



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MAKHANDA**

Case No: CA05/2022

In the matter between:

THE MINISTER OF POLICE

Appellant

and

OLWETHU KULATI

Respondent

JUDGMENT

BROOKS ADJP

[1] This is an appeal against the judgment and order of the court *a quo* (MFENYANA AJ) delivered on 18 February 2020. The order of the court *a quo* was as follows:

- (a) The arrest of the plaintiff and his subsequent detention from 14 April to 08h00 on 15 April 2017 was lawful.
- (b) The continued detention of the plaintiff from 08h00 on 15 April to 13h00 on 18 April 2017 was unlawful.
- (c) The defendant is liable to compensate the plaintiff for damages arising from the plaintiff's unlawful detention in the amount of R128 000.00.
- (d) The defendant shall pay interest on the above amount at the prescribed

rate of 10,25% calculated from date of judgment to date of payment.

(e) The defendant is ordered to pay the plaintiff's costs of suit.

[2] Leave to appeal to this court was granted by the court *a quo*.

[3] A single ground of appeal is set out in the notice of appeal and reflects the issue that was argued before this court. The relevant portion of the notice of appeal reads as follows:

The learned judge erred in finding that the provisions of section 59A of the Criminal Procedure Act 51 of 1977 (the CPA) places a duty on the South African Police Services (the SAPS) to facilitate the release of the respondent on bail in the absence of a request for bail from him.

[4] In the amended particulars of claim the respondent alleged that the detention he experienced subsequent to his arrest was unlawful. In essence the allegation of unlawfulness is based upon an allegation that the members of the South African Police Services involved with the detention "could and should" have brought him before a prosecutor in terms of section 59A of the CPA to enable him to be released on bail prior to his appearance in court but failed to do so. It was further pleaded that the respondent was not made aware of the provisions of section 59A of the CPA at any time during his detention.

[5] In the amended plea, the allegations that refer to the detention of the respondent as being unlawful are denied. The appellant admitted only that the respondent was released on 18 May 2017 after being taken to court. It was pleaded further that the respondent was lawfully detained "in terms of *inter alia* sections 39 and 50 of the CPA."

[6] In the circumstances the respondent bore an evidential *onus* to place before the court *a quo* evidence that he intended to rely upon in support of the allegations made in his amended particulars of claim that had not been admitted by the appellant.

[7] The appellant bore the onus of proof to establish that the entire period of the

detention of the respondent was not unlawful.¹

[8] The respondent, as plaintiff, did not testify before the court *a quo*. Reliance was placed upon the evidence of the respondent's mother who testified in support of his claim. She was found to be an unreliable and unhelpful witness whose evidence was incoherent and improbable. There is no cross-appeal challenge to this finding. In any event, her evidence had no bearing upon the finding and order of the court *a quo* and consequently has no bearing upon the issue in the appeal.

[9] It is common cause that the respondent was arrested by one Allers, a peace officer and member of the South African Police Services. The respondent was seen by Allers emerging from a "known drug house" and when he saw Allers the respondent started running. The respondent was seen to throw a matchbox on the ground. Allers picked it up and found a mandrax tablet inside it. These events gave rise to a suspicion on the part of Allers that the respondent was in possession of dependence-producing drugs and Allers arrested him. Reliance was placed by Allers, and the appellant as defendant in due course, upon the provisions of section 40(1)(h) of the CPA for the arrest by Allers, without a warrant, of the respondent as a person "who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition..."

[10] The court *a quo* found that the suspicion formed by Allers was a reasonable suspicion and that the circumstances fell within the ambit of the provisions of section 40(1)(h) of the CPA, quoted above. In the circumstances the court *a quo* found that the arrest of the respondent without a warrant was lawful. This finding was accepted by the respondent.

[11] With regard to the respondent's claim that his subsequent detention was unlawful, it was put to Allers by the respondent's legal representative that he never asked the respondent if he wanted to be released on bail. It was Allers' evidence in

¹ Minister of Safety and Security v Jan du Plessis 2010 (1) SACR 49 (ECG); Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589E-F; Syce and Another v Minister of Police 2024 (2) SACR 1 (SCA) para [40].

response to this line of questioning that the respondent did not say anything when his rights were read to him, including the right to be released on bail.

[12] The appellant also led the evidence of Captain Khwitshi, who saw the docket prepared in respect of the respondent the next day. He stated that he did not request the prosecutor to grant the respondent bail because the latter had not requested it. Khwitshi confirmed that he would have done so if the respondent had requested bail. He testified further that the respondent had said that he wanted to “speak in court”. Khwitshi maintained that his duty to request the prosecutor for bail only arises if the accused person informs him that he requires bail.

