IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED

DATE **25/8/16** **SIGNATURE**

CASE NO: A553/2014

Case numbers in the court below:
48208/2012, 48209/2012, 49490/2012

DATE: 6/5/2014

IN THE MATTER BETWEEN

MINISTER OF POLICE	APPELLANT
AND	
SIPHIWE NDABA	1ST RESPONDENT
MALIBONGWE MAZIBUKO	2ND RESPONDENT
SIBONISENI PHILIP MAZIBUKO	3RD RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The three respondents, as plaintiffs, each instituted a damages action against the appellant, as defendant, to be compensated for what they alleged to be their unlawful arrest and detention at about 19:00 or 20:00 on Saturday 24 September 2011.

[2] The three respondents were travelling together, with another male companion, in the same motor vehicle, driven by the third respondent at the time, when they were all arrested and detained together.

[3] They were arrested on the N3 highway near Heidelberg at about 19:30 on the Saturday evening, 24 September 2011, and detained at the Heidelberg police station at about 20:10 the same evening.

On Monday 26 September 2011, at about 14:00 they were transported to the Lenasia police station where they arrived at about 16:00 on the same day.

[4] The next morning, Tuesday 27 September 2011, they were taken to the Lenasia Magistrates' Court and they were released by that court at about 14:00 on the Tuesday afternoon. On the weight of the evidence, the prosecutor insisted on an identification parade to be held, which could not be arranged timeously by the investigating officer, with the result that the prosecutor was not prepared to enrol the matter and this led to the release of the respondents.

[5] The three damages actions instituted by the three respondents, as plaintiffs, were based on the alleged unlawful arrest and detention, as I have explained.

[6] The three actions were consolidated before the consolidated action came before the court *a quo*.

[7] The fourth arrestee did not institute a damages action.

[8] It is common cause that the arrest took place without a warrant, so that the provisions of section 40 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") to which I will refer hereunder, came into play.

BRIEF OVERVIEW OF THE BACKGROUND FACTS AND REFERENCE TO SECTION 40 OF THE CPA

[9] For reasons which will appear later, it is not necessary, for present purposes, to carefully analyse the underlying facts leading to the arrest and following thereupon, but the facts are not without relevance either, so that a brief summary is required.

[10] On 6 December 2011, six men were involved in an armed robbery at a house in Lenasia. Eye-witnesses identified the vehicle they were travelling in as a blue Nissan Tiida with registration number V[…].

Armed with this information, the investigating officer, Warrant Officer Motsemane Frans Baloyi ("Baloyi") consulted the relevant records, and established that the owner of the vehicle was the third respondent. The address of the latter, appearing in the records, turned out to be a false address, which Baloyi could not trace.

[11] Baloyi then, on advice of his superiors, put a notice on the internal police communication network to seek assistance of other police officers in tracing the vehicle. The process was referred to in the trial as "putting the vehicle on circulation".

[12] The defendant, who had the duty to begin, because of the *onus* on him to prove that the arrest was lawful, then called Constable Motseko ("Motseko"), who was attached to the Gauteng Flying Squad, Vaalrand, of the South African Police, as a witness. He testified that he was on duty on the N3 highway on 24 September 2011 (the Saturday) in the company of another police constable, Nkonza. They received a radio message that the particular blue Nissan with the aforesaid registration number had just passed a particular tollgate, and that such vehicle was linked to an armed robbery that occurred in Lenasia, involving six male perpetrators. Motseko and Nkonza got onto the highway and saw the vehicle. They stopped the vehicle and the driver got out. It is common cause that it was the third respondent. He said that he was the owner of the vehicle but denied that he was involved in the armed robbery. He said that since he purchased the vehicle (which appears to have been in November 2010) he was the only driver of the particular vehicle. There were four males in the vehicle including the third respondent. According to Motseko, the third respondent gave him his particulars, but informed the other passengers not to give their addresses to the police. Motseko played the radio communication to the third respondent to listen to the message, and thereafter arrested the driver and the other three occupants. Obviously, they included the first and second respondents.

[13] At the Heidelberg police station, Motseko informed the arrestees that they would be kept there until the Lenasia police could take over.

[14] Under cross-examination, Motseko gave the reasons why he arrested the four occupants:

(i) the vehicle fitted the description of the one involved in the armed robbery;

(ii) the driver identified himself as the owner and stated that he was the only person who had driven the vehicle and no one else had ever driven the vehicle since he purchased it in November 2010;

(iii) the radio message made reference to six male perpetrators, and when he stopped the vehicle there were four males occupying the vehicle;

(iv) the driver of the vehicle advised the other occupants not to give the police their addresses.

