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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: HCA35/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 28-06-2024

SIGNATURE:

In the matter between:

MAKOFANE WILLIAM MOHLALA

APPELLANT

And

MEC FOR TRANSPORT, LIMPOPO PROVINCE

1st RESPONDENT

MINISTER OF POLICE

2ND RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

3RD RESPONDENT

JUDGMENT

MASHAMBA, AJ

INTRODUCTION

[1] This is an appeal against the decision of the Regional Court sitting in Groblersdal, for dismissing the claim of the appellant. The claim arose from an arrest and detention of the appellant on charges of operating a motor vehicle whilst the alcohol limit in the breath or body of the appellant was above the legal limit, and the charge of defeating the administration or ends of justice. The date of arrest of the appellant is on 1 April 2017.

[2] The appellant instituted three (3) claims of unlawful arrest, detention and malicious prosecution against the first, second and third respondents ("the respondents"). The appellant's claims were dismissed by the learned Regional Magistrate on 25 April 2023. The appellant issued a notice of appeal to the above court on 20 July 2023. The appeal was set down for hearing on 24 May 2024.

[3] On the 24th May 2024, before the appeal could be heard, the appellant abandoned the claim of unlawful arrest and conceded the lawfulness of the arrest of the appellant without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act¹. The appellant pleaded with the court to decide on the two remaining claims as they appear in the particulars of claim, the first is that of unlawful detention and the second is that of malicious prosecution.

GROUND OF APPEAL

[4] The appellant's grounds of appeal are as follows:

¹ 51 of 1977

(i) that the learned magistrate erred in finding that it was common cause that the breathalyser conducted on the appellant showed that the concentration of alcohol in a sample of his breath was above the limit of 0.24mg per 1000ml,

(ii) that the learned magistrate erred in finding that the first respondent relied on section 40 (1)(f) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as Act 51 of 1977 or the Criminal Procedure Act) in that the appellant had willfully obstructed the peace officer in the performance of his duties,

(iii) that the learned magistrate erred in holding that the traffic officer who arrested the appellant on suspicion of driving a motor vehicle while the concentration of alcohol in his blood was higher than as allowed by law and that such suspicion was founded on the results of the breathalyser test and was therefore a reasonable suspicion,

(iv) the learned magistrate should have held that the first respondent relied on section 40 (1)(a) of the Criminal Procedure Act that the first respondent pleaded that the appellant was arrested because he was driving his motor vehicle on a public road while the concentration of alcohol in his specimen of breath exhaled was over the limit,

(v) the learned magistrate erred in finding that the appellant's detention was lawful,

(vi) the learned magistrate erred in finding that the first respondent proved that the breathalyser test administered on the appellant showed that the concentration of the alcohol in his specimen of the breath exhaled was over the limit; The learned magistrate erred in finding that the appellant committed an offence under the National Road Traffic Act because the appellant was not charged with such an offence but was charged with the offence of defeating the administration of justice only.

(viii) The learned magistrate erred in finding that the appellant did not prove the requirements of malicious prosecution.

SUMMARY OF FACTS

[5] At the court of first instance the respondents called 2 (two) witnesses, the first was Mr Donald Sizwe Mbonani ("Mr. Mbonani"), a provincial inspector at Moutse Traffic Station to testify. He testified that on the 1st April 2017, at R25 road, Dennilton, Limpopo Province, he was on duty together with other group of traffic officers belonging to one unit of drunk and driving at the same Traffic Station. There was a road block which was set up to search all motor vehicles and the breathalyser test was used to examine drivers who were driving while their concentration of alcohol of their specimen of breath exhaled were not less than 0,24 mg per 1000ml in terms of the National Road Traffic Act² (hereinafter referred to as the Act or Act 93 of 1996). The breathalyser test machines called A500 were used to test the alcohol level of the drivers.

