defendants jointly and severally liable.

[4] It is the plaintiffs' contention in the particulars of claim that the arresting officer and/or any other unknown policeman involved in the purported investigation against the plaintiff knew, alternatively, ought to have known that

no reasonable objective grounds or justification existed for their subsequent and continued detention. They could easily have ascertained by the taking of simple investigative steps that no such grounds or justification existed but failed to take any such steps. They, therefore, failed in their duty to inform the relevant prosecutors dealing with the matter that there were no grounds or justification and that indeed no objective facts reasonably linking the plaintiffs to the alleged murder. Consequently, plaintiffs contend that the police failed to take any steps whatsoever to ensure that the plaintiffs were released from detention as soon as possible.

[5] As against the second and/or fourth defendants' employees, plaintiffs contend that the prosecutor(s) who dealt with the case and had control over the relevant police docket and who dealt with the plaintiffs from time to time during their court appearances:

- (i) failed in his/her/their duty to acquaint himself/herself/themselves with the contents of the relevant police investigation docket from which it would have been obvious that there were no reasonable grounds or justification for the continued detention of the plaintiffs;
- (ii) failed in his/her/their duty to timeously withdraw the charges against the plaintiffs;
- (iii) failed in his/her/their duty to inform any presiding officer expeditiously that there were no objective facts reasonably linking the plaintiff to the alleged crime of murder;

- (iv) in any event failed in his/her/their duty to ascertain independently that no reasonable grounds or justification existed for the continued detention of the plaintiff;
- (v) failed to take steps to ensure that the plaintiffs were released from detention as soon as possible.

[6] In response to the above allegations in the particulars of claim and in the exceptions, defendants submit that it is the prosecutor who is solely responsible for objecting to the release of an awaiting trial prisoner and to make representations for his further detention to the presiding officer; and there is no legal duty on the investigating officer, outside of placing a fair and honest statement of the relevant facts before the prosecutor, to make representations to the latter regarding the grounds or justification for the continued detention of an awaiting trial prisoner once that prisoner has appeared before Court. Therefore, says the first defendant, the decision on whether to further detain the accused or to oppose bail is that of the prosecutor, and the decision to grant or refuse bail rests upon the exercise of a discretion by the presiding officer.

[7] First defendant therefore contends that the plaintiffs do not make allegations in their particulars of claim which are sufficient to establish a causal link between the conduct of the investigating officer and the plaintiffs' continued detention as awaiting trial prisoners. In the premises, plaintiffs

have failed to allege facts sufficient to sustain a cause of action, alternatively, have drafted particulars of claim which are vague and embarrassing. Therefore, the defendants are unable to fully or properly deal therewith or plead thereto or to appreciate the nature of the plaintiff's claim in that regard.

[8] During the argument of the exception *Mr G.G. Goosen SC* with *Mr P.N. Kroon* and *Ms A Rawjee* appeared for the defendants (excipients) and *Mr C.J. Mouton SC* with *L.D. Ah Shene* appeared for the plaintiffs (respondents).

C) MERITS OF THE EXCEPTIONS

[9] An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action, or the specific defence relied upon.¹

[10] The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.² When an exception is considered for decision by the court the facts alleged in the pleadings are taken as correct and that principle does not

¹Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa*, 5th ed, at 630. See also Rule 23(1) of the Uniform Rules of the Court.

²**Glaser v Heller** 1940 PH F 119 (C) cited in **Kahn v Stuart and Others** 1942 CPD 386 at 391.

extend to facts which on the face of them are manifestly false and so divorced from reality that they cannot possibly be proved.³

[11] In paragraphs 12 – 14 of the particulars of claim both plaintiffs have pleaded similarly as follows:

- “12. Subsequent to his first appearance before a magistrate on 19 March 2008, the plaintiff was further wrongfully and unlawfully detained at the instance of employees of all the defendants until he was released on bail on 18 April 2008, when he was released from detention.
13. The further detention of the plaintiff from 19 March 2008 until 18 April 2008 was wrongful and unlawful in that :
- 13.1 the said Inspector van Zyl and/or other unknown policemen involved in the purported investigation of the matter against the plaintiff:
- (i) knew; alternatively, ought to have known; that no reasonable or objective grounds or justification existed for either the arrest of the plaintiff or his subsequent and continued detention;
 - (ii) could have easily ascertained by the taking of simple investigative steps that no such grounds or justification existed, but failed to take any such steps;
 - (iii) failed in his/their duty to inform the relevant public prosecutor/s dealing with the matter that there were no such grounds or justification and indeed no objective facts reasonably linking the plaintiff to the alleged crime of murder;
 - (iv) failed to take any steps whatsoever to ensure the plaintiff was released from detention as soon as possible;
- 13.2 the prosecutor or prosecutors, whose identities are unknown to the plaintiff, who had control over the relevant police docket and who dealt with the plaintiff from time to time during his several Court appearances until he was released on bail on 18 April 2008 :
- (i) failed in his/her/their duty to acquaint himself/herself/ themselves with the contents of the relevant police investigation docket from which it would have been obvious that there were no reasonable grounds or justification for the continued detention of the plaintiff;
 - (ii) failed in his/her/their duty to timeously withdraw the charge against the plaintiff;

³Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd & Others 1990 (4) SA 749 (N) at 755B

- (iii) failed in his/her/their duty to inform any of the presiding magistrates expeditiously that there were no objective facts reasonably linking the plaintiff to the alleged crime of murder;
- (iv) in any event failed in his/her/their duty to ascertain independently that no reasonable grounds or justification existed for the continued detention of the plaintiff;
- (v) failed to take any steps to ensure that the plaintiff was released from detention as soon as possible.

14.

- 14.1 At all times material hereto the said Inspector van Zyl and/or the other policemen referred to above were employees of the first defendant acting in the course and scope of their employment as members of the aforesaid Service; further or alternatively, as employees of the Government of the Republic of South Africa.
- 14.2 At all times material hereto the aforesaid prosecutor/s was/were employees of the second defendant; further or alternatively, of the fourth defendant; further alternatively, of the third defendant, acting in the course and scope of their employment as such."

[12] In the present case the exception is based on the fact that the pleading concerned lacks averments which are necessary to sustain an action. I say so because it is the contention of the first defendant that *"the Plaintiff(s) has failed to allege facts sufficient to sustain a cause of action, . . ."*. The plaintiffs here have pleaded *inter alia* that the said Inspector Van Zyl and/or other unknown policemen who were involved in the purported investigation of the matter against the plaintiffs:

- "(i) knew, alternatively, ought to have known that no reasonable or objective grounds or justification existed for either the arrest of the plaintiff or his subsequent and continued detention;
- (ii) . . .
- (iii) Failed in his/her duty to inform the relevant public prosecutor(s) dealing with the matter that there were no grounds or justification and indeed no objective facts reasonably linking the plaintiffs to the alleged crime of murder. And failed to take any steps whatsoever to ensure that the plaintiffs were released from detention as soon as possible."

[13] The contention by the first defendant is that there are no facts pleaded which justify the conclusion that the first defendant's employee(s) failed to

take steps as alleged by the plaintiffs with a view to prevent the further detention of the plaintiffs. The argument by first defendant and or defendants fails to take into account that the defendants' employees in this instance had a constitutional obligation not to perform any act which infringes upon the fundamental rights protecting plaintiffs and which are entrenched in the Constitution.⁴ The most pertinent right in this case being section 12 which provides:

“12. Freedom and Security of the person

⁴Sections 7, 8, 10 and 12 of the Constitution of South Africa 1996, which are more relevant to our discussion. The provisions of sections 7, 8 and 10 follow:

“7 Rights

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8 Application

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

...

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.”

- (1) Everyone has the right to freedom and security of the person, which includes the right-
- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.“

[14] It is needless to emphasize that the Constitution⁵ further provides that everyone has inherent dignity and the right to have their dignity respected and protected.

[15] Much as the Constitutional provisions referred to above are apposite and important herein, the provisions of section 39 of the Constitution⁶ are also germane to the present discussion. The section provides:

“39 Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

[16] It has become common knowledge that during the pre-constitutional era the appropriate test for determining the wrongfulness of omissions in delictual

⁵Section 10 of the Constitution of South Africa 1996.

⁶Section 39 of the Constitution of South Africa 1996.

actions for damages in our law was settled.⁷ The issue then was one of reasonableness, determined with reference to the legal perceptions or convictions of the community as assessed by the court. Conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which “shape and, at times, refashion the common law must also reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people”.⁸

[17] The current situation, under the Constitution, in determining whether there was a legal duty on the police officers to act, “... [is] weighing and the striking of a balance between the interests of parties and the conflicting interests of the community. This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the spirit, purport and objects of the Bill of Rights, and the relevant factors must be weighed in the context of a Constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values”.⁹ The government does so through its organs and through legislation particularly the Constitution

⁷**Minister van Polisie v Ewels** 1975 (3) SA 590 (A) at 597A–C, **Minister of Law and Order v Kadir** 1995 (1) SA 303 (A) at 317, **Knop v Johannesburg City Council** 1995 (2) SA 1 (A) at 27G–I and **Government of the Republic of South Africa v Basdeo and Another** 1996 (1) SA 355 (A) at 367E–H.

