THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 788/11

Reportable

In the matter between:

MINISTER OF SAFETY AND SECURITY	**FIRST APPELLANT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**SECOND APPELLANT**

and

NEVER NDLOVU	**RESPONDENT**

Neutral citation: *Minister of Safety & Security v N Ndlovu* (788/11) [2012] ZASCA 189 (30 November 2012).

Coram: **Ponnan, Bosielo and Petse JJA**
Heard: **7 November 2012**
Delivered: **30 November 2012**

Summary: Claim for damages for unlawful detention following upon unlawful arrest – unlawfulness not ceasing when accused is brought before a reception court which remands him in custody without enquiring whether it is in the interests of justice to detain him further.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Mageza AJ sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel to be paid jointly and severally by the appellants, the one paying the other to be absolved.

2 The following order is substituted for the order of the court below:

'(1) Judgment is entered in favour of the plaintiff:

(a) against the first defendant for:

(i) payment of the sum of R55 000;

(ii) interest at the prescribed legal rate *a tempore morae;*

(iii) costs.

(b) against the first and second defendants jointly and severally, the one paying the other to be absolved, for:

(i) payment of the sum of R175 000;

(ii) interest at the prescribed legal rate *a tempore morae;*

(iii) costs.'

JUDGMENT

PETSE JA (Ponnan and Bosielo JJA concurring):

[1] This appeal concerns the issue whether or not the further detention of the respondent, Mr Never Ndlovu, for the period from 24 October to 31 October 2008 to await his trial on a charge of possession of suspected stolen property was unlawful. The Eastern Cape High Court, Grahamstown (Mageza AJ) held that it was and accordingly awarded the respondent damages. It subsequently granted

the appellants leave to appeal against its judgment and order to this court. I shall say more about the terms of the order later.

[2] The determination of the issue arising in this appeal will best be understood against the backdrop of the facts that follow.

[3] On 21 October 2008, late in the afternoon, the respondent, a Zimbabwean national, received a telephone call from an acquaintance known as Golden, requesting him to meet the latter in the street in Joza Township, Grahamstown, where the respondent lived at the time. Golden also requested the respondent to bring with him a laptop that he had earlier that day handed to the respondent for the purposes of the latter to install a Windows Software Program.

[4] The respondent obliged, but unbeknown to him Golden was accompanied by eight police officers, under the command of Warrant Officer Van Ross, who were investigating a case concerning the theft of the laptop in question from the premises of Westbank in Grahamstown. The police officers, after a brief questioning of the respondent, seized the laptop and asked the respondent to lead them to his residence, which he did. There, four police officers conducted a search of the premises without a search warrant. They seized an assortment of the respondent's property comprising, inter alia, computers, a television set, Tech DVD player, a LG flatron screen and miscellaneous computer accessories.

[5] The respondent was arrested and detained for being in possession of what the police said was suspected stolen property in contravention of s 36 of the General Law Amendment Act 62 of 1955. On 23 October 2008 he was brought before a so-called 'reception court' ─ about which more shall be said later ─ and remanded in custody to 30 October 2008 because a so-called 'Bail Information Form', completed by the police and contained in the police docket, reflected that the respondent had furnished a false address and consequently had no fixed address. For this reason, according to the police, the respondent was not to be

released on bail. On 30 October 2008, the respondent was granted bail of R500 which was paid on his behalf the following day. His case was postponed yet again. On 9 December 2008 charges against the respondent were withdrawn and on 10 December 2008 his property, seized by the police, on the date of arrest, was released to him.

[6] On 21 April 2010 the respondent instituted proceedings against the appellants, the Minister of Safety and Security, as the first defendant and the Minister for Justice and Constitutional Development, as the second defendant in the high court for unlawful arrest and detention from 21 to 31 October 2008.

[7] The matter proceeded to trial before Mageza AJ. During the appellants' case it was conceded on behalf of the first appellant that the arrest of the respondent on 21 October 2008 and his subsequent detention until 23 October 2008, when he was brought before the 'reception court', were unlawful. But the appellants persisted in their defence that the respondent's unlawful detention ceased when the magistrate in the 'reception court' remanded the respondent in custody to 30 October 2008 for a bail application and legal aid. This appeal is thus only concerned with the lawfulness of his further detention from 24 to 31 October 2008. The case of the appellants was that from the time the magistrate issued the detention order the unlawful detention ceased.

