MR v MINISTER OF SAFETY AND SECURITY

CONSTITUTIONAL COURT

MOGOENG CJ, MOSENEKE DCJ, BOSIELO AJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, MHLANTLA J, NKABINDE J and ZONDO J

2016 FEBRUARY 25; AUGUST 11
CASE No CCT 151/15 [2016] ZACC 24

Order

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld with costs, including the costs of two counsel.
4. The order of the trial court is set aside and replaced with the following:
   ‘*(a)* The Minister of Police is liable to Ms MR for damages that may be proved.
   (b) The Minister of Police must pay Ms MR’s costs.’
5. The order of the full court is set aside.
6. The Minister of Police must pay Ms MR’s costs in the full court and the Supreme Court of Appeal.
7. The matter is remitted to the Gauteng Local Division of the High Court, Johannesburg, for the determination of the amount of damages payable.

Bosielo AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

Introduction

[1] At the heart of this matter is the alleged wrongful arrest and detention of Ms MR (applicant) who was 15 years old at the time. The applicant instituted a claim for damages in

the South Gauteng High Court, Johannesburg (High Court)[1] against the respondent arising from her alleged unlawful arrest and detention. The High Court dismissed her claim.[2] Her appeal to the full court[3] was unsuccessful. Her petition to the Supreme Court of Appeal having failed, she now seeks leave to appeal to this court against the decision of the full court that confirmed the decision of the High Court that her arrest and detention were lawful.

[2] The application brings into focus the duties, powers and responsibilities of police officers to arrest those who may find themselves on the wrong side of the law and the rights and interests of children in that situation.

[3] Section 205(3) of the Constitution mandates the police to—

> 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.

In short, the police are there to ensure that we can live, go about our daily business and sleep peacefully in our homes at night. This is a constitutional mandate. To assist them to carry out these onerous constitutional responsibilities for the safety and security of our people, the law grants them a variety of powers, including the powers to arrest and detain suspects, and enter and search premises and people under certain circumscribed circumstances.

[4] On a different side of the spectrum is s 28(2) of the Constitution, which proclaims that '(a) child's best interests are of paramount importance in every matter concerning the child'. To the extent relevant, s 28(1)*(g)* goes further and proscribes the detention of a child except in instances where it is a measure of last resort.[4] Even in that case, detention shall be for the

---

[1] Now known as the High Court of South Africa, Gauteng Local Division, Johannesburg.

[2] *MR and Another v Minister of Safety and Security*, unreported judgment of the South Gauteng High Court, case Nos 41997/2008 and 41998/2008 (7 August 2013) (High Court judgment).

[3] *MR and Another v Minister of Safety and Security*, unreported judgment of the South Gauteng High Court, case Nos 41997/2008 and 41998/2008 (17 April 2015) (full court judgment).

[4] Section 28(1)*(g)* of the Constitution provides:

> 'Every child has the right—

shortest appropriate period, with due cognisance of the rights embodied in ss 12[5] and 35[6] of the Constitution.

[5] Two crucial questions call out for an answer: first, what does the best interests of the child mean? Intricately allied to this question is: what does it mean that these best interests be accorded paramount importance? Second, what does this require of police officers who have to confront children in conflict with the law in real life situations? In other words, how does s 28(2) impact on the power of police officers to arrest under s 40 of the Criminal Procedure Act[7] (CPA)? Does this mean that police officers may never arrest and detain children, even when they are in conflict with the law? This is what this appeal is about.

Background

[6] The facts of this case might appear prosaic. And yet they present us with an opportunity to interrogate some constitutional provisions which are crucial to our fledgling constitutionalism and evolving culture of respect for human rights. This is important given our dark and painful history—which we all committed ourselves to eradicate 22 years ago when we ushered in our fledgling constitutional democracy—a past characterised by oppression and repression, abuse of state power and a wholesale denial of human rights to the majority of the people of our country. A time where there was no place for the rule of law. Arrest and detention played a key role in the resolve of the government of the day to maintain its much maligned apartheid regime. The police played a central role in maintaining that regime. In facilitating

. . .

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age . . . .'

[5] Section 12(1), in relevant part, provides:

'Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause.'

[6] Section 35 makes provision for the rights of arrested, detained and accused persons.

[7] 51 of 1977.

this, the police resorted to brute force to arrest and detain. This was a culture within the police force. This is the culture which our Constitution aspires to eradicate and replace with a culture of human rights permeating through all facets of our lives.

[7] On 6 April 2008, two members of the South African Police Service (SAPS) were sent to the house of Mrs R to investigate a complaint of contravention of a protection order which had been issued against Mrs R. Upon arrival at her home, the police officers found her in the company of her family. When the police officers attempted to arrest her, her 15-year-old daughter, Ms MR, intervened and interposed herself between her mother and the police officers to stop them from arresting her mother. The police officers regarded this as an unlawful obstruction of the execution of their lawful duties. Relying on s 40(1)*(j)* of the CPA, the two police officers arrested the applicant for interfering with them in the execution of their duties. They then forcibly put her in the police vehicle. Mrs R was also arrested for a violation of the protection order. Both the applicant and Mrs R were taken to the nearest police station, where they were detained until the next day when they were released on warning after approximately 19 hours. Subsequently, the public prosecutor declined to prosecute them.