⁸See MM Corbett on Aspects of the Role of Policy in the Evolution of our Common Law (1987) SALJ 52 at page 67 – quoted by Hefer JA in **Minister of Law and Order v Kadir** 1995 (1) SA 303 (A) at 318F–G.

⁹**Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)** 2001 (4) SA 938 (CC) at 957B–C.

whose provisions are interpreted, applied and ultimately enforced through the Courts.

[18] It follows from the Constitutional provisions above that there is a duty on the state and all its organs not to perform any act that infringes the above rights. This will obviously apply to the conduct of the policemen in the case in issue. In **Carmichele v Minister of Safety and Security**¹⁰ Ackermann *et* Goldstone JJ stated as follows at 959 para [49] – [55]:

“[49] Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirements of foreseeability and proximity. This exercise in appropriate cases will establish limits to the delictual liability of public officials.

... .

[54] Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. . . . The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

[55] This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform. The proper development of the common law under s 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm.”

[19] Any member of the police service should exercise his or her powers in accordance with section 13 of the South African Police Service Act¹¹ (the SAPS Act) which provides:

¹⁰See footnote 9.

¹¹Act 68 of 1995.

“13 Members

(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.

(2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.

(3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.”

[20] What is meant by section 13 of the SAPS Act above is that all police officers must act in accordance with the requirements of the Constitution and in doing so must have regard to, particularly, the fundamental rights of every person they are dealing with in the course of their duties.¹² In **Fose v Minister of Safety and Security** above at paragraph [60] Ackermann J (writing for the majority opinion) stated:

“[60] Notwithstanding these differences, it seems to me that there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. . . ”

[21] I am mindful of the fact that we are not dealing with the merits of the main case but with the merits of the exception raised by the first defendant. It is the clear contention of the plaintiffs that in suing the defendants they rely on, *inter alia*, the provisions of the Constitution as contained in Chapter 2 of the Bill of Rights and even if this is not specifically stated in the pleadings, it can clearly be inferred from the nature and wording of the particulars of claim.

¹²**Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC).

[22] I assume that the first defendant's complaint is primarily based, *inter alia*, on the absence of a specific allegation by plaintiffs in their particulars of claim **that the docket did not contain any information which on the objective facts would justify the plaintiffs' further detention at least up to and until 18 April 2008 when they were released.** In my view, there was no need for the plaintiffs to include those specifics for this information is covered by paragraphs 13 – 15 of the plaintiffs' particulars of claim.

[23] In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action or defence (as the case may be) is disclosed; failing this the exception ought not to be upheld.¹³

[24] A further reason justifying the exclusion is that this is a matter of evidence. In **McKelvey v Cowan NO**¹⁴ it was held as follows:

"It is a first principle in matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action."

This would therefore be a matter to be ventilated by evidence during the trial of the case. Whether or not the plaintiffs can prove all the allegations complained of by the excipients is not a matter for this Court to decide now.

¹³**Pete's Warehousing and Sales CC v Bowsink Investments CC** 2000 (3) SA 833 ECD at 839G also at [2002] 2 All SA 266 (E), **Sun Packaging (Pty) Ltd v Vreulink** 1996 (4) SA 176 (A) at 183D–F and **Lewis v Oeanate (Pty) Ltd and Another** 1992 (4) SA 811 (A) at 817F–G.

¹⁴1980 (4) SA 525 (Z) at 525.

[25] The above is correctly so because in order to disclose a cause of action, the plaintiff's pleading must set out every material fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his or her right to judgment of the Court. "It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."¹⁵

[26] In the present case it can be implied from the plaintiffs allegations in the particulars of claim that first defendant's employees failed to make use of the information in the docket or lack thereof to prevent further detention of the plaintiffs and can be inferred from the pleadings that the plaintiffs' contention is that the docket did not contain any information which would justify the further detention of the plaintiffs beyond 19 March 2008. The necessary facts complained of by the first defendant have been pleaded by the plaintiffs in the manner stated in paragraphs 4 and 5 above. It is clear from the contents of paragraph 5 above, which is exactly the contentions of the plaintiffs in their particulars of claim, that the docket could not have contained the information which could justify the further detention of the plaintiffs beyond 19 March 2008. In other words, the policemen could simply have ascertained from the docket or any other source whether there are any facts or information which could have legally justified the further detention of the plaintiffs. The same holds true about the fourth defendant's employee, the public prosecutor, that he should have made the necessary enquiry with a view to establish the legal justification for the further detention of the plaintiffs beyond 19 March 2008.

