CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/07
[2008] ZACC 3

JONATHAN ZEALAND Applicant

versus

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

MINISTER OF CORRECTIONAL SERVICES Second Respondent

Heard on : 15 November 2007

Decided on : 11 March 2008

JUDGMENT

LANGA CJ:

[1] This case raises a single issue: Was the detention of Mr Jonathan Zealand (the applicant) between 23 August 1999 and 30 June 2004 as a sentenced prisoner in the maximum security section of St Albans Prison unlawful, for the purpose of a claim for delictual damages? The Supreme Court of Appeal held by a majority that only part of the detention during this period was unlawful.[1] The applicant now applies to this Court for leave to appeal against that order. The Minister for Justice and

[1] *Minister of Justice and Constitutional Development and Another v Zealand* 2007 (2) SACR 401 (SCA); [2007] 3 All SA 588 (SCA).

Constitutional Development and the Minister of Correctional Services (the respondents) oppose the application.

Factual background

[2] On 24 January 1997, the applicant was charged in the regional court, together with at least two other co-accused, with murder, rape and assault with intent to do grievous bodily harm (the first case). That case was postponed several times, with the applicant being remanded in custody. On 15 May 1997, the applicant escaped from custody and was re-arrested and put back into custody on 6 August 1997.

[3] On 20 April 1998, the applicant was convicted of escaping from custody and sentenced to imprisonment of six months, wholly suspended. On 28 September 1998, while still awaiting trial on the first case, he was convicted in the Port Elizabeth High Court of the murder of one Melvin Phillips and of the unlawful possession of a firearm and ammunition, crimes allegedly committed after the applicant's escape from custody but before his re-arrest (the second case). The applicant was sentenced to imprisonment of 18 years for these offences and was imprisoned in the maximum security block at St Albans Prison.

[4] The applicant was granted leave to appeal against his conviction and sentence in the second case to the full court of the Grahamstown High Court. His appeal was successful, with the result that his conviction and sentence in the second case were set aside on 23 August 1999. The Registrar of that High Court, however, negligently

failed to issue a warrant for the applicant's release, or otherwise to inform St Albans Prison of the successful appeal, until 8 December 2004. The applicant was eventually released only on 9 December 2004, more than five years after his successful appeal against his conviction and sentence in the second case.

[5] The Registrar's negligence was admitted by the respondents. Mrs Adendorff, the acting head of the maximum security section of St Albans Prison, testified before the High Court that, had the Registrar properly issued the release warrant after the applicant's successful appeal on 23 August 1999, he would immediately have been transferred to the medium security awaiting-trial section of the prison. That did not occur. Instead, notwithstanding his successful appeal, the applicant remained in detention in the maximum security block – an area which, as Mrs Adendorff explained, housed only convicted and sentenced prisoners – until his release on 9 December 2004.

[6] Between 23 August 1999 and the applicant's release, the first case was repeatedly postponed in the regional court, until the charges were finally withdrawn on 1 July 2004. The record of appearances and remands in the first case shows that, in respect of the overall majority of the postponements after he was sentenced in the second case on 28 September 1998 (including those after his successful appeal), the clerk of the regional court was directed by the St Albans Prison authorities, by way of the appropriate forms,[2] that the applicant was not to be released because he was a

[2] Form G344.

sentenced prisoner. On most occasions, the presiding magistrates who ordered the postponements remanded the applicant in custody at St Albans Prison by way of warrants for detention.[3] Notably, and again despite the applicant's successful appeal in the second case during August 1999, it was subsequently recorded on at least five occasions that he was to be held in custody because of the 18 year sentence of imprisonment imposed upon him on 28 September 1998.

[7] The record in the first case also reveals that on 11 October 2001 an order was made by Magistrate Allers that the case be postponed and that the applicant be released on warning. In addition, the relevant form contains the inscription that the applicant was to be released on warning. A warrant of detention, which is normally issued by a presiding officer following a remand in custody, was not issued. However, for reasons that are not apparent on the record, the applicant was not released. Instead, he was returned to the maximum security section of St Albans Prison and, at his very next appearance on 29 October 2001, a different magistrate again remanded him in custody.

The High Court

[8] The applicant sued the respondents in the Port Elizabeth High Court for delictual damages arising out of his alleged unlawful detention. The respondents conceded that the applicant was unlawfully detained between 1 July 2004, when the charges against him in the first case were dropped, and 9 December 2004, the date of

[3] Form J7. These warrants of detention are addressed to the prison and contain an instruction to detain.

his final release. By agreement therefore, the only dispute before the court was whether the applicant's detention for the period 23 August 1999 until 30 June 2004 was unlawful. The other elements of delictual liability, including fault, contributory negligence and quantum of damages, were to be considered only after the lawfulness of the detention had been decided upon.