Litigation history

High Court

[8] Based on the events set out above and on the refusal to prosecute, both Mrs R and the applicant instituted separate civil claims against the Minister of Safety and Security[8] (respondent) in the High Court, for unlawful arrest and detention, estimated future medical expenses, legal expenses, general damages and contumelia (insult and scorn).

[9] The respondent denied liability. Reduced to its bare essentials, the plea denied that the arrest and detention of both Mrs R and the applicant were unlawful. Regarding Mrs R, the respondent relied on the allegation that she had acted in breach of a valid warrant issued in terms of s 384(1) of the CPA. Concerning the applicant, the respondent relied on s 40(1)*(j)* of the CPA in that the applicant obstructed the police officers wilfully whilst effecting a lawful arrest.

[8] Formerly the Minister of Safety and Security and now known as the Minister of Police.

[10] Although the respondent denied during the trial through the two arresting officers that he knew that the applicant was a child during the arrest, he conceded during the hearing of the appeal that the two arresting officers knew that she was 15 years old when they ultimately booked her in at the police station. Furthermore, the evidence of both police officers was that even if they knew that she was a child when they arrested her, they would still have arrested her.

[11] Concerning her detention, their explanation is that notwithstanding that they knew that she was a child, they had no authority to release her. Only the commanding officer or investigating officer could release her.

[12] Regarding Mrs R, the High Court found that both the arrest and subsequent detention were justified and thus lawful as the two police officers arrested her on the strength of a valid warrant for contravening a protection order. Thus, they were protected by s 40(1)*(b)* of the CPA. Concerning the applicant, the High Court found that her arrest and detention were lawful as she wilfully obstructed the two police officers whilst trying to arrest Mrs R, this being a contravention of s 40(1)*(j)* of the CPA. As a result, the High Court accepted the respondent's version. In rejecting the applicant's case, the High Court reasoned as follows:

> 'Having traversed the evidence, I am unable to find that [the two police officers] exercised their powers in terms of section 40(1)*(b)* and *(j)* beyond the powers of the section. The jurisdictional facts set out in the section are present in this case and the Plaintiffs have not alleged that such powers were exercised for any purpose other than to bring the Plaintiffs before a court of law. Had they alleged that these powers were exercised for an ulterior purpose or that the police officers were inspired by mala fides or malicious intent, the onus would have shifted and rested upon them to prove such motive.'[9]

[9] High Court judgment above n 2 at para 56. The mention of s 40(1)*(b)* was related to the arrest of Mrs R and is thus not relevant to the matter before us.

Also in the judgment, the High Court concludes that '(t)herefore, according to *Sekhoto*,[10] a police officer is entitled to act as empowered by s 40(1)*(b) without any further consideration*' (emphasis added).[11]

[13] Dissatisfied with the High Court's judgment, the applicant and Mrs R appealed to the full court. In essence, the full court endorsed the findings of the High Court that, once the arresting officers were satisfied that all four jurisdictional requirements embedded in s 40(1)*(b)* and s 40(1)*(j)* of the CPA had been met, they were entitled to arrest them without any further consideration. The full court found that there was no evidence to suggest that the arresting officers arrested them 'for ulterior purposes, mala fide or arbitrarily'. Like the High Court, the full court also relied on *Sekhoto* and dismissed the appeal with costs. In dismissing the appeal, the full court held:

> 'In *Sekhoto* the court was faced with the question of whether or not an arresting officer was obliged to consider not arresting a suspect (whom he or she was otherwise entitled to arrest) on the basis that there may be other ways of getting the suspect to court. At paragraph 22 Harms DP said:
>
> > "I am unable to find anything in the provision which leads to the conclusion that there is, somewhere in the words, a hidden fifth jurisdictional fact."
>
> In paragraphs 28–41, the learned Deputy President discussed the nature of the discretion exercised by the arresting officer. He concluded that the discretion must be exercised in good faith, rationally and not arbitrarily. In the present case it cannot be said that the police officers arrested either mother or daughter other than lawfully. There was neither pleading nor evidence to the effect that the police had effected the arrests for ulterior purposes, mala fide or arbitrarily.'[12]

---

[10] *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157; [2010] ZASCA 141) (*Sekhoto*).

[11] High Court judgment above n 2 at para 44.

[12] Full court judgment above n 3 paras 13–14.

Before this court

[14] Aggrieved by the judgment of the full court, the applicant applied for special leave to appeal to the Supreme Court of Appeal, but the application was dismissed. This prompted her to apply to this court for leave to appeal against the judgment of the Supreme Court of Appeal. Hence this application.

[15] I interpose to state that Mrs R died before the appeal was heard in the full court. The executor of Mrs R's estate also applied for leave to appeal to this court. That application was dismissed on 16 September 2015 on the basis that it lacked prospects of success.

[16] The applicant waged a two-pronged frontal attack against her arrest and detention. Regarding her arrest, the main thrust of her contention was that, even if the police officers were authorised by s 40(1) to arrest her, they acted unlawfully and irrationally in arresting her. This is because s 40(1) gives them a discretion whether to arrest her or not. This is based on the fact that the section uses 'may', which is permissive and not 'must' or 'shall' which are peremptory. The contention was that the police officers were required to consider the prevailing circumstances and to decide if they justified a summary arrest. The police officers failed to exercise their discretion. It was submitted that if the police officers had considered the facts they would have come to the conclusion that an arrest was neither necessary nor justified, as they could have still secured her attendance in court by other less invasive albeit efficient alternative methods.

