REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A5081/2021

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

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DATE

In the matter between:

MINISTER OF POLICE Appellant

And

TELLMORE NYONI 1st Respondent

EFFORT MUSAYINWA 2nd Respondent

JUDGMENT

MAKUME, J:

[1] This is an appeal against the judgment and order by Molahlehi J dated the 14th July 2020 when he granted judgment in favour of the Respondents and ordered the Appellants to pay the Respondents an amount of R1.9 million

arising out of the arrest and detention of the Respondents by members of the South African police on the 19th of October 2014.

[2] The Appellant was granted leave to appeal by the Supreme Court of Appeal on the 13th of September 2021. The appeal lapsed due to the Appellant's attorneys failing to comply with the requirements of Rules 49 (2) read with Rule 49 (6) and 49 (7) of the Uniform Rules of Court.

[3] There is now before us an application for condonation as well as an application to reinstate the appeal. Both applications are opposed by the Respondents.

[4] Rule 49 (6)b) reads as follows:

> "The court to which the appeal is made may on application of the Appellant or cross Appellant and upon good cause shown reinstate an appeal or cross appeal which has lapsed."

[5] It is common cause and not in dispute that the appeal has lapsed the Appellant has filed together with their heads a substantive application seeking reinstatement of the appeal. It is trite law that the application for reinstatement can only be granted upon sufficient and satisfactory grounds.

[6] The Appellant says that the following are grounds and reasons that led to it not timeously complying with the requirements of Rule 49 (2) read with Rules 49 (6) and 49(7) of the Rules of court namely:

6.1 that during the period after the Supreme Court of Appeal had granted leave to appeal the offices of the State Attorney nationwide were hacked as a result the attorneys employed therein were unable to work on the matters properly as they had no access to emails nor the Internet as the server was down.

6.2 That the country was on lockdown due to the COVID-19 epidemic. This resulted in staff working off site and on a rotational basis as a result it was not business as usual. Offices were often closed for fumigation.

6.3 There was a delay in obtaining a properly transcribed court record until March 2022.

6.4 Court processes were now being generated via case lines and most attorneys at the State Attorney office did not have access to case lines.

6.5 Mr. Victor Manamela who is the attorney handling this matter reiterates in his affidavit opposing the order to declare the appeal having lapsed that during the time shortly after the Supreme Court of appeal had granted leave to appeal that he did not have access to his computer and missed on emails and other correspondences.

6.6 Manamela says that it is in the best interest of justice that the appeal ought to be fully argued as there are prospects of success.

6.7 The court record itself was incomplete as many portions were missing. He had to make follow up with the transcribers to locate the missing portions of the record.

6.8 The full proper record became available in March 2022 as a result the matter became ready to be heard. He adds further that there is no material or substantial prejudice to the Respondents if this appeal is reinstated.

[7] In their affidavit opposing reinstatement of the appeal the Respondents say that the Appellant has failed to set out full and detailed accounts, of the cause of delay to prosecute the appeal to enable the court to understand the reasons and be able to assess the Appellant’s blameworthiness.

[8] The Respondents further say that the correspondence addressed to the Appellant's attorneys reminding them of the time periods was sent by hand and not electronically and that the Appellant has not indicated why no responses were received to their letters.

[9] The Respondents conclude that the appellant has failed to set out an acceptable explanation for its delay in seeking condonation as a result the appeal should not be reinstated.

[10] The court in **AYMAC CC and Another v Widgrow 2009 (6) SA (W)** Gautshi AJ concluded that it is usual and desirable that the reinstatement application or an application for condonation and the appeal be heard at the same time.

[11] Holmes JA in **United Plant Hire (Pty) Ltd vs Hills and Others 1976(1) SA 717 (A) 720 E - G** laid down the applicable principles as follows:

> "It is well settled that in considering application for condonation the court has a discretion to be exercised judicially upon a consideration of all facts and that in essence it is a question of fairness to both sides. In this inquiry relevant considerations may include the degree of non- compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the Respondents' interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. These factors are not individually decisive but are interrelated must be weighed one against the other thus a slight delay and a good explanation may be held to compensate for prospects of success which are strong."

[12] In this matter leave to appeal was granted on the 14th of September 2021 and by March 2022 the court record had been fixed and the matter was ripe for hearing. In our view the delay was not excessive, and we are satisfied that an acceptable explanation for the delay has been furnished.

[13] In the result condonation is granted and the appeal is hereby reinstated for hearing before this court.

The unlawful arrest and detention

[14] The only issue before us in this appeal is whether the two police officers who arrested the Respondents had a reasonable suspicion based on solid grounds that it was the two Respondents who had assaulted the deceased.

