Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA 296/2014
Date heard: 14 August 2015
Date delivered: 26 August 2015

REPORTABLE

In the matter between

GLENWELL ASHWELL LUCAS **Appellant**

And

MINISTER OF SAFETY & SECURITY **Respondent**

Appeal – condonation for late prosecution in terms of Rule 51(3) of Magistrate's Court Rules – based on non-compliance of magistrate with obligations in terms of Rule 51(1) – condonation not opposed.

Appeal – Rule 51(1) obliges magistrate to furnish written judgment – *Held* where judgment delivered *ex tempore* magistrate obliged, on request, to deliver to clerk or registrar a written judgment or to obtain a transcript of the oral judgment delivered and to furnish same to clerk or registrar if it meets requirements set out in Rule 51(1). Condonation granted.

Unlawful arrest and detention – appeal against dismissal of claim – appellant arrested on charge of rape of a […..] year old boy – arresting officer relying on statement of complainant only – not evaluating or assessing allegations critically – focusing instead on seriousness of charge – *Held* that the magistrate

misdirected himself regarding the approach to the assessment of evidence – trial court erred in finding that arrest lawful - appeal upheld – damages awarded

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JUDGMENT

GOOSEN, J.

[1] The appellant instituted an action for damages arising from an alleged unlawful arrest by members of the South African Police Service. The action was initiated in the Grahamstown Magistrate's Court. The magistrate gave judgment on 13 December 2013 dismissing the appellant's claims. It is against this order that the appellant appeals.

Condonation for late prosecution of appeal

[2] At the commencement of the proceedings the appellant sought condonation for the late prosecution of the appeal. The application was not opposed, and in the light of the facts disclosed condonation was granted. It is however necessary to deal with an important issue raised in the condonation application.

[3] As indicated, the judgment was delivered on 13 December 2013. The judgment was given *ex tempore*. No written judgment was handed down by the magistrate. The appellant was aggrieved by the judgment and accordingly instructed his attorneys to file a notice in terms of Rule 51 (1) of the Magistrates Court Rules. The notice required the magistrate to hand to the clerk of the court a judgment in writing, reflecting the facts found to be proved and the reasons for the magistrate's judgment. The notice was filed on 19 December 2013.

[4] On 16 January 2014 the magistrate furnished the assistant registrar of the civil court with his reasons for judgment. The document records that the magistrate

had nothing to add to the judgment delivered on 13 December 2013. The appellant's attorney formed the view that the magistrate had not complied with the Rule in that a written judgment was not furnished. In consequence, a letter was addressed to the clerk of the court requesting that the appellant be supplied with a transcribed copy of the judgment. No response was received to this letter. The appellant's attorney obtained from Ikamva Veritas Transcription Services a quotation for the transcription of the record which would be required in order to proceed with the appeal. The cost was estimated in an amount of R1300.00. The appellant was impecunious and had to save in order to make these funds available to his attorney. He was able to accumulate the necessary funds by late July 2014.

[5] On 25 July 2014 the appellant's attorneys wrote to the respondent's attorneys indicating that the magistrate had not filed a written judgment and that the appellant was only then able to commission a transcript of the record, including the judgment. They took the view that the time period within which the appeal had to be noted would accordingly run from when a copy of the transcribed judgment became available and that condonation would only be sought if necessary. The respondent's attorneys wrote on 13 August 2014 stating that the notice in terms of Rule 51 (3) filed by the appellant, does not cure the fact that the appeal was filed late and that the appeal had effectively lapsed. They also took the view that a punitive cost order would be sought against the appellant. Despite this foreshadowed opposition to condonation, no such opposition was filed.

[6] The relevant portions of Rule 51 provide as follows:

> (1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days hand to the registrar or clerk of the court a judgment in writing, which shall become part of the record showing –
> (a) the facts, he or she found to be proved; and
> (b) his or her reasons for judgment.

(2) The registrar or clerk of the court shall on receipt from the judicial officer of a judgment in writing supply to the party applying therefor a copy of such judgment, and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.

(3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.

(8)(a) Upon the delivery of a notice of appeal the relevant judicial officer shall, within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her) –
(i) the facts he or she found to be proved;
(ii)the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against; and
(iii) his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.
(b) A statement referred to in paragraph (a) shall become part of the record.
(c) This rule shall also, so far as may be necessary, apply to a cross-appeal.

[7] The language employed in Rule 51 (1) is clear and unequivocal. It establishes an obligation, couched in peremptory terms, upon a magistrate who receives a written request as contemplated to furnish a written judgment within the time period specified.

