IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

Not Reportable
Case no: CA98/2021

In the matter between:

HERMANUS ARNOLDUS BARNARD Appellant

and

THE MINISTER OF POLICE 1st Respondent

and

HELGARD POTGIETER 2nd Respondent

JUDGMENT

Govindjee J

[1] The appellant claimed general damages and legal costs against the first respondent, alternatively the second respondent, for unlawful arrest and detention. The presiding magistrate dismissed the appellant's claim, concluding that the appellant's arrest had been lawful and justified in the circumstances, and that the

subsequent detention was also lawful. That decision is the subject of this appeal. There are, in addition, various preliminary issues to be considered.

Preliminary issues

[2] The appellant applied for condonation of its notice of prosecution of appeal, the late filing of the record on appeal and for an extension of the time limits for delivery thereof, together with an order reinstating his lapsed appeal.

[3] The appellant's damages claims were dismissed with costs on 8 July 2019. A notice of appeal was delivered timeously on 24 July 2019. The appeal should have been prosecuted within 60 days of the delivery of this notice, by Friday 18 October 2019. Delivery of the notice of prosecution of appeal was a few days late, on 31 October 2019, albeit without the requisite copies of the record, and filed on 1 November 2019. The appeal record was only served on 18 May 2021 and filed with the registrar on 19 May 2021, almost 500 days out of time. The application for condonation was filed only on 21 July 2021.

[4] Various reasons are advanced for this unfortunate state of affairs. The record was not available for many months, despite the appellant's representatives communicating with the magistrate's court and attending on the clerk of the court in order to arrange a transcript. The court file could not be located. This explains the delay in delivering the notice of prosecution of appeal and why the notice was filed without the requisite copies of the record.

[5] It must also be accepted that the delays in securing the court file were impacted by the Covid-19 pandemic and subsequent national lockdown. The appellant's correspondent attorney (Mr Powers) made regular enquiries about the court file, and arranged for his instructing attorneys to attend on the clerk of the court's offices to try to obtain and uplift the original file. A range of problems were experienced during the course of those interactions. The file was eventually located only on 12 May 2020.

[6] For the next number of months, the appeal record was erroneously not copied, delivered or filed due to communication errors on the part of the offices of the appellant's correspondent attorneys. The first respondent obtained an order on 16 February 2021 in the following terms:

'The appeal noted by the respondent on 24th July 2019 in the Magistrate's Court for the district of Uitenhage under case number 857/2015 is deemed to have lapsed…'

[7] That order followed an application that was served on the appellant's attorneys but not received by the attorney handling the matter. The blame for this is placed on a receptionist employed by the appellant's correspondent attorneys, and the suggestion is that the notice had been mislaid during an office reshuffle.

[8] Upon receipt of the order, Mr Powers realised for the first time that the record had not been delivered. A misguided attempt to file a fresh notice of appeal, which was eventually withdrawn, followed. The appeal record was finally indexed, paginated, copied and delivered to the state attorney on 18 May 2021 and filed of record on 19 May 2021. The subsequent application for condonation was served and filed approximately two months thereafter.

[9] The respondents take issue with the manner in which the appellant's legal representatives have handled the prosecution of this appeal. They point, firstly, to the court order confirming that the appeal had lapsed, suggesting that this order should have been appealed or rescinded prior to any application for reinstatement of the appeal. Secondly, it is argued that the appellant has failed to show good cause for the failure to timeously prosecute the appeal and, thirdly, has not addressed the issue of prospects of success on appeal in the condonation application. There is also a belated suggestion that the appellant ought to have applied separately for condonation for its failure to comply with the timeframe mentioned in Uniform Rule 50(4). These arguments will be addressed in turn.

[10] The respondents argue that there is a difference between appeals that have lapsed by operation of law, as envisaged in the rules, and instances where a court order has 'disposed of the appellant's intended appeal, insofar as it declared the appeal to have lapsed. It is therefore not open for the applicant to approach this

Court with a mere application, seeking condonation and reinstatement of the appeal, at this stage.' The crux of the submission is that the appellant ought first to have rescinded or appealed the order confirming the lapsing of the appeal.