[17] For her second leg of attack, the applicant placed strong reliance on s 28(2) of the Constitution which provides that in all matters concerning a child, a child's best interests are of paramount importance. The contention was that, as the applicant was a child, the police officers were obliged to consider and accord her best interests as of paramount importance. The submission was that the police officers failed to give effect to the constitutional injunction in s 28(2).

[18] Furthermore, we were also urged to interpret s 40(1) purposefully and to incorporate s 28(1)*(g)* and 28(2) as additional requirements to s 40(1) of the CPA, in line with South Africa's constitutional values.

[19] Her detention was impugned on the basis that it was in conflict with s 28(1)(*g)* of the Constitution, which demands that a child should not be detained except as a measure of last resort. It was submitted that on the facts her detention was not a measure of last resort, as she could have been left in the care and custody of her father who was present both during her arrest at her home and her detention later at the police cells.

[20] The Centre for Child Law, whose main objective is to promote the best interests of children, was admitted as amicus curiae. It has an interest in child justice related matters, and particularly children who are arrested and detained. In the main, it presented an overview of instruments on juvenile justice. These included the Convention of the Rights of the Child,[13] the International Covenant on Civil and Political Rights,[14] the United Nations General Assembly's Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules)[15] and the African Charter on Human and People's Rights,[16] all of which advocate for and promote the best interests of the child as an important consideration in all matters affecting a child. It submitted that s 28(2) of the Constitution seeks to align itself with these instruments in according the best interests of a child paramount importance. The upshot of all this is that the applicant's arrest was unlawful as it was in violation of s 28(2) of the Constitution. It contended further that the applicant's arrest was unlawful as it was against the Police Standing Order (G)341 which declares explicitly that arrest should be used as a last resort.[17]

[21] The applicant's detention was impugned on the basis that it was in violation of s 28(1)*(g)* as the evidence proved that it was not a measure of last resort.

---

[13] Convention on the Rights of the Child, 20 November 1989.

[14] International Covenant on Civil and Political Rights, 16 December 1966.

[15] United Nations Standard Minimum Rules on the Administration of Juvenile Justice (the Beijing Rules), 29 November 1985.

[16] African Charter on Human and People's Rights, 27 June 1981.

[17] Police Standing Order (G)341, s 3(1) provides:

> 'There are various methods by which an accused's attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.'

[22] I pause to observe that an important event occurred a night before the hearing. The respondent had initially filed heads of argument defending the arrest and detention of the applicant as being lawful. The argument was that the police officers acted strictly in terms of s 40(1) read with 40(1)*(j)* of the CPA. However, on the night preceding the hearing, the respondent appointed new counsel who abandoned the previous heads of argument and filed a new set. He conceded that both the arrest and subsequent detention of the applicant were unlawful. In essence, the respondent's new counsel expressly jettisoned any defence to the appeal before us.

[23] The respondent's counsel commenced his submissions by conceding that on the facts, the police officers knew that the applicant was a child. He submitted that an arrest in terms of s 40(1)*(j)* requires the police officers to prove that the applicant acted wilfully. He contended that, as she was a child, the police officers had to tender evidence that she acted with intent. He submitted that, as the police officers failed to prove such intent, it could not be said that all the jurisdictional requirements necessary to justify an arrest under s 40(1)*(j)* were met. Hence her arrest was unlawful.

[24] In developing his argument further, respondent's counsel submitted, in line with his concession, that s 40(1) does not mean that once its jurisdictional requirements have been met, the applicant had to be arrested. He submitted that s 40(1) gave the police officers a discretion whether to arrest or not. This required the police officers to consider the prevailing circumstances and decide if an arrest was necessary. The discretion must be exercised properly, so he submitted. He contended further that every arrest, whether it is of an adult or a child, must be objectively justifiable to be lawful. Crucially, he conceded that, in arresting the applicant, the police officers failed to exercise their discretion, with the result that her arrest was unlawful.

[25] He furthermore conceded that the police officers failed to accord primacy to the applicant's best interests as commanded by s 28(2) of the Constitution. As this was not done her arrest was unlawful, so went his submission.

[26] Concerning the applicant's detention, the respondent's counsel conceded that her detention was in violation of s 28(1)*(g)* of the Constitution, as she was a child and further that it was not a measure of last resort.

[27] Understood in their proper context, the concessions made by the respondent's counsel are tantamount to an abandonment of the merits of the appeal in the applicant's favour. All the essential elements constituting unlawful arrest and detention were conceded. As nothing was placed before us to suggest that counsel did not have a mandate to make such concessions, we have no reason not to accept them.[18]

Issues

[28] Apart from the preliminary issues regarding condonation and leave to appeal, the issues are:

(a) Whether the detention as referred to in s 28(1)*(g)* of the Constitution includes arrest.

(b) Whether the applicant's arrest and detention were lawful.

(c) Does s 28(2) of the Constitution create an additional jurisdictional requirement for a lawful arrest under s 40(1) of the CPA?

(d) If the applicant is successful on the merits, should this court determine quantum?

