

Throwing the Unlawful Detention Jurisprudence into Turmoil: A Critique of *De Klerk V Minister of Police* 2020 1 SACR 1 (CC)

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Abstract

Before the judgement in *De Klerk v Minister of Police* 2020 1 SACR 1 (CC), (*de Klerk*), a plaintiff could claim damages for unlawful arrest and detention after the first appearance in court if the arresting (or the investigating) officer had conducted himself unlawfully in addition to the unlawful arrest. The conduct of the arresting (or investigating) officer had to be such that it influenced the prosecution and/or the court to deny the plaintiff bail. In *De Klerk* the majority of the Constitutional Court (CC), after assuming that factual causation had been proven, held the Minister of Police (Minister) liable for the unlawful arrest and detention of the plaintiff (including detention after the plaintiff had appeared in court). This was despite the CC's having found that the conduct of the arresting officer after the appearance of the plaintiff in court had been lawful. The CC held that the arresting officer foresaw that by not releasing the plaintiff, the plaintiff would be remanded in detention – the unlawful conduct. The arresting officer was aware that the practice in the court where the plaintiff appeared was to remand all first appearance cases without considering the accused for release on bail. This note contends that the CC's decision does not bear scrutiny. The flaw in the CC's decision arose from its assumption that factual causation had been proven in this case. This faulty approach flowed from the CC's unconventional application of the "but-for" test. Instead of substituting the defendant's actual conduct for the hypothetical reasonable conduct, the CC held that it was the defendant's conduct *per se* that had caused the plaintiff harm. On this application of the "but-for" test, an arresting officer is unlikely to escape liability for an unlawful arrest and detention even if his or her conduct ceases to be unlawful at one stage or another. The Minister was held liable for the blameworthy conduct of the arresting officer up to the time of the plaintiff's appearance in court. The arresting officer played no role whatsoever after the appearance of the plaintiff in court. It is therefore absurd to hold that her conduct was the factual cause of the damage the plaintiff suffered. Ordinarily the Minister would not be held liable for detention after the court appearance. There was nothing extraordinary in the *De Klerk* case warranting the Minister's being held delictually liable for the post-court-appearance detention. The plaintiff failed to prove that it was the conduct of the arresting officer that caused the plaintiff damage post the court appearance.

Keywords

Constitutional and statutory roles; delictual liability; factual causation; unlawful arrest and detention; bail.

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1 Introduction

Until now, the South African jurisprudence on unlawful arrest and detention has seemed pretty much settled.¹ The courts have demarcated the delictual liability of state institutions according to each institution's breach of its constitutional and statutory responsibilities.² In what appears to have been the general rule, the police could not be held liable for damages for unlawful detention beyond the plaintiff's first appearance in court, except in specific circumstances.³ From the time of the first court appearance, the responsibility for dealing with the plaintiff lies with the prosecuting authority and the courts.⁴ Once the arrestee has appeared in court, the police no longer have any authority over him or her. If it is the conduct of the prosecution that is blameworthy, liability would fall on the National Prosecution Authority.⁵ Owing to the common law doctrine of judicial immunity, should the court find that any further detention of the plaintiff is due to the blameworthy conduct of the presiding officer, that would generally be the end of the matter.⁶ However, in *De Klerk v Minister of Police*⁷ (*De Klerk*) the majority judgement of the Constitutional Court (CC) has blurred, if not completely erased, the lines of separation of liability between these state institutions. The decision in *De Klerk* has the potential to throw the principles governing liability in unlawful arrest and detention claims into turmoil. Scott intimates that the "[f]lawed decision of a higher court can detrimentally affect the application of fundamental legal principles in a lower

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¹ In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency* 2009 2 SA 150 (SCA) para 16 the SCA held that "[a] legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail its purpose."

² See *Minister of Safety and Security v Janse van der Walt* 2015 2 SACR 1 (SCA).

³ See *Woji v Minister of Police* 2015 1 SACR 409 (SCA); *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA); *Minister of Safety and Security v Ndlovu* 2013 1 SACR 339 (SCA).

⁴ See *Minister of Safety and Security v Janse van der Walt* 2015 2 SACR 1 (SCA).

⁵ In *De Klerk v Minister of Police* 2020 1 SACR 1 (CC) the CC continually refers to the Minister of Justice as a party potentially liable for the conduct of both the National Prosecuting Authority (NPA) and the presiding magistrate. This seems to be incorrect if there is regard for the jurisprudence that the NPA is liable for the blameworthy conduct of the members of the prosecution and that the presiding officers do not fall under the executive authority of the Minister of Justice and the latter could not be held liable for the conduct of the former. However, this issue is of no moment as it was not the question before the Court. See *Minister of Safety and Security v Janse van der Walt* 2015 2 SACR 1 (SCA) paras 20-25; *National Director of Public Prosecutions v Swarts* 2020 ZAECHGHC 64 (17 June 2020).

⁶ *Claasen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC) paras 22-23; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) paras 17-20; *Okpaluba* 2007 Lesotho LJ 41-69.

⁷ *De Klerk v Minister of Police* 2020 1 SACR 1 (CC) (*De Klerk* CC).

court",⁸ with devastating repercussions on legal certainty – a facet of the rule of law. This blurring of the lines of liability also has the potential to disproportionately expose the Minister of Police (the Minister) to possible unlawful detention claims for the conduct of personnel over whom that office has no authority. In essence, this judgement obliterates the constitutional and statutory delineations between the functions and responsibilities of the different functionaries of state institutions.

