IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal case no: **A118/2022**

In the appeal of:

MINISTER OF HOME AFFAIRS Appellant

and

PETER IFEANYI NWANKO Respondent

CORAM: **MHLAMBI J, MOLITSOANE J et CRONJé, AJ**

HEARD ON: **12 MAY 2023**

DELIVERED ON: **17 OCTOBER 2023**

JUDGMENT BY: **MOLITSOANE, J**

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[1] The Respondent (Plaintiff in the Court a quo) instituted a claim against the Appellant (Defendant in the Court a quo) for unlawful detention. The Court a quo granted an order to separate the merits and quantum in terms of Uniform Rule 33(4) and dealt with the merits only. For convenience, the parties will be referred to as in the Court a quo. The trial Court partially upheld the claim and granted the following orders:

a) The Defendant shall be liable to the Plaintiff for any proven or agreed to damages he suffered following from his unlawful detention for the following periods:

a.a) 2 June 2013 to 6 August 2013;

a.b) 6 September 2013 to 9 October 2013;

b) The Defendant is liable for the Plaintiff's costs of suit on a party and party scale, with the following exception:

c) Each party shall be liable for his own costs occasioned by the postponements and/or removal from the roll of the matter prior to the first day of trial.

[2] The Defendant is aggrieved and appeals the orders as set out above except for the order contained in paragraph (c).

[3] In essence, the judgment and order are in brief assailed on the following grounds:

3.1 That the South African Police Service transferred the Plaintiff in terms of an occurrence book to them as they required his presence in Court on a drug-related matter;

3.2 The respondent's continued detention was thus at the behest of the SAPS and yet the Plaintiff failed to join the Minister of Police in these proceedings;

3.3 That there was no necessity for the Defendant to issue a further warrant for the detention of the respondent since he was no longer held at their behest;

3.4 The Plaintiff conceded that his detention was unlawful;

3.5 Throughout the period of the respondent's detention up until September 2013, Plaintiff was held in terms of warrants validly issued by Defendant, or in terms of the court order granted by the Magistrate on 3 June 2013;

3.6 The Court was satisfied with the validity of these documents and there was accordingly no basis to find that the Plaintiff was unlawfully detained;

3.7 The Court's findings relating to the validity of the warrants of detention and the Court order left no room for a finding that Plaintiff was unlawfully detained.

[4] The Plaintiff's cause of action is pleaded as follows in the particulars of claim:

> *6. On or about the 3rd May at or near number 31 Doren Street at Welkom the Plaintiff was arrested by police who took him to Welkom Police Station where he was detained without being charged as an illegal immigrant in South Africa.*
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> *7. On the 6th August 2013, the immigration officers known as Ms. Yvonne and Mr. Ramakau booked the Plaintiff out of the police cells and he was taken to Lindela Holding facilities in Krugersdorp for the purpose of deportation.*
>
> *8. Upon the arrival at Lindela Holding facilities, the immigration officers (Yvonne and Ramakau) tried to hand the Plaintiff over to Lindela officials, upon verification of Plaintiff's status which was submitted to immigration officer in Welkom, it was found that the Plaintiff's application for the extension of his permit issued by Department of Home Affairs was pending (see Annexure "B") and a copy of acknowledgment of the receipt of the same (see annexure "C").*

9. The immigration officers in Lindela would not admit the Plaintiff and thereafter he was taken back to Welkom police station, were he remained incarcerated in the dark dingy cell for 5(five) months from 3 May – 9 October 2013 when he was formally charged under case number A376/2013 of being illegal foreigner in the Republic of South Africa and was granted bail (see annexure "C").

10. The Plaintiff attended Welkom magistrate court until the charges were withdrawn on 4 December 2013.

11. The Plaintiff was detained at the instance of the aforementioned immigration officers, whose full and further particulars not known him.

12. As direct result of the said prolonged incarceration, Plaintiff was unlawfully and or without justifiable cause deprived of his liberty from the 3rd May until 9th October 2013 when he was granted bail."

[5] The Plaintiff is a Nigerian national. He entered South Africa on 13 January 2006. According to him, he came to South Africa on a spousal permit. The evidence reveals, however, that he met and married his South African wife about a month later. Although in evidence in chief, he averred that he married his wife in 2007, his marriage certificate revealed that the marriage was concluded on 8 February 2006. He thereafter applied for a spousal permit. He confirmed that it was a condition of his permit that he and his wife must stay together in one place. He confirmed that from the time that he entered this country, he had never worked.

[6] It is common cause that the Plaintiff was arrested on 3 May 2013 in Welkom by members of the South African Police Service. He was further detained at the said police station. On 15 May 2013, his wife deposed to an affidavit. In the affidavit, his wife avers that they had been married for seven years. She further avers that she was working in Boksburg while the plaintiff was looking

for employment in Welkom. She confirmed that as a result, they could not stay together during the marriage.

[7] In the particulars of claim, it is pleaded and admitted also in the plea that the Plaintiff was arrested by members of the SAPS[1]. He was, however, adamant that he was arrested by members of the Defendant[2]. According to the Plaintiff, Mr Ramakau, at times in the company of one Yvonne, who are both immigration officers dealt with him during his detention and also kept him in detention. He testified that a few days following his arrest, the said immigration officers visited him in the cells. He gave them a document entitled '*Acknowledgement of receipt*' which proved that he had applied for an extension of his permit. These officials however told him that his permit was fake. They also told him and one Mr Bashir, with whom he was kept in the holding cell, that they must buy tickets to enable them to be deported. He asked to be taken to Lindela to verify his papers. He was taken by Ramakau to Lindela on 6 August 2013 where he gave his receipts to an official there. The official informed Ramakau that the Plaintiff had applied for an extension of his permit and further that the application was still pending. The official at Lindela refused to accept him in the facility. Ramakau took him back to Welkom.

[8] It needs to be mentioned that the Plaintiff's spousal permit expired on 10 May 2012. On 15 May 2012, he applied for an extension of the said expired permit. According to him, one is allowed one month within which to apply for an extension after it has expired.

[9] Upon his return from Lindela, he instructed a legal representative to assist him and on 9 October 2013 he was released on bail of R500. According to him on 6 August 2013, he was served with a 'notice of rights'. He testified that after his return from Lindela, he never saw Ramakau and Yvonne. His application

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[1] See para 6 of the particulars of claim and corresponding para 6 of the plea on pages 9-10 and 19 respectively.
[2] Pages 258[lines 18-25[and 260 [lines 1-17] of the record.

for extension of the spousal permit was rejected because according to him it was said that he did not stay with his wife.[3] He was never told that he could appeal the decision to deport him or that he could ask to be taken to court to confirm the decision.It is his testimony that after paying bail of R500 for being an illegal immigrant he never appeared in court again and he did not know what happened to the case.

[10] Mr Nicolaas Gerhardus Jacobus Breed, the Control Immigration Officer and supervisor of the immigration officers Mr Ramakau and Ms. Yvonne Bofolo testified for the defendant. He testified that when a permit that allows a foreigner to be in the country expires, such a foreigner automatically becomes illegal in the country. According to him, a foreigner must apply for the extension of the permit before its expiry as a pending application will not detract from the fact that the foreigner is now automatically illegal in the country.

[11] Section 32 of the Immigration Act 13 of 2002 (the Act) provides as follows:

"(1) Any illegal foreigner shall depart unless authorised by the Director General in the prescribed manner to remain in the Republic pending his or her application for status.

(2) Any illegal foreigner shall be deported".

[12] It is common cause that the spousal permit of the Plaintiff expired on 10 May 2012. Although he insists that he applied for its 'extension' on 15 May 2012, the undisputed evidence is that such a permit had already expired. His assertion that he had a grace period of a month to apply for its extension after it had expired is not based on any legal foundation. Section 43(2) of the Act provides in peremptory terms that "*a foreigner shall depart upon expiry of his or her status.*" The expiry of his permit thus put him in the category of 'illegal foreigners' and was thus subject to deportation in terms of the Act and the Regulations promulgated thereunder. The court a quo was in my view correct in finding that the Plaintiff was an illegal foreigner irrespective of whether he

[3] See page 235 of the paginated record.

had contravened the terms of the permit or not or whether he had to apply for the extension of the expired permit.

[13] Section 34 of the Act deals with the deportation of foreigners and provides as follows:

> "(1) *Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-*
>
> (a) *shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;*
>
> (b) *may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;*
>
> (c) *shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;*
>
> (d) *may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and*
>
> (e) *shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."*

[14] It is necessary to repeat the following paragraph of the judgment of the court a quo as in my view it has much bearing in the adjudication of this appeal:

> *"[131} The initial 30 - day detention period was extended on 3 June 2013 when Ramakau's application to a magistrate was granted. It was not alleged that the magistrate failed to exercise his discretion in granting the extension or that he exercised his discretion improperly, arbitrarily, or unreasonably. Considering the duty of courts to scrutinise carefully all steps taken which invade on a person's right to freedom and security of person, <u>I cannot however shut my eyes against the failure by the Defendant to present evidence on the reasons which Ramakau considered good and reasonable for an extension of the</u>*

Plaintiff's detention or relating to the reasons why a specific period of detention was considered reasonable and necessary. (my emphasis) Breed's assumption that there 'must have been good reasons' is unfortunately not good enough."

[15] It is common cause, at least in the pleadings, that the Plaintiff was arrested by members of the SAPS for being illegal in the country. The Plaintiff does not contend that his arrest was unlawful. On 10 May 2013, a warrant for his detention was issued by Mr Ramakau for his detention on behalf of the Defendant. The lawfulness of this warrant of detention was not disputed. It can thus be accepted, as also found by the court a quo that at least following his arrest, the subsequent detention was lawful. The problem, however, arises from the finding that such lawfulness of the arrest ended on 2 June 2013. This thus has a bearing on the liability imposed on the first period referred to in the order.

[16] Regulation 28(4) promulgated under the Act provides as follows:

"An immigration officer intending to apply for the extension of the period in terms of s34(1)(d) shall-

a) Within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her intention on a form substantially corresponding to form 31;

b) Afford the detainee the opportunity to make representations in this regard within three days of the notification contemplated in paragraph (a) having been served on him or her;

c) Within 25 days following the arrest of the detainee, submit with the clerk of the court an application for the extension of the period of detention."

[17] As can be seen from the excerpt of the judgment of the court a quo above, the court held that no allegations were made that the magistrate failed to exercise his discretion improperly in granting the extension of the order. It is undisputed that an application was made to the magistrate for the further detention of the

Plaintiff. The Defendant issued the warrant for the detention of the Plaintiff within the prescribed time as contemplated in s34(1) and an application was made before the magistrate. The magistrate considered the application and in his sole discretion and based on the evidence before him, granted the further detention of the Plaintiff.

[18] The court a quo holds the view, presumably based on the onus the Defendant is saddled with to justify the detention, that the liability of the Defendant arises on the fact that Ramakau failed to give 'good and reasonable' reasons for the extension of the Plaintiff's detention. In this regard, the court a quo relies on *De Klerk v Minister of Police*[4]. In my view reliance on De Klerk is misplaced. There was a substantive application that served before the magistrate for the extension of the detention. No procedural defect is alluded to against the granting of the order. The discretion the magistrate exercised is also not attacked. It can be accepted that Ramakau presented evidence to the satisfaction of the magistrate to properly exercise his discretion that further detention was warranted. Much as the court a quo appears not to be satisfied with Ramakau, the fact is that Ramakau had to 'satisfy the Magistrate' and not the court a quo. The Plaintiff does not contend otherwise.

[19] The warrant of detention granted by the magistrate allowed for a detention for a period not exceeding 90 days as contemplated in s34(1) (d). The detention of the period up to 6 August thus fell within the 90 days as contemplated in the Act. The court a quo referred to *Jeebhai and Others v Minister of Home Affairs and Another*[5]. I quote it as in the judgment of the court a quo:

"It is true…that the failure of the respondents to comply with the regulations…was not raised pertinently on the papers. But, it does not follow… that the failure precludes the point being raised before this court as a point of law.

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[4] 2020(SACR 19 (CC).

[5] 2009(5 SA 54(SCA0.

Once the Plaintiff placed the lawfulness of his detention in issue, the Defendant was required at the very minimum, to adduce sufficient facts to prove that every procedural requirement ...was complied with."

It is settled that the order granted by a Court remains valid until set aside. The order of the magistrate has not been set aside and it remained valid and binding until it was finally executed. I agree with Counsel for the Defendant that if the order of the magistrate is challenged, then in that case, the Minister of Justice and Correctional Services should have been joined in these proceedings. Non-joinder of the said Minister disposes of the reliance on *Jeebhai*. For fear of repeating myself, the Plaintiff in this case did not attack the fact that the magistrate inappropriately exercised his discretion. In the absence of such an attack, the order he made remains valid and binding. I find that the court a quo erred in finding that the period of detention from 2 June 2013 to 6 August 2013 was unlawful.

[20] The court a quo also found that the Defendant was unlawfully detained during the period 6 September 2013 to 9 October 2013. On 26 August 2013, the police informed the Respondent that the Plaintiff was arrested for possession of drugs under Welkom CAS 306/4/2012. A request was also made that he should not be deported as he was needed to stand trial. Clearly, the Plaintiff was then handed over to the police. This is also illustrated by the fact that the immigration officers no longer went to check on him until he was released. Mr Breed testified that the 'transfer' of the Plaintiff from the Defendant would have been done by an occurrence book entry. The detention of the Plaintiff was at this stage at the behest of the SAPS. The court a quo accepted the evidence of Breed in this regard.

[21] If one accepts that the Plaintiff was handed over to the SAPS by an occurrence book entry, surely the inference to be drawn in those circumstances is that the Minister of Police should have been joined in these proceedings. This is also illustrated by the fact that the Plaintiff was arrested by the police. The Court a

quo was also taken aback by the approach of the Plaintiff in this case. The court said:

"[87] The came a surprising submission, namely that the Plaintiff is not claiming damages based on unlawful arrest but only based on his detention for such inordinate time. Mr Steenkamp indicated that he was of the opinion as an officer of the court, that Plaintiff failed to prove that his arrest had been effected unlawfully"

The failure to join the Minister of the Police is also fatal to the Plaintiff's case, at least for a claim for damages from 6 September 2013 to 9 October 2013. This thus disposes of the second leg of liability imposed by the court a quo on the Defendant. The appeal must thus be upheld. I accordingly propose the following orders:

ORDER

1. The appeal is upheld;
2. The order of the court a quo is set aside and replaced with the following: "The Plaintiff's claim is dismissed with costs."
3. The Respondent is ordered to pay the costs of the appeal.

[redacted]

P. E. MOLITSOANE, J

I agree

[redacted]

J.J MHLAMBI, J

I agree

[redacted]

P. R. CRONJé, AJ

On behalf of the Appellant:	Adv.RT Williams SC
Instructed by:	The State Attorney
	BLOEMFONTEIN
On behalf of the Respondent:	Adv. MJD Steenkamp
Instructed by	Jacobs Fourie
	BLOMFONTEIN