



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1119/2022

In the matter between:

RYAN SYCE

FIRST APPLICANT

SEBASTIAN CARL BLIGNAUT

SECOND APPLICANT

and

MINISTER OF POLICE

RESPONDENT

Neutral citation: *Syce and Another v Minister of Police* (1119/2022) [2024]
ZASCA 30 (27 March 2024)

Coram: MAKGOKA, CARELSE, WEINER and GOOSEN JJA and TOKOTA
AJA

Heard: 1 November 2023

Delivered: 27 March 2024

Summary: Application for special leave to appeal – referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 – discretion to arrest in terms of s 40(1)(b) of Criminal Procedure Act 51 of 1977 – whether lawful detention pursuant to arrest becomes unlawful when suspect entitled to be released on bail – effect of abandonment of portion of judgment relating to interest payable on damages in terms of s 86 of Magistrates Courts Act 32 of 1944 – whether special

circumstances established – special leave granted – appeal against dismissal of unlawful arrest claim dismissed – appeal against dismissal of unlawful detention claim and costs order in appeal against interest order upheld.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Van Zyl DJP and Ah Shene AJ, sitting as a court of appeal):

1 The first and second applicants are each granted special leave to appeal against the orders of the high court.

2 The costs of the applications for special leave to appeal shall be costs in the appeal.

3 The appeal against paragraph 1 of the high court order is upheld with costs.

4 Paragraph 1 of the high court order is set aside and replaced with the following:

‘1.1 The appeal is upheld.

1.2 The respondents are ordered to pay the costs of the appeal up to 20 July 2021, being the date of filing of the rule 51(11)(a) notice of abandonment.

1.3 No order for costs is made in relation to the appeal thereafter.’

5 The appeal against paragraph 4 of the high court order is upheld in part.

6 Paragraph 4 of the high court order is set aside and replaced with the following:

‘4.1 The first respondent’s cross-appeal against the dismissal of his claim for unlawful arrest is dismissed.

4.2 The first respondent’s cross-appeal against the dismissal of his claim for unlawful detention is upheld.

4.3 The order of the magistrates’ court is replaced with an order as follows:

‘The defendant is liable for the unlawful detention of the first plaintiff at Walmer Police Station, Gqeberha from 23h00 on 6 December 2014 to 12h10 on 7 December 2014.

The defendant is ordered to pay to the first plaintiff the sum of R40 000 as damages for said unlawful detention, together with interest thereon from date of judgment.’

4.4 There shall be no order for costs in the cross-appeal.’

7 The respondent is ordered to pay the second applicant’s costs of appeal in this Court.

8 No order for costs is made in relation to the first applicant’s appeal in this Court.

JUDGMENT

Weiner and Goosen JJA (Carelse JA and Tokota AJA concurring):

[1] This is an application for special leave to appeal against orders of the Eastern Cape Division of the High Court, Makhanda, sitting as a court of appeal (the high court). The application was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013, upon the usual terms that the parties should be prepared to address the merits of the appeal if required. The substantive issues concern the liability of the respondent, the Minister of Police (the Minister), for the alleged wrongful and unlawful arrest and detention of the first applicant, Mr Syce, and a costs order granted against the second applicant, Mr Blignaut.

[2] On the evening of 6 December 2014, two members of the South African Police Service (SAPS), Constables Tom and Grimsel, were on patrol in the suburb of

Walmer in Gqeberha. They were alerted to be on the look-out for a grey VW Polo motor vehicle, which was suspected to be transporting illicit drugs in the area of the Fig Tree Park Shopping Centre, in Walmer.

[3] At approximately 21h00, the police officers saw a grey VW Polo in the precinct of the Fig Tree Park Shopping Centre. They stopped the vehicle. Other police vehicles arrived on the scene. The constables approached the vehicle. Mr Syce was the driver. Mr Blignaut and Ms Varnyess were passengers in the vehicle. The police officers told the occupants why they had stopped the vehicle. They then searched the vehicle and each of the occupants. No drugs were found. The search had revealed some alcohol containers in the vehicle.

[4] During the search and the interaction with Mr Syce, Constable Tom detected the smell of alcohol on Mr Syce's breath. She requested him to undertake a breathalyser test. The test reading was 0,45 grams per 1000 millilitres, indicating that Mr Syce's blood alcohol content was over the legal limit.¹ Constable Tom informed Mr Syce that, since the reading was over the limit and that he had been driving the vehicle, she was arresting him on suspicion of 'drunken driving'. She warned him of his rights and placed him under arrest.

[5] Mr Blignaut and Ms Varnyess were permitted to leave. Mr Syce was placed in the police vehicle and taken to the Walmer Police Station, where he was formally detained; a case number was assigned; and a blood test kit obtained. His rights were explained to him and he was provided with a notice of rights, which he signed. An entry was made in the occurrence book at the Walmer Police Station at 21h20. Mr

¹ In terms of s 65 of the National Road Traffic Act 93 of 1996, the maximum permissible blood alcohol concentration is set at 0,05g/100ml and for alcohol concentration in breath at 0,24g/1000ml.

Syce was then taken to the Livingstone Hospital. They arrived at the hospital at approximately 21h35. A blood sample was drawn for a blood alcohol test by Dr Adebisi at 22h21. Thereafter, he was taken back to the Walmer Police Station, where he was detained. On 7 December 2014, at 08h00, he was charged by the investigating officer and at 12h10 he was released from custody and warned to appear in court on 6 July 2015.

[6] In July 2015, Mr Syce, Mr Blignaut and Ms Varnyess each instituted action against the Minister in the Magistrate's Court for the District of Port Elizabeth (the trial court). They claimed payment of an amount of R60 000 each for an unlawful search. Mr Syce also claimed R80 000 for his unlawful arrest and detention. On 9 February 2017, the three actions were consolidated into one. During the course of the trial, Ms Varnyess withdrew her claim. The magistrate gave judgment in favour of Mr Syce and Mr Blignaut in respect of their claims for unlawful search. The magistrate awarded each of them R30 000 in damages and interest on the amounts from the date of issue of summons. The magistrate dismissed Mr Syce's claim for unlawful arrest and detention. The Minister was ordered to pay the costs of the action.