[9] On the basis of his successful appeal in the second case, the applicant argued that his detention had been unlawful. The respondents countered that, save for the period from 1 July 2004 until 8 December 2004, the applicant was detained as a prisoner awaiting-trial in the first case, in terms of appropriate warrants of detention issued by magistrates on the occasion of the various postponements of that case between 24 January 1997 and 30 June 2004.

[10] Van der Byl AJ held that the applicant had been unlawfully detained for the entire period. The detention was not justified by the detention warrants which, in the circumstances, served no purpose other than to require the applicant to be returned to court on the dates to which the matter was repeatedly postponed. The substantive reasoning for this conclusion is captured in the following paragraph of the judgment:

> "The [applicant] was, had it not been for the registrar's failure to inform the prison authorities of the outcome of the [applicant's] appeal by way of a warrant of liberation or otherwise, at all times entitled to the same treatment as his co-accused [in the first case], but was clearly treated otherwise in that he was detained in maximum security, that he was subjected to the provisions of the two laws relating to correctional services insofar as they relate or related to sentenced prisoners and that

> he was, notwithstanding a number of orders that he be released on warning, not so released as opposed to some of his co-accused who had indeed been so released".[4]

The respondents appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal

[11] The Supreme Court of Appeal was divided. The majority judgment, written by Snyders AJA with Farlam and Combrinck JJA concurring, rejected the reasoning of the High Court and concluded that the applicant had been unlawfully detained for part of the disputed period only, that is, from 11 October 2001 until 30 June 2004. They held that his detention from 23 August 1999 until 10 October 2001 was lawful.

[12] The majority reasoned that every exercise of the executive power of arrest and detention had to comply with the principle of legality. It held that after the successful appeal in the second case on 23 August 1999, any possible legal authority to detain the applicant further had to derive from the first case, in respect of which he was still awaiting trial. The applicant's continued detention prior to 11 October 2001 was in terms of a magistrate's order remanding him in custody. Such an order is lawful. Continued detention only becomes unlawful from the time when the order is set aside, as it was on 11 October 2001 when a magistrate ordered that the applicant be released on warning.

[4] *Jonathan Zealand v The Minister of Justice and Constitutional Development and Another* Case No 3968/05 of the Port Elizabeth High Court, 22 June 2006, unreported, at 98-9.

[13] That order releasing the applicant on warning could only be lawfully cancelled by a court acting in terms of sections 68, 72(4) and 72A of the Criminal Procedure Act.[5] At the applicant's next hearing on 29 October 2001, the magistrate who again

[5] Act 51 of 1977. Section 68 provides–

> "(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that–
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> (a) the accused is about to evade justice or is about to abscond in order to evade justice;
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> (b) the accused has interfered or threatened or attempted to interfere with witnesses;
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> (c) the accused has defeated or attempted to defeat the ends of justice;
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> (d) the accused poses a threat to the safety of the public or of a particular person;
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> (e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
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> (f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or
>
> (g) it is in the interests of justice to do so,
>
> issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.
>
> (2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that–
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> (a) he or she has reason to believe that–
>
> (i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice;
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> (ii) the accused has interfered or threatened or attempted to interfere with witnesses;
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> (iii) the accused has defeated or attempted to defeat the ends of justice; or
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> (iv) the accused poses a threat to the safety of the public or of a particular person;
>
> (b) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
>
> (c) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to release the accused on bail; or
>
> (d) it is in the interests of justice to do so,

remanded him in custody did not comply with these sections. Accordingly, the applicant's release on warning was not lawfully cancelled and the principle of legality was breached. According to the majority judgment, it follows that the applicant was unlawfully detained from 11 October 2001 until 30 June 2004.

[14] In reaching these conclusions, the majority rejected two contentions advanced in favour of the applicant. The first, in essence, was that the detention after 23 August 1999 was unlawful because the magistrates' orders remanding him in custody after that date were made in ignorance of his successful appeal in the second case and, accordingly, on the basis of a mistaken belief that he was still serving a sentence. The majority's view was that this line of reasoning incorrectly assumed that had the magistrates known the true facts they would have released the applicant on bail or warning. That assumption could not be made in the circumstances.

> issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail."

Section 72(4) provides–

> "The court may, if satisfied that an accused referred to in subsection (2)(a) or a person referred to in subsection (2)(b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months."