In *De Klerk*, the majority attributed liability to the Minister for conduct that was in essence actionable against the public prosecutor and the presiding magistrate, who are not the servants of the Minister. The majority assumed that the police officer's arrest of the plaintiff was the factual cause of the plaintiff's damage. This contribution contends that this conclusion does not correspond with the facts and probabilities, and that the majority was therefore remiss in this regard. The judgement in *De Klerk* assumed, without interrogation, that factual causation had been proven. This points to the dangers of courts drawing conclusions with respect to issues that still have to be adjudicated rather than dealing with them. This contribution attempts to illustrate that had the CC undertaken a thorough analysis of factual causation as an element of a delictual claim for unlawful arrest and detention, it would have come to a different conclusion. In short, the majority opinion failed to appreciate that the detention before and after the court appearance are separate causes of action. Since they failed to distinguish the two, the *De Klerk* majority fell into the trap of assigning blame to the arresting officer. The majority of the CC saw the primary issue for determination as the police's failure to release the plaintiff on bail as the sole cause of his further detention. In coming to this conclusion, the lead judgement paid scant attention to the constitutional and statutory obligations of the public prosecutor and the courts in the determination of whether an arrestee must be released from detention pending trial or not. In fact, the majority lost sight of the fact that once an arrestee appears in court, the arresting officer's powers to release the arrestee end. Furthermore, the majority opinion ignored the existing precedent that the Minister may be held liable for further detention only if the arresting officer, in addition to the unlawful arrest, engaged in further unlawful conduct. Against this backdrop, this contribution contends that on the facts of this case, the plaintiff had failed to surmount the factual causation element. The discussion is structured as follows: the facts and issues for determination are briefly canvassed, followed by the fulcrum of the discussion, namely whether the element of factual causation was satisfied. The discussion then closely

⁸ Scott 2016 *THRHR* 558.

scrutinises the approach of the majority to the Supreme Court of Appeal (SCA) precedent and ends with concluding remarks.

2 Facts and issues for determination

The facts in this case are not contentious. The plaintiff was arrested for allegedly assaulting the complainant with the intention to cause him grievous bodily harm. As a result, the complainant laid charges against the plaintiff. The plaintiff presented himself at the police station the day after the police requested him to do so. On his arrival at the police station, he was arrested, processed and taken to court within two hours. At court he was remanded in custody for seven days without the prosecutor and the presiding magistrate giving any consideration to his release on bail. This was despite the recommendation by the investigating officer that the plaintiff be released on R1 000.00 bail being endorsed in the police docket. The plaintiff was released from detention without appearing in court after the complainant withdrew the charges against him.⁹ The plaintiff instituted action against the Minister for unlawful arrest and detention, as well as malicious prosecution. The high court dismissed both claims. It held that the plaintiff's arrest and detention were lawful because section 40(1)(b) read with Schedule 1 of the *Criminal Procedure Act 51 of 1977* (the Act) empowered a peace officer to arrest a suspect whom the arrestor reasonably suspects to have committed an offence where, on conviction, the arrestee may be sentenced to a period of imprisonment exceeding six months without the option of a fine. The arresting officer reasonably entertained such belief.¹⁰ With regard to malicious prosecution,¹¹ the high court found that the police official who arrested the plaintiff had not set the law in motion.¹²

The plaintiff appealed to the SCA against the finding on unlawful arrest only. The SCA unanimously dismissed the lawfulness of the arrest because the grounds on which the court of first instance relied were not pleaded and, in any case, assault with intent to cause grievous bodily harm was not one of the offences listed in Schedule 1 of the Act.¹³ However, members of the court diverged on when the unlawfulness of the detention ceased. The majority of the SCA upheld the appeal for unlawful arrest and detention up

⁹ See *De Klerk* CC paras 2-4.

¹⁰ *De Klerk v Minister of Police* 2016 ZAGPPHC 827 (9 September 2016) (*De Klerk* GP) para 8.

¹¹ For a sustained appraisal on the subject see Okpaluba 2012 *JJS* 65-95; Okpaluba 2013 *PELJ* 241-279; Okpaluba 2013 *TSAR* 236-256, among others.

¹² *De Klerk* GP para 28.

¹³ *De Klerk v Minister of Police* 2018 2 SACR 28 (SCA) (*De Klerk* SCA) by majority judgement paras 7, 9 and minority judgement paras 21-22.

to the time the plaintiff appeared in court (a period of approximately two hours) and dismissed the appeal against further detention.¹⁴ Relying on *Minister of Safety and Security v Sekhoto* (*Sekhoto*),¹⁵ the majority of the SCA held that the unlawfulness of the plaintiff's arrest and detention ceased the moment the plaintiff appeared in court.¹⁶ The minority of the SCA, on the other hand, found that the entire period of detention had to be considered as the arrest and that the initial detention was the sole cause of the damage the plaintiff suffered (i.e., the subsequent detention). The arresting officer could foresee that her conduct would cause harm to the plaintiff.¹⁷ The plaintiff appealed to the CC against the limited success of his claim.¹⁸

The CC produced four judgements. The opinion for the majority was penned by Theron J with a concurring opinion by Cameron J, and the dissenters' opinions were penned by Mogoeng CJ and Froneman J. For the majority, the issue for determination was whether the arresting officer's conduct was also the legal cause of the plaintiff's harm after the plaintiff's first appearance in court.¹⁹ This is assuming that factual causation has been satisfied. Although Mogoeng CJ agreed with the majority on the characterisation of the question for adjudication, he nonetheless found that the plaintiff's appearance in court constituted a new intervening act.²⁰ For Froneman J, however, the issue for determination was the question of wrongfulness. According to Froneman J, the question of causation cannot be considered if the conduct of the defendant is found not to be wrongful.²¹ Put differently,

¹⁴ *De Klerk* SCA paras 16-17.

¹⁵ *Minister of Safety and Security v Sekhoto* 2011 5 SA 367 (SCA) (*Sekhoto*) paras 42-44.

¹⁶ *De Klerk* SCA paras 12-15.

¹⁷ *De Klerk* SCA para 49.