[7] The Minister appealed to the high court against the order that interest was payable from the date of summons. The Minister also appealed against the magistrate's failure to award costs in favour of the Minister in relation to the unlawful arrest and detention claim. The Minister did not appeal against the finding of liability in relation to the unlawful search, nor the quantum of damages payable.

[8] Mr Syce cross-appealed against the dismissal of his claim for unlawful arrest and detention. Before the appeal was heard, Mr Syce and Mr Blignaut abandoned

the order in relation to interest payable from the date of summons. They filed a notice in terms of rule 51(11)(a) of the Magistrates' Court Rules, in which they consented to an order that interest run from the date of judgment. We were informed by counsel that a copy of the rule 51(11)(a) notice was presented to the high court when the appeal was argued and that Mr Blignaut did not participate in the appeal.

[9] The high court upheld the Minister's appeal in relation to the order that interest was payable from the date of summons. It replaced the magistrate's order with an order that interest was to be paid from a date 14 days after judgment until final payment was made. The high court awarded the costs of the appeal to the Minister. It dismissed the Minister's appeal in relation to the costs of the action and dismissed the first applicant's cross-appeal. The high court found that the arrest and detention were lawful. It is against these latter orders that Mr Syce and Mr Blignaut now seek special leave to appeal.²

[10] Mr Syce wishes to appeal against the costs order made against him in respect of the Minister's appeal before the high court (the interest-order appeal).³ He also wants to appeal against the dismissal of his claim for unlawful arrest and detention.⁴ Mr Blignaut wishes to appeal against the costs order in the interest-order appeal.⁵

² The order of the high court reads as follows:

'1. The appeal be and is hereby upheld with costs.

2. The orders of the Magistrate with regards to the interest awarded to the two Respondents be and are hereby set aside, and substituted with an order in respect of each Respondent that:

'The defendant is directed to pay interest on the amount of R30 000.00 to be calculated at the prescribed rate of interest from a date fourteen days after the date of judgment to date of payment.'

3. The appeal in respect of the costs of the action be and is hereby dismissed.

4. The First Respondent's cross-appeal be and is hereby dismissed with costs.'

³ Paragraph 1 of the order above.

⁴ Paragraph 4 of the order above.

⁵ Paragraph 1 of the order above.

Special leave to appeal

[11] Special leave to appeal will be granted if the applicant can establish not only that there is a reasonable prospect of success on appeal, but that there are special or extraordinary circumstances which warrant a further appeal. In *Van Wyk v S; Galela v S*,⁶ this Court re-affirmed the test laid down in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*,⁷ as follows:

‘An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal to this court. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.’

[12] In urging us to grant special leave to appeal in relation to the unlawful arrest and detention claim, counsel for Mr Syce submitted that the evidence showed that the arresting officer was not aware that she had a discretion not to arrest. She could therefore not have exercised the discretion. This would render the arrest and detention unlawful. Furthermore, the case concerns the ambit of a police officer’s discretion when effecting an arrest in circumstances such as the present. These are legal questions of considerable importance, it was submitted, upon which no clear authority exists.

[13] We agree. If indeed the discretion whether or not to arrest was triggered, its ambit is a matter of considerable importance. Accordingly, we are satisfied that the threshold for special leave to appeal is met in relation to Mr Syce’s appeal against the dismissal of his cross-appeal before the high court.

⁶ *Van Wyk v S; Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para 21.

⁷ *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E.

[14] Regarding the costs award made in the interest-order appeal, it was submitted that the high court was not required to address the issue in light of the notice of abandonment. By proceeding with the appeal on that issue the high court committed an error of law. Furthermore, so it was submitted, the high court committed an ‘extraordinary error’ by awarding costs against Mr Blignaut, who did not participate in the appeal. This would qualify as a special circumstance justifying the granting of special leave to appeal.

[15] Counsel for the Minister argued that the notice of abandonment did not contain a tender for the costs of the appeal. The Minister was therefore entitled to proceed with the appeal in order to obtain such an order for costs. The high court was therefore entitled to deal with the issue as it did. Accordingly, this was not a matter where there are special circumstances which warrant an appeal which, in effect, is solely against costs.

[16] The high court judgment does not address the abandonment of the order, despite it having been drawn to its attention at the hearing of the appeal. The high court instead determined the merits of the Minister’s appeal and, upon concluding that the appeal should succeed, made the usual costs order.

[17] The abandonment of a judgment or order which is under appeal has the effect of removing the *lis* between the parties. In *Durban City Council v Kistan*⁸ (*Kistan*), it was stated that:

‘By abandoning that part of the order which is appealable the defendant has conceded to the plaintiff the only relief which he was entitled in law to seek from this Court.’⁹

⁸ *Durban City Council v Kistan* 1972 (4) SA 465 (N) (*Kistan*).

⁹ *Ibid* at 469H.

And further that:

‘The only *lis* between the parties was the order for costs granted by the magistrate. That *lis* has been removed by the defendant’s abandonment of the order in his favour relating to that *lis*.’¹⁰

[18] The absence of any consideration of the notice of abandonment filed pursuant to s 86 of the Magistrates’ Court Act 32 of 1944 (the Magistrates’ Court Act), suggests that the high court did not exercise its discretion to award costs with reference to relevant principles. As Cloete JA put it in *Naylor v Jansen*:

‘I had occasion in *Logistic Technologies (Pty) Ltd v Coetzee* to express the view that a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance. I still adhere to that view — for if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order, simply because an appeal would be concerned only with costs . . .’¹¹
(Footnote omitted.)

[19] In addition, one of the factors which constitute a special circumstance for granting special leave is that the prospects of success are so strong that a refusal of leave may result in a manifest denial of justice.¹² In the present matter, we consider this to be the case. An injustice would accrue to Mr Syce and Mr Blignaut because if the order of the high court stands, they would be obliged to pay the full extent of the costs on appeal, despite their abandonment of the erroneous order by the trial court. In our view, the threshold for granting special leave to appeal is therefore also met on this issue.