Condonation

[29] The applicant's petition to the Supreme Court of Appeal was dismissed on 29 June 2015. The application for leave to appeal to this court was filed on 18 August 2015. This application is late by almost a month. This delay warrants an explanation.

[30] In a nutshell, the applicant ascribed her delay to financial constraints and family difficulties brought about by the passing away of her mother. She avers that her financial woes were exacerbated by the fact that her father is a pensioner whilst she is still a student. The delay is not inordinate and the explanation appears to be reasonable. Furthermore, there is no suggestion that the respondent has suffered any prejudice.

[31] Undoubtedly, this matter raises important constitutional issues affecting the right to liberty, the right to dignity and the rights of children. The interests of justice militate for the granting of condonation. Condonation is granted.

---

[18] See *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) (2006 (5) BCLR 622; [2006] ZACC 2) paras 66–67.

Leave to appeal

[32] This case pits the constitutional duty of the police to prevent, combat and investigate crime as set out in s 205 of the Constitution against the rights of children in conflict with the law, seen through the prism of s 28 of the Constitution. This it does in the context of the police power to arrest and detain suspects in terms of s 40 of the CPA. A number of constitutional rights are at play. These are the rights of people to their freedom,[19] dignity,[20] and the rights of children[21] contrasted with the duties of the police to safeguard society by investigating, combating and preventing crime, and essentially to uphold and enforce the law.[22] The importance of the case to the general public is beyond question. Furthermore, except for criminal matters involving sentencing of child offenders,[23] this court has never had an opportunity to deal expressly with a case involving the arrest and detention of a child in conflict with the law against the backdrop of s 28 of the Constitution. To my mind, this case meets the threshold of the interests of justice. Moreover, there are reasonable prospects of success. Leave to appeal is granted.

Discussion

Does detention in s 28(1)*(g) *include arrest?

[33] Counsel for the applicant urged us to find that read purposively, and in the context of s 28(1)*(g)* of the Constitution, there is no distinction between an arrest and detention. If there is any, he contended that it is merely artificial as the effect of both is the same in that they result in interference with a person's liberty.

[34] The amicus argued that, although the two processes are separate, in the context of s 28(1)*(g)* of the Constitution, detention can be interpreted to include an arrest.

---

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

[20] Id s 10.

[21] Id s 28.

[22] Id s 205(3).

[23] See *Centre for Child Law v Minister for Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as Amicus Curiae)* 2009 (2) SACR 477 (CC) (2009 (6) SA 632; 2009 (11) BCLR 1105; [2009] ZACC 18) (*Centre for Child Law*).

[35] For his part, counsel for the respondent contended that an arrest is a pre-trial process. He submitted that after an arrest, police officers have a discretion whether to detain or not. He urged us to find that these are two separate processes.

[36] A direct answer to this question must be sought in the Constitution. Section 35 of the Constitution treats arrest and detention differently and in two separate subsections. To the extent relevant, s 35(1) reads that 'everyone who is *arrested* for allegedly committing an offence' has specific rights.[24] Subsection (2), in turn, relates to 'everyone who is *detained*, including every sentenced prisoner' and recognises its own set of rights.[25] Evidently, s 35(1)

---

[24] Section 35(1) provides:

> 'Everyone who is arrested for allegedly committing an offence has the right—
>
> *(a)* to remain silent;
>
> *(b)* to be informed promptly—
>
> (i) of the right to remain silent; and
>
> (ii) of the consequences of not remaining silent;
>
> *(c)* not to be compelled to make any confession or admission that could be used in evidence against that person;
>
> *(d)* to be brought before a court as soon as reasonably possible, but not later than—
>
> (i) 48 hours after the arrest; or
>
> (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
>
> *(e)* at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
>
> *(f)* to be released from detention if the interests of justice permit, subject to reasonable conditions.'

[25] Section 35(2) provides:

> 'Everyone who is detained, including every sentenced prisoner, has the right—
>
> *(a)* to be informed promptly of the reason for being detained;
>
> *(b)* to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
>
> *(c)* to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> *(d)* to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

and (2) draws a bright line between arrested and detained persons. Yacoob J articulated this distinction clearly in *Thebus* as follows:

> 'The three subsections intersect, complement each other and demonstrate a logical pattern when viewed from the point of view of the criminal justice process that might unfold in relation to a person who is suspected of having committed an offence. The first step envisaged is the arrest of a person for allegedly having committed an offence. That person is not yet an accused and the arrest itself does not render him a detainee entitled to the right set out in ss (2). The rights in ss (1) and (2) will be applicable to everyone who is arrested and thereafter detained. Every person arrested for allegedly committing an offence has the right, at the first court appearance, to be charged, to be informed of the reason for the detention to continue, or to be released. If she or he is released the process is at an end. Presumably the person may be detained further and informed that the matter is under further investigation. In that event, the person concerned remains a detainee and is entitled to the rights described in ss (1) and (2). It is only if the person is charged that he or she becomes an accused and has the right to a fair trial in terms of ss (3).'[26]

[37] The CPA is aligned with s 35 of the Constitution. It treats arrest as different and separate from detention. The authority of police officers to arrest resorts under ss 40 and 41 of the CPA. Section 40(1) authorises police officers to arrest persons who commit or are suspected, on reasonable grounds, of committing certain specified offences. Section 41 authorises a police

---

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.'