¹⁸ *De Klerk* CC paras 11-12. The Court assumed jurisdiction by reading conjunctively subparagraphs (i) and (ii) of s 167 (3)(b) of the *Constitution of the Republic of South Africa, 1996* (the Constitution). Scott bemoans the CC approach to the extended jurisdiction to include non-constitutional matters that raise an arguable point of law of public importance. The grounds for CC jurisdiction in s 167 (3)(b) are independent of each other. Therefore, it is not necessary for the CC to pronounce on both of them in order to assume jurisdiction. Should s 167(3)(b) be read to mean that both conditions in the subparagraphs in that provision must be present, this may lead to untenable results like one in which the CC finds that the matter is constitutional on the one hand and that it does not raise an arguable point of general public importance on the other. Scott 2016 *THRHR* 562-564.

¹⁹ *De Klerk* CC paras 33-63; paras 107-112 concurring opinion.

²⁰ *De Klerk* CC paras 153-154.

²¹ *De Klerk* CC para 121.

it could not be said that it was the conduct of the arresting officer after the appearance of the plaintiff in court that wrongfully infringed the plaintiff's right to freedom of movement.²² However, the difficulty with Froneman J's analysis of the issue before the CC is that the police officer's initial conduct of arresting the plaintiff was wrongful. She had avenues available to avoid violating the plaintiff's right to freedom of movement but she failed to consider them. Therefore, her conduct could not be characterised as anything but blameworthy. It is noteworthy that in unlawful arrest and detention claims, the burden shifts to the defendant to justify the arrest and detention once the plaintiff has established it. In this case, no justification was forthcoming. However, this is not sufficient to find liability against the Minister. The plaintiff is also obliged to prove other elements of the delict. As already indicated, the purpose of this contribution is to examine whether the factual causation element had been satisfied. If not, the plaintiff's claim for further detention ought to have been dismissed.

3 Was factual causation proved?

In *Lee v Minister of Correctional Services*²³, the CC delineated the test for factual causation as follows:

Although different theories have developed on causation, the one frequently employed by courts in determining factual causation, is the *conditio sine qua non* theory or but-for test. This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine a causal link, put in its simplest formulation, is whether 'one fact follows from another.' The test—

'may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.'

In the case of 'positive' conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility. The other reason is because it is not always easy to draw the line between a positive act and an omission. Indeed there is no magic formula by which one can generally

²² *De Klerk* CC para 134.

²³ *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) (*Lee*) paras 40-41.

establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case.

In *De Klerk* both the minority in the SCA and the majority judgement at the apex court assumed, without much ado, that factual causation had been proven: "but for the arrest by Constable Ndala, the applicant would probably not have been remanded by the Magistrate for the week."²⁴ Was this conclusion justified based on the facts and probabilities?²⁵ It is submitted that it was not. This conclusion by the CC ignored many variables of the process associated with pre-trial detention. Although it is true that arrest invariably leads to and constitutes some form of detention, the two are not factually and conceptually synonymous, nor are they always exercised by the same personnel or institution.²⁶ Although the line is thin, the two remain distinct.²⁷ The SCA has confirmed that even where the arrest is found to be lawful, it does not inexorably follow that the subsequent detention is lawful as well.²⁸ The opposite must also be true. Put the other way, where the arrest is found to be unlawful, it does not automatically mean that the detention that follows would be unlawful as well, or that the arrestor's conduct shall be the cause of the unlawful detention. Our courts have dealt with the detention before and after an appearance in court as separate causes of action.²⁹ The compartmentalisation of the two causes of action undoubtedly reflects the constitutional and statutory framework that assigns the roles of arrest and detention before the appearance in court on the one hand, and the further detention after the arrestee's appearance in court on

²⁴ *De Klerk* CC para 24. The minority of the SCA in *De Klerk* SCA para 39 put it as follows: "[B]ut for the unlawful arrest, the appellant would not have been brought before the court and there would have been no occasion for the court to remand him in custody." However, it is equally obvious that had the complainant not laid charges against the appellant, the police would not have arrested the latter. Despite this, the complainant will not be held liable for the appellant's deprivation of freedom of movement without more. See Neethling and Potgieter *Visser Law of Delict* 7th ed 349. Therefore, the proposition that because the arrest was effected by a police officer and therefore all the consequences arising from his or her conduct must befall the Minister is not apposite.

²⁵ See Neethling and Potgieter *Visser Law of Delict* 7th ed 184-185.

²⁶ See s 39 read with s 50(1) of the *Criminal Procedure Act* 51 of 1977 (the Act). These provisions echo s 35(1) and (2) of the Constitution.

²⁷ See ss 35(1) and (2) of the Constitution.

²⁸ See *Minister of Police v Du Plessis* 2014 1 SACR 217 (SCA) paras 19-26; *Woji v Minister of Police* 2015 1 SACR 409 (SCA) para 18.

²⁹ See for example *Mahlangu v Minister of Police* 2020 2 All SA 656 (SCA) paras 22-25. At para 22 the SCA had this to say in this regard: "Where the police acted unlawfully 'after' the unlawful arrest, any harm resulting from having 'acted unlawfully' is not caused by the unlawful arrest, but is caused by the unlawful conduct, just as unlawful conduct by the police after a lawful arrest would constitute a separate delict." On further appeal, the CC reaffirmed this proposition: *Mahlangu v Minister* 2021 7 BCLR 698 (CC), especially paras 33 and 45. See also *Minister of Safety and Security v Ndlovu* 2013 1 SACR 339 (SCA) para 17.

the other, to separate state institutions. The SCA majority, therefore, was correct in holding that once the plaintiff appeared in court, the arresting officer had a limited role to play. As soon as the plaintiff appeared in court, the power to determine subsequent events shifts to the public prosecutor and the court.³⁰ The truth of this supposition is underscored in the following passage from the majority judgement:

Linked to the separation of powers is the value of accountability; a value upon which our democratic state is founded. Once a police officer hands over an arrested person to an officer of the court, it is the judiciary, and not the executive, who is primarily responsible. Previous cases dealing with this issue have imposed liability on the Minister of Police in cases where the arresting or investigating officer had taken *unlawful steps resulting in the remand other than just the unlawful arrest*. Constable Ndala, here, did discharge her constitutional duty to bring the applicant before Court. In addition, she recommended inside the docket that, if bail was considered, the applicant should be released.³¹