The issues on appeal

¹⁰ Ibid at 470A.

¹¹ *Naylor and Another v Jansen* [2006] ZASCA 94; 2007 (1) SA 16 (SCA) para 10.

¹² *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 8.

[20] There are two issues which must be decided in the appeals. First, whether the order dismissing the unlawful arrest and detention claim should stand. Secondly, whether the high court order upholding the Minister's appeal against the interest order, with costs, was an appropriate order.

The arrest

[21] During the course of the trial it was conceded by Mr Syce that the jurisdictional requirements, set out in s 40(1) of the Criminal Procedure Act 51 of 1977 (the CPA), for his arrest had been met. At the conclusion of his evidence-in-chief, however, his particulars of claim were amended to allege that Mr Syce had asked the arresting officer to allow him to walk to the nearby home of his girlfriend, but that his request was ignored. This came to be the central attack on the lawfulness of the arrest, namely an alleged failure by the arresting officer to exercise a discretion whether or not to arrest.

[22] A peace officer who makes a warrantless arrest has a discretion whether or not to make the arrest. The discretion arises once the jurisdictional requirements stipulated in s 40(1) of the CPA are satisfied.¹³ In *Groves NO v Minister of Police*¹⁴ (*Groves*), the Constitutional Court confirmed this principle in relation to a warrantless arrest, as follows:

‘The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.’

¹³ *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 28.

¹⁴ *Groves NO v Minister of Police* [2023] ZACC 36; 2024 (1) SACR 286 (CC) (*Groves*) para 52.

[23] Although the Constitutional Court in *Groves* was dealing with an arrest made pursuant to a warrant, it provided important guidance in relation to the circumstances which trigger the discretion. It stated that:

‘Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and “[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries”. An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.’¹⁵

[24] Prior to the amendment of his particulars of claim they read, in relevant part, as follows:

‘14. Plaintiff’s arrest was wrongful, unlawful, and malicious, in that, *inter alia*:

14.1 he did not commit an offence in the presence of a peace officer;

14.2 there was no reasonable suspicion that he had committed a Schedule 1 offence.’

[25] When the amendment was moved, the magistrate noted that paragraph 14.1 was to be deleted and replaced with, ‘the arresting officer informed the plaintiff that he was obliged to arrest him.’ Paragraph 14.2 was to be deleted and replaced with, ‘the arresting officer refused the plaintiff to go to the third plaintiff’s house which was not far from the place of arrest, and to leave his motor vehicle [at] the nearest petrol station.’

¹⁵ Ibid para 60.

[26] Mr Syce's evidence-in-chief on the issue was presented as follows:

'Now, did you tell the Police members where you guys were on your way to? – Yes.

When did it happen? – Excuse me?

When did that happen, when did you tell the Policemen? – When they pulled us off.

Okay. This is now during the search? – Yes.

And exactly, how far were you away from your destination? – Basically walking, you can walk, it is walking distance.

Walking distance away from your destination? – Yes.

Did you tell the Police that? – We told them that we are going to Fairview Links, it is not far.

You told them it is not far? – Yes.

And what did he say? – He did not listen.'

[27] After a short exchange in which Mr Syce seemed unsure of the questions, he was asked:

'Look, the reason I am asking you this, is because I want to establish, how did it come about that he, the Policeman, actually told you that he had to arrest you, that is why I am asking you the question? – Yes. Because his supervisor was going to do a follow up on him.'

[28] Later, there are the following exchanges:

'Now, to your mind, was there any need for the Police to have handcuffed you and arrested you? – No

Why do you say that? – Because I was not a threat on the road, I was not driving recklessly.

So there was no need for them to have arrested you? – No.

...

And what did you tell the Police about your destination? – I told them it is just close by, in Fairview Link. Is there any way that we can leave the vehicle, and just walk the way?

You asked the Police if you can walk to Fairview Link, and leave the car there? – At the nearest garage.

...

You asked that specifically – Yes.

And what was the response to that request? – They were not interested in that.’

[29] This was the evidence upon which it was contended that the arresting officer had failed to exercise a discretion rendering the arrest unlawful. When Constable Grimsel testified, he was presented in cross-examination with an expanded version of Mr Syce’s evidence, which included a specific allegation about who had arrested him:

‘The plaintiff testified also that when after he blew the breathalyser was over the limit, he asked you but . . . he told you, “look here I am basically walking distance away from my ex-girlfriend’s house.” At that time it was his girlfriend’s house. “I am walking distance from my girlfriend’s house. Can I not just leave the car here and then we walk home.” He asked you not to arrest him but you refused. You said no, you are obliged to arrest him because your superior is watching you and she will follow up, she will make a follow-up to see if you arrested him.’

[30] During cross-examination the arresting officer, Constable Tom, denied that Mr Syce had asked not to be arrested. She explained that no such request was made to her. She indicated that in circumstances where the person is over the legal limit for driving under the influence of alcohol she would be obliged to arrest. It was on this basis that it was suggested that her failure to appreciate that she had a discretion rendered the arrest unlawful.

[31] We have set out the evidence in some detail because it illustrates several problems with the case as presented on the issue of the exercise of a discretion by the arresting officer. First, the alleged failure by the arresting officer to exercise a discretion did not form part of the cause of action advanced by Mr Syce. The belated introduction of the amended paragraphs 14.1 and 14.2 did not squarely raise the alleged failure to properly exercise a discretion. Secondly, as the passages from the record demonstrate, there was a considerable difference between Mr Syce’s evidence

and that which his legal representative suggested was his evidence. An oblique request to be allowed to walk home came to be presented as a specific and motivated request not to be arrested.

