

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. A166/2022

In the matter between:

THE MINISTER OF POLICE

1st Appellant

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

2nd Appellant

and

BOLLYCARPUS PETRUS VERSTER

Respondent

CORAM:

OPPERMAN, J *et* GUSHA, AJ

HEARD ON:

17 APRIL 2023

DELIVERED ON:

10 JULY 2023. The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 10 July 2023. The date and time for hand-down is deemed to be 10 July 2023 at 15h00

JUDGMENT BY:

GUSHA, AJ

JUDGMENT

INTRODUCTION

- [1] Section 12(1) of the Constitution of the Republic of South Africa, 1996 guarantees the right to freedom of movement and security of a person.¹ This is one of the sacrosanct rights enshrined in our Bill of Rights. This right, and indeed others, are steeped in and are hallowed because of our country's past unjust and unsavory history of lack of respect for, and the often-arbitrary deprivation of basic human rights.
- [2] The present case has at its heart the deprivation of the very basic right of freedom of movement. The germane facts are that the respondent² was arrested on the 17th of December 2015 on a charge of assault with intent to do grievous bodily harm without a warrant. The arrest was executed by warrant officer Mpata (Mpata), an employee of the 1st appellant.³ Subsequent to the respondent's arrest, he appeared before the Petrusburg District Court. The case was remanded and it was ordered that he remain in custody. He was then detained at Grootvlei prison pending his next appearance. The incarceration was ordered notwithstanding the fact that Mpata did not oppose his release. On the 22nd of December 2015, pursuant to bringing an unopposed bail application, the plaintiff was admitted to bail and released from custody. On the 12th of February 2016 the charges against him and his co-accused were withdrawn at the request of the complainant.
- [3] It is against this backdrop that the respondent instituted action proceedings against the 1st and 2nd appellants for damages suffered as a result of his purported unlawful arrest, detention and the purported malicious prosecution against him.

¹ **Freedom and security of the person**

12 (1) 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;

(b) not to be detained without trial; ...

² Plaintiff in the court *a quo*.

³ 1st Defendant in the court *a quo*.

[4] On the 1st of September 2022 during the aforesaid proceedings, the court *a quo*⁴ found in favour of the respondent and made the following order:⁵

1. First Defendant is to pay Plaintiff the sum of R15, 000.00 as for damages.
2. First Defendant is to pay interest on such damages, at the prescribed rate of interest, from date of judgment to date of payment.
3. First Defendant and Second Defendants are to pay the Plaintiff, jointly and severally, the one paying the other to be absolved the sum of R150 000.00 as for damages.
4. First Defendant and Second Defendant's (sic) are to pay interest on such damages, at the prescribed rate of interest, from date of judgment to date of payment.
5. First Defendant and Second Defendants are to pay Plaintiff's costs of suit, by agreement to include the costs of counsel not limited by the magistrate's court tariff, including travelling and preparation.
6. Plaintiffs claim for special damages for legal fees is dismissed.

[5] It is this decision that lies at the heart of the appeal before us.

[6] For ease of reference, the parties shall henceforth be referred to as they were cited in the court *a quo*, namely as the plaintiff, 1st and 2nd defendants.

GROUND OF APPEAL

[7] The grounds for appeal as reiterated in the heads of argument for the appellants are that the Honourable Court erred in finding that:

⁴ Petrusburg Magistrate's Court.

⁵ Pages 86 - 87: "Record of Appeal" (the Record).

- 20.1 The First Appellant failed to establish jurisdictional facts in order to discharge the onus that rests upon him in terms of Section 40(b) of Act 51 of 1977 (hereinafter referred to as "*the CPA*").
- 20.2 The First Appellant is liable (jointly and severally) for the detention endured by the Respondent for a period of five (5) days pursuant to his first Court appearance.
- 20.3 That the Second Appellant failed to carry out its prosecutorial functions regarding bail as a result thereof, causing the Respondent harm wrongfully and malicious.
- 20.4 The Second Appellant failed to commence and finalize the Respondent's release without unreasonable delay.
- 20.5 In the assessment and evaluation of evidence.

[8] The legal position with regards to the powers of a court of appeal to interfere with the credibility findings of the trial court need no restating.⁶

[9] Before traversing the above issues we are confronted with in this appeal, I pause here in order to deal with the aspect of non-compliance with the Rules; the application for the late filing of the notice of appeal.

CONDONATION

[10] The appellants noted their notice of appeal on the 11th of November 2022, approximately 31 days out of time.⁷ In tandem with the notice of appeal, the appellants moved an application for condonation of their non-compliance with the Rules. Truncated, the reasons submitted for the non-compliance were that the

⁶ *Rex v Dhlumayo and Another* 1947 (2) SA 677 (A) at 705, *S v Francis* 1991 (1) SACR 198 (A), *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT1099) [1999] ZACC 17.

⁷ Rule 51(3) of the Magistrate's Court Rules provides as follows; An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.

delays were not inordinate and that same was occasioned by the administration process related to obtaining authorization for and appointing counsel.