Regrettably, the majority judgement failed to sufficiently engage with the meaning of this dicta, no attach enough weight to it despite having advanced it. This is demonstrated by the majority's correctly noting that in the previous cases where the Minister was held liable for further detention, the arresting officer had engaged in egregious conduct that caused the further remand of the arrestee.³² The unlawful arrest was not per se the basis (or at the very least not the only basis) for the finding against the Minister.³³ The majority opinion failed to engage with this point outright. This should have been the point of departure of the analysis of cases holding the Minister liable. Despite the cogent observation by the majority in this regard, the CC criticised the majority of the SCA for the finding that the duty of the police was limited to bringing the arrested person before court on the basis that the case on which the majority of the SCA relied – *Sekhoto* – did not support this proposition. The majority of the CC held that *Sekhoto* had nothing to do with the role of the arresting officer after the court appearance. In any event, the CC concluded that the views expressed in *Sekhoto* were obiter.³⁴ Whatever views the majority espoused with respect to the reliance of the SCA majority on *Sekhoto*, the passage quoted above clearly supports the conclusion of the majority of the SCA. The majority of the SCA predicated its decision on the fact that the police do not have authority over the arrestee once the arrestee has appeared in court,³⁵ a trite point in our law.

³⁰ *De Klerk* SCA para 14.

³¹ *De Klerk* CC para 69 (emphasis added in the original).

³² See *De Klerk* CC paras 58, 61.

³³ See for example *Mahlangu v Minister of Police* 2020 2 All SA 656 (SCA) para 22.

³⁴ *De Klerk* CC paras 70-72.

³⁵ *De Klerk* SCA para 14.

Furthermore, the arresting officer did not engage in any unlawful conduct other than the unlawful arrest itself. The majority opinion failed to attach sufficient weight to these factors.³⁶ If the majority had regard for the above considerations, it would have concluded that the arresting officer's conduct was not the factual cause of the plaintiff's harm.

The majority of the CC bypassed this difficulty by holding that the requirement of factual causation is not inflexible.³⁷ To this end, the CC rejected even the SCA minority judgement that where the presiding officer had applied his or her mind to the release of the arrestee on bail, the Minister may not be held liable as the presiding officer's conduct constituted a new intervening act.³⁸ This position is contrasted with the instance where the presiding officer mechanically postpones the matter without regard to the question of the release of the arrestee on bail. The CC majority judgement reaffirmed the flexibility of the test for legal causation having regard to the facts of each case.³⁹ Although the CC was sympathetic to the Minister,⁴⁰ it nonetheless found that the Minister was liable because the arresting officer had the requisite knowledge and foresight to know that the question of the release of the plaintiff on bail would not be considered by the court.⁴¹ The conclusion by the majority is attributable to the oversight that foreseeability can be part of the wrongfulness enquiry, although it is not a decisive factor.⁴² This point is illustrated by Petse JA's unequivocal declaration that reception courts have ceased to exist.⁴³ Where they exist, they are wrongful. The foreseeability of the wrongfulness of the use of reception courts by an individual who does not have any authority over their (the reception court's) functioning cannot amount to a factual cause of the harm when he or she acts within the parameters of his or her authority. This was the position in

³⁶ See the minority judgement of Mogoeng CJ in *De Klerk CC*.

³⁷ See *De Klerk CC* paras 33, 39 and Cameron J concurrence, para 103. Some commentators are critical of the CC's flexible application of the "but-for" test on the basis that it does not correctly reflect the common law position. See Paizes 2014 *SALJ* 500-509; Fagan 2015 *CCR* 104-134; Price 2014 *SALJ* 491-500. See Wallis 2019 *SALJ* 165-190; Neethling and Potgieter *Visser Law of Delict* 8th ed 226-227.

³⁸ *De Klerk SCA* para 44. Cameron J, however, associates himself with the view of the majority of the SCA. See *De Klerk CC* para 106.

³⁹ *De Klerk CC* paras 73-74. Writing in the context of *Lee Price* was presciently critical of the flexible application of the factual causation test. "At no point does the majority judgement in *Lee* explain *when* these alternative tests for factual causation are to be applied in future. What makes a case 'appropriate' for the 'relaxation of the but-for test' (para 74), so that the traditional approach – summarised above – is no longer determinative of factual causation? In what classes of case should a more 'flexible' approach be applied?" Price 2014 *SALJ* 493.

⁴⁰ *De Klerk CC* para 75.

⁴¹ *De Klerk CC* paras 76-81.

⁴² Neethling and Potgieter 2014 *TSAR* 894.

⁴³ See *Minister of Safety and Security v Ndlovu* 2013 1 *SACR* 339 (SCA) para 13.

this matter. Thus, the CC failure to engage with the question of whether there had been factual causation was misplaced. The majority of the CC seems to have adopted the approach that in determining factual causation:

[t]he court need not always ask itself whether the harm would hypothetically have been suffered had the defendant acted reasonably; that is, the court need not always substitute hypothetical *reasonable* conduct for the defendant's actual conduct. Instead, in appropriate cases the court may decide the issue of factual causation simply by asking whether the defendant's conduct *per se* caused the harm.⁴⁴

Price asserts that factual causation is not "established merely by proving that but for the defendant's conduct *per se*, the harm would not have occurred."⁴⁵ This is exactly what the majority of the CC did. On this test, Price contends that the boundaries for delictual liability would be unduly widened,⁴⁶ exactly the implications the *De Klerk* case would have for the Minister.