[32] It was not Mr Syce's case that he had acknowledged the transgression; that he accepted that he would be charged with an offence; and that he had offered co-operation to enable that process to occur. Even accepting that Mr Syce had asked either of Constables Grimsel or Tom, to be allowed to walk home, the request was in truth no more than that he be let off the hook. In our view, a police officer who has clear evidence in the form of a breathalyser test, cannot be criticised for refusing the transgressor an opportunity to walk away.

[33] We say this because of the nature of the offence Mr Syce was suspected of having committed, namely driving a motor vehicle in contravention of s 65 of the National Road Traffic Act 93 of 1996. The section prohibits the driving of a motor vehicle on a public road in three sets of circumstances: when under the influence of alcohol or a drug having a narcotic effect; when the driver's blood alcohol concentration is above 0,05 gram per 100 millilitres; and when the concentration of alcohol in the driver's breath is above 0,24 milligrams per 1000 millilitres.

[34] The section imposes a time limit of two hours from the time of commission of one or other of the prohibited acts, within which a blood test or breathalyser test must be performed. This restriction serves to protect the integrity and reliability of the evidence gathered from such tests. Subsections (8) and (9) provide that:

‘(8) Any person detained for an alleged contravention of any provision of this section shall not—

- (a) during his or her detention consume any substance that contains alcohol of any nature, except on the instruction of or when administered by a medical practitioner;
 - (b) during his or her detention smoke until the specimen referred to in subsection (3) or (6) has been taken, as the case may be.
- (9) No person shall refuse that a specimen of blood, or a specimen of breath, be taken of him or her.’

[35] These subsections impose restrictions upon the liberty person suspected of having committed an offence under s 65(1), (2) or (5). They apply only to a person detained. In other words, the statute envisages detention as a means to obtain evidence required for the proof of the prohibited conduct and to secure its reliability. The ambit of a police officer’s discretion not to arrest a person suspected of committing a s 65 offence, must be construed in light of the envisaged detention contemplated by the section. The discretion not to arrest and detain can only arise if the broader objects of s 65 can be met without imposing restrictions upon the liberty of the suspect.

[36] In our view, this matter does not properly engage the question of whether, in the circumstances of this arrest, the arresting officer failed to exercise a discretion. It does not arise on the evidence. Nor does it arise upon the pleaded case. In light of this, the trial court’s treatment of the matter cannot be faulted. Nor can that of the high court, where it held that the issue of the improper exercise of the power to arrest was not properly raised nor substantiated by the evidence.

The detention

[37] Regarding the alleged unlawful detention at Walmer Police Station, Mr Syce’s case at trial was that it was unlawful by reason of the unlawful arrest. He pleaded, however, that his detention and incarceration were wrongful, unlawful, and

malicious in that ‘there were no reasonable and/or objective grounds justifying [this] subsequent detention after his blood was drawn . . . and his personal particulars were obtained by the arresting officer.’ He also pleaded that the arresting officer and other police officers at the Walmer Police Station had failed to apply their minds in respect of his detention and that he was not promptly informed of his right to apply for bail, as required by s 50(1)(b) of the CPA.

[38] The facts disclose that Mr Syce was, immediately after being placed under arrest, transported to the Walmer Police Station, where he was formally placed in detention. A case number was assigned; he was provided with a formal notice of rights; and a forensic blood sample kit was assigned. He was taken to the Livingstone Hospital to have a blood sample taken. At that stage he was already in detention pursuant to his arrest.

[39] Although Mr Syce claimed that his *further* detention was unlawful, there was, in fact, only a detention pursuant to the arrest. He remained in detention until his release from custody on 7 December 2014, shortly after midday, when he was released in terms of s 59 of the CPA on warning to appear in court.

[40] The onus to establish that the detention of Mr Syce was lawful rests upon the Minister.¹⁶ Although it rests upon the Minister throughout, the onus arises in the adjudication of a matter only if the unlawfulness of the detention is pleaded or is canvassed in the evidence.¹⁷ In this instance, as will be shown, it was pleaded in a manner which triggered the application of the onus.

¹⁶ *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) par 17.

¹⁷ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (*Slabbert*) para 21-22.

[41] The Minister's defence of the unlawful detention claim rested upon s 39(3) of the CPA. That section provides that the effect of a lawful arrest shall be that the person arrested shall be in lawful custody until lawfully discharged or released from custody. It was the Minister's case, therefore, that the detention of Mr Syce pursuant to his lawful arrest remained so until his release.

[42] While s 39(3) of the CPA provides for the continuity of the lawfulness of the detention of a suspect, it must be read in the context of those provisions of the CPA which provide for the release of a suspect from detention. Lawful release from custody may occur either before, at or after the detained suspect's first appearance in court, as is required by s 50 of the CPA. Release from custody prior to the first appearance in court may occur by release on bail or warning, for specified offences, in terms of ss 59 and 59A of the CPA. These sections impose upon the police certain obligations, in relation to detained persons, which, if not met may render the continued detention of a suspect unlawful, notwithstanding s 39(3) of the CPA

[43] Section 50(1)(b) obliges the police to inform the detained person, as soon as reasonably possible' of the right to apply for bail. Subsection (1)(c) provides that:

'Subject to paragraph (d), if such an arrested person is not released by reason that-

- (i) no charge is to be brought against him or her; or
- (ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.'

[44] Section 50 therefore contemplates that a detained person must be informed of their right to bail *in order that* the right may be exercised even before the first appearance.¹⁸ Section 59, which applies in this case by virtue of the offence for

¹⁸ The obligation to give expeditious effect to the right to apply for bail, either in court or in terms of ss 59 and 59A of the CPA, is clear. In *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) par 16, it was held that a detainee has

which Mr Syce was arrested and detained, provides for bail to be granted by a senior police officer. In relevant part it states:

‘(1)(a) An accused who is in custody in respect of any offence, other than an offence –
(i) referred to in Part II or Part III of Schedule 2;

...

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.’