[26] *S v Thebus and Another* 2003 (2) SACR 319 (CC) (2003 (6) SA 505; 2003 (10) BCLR 1100; [2003] ZACC 12) (*Thebus*) para 103.

officer to arrest forthwith and without a warrant any person who is reasonably suspected of having committed or of having attempted to commit an offence or who, in the opinion of such a police officer, furnishes to the police officer a name or address which the police officer suspects to be false.

[38] Section 50 deals with the procedure after arrest. Section 50(1) requires that any person who is arrested with or without a warrant for allegedly committing an offence or for any other reason must be brought to a police station for detention as soon as possible. Any person who is arrested on a warrant shall be taken as soon as possible to the place mentioned in the warrant for detention.

[39] As a result, I find that arrest and detention are separate legal processes. The fact that both result in someone being deprived of his or her liberty, does not make them one legal process.

Lawfulness of the arrest

[40] The applicant launched a two-legged attack against her arrest. First, she submitted that it was unlawful as the police officers failed to exercise their discretion in s 40(1). In essence, she argued that the police officers acted irrationally. Second, she contended that her arrest was unconstitutional, as it was in violation of her rights enshrined in s 28(2) of the Constitution as the police officers failed to give her best interests paramount importance.

[41] The applicant was arrested for a contravention of s 40(1)*(j)* of the CPA. This section provides that '(a) peace officer may without a warrant arrest any person . . . who wilfully obstructs him in the execution of his duty'. It is not in dispute that she interposed herself between the police officers and her mother whilst the police officers were trying to arrest her mother. This led to the police officers arresting and putting her in their vehicle. Crucially, the police officers conceded that she posed no threat to them; she could be subdued with ease; there was no fear that, left free, she might commit another offence; and she was not a flight risk. Given these facts, did the police officers have to arrest her? Put simply, was it a must that she be arrested?

[42] Section 40(1) of the CPA states that a police officer 'may' and not 'must' or 'shall' arrest without a warrant any person who commits or is reasonably suspected of having

committed any of the offences specified therein. In its ordinary and grammatical use, the word 'may' suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officers are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officers may or may not exercise their discretion. Such an attempt might have the unintended consequence of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime.

[43] As s 40(1) grants police officers a discretion whether to arrest, the two courts should have gone further in their evaluation of the evidence to determine whether the facts justified an arrest.[27] This is so because an arrest is a drastic invasion of a person's liberty and an impairment of their rights to dignity, both of which are enshrined in the Bill of Rights.[28]

[44] In other words the courts should enquire whether in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in *Duncan*[29] or as per *Sekhoto* where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy, held that the discretion conferred in s 40(1) must be exercised 'in light of the Bill of Rights'.

[45] Although both the High Court and full court traversed the discretion embedded in s 40(1), as it was elucidated in *Sekhoto*, in their respective judgments—they did not appropriately evaluate the facts to determine if the arrest was justified.

---

[27] *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) (2007 (10) BCLR 1102; [2007] ZACC 15) paras 17 and 20.

[28] *Sekhoto* above n 10 at para 40.

[29] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1986] ZASCA 24) at 818G–H.

[46] As far back as 1986, the Appellate Division (now the Supreme Court of Appeal) enunciated the correct legal approach in *Duncan* as follows:

> 'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words he then has a discretion as to whether or not to exercise that power . . . . No doubt the discretion must be properly exercised.'[30]

This salutary approach was confirmed in *Sekhoto* as follows:

> 'Once the jurisdictional facts for an arrest . . . in terms of any paragraph of section 40(1) . . . are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. *In other words, once the required jurisdictional facts are present the discretion whether to arrest or not arises. The officer, it should be emphasised, is not obliged to effect an arrest.*'[31] [Emphasis added.]

[47] Having established that police officers are not obliged to effect an arrest, despite all the jurisdictional facts being present, the next questions arise: what amounts to a proper exercise of discretion? Does the Bill of Rights have an impact on the common law understanding of how police discretion should be exercised? These are the questions that the paragraphs which follow seek to address.

[48] As already indicated, the second attack was based on the failure of the police officers to give the applicant's best interests paramount importance as she is a child. Section 28(2) demands, in peremptory terms, that in all matters affecting a child, her best interests are of paramount importance. In the context of an arrest of a child, this requires of the police officers, notwithstanding the fact that they are satisfied that the jurisdictional facts in s 40 of the CPA have been met, to go further and not merely consider but accord the best interests of such a

---

[30] Id.

[31] *Sekhoto* n 10 above para 28.

child paramount importance. The following extracts from the evidence by the police officers clearly show that they did not care if she was a child or not:

> '*Counsel*: Could you not see . . . [that] you are dealing with a young girl, a school girl?
> *Du Plessis*: It is not for me to decide what age she is.
> *Counsel*: I am not asking what age, or putting it to you.
> *Du Plessis*: It is not for me to determine what age she is.'

[49] The following exchange and the responses by Sgt Du Plessis, one of the arresting officers, is even more telling:

> '*Counsel*: You are telling us . . . [that] once you [effect] the arrest, it does not make [a] difference whether [the arrestee] is a minor or not . . . your job is done, somebody else [must] make the decision?
> *Du Plessis*: My job [is] done there.
> . . .
> *Counsel*: Had you known that [the applicant] was a minor, how would you have dealt with her?
> *Du Plessis*: No she definitely would have been arrested.'