[11] That submission does not survive scrutiny. The order in question was declaratory in nature, confirming that the noted appeal was deemed to have lapsed. The order did no more than confirm the provisions of Uniform Rule 50(1): a civil appeal from a magistrate's court shall be prosecuted within 60 days after the noting of such appeal. Unless so prosecuted 'it shall be deemed to have lapsed'. That 'deemed lapsing' operated irrespective of the court order, and because the 60-day time period specified in the rule had been exceeded. The order was seemingly not rescindable in terms of the Uniform Rules or the common law. It was also not appealable, being purely interlocutory in nature, issued during the progress of the litigation and not having a final effect on the main action.[1] That order does not dispose of any issue or any portion of the issue in the matter, nor does it irreparably anticipate or preclude any of the relief which might be given at the hearing (taking the 'hearing' in the case to be the hearing of the appeal).[2]

[12] This approach is, in effect, confirmed by the rules. Leaving aside the reality that the parties agree that the appeal was deemed to have lapsed, so that there are no prospects of successfully appealing the order of 16 February 2021, an application for the reinstatement of an appeal which has lapsed, in the case of civil appeals from the High Court, shall be heard by the court to which the appeal is made.[3] Section 84 of the Magistrates' Court Act, 1944,[4] *inter alia*, provides that every party appealing must do so 'within the period … prescribed by the rules; but the court of appeal may in any case extend such period'. It is for the court of appeal to condone non-compliance with time periods, and extend time periods, on good cause shown. There is also authority confirming that practical considerations, including the saving of costs, warrant the court of appeal combining the hearing of

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[1] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549.
[2] See *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (AD).
[3] Uniform Rule 49(6)*(b)*.
[4] Act 32 of 1944.

the appeal with an application for reinstatement.[5] These matters are properly before this court. The order of 16 February 2021 does not change that position.

[13] The remaining preliminary arguments advanced by the respondents are also without merit. In all cases of time limitation, this court enjoys the inherent right to grant condonation where principles of justice and fairness demand this and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. The matter rests in the judicial discretion of the court, to be exercised with due regard to the circumstances of the case. Matters to be considered in exercising this discretion include the degree of non-compliance with the rules, the explanation therefor, the effect of the delay on the administration of justice and the prospects of success on appeal.

[14] An application for condonation must provide a full explanation for the delay, which must not only cover the entire period of the delay but must be reasonable.[6] The appellant has done so in this instance, his corresponding attorney having explained the unfortunate circumstances that resulted in the various delays. There are, of course, limits beyond which a litigant cannot escape the result of his attorney's lack of diligence.[7] In this case, however, the attorney's default may be said to be due to bona fide errors or misunderstandings within that office, and the default has been satisfactorily explained. There can also be no doubt that the appellant throughout intended to prosecute his appeal.

[15] As to the suggestion that the application for condonation deals with the prospects of success inadequately, the respondents overlook that the modern practice of setting down an application for condonation at the same time as the hearing of the appeal results in a court of appeal having before it the judgment of the court below, the heads of argument and the full appeal record.[8] The main allegations of deficiencies in the magistrate's reasoning and prospects of success were, in any event, sketched in the application for condonation.

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[5] See *South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A) at 4B.
[6] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E.
[7] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E.
[8] *South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A) at 4B.

[16] The appellant effectively seeks to vindicate his constitutional right not to be deprived of freedom arbitrarily or without just cause. The prospects of success are weighty. The respondents were forced to concede during argument that the arresting officer apparently failed to appreciate that he enjoyed a discretion whether or not to arrest the appellant after forming a suspicion that an offence had been committed. In these circumstances, it is in the interests of justice for this court to grant the condonation sought and to re-instate the lapsed appeal. Any prejudice suffered by the respondents is outweighed by the other factors considered, notably the prospects of success.