[15] The court in **Mabona and Another v Minister of Law and Order 1988 (2) SA 654 (SE)** held that the information received by the police must not necessarily be of sufficiently high quality and cogency. Section 40 (1)(b) requires suspicion not certainty which suspicion must be based on solid grounds.

[16] In **Mabona** the police officer received information about a robbery from an informer and on searching the premises of the Respondents no amount of money that the informer had said was there could be found. Despite that the police proceeded to arrest the plaintiff. It was therefore not surprising that the court found that the police could on that information have formed a reasonable suspicion that the plaintiff had indeed committed the robbery.

[17] The facts in this appeal are different the two police officers received information from people who witnessed the assault and when they approached the two plaintiffs, they say they admitted the assault. This in our view was sufficient basis for a reasonable suspicion that they had committed the crime and were justified in arresting them.

[18] It is trite that in defending a claim for unlawful arrest the four jurisdictional facts set out in Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 must be pleaded namely that the arrestor was a peace officer, that he or she entertained a suspicion, that the suspicion entailed that the person to be arrested had committed a Schedule 1 offence and lastly that the suspicion rested on reasonable grounds.

[19] The common cause facts found by the court *a quo* as stated in paragraphs 4 and 5 of the judgment by Molahlehi J are the following:

> "(4) it is common cause that Mr Thato Majola the deceased was assaulted on 18 October 2014. He was rushed to the hospital where he subsequently succumbed to his injuries. Following his death on 19 October 2014 a group of people approached the plaintiff's residence and accused them of being responsible for the murder of their relative. They threatened to assault them The Plaintiffs locked themselves inside the house fearing for their lives. They contacted the police and pleaded for help.
>
> (5) The police responded to the plaintiffs' request and upon their arrival found a group of people outside the yard threatening to attack the Plaintiffs. After interviewing them (the police) entered the plaintiff's home. They then left with the Plaintiffs to the deceased home. Upon arrival at the deceased home, they enquired from the deceased's mother whether the plaintiffs were responsible for the assault on her son. She responded in the affirmative and further informed the police that she had received a call from the hospital informing her that Thato had passed away. The Plaintiffs were arrested. They appeared before the Magistrate the following day 20 October 2014, where they were charged with murder, but we're subsequently found not guilty and that the charges against them were withdrawn."

[20] What is not clear from that judgment is whether the criminal trial started, and evidence was led where after a finding of not guilty was made or whether the charges were withdrawn. In either case that finding is not relevant for purposes of this appeal.

[21] What is in issue in this matter is whether the police officers had a reasonable suspicion based on solid grounds that the death of Thato Majola was brought about by the assault on him by the plaintiffs.

[22] The evidence surrounding the incident can be summarized as follows. The two Respondents operate a shop in the area. They are involved in the business of fixing electronic appliances such as television sets.

[23] On the night of the 18th of October 2014 the plaintiff Musanyiwa received a call that there was a burglary at their workshop. He phoned the police and then proceeded to the workshop where he confirmed that indeed a burglary had taken place. It is what happened after that discovery where the evidence of the plaintiffs diverges from that of the police.

[24] According to the plaintiff after they discovered the burglary and whilst busy doing inspection, they heard a noise not far from the workshop. He immediately proceeded to the place and found a group of people unknown to him assaulting the deceased. He Musanyiwa pleaded with the people to stop which they did. He thereafter proceeded to the deceased house and reported the assault to the deceased sister. The deceased brother arrived, and the deceased was then transported to the hospital.

[25] The following morning being the 19th the brother of the deceased attacked the Plaintiff accusing him of the death of his brother. Musayinwa ran to the police and reported. Later that evening the crowd descended on their house threatening to assault them. They then phoned the police and after inquiry they were arrested.

[26] The Court *a quo* found that the Appellant succeeded to satisfy the first three jurisdictional facts but the police failed to satisfy the court that their suspicion was based on reasonable and solid grounds. I turn now to that reasoning.

[27] Hefer JA in **Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A) at 38G** set out the general principle as follows:

> "Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion

was improperly formed, it is for the party who makes the allegations to prove it. There are in such a case two separate and distinct issues, each having its own onus (**Pillay v Krishni and Another 1946 AD 946 at 953**). The first is whether the opinion was actually formed, the second which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed is whether it was properly formed."

[28] In the court *a quo* my brother Molahlehi J concluded as follows at paragraph 30 of the judgment:

> "In my view it is clear from the above that the information the police relied upon in arresting the plaintiff was insufficient to create a reasonable suspicion that the plaintiffs were involved in the assault that resulted in the death of the deceased. For the reasons set out below I find that the defendant has failed to discharge its onus of showing that the arrest of the plaintiff without a warrant was based on the grounds of reasonable suspicion that the plaintiffs were responsible for the death of the deceased."