In this regard, I add that the three respondents, when they testified as plaintiffs, denied that the third respondent had instructed the others not to furnish their addresses, but this denial was not put to Motseko in cross-examination and the learned Judge, when analysing the evidence, and emphasising unsatisfactory aspects of the evidence of the respondents, accepted the evidence of Motseko.

[15] I consider it unnecessary to analyse the evidence of the three respondents in detail. The learned Judge, correctly with respect, pointed out several inaccuracies in their evidence and contradictions of a material nature. Importantly, they all, broadly, corroborated the evidence of Motseko about the arrest and detention.

[16] In a comprehensive judgment, the learned Judge considered whether the arrest was lawful. He referred to the provisions of section 40(1)(b) and (e) of the CPA, which read as follows:

"**Arrest by peace-officer without warrant**

40(1) A peace-officer may without warrant arrest any person –

(a) ...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) ...

(d) ...

(e) who is found in possession of anything which the peace-officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace-officer reasonably suspects of having committed an offence with respect to such thing."

[17] In his well-reasoned judgment, and with reference to the relevant authorities, including the leading case of *Minister of Safety and Security v Sekhoto* 2011(1) SACR 315 (SCA), he found that all the jurisdictional requirements for a lawful arrest without a warrant had been established by the appellant, as defendant, and concluded that the action of the respondents, as plaintiffs, based on an alleged unlawful arrest could not succeed.

THE DETENTION

[18] This appeal turns on the proper interpretation of the provisions of section 50 of the CPA, and more particularly the provisions of section 50(1)(d)(i). The question to be

decided involves the provision, in section 50, that an arrested person must be brought before a lower court not later than 48 hours after the arrest.

[19] The first portion of section 50, leading up to subsection (d)(i), provides as follows:

"**Procedure after arrest**

50(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

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

(c) 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 (my note: these sections do not apply for present purposes)

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires –

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

(ii) ..." (Emphasis added.)

[20] Subsection (2) of section 50, containing the relevant definitions, reads as follows:

"(2) For purposes of this section –

(a) '**a court day**' means a day on which the court in question normally sits as a court and

'**ordinary court day**' has a corresponding meaning; and

(b) '**ordinary court hours**' means the hours from 9:00 until 16:00 on a court day."

[21] On the basis of these provisions, the position is then as follows: the respondents were arrested after 19:00 on Saturday 24 September 2011 and detained, as the learned Judge found, at 20:10 that evening in the Heidelberg police station.

The 48 hours after their arrest would then have expired, at the earliest, after 19:00 on Monday 26 September 2011.

The 48 hours would then have expired "outside ordinary court hours" in which case "the accused shall be brought before a lower court not later than the end of the first court day" (section 50(1)(d)(i)).

[22] In his evidence during the trial, Investigating Officer Baloyi (who was, of course, based at Lenasia and not at Heidelberg) testified that he was notified by the Heidelberg police on Monday 26 September 2011 about the arrest of the people found travelling in the vehicle that Baloyi was looking for.

[23] Baloyi testified that he could not get a police vehicle made available to him right away, but when he got the vehicle, he travelled to Heidelberg and arrived there at about 14:00 on Monday 26 September. He met the detainees, disposed of the relevant paper work so that they could be released into his custody, and told them that they had to go to the Lenasia police station. They arrived at this destination at about 16:00.

[24] Upon arrival, he informed the detainees that he would take them to court the next day, which he did, early in the morning of Tuesday 27 September. This evidence is undisputed.

[25] I have already mentioned that the prosecutor at the Lenasia court did not want to enrol the matter because he wanted an identification parade to be held and that the respondents, as accused, were released by the court at about 14:00 on the Tuesday.

[26] When the question of unlawful detention of the respondents came up for consideration during the trial, the learned Judge was referred to, and followed, the approach adopted by this court in *Prinsloo v Nasionale Vervolgingsgesag en Andere* 2011 2 SA 214 (GNP).

[27] In that case, Prinsloo, suspected of having murdered his wife, was arrested at 16:30 on Wednesday 18 November 2009, so that the 48 hours, on the strength of the provisions of section 50 of the CPA, would have expired after court hours, at 16:30 on Friday 20 November 2009.

Shortly after the arrest, and presumably later on 18 November, although these details do not appear from the judgment, the arrestee's attorney approached the investigating officer, Inspector Mashilo, who was based in Pretoria North, in which area of jurisdiction the arrest took place, with a view to arranging for an earlier appearance in the court but the inspector, unreasonably, indicated that he had other work to attend to and would only take the prisoner to court on Monday 23 November. This court was approached on an urgent basis, and on Friday 20 November it was ordered that the arrestee should be released subject to an appearance on the Monday before the court for purposes of a bail application. Mashilo, who was the second respondent, was ordered to pay the costs of the application on the scale as between attorney and client.