¹⁵**McKenzie v Farmers Co-operative Meat Industries Ltd** 1922 AD 16 at 23. See also **South African National Parks v RAS** 2002 (2) SA 537 (C) at 542 E – G.

[27] *Mr Goosen* for the first defendant has argued, as it is also alleged in the notice of exception, that the cause of action sought to be framed by the plaintiffs' allegations unjustly poses a further additional legal duty on the first defendant's employees (the investigators) to assess and evaluate the grounds for the continued detention of the plaintiffs and to inform the public prosecutor of the existence of such justification. It is trite law that on the correct interpretation of sections 8, 10 and 12 of the Constitution, referred to *supra*, before any person can be detained by a police officer exercising public power in terms of a statute or common law, the police officer must assess and evaluate the presence of the grounds or justification for the continued detention. In the present case, the onus being on the first and fourth defendants to justify the further incarceration of the plaintiffs beyond 19 March 2008, they have an evidential burden to show the legality and justification of the plaintiffs' further incarceration for the period in question. In my view, the information they seek from the plaintiffs by way of the exception should be elicited by them by way of evidence at the trial.

[28] In terms of section 39(2) of the Constitution Act¹⁶ where the common law deviates from the spirit, purport and objects of the Bill of Rights the Courts have an obligation to develop it by removing that deviation.¹⁷

¹⁶The Constitution of South Africa 1996.

¹⁷See **Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)** 2001 (4) SA 938 (CC) at 954A.

[29] It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of the section 12(1) of the Constitution which provisions are described in para 11 of this judgment.¹⁸ These provisions, therefore, place an obligation on police officials who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention.

[30] This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case and the law casts an obligation on the police official to do so. In **MVU v Minister of Safety and Security**¹⁹ Willis J held as follows: “It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person’s

¹⁸ Section 12(1) provides that everyone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) . . .
- (d) . . .
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

¹⁹2009 (6) SA 82 (GSJ) at 90A.

detention, this includes applying his or her mind to the question of whether detention is necessary at all". It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all.²⁰ This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to have an informed decision whether or not there is any legal justification for the further detention of the person. The above view was echoed by Froneman J in **Tobani v Minister of Correctional Services NO**²¹ at 323 as follows:

"What I have said thus far about the issue of the unlawfulness of plaintiffs' detention is based squarely on the principle of constitutional legality. This is a clear case of a public power being exercised by part of the executive administration of the State, namely, in this case, the defendant and the servants in the Department of Correctional Services. In these circumstances I think it is correct to approach the matter at the outset from the viewpoint of legality. That is what I understand is called for in terms of the Constitutional Court's decision in the *Pharmaceutical Manufacturers'* case above, and it appears to me that the pre-constitutional common law would have made the same demand, albeit perhaps couched in different terms.

In the *Pharmaceutical Manufacturers'* case Chaskalson P, writing for the full court, emphasised that the exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law (at para [20]) . . ."

[31] It follows from what I have stated above that our Constitutional provisions referred to above make it obligatory for police officers to first establish the legal justification of the further detention of a person so as to relate such information to the public prosecutor and the latter would then, after applying his mind to the matter, be in an informed position whether or not to apply for the further detention of the person in custody. In my view, and in

²⁰**Mvu v Minister of Safety and Security and Another** *supra*.

²¹[2000] 2 All SA 318 (SE) also quoted by Jones J in **Minister of Correctional Services v Tobani** 2003 (5) SA 126 (ECD) at 135 B – C.

practice, it is the police official investigating the case who should be in a position to and must inform the prosecutor, about the strength or otherwise of his or her case. Failure by the police officer to apply his mind in the manner suggested *supra*, could result in the further detention, being contrary to the Constitutional provisions and liable to be declared to be unlawful.²²

[32] Relative to the prosecutors, they owe a duty to carry out their public functions independently and in the interests of the public. In doing so he or she is obliged to act in accordance with the requirements of the Constitution and has to have regard to the rights of the accused person. Such rights include the accused's rights to bail and not to be detained arbitrarily and without just cause. Although the question of bail consideration is pre-eminently a matter for the judicial officer,²³ the information furnished to the judicial officer can but come from the prosecutor. The latter has a duty to place before court any information relevant to the exercise of the discretion with regard to the granting or refusal of bail.²⁴

[33] Prosecutors also have a duty to establish facts which justify the further incarceration of a detained person before he or she can apply to the court for the detainee's further incarceration. One of the methods expected to be used by the prosecutor is to establish from the police official investigating the case,

²²See **Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)** 2001 (4) SA 938 (CC).

