

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

NOT REPORTABLE

Case No.: 3131/2017

Date Heard: 7 March 2019

Date Delivered: 8 March 2019

In the matter between

BRENDA WARDLE

Applicant

and

THE MINISTER OF POLICE

First Respondent

MINISTER OF JUSTICE

Second Respondent

HEAD, DPCI

Third Respondent

NATION DIRECTOR OF PUBLIC PROSECUTIONS

Fourth Respondent

**EASTERN CAPE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Fifth Respondent

REGIONAL MAGISTRATE JJ CLAASSEN

Sixth Respondent

ADV T VAN ZYL

Seventh Respondent

LT COL DEYSEL

Eighth Respondent

CAPTAIN BOWER

Ninth Respondent

CAPTAIN L H VAN BELLING

Tenth Respondent

COLONEL A J HORAK

Eleventh Respondent

REGIONAL MAGISTRATE L LINDOOR

Twelfth Respondent

STATION COMMANDER KABEGA PARK SAPS

Thirteenth Respondent

JUDGMENT

GAJJAR AJ:

Introduction

[1] The present application comes before us pursuant to the applicant's arrest on 29 June 2017 following the issue of a warrant in terms of section 43 of the Criminal Procedure Act, 51 of 1977 ("CPA") issued on 5 July 2016.¹ The applicant, who appeared in person, in essence seeks her release from detention on the basis that the warrant issued in terms of section 43 of the CPA was defective and thus falls to be reviewed and set aside. She seeks further relief that all that followed her arrest was irregular and thus is also liable to be reviewed and set aside. The further relief sought is, in my view, not relevant for present purposes.

[2] The applicant who describes herself as a legal analyst is an awaiting trial prisoner and is incarcerated at the Port Elizabeth Correctional Centre. The record shows that she holds a bachelor and master degree in law and that she is engaged in doctoral studies. She faces charges of fraud, alternatively theft, further alternatively contravention of section 83(1) and (10) of the Attorneys Act, 53 of 1979 in that she accepted fees from a member of the public while she was not a practising attorney. The amount involved is R538 766,00.

Background

[3] The background facts are largely common cause. The charges which the applicant faces are Schedule 5 offences as set out in the CPA. This had a bearing

¹ Also known as a J50 warrant

on the outcome of the two bail applications before the Magistrates' Court as well as the determination of the subsequent bail appeal.

[4] The applicant first appeared in the Specialised Commercial Crimes Court ("SCCC"), Port Elizabeth² on 12 May 2014. She was then released on bail of R3 000,00 and the matter stood adjourned until 20 June 2014. The applicant failed to appear on 20 June 2014 and consequently a warrant for her arrest was issued. She, however, appeared in court and the matter was postponed to 20 April 2015 for trial. On the trial date the applicant did not appear and a warrant for her arrest was issued which was stayed until 28 April 2015. On that day the applicant appeared and presented a medical certificate explaining her absence. The applicant's explanation was accepted and the warrant was cancelled. The matter was then postponed to 15 May 2015.

[5] On 15 May 2015 the applicant failed to appear and a warrant was again authorised for her arrest but the issue thereof was held over until 18 May 2015. She failed to appear on that date as well as on 2 June 2015, 19 June 2015 and 3 July 2015, notwithstanding an agreement having been reached to have the issue of the warrant stayed on each of the said dates. On 17 July 2015 the applicant remained absent and her bail of R3 000,00 was finally forfeited to the State.

[6] On 28 July 2015 the applicant, on her own accord, appeared in court. The warrant for her arrest was cancelled and the applicant was released on warning. The case was postponed to 28 August 2015 to enable a legal representative to be appointed. In the intervening period the applicant was arrested in respect of two unrelated cases in Gauteng and was released on R10 000,00 in respect of those cases. She, however, failed to appear in court in respect of those matters and the R10 000,00 was forfeited to the State.