[28] The learned Judge, in a comprehensive judgment handed down well after the order was made in the urgent court, held that the relevant statutory provision should be interpreted in such a way that, where the 48 hour period expires after court hours or on a day which is not an ordinary court day, the arrested person ought to be brought to court during the first court day after the arrest.

At 221B the learned Judge says the following:

> "Ek is dus van mening dat op 'n behoorlike interpretasie van artikel 50(1)(d) van die Strafproseswet, 'n gearresteerde persoon, indien die 48 uur verstryk buite gewone hofure of op 'n dag wat nie 'n gewone hofdag is nie, voor die hof gebring moet word gedurende en nie later nie as die einde van die eerste hofdag na sy arrestasie."

In a well considered judgment, the learned Judge motivates his decision as follows at 220F-221A:

> "In hierdie geval het die 48 uur verstryk om 16h30 op Vrydag 20 November 2009. Na my mening beteken die verwysing na eerste hofdag nie 'n hofdag na verstryking van die 48 uur nie, maar 'n hofdag in die eerste gedeelte van die 48 uur. Daar kan geen ander interpretasie van hierdie subartikel wees nie. 'n Wet moet juis so uitgelê word dat dit die persone waarop dit van toepassing is so min moontlik beswaar. My interpretasie hierbo is die mins beswarende interpretasie ten opsigte van persone wat geaffekteer word deur hierdie artikel. Verder word vermoed dat die wetgewer die openbare belang wil bevorder. Dit sal teen die openbare belang wees indien 'n persoon vir langer as 48 uur aangehou kan word onder hierdie omstandighede. Die wetgewer sou uit die aard van die saak nie 'n geregverdigde inbreukmaking op 'n persoon se reg op vryheid, wat beskerm word in die Grondwet, onnodig wou inhibeer en op inbreuk maak nie. Die doel van die wetgewing is baie duidelik, naamlik dat 48 uur die absolute maksimum periode is vir aanhouding ingevolge artikel 50."

Authorities relied upon by the learned Judge are mentioned in footnotes 4 and 5 on p220 of the judgment.

[29] Relying on this judgment, the learned Judge held that the respondents were unlawfully detained from Monday 26 September 2011 at 20:10 (when the 48 hours expired) until their release on Tuesday 27 September at 14:00.

[30] In his reasoning leading up to this conclusion, the learned Judge also brought the provisions of section 50(1)(d)(ii) into the equation. This deals with the situation where the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court when the 48 hour period expires. Provision is then made for the prosecutor to apply to the court, if not before the expiration of the period of 48 hours, then on the next succeeding court day, for the arrested person to be detained at a place specified by the court and for a period so specified for recuperation purposes before being brought to court.

[31] The learned Judge said the following in paragraph 43 of his judgment:

> "It also seems to me that this interpretation (my note: the one in *Prinsloo*) is supported by the fact that in the immediate subsection 50(1)(d)(ii) which follows, the statute refers to instances where the person so detained may be brought to Court, subject to certain specified conditions such as physical illness '... on, the next succeeding Court day'. The notion that where the period of 48 hours after arrest expires after Court hours on a Court day in terms of section 50(1)(d)(i), that the detainee may be brought to Court the next succeeding Court day is false. Resort to the next succeeding Court day is only applicable to instances which fall under section 50(1)(d)(ii). I therefore agree with the interpretation and approach by the Court in *Prinsloo v Nasionale Vervolgingsgesag supra* and will follow it."

In my respectful view, there was no justification for relying on the provisions of section 50(1)(d)(ii) which deal with an entirely different state of affairs.

[32] It is of some relevance, as will appear later, that the learned Judge also dealt with the evidence of Baloyi to the effect that he could only transport the detainees later in the afternoon on Monday 26 September. In paragraph 44 of his judgment, the learned Judge said the following:

> "According to Baloyi, the plaintiffs could not be taken to court on Monday due to unavailability of transport. They could only be transported at 14h00 on Monday, an hour or two before the court adjourns. As a result, they had to spend one more night in custody. This clearly cannot be an excuse to prolong their incarceration. In my view they should have been taken to court on Monday 26. Consequently, they were unlawfully detained from Monday 26 September 2012 (*sic,* it is 2011) at 20h10 until their release on Tuesday 27 at 14h00 as their further detention was neither authorised by court nor was their case on the roll awaiting hearing."

