

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA51/2024

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED.

G.C MULLER

DATE 5/12/25 SIGNATURE.....

In the matter between:

NGWANATLALA SIMON PHASHA

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

 JUDGMENT

MULLER J:

[1] The appeal before us emanated from an action which the appellant has instituted in the regional court held at Sekhukhune for the recovery of damages that he sustained as a result of his unlawful arrest and detention. The claim was dismissed with costs.

[2] It is alleged in the particulars of claim that the appellant was arrested without a warrant of arrest on 8 October 2019 by colonel Mukwevho and two other police officers. He was released by court on 10 October 2019.

[3] The defendant entered an appearance to defend and filed a plea. Apart from "noting" the name of the appellant, all of the allegations contained in the particulars of claim as well as liability, were denied. However, a pre-trial minute without a date and time when the meeting was held, but which purports to be signed by both parties is part of the record. In paragraph 11.2 of the said minute under the heading "What aspects are in dispute?" it is recorded that:

"a" the unlawfulness and wrongfulness of the arrest and detention of the plaintiff, and "b" The quantum of damages and "c" That the arrest by peace officer without warrant of arrest in terms of S40 of CPA of 1977 was wrongful."

[4] It is clear from the pre-trial minute that it was no longer in dispute that the plaintiff was arrested without a warrant of arrest. The admission caused the onus to prove the lawfulness of the arrest to be squarely cast onto the defendant.¹ The onus to prove the quantum of damages sustained by the plaintiff rested with the plaintiff. Rule 29(9)(a) provides:

¹ *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC) par 25.

"Where the burden of proving one or more of the issues is on the plaintiff and that of proving others on is on the defendant, the plaintiff shall first call his evidence on any of the issues proof whereof is upon him, and may then close his case, and the defendant shall then call his evidence on all the issues."

[5] The trial commenced without any opening address by the legal representatives of the parties or any question from the court.² The appellant adduced evidence first.

[6] The appellant testified that he is a warrant officer in the SA Police Service with many years of experience stationed at Hlohlo. He was arrested by colonel Mukwevho on 8 October 2019 who was in the company of captain Munjana and colonel Morema. He was taken to Zaaiplaas Police station, which is 20-25 kilometres from Hlohlo, after his arrest and detained. He was charged with the defeating the ends of justice. The plaintiff requested to be released or be given a notice to appear in court or alternatively bail. His request was refused. The blankets in the cell in which he was detained were smelling with the toilet and shower just next where one is sitting. He did not sleep the whole night because it was unsafe. Some of the detainees who shared the cell with him were known to him as a police officer. Others were rapists and murderers. It was an embarrassing experience. The next day when he appeared in court he was released.

[7] The appellant was extensively cross-examined by the legal representative of the respondent. It was suggested to the plaintiff during cross-examination that he was arrested because he met with one Mahlatsi in a car park who was a suspect in a burglary of a business case, where after the said Mahlatsi disappeared. Meeting with Mahlatsi was not disputed by the plaintiff, but he denied that he was aware that Mahlatsi was a suspect.

² Rule 29(3) states: "The court may, before proceeding to hear evidence, require the parties to state shortly the issues of fact or questions of law which are in dispute and may record the issues so stated."

[8] The magistrate after conclusion of re-examination asked certain questions to the plaintiff which were mainly directed at the reason why the plaintiff interviewed Mahlatsi in a parking area as opposed to at the police station and why he socialised with people that are potential suspects.

[9] The court, correctly, afforded the legal representatives the opportunity to put further questions to the plaintiff to deal with matters raised by the court.

[10] The legal representative of the plaintiff also handed in as exhibits a statement by a certain Amos Tekhupi Mapaleng as well as certain entries in the investigating diary together with entries made by the public prosecutor. The plaintiff thereafter closed his case.

[11] The record of the proceedings shows that the following took place immediately after plaintiff closed his case.

"Court: Okay thank you, Mr Mashifani. Mr Maputlha you both said a lot today. I am going to allow you both time to apply your minds so that you can assist the Court with heads, closing arguments. Is that in order?"

MR MAPUTLHA: Correct so, your Worship.

MR MASHIFANI: Correct so, your Worship.

COURT: Or are you able to do it right now?"