[7] It does not appear from the papers when the matter was postponed to 11 September 2015. On that day Adv Kriel appeared on behalf of the applicant and the matter was postponed for trial to commence on 29 March 2016. On that date, the

² Under case number 1/33/2014

applicant failed to appear. Adv Kriel also did not appear. Accordingly, the trial could not commence. A bench warrant (a J165 warrant) for the applicant's arrest was authorised and issued on the same day which was to be executed to secure her attendance at court. It was not executed because the applicant could not be located. That warrant lapsed through the effluxion of time. This consequently led to the issuing of the warrant in terms of section 43 of the CPA on 5 July 2016.

[8] Some 15 months later, on 29 June 2017, the applicant was arrested in East London on the strength of the warrant issued in terms of section 43 of the CPA. Following her appearance in court on 30 June 2017 she has remained in detention as an awaiting trial prisoner following three attempts to be released on bail.

Section 43 of the CPA and the applicant's attack on the validity thereof

[9] Section 43 of the CPA reads as follows:

"43 Warrant of arrest may be issued by magistrate or justice

(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

- (a) which sets out the offence alleged to have been committed;*
 - (b) which alleges that such an offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed during such area of jurisdiction which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and*
 - (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.*
- (2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the*

offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50.

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with the like authority, or until it is executed.”

[10] The applicant’s attack on the validity of the warrant is narrow. She argued that the warrant is invalid because it is unstamped. It is nonetheless dated. The date of 5 July 2016 appears below the signature of the issuing justice of the peace.

[11] Based on the applicant’s attack on the warrant issued in terms of section 43, the question which arises is whether or not the warrant must be stamped in order for it to be valid. Having regard to the provisions of section 43 it is apparent that there is no express or implied requirement set out therein that a warrant of arrest must be stamped in order for it to be valid. Accordingly, the warrant in question, on the face of it appears regular. Significantly, the applicant did not challenge the exercise of the discretion of the justice of the peace who issued the warrant.

[12] A second blow to the applicant’s attack on the warrant issued pursuant to section 43 of the CPA is that the issue of that warrant emanated from the earlier bench warrant, the J165 warrant. The applicant’s attempt to draw a linkage between the two warrants is misplaced. It is important to note that the applicant was not arrested on the authority of the J165 warrant as it had lapsed before her arrest on 29 June 2017. Accordingly, the J165 warrant, in my view, bears no relevance to the present proceedings.

[13] The applicant argued that if the warrants of arrest are set aside, the further relief which she claims must follow. For reasons stated neither warrant is liable to be set aside. In any event, what is telling is that during argument the applicant stated that before she was brought before magistrate Lindoor, the twelfth respondent, on 30 June 2017 she thought she was going to be released on bail. It is common cause that formal bail proceedings were held before the twelfth respondent on 30 June 2017.

[14] In my view, there is no reason to question the validity of either the J165 warrant or the J50 warrant. For the reasons stated, the applicant cannot succeed in respect of the remainder of the relief sought.

[15] As alluded to, as the applicant faces a Schedule 5 offence, she bore the onus in terms of section 60(11)(b) of the CPA to produce evidence to satisfy the court that it is in the interests of justice to permit her release on bail. The twelfth respondent found that the applicant failed to discharge the onus and ordered her detention pending trial. Although the applicant made it clear that she wished to exercise her right of appeal, no appeal was lodged against that decision. Subsequently, however, the applicant brought a fresh bail application on supposed “new facts”. The second bail application suffered the same fate. The applicant exercised her right of appeal in respect of that decision. The appeal was heard on 3 May 2018 by Goosen J and on 10 May 2018 he dismissed the appeal.³

[16] In arguing the present application, the applicant sought to revisit an issue which was argued before Goosen J. She contended that the initial bail application was conducted in terms of an incorrect procedure. The applicant’s argument was premised on section 72 of the CPA. The applicant contended that section 72 of the CPA provides for a summary enquiry to be conducted into the reasons for the non-appearance of an accused person. She contended that the twelfth respondent was obliged to follow the process set out in section 72 and not to conduct a bail application as he did. In my view, there is no merit in this submission. Section 72(4) of the CPA indeed requires an enquiry to be conducted in relation to the failure of an accused person to appear, the purpose of such an enquiry is to determine whether the punitive provisions which apply to such non-appearance are to be imposed. It has nothing to do with bail. The applicant’s appearance before the twelfth respondent was, after all, in consequence of the execution of a warrant of arrest to secure her attendance at court. It was no more and no less. In any event, section 60 of the CPA provides that an accused person remanded in custody be afforded a reasonable opportunity to apply for bail. This is precisely what occurred. In this regard, the it is common cause that the applicant had no less than three

³ Under case number CA&R 5/2018, Port Elizabeth

opportunities to persuade a court that it is in the interests of justice that she be released on bail. On each occasion she failed.