Section 72A provides–

> "Notwithstanding the provisions of section 72(4), the provisions of section 68(1) and (2) in respect of an accused who has been granted bail, are, with the necessary changes, applicable in respect of an accused who has been released on warning."

[15] The second contention focused not on the applicant's detention per se, but on his detention as a sentenced prisoner in maximum security, together with persons convicted of serious criminal wrongdoing. It was unlawful, so the argument went, to detain the applicant in maximum security and to treat him no differently to sentenced prisoners when he was merely awaiting his trial. The majority held that the lawfulness of a detention arises from the court order authorising it, not from the place where and manner in which it is carried out. Thus, detaining someone contrary to his or her status as "awaiting-trial" or "sentenced" cannot affect the lawfulness of a detention. The majority held further that, although redress may be claimable for being detained at the wrong facility, this question was beyond the ambit of what the court had been asked to decide. This was because the applicant had pleaded only that the unlawfulness of his detention arose from his successful appeal in the second case and failed to mention his detention at the wrong section of St Albans Prison.

[16] The minority judgment, written by Ponnan JA with Howie P concurring, accepted the second of the two contentions rejected by the majority and consequently agreed with the High Court that the detention had been unlawful for the full period. According to it, the applicant's status changed on 23 August 1999 from that of a sentenced prisoner to an accused person awaiting trial who became entitled to claim immunity from any additional infringement on his liberty which was not an incident of his changed status. That he remained in detention as a sentenced prisoner in a maximum security facility was an unwarranted, additional encroachment upon his liberty; it was harsher treatment to which other awaiting-trial prisoners were not

subjected, solely because of the negligence of the Registrar of the Grahamstown High Court. It was furthermore unnecessary to secure his attendance at court. It therefore amounted to a form of punishment and was illegal.

[17] To sum up, the Supreme Court of Appeal by a majority held that the detention of the applicant for the period 11 October 2001 until 30 June 2004 was unlawful, but that the detention between 23 August 1999 and 10 October 2001 was lawful. It is against this judgment that the applicant seeks to appeal.

The parties' submissions

[18] The applicant argues that his detention was unlawful in its entirety and that the approach of the majority of the Supreme Court of Appeal was incorrect for three reasons. First, the applicant's detention as a sentenced prisoner in maximum security breached the constitutional principle of legality, because it was neither authorised by law nor in accordance with law. Second, the detention unreasonably and unjustifiably infringed his right to freedom and security of the person, and specifically his right not to be deprived of freedom arbitrarily or without just cause, in terms of section 12(1) of the Constitution. Third, the detention was unlawful because it flowed from the breach of positive duties on state officials to protect the rights of vulnerable prisoners, which were owed to the applicant in this case.

[19] The respondents advance, in essence, two arguments in reply. The first is a procedural objection that the applicant is unfairly attempting to make out a new case

on appeal, and that if this Court decides the case as the applicant now presents it, the respondents' right to a fair public hearing in terms of section 34 of the Constitution will be violated. They assert that the applicant merely argued before the High Court that his detention in itself was unlawful; he did not object to the place and manner of that detention. He now raises three grounds of appeal that were not raised before the lower courts. In consequence, there is a lack of necessary facts in evidence before this Court for it to reach a proper decision without unfairly prejudicing the respondents.

[20] The second argument is that the majority of the Supreme Court of Appeal was correct to hold that the applicant's detention per se was justified by the series of magistrates' orders remanding him in custody. Any assertion that the magistrates' possible ignorance of the applicant's successful appeal vitiated those remand orders, overlooks the fact that the applicant had been lawfully remanded in custody as an awaiting-trial prisoner before his conviction in the second case. Accordingly, on the basis of these two lines of reasoning, the application for leave to appeal should be dismissed.

The legal issue

[21] I stated at the outset that this case raises a single issue: whether the applicant's detention between 23 August 1999 and 30 June 2004 as a sentenced prisoner in the maximum security section of St Albans Prison was unlawful for the purpose of delictual damages. That issue may be framed more generally as follows: Is it lawful to detain a person as if he or she were a convicted prisoner in circumstances where

(i) the ostensible basis for his or her detention is absent inasmuch as a court of law has upheld his or her appeal against conviction and sentence, but (ii) he or she is awaiting trial on other charges in relation to a separate offence in respect of which he or she has not been convicted or sentenced?

Leave to appeal

[22] The question whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in section 12(1) of the Constitution is a constitutional matter. In light of the view I take of the matter and for the reasons that will follow in due course, the application for leave to appeal should be granted. It will however be convenient to deal first with the procedural objections raised by the respondents.