[45] In *Setlhapelo v Minister of Police and Another*¹⁹ it was held that:

‘[I] am of the view that once the jurisdictional facts for the consideration of police bail in terms of s 59(1)(a) of the CPA are present, the police have a constitutional duty to ascertain as soon as reasonably possible after the arrest whether the arrestee wishes bail to be considered. If the arrestee wishes to apply for police bail, the senior police official, in consultation with the investigating police official, must consider bail as a matter of urgency. A failure to inform the arrestee of his constitutional right to apply for bail or a failure to consider bail or any unreasonable delay in the process could, depending on the circumstances of the case, render the arrestee's further detention until his first appearance in court unlawful.’²⁰

[46] In *EF v Minister of Safety and Security (EF)*,²¹ this Court considered the effect of a failure by the police to act in accordance with s 59 of the CPA and release a suspect, in the context of a delictual claim for damages arising from a sexual assault

a procedural right to a prompt decision upon a request for bail that is not dependent upon the merits of the request, and in *Mashilo and Another v Prinsloo* [2012] ZASCA 146; 2013 (SACR) 648 (SCA) par 16, it was held that ‘expedition relative to circumstances is what is dictated by [ss 50(1)(b) and (c)] and the Constitution.’

¹⁹ *Setlhapelo v Minister of Police and Another* [2015] ZAGPPHC 363. Despite this exposition of the principles the court dismissed the plaintiff's claim because he had not specifically relied upon the provisions of s 59 in his particulars of claim. In the light of *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (*Zealand*) para 24, the outcome appears erroneous.

²⁰ *Ibid* para 38. See also *Gqunta v Minister of Police* [2020] ZAECGHC 82 para 14.

²¹ *E F v Minister of Safety & Security* [2018] ZASCA 96; 2018 (2) SACR 123 (SCA) (*EF*).

perpetrated upon the suspect whilst in police custody. Although the case did not concern a claim founded upon an unlawful detention, s 59 of the CPA was relevant. The facts were that following the suspect's detention on a charge of drunken driving (as in this case), a senior police officer interviewed him. It was common cause that s 59 of the CPA applied and that the suspect could be released on bail, upon the recommendation of a senior police officer. The senior police officer had recommended his release. The suspect was, however, transferred to another police station and the recommended release did not occur. When his wife enquired about her husband's release on bail, she was told that no bail had been recommended or set. The suspect therefore remained in custody. The sexual assault by other inmates occurred during this period.

[47] Based on these facts, this Court had no difficulty in finding that the failure of the police officers to give effect to the recommendation to release the suspect was wrongful and negligent.²² Where the question to be answered is whether the continued detention of a suspect who is entitled to be released, is lawful, the same principle would apply, namely that the failure to release or consider the release of a suspect in accordance with provisions that would permit of such release, would render the continued detention unlawful.²³

[48] Mr Syce's pleaded case was that his continued detention was unlawful on the basis that it was no longer required. This related to him having furnished his personal particulars and having provided a blood sample. The blood sample was provided after 22h00 on the night he was arrested and he was thereafter detained at the Walmer

²² Ibid paras 18–20.

²³ In *Mvu v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ); 2009 (6) SA 82 (GSJ) paras 10 – 12; 17, it was stated that continued detention is always subject to the exercise of a discretion. That is certainly so in circumstances where ss 59 and 59A of the CPA apply.

Police Station. His release from detention was, however, as a matter of law, subject to the provisions of the CPA which permit the release of a suspect prior to his first appearance in court. Mr Syce's evidence was that he had been told, by the arresting officer, that he would be released after four hours. He stated that he was not informed of his right to apply for bail in terms of s 50(1)(b) of the CPA.

[49] The issue of the lawfulness of his continued detention was properly and sufficiently raised on the pleadings and in his evidence.²⁴ In the circumstances, the onus to prove that the continued detention was not unlawful arose, in the sense that evidence was required to justify the conclusion that it was not unlawful.²⁵

[50] The evidence presented by the Minister was, however, confined to that of the arresting officers, Constables Tom, and Grimsel. They denied that they had told Mr Syce that he would be released after four hours. According to them, once their functions as arresting officers had been carried out, the decision to release was that of senior officers at the Walmer Police Station and the detectives assigned to the case. Thus, even on the evidence presented on behalf of the Minister, the release of Mr Syce was a matter to be determined by senior police officers at the Walmer Police Station. No evidence was presented on behalf of the Minister to challenge the assertion that Mr Syce was not informed of his right to apply for bail. His evidence stood uncontradicted. No evidence was presented to explain the circumstances giving rise to Mr Syce's release, in terms of s 59 of the CPA, only shortly after midday on the following day.

²⁴ See *Zealand* fn 19 above para 24, where the Constitutional Court held that:

'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, as well as the founding value of freedom. 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 *Slabbert* fn 17 above.

[51] Although it is apparent, on the common cause facts, that Mr Syce was released in terms of s 59 of the CPA, they were required to justify his continued detention until he was released. We know only that Mr Syce was seen by the investigating officer at 08h00 on the following morning and that he was released at 12h10. If it was the case that Mr Syce's release in accordance with s 59 of the CPA could not reasonably have been achieved before the time of his actual release, then it was incumbent upon the police to explain why that was so, particularly in the light of their failure to inform him of his right to apply for bail.

[52] The absence of evidence to justify the lawfulness of Mr Syce's continued detention after his return to the Walmer Police Station, means that there was no evidence upon which the onus could be discharged. The high court therefore erred in finding that the continued detention of Mr Syce was lawful. In the circumstances, his cross-appeal on the unlawful detention claim ought to have been upheld. Since he succeeds before this Court, it is necessary to consider an appropriate award of damages.