Mogoeng CJ, although in agreement with the description of the issue for determination, is equally critical of the reasoning of the majority. The Chief Justice holds that the arresting officer's knowledge and foresight is an immaterial factor in establishing legal causation. The duty of the court to determine the release of the arrestee on bail is independent from what the arresting officer knew or did not know when he or she caused the arrestee to appear in court. Based on the principle of the separation of powers, the appearance of the plaintiff in court severed the connection between the conduct of the arresting officer and the harm suffered by the plaintiff.⁴⁷ However, Mogoeng CJ's concurrence with the majority that the case involved the question of legal causation is belied by the following passage from his judgement:

[t]he entire period of detention for which the Minister of Police is sought to be held liable by the first judgement, would have been justifiable if Mr De Klerk had remained under the exclusive control of the Police, and no other authority, statutorily or constitutionally empowered to release him on bail or on his own recognisance, got involved before he was released.⁴⁸

The passage tells us in no uncertain terms that the arresting officer had no powers to release the plaintiff after his appearance in court. If this is correct, then the arresting officer could never be the factual cause of the harm the plaintiff suffered. This is more so given the fact that the arresting officer's conduct did not contribute in any manner to the prosecutor's and court's

⁴⁴ Price 2014 SALJ 493 (italics in the original).

⁴⁵ Price 2014 SALJ 493 (italics in the original).

⁴⁶ Price 2014 SALJ 493.

⁴⁷ *De Klerk* CC paras 161 *et seq.*

⁴⁸ *De Klerk* CC para 155.

failure to properly exercise their constitutional duties. Any conduct by the arresting officer geared towards the release of the plaintiff after the latter's appearance in court would have constituted a criminal offence of defeating or obstructing the course of justice. Contending otherwise would be tantamount to imposing an unfair standard on the police.⁴⁹ The police, like all state functionaries, are subject to the rule of law.

Froneman J, on the other hand, confirming a line of SCA authorities in this regard,⁵⁰ held that on the facts of this case, the arresting officer did not act unlawfully.⁵¹ Like Mogoeng CJ, Froneman J holds that the question of foreseeability is irrelevant because the arresting officer did not have any authority to release the plaintiff on bail once he appeared in court.⁵² A crucial factor identified by Froneman J is that holding the Minister responsible on the facts of this case "would undermine the distinction between unlawful and malicious deprivation of liberty."⁵³ Theron J failed to adequately deal with this important aspect of the case, given the fact that she found that the arresting officer did not act unlawfully.⁵⁴ By failing to address this crucial issue, the judgement of Theron J threatens the application of the settled principles of law in relation to these delicts by the lower courts.⁵⁵ Failure to address questions pertinently raised by a dissenting judgement amounts to the dereliction of duty by the members of the judiciary.⁵⁶

Given the fact that the CC found that the arresting officer's conduct was lawful, the CC should have determined whether the first leg of the causation test had been satisfied. Therefore, the majority judgement was remiss in accepting unequivocally that the arrest of the plaintiff was the factual cause of the plaintiff's detention after his appearance in court. This remissness becomes pointed if one takes into consideration that it was the court, a body constitutionally authorised to do so, that ordered the further detention of the plaintiff independent of any conduct of the arresting officer⁵⁷ – the latter had no say in this matter. In *S v Lungile*⁵⁸ the SCA held that lawful conduct

⁴⁹ Paizes 1996 SALJ 244.

⁵⁰ See *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA); *Woji v Minister of Police* 2015 1 SACR 409 (SCA); and *Minister of Safety and Security v Ndlovu* 2013 1 SACR 339 (SCA). Although the Judge did not cite these cases, the proposition he makes has been upheld by the SCA in these cases.

⁵¹ *De Klerk* CC para 133.

⁵² *De Klerk* CC paras 133-134.

⁵³ *De Klerk* CC para 135.

⁵⁴ *De Klerk* CC para 69.

⁵⁵ Scott 2016 *THRHR* 551, 558.

⁵⁶ See Msaule 2020 *De Rebus* 38-39.

⁵⁷ "A magistrate failing to apply their mind to the question of bail and remanding the arrested person is necessarily an unlawful remand." *De Klerk* CC fn 106.

⁵⁸ *S v Lungile* 2000 1 All SA 179 (SCA) paras 25-31, especially para 29.

cannot bring about unlawful results. However, the SCA's finding in that case that the act, which was neither unlawful nor intentional, was the factual cause of the prohibited result,⁵⁹ does not bear scrutiny. It is trite that although the elements of delict are not mechanically considered, once it has been established that the conduct is lawful in the sense of not being blameworthy, it would be superfluous to consider other elements.⁶⁰ This is the difficulty that confronted the majority in *De Klerk*. In this regard, the majority judgement held that the arresting officer acted lawfully, but strangely proceeded to hold that her conduct produced unlawful results. This conclusion baffles the mind. The majority held that failure by the magistrate to consider the release of the plaintiff on bail could not serve as a *novus actus intervenes*. The phrase *novus actus intervenes* presupposes the existence of anterior unlawful conduct – without anterior unlawful conduct there cannot be an intervening act. It is in this respect that the judgement of the majority is incomprehensible. The argument that the arrest was unlawful is to no avail. At worst, it points to wrongfulness, but not causation. The minority SCA attempt to address this issue is equally unsatisfactory. The minority of the SCA posits that:

A moment's reflection will reveal that there are many cases where the act of a third party, itself having causal effect, intervenes between the act of the wrongdoer and the harmful consequences but where the wrongdoer is still held liable for the harmful consequences. This may be so whether the act of the third party is lawful or unlawful...

There is no reason for not following the same approach in determining the harmful consequences of an unlawful arrest for which the police may be held liable.⁶¹

The SCA minority observation is correct, except that the duties of the public prosecutor and magistrate are constitutional injunctions that could not be likened to a third party's interventions. They are cogs in the wheel that is the criminal justice system. They are in themselves independent wrongdoers. In terms of section 7 of the *Constitution of the Republic of South Africa, 1996*, the prosecuting authority and the courts "must respect, protect, promote and fulfil the rights in the Bill of Rights." It is trite that the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.⁶² Their role in ensuring that an arrested person's detention is lawful and is not unnecessarily extended is constitutionally mandated. They have

⁵⁹ See *S v Lungile* 2000 1 All SA 179 (SCA) para 27.