The respondents' procedural objections

[23] I do not agree that the applicant attempted to present an entirely new case on appeal. It is true that both his particulars of claim and his reply to the respondents' request for further particulars for trial before the High Court were somewhat equivocal.[6] Nevertheless, it is clear from the judgments of both the High Court[7] and

[6] In his particulars of claim, the applicant states at para 17 that "[a]s a result of the breach of the legal duty and negligence referred to above, plaintiff *was unlawfully detained at the St Albans Prison*"; in his reply to the respondents' request for further particulars, the applicant states at para 1.3 that "[i]t is plaintiff's case that despite the alleged warrants he *was unlawfully detained in St Albans Prison*". (Emphases added.) Both statements are equivocal between the two subtly different causes of action: whether the detention was unlawful per se, or whether its manner and place were unlawful.

[7] In the High Court judgment, above n 4 at 94, Van der Byl AJ states that counsel for the applicant argued that the remand warrants did not render his detention lawful in part due to the fact that–

> "the plaintiff was during the period 23 August 1999 until his release on 9 December indeed *detained and treated as a sentenced prisoner* on the warrant issued in respect of the 18 years imprisonment imposed upon him . . . ."

Supreme Court of Appeal[8] that the applicant advanced the argument that his detention as a sentenced prisoner in the maximum security section of St Albans Prison, and not merely his detention in itself, was unlawful. I accordingly disagree with the finding of the majority that whether the applicant was detained contrary to his status or at the wrong facility were matters that fell outside the ambit of what that court had to decide.[9]

[24] There is another, more important reason why this Court should rule in the applicant's favour. The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause,[10] as well as the founding value of freedom.[11] Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.

[25] This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful.[12] Thus, once the claimant establishes that an interference has occurred, the

[8] The minority judgment of Ponnan JA makes this clear. See above n 1, at paras 25 and 28.

[9] Id at para 19.

[10] Section 12(1) of the Constitution.

[11] Sections 1(a) and 7(1) of the Constitution.

[12] See, for example, *Ingram v Minister of Justice* 1962 (3) SA 225 (WLD) at 227; [1962] 3 All SA 76 (W) at 79; *Boland Bank Bpk v Bellville Munisipaliteit en Andere* 1981 (2) SA 437 (C) at 444; [1981] 2 All SA 9 (C) at 14; *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) at 559; [1982] (4) All SA 153 (C) at 155; *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589; [1986] 2 All SA 428 (A) at 443; *During NO v Boesak and Another* 1990 (3) SA 661 (A) at 673-4; [1990] 2 All SA 347 (A) at 355; *Masawi v Chabata and Another* 1991 (4) SA 764 (ZH) at 771-2; [1991] 4 All SA 544 (ZH) at 550; *Minister of Justice v*

burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*,[13] the Supreme Court of Appeal again affirmed that principle,[14] and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the rei vindicatio a useful analogy.[15] The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant.[16] There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.

[26] Even if the applicant can be said to have altered his cause of action (which I do not accept to be the case), no prejudice will be suffered by the respondents if this Court decides the case as it has now been presented. That is so, because (i) the question of the lawfulness of the applicant's detention as a sentenced prisoner in a

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Hofmeyr 1993 (3) SA 131 (A) at 153; [1993] 2 All SA 232 (A) at 244; *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 520; [1995] 3 All SA 98 (C) at 98; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 (4) SA 168 (T) at 172; and *Bentley and Another v McPherson* 1999 (3) SA 854 (E) at 857; [1999] 2 All SA 89 (EC) at 91.

[13] 1990 (1) SA 280 (A); [1990] 1 All SA 425 (A) (*Matshoba*).

[14] Id at 284 and 427.

[15] Id at 285-6 and 428.

[16] Id at 286B-C and 428.

maximum security facility was canvassed before both the High Court[17] and the Supreme Court of Appeal,[18] and (ii) there is sufficient evidence before this Court properly to decide the case.

Alleged evidentiary short-comings

[27] It is necessary to expand on this last point. The respondents argue that there are three evidentiary short-comings that must prevent this Court from deciding the case. The first concerns the question why the applicant himself failed to raise the matter of his successful appeal with any of the several magistrates who postponed his case, or with counsel appearing at these hearings. This question, however, has no bearing on the lawfulness of the applicant's detention; though it may possibly have a bearing on an enquiry as to whether there was contributory negligence and on the quantum of damages. The second alleged evidentiary short-coming concerns the possible

[17] See the argument advanced by the applicant's counsel, summarized above n 7. Counsel for the respondents submitted in reply before the High Court, above n 4 at 95, that–

> "the plaintiff's detention as a sentenced prisoner and his detention as an awaiting trial prisoner should be treated as separate issues and that his detention as a sentenced prisoner and the treatment he received as such are to be regarded as irrelevant."