[53] The assessment of damages is ordinarily the preserve of a trial court. The default position when the issue arises before an appeal court would be to remit the matter to the trial court. That is not always necessary or appropriate. In *EF* this Court said:

'The general rule is that the determination of damages is a function peculiarly within the province of the trial court. It is competent, however, for this court itself to fix the damages to which the appellant is entitled. See *Neethling v Du Preez and Others*; *Neethling v Weekly Mail and Others* 1995 (1) SA 292 (A) at 301A-C. This court has all the information necessary to consider this

aspect. It is therefore in as good a position to do so as the trial court. For that reason, no purpose would be served by remitting the matter for that purpose.’²⁶

[54] The evidence on record in this matter is sufficient to allow this Court to make an award for general damages. The purpose of the award in a matter such as this, is to compensate a claimant for deprivation of personal liberty and freedom and the attendant mental anguish and distress caused by the detention. In *Minister of Safety and Security v Tyulu*,²⁷ this Court emphasized that ‘the primary purpose is not to enrich the aggrieved party, but to offer him some needed *solatium* for his injured feelings.’²⁸

[55] In *EF*, it was said:

‘Arriving at an appropriate award for general damages is never an easy task. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the court’s view of what is fair in all circumstances of the case. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 and *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA). In the latter case, this court noted that there was a readily perceptible tendency towards increased awards in respect of general damages in recent times. However, it reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages (para 60). It concluded that the principle remained that the award should be fair to both sides – it must give just compensation to the plaintiff, but ‘not pour out largesse from the horn of plenty at the defendant’s expense’, as pointed out in *Pitt v Economic Insurance Company Limited* 1957 (3) SA 284 (D) at 287E-F.’²⁹

[56] Mr Syce claimed R80 000 as his damages, whereas the Minister submitted that R30 000 would be a reasonable amount. Among the factors considered are the personal circumstances of the plaintiff and the circumstances of the detention.

²⁶ *EF* fn 21 above para 32.

²⁷ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA); 2009 (2) SACR 282 (SCA).

²⁸ *Ibid* para 26.

²⁹ *EF* fn 21 above para 33.

Regarding his personal circumstances, Mr Syce was 36 years of age, and not married, although he had a partner. He held a tertiary qualification in the form of a N2 in engineering and was employed by Transnet. Apart from this, there is no evidence about his earnings or standing in the community.

[57] Mr Syce described the conditions of the cell as bad. He said that there was a smell of urine; that the toilets were dirty, and it was unbearable inside the cell. There were seven other detainees. He was given a dirty blanket which had fleas on it. There was no mattress in the cell. He was afraid that the other detainees could harm him.

[58] The determination of an appropriate sum for damages is a matter of discretion. Counsel for the parties referred us to similar cases to consider in the determination of damages. Previous awards made in comparable cases, can afford guidance. The comparative exercise is, however, not a meticulous examination of awards, and should not impinge upon the court's general discretion.³⁰ Suffice it to say that a survey of the cases referred to by counsel, emphasized the high premium placed on the right to freedom and security of the person as enshrined in the Constitution.³¹ This is discernable in progressively more generous amounts awarded for damages in such cases.

[59] There is no evidence that Mr Syce suffered any degree of humiliation beyond that inherent in being detained. Although his cell was overcrowded and dirty, there is no suggestion that he was harassed in the cell by any of the inmates, although he was apprehensive of them. His unlawful detention extended from his return to the

³⁰ *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535B-536A.

³¹ Section 12(1) of the Constitution.

police station until his release shortly after noon on the following day. This was a period of approximately 13 hours.

[60] Taking all these factors into account, an award of R40 000 would be an appropriate sum for damages for Mr Syce's unlawful detention.

The costs in the interest-order appeal

[61] Section 86 of the Magistrates' Court Act provides that:

- '(1) A party may by notice in writing abandon the whole or any part of a judgment in his favour.
- (2) Where the party so abandoning was the plaintiff, or applicant, judgment in respect of the part abandoned shall be entered for the defendant or respondent with costs.
- (3) Where the party so abandoning was the defendant or respondent, judgment in respect of the part abandoned shall be entered for the plaintiff or applicant in terms of the claim in the summons or application.
- (4) A judgment so entered shall have the same effect in all respects as if it had been the judgment originally pronounced by the court in the action or matter.
- (5) If a party abandons a judgment given in his or her favour because the judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid, no judgment referred to in subsection (2) or (3) shall be entered in favour of the other party.'

[62] Rule 51(11) of the Magistrates' Court Rules provides that:

- '(a) A respondent desiring to abandon the whole or any part of a judgment appealed against may do so by the delivery of a notice in writing stating whether he or she abandons the whole, or if part only, what part of such judgment.
- (b) Every notice of abandonment in terms of paragraph (a) shall become part of the record.'

[63] The notice of abandonment is directed to the clerk of the court who is required to enter the orders for which provision is made in s 86(2) and (3) of the Magistrates'

Court Act.³² The notice also serves as a notice filed in the appeal against the judgment or order so abandoned.

[64] The rationale and purpose of abandonment as provided by s 83 of the Magistrates' Court Act, 32 of 1917 (the present s 86), was described by De Villiers JP, in *Burridge v Chodos*:³³

'Sec., 83 obviously aims at simplifying the procedure in a case where a successful party in a magistrate's court finds himself in possession of a *damnosa hereditas*, in the shape of a judgment which he sees no prospect of maintaining on appeal. Formerly such a judgment could only be altered, as a rule, by going through the expensive routine of appeal. The Act introduces an automatic method of, altering the judgment by the process of an "abandonment". One can see that it would be an essential feature of an automatic scheme that it should be laid down exactly, and precisely, and rigidly, what should be the extent of the alteration of the judgment effected by an abandonment, for, if any discretion were left to any judicial or other officer, the scheme would lose its automatic character. We find this feature duly embodied in sec. 83, in which it is provided that "the respondent to an appeal may by notice in writing abandon the whole or any part of the judgment against which the appeal is noted" and "where the party so abandoning was the plaintiff, judgment in respect of the part abandoned shall be entered for the defendant with costs"; and "a judgment so entered shall have the same effect in all respects as if it had been the judgment originally pronounced by the court in the action." It appears thus that if a successful plaintiff desires to make use of this automatic statutory procedure he can only do so at the price of a complete reversal of the abandoned judgment (or part of judgment): in other words he can only do so if he is agreeable to see judgment entered for the defendant in lieu of judgment for himself, and he cannot, under the statutory procedure, stop halfway by altering the judgment in his own favour into a judgment of "absolution from the instance." If a successful plaintiff is not willing to go to this length, then he is relegated to the position in which he would have been before the Act, *i.e.*,

³² See *Scrooby v Engelbrecht* 1940 TPD 100 at 105, which dealt with s 83 of the Magistrates' Court Act, 32 of 1917 (which was in identical terms to the present s 86), where it was held that:

'An abandonment under sec. 83 has certain results which are set out in the Act and it enables the clerk of the court to make certain alterations in the records of the court *without an order of the Court of Appeal*.' (My emphasis.)