[13] The evidence indicated that the investigation subsequent to the arrest of the respondent was completed on 15 April 2017. The arrest had been made on 14 April 2017, which was Good Friday and the ensuing Easter public holiday meant that the first available court date after the arrest was Tuesday 18 April 2017. The docket was sent to court without information relating to bail. On 18 April 2017 the respondent was released without an appearance in court.

[14] The court *a quo* found that there was a duty on members of the South African Police Services to bring the matter of release of the respondent on bail to the attention of the prosecutor having themselves determined the respondent’s eligibility for bail. As the evidence indicated that this had not been done the court *a quo* held that the detention of the respondent from 08h00 on 15 April 2017 until his release at 13h00 on 18 April 2017 was unlawful.

[15] The crisp issue is whether or not the court *a quo* was correct in finding that there is a duty on members of the South African Police Services to facilitate the release of a detained person on bail in terms of the provisions of section 59A of the CPA in the absence of any request by the detained person to be so released.

[16] Section 59 of the CPA provides:

(1)(a) An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first

appearance in a lower court, be released on bail in respect of such offence by any police official or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

[17] The offence for which the respondent was arrested falls within Part II of Schedule 2 of the CPA. Therefore, the court *a quo* was correct in concluding that the procedure set out in section 59(1)(a) of the CPA was not available to the respondent.

[18] In respect of offences not covered by the provisions of section 59 of the CPA, the provisions of section 59A of the CPA find application. That section provides:

(1) An attorney-general, or a prosecutor authorised thereto in writing by the attorney-general concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail.

[19] Interpreting the provisions of section 59A of the CPA, the court *a quo* held:

It is clear from this section as well that the provision does not envisage a request by the accused person, but a determination by the prosecutor armed with such information as may be relevant for them to arrive at a decision, in consultation with the investigating officer. It involves the exercise of a discretion by the prosecutor in consultation with the police officer. Were this not the case, it would be reasonable for the prosecutor to simply wait for the accused person and only then, make such a determination. This is not what is contemplated by section 59A. That discretion was not exercised, ostensibly in the belief that the accused person had to make a request and in the absence thereof, the discretion did not arise. This cannot be...It was incumbent on Khwatsha [sic] in consultation with Groenewald, to assess the circumstances of each case, and make a determination whether the matter qualifies to be brought before the prosecutor for bail. With due diligence, the police could have ensured that the plaintiff was released upon finalisation of the investigation and prevent a further

infringement of his right to liberty.

[20] It is evident, from the judgment under scrutiny that the court *a quo* had been referred to the judgment of Crouse AJ in *Malisha v Minister of Police*.² Therein the learned judge had considered the provisions of section 59(A) of the CPA in conjunction with the content of paragraph 8.2 of the South African Police Services National Directive 3 of 2016. This sub paragraph reads as follows of the judgment in the court *a quo*:

The offences in respect of which the Director of Public Prosecutions or authorised prosecutors may grant bail, are offences that are more serious than those in respect of which a Sergeant may grant bail. If an arrested person is in detention, is an offence in respect of which a Sergeant may not consider the release of a person on bail, the member must determine whether the offence is contained in Schedule 7 of the Act (Annexure E). If this is the case, the relevant authorised prosecutor must be contacted by the investigating official and be informed of the application to be released on bail. A meeting must then be arranged with the prosecutor to enable him or her to consider the bail application.

[21] In *Malisha*, the learned judge concluded as follows:

It would therefore seem that section 59A places a duty on a police official to contact the prosecutor, only when an arrested person applies for bail. The granting or refusal of bail lies in the prosecutor's discretion, but the police have a duty to provide information to the prosecutor... To place a burden on the police in the circumstances where there is no request to facilitate so-called prosecutor's bail will lead to undue burden on both the police and the prosecutors.

[22] The court *a quo* was dismissive of the judgment in *Malisha*. The reasons appear from the following paragraph of the judgment of the court *a quo*:

² (2006/2016) [2019] ZAECPHC 37 (12 June 2019).

[23] I was referred to a judgment of this division in *Malisha v Minister of Police* where the court found that there was no legal duty on the police to contact a prosecutor and to secure bail for the plaintiff where there was no request from the plaintiff. I respectfully disagree with the reasoning of the learned judge for the following reasons:

(a) Section 59A does not require the accused person to make application or representations to be released on bail.