[50] This indifferent and nonchalant attitude by the police officers persisted throughout the arrest, as is demonstrated by the responses given by Sgt Du Plessis during his cross-examination:

> '*Counsel*: You did not ask her for any explanation, right? She was a young girl against two really large police officers, she was not any danger to you is that correct?
> *Du Plessis*: That is correct.
> *Counsel*: You could have handled her with ease?
> *Du Plessis*: That is correct.
> *Counsel*: She never tried to run away or abscond from your presence is that correct?
> *Du Plessis*: She was busy.

Counsel: Did she run away or try and abscond from you or Constable Govender, yes or no?

Du Plessis: No.

Counsel: She was not causing any physical harm to you or Constable Govender?

Du Plessis: No.

Counsel: She was not in any way threatening the complainant or harming the complainant in your presence?

Du Plessis: I cannot remember.

Counsel: Well I put it to you she gives evidence she will say not at all, she did not even deal with the complainant in your presence.

Du Plessis: I would not remember that.

Counsel: You would not remember that. Right, her father was present on the scene. He was the driver of the car. He is also 36 years in the police, ex-policeman. He was there he was the driver of the car, Mr PR. You did not speak to him?

Du Plessis: No

Counsel: You are not disputing that he was there and he was driving the car?

Du Plessis: I do not dispute that he was there.

Counsel: Right, her sister who was carrying a small baby, small baby boy, she was also present on the scene, you did not arrest her?

Du Plessis: I could not remember that she was.'

[51] It is against this backdrop that we have to ask: why then did the police officers have to arrest the applicant? The answers by Sgt Du Plessis prove that there was no reason to arrest her. What is more disconcerting is that the above extracts of the evidence reveal a lack of knowledge and appreciation by the police officers of their constitutional obligation when arresting a child to consider her best interests as demanded by s 28(2). They demonstrate that the police officers did not care whether the applicant was a minor or not. Sergeant Du Plessis said it expressly, that even if he knew that the applicant was a minor, he would still have arrested her. This is because he considers it to be his job to arrest. The fact that the arrestee is a minor would make no difference.

[52] Furthermore, they did not consider the crucial facts that she was no danger to them; that they could have handled or subdued her with ease; that she did not try to run away from them; that she was not causing any physical harm to them; that she was at or near her parental home

and, importantly; that her father was present with them. No doubt such an approach to an arrest of a minor is incompatible with s 28(2). If the police officers had considered the applicant's best interests, there would have been no reason for them to arrest her. They could have resorted to s 38 of the CPA, by either issuing a summons, a written notice or, as her father was present, leaving her in his custody with instructions for him to bring her to court. It follows that the applicant's arrest is inconsistent with the Constitution and therefore unlawful.

[53] Section 39(1)[32] commands a court, tribunal or forum, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This is a constitutional injunction. Both the High Court and the full court were constitutionally obliged to consider the evidence through the lens of s 28(2) to determine if the police officers considered the applicant's best interests, and if they did, whether they accorded them paramount importance. However, it does not appear from the judgments of either court that there was compliance with this constitutional injunction.

[54] Our courts are enjoined by s 39(1) when interpreting any legislation to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. This requires of our courts to play a crucial role in giving content and meaning to the fundamental rights enshrined in the Bill of Rights. Therefore, the courts are the guardians of the Constitution and the values it espouses. In interpreting the law they must infuse it with values of our Constitution. Courts must never shirk this constitutional responsibility.[33]

---

[32] Section 39(1) of the Constitution, in relevant part, provides:

> 'When interpreting the Bill of Rights, a court, tribunal or forum—
>
> *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; . . . .'

[33] As Moseneke DCJ stated in 'Transformative Adjudication, the Fourth Bram Fischer Memorial Lecture' (2002) 18 *SAJHR* 309 at 318:

> 'The Constitution has reconfigured the way judges should do their work. It invites us into a new plane of jurisprudential creativity and self-reflection about legal method, analysis and reasoning consistent with transformative roles. The new legal order liberates the judicial function from the confines of the common law, customary law, statutory law or any other law to the extent of its inconsistency with the Constitution. This is an epoch making opportunity which only a few, in my view, of the High Court judges have cared to embrace or grasp. A substantive, deliberate and speedy plan to achieve an appropriate

[55] Over two decades ago, we adopted our Constitution. In doing so we signalled a decisive break with our past—a ringing rejection of a history of denial of human rights to our people. We started an ambitious and laudable project to develop, nurture and infuse a culture of respect for human rights in all aspects of our lives. We all committed ourselves to a new and egalitarian society founded on values of human dignity, equality and freedom for all. Section 2 proclaims the Constitution to be the supreme law of the country. Importantly, it declares that law or conduct inconsistent with it is invalid, and further that the obligations it imposes must be fulfilled. This Constitution is underpinned by a Bill of Rights that, according to s 7, is declared a cornerstone of our democracy. Section 7(2) commands the state, including the Judiciary, to respect, protect, promote and fulfil the rights in the Bill of Rights subject to the limitations in s 36 or elsewhere in the Bill.