³³ *Burridge v Chodos* 1928 OPD 16 at 17-18.

he must either come to terms with his adversary or allow the latter to go through the routine of appeal.’³⁴

[65] Whether s 86 of the Magistrates’ Court Act permits only the entry of the consequential orders provided by the section, need not be decided for purposes of the present appeal. That is so because the high court’s order varying the magistrate’s order was not in question. The abandonment of an order in a pending appeal, however, plainly carries costs implications. What was required of the high court, therefore, was to decide the liability for the costs of the appeal in the light of the notice of abandonment. The fact that it did not do so means that its discretion was exercised upon an incorrect basis. This Court is, therefore, entitled to interfere with the order and grant a costs order which, in its discretion, will meet the exigencies of the case.

[66] Counsel for the Minister relied upon the judgment in *Vaal Investment & Trust Co (Pty) Ltd v DG Ladegaard (Pty) Ltd*,³⁵ where it was held that it is necessary that a tender for costs of the appeal should be included in the notice of abandonment. It was submitted that the Minister was entitled to pursue the costs of the appeal in the absence of the tender. On this basis, it was suggested that the order of the high court was, irrespective of the failure to deal with the abandonment, correct. For that reason the appeal ought not to succeed.

³⁴ The same interpretation was applied in *Viljoen v Richter* 1928 OPD 97 at 100-101. This was followed in *Bonthuys v Visser’s Garage* 1950 (3) SA 130 (SWA) at 132E (*Bonthuys*). In *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 251, which dealt with the section in its present form, it was held that:

‘If a party wishes to avoid the costs of an appeal against a judgment obtained by him by abandoning his judgment, he must take the result prescribed under sec. 86 if he abandons in terms of that section or must get his opponent to accept an abandonment outside that section. I incline therefore to the view that *Burridge v Chodos*, *supra*, was correctly decided, but I consider it unnecessary to make a definite finding on the point.’

³⁵ *Vaal Investment & Trust Co (Pty) Ltd v DG Ladegaard (Pty) Ltd* 1973 (2) SA 799 (T) at 800G.

[67] A party in whose favour abandonment of an order occurs after an appeal against the order has been prosecuted, is entitled to claim the costs incurred in connection with the appeal up to the date of abandonment. In *Department: Transport, Province of KwaZulu-Natal v Ramsaran and Others (Ramsaran)*,³⁶ this Court approved the dictum in *Bonthuys v Visser's Garage (Bonthuys)* which held that:

‘The claimant seems to have two courses open to him to obtain these costs, i.e. (a) he may set the appeal down, not for argument on the merits, but for recovering costs due to him up to the date when he received the notice of abandonment, or (b) he may apply, on notice to the other party, for an order from the Appeal Court granting him these costs, if the other party refuses to recognise his claim thereto, as is the case here.’³⁷

[68] *Bonthuys* was concerned with an abandonment which fell outside of the ambit of the erstwhile s 83 (now s 86 of the Magistrates’ Court Act). It held that the judgment could not be automatically altered and required alteration on appeal.³⁸ The appellant, however, was not entitled to pursue the appeal on its merits. The appellant was only entitled to proceed at the appeal to determine liability for costs up to the date of abandonment.³⁹ In that case, it was held that the appellant was entitled to those costs ‘as well as the costs of argument at the appeal regarding the liability for those costs’.⁴⁰

[69] In *Ramsaran*, the second option identified in *Bonthuys* was available. The abandonment of the order under appeal had taken place in terms of Uniform Rule

³⁶ See *Department: Transport, Province of KwaZulu-Natal v Ramsaran and Others* [2019] ZASCA 62 (*Ramsaran*) para 9.

³⁷ *Bonthuys* fn 34 above at 132H.

³⁸ *Ibid* at 132E-F.

³⁹ *Ibid* at 132G.

⁴⁰ *Ibid* at 133D.

41. Rule 41(1)(c) permits an application to be made for the costs to be awarded where no consent to pay such costs is contained in the notice of abandonment.⁴¹ *Ramsaran* therefore only allowed the costs of the appeal up to the date of abandonment of the orders under appeal.

[70] Thus, whether or not the terms of the abandonment required a variation of the order on appeal, the Minister was only entitled to claim the costs of appeal up to the stage of abandonment. It was not open to the Minister to proceed with the appeal as if the notice of abandonment had not been filed. We were informed that the notice of abandonment was presented to the high court at the hearing of the appeal because it had not been included in the appeal record. Why it was not included is not known. Rule 51(11)(b) of the Magistrates' Court Rules requires that the notice be included in the appeal record. The failure to tender the costs of appeal up to the stage of the abandonment, may have entitled the Minister to claim the costs of argument at the appeal to determine liability for those costs, but it does not follow that such costs must necessarily be awarded. That will depend upon the facts and the exercise of the court's discretion. In this instance the abandonment conceded the variation sought on appeal shortly after the appeal was prosecuted.⁴² It disposed of the *lis* between the parties as a matter of law.⁴³ It was common ground that Mr Blignaut had not participated in the appeal after the abandonment. Mr Syce's cross-appeal, however, remained and required an appeal hearing. Nothing on the record indicates that the failure to tender the costs up to the date of abandonment was raised with Mr Syce or Mr Blignaut as an issue to be pursued at the appeal hearing.

⁴¹ Rule 51 of the Magistrates' Court Rules does not contain an equivalent provision.