⁶⁰ Neethling and Potgieter *Visser Law of Delict* 7th ed 4 defines a delict as an "act of a person that in a wrongful and culpable way causes harm to another" (emphasis in the original).

⁶¹ *De Klerk* SCA paras 32-33.

⁶² See s 8(1) of the Constitution.

no choice. Even before the currency of the *Constitution of the Republic of South Africa*, 1996, courts recognised the crucial role they had to play to minimise the violation of the arrestee's right to freedom and the occurrences of arbitrary detention. In *Minister of Law and Order v Kader*,⁶³ the Appellate Division (as it then was) held that:

It is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds and, in any event, to ensure that his detention is not unduly extended.

In *Minister of Safety and Security v Ndlovu*⁶⁴ the SCA held that a public prosecutor had a duty to evaluate the information before him or her to come to the decision to recommend the refusal or the granting of bail. Furthermore, the SCA held that the "reception court has since ceased to exist."⁶⁵ This does not mean, however, that the Minister cannot be held liable where the conduct of the police constitutes an impediment in the proper exercise of the prosecution and court's powers to release the arrestee on bail. Indeed, the SCA has confirmed that in cases where the conduct of the arresting officer is unlawful in addition to the unlawful arrest, the Minister may be held liable.⁶⁶ The distinguishing factor is that the conduct of the arresting officer in this case was not unlawful beyond the unlawful arrest. To hold otherwise would be tantamount to applying to the Minister "a legal standard so exacting as to be entirely inappropriate and unjust."⁶⁷ That would not only be inappropriate but also unjustifiable. The inappropriateness and unjustifiability of this standard are evinced by the fact that the Minister would be held accountable in delict for conduct that does not emanate from the Minister's employees.

The majority of the CC justify their conclusion on the grounds that the police could have granted the plaintiff the so-called police bail in terms of section 59 of the Act. According to this reasoning, the police's wrongful conduct was their failure to positively release the plaintiff rather than their failure to cause the plaintiff's release during his appearance in court.⁶⁸ For that, the Minister has been held liable. Once an arrestee appears before a magistrate, the power to grant police bail is exhausted and instead a distinct cause of action is birthed. Whether the plaintiff had framed his pleadings as a positive act

⁶³ *Minister of Law and Order v Kader* 1991 1 SA 41 (AD) para 41.

⁶⁴ *Minister of Safety and Security v Ndlovu* 2013 1 SACR 339 (SCA) para 11.

⁶⁵ *Minister of Safety and Security v Ndlovu* 2013 1 SACR 339 (SCA) para 13.

⁶⁶ *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA); *Woji v Minister of Police* 2015 1 SACR 409 (SCA).

⁶⁷ Paizes 1996 SALJ 244.

⁶⁸ *De Klerk* CC para 21.

or as an omission on the part of the police is of no relevance.⁶⁹ Generally, this cause of action is not brought about by the conduct of the police, although it may have its genesis in that conduct. It is common cause that at this stage the police no longer have any power to release an arrestee on bail. Therefore, the majority's supposition that the cause of the plaintiff's further detention is the police's positive conduct of arrest as opposed to the police's failure to release the plaintiff after his appearance in court misses the point. A cause of action based *merely* on failure by the police to release the plaintiff after his appearance in court does not disclose a cause of action and is therefore expiable.⁷⁰ The police are not entrusted with such power. Furthermore, in this case the arresting officer has done everything by the book after her initial failure to release the plaintiff on police bail, for which the Minister has been held liable. The CC seems to have applied the discredited *versari* doctrine.⁷¹ Adherence to a constitutionally compliant law cannot produce blameworthy consequences. Put in another way, conduct that complies with the precepts of the law is lawful. It is submitted that even if the conduct was initially unlawful, the moment it conforms to the law it becomes lawful, or at least the consequences flowing from it do so.⁷² Therefore, factually, such conduct cannot produce harmful consequences.

As alluded to already, the majority of the CC assumed that factual causation has been satisfied without an in-depth analysis of this issue. Had the CC engaged in a thorough investigation to establish whether or not factual causation had been established, it would have reached a different conclusion. It bears repetition that the plaintiff had framed his cause of action as a positive act against the police. The CC accepted that the normal "but-for" test was applicable on the facts of this case to determine factual causation.⁷³ In the case of positive conduct, the test postulates the elimination of the wrongful conduct and assesses whether the prohibited results would nonetheless have ensued. If the wrongful conduct would still have ensued despite the hypothetical lawful course, the initial conduct would not be the cause of the harm suffered by the plaintiff. The majority of the CC held that the conduct of the arresting officer was lawful. Therefore, on the facts, the conduct of the arresting officer is blameworthy only until

⁶⁹ See *De Klerk* CC para 22. The CC held that even if the appellant would have couched his pleadings as an omission the CC would still have found against the Minister because such omission was also the cause of the appellant's further detention. See Paizes 2014 SALJ 508.

⁷⁰ See rule 23(1) of the Uniform Rules of Court (GN R48 in GG 999 of 12 January 1965).

⁷¹ See for instance Snyman *Criminal Law* 149.

⁷² See Paizes 2014 SALJ 508.

⁷³ *De Klerk* CC para 24.

the plaintiff's first appearance in court. If the conduct of the arresting officer is to blame only up until the plaintiff's first appearance in court, it is difficult to reach the conclusion that the conduct of the arresting officer was the factual cause of the plaintiff's harm. Fagan posits that only what is necessary of the blameworthy conduct must be removed in the hypothetical exercise, no more, no less. In other words, it is not necessary in all cases to remove the entire blameworthy conduct. Fagan⁷⁴ contends that:

[o]ne has to mentally eliminate or 'think away' *as much of the conduct as, but no more of the conduct than*, was negligent (or wrongful). Thereafter one must ask: if *this much, but no more*, of the conduct were eliminated, would the harm still have occurred?