[6] The appellant was among the drivers who were driving on the public road on the 1st April 2017 at around 15h30 when he was stopped. The appellant was driving the motor vehicle with registration numbers and letters F[...] when stopped. The appellant was requested to exhale for a breathalyser test. The appellant's results exposed his concentration of alcohol in a sample of his breath exhaled to be above the legal limit of 0,24 mg per 1000ml in terms of the Act. The appellant's breathalyser test exposed that his concentration of alcohol in his sample of breath was 0,30 mg per 1000ml. The appellant was informed that he was under arrest for driving under the influence of alcohol in terms of the Act and further informed of his constitutional rights. Instantly, the appellant was taken to Philadelphia Hospital for purposes of drawing a sample of his blood for further investigation. The appellant cooperated when arrested and even at the hospital when he was first examined by the nurses. The appellant was taken to the consultation room in the presence of Mr. Mbonani.

² Act 93 of 1996

[7] Dr Tshivula requested to draw his blood sample but the appellant refused and indicated that he is allergic to needles or injections. The appellant indicated that his blood sample could only be drawn in the presence of his family doctor, Dr Van Rensburg who is practicing in Witbank. Dr Tshivula requested the contact details of Dr Van Rensburg but the appellant refused to produce the requested contact details. The appellant was taken to the police station where he was charged with defeating the ends of justice and driving under the influence of alcohol.

[8] The appellant was detained in the police cells from the 1st April 2017 until when he appeared before the Magistrates' Court, Groblersdal on the 3rd of April 2017 and he was released at his own recognisance on the same day. The appellant appeared several days from May, June, July 2017 until the date on which his entire charges were withdrawn being, 02 August 2017.

[9] The respondents further called Ms. Mothiba, an inspector at the same traffic station to testify. She confirmed that on the date in question she was working with Mr. Mbonani. She corroborated the evidence of Mr. Sizwe Mbonani and added by indicating that she heard the appellant speaking with a loud voice the moment the Doctor requested to draw his blood sample.

[10] The appellant testified in support of his case. He indicated that he had not refused that his blood sample be drawn but confirmed that he definitely required the presence of his family Doctor, Dr Van Rensburg before Dr Tshivula could be allowed to draw his blood samples because he is allergic to needles or injections. The appellant alleged that he was arrested with other two suspects, and he does not know what was their charges. The appellant further alleged that the two (2) suspects mentioned were granted police bail and it was unreasonable not to be granted police bail same as the other suspects. The appellant does not have any details of the suspects he mentioned and he does not know their names and who released them. The mentioned 2 (two) suspects were not called to give evidence.

[11] The appellant denied to have consumed alcohol on the date in question. The appellant alleges that the breathalyser equipment was malfunctional and the results are therefore not correct. The appellant confirmed that he was locked up in one of

the police cells. He was detained with several suspects who were arrested for different crimes. The appellant was not given blankets when he wanted to sleep. The toilets were dirty and the hygiene was unbearable.

THE APPLICABLE LAW

[12] In terms of section 65 (5) of the National Road Traffic Act 93 of 1996 (hereinafter referred to as the Act), the following is stipulated:

"No person shall on a public road (a) drive a vehicle; or (b) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in any specimen of breath exhaled by such person is not less than 0,24 milligrams per 1 000 milliliters, or in the case of a professional driver referred to in section 32, not less 0,10 milligrams per 1000 milliliters"

[13] Section 65 (6) of the Act states that:

"If, in any prosecution for a contravention of a provision of subsection (5), it is proved that the concentration of alcohol in any specimen of breath of the person concerned was not less than 0,24 milligrams per 1 000 milliliters of breath taken at any time within two hours after the alleged contravention, it shall be presumed, in the absence of evidence to the contrary, that such concentration was not less than 0,24 milligrams per 1 000 milliliters of at the time of the alleged contravention,... "

[14] Section 65 (9) of the Act, further stipulates that:

"no person shall refuse that a specimen of blood, or a specimen of breath, be taken of him or her".

[15] Section 89(1) of the Act, stipulates that:

"(1) Any person who contravenes or fails to comply with any provision of this Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence".