[29] The Court *a quo* in our view erred and, in a way, committed the same mistake as Bertelsman J in **Louw and Another v Minister of Safety and Security and Others 2006 (2) SACR 178(T)** where a fifth jurisdictional fact was introduced in cases involving Section 40 of the Criminal Procedure Act.

[30] The Supreme Court of Appeal in **Minister of Safety and Security v Sikhoto 2011 (5) SA 367** criticized the finding in Louw and said that Bertelsmann in Louw conflated jurisdictional facts with discretion.

[31] In paragraph 27 of this judgment I have made reference to the decision of **Dempsey** wherein Hefer JA held that once it is alleged that the opinion (meaning the opinion or discretion to arrest) was improperly formed it is for the party who makes that allegation to prove it.

[32] Van Heerden JA in **Duncan v Minister of Law-and-Order 1986 (2) SA 80-5 (A)** held that:

> "No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful need not be considered because it does not arise in this case."

[33] The Court *a quo* erred in finding that the suspicion or discretion was not based on reasonable grounds by saying that the police failed to enquire from the crowd whether anyone of them witnessed the assault on the deceased.

[34] In this matter both police officers testified that on their arrival at the house of the Plaintiffs they were informed that the deceased had been assaulted by the Plaintiffs.

[35] The deceased's mother also said that the deceased had been assaulted by the Plaintiffs even though that was hearsay evidence. .

[36] It was at that stage that the two police officers formed a suspicion based on what had been related to them that they exercised their discretion to effect an arrest. There was no requirement in our view that the two officers should have first made inquiry as to who the eyewitnesses were as it was found by the court *a quo*.

[37] In their heads of argument the Respondents placed reliance on the decision of **Gellman v Minister of Safety and Security 2008 (1) SACR 44** for wrong reasons. In that matter the arrest was made by the investigating officer after he had read the statement of the complainant and decided to make an arrest without further investigation. The investigating officer, one inspector Dlamini at Germiston police station after receiving the docket and after reading the statement of the complainant testified at the trial in the following words at page 174 of the record:

> "I received a case docket which was allocated to me that was on 21 February 2005. After receiving the docket, I read the statement made by the

> complainant, by then the charge was written outside pointing of a firearm. I have undergone a course, a detective course and the people who are the ones who opened this case in the charge office is a policeman (sic) he is a uniform guy. Then the charges I have stated that it is a pointing of a firearm but when I read in the statement and I discovered that the items also were taken, after a firearm had been used by pointing. Then when I see this case, a weapon has been used and some items were destroyed. To me as it appeared as an armed robbery charge. So, the person who opened this case he only concentrated only with the pointing of a firearm. Maybe it is lack of knowledge, seeing that the items had also been taken also the charge itself is armed robbery if a firearm had been used pointing and remove somebody's items automatically it comes to armed robbery."

[38] Salduker JA with Liebenberg AJ in that matter criticised the inspector at paragraph 18 as follows:

> "We infer from Inspector Dlamini's testimony that after he had had an opportunity to review the statement, he embarked on a fanciful attempt to build up other serious charges against the appellant."

[39] The facts in this appeal are far and distinguishable from the evidence and facts in **Gellman**. In this matter the police officers genuinely formed a reasonable suspicion based on the evidence before them at that time as well as the prevailing circumstances that the Respondents had committed a Schedule 1 offence.

[40] In **Gellman** Inspector Dlamini was the investigating officer and after reviewing the Complainant's statement he "unlawfully build up" a case of armed robbery against Gellman when there was no such evidence supporting a case of armed robbery.

[41] The next aspect raised in this appeal is whether or not the court *a quo* misinterpreted and misapplied the principles of legal causation laid out by the Constitutional Court in **De Klerk vs Minister of Police 2020 (1) SACR 1 (CC).**

[42] At issue in the De Klerk was whether the Appellant could claim against the minister of police for his detention after his first court appearance. The answer to that is whether the original arrest was lawful or not lawful.

[43] The Constitutional Court in De Klerk concluded that in considering liability of the police for post court appearance detention the court must look into whether the initial detention was lawful.

[44] The evidence in the court *a quo* clearly demonstrated that the police officers formed a suspicion based on reasonable grounds that the two Plaintiffs (now Respondents) had committed a Schedule 1 offence and thus lawfully arrested them and had them detained. In the result the Appellant has discharged the onus placed on it in terms of Section 40 (1) (b) of the Criminal Procedure Act.

ORDER

a) The appeal is granted the judgment and order of the court *a quo* is set aside and substituted with the following:

   i) The Plaintiffs claims are dismissed.

b) Each party to pay own costs.

Dated at Johannesburg on this 05th day of March 2024

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

JE DLAMINI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Y CARRIM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

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