Should the arrest of the plaintiff, therefore, be disregarded entirely? Put another way, "how much" of the arresting officer's conduct must be thought away to render her conduct not worthy of blame? The act of the arrest should not be removed completely (this is impossible in any event). If the arrest is eliminated entirely, one would be eradicating more than is necessary because the plaintiff's appearance in court was the sequel to his arrest, although the two are distinct. The question of further detention must be assessed from the moment the arresting officer hands over the arrestee to the authority of the public prosecutor. If that is the case, the act of arrest may be eliminated from the equation. As the conduct of the arresting officer was not wholly unlawful, it should not be eliminated entirely.⁷⁵ In this elimination exercise, the lawful conduct must remain extant.⁷⁶ It is common cause that the conduct of the arresting officer after the plaintiff's appearance in court was not unlawful. As Fagan⁷⁷ puts it:

[w]e are to start by positing a course of conduct that differs from the ... actual course of conduct to the smallest extent necessary to cancel out its negligent nature.

The starting point on such a course, it is submitted, is after the plaintiff's appearance in court. This is so because ordinarily the unlawful detention before and after the appearance in court constitutes distinct causes of action.⁷⁸ It is therefore baffling that the CC held that the unblameworthy conduct was the factual cause of the prohibited results. The elimination process must consider until what stage ("removing much, but no more") the

⁷⁴ Fagan 2015 CCR 109 (italics in the original).

⁷⁵ *De Klerk* CC para 69.

⁷⁶ Fagan 2015 CCR 109.

⁷⁷ Fagan 2015 CCR 110.

⁷⁸ See *Minister of Safety and Security v Magagula* 2017 ZASCA 103 (6 September 2017) para 13. The approach of the CC in *De Klerk* bears this proposition out. The CC dealt only with the detention post the plaintiff's appearance in court. See *De Klerk* CC para 60.

conduct of the arresting officer could be regarded as blameworthy. This question is necessitated by the majority decision that the conduct by the arresting officer that caused the plaintiff to appear in court after his arrest was lawful.⁷⁹ Therefore, the lawful conduct of the arresting officer must, subsequent to the appearance of the plaintiff in court, bring to a halt any suggestion of unlawfulness on her part as the cause of the harm that the plaintiff suffered. If after the elimination of the arresting officer's conduct the harm would still have ensued, the conduct of the arresting officer is not the factual cause of the harm the plaintiff suffered. It is common cause that on the facts of this case, the same predicament would have befallen the plaintiff even if the conduct of the arresting officer subsequent to the appearance in court is thought away (this should be done independently of the initial arrest). Once the plaintiff appeared in court there was nothing that the arresting officer could do to avoid harm befalling the plaintiff. "To put it another way, the imagined conduct should alter the actual conduct *only just enough* to render it non-negligent (or lawful)."⁸⁰ In *mCubed International (Pty) Ltd v Singer*⁸¹ (*mCubed*) the SCA held that:

Application of the 'but-for' test to the facts of this case, raises the anterior question: what hypothetical lawful conduct should mentally replace the wrongful misrepresentation in the process of 'but-for' reasoning? Otherwise stated: what is Cosgrove supposed to have done?

The court proceeded to observe that the answer to the question posed in the quoted passage raised another question: "is this the end of the 'but-for' enquiry?" On the facts of that case, the SCA held that it was not.⁸² It is submitted that the same is true for the second question posed in *mCubed* based on the facts of this case.

After the appearance of the plaintiff in court, what could the arresting officer have done to ensure his release? It goes without saying that there is nothing that the arresting officer could have done to alter the conduct of the magistrate and therefore the resultant harmful consequences against the plaintiff. The finding by the majority of the CC that the conduct of the arresting officer when taking the plaintiff to court was lawful stands against any suggestion that there was anything that could alter the conduct of the arresting officer just enough to render it non-negligent as it was at this stage not blameworthy (any other conduct would have been illegal). This finding,

⁷⁹ *De Klerk* CC para 69.

⁸⁰ Fagan 2015 CCR 109 (italics in the original). As already indicated, given the finding by the CC that by taking the appellant to court the arresting officer's conduct was not unlawful, it is difficult to imagine any conduct that could alter the actual conduct just enough to render it non-negligent.

⁸¹ *mCubed International (Pty) Ltd v Singer* 2009 4 SA 471 (SCA) para 24.

⁸² *mCubed International (Pty) Ltd v Singer* 2009 4 SA 471 (SCA) para 25.

it is submitted, could not be faulted, and thus raises doubt as to the correctness of the majority of the CC's holding the Minister liable. To the extent that the majority attached undue value to the pleadings rather than the application of the law to the facts and evidence before it, the CC misdirected itself.⁸³ It should be recalled that:

In order to determine whether negligent (or wrongful) conduct was a factual cause of harm, one always has to posit or imagine a course of conduct that deviates from the actual one. However, and this is critical, the course of conduct which one posits or imagines should deviate from the actual conduct *no more than is necessary* to deprive the conduct of its negligent (or wrongful character).⁸⁴

In his pleadings, the plaintiff sought to hold the Minister liable for the entire period of detention based on the anterior unlawful arrest. As already pointed out, the detention before and after the arrestee's appearance in court constitutes different causes of action. To circumvent this difficulty, the plaintiff lumped the separate causes of action together.⁸⁵ The plaintiff had failed to plead facts that justified the court's finding that the conduct of the arresting officer before the plaintiff's appearance in court in any form influenced the decision of the presiding officer to remand the plaintiff in custody. Failure to allege those facts means that the further detention was not actionable against the Minister.⁸⁶ Mere unlawful failure by the police to release an arrestee on police bail is no basis for holding the Minister liable for detention after the court appearance. The plaintiff did not plead any facts justifying an action against the Minister after the court appearance. This is clear from the following passage in the majority judgement:

The applicant further avers in his particulars of claim that '[t]he members of the SAPS wrongfully failed and/or unreasonably refused to release the [applicant] on bail' and '[a]s a result of the foregoing the [applicant's] further detention was unlawful.' At best, the particulars of claim appear to allude to a failure by the police to give the applicant police bail – not to cause his release at the first appearance. It seems to me that the applicant pleaded that the police wrongfully failed to 'release' him on bail at the Sandton Police station rather than failed to cause his release on bail before the Magistrate.⁸⁷

Clearly, this passage does not point to any conduct on the part of the arresting officer that affected the prosecution or the court's not granting the plaintiff bail. Mogoeng CJ⁸⁸ holds that the court, although having regard for

⁸³ *De Klerk* CC para 20-21.