Van der Byl AJ considered these competing arguments and held, at 98, that the applicant "was at all relevant times detained and imprisoned in terms of his perceived sentence, *and, I add, treated as a sentenced prisoner*." (Emphasis added.) He then went on to hold, at 98-9, that–

> "[t]he plaintiff was, had it not been for the registrar's failure to inform the prison authorities of the outcome of the plaintiff's appeal by way of a warrant of liberation or otherwise, at all times entitled to the same treatment as his co-accused, but was clearly treated otherwise *in that he was detained in maximum security, that he was subjected to the provisions of the two laws relating to correctional services insofar as they relate or related to sentenced prisoners* and that he was, notwithstanding a number of orders that he be released on warning, not so released . . . ." (Emphasis added.)

All of this clearly establishes that the question of the applicant's detention *in a particular manner and place* was canvassed before the High Court and formed a core part of the judge's reasoning.

[18] This again is clearly established by the reasoning of Ponnan JA's minority judgment, above n 1 at paras 25 and 28.

question of the applicant's membership of a gang while in prison and how he acquired his tattoos. This is also irrelevant to the lawfulness of his detention.

[28] The third alleged short-coming concerns the relative physical conditions in the maximum and medium security sections of St Albans Prison. It will be convenient to consider this question together with the merits of the case, to which I now turn.

The right not to be deprived of freedom arbitrarily or without just cause

[29] The applicant argues that his detention unreasonably and unjustifiably infringed his rights under section 12(1)(a) of the Constitution. That section provides:

> "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".

The threshold question that arises under these provisions is whether the applicant has been "deprived of freedom" in any way. In my view, for the reasons that follow, he clearly has.

Deprivation of freedom

[30] As mentioned above, Mrs Adendorff's evidence established, first, that only convicted and sentenced prisoners were kept in the maximum security section of St Albans Prison and, second, that had the High Court Registrar informed the prison of the applicant's successful appeal in the second case, he would immediately have been transferred to the medium security awaiting-trial block of the prison. The difference

between the two prison sections is of great significance. It reflects the fundamental difference in status between, on the one hand, persons who are merely awaiting the completion of their trials, and on the other hand, persons who have been convicted of a crime and consequently sentenced to punishment by a court of law. Crucially, the former bear the right to be presumed innocent; the latter do not. Respect for fundamental human dignity, which is entrenched in our Constitution, demands that this fundamental difference in status be always recognised, and that it be reflected in prisons wherever possible. Indeed, the Republic of South Africa has an international obligation to do so in terms of article 10(2) of the International Covenant on Civil and Political Rights,[19] (ICCPR) which provides:

> "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons."

[31] The distinction is also recognised in our correctional services statutes. Thus, while sentenced prisoners are restricted in relation to telephone calls they may make and visits they may receive, and are required to wear prison dress, sections 82 and 83 of the Correctional Services Act 8 of 1959[20] provide that no such restrictions or requirements exist in relation to unsentenced prisoners. Chapters 4 and 5 of the Correctional Services Act 111 of 1998,[21] which commenced on 31 July 2004, draw even more significant distinctions between the two classes of prisoner. Unsentenced

[19] South Africa ratified the International Covenant on Civil and Political Rights on 10 March 1999.

[20] The Correctional Services Act 8 of 1959 remained in force until 31 July 2004, when it was repealed and replaced in material respects by the Correctional Services Act 111 of 1998. The former Act, therefore, is applicable for the entire period under consideration.

[21] Id.

prisoners may be subjected only to those restrictions that are necessary for the maintenance of security and good order in the prison and must, where practicable, be allowed all the amenities to which they could have access outside the prison.[22]

[32] The applicant, by being detained as a sentenced prisoner in maximum security, was denied his legal entitlement to these amenities. He was detained in accordance with a legal status that is characterised by a lesser set of legal rights and liberties (which excluded the right to be presumed innocent) than that to which he was rightly entitled. That deprivation of legal rights and liberties must amount to a deprivation of freedom.

Arbitrary or without just cause

[33] The next stage of the enquiry is whether that deprivation was "arbitrary or without just cause" in terms of section 12(1)(a). It is by now well established in our constitutional jurisprudence that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivations. As O'Regan J said in *S v Coetzee*:[23]

> "[There are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom [the substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [the procedural component]. . . . [O]ur Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of

[22] Id section 46.