²³**Carmichele v Minister of Safety and Security and Another** 2001 (4) SA 938 (CC) at 967 para [72], **S v Dlamini**; **S v Dladla and Others**; **S v Joubert**; **S v Schietekat** 1999 (4) SA 623 (CC) at 641 para [11].

²⁴**Carmichele v Minister of Safety and Security and Another** *supra* at 967E–968A

all the facts which would justify the further detention of the arrested person. He or she has to protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.²⁵ The same holds true in our country especially in view of the principle of legality recognised in section 1(c) of the Constitution which describes the supremacy of the Constitution and the rule of law as one of the foundational values of the Republic of South Africa. The doctrine of legality, which requires that public power should have a source of law, is applicable whenever public power is exercised and the public power must comply with the Constitution which is our country's supreme law.²⁶

[34] In the present case, if the docket contents did not include information justifying the further detention of the plaintiffs herein, the prosecutor would have had a duty to establish from the investigator the facts which would justify the further detention of the plaintiffs. His failure to do so, and in the event that there were no such facts justifying further detention of the plaintiffs, the prosecutor would have acted unlawfully in applying for further detention of the plaintiffs. This view is strengthened by the provisions of section 35(1) of the Constitution which provides that every one who is arrested for allegedly committing an offence has, *inter alia*, the following rights:

²⁵*United Nations Guidelines on the Role of Prosecutors* - Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana, Cuba, from 17 August - 7 September 1990 – quoted in **Carmichele** judgment *supra* at 968D.

²⁶**SWEAT v Minister of Safety and Security and Others** 2009 (6) SA 513 (WCC) at 523 para [29], **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another** 2007 (1) SA 343 (CC) at 372 para [68], [2006] 11 BCLR 1255 at 1281 para [68].

“(a) . . .

. . .

(e) that at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

[35] The question about the chilling effect on how the delictual liability might have on the proper exercise of duties by public servants was answered in **Carmichele** *supra* at 959 – 960 para 49 and the relevant extract is quoted *verbatim* in paragraph 18 of this judgment.

[36] The defendants seek to have been declared exipiable the particulars of claim mentioned in paragraph 10 of this judgment on the grounds of lack of particularity in terms of averments which are necessary to sustain a cause of action, alternatively, they are vague and embarrassing such that the defendants will be unable to fully or properly deal therewith or to plead thereto or at least appreciate the nature of the plaintiffs’ claim. I do not agree, the particulars quoted above are sufficiently comprised with the averments which are necessary to sustain a claim. In my view, defendants will be in a position to plead to those particulars and without any embarrassment. What appears to be lacking in my view is the evidence in the form of *facta probantia* which in any event is not necessary to include in the pleadings at this stage of the proceedings.²⁷

[37] Both in his helpful heads of argument and even during argument in Court, *Mr Mouton* for the plaintiffs contended, *inter alia*, that owing to the factual allegations by the plaintiffs against the various defendants, which

²⁷**Busheiko v Milburn** 1964 (4) SA 648 at 658 A.

would assist the Court in considering whether lack of unlawfulness as well as the existence of and the breach of the duty of care has been established, would need facts which can only be established at the trial after evidence has been adduced and tested. I do not agree, for my approach to the issues involved herein will not deprive the parties of the opportunity of establishing at the trial, by way of evidence, the existence or otherwise of the legal duty and if so whether such duty has been breached by the defendants. My task at this stage is to consider whether or not the plaintiffs particulars of claim with regards to the further detention of the plaintiffs from 19 March 2008 to 18 April 2008, are excipiable. My finding is simply that for the reasons stated *supra* they are not. I am satisfied that the defendants' exception cannot succeed. Both parties are in agreement that there would be no need for the award of costs of more than two counsel.

[38] In the result I make the following order:

The exceptions against the plaintiffs' particulars of claim in case no. 575/2009 and 576/2009 are hereby dismissed with costs. Such costs shall include costs occasioned by the employment of two counsel.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv C.J. Mouton SC and Adv. L.D. Ah Shene instructed by Swarts Attorneys, Port Elizabeth

For the first defendant: Adv G.G. Goosen SC , Adv P.N. Kroon and Adv A. Rawjee instructed by the State Attorney, Port Elizabeth