[16] Section 59(1) (a) of the Criminal Procedure Act, states that:

(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,

(ii)...

(iii)...., 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".

APPELLANT'S SUBMISSIONS

[17] The appellant submitted that although the arrest was lawful in terms of section 40(1)(b) of the Criminal Procedure Act, the detention was unlawful because the police had a discretionary power to release the appellant by granting police bail in terms of section 59(1) of the Criminal Procedure Act. The appellant indicated that there was a senior police officer present who had authority to grant police bail on the same date of arrest. The appellant further submitted that two suspects who were arrested the same day with him were released on police bail but he was excluded without any reasonable grounds.

[18] The appellant submitted that he qualified for police bail and that a senior police officer who had authority to grant bail to the appellant was present. The appellant indicated that the burden shifted to the respondents to indicate on how the senior police officer exercised his discretion not to grant police bail to the appellant

who qualified in terms of section 59(1) of the Criminal Procedure Act. The appellant argued that the failure by the authorized police officer to grant police bail made the detention to be unlawful.

[19] The appellant submitted further that the prosecutor was malicious in laying a charge of defeating the ends of justice against him because such a charge is not in terms of the Criminal Procedure Act, and further that the prosecutor should have not charged the appellant for refusing his blood sample to be drawn because the appellant did not refuse but he indicated that he is allergic to injections and needles. The prosecutor should not have charged the appellant with driving under the influence of alcohol without any medical reports to that fact, therefore, the prosecution was malicious. The appellant submitted that the prosecutor should not have charged the appellant based on the breathalyser test.

[20] The prosecutor should have realized that there was no medical evidence of blood samples which confirms that he was driving under the influence of alcohol. The appellant further submitted that he had no legal duty to submit his blood specimen when he was requested to do so and could not have been charged of defeating the ends of justice and be punished. In this argument the court was referred to the case of **S v Binta**³ and **S v Kiti**⁴. The appellant indicated that he was supposed not to have been punished for not allowing his blood samples to be drawn.

[21] The appellant further submitted that the appeal should be upheld and that the appellant was unlawfully detained for 48 hours and maliciously prosecuted. The appellant submitted that the amount of R 50 000.00 will be reasonable for the compensation of the appellant for both claims plus costs in this court and Regional Court, to be paid by the respondents jointly and severally, with one paying for the others to be absolved.

RESPONDENTS' SUBMISSIONS

³ 1993(2) SA 533 (C) at 564F

⁴ 1994(1) SA 14 (E) at 19E-H

[22] The respondents in response to the above appellant's submissions indicated that the cases of **Binta** and **Kiti**, *supra*, referred to by the appellant were decided before section 65 (9) of the National Road Traffic Act had criminalized the refusal. The respondent submitted that the appellant had a legal duty not to refuse his blood specimen to be taken.

[23] The appellant's unfounded allegations and speculations that others were given police bail, but he was excluded, such evidence is hearsay and inadmissible. The respondents further indicated that there is no proof to show that the appellant applied for police bail. The detention was lawful because the arrest was lawful, and that aspect was already conceded by the appellant.

[24] The appellant's breathalyser test results prove that his concentration of alcohol in his specimen of breath exhaled was not less than 0,24 mg per 1000 ml as required by law, therefore, the appellant committed an offense in terms of section 65 (5) of the Act. The appellant was brought to court within 48 hours as required in terms of section 35, of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) and the Criminal Procedure Act. The appellant refused that his blood sample be taken because he was aware that his alcohol level was beyond the required limit in terms of the law and his refusal for his blood sample to be taken contravened section 65(9) of the Act as mentioned and is an offence in terms of section 89 of the Act.

[25] The respondents argued that the appellant did not succeed in proving the requirements of malicious prosecution which include, among others, that the prosecutor set the law in motion or instituted the proceedings against the appellant without reasonable or probable cause and with malice or intent to injure the appellant. The prosecutor had to prosecute the appellant since he has committed an offence in terms of section 65(5) of the Act and further that the appellant refused that his blood samples be taken in contravention of section 65(9) of the Act.