[8] In Priem v Hilton Stuart Trust and another[1] a full court of this division said the following:

> Once a request in compliance with Rule 51 had been received by the second respondent, the latter had no further discretion in the matter. The judicial officer was enjoined in peremptory terms to furnish written reasons and in doing so his function was purely administrative by nature, the judicial function having been completed and fulfilled when the officer gave his judgment and became *functus officio* as presiding judicial officer in the matter.

[9] The response by the magistrate, referred to above, clearly did not comply with the requirements of Rule 51 (1). An oral statement of reasons for judgment

[1] 1994 (4) SA 255 (E) at 259B-C; see also Raubex Construction (Pty) Ltd h/a Raumix v Armist Wholesalers (Pty) Ltd en 'n ander 1998 (3) SA 116 (O) at 124B

delivered during the course of proceedings does not form part of the record for purposes of appeal (Davidhoff v Tsaokhung[2]). Where a magistrate delivers an oral statement of reasons for judgment he / she is not absolved from the obligation to deliver a written judgment upon request (R v Bezuidenhout [3]).

[10] In Williams v Eerste Addisionele Landros, Bloemfontein[4] De Villiers J found that the obligation imposed by Rule 47 (1) (a predecessor to the present Rule 51 (1)) may be met if the magistrate files with the clerk a transcription of the oral judgment delivered. The learned judge said the following:

> Al wat die Reël verlang is dat die betrokke regterlike amptenaar binne die voorgeskrewe tyd aan die klerk van die hof ‘n skriftelike vonnis oorhandig waarin die bewese feite en sy redes vir vonnis uiteengesit word. Die woord ‘skriftelik’, soos gebesig in die Reël, beteken dat die vonnis in geskrif moet wees in teenstelling met ‘n mondelinge vonnis wat nie gelees kan word nie. ‘n Regterlike amptenaar sou geregtig wees om ‘n klerk te vra om sy mondelinge vonnis in snelskrif af te neem en dit beskikbaar te hou om gebruik te word indien hy later vir sy skriftelike vonnis gevra word. Dan kan hy ‘n afskrif daarvan gebruik as ‘n basis vir die opstel van sy skriftelike vonnis. Maar indien hy meen dat die afskrif van sy mondelinge vonnis volledig genoeg is en die fetitebvindings en redes soos verlang deur Reël 47 (1) behoorlik uiteensit, sou hy geregtig wees om die afsrif by die klerk van die hof in te handig as synde sy skriftelike vonnis in terme van genoemde Reël. Dit sou nie vir hom nodig wees om die afskrif van sy mondelinge vonnis oor te skrywe in ‘n aparte geskrewe document, daarna te verwys en dit in te lyf nie. Sy handeling om ‘n afskrif van die mondelinge vonnis, wat voldoen aan die voorskrifte van Reël 47 (1) wat die inhoud daarvan betref, en waaraan hy nie wil verander nie, by die klerk van die hof in te handig as synde sy skriftelike vonnis sou voldoen aan die bepalings van Reël 47 (1). [5]

[11] This passage was specifically approved on appeal to the full court of that Division.[6] This statement not only accords with the plain wording of Rule 51 (1), it is also eminently practical. Magistrates operate under considerable pressure and often deliver oral statements of the reasons for judgment at the conclusion of proceedings. Obtaining a transcript of the recorded oral statements and using

[2] 1919 TPD 149 at 151
[3] 1954 (3) SA 188 (A) at 222D-F
[4] 1967(2) SA 313 (O)
[5] At 315C-G
[6] Williams v Eerste Addisionele Landros, Bloemfontein 1967 (4) SA 61 (O) at 64G-H

this as the basis for the presentation of a written judgment, when requested, will facilitate compliance with the obligation which Rule 51 (1) imposes. It must be emphasised however, that the obligation to deliver a written judgment is <u>not</u> met by simply referring to the oral statement previously given, as occurred in this case.

[12] The requirements of Rue 51 (1) may be summarised as follows. When notice is given in terms of Rule 51 (1) the magistrate is obliged to deliver to the clerk or registrar a written judgment that complies with the provisions of the Rule. If an oral judgment was delivered then in that event the magistrate is obliged <u>either</u> to deliver a written judgment which complies with the Rule <u>or</u> to deliver to the clerk or registrar a typed transcript of the oral judgment if that transcribed judgment meets the requirements of Rule 51 (1).