[17] The applicant informed the court from the Bar that she has petitioned the Supreme Court of Appeal in respect of the dismissal of her appeal by Goosen J against the ruling in the second bail application. When it was put to the applicant that the outcome of that petition would have a bearing on the present application, the applicant unsuccessfully tried to distinguish the basis of the petition and the present application. In my view, there is no distinction. The ultimate purpose of that petition as well as the present application is aimed at securing the applicant's release from detention.

[18] Although not raised in the papers, the applicant sought to rely on section 12(1)(a) of the Constitution which entrenches the right to freedom and security of the person not to be deprived of freedom arbitrarily or without just cause. As I understood the applicant, her complaint is that there was procedural unfairness in respect of her arrest. She, however, (correctly) accepted that there was just cause for her arrest. The applicant's freedom has been deprived as she was not able to discharge the onus which rested upon her as required by section 60(11)(b) of the CPA. Thus, there is no merit in the applicant's reliance on section 12(1)(a) of the Constitution, there being no question that she has been deprived of her freedom arbitrarily or without just cause.

[19] The issuing of the warrant in terms of section 43 of the CPA was solely motivated by ensuring the applicant's attendance at court for purposes of attending trial. Section 38(1) of the CPA provides for the methods of securing the attendance of an adult accused person in court for the purposes of standing trial. They are: arrest, summons, written notice and indictment. Evident from the history of this matter is that the applicant has habitually been cavalier and recalcitrant by not making good on her undertakings to appear in court.

[20] It is trite that arrest is the most drastic method whereby an accused's attendance at his/her trial can be ensured.⁴ Section 39(3) of the CPA provides that the effect of an arrest is that the person arrested shall be in lawful custody and that he/she shall be detained in custody until he/she is eventually discharged or released from custody.

[21] In general, the object of an arrest is to bring the arrested person before a court to be charged, tried and then either convicted or acquitted.⁵ The decision to arrest must be based on an intention to bring the arrested person to justice and not for ulterior purposes.⁶ In the instant matter, and given the applicant's own conduct by not keeping to her word, it cannot be suggested that the applicant's arrest on 29 June 2017 was effected with the intention to intimidate or inconvenience her. There is no suggestion that the applicant's arrest was motivated by any malicious intent other than to bring her before court to be tried.⁷

[22] Following the applicant's arrest there was compliance with the provisions of section 50 of the CPA in that she was brought before court well within 48 hours of her arrest. Her further and continued detention was a consequence of the denial of bail. A valid lawful arrest is not a requirement for the trialability of the arrestee. In spite of the unlawfulness of his/her original arrest, the arrestee can later be tried and either convicted or acquitted.⁸

Costs

[23] The applicant submitted that she should be awarded her costs albeit that she represented herself. She submitted that she had incurred disbursements in presenting her case. Even if the result was otherwise, there would have been no basis upon which to award costs in the applicant's favour. Counsel for the first and second respondents, Mr *Nobatana*, submitted that in the event that the application is dismissed, he had no instructions in respect of costs. I understood this to mean that

⁴ See generally *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T)

⁵ See *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ) at [28]

⁶ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at [30]-[31]

⁷ See *Sekhoto*, supra at para [31]

⁸ See *R v Jones* 1952 (1) SA 327E

the first and second respondents were not persisting in seeking costs against the applicant.

Conclusion

[24] In the result, the following order shall issue:

24.1 The application is dismissed;

24.2 There shall be no order as to costs.

G J GAJJAR

ACTING JUDGE OF THE HIGH COURT

I agree.

S M MFENYANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant:

In person

For First and Second Respondents: Adv Nobatana instructed by the State
Attorney, Port Elizabeth