REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: HCA23/2019

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

DATE..... SIGNATURE:.....

In the matter between:

TLOU BERNARD MATABA **APPELLANT**

And

MINISTER OF POLICE **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The appellant has instituted action against the respondent alleging that he was wrongly and unlawfully arrested and detained by members of the South

African Police Services (SAPS) who were acting within the cause and scope of their employment. The respondent had defended the appellant's action. The respondent in its plea admitted that the appellant was arrested by members of the SAPS without a warrant, and that the arresting officer, was authorised to arrest and detain the appellant in accordance with section 40(1)(b) of the **Criminal Procedure Act**[1](CPA) read with section 50(1) of the CPA.

[2] A pre-trial conference in terms of section 54(1) of the **Magistrate Court Act**[2] was held before the Regional Court Magistrate MJ Wessels. In the pre-trial minutes the parties have agreed to separate merits and quantum during trial. The parties further agreed that the respondent bear the onus in respect of merits of the case, whilst the appellant bear the onus in respect of quantum.

[3] The plaintiff testified under oath and stated that on 6th July 2015 he was employed by Madiba Trucking as a crew. Madiba Trucking had employed him on the 3rd July 2015. Before he was employed by Madiba Trucking, he was working for an Indian man known as Bigshow.

[4] On 6th July 2015 one Freddy whom the appellant used to work with at Bigshow phoned him telling him that he was looking for employment at Madiba Trucking. Freddy in the company of Bigshow went to Engen garage on the 6th July 2015 where they found the appellant. The appellant was with Mr Madiba who was the driver of the truck when

[1] Act 51 of 1977
[2] Act 32 of 1944

Freddy and Bigshow came to him. On arrival Freddy told the appellant that Bigshow alleged that he stole a truck loaded with mealie meal. After that Bigshow phoned the police.

[5] The police came in three vehicles. On arrival of the police, Freddy and Bigshow pointed the appellant to the police as the person who stole the mealie meal. The police told the appellant that they are arresting him as Freddy and Bigshow were alleging that he had stolen and they are law enforcement officers. The appellant tried to explain his side of the story but they did not listen to him. The appellant stated that even Mr Madiba told the police that the appellant was with him, but the police did not listen. He was put in one of the police vans and taken to the police station.

[6] On arrival at the police station he found that a docket had already been opened. His finger prints were taken and after that he was taken to the police cells where they locked him in. He was arrested at about approximately 6h00 in the morning. In the morning of the 7th July 2015, a certain policeman by the name of Sebola came in the company of Bigshow together with someone whom they alleged he was the one who had stolen the mealie meal. Sebola took him, Bigshow, Freddy and that person to a certain office. In that office the appellant gave Sebola an explanation, and Sebola told him that he was lying. Later on the 7th July 2015 the appellant was released from custody. The appellant denied committing any offence. The appellant further testified that whilst

in police custody he was assaulted and raped by other inmates who wanted him to share with them the money that he had.

[7] The respondent called Captain Sebola who testified under oath. He testified that he started knowing the appellant the day he was arrested and that was during July 2015. That on that particular date when he reported for duty he found a docket already opened. In that docket he found that the complainant alleged that he knew the people who had stolen from him.

[8] Captain Sebola phoned the complainant who confirmed that he had already made a written statement. The complainant told him that one of his stand in driver did not deliver the mealie meal he had loaded at Progress Milling at the place where it was supposed to be delivered. The complainant told him that the truck which was supposed to deliver had three people who were the driver and his two crew. That the appellant was one of the crew members. The complainant further told him that the drivers of his trucks are his permanent employees, and when his drivers goes to deliver they will use casual employees whom they pick up from the street. After picking up the casual employees, the driver will bring copies of their ID documents. That is the reason why the complainant was able to identify the appellant as one of the crew members who was in his truck on the day in question. The complainant told him that he was with the appellant at Engen garage.

[9] Captain Sebola stated that as he was having other commitments, he instructed his colleagues to assist him by going to arrest the appellant at Engen garage. His colleagues went to Engen garage where they arrested the appellant and brought him to the police station.