(b) It remains a constitutional imperative for an accused person whose liberty has been limited, whether justifiably or not, to be informed of all his rights including the right to be released on bail.

(c) Section 59A places a duty on the prosecutor upon receiving the relevant information from the investigating officer, to make a determination whether or not to release the accused. By their own admission, the police did not place this information before the prosecutor.

[23] In my view, the rejection by the court *a quo* of the judgment in *Malisha* was incorrect. Quite simply, the wording in the provisions contained in section 59A of the CPA contains no unequivocal prescriptive wording that creates a duty on the part of police officials. The absence of any reference therein to an accused person making an application or representations to be released on bail is also not indicative of the legislature's intention to create a duty on the part of the police officers. Sensibly, as found by the learned judge in *Malisha* (para 69), "[t]here may be a good reason as to why the police's duty to call a prosecutor to consider bail in terms of section 59A is only triggered (on a reading of section 59A) on an application from the arrested person. It may be that the arrested person is not in possession of sufficient money or needs time to obtain money." As was the case on the evidence placed before the court *a quo* in this matter, in *Malisha* the plaintiff was more than willing to wait until his court first appearance. In *casu* this was to take the opportunity to "speak in court." In *Malisha*, it was to obtain the services of an attorney and to obtain bail. Moreover, no mention is made in section 59A of the CPA of an obligation to inform an arrested person in detention of his or her right to make application to be released on bail. This obligation is to be found in section 50(1)(b) of the CPA, which provides as follows:

A person who is in detention as contemplated in paragraph (a)³ shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

[24] The judgment of the court *a quo* was referred to recently in this division in a judgment arising from an appeal against a judgment and order of the magistrate's court. In *Minister of Police v Fry*,⁴ Hartle J considered the argument that there existed a duty upon a police officer to consider the release of a detained person on bail irrespective of whether or not there had been a request for such release. The learned judge considered the question in the context of the ability of a police official to release a person detained in circumstances governed by section 50(1)(a) of the CPA. The following portion of the judgment is relevant:

[this] expectation of release on bail if the interests of justice permit it do not arise in my view unless there is first and foremost a duty of the responsible police officer to consider the detainee's release on such a basis. I have set out above an exposition of the machinery for a realization of a detainee's right in this respect.⁵ Nothing from it (contrary to *Kulati* which unfortunately does not refer to the relevant provisions of section 50(1)(b) of the CPA) suggests to my mind that a responsible police officer is required to consider the release on bail pending trial of a detainee unless there is a request in this respect.

[25] In *Fry*, the court also had regard to the judgment of the Supreme Court of Appeal in *National Commissioner of Police v Coetzee*⁶ where the court was called upon to consider whether the effect of the provisions of section 50(1)(b) of the CPA and 35(1)(f) of the Constitution⁷ entailed that the relevant police officer responsible for considering bail under those circumstances was obliged to do so without having been asked by an arrested person to do so. The following was held in para [16] of the

³ Paragraph (a) provides that any person who is arrested with or without a warrant for allegedly committing a crime shall be brought to a police station as soon as possible.

⁴ (CA259/2019) [2020] ZAECHC 150 (6 December 2020).

⁵ The learned judge had earlier set out the provisions of section 59(1)(a) of the CPA.

⁶ 2013 (1) SACR 358 (SCA).

⁷ Constitution of the Republic of South Africa 1996.

judgment:

“[16] Courts must guard against and resist the temptation to impose duties on police officials under the guise of an alleged protection of rights guaranteed in the Bill of Rights, which existing law, in this case the CPA, does not impose. It is well to repeat what Stegmann J said in *S v Baleka & Others* 1986 (1) SA 361 (T) at 374H - 375A:

‘The Supreme Court has inherent powers under the common law, exercised particularly by way of the *interdictum de homine libero exhibendo*, to protect the liberty of the subject, and to ensure that interference by the State with individual liberty does not go beyond the proper exercise of the State’s lawful powers. Nevertheless, when a person has lawfully been arrested and charged with the commission of an offence, the question of his right to apply for his release on bail pending his trial or the outcome thereof, is a question which is exhaustively governed by statutory provisions. No room remains for the exercise of the court’s inherent common law powers in that respect, save, perhaps, to the extent that such powers can be exercised within the framework set by the statutory provisions.’

The same applies, in my view, where the arrested person has not as yet been charged, as was the case with the respondent in this instance.