[13] In the light of the failure to comply with the obligation in terms of Rule 51 (1), in this instance, the time period for the noting of the appeal in terms of Rule 51 (3) did not run. Even if it did, for the reasons already given and for those which will be apparent from what follows on the merits, good cause was established to justify condonation for the late prosecution of the appeal.

<u>The merits of the appeal</u>

[14] It was common cause that the appellant was arrested without a warrant on a charge of rape on 23 May 2012. The appellant was arrested shortly after midnight at his home. He was in the company of his fiancée, a partner with whom he had spent 17 years and who is the mother of his two children.

[15] The appellant is employed as a caretaker/security guard at George Dickerson Primary School in Grahamstown. The arrest was carried out by a number of police officers who had arrived in two police vehicles and an unmarked vehicle. The arrest was carried out by warrant officer Maxhagana. Following his arrest the

appellant was transported to the Grahamstown Police Station where he was detained in a police cell along with five other detainees. During the early hours of the morning he was formally charged with the rape of a young boy aged […] years old. He was held in custody until he appeared in court on 24 May 2013. On his appearance the prosecutor withdrew the charge against him. Following this, in an effort to clear his name the appellant voluntarily submitted to blood samples being taken in order to facilitate DNA analysis to be undertaken. Nothing further has transpired since the charges were withdrawn.

[16] It was agreed between the parties prior to the commencement of the trial that the onus to establish that the arrest was lawful rests upon the respondent. The appellant however commenced adducing evidence.

[17] The appellant and his fiancée, Daphne Olivier, testified. It is not necessary to repeat the evidence here. The summary set out above captures the essential facts relevant to the matter. As far as the effect that the arrest had on the appellant and his family is concerned, the evidence adduced by the appellant was not challenged. From this it emerged that the arrest and subsequent detention of the appellant has had a profound effect upon him. He explained that he felt hurt and betrayed as a result of the allegations and required psychological assistance. He is unable to sleep at night without the assistance of sleeping pills. He stated that when he walks in the street he feels as if people are looking at him as a rapist. His arrest and appearance in court was published in the local newspapers. The community in which he lives is small. His evidence was that he was fortunate to be supported by his fiancée. His arrest has however had a negative effect on his children. They have often returned home from school in tears as a result of being subjected to teasing by other children who referred to the appellant, their father, as the rapist from George Dickerson.

[18] The evidence of Daphne Olivier was not placed in dispute. She describes in poignant terms the effect that the arrest and detention of the appellant has had:

> "… now Sir it has done a lot of damage because my one kid who is 13 years old is not the same with us any more since that incident occurred. She was 11 years old and she heard it on the playground at school that was made it so difficult for her. The respect is no longer there and the relationship between me and my husband, I know from the start. He did not do anything but from the people outside you what they think all the time so that was what was hurting us the most what the people think and the way they were looking at us, although we knew we have not done anything wrong. Even up to now, I do not think there is people who know the truth or what can I say.

[19] The respondent presented the evidence of warrant officer Maxhagana. He said that on the night of 22 May he was on patrol duty. He read the docket in relation to the complaint of rape of a minor child. Having done so, he decided to arrest the suspect one Lucas, who was employed at George Dickerson Primary School. He proceeded to the address of the appellant. When he arrived at the house it was pointed out by a neighbour. He then went to the main house where an occupant, the sister of the appellant, directed him to a separate dwelling at the back of the property. He knocked on the door which was opened by the appellant's fiancée. The appellant was woken and he was then informed that he was arrested on a charge of rape. The appellant was transported to the police station where he was detained in the cells. Warrant officer Maxhagana had nothing further to do with the investigation of the matter.

[20] The magistrate came to the conclusion that the arrest of the appellant was lawful. He did so on the basis that Maxhagana had "read the docket" and formulated a suspicion based on that reading that the appellant had committed a schedule 1 offence. Based on this the trial court concluded that "objectively" assessed the court could not fault the respondent. The magistrate then went on to find that the police officer's discretion was correctly exercised since, given the seriousness of the offence, the arrest was necessary to secure the attendance of the appellant in court.

[21] The investigation docket was submitted in evidence and received as exhibit A. There was no objection to its reception. It is this docket which Maxhagana

allegedly read. It must however immediately be stated that exhibit A contained a number of statements which were only received after the arrest of the appellant and therefore could not have formed part of the material which was available to the arresting officer prior to the arrest. As will become apparent hereunder Maxhagana only had regard to the statement of the complainant.