[23] 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC); 1997 (1) SACR 379 (CC) (*Coetzee*).

> freedom for acceptable reasons, may it do so in a manner which is procedurally unfair."[24]

[34] In my view, in detaining the applicant as a sentenced prisoner in maximum security, the state failed to comply with the substantive component of the section 12(1)(a) right, for the following reasons. Following his successful appeal in the second case, the applicant was treated as a sentenced prisoner when he was not in fact sentenced, and was remanded into maximum security when he had no conviction of any serious criminal wrongdoing. The only possible legal basis on which to justify any deprivation of the applicant's freedom at all was the fact that he was still awaiting trial in the first case. That, however, was insufficient to justify treating him as if he were convicted and sentenced. This additional encroachment on his liberty was undoubtedly greater than was necessary to secure the applicant's attendance at trial. Moreover, other prisoners of his class – those awaiting their trials in detention at St Albans Prison – were not subjected to the same treatment. This harsher, differential treatment may therefore properly be described, in words of Innes CJ, as a form of "punishment".[25] It follows that the deprivation of freedom inflicted upon the applicant was undoubtedly "without just cause" in terms of section 12(1)(a) of the Constitution. Furthermore, the fact that the deprivation was in no way rationally connected to an objectively-determinable purpose[26] must mean that it was also "arbitrary" within the meaning of that provision.

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[24] Id at para 159, quoted in *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 18 (*De Lange*).

[25] *Whittaker v Roos and Bateman, Morant v Roos and Bateman* 1912 AD 92 at 121 (*Whittaker*).

[26] See *De Lange* above n 24, at para 23.

[35] It would seem, therefore, that the right not to be deprived of freedom arbitrarily or without just cause has been infringed, and thus that the applicant's detention was unlawful. The respondents however resist this conclusion on two grounds. First, they argue that the majority of the Supreme Court of Appeal was correct to hold that the applicant's detention was justified by the series of magistrates' orders remanding him in custody. In addition, they advance a final procedural objection in the form of a third alleged evidentiary short-coming concerning the relative actual physical conditions in the maximum and medium security sections of St Albans Prison. I deal with both submissions below.

The relevance of the relative factual conditions in maximum and medium security

[36] The respondents argue that there is no absolute duty on prison officials to segregate awaiting-trial and sentenced prisoners; instead, officials have a discretion to place awaiting-trial prisoners with sentenced prisoners in exceptional circumstances having regard to the actual conditions in a prison.[27] However, they continue, there is insufficient evidence before this Court concerning the relative physical conditions in the maximum and medium security sections of St Albans Prison. The only evidence in the record on this point is Mrs Adendorff's untested oral statement before the High Court that–

[27] They rely, for this proposition, on section 27 of the Correctional Services Act 8 of 1959; regulation 142 of the Correctional Service Regulations, published in GN R2080 of 31 December 1965; article 10(2) of the ICCPR; and United Nations Standard Minimum Rules for the Treatment of Prisoners.

> "[awaiting-trial prisoners] are supposed to have more access to visitors and to telephones, but other than that there is really no better quality of standards at awaiting trial, in fact I would even go as far as to say it is worse, for myself, from my point of view, for an inmate at awaiting trial section rather than a sentenced one. . . . it is very over-populated. I suppose that is the problem."

[37] This evidence suggests that the conditions under which the applicant was detained may in fact have been better than those he would have been subjected to in the awaiting-trial section of the prison. It follows, in the respondents' view, that this Court does not have the necessary facts before it to establish that the detention of the applicant with sentenced prisoners deprived him of better treatment than he would otherwise have received, or that any such deprivation was justified in the prevailing circumstances of St Albans Prison. Accordingly, so the argument concludes, the matter should instead be remitted to the High Court for the leading of fresh evidence.

[38] This argument must fail. It ignores the crucial point that the applicant, by being detained as a sentenced prisoner in the maximum security section of St Albans Prison, was denied the legal status of an awaiting-trial prisoner with all its attendant rights and liberties, including the right to be presumed innocent. The state bears the onus to justify such a denial,[28] and it manifestly failed to do so. The respondents themselves could have taken the initiative to lead more evidence before the High Court but chose not to. Even if they had, the fact is that the denial was not the result of a conscious decision to place the applicant in the maximum security section of the prison; it flowed instead from the High Court Registrar's negligent error.

[28] See *Matshoba* above n 13.