[56] However, this responsibility is not confined to the courts. Section 7(2) talks of the state. The executive is also required to honour the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. This is crucial as the police are, in the daily execution of their duties, involved in instances that have the potential to affect people's rights to dignity, equality and freedom—which are foundational to our democracy. Our people deserve a police service which is steeped in a culture of respect for human rights. This requires them in all their dealings with society whilst executing their constitutional duties to be guided by respect for human rights and strict observance of the rights to human dignity, equality and freedom.

> shift of legal culture at the High Courts and Magistrates' Courts is necessary. After all, it is the Constitution that confers substantial review powers on the judiciary. However, without an appropriate legal culture change the judiciary may become an instrument of social retrogression. In time the judiciary will lose its constitutionally derived legitimacy.'

Froneman J, in *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) ([2005] 1 All SA 745) para 16, makes the following pointed observation:

> 'All courts, including the High Court, are enjoined by the Constitution to uphold the rights of all, to ensure compliance with constitutional values, and to do so by granting "appropriate relief", "just and equitable orders", and by developing the common law "taking into account the interests of justice". In a new constitutional democracy such as ours that means that courts have to devise means of protection and enforcing fundamental rights that were not recognised under the common law.'

[57] It is trite that an arrest is an invasive curtailment of a person's freedom. Under any circumstances an arrest is a traumatising event. Its impact and consequences on children might be long-lasting if not permanent. The need for our society to be sensitive to a child's inherent vulnerability is behind s 28(2) of the Constitution. Section 28(2) is broadly worded. The interests of children are multifarious. However, in the context of arrests of children, s 28(2) seeks to insulate them from the trauma of an arrest by demanding in peremptory terms that, even when a child has to be arrested, his or her best interests must be accorded paramount importance.

[58] Given the importance which our Constitution places on the rights of children, this means that an arrest of a child should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court. This requires police officers to consider and weigh all the facts carefully and exercise a value-judgement whether an arrest can be justified. Invariably this puts them in an invidious position. A question might be asked: how do they execute their constitutional mandate to prevent and combat crime without falling foul of s 28(2)? Does this mean that children shall, under no circumstances, be arrested or detained? The answer is no. For it is a fact that children do commit crimes. Even heinous crimes for that matter. Statistics can attest to this. Sad as it might be, it is a reality of our times.

[59] Does the fact that s 28(2) demands that the best interests of children be accorded paramount importance mean that children's rights trump all other rights? Certainly not. All that the Constitution requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children—with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. The Constitution demands that our criminal justice system should be child-sensitive.

[60] Reflecting on how our pre-1994 justice system treated children, Ponnan AJA remarked poignantly in *Brandt*:

'Historically, the South African justice system has never had a separate, self-contained and compartmentalised system for dealing with child offenders. Our justice system has generally treated child offenders as smaller versions of adult offenders. In *S v Williams and Others* 1995 (3) SA 632 (CC) paragraph 74 the Constitutional Court in abolishing whipping sounded "a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system".'[34]

[61] Contrary to the position pre-1994, our constitutional dispensation has ushered in a new era— an era where the best interests of a child must be accorded paramount importance in all matters affecting the child—an era where we, as society, are committed to raising, developing and nurturing our children in an environment that conduces to their well-being. This resolve was captured admirably by Khampepe J in *Teddy Bear Clinic*:

'Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.'[35]

[62] In line with their constitutional obligation, both the High Court and the full court were obliged to interpret s 40(1) of the CPA through the prism of s 28(2) of the Constitution to determine if the police officers had accorded the applicant's best interests paramount importance. This is a constitutional obligation imposed on them by s 39(2) of the Constitution.

[34] *S v Brandt* [2005] (2) All SA 1 (SCA) (2004] ZASCA 120) para 14.

[35] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 014 (1) SACR 327 (CC) (2014 (2) SA 168; 2013 (12) BCLR 1429; [2013] ZACC 35) (*Teddy Bear Clinic*) para 1.

Should s 28(2) be made an additional jurisdictional requirement?

[63] The amicus curiae urged this court, in line with its constitutional mandate to promote and protect the values and ethos that underpin our Constitution, to find that s 28(2) constitutes an additional jurisdictional requirement to those embodied in s 40 of the CPA. The thrust of the submission is that, because an arrest constitutes an infringement of a person's rights to his or her liberty and dignity, both of which are enshrined in the Bill of Rights, any arrest must be justifiable according to the dictates of the Bill of Rights. The contention went further that, in line with our nascent human rights culture, before every arrest is executed, police officers must consider whether there are no less invasive methods which may be used to bring the suspect before court. Reliance for this proposition was placed on *Louw*,[36] a judgment of a single judge. This argument was dismissed by the Supreme Court of Appeal in *Sekhoto*.[37]

[64] In my view the nub of the enquiry should not be whether this should be added to s 40 as an additional jurisdictional fact, but whether this should be considered in the exercise of their discretion in s 40. Section 39(2) enjoins the courts, in interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. This requires courts to interpret s 40(1) in line with these constitutional values. However, the constitutionality of s 40(1) was not attacked. In essence, what the applicant seeks is for this court to amend s 40(1) by including or reading in s 28(2) as an additional requirement. Absent a formal constitutional attack, it is not open to this court to do that, as doing so would be tantamount to an impermissible amendment of s 40.[38]

[65] There is no need to make s 28(2) an additional jurisdictional requirement. It is sufficient that in arresting a child, police officers must do it through the lens of the Bill of Rights and pay

---

[36] *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) (*Louw*) at 186A–187E.