[22] A reading of the magistrate's judgment indicates that no assessment of Maxhagana's evidence was undertaken in the light of significant concessions made by him during cross-examination. Indeed the magistrate appears to have ignored Maxhagana's evidence in cross examination entirely. The following appears from the judgment.

> The evidence of the Plaintiff (sic) is on record I read the Police docket. I read pages 42, 43, 45, 47 and the entire Police statement however, on cross examination he was cross examined and he testified that he read paragraph 3, it was put to him that he had he exercised or applied his mind to the facts before him, he would not formulated that suspicion. Had he read other statements and not page 2 or the statement of the Complainant on the rape charge, he would have not formulated a suspicion that there was a case against the appellant which would have then justified his arrest. The evidence of the witness was that he did not only read paragraph 3 of page 43, but he read the entire docket page 43, page 42 paragraph three. The name is mentioned of the suspect and reading the entire statement the work address of the suspect implicated by the Complainant or the victim is mentioned in the statement of the victim or Complainant to the first report the statement of the first report there is reference to a complaint made by the complainant to the first report.

[23] The magistrate erred in this statement of the evidence. He also erred in the statement that the work address of the suspect appears from the complainant's statement. It does not. The magistrate's laissez-faire approach to the assessment of the evidence tendered by the respondent is foreshadowed during an important portion of the cross-examination of Maxhagana. Mr van der Veen, who represented the appellant at trial, asks the following question:

> Sir, if I understand you correctly, Sir, you based your decision to arrest Mr Lucas on the fact that this was a sever (sic) offence? – – – Yes.
> Is that the only basis upon which you based your decision to arrest Mr Lucas? – – – That is correct.

[24] He then proceeds to deal with section 42 of the Criminal Procedure Act.[7] What follows is an objection by the respondent's attorney to the effect that it was not only the fact that the offence is a serious one that prompted the decision to arrest but also because the suspect had been identified. An objection, I dare say, which appears to have been calculated to cast a lifeline to the witness. The appellant's attorney then proceeds as follows:

> Sir to rephrase that question for you; I understand your evidence through a combination of evidence in chief and in cross-examination that your decision to arrest the Plaintiff was based on the fact that this was a serious offence and that the Accused person had been identified to you? – – – Yes.

[25] The court then asks the witness to "unpack" what he means referring him to what he said in his examination in chief regarding the fact that the offence was a schedule 1 offence.

[26] The appellant's attorney then proceeds to ask:

> I ask you now, for the final time is [that] the soul (sic) basis upon which you decided to arrest the appellant? – – – Yes.

[27] Not content to leave it there the attorney then comments that this answer must mean that he had not applied his mind to whether the appellant had actually committed the act or not. This elicited an objection from the defence attorney and a debate ensued regarding whether the witness had formulated a reasonable suspicion prior to the arrest. At the conclusion of this debate the magistrate says the following:

> The evidence of the witness is on record. He was a suspect and on the matter of this nature he was identified and on a matter of this nature as the means of securing an attendance in court one is allowed to arrest, his evidence is there which is that among others, but I just feel his evidence is there, it has been there right from the beginning in chief and under cross-examination, he may not be putting it as one would want to and in view of that I allow the question you will have an opportunity to re-examine Mr McCallum on this aspect.

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[7] Act 51 of 1977

[28] The cross-examination that followed focused on the information available to the arresting officer prior to the arrest. He confirmed that this consisted of the complainant's statement and the statement of the complainant's mother. Maxhagana then confirmed that he based his decision to arrest the appellant solely on the statement of the complainant and in particular the paragraph which stated that he was taken out of the vehicle by Lucas pulled into the toilets and raped.

[29] When confronted by the fact that the mother's statement refers to the complainant initially alleging that he was kicked by Lucas and only later alleging rape, Maxhagana makes no comment, presumably because he had never read the statement. He confirmed in cross-examination that he did not consider the fact that reference was made to an earlier incident and that he did not make enquiries as to whether that had been investigated. He also confirmed that he did not consider it necessary to enquire whether the identified eyewitnesses would confirm the version presented by the child victim. He reiterated, during cross-examination, on a number of occasions, as is evidenced by what has been set out hereinabove, that the sole consideration was the seriousness of the offence.

[30] None of this evidence was considered by the magistrate. The failure to consider highly relevant concessions as to precisely what was in the mind of the arresting officer and what animated his formulation of a suspicion sufficient to arrest, amounts, in my view to a serious misdirection. This misdirection, has the effect of vitiating the finding made by the magistrate that the arrest was indeed lawful.