[17] Finally, the argument that there has been non-compliance with Uniform Rule 50(4), so that an additional application for condonation was required, is a non-starter. Rule 50(1) must be read together with rule 50(4). As rule 50(4)*(c)* makes apparent, the obligatory requirements of that subrule form part and parcel of the proper prosecution of civil appeals from the magistrate's court. Failure to duly prosecute an appeal results in the deemed lapsing of the appeal. Unlike *Minister of Police v Nojoko*,[9] the case relied upon for this leg of the respondents' argument, the appellant in this case has correctly applied for reinstatement of the appeal in circumstances where it has been deemed to have lapsed.

[18] In any event, the thrust of the application for condonation and re-instatement relate to the appellant's failures in duly prosecuting the appeal, including failures in respect of the filing of the record. The application must be read, in its totality, to include a request for condonation for all instances of non-compliance with the applicable rules and formalities, resulting in a lapsed appeal. That aside, when considering the matter in its totality, including the constitutional underpinnings of the appellant's claim, it would not be in the interests of justice to deny condonation or re-instatement of the appeal on a technical point raised for the first time during argument.[10]

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[9] *Minister of Police v Nojoko* (ECD, Grahamstown) (unreported) (Case no. CA314/2019).

[10] *Cf Minister of Police v Nojoko* (ECD, Grahamstown) (unreported) (Case no. CA314/2019) para 18. The facts of this matter are distinguishable. Other than an application for condonation of non-service, no condonation was sought by the appellant in *Nojoko* for non-compliance with rule 50 of the Uniform Rules: para 21.

[19] While it is appropriate in these circumstances for condonation to be granted and for the appeal to be re-instated, the respondents were well within their rights to oppose and argue the point. The appellant seeks an indulgence and should pay the costs of that application.

The pleadings

[20] The appellant was employed as the manager of Despatch Scrap Metal. He was arrested on a charge of theft on 10 July 2014. He claimed that there was no reasonable or probable cause for arrest, and that he would have co-operated with police. There was no urgency for his arrest and he lived at a fixed and known address. The second defendant never made an attempt to establish the appellant's innocence and ignored an explanation he provided. It was specifically pleaded that the arresting officer failed to properly exercise his discretion in arresting the appellant.[11] The second defendant had no regard to less invasive methods of securing the appellant's attendance in court. The consequence was that the appellant was detained in the Despatch Police Station cells for approximately six hours before being released on warning. The prosecution never proceeded.

[21] As a result, the appellant claimed that he suffered general damages in respect of embarrassment, being deprived of freedom of movement, loss of amenities of life, impairment of dignity and contumelia in the amount of R90 000,00. The appellant also incurred legal costs totaling almost R3500,00 in order to secure his release.

[22] The respondents claimed on the papers that the appellant had committed an offence in a manner that justified an arrest without a warrant in terms of s 40(1)*(b)* of the Criminal Procedure Act, 1977 ('the Act'), and that the second respondent had exercised his discretion in a fair and rational manner. The subsequent detentions were also lawful and justified in terms of sections 39 and 50 of the Act.

The trial proceedings

[11] See *Sandi v Minister of Safety and Security* [2017] ZAECGHC 104 para 21.

[23] The second respondent received a complaint of theft. Mr Petrus du Plessis Laas alleged that the appellant, who rented his house, had stolen three cycad trees, as well as scaffolding, sometime between February and July 2014. The appellant had keys to the property and the garage and kept vicious dogs, so that it was impossible for other people to enter. Armed with this information, the second respondent arrested the appellant at his workplace, and without conducting any further investigation at the appellant's place of residence. The second respondent knew the appellant, as well as his place of work and residence. He conceded that the appellant was not a flight risk but nevertheless arrested him without affording him the option to attend the police station in his own vehicle, or to appear in court the following Monday on warning. The appellant was not asked for an explanation prior to his arrest.