[37] *Sekhoto* above n 10 para 22.

[38] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18, where Wallis JA held:

> 'Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation . . . .'

special attention to the paramount importance of the best interests of such a child. The Constitution demands that of the police as a constitutive part of the state.[39] A failure to do this would render such an arrest inconsistent with the Constitution and thus unlawful.

Lawfulness of the detention

[66] Following upon her arrest, the applicant was taken to the local police station for detention. But before she could be detained, she had to be booked in at the charge office. This procedure includes writing down her personal particulars which includes her date of birth, address, etc. It was during this process that she disclosed that she was 15 years old. The respondent conceded this before the High Court. Notwithstanding this, the police officers detained her with Mrs R in the police cells until she was released the next day on warning.

[67] Section 28(1)*(g)* demands that a child should only be detained as a measure of last resort. In its ordinary and grammatical meaning, the expression 'a measure of last resort' means that the detention of a child should happen when all else has failed. This requires police officers to investigate other less invasive methods which can satisfy their legitimate purpose without having to detain a child. This is because, first, a detention constitutes a drastic curtailment of a person's freedom which our Constitution guards jealously, and should only be interfered with where there is a justifiable cause. Second, detention has traumatic, brutalising, dehumanising and degrading effects on people.

[68] It is a known fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities which one requires for raising children. It is worse for children. The atmosphere is not conducive to their normal growth, healthy psycho-emotional development and nurturing as children. The evidence by the applicant's expert witness, Dr Fine, demonstrates the harm which an ill-considered detention of a child might have on such a child. The applicant was seriously traumatised by this experience. Her detention has left her with serious psycho-emotional problems. Wounds that are still festering.[40] These are the deleterious effects of incarceration

---

[39] See [56] above.

[40] In the psychiatric medico-legal report, Dr Fine states that four years and four months following upon the incident in question:

against which the Constitution seeks to protect children. This is the reason why, even when a child has to be detained, s 28(1)*(g)* stipulates that it should be for 'the shortest appropriate time'.

[69] Similar to the discussion on arrest, does the constitutional injunction to safeguard children's rights mean that children will never be detained?[41] The answer is also no. The need to detain a child is necessarily a fact based inquiry that requires a balancing of interests. Cameron J eloquently explains this balance in *Centre for Child Law*:

> 'The constitutional injunction that "(a) child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else", but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment.'[42]

[70] Was the applicant's detention in the circumstances of this case justifiable as a measure of last resort? Certainly not. This is because: the applicant was arrested at her parental home in the presence of both her parents and, importantly, her father was available and willing to take her into his custody; nothing prevented the police officers from leaving the applicant in the custody of her father with appropriate instructions to ensure her appearance in court; and significantly, the police officers conceded that she was not a flight risk. There being no evidence that they considered her circumstances to determine if her detention was a measure of last resort, it follows that her detention was in flagrant violation of s 28(1)*(g)*. It is therefore unlawful.

> '[S]he presents with ongoing residual features of a Post-Traumatic Stress Disorder, where that incident, occurring when she was young, had been particularly humiliating and traumatic to her . . . having effects upon her academically, socially and physically.'

[41] See [58] above.

[42] *Centre for Child Law* above n 23 para 29.

[71] Based on the above exposition, I conclude that both the applicant's arrest and detention were in flagrant violation of her constitutional rights in s 28(2) and 28(1)*(g)* and thus unlawful. The appeal is upheld.

Quantum

[72] During the hearing, the parties indicated their willingness to enter negotiations regarding a possible settlement of quantum. They were given until 29 March 2016 to try and settle quantum. Regrettably, they were unable to.

[73] Although the High Court briefly mentioned quantum, neither it nor the full court granted judgment on quantum. As a result, there cannot be an appeal where there is no judgment. Furthermore, for this court to deal with quantum, it will be acting as both a court of first instance and an appeal court. Self-evidently, this is undesirable as it will deny the parties the right of appeal.[43] It follows that the correct procedure is to remit the case to the High Court, where the parties can adduce whatever relevant evidence in order to determine quantum.

[74] I cannot but add, when the matter was argued, an indication was made on behalf of the applicant as to the expected quantum. Likewise, the respondent advised how much he was prepared to pay. Rather than pursue a trial on quantum, it is in the interests of the parties again to consider settlement with all earnestness. This is especially so, seeing that they were not far apart at all.

Costs

[75] There is no reason or principle to justify a departure from the general principles regarding costs. Costs must follow the results.

Order

[76] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld with costs, including the costs of two counsel.

---

[43] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) (1998 (4) BCLR 415; [1998] ZACC 3) para 8.

4. The order of the trial Court is set aside and replaced with the following:

   ‘*(a)* The Minister of Police is liable to Ms MR for damages that may be proved.

   (b) The Minister of Police must pay Ms MR’s costs.’

5. The order of the full court is set aside.
6. The Minister of Police must pay Ms MR’s costs in the full court and the Supreme Court of Appeal.
7. The matter is remitted to the Gauteng Local Division of the High Court, Johannesburg for the determination of the amount of damages payable.

Applicant’s Attorneys: *Jothi Govender Inc*, Johannesburg.