[11] It is trite that the court has a discretion whether to grant condonation or not. However, equally trite, is that same cannot be had merely for the asking. It is an indulgence which a court can give. A full, detailed and accurate account of the causes for the delay and their effects must be furnished so as to enable the court, when exercising its discretion, to clearly understand the reasons for the delay and to assess its responsibility.⁸

[12] After having heard both parties on this aspect, we exercised our discretion in favour of the appellants and were of the considered view that their non-compliance notwithstanding, the interests of justice dictate that we condone their non-compliance.⁹ I would however be remiss if I do not remark that the practice of non-compliance with the Rules is to be frowned upon.

LEGAL ISSUE TO BE DETERMINED ON APPEAL

[13] I now turn to deal with the issue at hand, the appeal.

[14] During arguments the defendants conceded that the trial court did not make any findings with regards to malicious prosecution, that aspect therefore need not detain us any further. Consequently, the only issue to be determined is whether the plaintiff's arrest and his continued detention was unlawful.

FINDINGS BY THE COURT A QUO

Unlawful arrest¹⁰

[15] I now turn to deal with the factual findings of the court *a quo*. After evaluating the evidence, the trial court found that Mpata's suspicion was based exclusively on having perused the A1 statement of the complainant and a brief sighting of him more than a week prior to the arrest of the plaintiff. The court further found that Mpata should have ascertained the nature of the complainant's injuries before he

⁸ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA).

⁹ *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at para [20].

¹⁰ Pages 71 - 73 of the Record.

could form the suspicion that the plaintiff committed a Schedule 1 offence - assault when a dangerous wound is inflicted. The court reasoned further that as there was no J88 and Mpata did not interview the complainant to satisfy himself that a dangerous injury was inflicted, it followed that whatever suspicion Mpata harboured, was not based on objectively reasonable grounds. Accordingly, the trial court found that the defendants did not pass muster of the jurisdictional facts as required in section 40 of the Criminal Procedure Act, 51 of 1977.

Unlawful detention post first court appearance¹¹

- [16] With regards to the defendant's liability for unlawful detention post the plaintiff's first court appearance, the court correctly found that *once the arrested person has been taken to court, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.* Having arrived at this conclusion, the court was however alive to the fact and correctly found that not every order by a magistrate renders the further detention lawful.¹²

SUBMISSIONS BY THE PARTIES

- [17] The parties' submissions were comprehensively ventilated in their respective heads of arguments and before us, for that reason I am loathe to overburden this judgment by repeating same herein. I shall therefore only refer to some salient aspects of their respective arguments.
- [18] The 1st defendant conceded that at trial it bore the onus to prove that the arrest was lawful. They submitted that Mpata satisfied all the jurisdictional requirements for effecting a warrantless arrest. It was further submitted that he harboured a reasonable suspicion that the plaintiff committed a Schedule 1 offence. This suspicion was based on the information contained in the police docket; among others, the statement of the complainant, the weapon(s) allegedly used,¹³ the

¹¹ Pages 73 - 82 of the Record.

¹² *De Klerk v Minister of Police* (CCT95/18) [2019] ZACC 32 at para 62 the court held that "A remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty..."

¹³ A sjambok and an iron rod.

visible injuries Mpata observed on the complainant¹⁴ as well as a witness statement that at the time the complainant and another were brought to the police station; they reeked of petrol.

- [19] The plaintiff submitted that Mpata arrested the plaintiff based on the contents of the A1 statement of the complainant and a brief sighting of the injured complainant at the Petrusburg police station a week prior to the arrest. Further, that at the time of the arrest Mpata did not possess the medico - legal report,¹⁵ thus there was no indication at the time that the complainant sustained serious injuries. Thus, so their submissions went, Mpata could not have formed a reasonable suspicion that the plaintiff committed a Schedule 1 offence.
- [20] With regards to the plaintiff's continued detention post - first appearance in court, it was submitted that the 2nd defendant, represented by its employee the public prosecutor, failed in its duty of care by failing to commence and finalise the plaintiff's release without unreasonable delay, especially in the face of the fact that Mpata did not oppose the plaintiff's release.
- [21] The plaintiff submitted that the appeal be dismissed and that a punitive cost order on an attorney - and - client scale be awarded.

LEGAL FRAMEWORK

- [22] Section 40 the Criminal Procedure Act, 51 of 1977 (the Act) provides that a peace officer may effect an arrest without a warrant if there is reasonable suspicion that a suspect has committed an offence referred to in Schedule 1 of the Act.
- [23] It is trite that in order to prove that the arrest was lawful the 1st defendant had to prove the following jurisdictional facts:
- (i) The arresting officer was a peace officer;
 - (ii) the arresting officer entertained a suspicion;

¹⁴ A bump on the head.

¹⁵ In official (court and SAPS) parlance often colloquially referenced as the "J88".

- (iii) that the suspect to be arrested committed an offence referred to in schedule 1; and
- (iv) the suspicion rested on reasonable grounds.

[24] In this appeal we need only concern ourselves with three of the jurisdictional facts as it is common cause that Mpata, the arresting officer, is a peace officer.

APPLICATION

[25] For purposes of adjudicating the vexed issue, I propose to deal with the three jurisdictional issues at once as I hold the considered view that in the circumstances of this case, they are inter - connected.

[26] In doing so, I can do no better than have regard to the decision of the court per Musi AJA (as he then was) in *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022) wherein it was stated as follows:

[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularized suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the

determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.

[27] I now turn to deal with the three remaining jurisdictional facts. Drawing from the wisdom *supra* it is crystal that the three jurisdictional facts have not been met by the 1st defendant. Mpata acted solely on information contained in the docket as well as his brief observation of some injuries the complainant had when he saw the latter at the police station. I am not persuaded that the suspicion Mpata harboured was objectively viewed based on reasonable grounds. I hasten to add that I am alive to the fact that the standard of a reasonable suspicion is very low and that in order to establish whether a dangerous wound was inflicted, it is was not required of Mpata to examine the wounds of the complainant, he is after all no medical doctor. I however hold the considered view that under the circumstances of this case, Mpata needed a little bit more, for he neither interviewed the complainant nor had at his disposal a J88, in fact the evidence at trial was that same was never filed in the docket.¹⁶ In order to discharge the onus and pass muster of an arrest without a warrant, all that Mpata should have done, in addition to the statement filed in the docket, was to interview the complainant and obtain the J88, that objectively viewed, would have established the reasonableness of the suspicion he harbored that a Schedule 1 offence was committed by the plaintiff. The plaintiff reported to the police station voluntarily, apparently drove himself to the court and the investigating officer was well aware of his whereabouts in town. He was not a flight risk nor a risk to the community and there was no indication that he would evade his trial.

¹⁶ Page 236 of the Record.

- [28] Having found that the arrest was unlawful I now turn to the aspect of whether the plaintiff's detention post his court appearance was lawful. It needs no restating that the deprivation of liberty through arrest and detention, is *per se prima facie* unlawful. In cases like this, the liability of the police for detention post - court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post - appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts - there is no general rule that can be applied dogmatically in order to determine liability.¹⁷
- [29] In the present case there is a direct causal link between Mpata's wrongful act, the plaintiff's unlawful arrest, and the harm done due to the plaintiff's subsequent detention for a further 5 days, post his court appearance. The fact that the plaintiff's detention post his court appearance was sanctioned by an order of the learned Magistrate, cannot and indeed should not render the further detention lawful and thus act as a *novus actus interveniens*. Mpata failed in his duty, notwithstanding the fact that the plaintiff was known to him, he did not have a J88, he did not oppose bail, and he fully appreciated that the plaintiff might be remanded in custody post his first appearance in court and that notwithstanding he did not complete the bail information document which might have guided the decision to formally oppose bail or not.¹⁸
- [30] I now turn to deal with the liability of the 2nd defendant. In a well - reasoned judgment, the trial court correctly found that in the present case there are concurrent wrongdoers: the Minister of Justice, the Minister of Police and the Director of Public Prosecutions as represented by the prosecutor and that accordingly they ought to be found to be jointly and severally liable for the unlawful post court appearance detention of the plaintiff. The liability of the 2nd defendant is

¹⁷ Footnote 11 *supra*.

¹⁸ *Ibid* at pages 224 - 225.

to be found in the lackadaisical conduct of its authorized delegate, Mr Mrabe, the prosecutor involved in the court during the plaintiff's first appearance on the 17th of December 2015. Despite the absence of a J88 in the docket and any other evidence to found a charge of attempted murder, Mr Mrabe charged the plaintiff and his co - accused with attempted murder and requested, and was granted, a remand for a formal bail application some 3 weeks later. Further display of this lackadaisical approach, on the following day, despite the plaintiff being requisitioned and present in the court holding cells, Mr Mrabe refused to assist in enrolling the case for a formal bail application. The aforesaid is to be lamented. Prosecutors, by their very duty, wield a lot of power and play an important role in our criminal justice system and this confidence can only be inspired if they act in the interests of the community, do not act arbitrarily and possess the requisite legal acumen.¹⁹ For that reason, they must inspire confidence in the criminal justice system. They must act without fear, favour or prejudice. Clearly Mr Mrabe fell short of this standard; for had he approached his prosecutorial duties conscientiously; the plaintiff would not have spent 5 days detained unlawfully.

[31] Consequently, we are not persuaded that the court *a quo* misdirected itself on the facts and the law. Therefore, this appeal ought not to succeed.

COSTS

[32] With regards to what constitutes an appropriate costs order, it is a well - established principle of our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. Equally established is the principle that the court exercises a discretion when considering an appropriate costs order and should, of necessity, exercise same judiciously.²⁰ We are however not persuaded that this is a case where a punitive costs order is warranted.

[33] Accordingly, I make the following order:

¹⁹ *Patel v National Director of Public Prosecutions and Others* (4347/2015) [2018] ZAKZDHC 17 at para 27 - 28.

²⁰ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 at para 85.

ORDER

The appeal is dismissed with costs.

NG GUSHA, AJ

I concur,

M OPPERMAN, J

On behalf of the Appellant

Instructed by:

Adv. P. Chaka

State Attorney

BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

Adv. GSJ Van Rensburg

Loubser Van der Walt Inc

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