[26] The respondents referred the court to the case of **C v C and others**⁵ where the SCA said the following:

"Reasonable and probable cause means an honest belief founded on reasonable grounds that the prosecution was justified. This import both an objective element (reasonable grounds) and a subjective element (honest belief). Animo iniuriandi in this sense means that the defendant, aware that no reasonable grounds for the prosecution exist, nonetheless initiates the proceedings. If reasonable grounds are absent but the defendant honestly believes that the plaintiff is guilty or that there are reasonable grounds, wrongfulness is lacking. This would also occur in the event of a mistake on the part of the defendant".

COURT'S FINDINGS

[27] The learned Regional Magistrate found that section 59 of the Criminal Procedure Act, regulates the release of a suspect before the first appearance in court and grants discretionary powers to a commissioned police officer above the rank of a warrant officer to cause the release of a suspect after consultation with the investigating officer. The appellant did not prove that a police officer with the required rank was available at the police station or had refused to exercise his or her discretionary powers to grant police bail. The learned Regional Magistrate was not wrong to find that the appellant carried the burden of proof that his further detention was indeed unlawful.

[28] The court in terms of section 59 of the Criminal Procedure Act, the grant or refusal of the police bail is exclusively a matter to be decided by an authorised police officer after consultation with the investigating officer. The appellant did not prove that he applied for police bail to the authorised by the police officer and that the said police officer refused to grant police bail. The evidence which has been given by the appellant that other 2 (two) suspects arrested with him were given police bail does not help the court to conclude that the discretion in terms of section 59 of the Act

⁵ (205/2019) [2021] ZASCA 12 at par 39

was not properly exercised. The appellant did not prove that he applied for bail from an authorised police officer and that such application was refused, without just cause. The court finds no misdirection on the part of the learned Regional Magistrate when he found that the detention was lawful and the claim for unlawful detention was to be dismissed.

[29] The appellant does not deny that the breathalyser reading was beyond the legal limit, but his contention was that the machines were not in a good working condition. There was no evidence to substantiate that indeed the machines were not in a good working condition. The learned Regional Magistrate therefore, did not misdirect himself by finding that the respondents proved that a breathalyser test results of the concentration of alcohol in his specimen of breath exhaled was above the legal limit.

[30] The court has already said that there was no evidence that was presented to the court *a quo*, either in the form of a medical report or any other evidence to prove that the appellant was allergic to needles or injections. In the absence of any evidence by the appellant to support his submission, the learned Regional Magistrate was correct to find that the appellant had refused that the blood be drawn from him which is a criminal offence under the Act. The court *a quo* did not misdirect itself when it concluded that the court could not find that the prosecutor acted without probable cause or with malice in initiating the prosecution. The learned Regional Magistrate was not wrong when he found that the appellant could not establish any fact to fulfil the requirements for malicious prosecution except to show that the charges were later withdrawn and has not yet been re-instituted.

[31] The guidelines as stated in the *C v C* case, *supra*, finds application in this case as the prosecutor who was presented with the facts and the circumstances of the case of the appellant, must have honestly believed that the prosecution was justified. The court considered the submissions of both parties and further went through the trial records. The court is not persuaded to differ with the decision of the learned Regional Magistrate.

[32] The court finds no reasons to deviate from the principle that costs should follow the outcome.

[33] In the result, the following order is made:

[1] The Appeal is dismissed with costs.

MASHAMBA, AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

I agree

NGOBENI, AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCES

FOR THE APPELLANT: ADV T.P. MOTLATLE
INSTRUCTED BY: RATALE MASHIFANE ATTORNEYS

FOR THE RESPONDENTS: ADV K.S. MABOEA
INSTRUCTED BY: THE STATE ATTORNEY, POLOKWANE

DATE OF HEARING: 24 MAY 2024
DATE OF JUDGMENT: 28 JUNE 2024