These remarks were made by the learned Judge after he concluded that the judgment in *Prinsloo* was correct, namely that the prisoner should be taken to court on the first court day after the arrest. Moreover, Baloyi did not testify that the plaintiffs (now respondents) **could not be taken to court on Monday due to unavailability of transport**. He simply said that he only got the news of the arrest on Monday, had to wait for a police vehicle and then travelled to Heidelberg where he arrived at 14:00 and after the paper work and other formalities he managed to reach Lenasia police station by 16:00. He then informed the detainees that they would go to court the next day.

[33] After dealing with the question of *quantum*, the learned Judge made the following order:

> "1. The plaintiffs' action for unlawful arrest is dismissed.
>
> 2. The plaintiff's action for unlawful detention succeeds in part.
>
> 3. The defendant is ordered to pay each plaintiff an amount of R10 000,00 as damages for unlawful detention.
>
> 4. The defendant is ordered to pay 50% of the plaintiffs' taxed costs."

THE JUDGMENT IN *MASHILO AND ANOTHER V PRINSLOO* 2013(2) SACR 648 (SCA)

[34] The present case which is the subject of the appeal which came before us, was heard in March 2014, and the judgment handed down on 2 April 2014.

[35] The judgment in *Mashilo and Another*, mentioned above, was heard in August and September 2012 and, as appears from the citation, already reported in 2013. However, the learned Judge in the matter before us, was clearly not referred to that judgment, to which I will refer as "*Mashilo and Another*". This was the *Prinsloo* case to which I have referred.

[36] When leave to appeal was refused in the *Prinsloo* case (evidently the appeal was only directed at the costs order granted against *Mashilo*) the latter and the prosecuting authority applied to the Supreme Court of Appeal for leave to appeal which was granted, and the appeal was upheld at the same time.

The basis upon which the matter came before the Supreme Court of Appeal ("SCA") is described as follows in the judgment at 651d-g:

> "The application for leave to appeal did not pertain to the earlier order by the High Court, but to the subsequent order releasing Prinsloo and the costs order against Mashilo. As Prinsloo had already been released, the essence of the application for leave to appeal was not to set aside such an order. Such an exercise would have been academic. It was directed at the costs order made against Mashilo. In this court, counsel for Prinsloo conceded that the costs order against Mashilo should not have been made, as Prinsloo had abandoned his prayer for costs against Mashilo. But because that costs order was based on an alleged misinterpretation by the court below of the provisions of section 50 of the Criminal Procedure Act, counsel for the appellants submitted that this court should consider the merits of the matter. What was sought to be achieved was a definite interpretation of that section ..."

The court then proceeded to interpret sections 50(1) and (6).

Subsection (6), with respect, is not directly in point for present purposes. It provides:

> "(6)(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who –
>
> (i) was arrested for allegedly committing an offence shall, subject to this section and section 60 –
>
> (aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released on bail; ..."

Section 60 deals with bail applications.

[37] In *Mashilo and Another*, the learned Judge of Appeal says the following at 653c-f:

"Section 50(d)(i) was clearly intended to extend the 48-hour outer limit during which an arrested person could be detained. That is made plain from the language of the subsection and has, during the last thirty five years since the introduction of the Act, always been understood to be so. This is clear from one of the earlier, foremost authorities on criminal law and procedure, namely the work by Lansdown & Campbell *South African Criminal Law and Procedure* vol 5: *Criminal Procedure and Evidence op cit* at 299-300. See also the interpretation given by Eksteen J in *Hash and Others v Minister of Safety and Security* [2011] ZAECPEHC 34 in paragraph 71. The legislative purpose in extending the 48 hours, if it is interrupted by a week-end, appears to me to be fairly obvious. It is because the logistics of ensuring an appearance before court over a week-end are difficult. Put differently, it is difficult to co-ordinate police, prosecutorial and court administration and activities over a week-end. This was especially true at the time that the legislation was introduced. It continues to be true today." (Emphasis added.)

[38] After dealing with the interpretation adopted by the learned Judge in the court below, in the urgent court, the learned Judge of Appeal said the following at 653i-j:

"This interpretation was erroneous. In arriving at his conclusion the learned Judge in the court below failed to consider not only what is set out in the preceding paragraphs, but also in having regard to constitutional values. He failed to take into account section 35(1)(d)(ii) which, itself, recognises that the 48-hour period may be extended if interrupted by a week-end."

Here the learned Judge of Appeal refers to section 35(1)(d) of the Constitution which reads as follows:

"Everyone who is arrested for allegedly committing an offence has the right –

...