[31] In Mabona and another v Minister of Law and Order and others[8] the court held:

> The reasonable man will therefore analyse and assess the quality of information at his disposal critically, and he will not accept it likely without checking it where it can be checked. It is only after an examination of this that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficient high-quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section

[8] 1988 (2) SA 654 (SE) at 658G – I

> requires a suspicion but not certainty. However, the suspicion must be based on solid grounds.

[32] As the evidence on record indicates the arresting officer, Maxhagana, undertook no assessment of the quality of the information at his disposal and gave no consideration to the source and reliability of the information. The high-water mark of the respondent's case is the statement by Maxhagana in his evidence in chief that:

> In this matter I read the docket and saw that someone committed this offence and he had to be arrested.

[33] As already indicated, Maxhagana conceded in cross-examination that he gave no consideration to the fact that the complainant was a [....]-year-old child who had initially not made any disclosure. Nor was any consideration given to the fact that the child only reported the alleged rape after his mother had intensively questioned him. It was specifically also not considered that there were allegations of an earlier incident. The arresting officer need only formulate a suspicion. He or she need not be satisfied that the suspect is guilty. However, as the passage in Mabona indicates the arresting officer must assess the quality of the information at his disposal critically, and must check it where it can be checked.[9] None of this was done.

[34] On the evidence presented by Maxhagana, it cannot be found that he entertained a reasonable suspicion that the appellant had committed the offence which justified the arrest of the appellant. It follows that the respondent failed to discharge the onus which rests upon it to establish on a balance of probabilities that the arrest was lawful. In the circumstances the appeal must succeed.

[35] In the light of the finding that the magistrate was wrong to conclude that the respondent had discharged the onus and that the arrest was lawful, it is unnecessary to consider the further question, namely whether the arresting

[9] *Supra* at 658G

officer properly exercised the discretion vested in him or her to effect an arrest based upon the reasonable suspicion that he harboured.

[36] Appellant argued that in the event that the arrest is found to be unlawful that an appropriate award of damages would be R150,000, the amount claimed in the summons. The respondent, on the other hand, submitted that an amount of R45,000 would be reasonable in the circumstances.

[37] In Thandani v Minister of Law and Order [10] it was held:

> In considering quantum site must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual.

[38] The appellant was 37 years old. He was arrested in the presence of his fiancée and family. I have already set out the consequences of the arrest as established in his uncontested evidence. I need not repeat it here. The submission made by the respondent that the evidence of the effect that the arrest had on the appellant amounts to his *ipse dixit* and ought not to be accepted, is without merit. The appellant tendered the evidence at trial. It was not challenged at all. It must therefore be accepted. The appellant was detained for almost 2 days before appearing in court. Upon his appearance the charges were withdrawn because of insufficiency of evidence. It appears that he requested to have blood drawn for DNA test purposes and that this only occurred later in the day. I will accept therefore that a portion of the time that the appellant spent in custody after his court appearance was as a result of this request. Nevertheless, his unlawful detention following his arrest extended for a period, on the evidence, of at least 36 hours. On the evidence he was held in held in a communal cell, along with five other persons.

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[10] 1991 (1) SA 702 (E) at 707 B

[39] When I take into account all of the circumstances of this matter and have regard to the nature and impact of the arrest and unlawful detention of the appellant, I am satisfied that a globular award in the amount of R60,000 would represent a reasonable and appropriate award of damages.

[40] I therefore make the following order:

1. The appeal succeeds.

2. The magistrate's order is hereby set aside and substituted with the following:
   (a) The respondent is ordered to pay to the appellant damages in the sum of R60 000 for the unlawful arrest and subsequent detention of the appellant on 23 May 2012;
   (b) The respondent is ordered to pay interest on the aforestated amount of damages at the prevailing legal rate *a tempora mora* from date of judgment to date of payment;
   (c) The respondent is ordered to pay the appellant's costs of suit.

3. The respondent is ordered to pay the appellant's costs on appeal.

G. GOOSEN
JUDGE OF THE HIGH COURT

VAN ZYL, ADJP.

I agree.

D. VAN ZYL
JUDGE OF THE HIGH COURT

Appearances:	For the Appellant Adv. K. L. Watt Instructed by Wheeldon Rushmere & Cole. For Respondent Adv. N. J. Sandi Instructed by Mc Callum Attorneys