[10] On arrival at the police station as the appellant was already arrested, captain Sebola told the appellant that his case was about the stealing of the mealie meal bags on the way to Moletlane. He explained to the appellant his constitutional rights and also told the appellant that he was not compelled to explain his side of the matter, that he has the right to remain silent and also the right to get a legal representative. The appellant told him that he was not going to say anything because he was not involved in the matter. At that time the complainant had already identified the appellant as one of the occupiers of his truck on the day in question. He believed the complainant's version and he decided to detain the appellant. He completed the SAP14A form which relates to the suspect's constitutional rights, and after completing it, he gave it to the appellant. He also completed the cell book stating where the appellant was to be detained.

[11] After detaining the appellant he investigated the matter further and satisfied himself that he was having a strong case against the three suspects. The following day when Captain Sebola went to the cells the appellant told him that he wanted to talk to him. He told the appellant that he was not compelled to make a statement. After listening to the

appellant's explanation, Captain Sebola realized that he was not having a strong case against the appellant as he initially thought, and he decided to release him.

[12] Captain Sebola denied that the appellant was employed by Madiba Trucking, but that on the day in question the appellant was unemployed. Captain Sebola further stated that on the day in question, the appellant took part in taking the goods, that the appellant had knowledge of the place where the goods were taken and was part of the other suspects, although he alighted on the way and did not complete the journey with the other suspects. He denied knowledge of the assault and rape of the appellant whilst in police custody.

[13] On 24th May 2019 the court *a quo* dismissed the appellant's claim with costs. On 31st May 2019 the appellant filed a notice in terms of Rule 51(1) of the Magistrate's Court Rules requesting reasons for judgment. On 13th June 2019 the appellant filed his notice of appeal against the whole judgment and orders of the court *a quo.* On 25th October 2019 the appellant filed two copies of the appeal record with the registrar of this court. On 30th October 2019 the appellant filed an application for condonation of late prosecution of the appeal together with a notice of application for a date of hearing of the appeal.

[14] In his condonation application, the appellant had stated that the lateness of prosecuting his appeal was caused by the problem that he had encountered when transcribing the record of the proceedings in the

court *a quo*. He had stated that on 18th June 2019, he approached Lepelle Scribes to transcribe the record but found that they were no longer occupying their known offices. On 18th June 2019 he approached the registrar of the Regional Court and was informed that the contract with Lepelle Scribes had ended and that the new contracted transcribers were Elt-Pro Transcriptions. He approached Elt-Pro to transcribe the record. He was given the quotation for transcription on 5th July 2019. On the 9th July 2019 he paid their full amount. On 26th July 2019 he received a transcribed record which was not complete. On 29th July 2019 he wrote a letter to Elt-Pro Transcriptions notifying them of the problem. On 28th August 2019 he received another quotation from Elt-Pro Transcriptions for transcription of the outstanding portion of the record of the proceedings. He paid the said amount of R29 645.60 the same day. They only received a full transcribed record on 21st October 2019.

[15] The respondent has filed its answering affidavit. In its answering affidavit the respondent had stated that the appellant's application for condonation was defective as it deals with non-compliance with Rule 50(1) only, and did not specifically pray for the reinstatement of the lapsed appeal. That the appellant had applied for a hearing date of the appeal on 19th November 2019 and has failed to comply with Rule 50(4)(a), and has not given any explanation for his non-compliance.

[16] It is trite that the factors which a court must consider when exercising its discretion whether to grant condonation includes the degree of lateness, explanation for the delay, prospects of success, degree of non-compliance with the rules, the importance of the case, the respondent's interest in finality of the judgment of the court below, and the convenience of the court and avoidance of unnecessary delay in the administration of justice. **(See Dengetenge Holdings (Pty) Ltd v Southern Spheres Mining and Development Company Ltd and Others[3]).**

[17] In **Ferris v First Rand Bank[4]** Moseneke ACJ said:

> "…the test for condonation is whether it is in the interest of justice to grant it. As the interest of justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, and the prospect of success and the importance of the issue to be determined are relevant factors."

[18] The first issue to be determined is whether the appellant's application for condonation is defective or not. The appellant in his application for condonation of late prosecution of the appeal, is seeking an order that his late prosecution of his appeal be condoned and that he be granted leave to prosecute his appeal to finality. The respondent had submitted that the appellant has failed to specifically pray for the reinstatement of the lapsed appeal. The appellant's prayer is clear, that he be granted leave to prosecute his appeal to finality. He can only be able to prosecute his appeal to finality if the appeal has been reinstated. By seeking that he be granted leave to prosecute his appeal to finality in my view includes the reinstatement of the

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[3] [2013] 2 All SA 251 (SCA) para 11
[4] 2014 (3) SA 39 (CC) at para 10

appeal that has lapsed. Therefore, the submission by the respondent that the appellant's application for condonation is defective has no merit.

[19] The noting of appeal in this matter is in terms of Magistrate's Court Rules, whilst the prosecuting of it is in terms of the Uniform Rules of Court. In terms of Rule 49(6) (a) of the Uniform Rules of Court, within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the High Court for a date of hearing of the appeal. Rule 49(6)(7)(a) of the Uniform Rules of Court provides that at the same time as the application for a date for the hearing of an appeal, the appellant shall file with the registrar three copies of the record of appeal and shall furnish two copies to the respondent.

[20] It is peremptory that when the appellant applies for a date of appeal hearing, he/she must at the same time file with the registrar and serve with respondent copies of the record of the proceedings in the court *a quo*. An appeal is prosecuted when the appellant or the respondent applies for a date of hearing of the appeal. An application for a date of hearing of the appeal without filling the records of the court *a quo* will be defective.

[21] It is common cause that the appellant has applied for a date of hearing of the appeal outside the stipulated sixty days' period. The sixty days' period in this matter has lapsed on 20th August 2019. The record was filed on the 25th October 2019 and application for a date of hearing of the appeal was filed on 30th October 2019. The appellant's application for date of hearing of the appeal was 50 days late. In my view, 50 days is not that extremely excessive.

[22] In his founding affidavit, the appellant has spelled out the obstacles he had encountered in trying to transcribe the record; the date of each incident; and what action he had taken in trying to speed up the process of transcribing. In my view the appellant has given a full, detailed and accurate account of the cause of the delay. Therefore, his explanation for the delay is adequate.

[23] With regards to prospect of success, the parties in their pre-trial minutes have agreed that the respondent bore the onus of prove on merits. However, without any explanation, when the trial started, the onus of prove was shifted on the appellant despite the respondent having pleaded that the arresting officer had acted in terms of section 40(1)(b) of the CPA. Without going deep into the merits of the case, the appellant is having a fairly good chance on prospect of success. Such prospects of success are, in my view, reasonable.

[24] It was not shown to this court what prejudice the respondent will suffer as a result of the granting of condonation. Accordingly, in my view, it is in the interest of justice that condonation be granted.

[25] Turning to the merits of the case, the respondent in their plea has admitted arrest and detention. The respondent has pleaded that the arrest and detention were lawful and further that the arresting officer was authorized to arrest and detain the appellant in accordance with section 40(1)(b) of the CPA read with section 50(1) of the CPA.

[26] Generally an arrest and detention is *prima facie* unlawful and wrongful and it is for the defendant to prove the lawfulness of the arrest and detention once these are admitted. **(See Lombo v African National Congress[5])**

[5] 2002 (5) SA 668 (SCA) at para 32

[27] The respondent had admitted the arrest and detention and even in the pre-trial minutes, it was agreed by the parties that the respondent bore the onus in relation to the merits of the appellant's case. It is common cause that the appellant was arrested without a warrant.

[28] In **Minister of Law and Order v Hurley and Another**[6] Rabbie CJ stated the following:

> "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[29] There was no duty on the appellant to prove his innocence before the respondent could justify its actions in arresting and detaining the appellant. However, in the case at hand, it was the appellant who started testifying as if the onus was on him to prove that he was unlawfully arrested and detained. The onus could have been on the appellant if the arrest was pursuant to a valid warrant wherein he could have been required to prove the wrongfulness of the arrest and detention.

[30] Since the respondent had admitted arrest and detention, and the appellant was arrested without a warrant, the onus was on the respondent to prove that their actions were justified in law. The court *a quo* therefore, erred in allowing the appellant to start testifying as if the onus was on him to discharge.

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[6] 1986(3) SA 568 (A) at para 859E-F

[31] Despite what transpired during the trial in the court *a quo*, the question is whether the required onus was discharged to prove that the arrest and detention of the appellant was justified in law. In terms of section 40(1)(b) of the CPA, a peace officer may without a warrant arrest any person whom he/she reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

[32] It is trite that the jurisdictional facts must exist before section 40(1)(b) of the CPA can be invoked. Those jurisdictional factors are that the arrestor must be a peace officer, he must entertain a suspicion, it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA, and the suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the powers conferred by the subsection, ie, he may arrest the suspect. **(See Duncan v Minister of Law and Order[7])**

[33] An arrest without a warrant must be based on a reasonable suspicion. On what is a reasonable suspicion, there must be evidence for the arresting officer to form a reasonable suspicion which is objectively sustainable. **(See Minister of Law and Order v Hurley and Another *supra* at 579E-580E).** This will entail the arresting officer investigating the circumstances of the particular offence which is alleged to have

[7] 1986 (2) SA 805 (A) at 818 G-I

been committed before it can be said that there is reasonable suspicion that an offence has been committed.

[34] The respondent called Captain Sebola as its only witness. Captain Sebola was not the arresting officer, but was policeman who had detained appellant after he was arrested by the other officers. Captain Sebola was not present when the appellant was arrested, however he is the police officer who had instructed these other police officers to go and arrest the appellant.

[35] Even though Captain Sebola had instructed the other police officers to go and arrest the appellant, that does not absolve the arresting officer to first make an investigation into the essentials relevant to the particular offence before it can be said that there is a reasonable suspicion that an offence has been committed since the appellant was arrested without a warrant. The police officer who was supposed to have shared light whether the arrest was based on reasonable suspicion that an offence had been committed, was the arresting officer. Captain Sebola's evidence will not assist in this regard as he was not present during the arrest, and does not even know how the appellant was arrested. The appellant was only brought to him after he was arrested. There are no facts which have been put before the court *a quo* to show that the arrest of the appellant was based on a reasonable suspicion that he committed an offence referred to in Schedule1 of the CPA. The complainant who opened the case was also not called to share any light

in relation to the case that he had opened with the SAPS and how the appellant was linked to that. The evidence of captain Sebola was merely hearsay and had no probative value.

[36] In my view, the respondent has failed to discharge its onus of proving that the arrest of the appellant was based on a reasonable suspicion that the appellant had committed an offence referred to in Schedule 1 of the CPA. It therefore follows that his arrest was unlawful. Whatever steps that were taken after the unlawful arrest, were tainted. The detention of the appellant was based on an unlawful arrest, and therefore it follows that the detention of the appellant was also unlawful. The court *a quo* has therefore erred in dismissing the appellant's claim.

[37] For all the reasons set out above, the following order is made:

37.1 The appellant is granted condonation for late filing of the record.

37.2 Condonation is granted for the late filing of application.

37.3 The appeal is reinstated.

37.4 The appeal is upheld with costs.

37.5 The order of the court *a quo* is set aside and substituted with the following:

"The plaintiff succeeds in his claim for unlawful arrest and detention against the defendant with costs"

37.6 The matter is remitted to the court *a quo* to proceed on quantum.

MF. KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

I concur,

MG. PHATUDI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCE:

Counsel for the Appellant: **Adv. GG Mashimbye**

Instructed by: **David Mahapa Incorporated**

Counsel for the Respondent: **Adv. MA Matlamela**

Instructed by: **State Attorney Polokwane**

Date of hearing: **27 November 2020**

Date of Judgment: **2nd February 2021**