[17] The conclusion I have reached above, that the finding of the court *a quo* that the detention of the respondent was unlawful had no foundation, means that the substratum or basis for the costs orders it made has collapsed. The orders must accordingly be set aside. But I must stress that I have grave difficulty in understanding why, in any event, costs orders – let alone the unprecedented punitive costs orders – were made against the station commander of the Pretoria West Police Station, senior superintendent Moodley, and his assistant, superintendent Klopper. Their sin, it seems, was a failure to explain or to give reasons on the ‘return day’ ‘why no member of the SAPS considered the [respondent’s] position and why the complaints commanders, Nhlazo and Dulebu did not take any action’, and ‘why the station commander on duty at the time did not do anything pertaining to the [respondent’s] position’. Although these officers, including Captain Nhlazo and Inspector Dulebu, did not depose to any affidavits, the court *a quo* concluded

that they 'had been joined as respondents to the proceedings, because they were represented by counsel and also because they opposed the relief sought, and even argued that the arrest and detention were lawful . . . ' and that they 'infringed upon the constitutional right of the [respondent] not to be detained unlawfully . . . '. The fact of the matter, though, is that the officers were invited by the court *a quo* to provide it 'with further facts pertaining to the events at the police station'.

Captain Nhlazo was apparently on duty at the time the respondent was detained and Inspector Dulebu took over from him at 19h00. (The same costs orders were made against them.) The implication is that Inspector Dulebu should, upon coming on duty, have enquired from each and every detainee held at his police station what the reason for his or her arrest was and to consider whether or not to grant bail. Much as that would be a most desirable exercise, it would, to my mind, be an onerous duty to impose on the police. It is a well-known fact that the police service suffers from an acute shortage of personnel. The reasoning of the court *a quo* is, with respect, untenable."

[26] In the circumstances, the court held in Fry that there is no general obligation resting upon the relevant police official to apply his mind to the further detention of the arrested person in that matter because he had not been asked by her to consider her release on bail.

[27] The court also referred with approval to the decision in Malisha in support of the conclusion reached in Fry.

[28] Before this court counsel for the respondent relied upon the following paragraphs in the judgment in *Syce and Another v Minister of Police*⁸:

[41] The Minister's defence of the unlawful detention claim rested upon s 39(3) of the CPA. That section provides that the effect of a lawful arrest shall be that the person arrested shall be in lawful custody until lawfully discharged or released from custody. It was the Minister's case, therefore, that the

⁸ 2024 (2) SACR 1 (SCA).

detention of Mr Syce pursuant to his lawful arrest remained so until his release.

[42] While s 39(3) of the CPA provides for the continuity of the lawfulness of the detention of a suspect, it must be read in the context of those provisions of the CPA which provide for the release of a suspect from detention. Lawful release from custody may occur either before, at or after the detained suspect's first appearance in court, as is required by s 50 of the CPA. Release from custody prior to the first appearance in court may occur by release on bail or warning, for specified offences, in terms of ss 59 and 59A of the CPA. These sections impose upon the police certain obligations, in relation to detained persons, which, if not met may render the continued detention of a suspect unlawful, notwithstanding s 39(3) of the CPA.

[43] Section 50(1)(b) obliges the police to inform the detained person, as soon as reasonably possible' of the right to apply for bail. Subsection (1)(c) provides that:

'Subject to paragraph (d), if such an arrested person is not released by reason that-

- (i) no charge is to be brought against him or her; or
- (ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.'

[44] Section 50 therefore contemplates that a detained person must be informed of their right to bail in order that the right may be exercised even before the first appearance. Section 59, which applies in this case by virtue of the offence for which Mr Syce was arrested and detained, provides for bail to be granted by a senior police officer. In relevant part it states:

'(1)(a) An accused who is in custody in respect of any offence, other than an offence –

- (i) referred to in Part II or Part III of Schedule 2;

. . .

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-

commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.'

[45] In *Setlhapelo v Minister of Police and Another*: it was held that:
'[I] am of the view that once the jurisdictional facts for the consideration of police bail in terms of s 59(1)(a) of the CPA are present, the police have a constitutional duty to ascertain as soon as reasonably possible after the arrest whether the arrestee wishes bail to be considered. If the arrestee wishes to apply for police bail, the senior police official, in consultation with the investigating police official, must consider bail as a matter of urgency. A failure to inform the arrestee of his constitutional right to apply for bail or a failure to consider bail or any unreasonable delay in the process could, depending on the circumstances of the case, render the arrestee's further detention until his first appearance in court unlawful.'