⁸⁴ Fagan 2015 CCR 109 (italics in the original).

⁸⁵ See *De Klerk* CC paras 19-22.

⁸⁶ See *Mahlangu v Minister of Police* 2021 7 BCLR 698 (CC); *Woji v Minister of Police* 2015 1 SACR 409 (SCA).

⁸⁷ *De Klerk* CC para 21.

⁸⁸ *De Klerk* CC para 165.

the pleadings, must not put form over substance, in whichever way the pleadings are framed. The Chief Justice posits that:

The Minister of Police should not be made to bear the constitutional burden of the Judiciary, simply because Mr De Klerk failed to sue the latter for the period of detention beyond the two hours for which the Police are exclusively responsible. Nothing stopped him from doing so. It was his own lawyers' ineptitude that is responsible for this failure. It is therefore not the responsibility of a court to bend over backwards to mercifully accommodate him at the expense of constitutional imperatives or sound legal principles.

In short, the Chief Justice intimates that the court cannot use the manner in which the pleadings have been framed as a bar when considering the real issues before it.

4 The SCA authorities on the liability of the Minister after the court appearance

The last issue worthy of consideration is the excursion of the majority judgement on whether the lawfulness or unlawfulness of the arrestee's detention subsequent to his or her appearance in court is determinative of liability.⁸⁹ The SCA decisions in this regard are not conclusive.⁹⁰ However, this excursion by the majority of the CC served no purpose as the facts of all the cases that the Majority of the CC referred to were distinctly distinguishable from *De Klerk*. In all these cases there was an element of criminality in addition to the unlawful arrest – something which cannot be alleged in *De Klerk*. Therefore, whether the subsequent detention was sanctioned by the court was neither here nor there. Since *Zealand v Minister of Justice and Constitutional Development*⁹¹ it has become trite law that a purportedly lawful remand order does not automatically render a subsequent detention lawful. The case of *De Klerk* was not dependent on whether the remand order was lawful or unlawful, but as already indicated on the failure by the police to release the plaintiff on police bail.⁹² This then put paid to any suggestion of how germane the court's order relating to the plaintiff's subsequent detention was. Despite the defendant's having pleaded that its conduct was excusable based on the remand order, the question whether the defendant should be held liable for conduct that was

⁸⁹ *De Klerk* CC paras 36-58. These cases are *Isaacs v Minister van Wet en Orde* 1996 1 SACR 314 (A); *Minister of Law and Order v Thandani* 1991 4 SA 862 (A); *Minister of Law and Order v Ebrahim* 1994 ZASCA 163 (22 November 1994); *Mthimkhulu v Minister of Law and Order* 1993 3 SA 432 (E); *Minister of Safety and Security v Tyokwana* 2015 1 SACR 597 (SCA); *Woji v Minister of Police* 2015 1 SACR 409 (SCA); *Minister of Safety and Security v Ndlovu* 2013 1 SACR 339 (SCA).

⁹⁰ *De Klerk* CC para 59.

⁹¹ *Zealand v Minister of Justice and Constitutional Development* 2008 4 SA 458 (CC).

⁹² *De Klerk* CC para 21.

not unlawful beyond the unlawful arrest is a question of law and the Court ought to have considered it as such. It is trite that a court is not bound by a concession that is wrong in law.⁹³ The majority of the CC acknowledged that in the cases to which it referred, the conduct of the police was egregious,⁹⁴ in contrast to the conduct of the arresting officer in *De Klerk*. Therefore, for all intents and purposes, the consideration of the SCA precedent by the majority of the CC was not on point and was therefore not necessary.

5 Concluding remarks

This contribution has critiqued the majority judgement in *De Klerk*. The aim of the critique was to illustrate that the CC erred in concluding that factual causation had been established on the facts of this case. The contribution bemoans the CC's failure to engage with the element of factual causation. In this regard, it should be noted that the court assumed that factual causation had been established. The CC erred in finding that the factual causation element was present. This is so because, as the CC held, the conduct of the arresting officer after the plaintiff's first court appearance was not blameworthy. The plaintiff's arrest was not the factual cause of the plaintiff's further detention because the arresting officer had not engaged in any unlawful conduct beyond the unlawful arrest. In other words, the conduct of the arresting officer did not contribute in any way to the plaintiff's being remanded in custody. This decision was taken by the public prosecutor on the one hand and the court on the other, independently of the conduct of the arresting officer. It is trite that once the arrestee appears in court, the power of the arresting officer to release the arrestee is exhausted. Any conduct to that end would be illegal. Holding the Minister liable for conduct by his or her officials that may result in illegality is implausible. The time before and after the appearance in court constitutes different causes of action. In this case the plaintiff failed to allege facts warranting the Minister's being held liable for the plaintiff's further detention. To hold otherwise would raise the spectre of indeterminate liability against the Minister. More so because the Minister does not have authority over the conduct of the public prosecutor and the magistrate who caused the further detention of the plaintiff. The fact that the arresting officer foresaw the plaintiff's being remanded in custody without the consideration of the question of a release on bail is without moment because the SCA has found the reception courts to be unlawful and unconstitutional. The fact that the

⁹³ See *Cape Town City v Aurecon SA (Pty) Ltd* 2017 4 SA 223 (CC) para 34.

⁹⁴ *De Klerk* CC paras 58, 61.

court where the plaintiff appeared was a reception court can therefore not be attributed to the Minister.

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List of Abbreviations

CC	Constitutional Court
CCR	Constitutional Court Review
JJS	Journal for Juridical Science
Lesotho LJ	Lesotho Law Journal

NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeins- Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg