



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

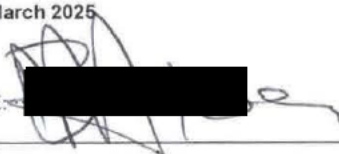
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(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 20 March 2025

SIGNATURE: 

Case no. A281/2023

In the matter between:

MATHEW M MOLOSI

APPELLANT

(In his capacity as Curator ad Litem) of

MTHEMBU NTHUTHUKO SIPHO

And

MINISTER OF POLICE

FIRST RESPONDENT

MEC FOR EDUCATION

SECOND RESPONDENT

(GAUTENG PROVINCE)

Coram: Mbongwe J, Millar JJ et Mokoena AJ

Heard: 12 March 2025

Delivered: 20 March 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 20 March 2025.

JUDGMENT

MOKOENA AJ (MBONGWE J et MILLAR J CONCURRING)

- [1] This appeal is with the leave of the Court *a quo*. The issue is a limited one. It is whether the Court *a quo* erred when it dismissed the Appellant's delictual claim against the Respondents for unlawful detention after his release by the police, within 48 hours, without appearing in Court.
- [2] On 3 November 2014, the Appellant was arrested by a police officer without a warrant for the alleged rape of a disabled learner. He was detained at the Soshanguve Police Station until his release on 5 November.
- [3] On the day in question, the Appellant and other detainees were taken to the magistrate's Court, for their appearance. However, he did not appear because his matter was not on the Court roll. The police subsequently released him.
- [4] The evidence of the arresting police officer, which was never challenged, was that the docket was delivered to the Soshanguve Magistrate's Court. No explanation was provided to this Court and the Court *a quo* as to why the matter was not on the Court roll on 5 November 2014.
- [5] During argument, Mr. Van der Berg for the Appellant conceded that the arrest of the Appellant was lawful. However, he contended that his release by the police without his appearance in Court rendered his detention unlawful.

[8] In *Minister of Police v du Plessis*² the Supreme Court of Appeal held:

“Justification for the detention after an arrest until a first appearance in court continues to rest on the police.... Once an arrestee is brought before a court, in terms of s 50 of the Criminal Procedure Act 50 of 1977(CPA), the police’s authority to detain, inherent in the power to arrest, is exhausted.”

[9] The procedure to bring an arrestee before Court lies with the Control Prosecutor who is duty-bound to place the matter on the Court roll once he receives the docket from the police.

[10] The Court is then vested with the power to release the arrestee with conditions or order his further detention. The police would therefore be justified to detain the arrestee beyond 48 hours until the next court appearance if the Court has ordered further detention.

[11] Questions arising are whether the police acted within their powers or duty when they released the Appellant and if so, where did they derive such powers or duty to release him.

[12] Section 12(1) of the Constitution provides:

‘(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;

....’

[13] There is no express limitation in Section 50(1)(a) and (c) of the Criminal Procedure Act and Sections 12(1) and 35(1)(d) of the Constitution that the power to release the detained suspect vested only with the Court.

[14] To read such a limitation in the provisions of these Sections will, in my view take away the right of the arrested person to be released by the police, if it

² 2014 (1) SACR 217 (SCA) at [17] & [28].

turns out within 48 hours and before the arrestee's appearance in Court, that there is no justification for his or her further detention.

[15] The principle that it is incumbent upon the police to release an arrestee after the expiry of 48 hours if he is not brought before the Court, equally applies to the Appellant's case³.

[16] The Appellant's right to be released from custody as provided for in these Sections, became alive immediately after his matter was not heard on 5 November 2014 within 48 hours. There was no justification from that moment to keep him in further detention. The duty to release him was now on the police because he was in their custody and there was no Court order directing them to detain him beyond 48 hours.

[17] I deem it necessary to clarify that the power to release an arrestee suspected of having committed a Schedule 6 offense, is vested with the Court. However, the Constitutional duty to immediately release the arrestee is that of the police officer if, for whatever reason, it comes to his knowledge that there is no justification for further detention of the suspect⁴.

[18] The police officer therefore bears the onus to prove that further detention of the suspect was justified failing which, the unlawfulness part of the period of detention could render the total period of detention unlawful

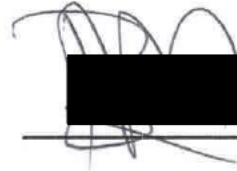
[19] The problem with the submissions made by Mr. Van der Berg is that the police did not have the power to release the Appellant because he was not brought before Court. Following this logic, the Appellant was to remain in custody in breach of his Constitutional right not to be detained arbitrarily or without just cause. That is an untenable proposition.

[20] In the result, the finding of the Court *a quo* cannot be faulted. I therefore propose the following order ———

- (1) The appeal is dismissed;
- (2) No order as to costs.

³ Hoco v Mtekwana 2010 (2) SACR 536 (ECP) at [14].

⁴ Minister of Police *supra*, at [11],[16] and [26].


[Redacted signature]

M MOKOENA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED


[Redacted signature]

M MBONGWE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I AGREE,

[Redacted signature]

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

12 March 2025

JUDGMENT DELIVERED ON:

20 March 2025

COUNSEL FOR THE APPELLANTS:

ADV. G. V. D. BERG