⁴² The appeal to the high court was prosecuted on 7 May 2021. The rule 51(11)(a) notice was served on 20 July 2021.

⁴³ *Kistan* fn 8 above.

[71] These are important considerations which, in this case, ought to be weighed in the exercise of the discretion to award costs beyond the date of filing of the notice of abandonment. A costs order serves to indemnify a successful party against the legal costs incurred in vindicating its rights. It is underpinned by considerations of fairness and reasonableness, hence as a rule the costs of the appeal should be paid up to the date of abandonment. In our view, however, the circumstances of this case require that no costs order should be made in the Minister's interest-order appeal after that date. The appeal against the high court's costs order must, therefore, succeed.⁴⁴

[72] We turn briefly to the costs orders. For the reasons we have set out, the Minister ought to have secured an order dismissing the cross-appeal in relation to the unlawful arrest. Mr Syce ought to have succeeded in the appeal relating to the unlawful detention and secured an award of damages. Ordinarily this would be accommodated by applying the principle that the costs follow the result. The two aspects were, however, inextricably interlinked insofar as the prosecution of the appeal was concerned. Both parties achieved success. It is not readily clear on what basis it might be found that one of the parties achieved more substantial success. The fact that damages were awarded on the one claim does not assist, since it is equally true that damages were not awarded on the other claim.

[73] In light of this, fairness suggests that in relation to the cross-appeal before the high court, each party should pay its own costs. The same applies to the appeal, on those issues, before this Court.

⁴⁴ See paragraph 1 of the high court order set out in fn 2 above.

[74] In the result, the following order is made:

1 The first and second applicants are each granted special leave to appeal against the orders of the high court.

2 The costs of the applications for special leave to appeal shall be costs in the appeal.

3 The appeal against paragraph 1 of the high court order is upheld with costs.

4 Paragraph 1 of the high court order is set aside and replaced with the following:

‘1.1 The appeal is upheld.

1.2 The respondents are ordered to pay the costs of the appeal up to 20 July 2021, being the date of filing of the rule 51(11)(a) notice of abandonment.

1.3 No order for costs is made in relation to the appeal thereafter.’

5 The appeal against paragraph 4 of the high court order is upheld in part.

6 Paragraph 4 of the high court order is set aside and replaced with the following:

‘4.1 The first respondent’s cross-appeal against the dismissal of his claim for unlawful arrest is dismissed.

4.2 The first respondent’s cross-appeal against the dismissal of his claim for unlawful detention is upheld.

4.3 The order of the magistrates’ court is replaced with an order as follows:

‘The defendant is liable for the unlawful detention of the first plaintiff at Walmer Police Station, Gqeberha from 23h00 on 6 December 2014 to 12h10 on 7 December 2014.

The defendant is ordered to pay to the first plaintiff the sum of R40 000 as damages for said unlawful detention, together with interest thereon from date of judgment.’

4.4 There shall be no order for costs in the cross-appeal.’

7 The respondent is ordered to pay the second applicant's costs of appeal in this Court.

8 No order for costs is made in relation to the first applicant's appeal in this Court.

S WEINER
JUDGE OF APPEAL

G GOOSEN
JUDGE OF APPEAL

Makgoka JA:

[75] I have had the privilege to read the judgment of my Colleagues, Weiner and Goosen JJA (the first judgment). I agree with the orders made in the first judgment. I write separately as I do not agree with the reasoning underpinning the interests-costs issue. In my view, that issue should not detain us for as long as it does in the first judgment. The hallmark of this Court's judgments has always been the brevity and linear reasoning. There are of course, cases in which an expansive exposition is inevitable. The issue in question does not fall within that category. In my view, it can, and should, be disposed of pithily. The lengthy discourse on established

principles in the first judgment is, in my view, not necessary for the determination of this simple issue.

[76] The issue arose as follows. The trial court upheld the appellants' claims for wrongful and unlawful search. It awarded them compensation of R30 000 each. Interest on the amount was ordered to run from the date of service of summons. The Minister noted an appeal to the high court against this order, among others. In turn, Mr Syce noted a cross-appeal against the trial court's dismissal of his claim for unlawful detention.

[77] On 20 July 2021 the appellants delivered a notice in terms of rule 51(11)(a) of the magistrate court's rules, in which they abandoned the interest portion of the trial court's order. The appellants accepted that the trial court had erred in awarding them interest from the date of summons. They accepted that interest should have been ordered to run only from the date of judgment. The effect of the abandonment was that on appeal, the appellants would be liable to pay the Ministers costs only up to the date of the abandonment, namely, 20 July 2021.

[78] Although the notice of abandonment was not included in the record of appeal in the high court, counsel for the parties confirmed to us that: (a) the notice was handed up to the court at the commencement of the hearing of the appeal in the high court; (b) the high court was informed that the notice rendered moot, the appeal in respect of the interest portion of the trial court's order; and (c) the high court did not need to adjudicate the appeal in respect of the interest award. Despite the above, the high court adjudicated the issue in its judgment. It upheld the Minister's appeal against the award of interest and ordered the appellants to pay the costs in respect

thereof. It did not refer at all, to the notice of abandonment. The effect was that the appellants were ordered to pay the costs even after the date of the abandonment of the order.

[79] The applicants now seek this Court to reverse the high court's order and replace it with one ordering them to pay the costs up to the date of the delivery of their notice of abandonment. Were the order of the high court to stand, an injustice would occur to Mr Syce and Mr Blignaut, in that they would be obliged to pay the full extent of the costs on appeal, despite their abandonment of the erroneous order by the trial court. This points to the fact that the prospects of success are so strong that a refusal of leave may result in a manifest denial of justice,⁴⁵ – a key consideration whether special leave should be granted.

[80] In my view, this is the nub of the appeal on this issue, and the basis on which it should be decided. The error of the high court should be corrected. For these brief reasons I agree with the order of the first judgment to do so.

T MAKGOKA
JUDGE OF APPEAL

⁴⁵ *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 8.

Appearances

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