The judgment of the court *a quo*

[24] The magistrate, after summarising the evidence and quoting section 40(1)*(b*) of the Act, concluded that the appellant had not offered any explanation at the time, so that his evidence that the second respondent had been invited to his house to see the scaffolding had to be rejected. The magistrate considered it suspicious that the appellant had not testified in chief about his ongoing differences with Laas, and his suspicion that Laas had himself removed the cycads. This prompted him to conclude as follows:

'Such information, if it was passed on to Potgieter at the time might very well have given Potgieter reason to make further enquiries or investigations prior to effecting the arrest. In the matter at hand Potgieter had an affidavit alleging theft of cycads and scaffolding valued at approximately R46 000,00, he had an identified suspect and no explanation from the suspect indicating further enquiries might be called for. The matter squarely fell within the ambit of section 40(1)*(b)* of the … Act.'

The appeal

[25] Various grounds of appeal were advanced. In particular, the appellant submitted that the magistrate erred and misdirected himself in basing his judgment

on findings unsupported by the evidence. It was submitted that there was a duty on the second respondent to investigate the charge prior to arresting the appellant, and that the respondents' reliance on s 40(1)*(b)* was misplaced. The magistrate had failed to deal with the discretion of the arresting officer fully, despite this having been pleaded and canvassed during evidence. The magistrate had erred in finding that there was no duty on the arresting officer to use a less invasive way to secure the appellant's attendance at court, particularly given the circumstances of the case and the facts within the second respondent's knowledge at the time. In essence, it was submitted that the magistrate erred and misdirected himself in dismissing the appellant's claim with costs.

Analysis

[26] Section 40(1)(*b)* provides that a peace officer may arrest any person whom they reasonably suspect of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. Theft, whether under the common law or a statutory provision, is listed in Schedule 1.

[27] The respondents relied exclusively on the testimony of Potgieter to prove the jurisdictional facts for a lawful arrest. Even accepting, for present purposes, the existence of the various jurisdictional facts for an arrest, including reasonable suspicion, police officers are never obliged to effect an arrest. There remains a discretion to be exercised.[12] A prudent police officer will, for example, not simply ignore less invasive methods of bringing an accused person to justice, and, in so doing, fail to exercise the discretion properly or at all.[13]

[28] In *MR v Minister of Safety and Security*,[14] the Constitutional Court considered whether it was obligatory for police officers to have arrested the applicant for committing an offence. The applicant was 15-years old at the time, posed no threat

[12] *Matebese v Minister of Police* [2019] ZAECPEHC 37 para 29.
[13] See *Minister of Safety and Security v Sekhoto and Another* (2011) 1 SACR 315 (SCA) para 49; *Barnard v Minister of Police and Another* 2019 (2) SACR 362 (ECG) at para 48: it is for a plaintiff to prove that the arresting officer exercised his discretion improperly or not at all, with respect to the availability of less invasive means than the warrantless deprivation of the arrestee's liberty and freedom of movement. See *Accom and others v The Minister of Police* [2021] ZAECGHC 112 paras 16-18, from which this summary of applicable principles is drawn.
[14] 2016 (2) SACR 540 (CC).

to the police officers, could be subdued with ease, was unlikely to commit another offence and was not a flight risk.[15] The Court confirmed that an ordinary reading of the applicable section gave police officers a discretion whether to arrest or not. The permissive wording of the section required police officers to consider and weigh the prevailing circumstances before deciding whether an arrest was necessary. The enquiry is fact-specific. Police officers must necessarily display a measure of flexibility in their approach given that they are confronted with different facts on each occasion that they effect an arrest.[16] It is only once the jurisdictional factors are present that the discretion whether or not to arrest arises.[17]

[29] Individual liberty and human dignity are rights that enjoy constitutional protection. Arrests constitute a severe impingement on those rights. Courts are therefore required to evaluate the evidence of the reasons for an arrest in some detail. This includes considering whether the police officers exercised their discretion at all and, if they did, whether it was exercised properly[18] so as to justify the arrest.[19] The discretion must be exercised in good faith, rationally and not arbitrarily and with the objective of bringing the subject before court.[20]