[29] In essence, the submission made was that the facts in *Syce* were the same as those in the matter under scrutiny in this court and that in the circumstances this court should find that the detention of the respondent was unlawful.

[30] In my view, there are important differences between the facts in the matter before this court and those that emerge from the judgment in *Syce*. In *Syce* the plaintiff did give evidence and stated that he was not informed of his right to apply for bail in terms of section 50(1)(b) of the CPA. No evidence was presented on behalf of the Minister of Police to challenge the assertion that the plaintiff was not informed of his right to apply for bail. Therefore, his evidence stood uncontradicted. In the present matter, the plaintiff led no evidence in support of the allegations made in the amended particulars of claim. Evidence was led from the relevant members of the South African Police Services and stood uncontradicted. That evidence indicates that the respondent was informed of his right to apply for bail. It indicates further that this was done timeously and that the respondent made no indication of a willingness to be released on bail.

[31] The argument before this court based specifically upon paragraph [44] of the

judgment in Syce was that what is required in order that the right to bail maybe exercised even before the first appearance is an explanation (in the present matter) of the mechanism provided for in section 59A of the CPA, not just an explanation that the respondent had a right to apply for his release on bail. In the context of the facts that were considered by the Supreme Court of Appeal in Syce, the emphasis appears to me to have been on the need for a detainee to be informed timeously of the right to apply for bail.

[32] The footnote⁹ to the first sentence in paragraph [44] of Syce reads as follows:

The obligation to give expeditious effect to the right to apply for bail, either in court or in terms of ss 59 and 59A of the CPA, is clear. In *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) par 16, it was held that a detainee has a procedural right to a prompt decision upon a request for bail that is not dependent upon the merits of the request, and in *Mashilo and Another v Prinsloo* [2012] ZASCA 146; 2013 (SACR) 648 (SCA) par 16, it was held that ‘expedition relative to circumstances is what is dictated by [ss 50(1)(b) and (c)] and the Constitution.’

[33] In the matter before this court, the respondent was informed expeditiously of his right to apply for bail. Had he wished to do so, the respondent could have exercised his right to apply for bail even before he appeared in court.

[34] In my view, the proper interpretation of the judgment in Syce supports the view that the relevant members of the South African Police Services have a duty in accordance with the provisions of section 59A of the CPA when a detainee to whom those provisions are applicable seeks to exercise the right to apply for bail. The principle re-asserted in Syce is that the detainee must be informed expeditiously of their right to bail. The judgment in Syce is not supportive of a finding that the provisions of section 59A of the CPA create a duty on the part of the relevant members of the South African Police Services to initiate the process securing bail in the absence of a request from the detainee.

⁹ Footnote 18 in Syce.

[35] In my view, the approach adopted by the Supreme Court of Appeal in *Coetzee* is the correct approach to be adopted in this matter. The relevant provisions of section 59A of the CPA do not impose duties on officials of the South African Police Force that are not unequivocally set out therein. This court must guard against the judicial imposition of burdensome duties on the police officials. In the absence of a request having been made by the respondent, the court *a quo* erred in concluding that the provisions of section 59A of the CPA created a duty on the relevant police official to raise the release of the respondent on bail with the prosecutor.

[36] It follows that there is merit in the present appeal and that it should be upheld. The issue in the appeal was sufficiently complex to warrant the employment of two counsel.

[37] What remains is the issue of costs. As was the approach adopted in *Fry*, this court finds the principle expressed in *Minister of Safety and Security and Another v Schuster and Another*¹⁰ apposite. This case plainly not a “constitutional matter” and it would be unjust and inequitable to deprive the successful appellant of costs on an erroneous application of the “*Biowatch* principle”. Costs must follow the result. The issue in the appeal was sufficiently complex to warrant the employment of two counsel.

[38] The following order is made.

1. The appeal succeeds with costs, such costs to include the costs of the application for leave to appeal and the costs occasioned by the employment of two counsel.
2. The judgment and order of the court *a quo* are set aside and replaced with the following:

“The plaintiff’s claim is dismissed with costs.”

¹⁰ (114/2018) [2018] ZASCA 112 (13 September 2018) para [26].

RWN BROOKS
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MJALI J:

I agree.

NG MJALI
JUDGE OF THE HIGH COURT

MATEBESE AJ

I agree

ZZ MATEBESE
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

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Date of hearing:	19 May 2025
Date of delivery:	23 May 2025