[39] Even if there had been a conscious decision, there could be no justification for singling out the applicant for this special treatment while all other awaiting-trial prisoners remained in the medium security block. Finally, even if the state had led further evidence, I think it would be gravely unjust to allow it to defend its negligently-caused detention of the applicant as a sentenced prisoner by pointing to its failure to maintain reasonable awaiting-trial conditions. It would be strange indeed to allow the state's breach of one duty to be invoked as a justification for its breach of other duties.

[40] In this case, therefore, the actual conditions under which the applicant was detained are irrelevant for the purposes of determining the lawfulness of that detention. What matters, under the lawfulness enquiry, is whether the applicant's detention as a convicted prisoner affected him in his status and impacted on his rights and the obligations of the state. Ultimately, no set of factual conditions could ever justify denying a prisoner an awaiting-trial status to which he is legally entitled.

[41] It is important to clarify my conclusion concerning the relative factual and physical conditions in prison blocks. I do not hold that such conditions are always legally irrelevant for all purposes. They will certainly be relevant to quantifying the damages to be awarded in respect of unlawful detention. They are also relevant to determining whether the state has complied with a detainee's right "to conditions of detention that are consistent with human dignity" in terms of section 35(2)(e) of the

Constitution. Furthermore, it may be that the duty to segregate prisoners is not absolute under our law. Nevertheless, it is my view that awaiting-trial and sentenced prisoners could only ever lawfully be detained together where that is the result of a conscious decision by prison authorities, which impartially affects a class of prisoners and is clearly justified by the factual conditions present in a specific set of circumstances, and where the difference in legal status between the two groups of prisoners, thus jointly-housed, is nevertheless respected. As pointed out above,[29] there was no conscious decision, only the applicant was affected, and his legal status as a person awaiting trial was ignored.

The approach of the majority of the Supreme Court of Appeal

[42] The respondents' final argument is that the majority decision of the Supreme Court of Appeal was correct to conclude that the applicant's detention was justified by the series of magistrates' orders remanding him in custody. These started before his conviction in the second case, continued after his successful appeal in that case, and ran right up until the charges against him in the first case were dropped. The majority held that–

> "[t]o detain someone contrary to his or her status does not . . . affect the lawfulness of the detention, which arises from the court order and not from the place or manner of detention."[30]

[29] At paras 38-9 of this judgment.

[30] Above n 1 at para 19.

[43] I cannot agree. This reasoning ignores the substantive protection afforded by the right not to be deprived of freedom arbitrarily or without just cause contained in section 12(1)(a) of the Constitution. That right requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons.[31] The mere fact that a series of magistrates issued orders remanding the applicant in detention is not sufficient to establish that the detention was not "arbitrary or without just cause". To the contrary, for the reasons I advanced above,[32] it is my view that the detention was manifestly both arbitrary and without just cause.

[44] Moreover, it seems to me that those orders breached the constitutional principle of legality in no less than three ways. First, their effect was to bring about an illegal state of affairs, namely, the detention of the applicant as a sentenced prisoner in a maximum security facility contrary to his constitutional right to freedom and security of the person in terms of section 12(1)(a) of the Constitution. Second, the orders were irrational and therefore arbitrary, in the sense that the power to grant them was not exercised in a manner that was rationally related to the purpose for which that power was given.[33] The purpose of the power to remand an awaiting-trial prisoner in custody is to ensure his or her attendance at trial; detaining the applicant as a sentenced prisoner was unnecessary for that purpose. Third, in my view, the orders

[31] See *Coetzee*, above n 23 at para 159, and *De Lange*, above n 24 at para 18.

[32] At paras 34-5 of this judgment.

[33] As was held by this Court in *Pharmaceutical Manufacturers Association of SA and Another: In Re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85, it is a requirement of the constitutional principle of legality that "[d]ecisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary".

were also issued in breach of sections 168 and 276 of the Criminal Procedure Act.[34] Section 168 provides that a court before which criminal proceedings are pending may adjourn those proceedings on "terms which to the court may seem proper and which are not inconsistent with any provisions of this Act." Section 276 empowers a court to pass punitive sentences only "upon a person convicted of an offence". Since I agree with the minority judgment that the applicant's detention in effect amounted to a form of punishment,[35] it follows that the magistrates' orders had the illegal effect of imposing punishment on a person who was not convicted of an offence.

[45] For these reasons, I find that the majority in the Supreme Court of Appeal wrongly held that the magistrates' remand orders justified the applicant's deprivation of freedom. The respondents have manifestly failed to satisfy their burden of justifying the encroachment on the applicant's liberty.