[30] Potgieter's cross-examination is particularly revealing. He knew the appellant for more than a year and knew where he worked and lived. Despite knowing the house that the appellant was renting, which was the alleged scene of the crime, Potgieter did not take the time to visit. He also did not gather any other evidence, even though the complaint received suggested that the theft had occurred sometime during a period in excess of four months. In so far as his interaction with the appellant, Potgieter testified as follows:

'Mr Le Roux: Did you ask Mr Barnard for an explanation of the allegations against him?

Mr Potgieter: I informed him his rights, that he can have the right to remain silent. So, I did not ask him for an explanation.

Mr Le Roux: So, before you decided to arrest him you did not ask him for an explanation?

Mr Potgieter: That is correct.

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[15] At para 41.
[16] *MR supra* at para 42.
[17] *Barnard supra* para 54.
[18] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Sekhoto supra* paras 6, 28.
[19] *MR supra* at para 43, 44.
[20] *Barnard supra* at paras 10, 11.

Mr Le Roux: So, you were satisfied that you could arrest him without interviewing him?
Mr Potgieter: That is correct.
Mr Le Roux: And you were satisfied that you could arrest him without interviewing any of the neighbours around that property. Is that so?
Mr Potgieter: That is correct … The information I had on hand at that time was enough for me to arrest him.
…
Mr Le Roux: So, you did not consider him to be a flight risk because you knew where he worked, and you knew where he stayed?
Mr Potgieter: That is correct.
Mr Le Roux: Yet you decided to arrest him at his place of employment and place him in the back of a van as you testified?
Mr Potgieter: That is correct.
Mr Le Roux: You did not give him the option of attending to the police station in his own vehicle to meet with you there in respect of these charges against him?
Mr Potgieter: No, I did not.
Mr Le Roux: There was no reason why you suspected that he would not go to the police station if you asked him to do so, is that correct?
Mr Potgieter: I cannot answer on that one. No, he might have, he could have, I cannot really say.
Mr Le Roux: There is also no reason that you would have suspected him not to go to court on the Monday if you asked him to attend court out of his free will.
Mr Potgieter: I cannot tell. I was not sure … dit was absoluut net on hom te arresteer om hom voor die Hof te bring … en hy was so gou as moontlik daarna vrygelaat.
…
Mr Le Roux: So u stem saam met my dat u geen ondersoekende stappe geneem het nadat u die verklaring van Mnr Laas gekry het nie?
Mnr Potgieter: Dis korrek, ja.
…
Mnr Le Roux: Hy sal sê hy is nooit die keuse gegee om op waarskuwing Maandag in die hof te verskyn nie.
Mnr Potgieter: Okay daai Edelagbare gedeelte is deel van die ondersoekbeampte. Ek is die arresterende beampte, ek ondersoek nie die saak nie …

[31] These extracts demonstrate that Potgieter took little time to decide that an arrest was necessary, probably even having decided to arrest the appellant prior to

arrival at his place of work. For reasons unknown, Potgieter appeared to operate on the basis that he was obliged, as the 'arresting officer' to arrest the appellant because, merely on the strength of the complaint received from Mr Laas.

[32] There was no thought given to the conduct of the appellant at the time, or the likelihood that he would not appear in court if warned to do so. The matter related to a landlord / tenant relationship and the charges were premised solely on the appellant's occupation of the property. There is no suggestion that the appellant was a danger to the police or caused any physical harm at the time.[21] In addition, it cannot be said that the offence, on its own, was so serious as to justify an arrest.[22]

[33] The purpose of arrest is to bring the arrestee before court and an arrest will be irrational and unlawful if the arrestor exercises his discretion to arrest for a purpose not contemplated by law.[23] These factors seem to have been ignored, whether due to haste, ignorance or otherwise. The respondents' own version adequately demonstrates these failures, and confirms that the warrantless arrest, even if based on reasonable suspicion, occurred in the absence of any exercise of discretion on the part of the arresting officer. Counsel for the respondents rightly conceded the point during argument.