(d) to be brought before the court as soon as reasonably possible, but not later than –

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day." (Emphasis added,)

This provision also clearly flies in the face of the interpretation preferred by the learned Judge in the court below in *Prinsloo*, and followed by the learned Judge in the court below in the matter before us: in this case, the 48 hours expired on Monday evening and the arrested persons were taken to court the next morning, namely "the first court day after the expiry of the 48 hours" as directed by the Constitution.

[39] In Hiemstra's *Criminal Procedure* (loose leaf edition) at 5-30, the learned author recognises that the decision by the court below was overturned by the SCA in *Mashilo and Another* and observes:

> "In section 50(1)(d)(i) the 'first court day' means the first court day after expiry of the 48 hour period."

[40] In conclusion, however, it seems to me to be appropriate to make the remark that the judgment in *Mashilo and Another* has a proverbial "sting in the tail". It seems to provide that the arrested person ought not to be detained for the entire period if he can be brought to the court earlier.

At 654a-c the following is stated by the learned Judge of Appeal:

> "The matter could have been decided in the court below without resorting to a strained interpretation of section 50(1)(d). The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it can be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hours expired before or during the week-end. Expedition relative to circumstances is what is dictated by the subsection and the Constitution. Deliberately obstructive behaviour, as was evidenced by *Mashilo*, is not tolerated. On that basis alone the court below could quite easily have ordered that he be brought to court immediately to facilitate a bail application."

[41] In this regard, I have mentioned the unreasonable and obstructive attitude displayed by Mashilo. When he was approached by the attorney at an early stage (presumably already on the Wednesday) he said he was busy with other matters and would only take Prinsloo to court on the Monday. This conduct was criticised by the SCA, as appears from the quote above.

As far as the conduct of Investigating Officer Baloyi in the present case is concerned, I see no basis of finding "deliberately obstructive behaviour" on his part, neither did I understand the learned Judge to come to such a conclusion. If he did, I am of the respectful view that he was wrong. In my view, Baloyi acted with due expedition and, in taking the respondents to court on the Tuesday morning, he clearly complied with the requirements of section 35(1)(d)(ii) of the Constitution and also with the approach adopted by the SCA.

[42] Despite its finding of "deliberately obstructive behaviour" on the part of Mashilo, the SCA nevertheless upheld the appeal. In the present case, where the learned Judge adopted the same interpretation, rejected by the SCA, this appeal also ought to be upheld.

[43] As far as the *dictum* by the SCA about "deliberately obstructive behaviour" is concerned, it seems to be intended to guide police officers without detracting from the correct interpretation of section 50(1)(d)(ii). It appears that each case will have to be treated on its own merits, and that an arrested person, relying on "deliberately obstructive behaviour" on the part of the police officer, may, in a proper case,

approach the court for assistance and relief before expiry of the 48 hour period with a view to obtaining immediate release and/or assistance to facilitate a bail application.

COSTS

[44] In the present matter, at least a portion of the case dealt with the interpretation of section 50(1)(d)(ii). The decision in *Mashilo and Another* was not brought to the attention of the learned Judge. The appeal before us was also not opposed by the respondents.

As to costs, the following was said in *Mashilo and Another* by the learned Judge of Appeal at 654f-g:

> "That then brings me to the issue of costs. The present appeal was brought by the NPA in order to gain clarity on the proper interpretation of section 50(1) and (6) of the Criminal Procedure Act. To the extent that the interpretation by the court below has been corrected, its appeal succeeds. The appeal by Mashilo also succeeds, as the costs order against him has been set aside. It would be unfair to burden Prinsloo with the costs of an appeal, pursued for the present purposes. An appropriate costs order therefore would be that there should be no order as to costs."

[45] In the present case, it seems to me that, where the respondents, as plaintiffs, failed with their claim for damages based on unlawful arrest, they ought to be held responsible for a portion of the trial costs. I see no reason to deviate from the 50% approach adopted by the learned Judge.

However, for the reasons mentioned, I am of the view that the respondents ought not to be ordered to pay the costs of the appeal.

THE ORDER

[46] I make the following order:

1. The appeal is upheld.
2. There is no order as to costs with regard to the appeal.
3. The order of the court below is set aside and replaced with the following:

   "The claims of the plaintiffs are dismissed, and the plaintiffs, jointly and severally, are ordered to pay 50% of the defendant's taxed or agreed costs."

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A553/2014

I agree

N RANCHOD
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

H J FABRICIUS
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 10 FEBRUARY 2016
FOR THE APPELLANT: K M MOKOTEDI
INSTRUCTED BY: THE STATE ATTORNEY
NO APPEARANCE FOR THE RESPONDENTS