[12] A discussion then followed between the legal representatives and the magistrate to determine a suitable date which is unnecessary to repeat. Ultimately it was agreed that the case be postponed until 12 July 2024 for "closing arguments" and that costs be costs in the cause.

[13] On 12 July 2024 arguments were presented by the legal representatives of both parties, with the defendant commencing with the argument first and without him indicating that the defendant elects to close his case without adducing evidence. The matter was then postponed to 4 October 2024 for judgment.

[14] On 4 October 2024, the learned magistrate dismissed the claim with costs.³ In her judgment the magistrate placed on record that:

"The defendants led no witnesses, and relied on what is contained in their papers"

[15] Included in the grounds of appeal is an allegation that:

"The learned magistrate erred by holding that the defendant did not call witnesses by relied on what was contained on the papers before court. The defendant could not have relied on papers in an action proceedings and that was not an application by the defendant."

[16] The above ground of appeal, in my view, is sufficiently wide to cover a gross irregularity committed by the magistrate not to afford the defendant the opportunity to present its case. The failure to afford the defendant the opportunity to present its case by adducing evidence, deprived the defendant of the right of *audi alteram*. It is a fundamental principle which should have been applied by the court as a matter of policy. The failure to do so constituted a gross irregularity which violated the right to a fair trial as envisaged by section 34 of the Constitution and vitiated the proceedings. Rule 29(9)(a) of the magistrate's court rules which regulates trial proceedings in that court was similarly not given effect to.

³ The record is not bound properly. The judgment commences on page 92- 96 and then proceeded at page 87-88 where the following finding appears: "That the plaintiff has failed to prove his claim, and therefore the Court finds in favour of the defendants."

[17] The *onus* in the present matter was on the defendant to justify the arrest under circumstances where the arrest took place without a warrant of arrest which is *prima facie* unlawful.

[18] The failure by the legal representatives who appeared at the trial to alert the magistrate to the failure to allow the defendant to exercise its rights after the case of the plaintiff was closed reflects badly on their duty as officers of the court. It was in the interest of justice and their respective clients to bring the omission to the attention of magistrate immediately. The situation could have been rectified, there and then, without prejudice to any of the parties.

[19] It is unfortunate. The interest of justice dictates that the trial should start *de novo* before another magistrate. This court, sitting as a court of appeal, is empowered in terms of section 19(c) of the Superior Courts Act,⁴ to remit the case to the court of first instance.

[20] The record of the appeal did not include a notice of appeal delivered in the magistrate's court in accordance with rule 51(3).⁵ The appellant was requested to file supplementary heads of argument to advance reasons why the appeal should not be struck from the roll on the basis that the appeal has lapsed. Counsel attached a copy of the notice of appeal that was delivered in the magistrate's court to his heads of argument. *Ex facie* the document, the notice of appeal was delivered on 29 October 2024 which was within the 20 days period allowed to note an appeal as prescribed by the rule 51(3). Counsel requested that the document be accepted. The appeal is unopposed.⁶ The defendant is not prejudiced by the late filing of the notice of appeal which is similar to the notice of appeal included in

⁴ Act 10 of 2013.

⁵ The notice of appeal delivered in the High Court was included in the record.

⁶ The notice of set-down of the appeal was served by hand on the State Attorney on 16 September 2025.

the record. It is, furthermore, in the interest of justice that the appeal be disposed of as a matter of urgency. Both parties are entitled to have their case heard as soon as possible.

[21] I think it fair that the appellant be awarded the costs of the appeal in this court. It was necessary for the appellant to approach this court to overturn the order of the magistrate. No order is made in respect of the costs in the magistrate's court.

ORDER:

- 1. The appeal is upheld with costs.**
 - 2. The order of the magistrate is set aside.**
 - 3. The case is remitted back to the regional court to commence *de novo* before a different magistrate.**
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G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, agree



E.J BURNETT AJ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, HIGH COURT

APPEARANCES:

FOR THE APPELLANT : ADV T.P MOTLATLE

INSTRUCTED BY : RATALE MASHIFANE INC ATT

FOR THE RESPONDENT : IN DEFAULT

INSTRUCTED BY : STATE ATTORNEY, POLOKWANE