Section 12(1)(a) unjustifiably and unreasonably breached

[46] The inevitable conclusion is that the applicant was unjustifiably detained in a manner that violated his right not to be deprived of freedom arbitrarily and without just cause. Further, that violation cannot be justified under section 36 of the Constitution because it was not "in terms of law of general application". It follows that the applicant's detention from 23 August 1999 until 30 June 2004 was indeed unlawful.

[34] Above n 5.

[35] See above n 1 at paras 27-8, where Ponnan JA cites with approval *Whittaker*, above n 25. I agree with this finding at para 34 of this judgment.

[47] That, in my view, is a sufficient basis on which to uphold the appeal. There is no need, therefore, to consider the applicant's third argument based on the state's alleged breach of positive duties owed to him.[36] There is also no need to consider whether the magistrates issued their remand orders in ignorance of the applicant's successful appeal in the second case, whether the prison authorities should have taken positive steps to investigate the situation (there being factual disputes concerning the applicant's requesting them to do so), or the likelihood that the applicant would have been released on bail or warning had the High Court Registrar informed St Albans Prison of his successful appeal. While all these matters were raised before this Court, my view is that their resolution is unnecessary for the purposes of deciding the appeal.

Unlawfulness for the purposes of a delictual damages claim for wrongful detention

[48] In this case, the applicant claims delictual damages on the basis of an action for unlawful or wrongful detention. The only issue before us is whether the applicant's detention between 23 August 1999 and 30 June 2004 was unlawful for the purpose of this claim based on private law.

[49] I have already held that his detention for the entire period was unlawful in the sense that section 12(1)(a) of the Constitution was unjustifiably and unreasonably violated. The question thus arises whether that is sufficient, in this case, to justify a finding that the applicant's detention during that period was also unlawful or wrongful

[36] I briefly summarise that argument above at para 18.

in the sense required by the private law delictual action of unlawful or wrongful detention.

[50] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,[37] this Court considered the relationship between violations of constitutional rights in public law and delictual claims against the state in private law. This Court unanimously held, on the one hand, that "private law damages claims are not always the most appropriate method to enforce constitutional rights."[38] It held also that "[i]t should be emphasised that a public law obligation . . . does not automatically give rise to a legal duty for the purposes of the law of delict."[39] On the other hand, the Court also held that–

> "[we] should not . . . be understood to suggest that delictual relief should not lie for the infringement of constitutional rights in appropriate circumstances. There will be circumstances where delictual relief is appropriate."[40]

[51] Accordingly, the Court held that, when determining whether an action lies in the private law of delict where a public law duty has been breached, the constitutional norm of accountability should be considered.[41] Furthermore,–

> "careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principle

[37] 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC).

[38] Id at para 80.

[39] Id at para 81.

[40] Id.

[41] Id at paras 73-8.

> of effectiveness and the need to be responsive to people's needs."[42] (Footnotes omitted.)

[52] This is not an appropriate case to traverse fully the complex relationship between public law duties and private law remedies. Suffice it to say the following. I can think of no reason why an unjustifiable breach of section 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention. Moreover, South Africa also bears an international obligation in this regard in terms of article 9(5) of the ICCPR, which provides that–

> "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Conclusion

[53] I accordingly hold that the breach of section 12(1)(a) is sufficient, in the circumstances of this case, to render the applicant's detention unlawful for the purposes of a delictual claim for damages. That will be the most effective way to vindicate the applicant's constitutional right. I expect that to be the case in most instances of unlawful detention.

[54] It is appropriate to conclude this judgment by emphasising that the circumstances that gave rise to the claim for damages by the applicant are cause for grave concern. The type of error that resulted in his unlawful detention for about five

[42] Id at para 78.

years has the potential to bring the administration of justice into disrepute. Those responsible must make sure that every reasonable measure is taken to prevent a recurrence of this kind of error.

Order

[55] It is ordered that:

(a) The application for leave to appeal is granted.

(b) The appeal is upheld and the order made by the Supreme Court of Appeal is set aside.

(c) It is declared that the applicant was unlawfully detained and imprisoned during the period 23 August 1999 to 30 June 2004.

(d) The respondents are ordered to pay the applicant's costs in the High Court, in the Supreme Court of Appeal and in this Court, jointly and severally, the one paying, the other to be absolved, including the costs attendant upon the employment of two counsel.

Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Langa CJ.

For the Applicant:	Advocate G Marcus SC, Advocate T Price and Advocate M du Plessis instructed by Roelofse Meyer Inc.
For the Respondents:	Advocate RF van Rooyen SC and Advocate HS Havenga instructed by the State Attorney, Port Elizabeth.