[34] The court *a quo* committed an irregularity by failing to evaluate this aspect of the enquiry. The approach adopted ignores the permissive wording of section 40, the discretion to arrest and the factors relevant to the exercise of that discretion. A careful weighing and consideration of all factors as part of the exercise of a value judgment was palpably absent. The approach adopted resulted in the magistrate arriving at an outcome which could not reasonably have been reached. The court *a quo* was misdirected in its approach, justifying this court's interference. The magistrate's decision must be substituted with an order that the appellant's arrest, and subsequent detention, was unlawful.

Quantum

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[21] See *MR supra* para 52.
[22] See *Banda v Minister of Police* [2021] ZAECGHC 55 at paras 59, 60.
[23] *Minister of Police v Claasen* [2020] ZAECGHC 115 para 16; *Barnard supra* at para 55.

[35] The appellant was held in custody for approximately six hours. He testified briefly about the dirty conditions he experienced in the police cells. The water basin was blocked and there was a despicable smell. He was also arrested openly in front of members of staff and the public.

[36] The *actio iniuriarum* is designed to afford personal satisfaction for the impairment of a personality right, such as dignity. The primary concern is to provide a measure of satisfaction through the payment of money, as a solatium, and as a form of payback for the injustice suffered. The unlawful deprivation of liberty is a serious deprivation of fundamental rights requiring an appropriate award of damages. But this is not to suggest that large amounts are always justified whenever an arrest and detention is found to be unlawful. As Holmes J remarked in *Pitt v Economic Insurance Co Ltd*:[24]

'I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense.'

[37] Various considerations militate against a substantial damages award in this instance. The detention was for a period of only six hours during the afternoon, and the appellant was not made to spend the night in the cell. While previous decisions provide some useful indications, the actual amounts awarded are ultimately influenced by the facts of each case.[25] It is accepted that the appellant acted reasonably in incurring legal costs to secure his release. An award for general damages and the legal costs necessarily and reasonably incurred in securing the appellant's release in the sum of R25 000 appears to be appropriate in this instance.

Order

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[24] 1957 (3) SA 284 (D) at 287E-F.

[25] See *Minister of Safety and Security v Seymour* [2006] ZASCA 71; [2007] 1 All SA 558 (SCA) para 17.

[38] In the result:

1. Condonation is granted and the appellant's appeal is re-instated.
2. The costs occasioned by the application for condonation and re-instatement is to be paid by the appellant.
3. The appeal is upheld with costs.
4. The order of the court *a quo* is set aside and is replaced with the following:

"1. The first defendant is ordered to pay to the plaintiff the amount of R25 000,00, as and for general damages.
2. The first defendant is ordered to pay to the plaintiff the amount of R3492,00 as and for special damages.
3. The defendant is ordered to pay interest on the aforesaid amounts at the legally prescribed rate, from the date of service of summons to date of payment.
4. The defendant is ordered to pay the plaintiff's costs of suit, together with interest calculated thereon at the legally prescribed rate, from a date fourteen (14) days after taxation to the date of payment."

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A. GOVINDJEE
JUDGE OF THE HIGH COURT

VAN ZYL DJP:

I agree.

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D. VAN ZYL

DEPUTY JUDGE PRESIDENT OF

THE HIGH COURT

Appearances:

Counsel for the Appellants:		Adv S. Sephton St George's Chambers Makhanda
Instructed by	:	Neville Borman and Botha 22 Hill Street Makhanda 046 622 7200
Counsel for the respondent:		Adv V. Madokwe Oasim Building Port Elizabeth
Instructed by	:	Zilwa Attorneys 41 African Street Makhanda 047 531 0356

Heard: 22 April 2022

Delivered: 3 May 2022