[8] The high court found in favour of the respondent and granted judgment as follows:

'1. Judgment is entered in favour of Plaintiff:

(a) in respect of the unlawful arrest, attendant *contumelia* and detention between the evening of the 21st to the morning of the 23rd October 2008, damages in the amount of R55 000.00.

(b) in respect of the unlawful detention in prison between the 24th October to 31st October 2008 for the sum of R175 000.00.

(c) The defendants are ordered, jointly and severally, to pay interest on the damages awarded in (a) and (b) above at the legal rate from a date fourteen days after date of this judgment to date of final payment.
(d) Costs of suit together with interest calculated at the legal rate from a date fourteen days after the *allocator* to the date of payment.'

[9] On the pleadings, the arrest and subsequent detention of the respondent were common cause. It was also not in dispute that the respondent was arrested at Extension 4, Grahamstown where he was found in possession of the goods seized by the police on suspicion that they had been stolen. At a subsequent pre-trial conference, held on 7 April 2011 in terms of rule 37(1) of the Uniform Rules, the appellants correctly accepted that they bore the onus to establish that the respondent's arrest and detention were legally justified (see *Minister of Law & Order & others v Hurley & another* 1986 (3) SA 568 (A).

[10] In *Zealand v Minister for Justice and Constitutional Development & another* 2008 (6) BCLR 601 (CC) the Constitutional Court in affirming this principle said:
'It has long been firmly established in our common-law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.
. . .
There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.'[1]

[11] Of the witnesses who testified at the trial only the evidence of Captain Green, who was, at the material time, the Sector Commander of the Detective Branch, Grahamstown and Mr Lionel Prince, the prosecutor who appeared for the State in the 'reception court' on 23 October 2008, is material. Captain Green testified that, as Sector Commander, he had eighteen investigating officers under

[1]At para 25.

him. When he received police dockets he would peruse them and allocate them to designated investigating officers. When he received the docket relating to the respondent, he observed that it contained no identity or passport number and that a visit by an officer to the address furnished by the respondent had established that the respondent was unknown and that this triggered what he called ‘red lights’ because the respondent was a Zimbabwean national. Contained in the docket was a document titled ‘Bail Information Form’, which had been completed by Constable Buthi. This ‘Bail Information Form’ was intended to assist the prosecutor at the respondent’s first appearance at court. The prosecutor was expected to evaluate the information contained in that form and then decide whether to consent or object to bail. The form recorded that the appellant be refused bail because he was considered a flight risk.

[12] Prince testified that he did not study the docket but merely perused the ‘Bail Information Form’. He said it was the responsibility of the control prosecutor, Ms Msesiwe, to study the docket, draw a charge-sheet and thereafter give it to the prosecutor in the ‘reception court’. He, upon receiving the docket, only read the ‘Bail Information Form’ and realised that bail was to be opposed. He then called the respondent’s case before a magistrate in the ‘reception court’ and applied for the case to be remanded. All of this he did without reference to the respondent. Without further ado the magistrate postponed the case for seven days.

[13] It is opportune to say something about the so-called ‘reception court’, which has since ceased to exist. This is a ‘court’ which at that time was solely dedicated to dealing with accused persons at their first appearance in court. All cases before it were postponed as a matter of course and as a rule it never entertained any bail applications. Neither did it embark on a judicial evaluation to determine whether it was in the interests of justice to grant bail nor, in this case, did it afford the respondent an opportunity to address it on the question of his eligibility to be released on bail.

[14] Msesiwe, who was said to have perused the docket to make a determination as to whether the respondent should be released (whether on bail or warning) or detained further, did not testify. Nor did Constable Buthi. The evidence does reveal that the arresting officers had been to the respondent's residence where they conducted a search and seized some of the respondent's goods at the time of his arrest. Accordingly there could have been no doubt about the respondent's residential address. It is thus inexplicable why Buthi would have suggested that the respondent had no fixed abode and as a consequence that he posed a flight risk. Buthi was a crucial witness. Indeed that seemed to have been accepted by Green when he testified.

[15] The case of the appellants thus suffers fundamentally from evidentiary short-comings. First, Prince who applied for the postponement of the respondent's case on 23 October 2008 did not, on a fair assessment of his evidence, read the contents of the docket. He solely relied on the police entry in the 'Bail Information Form' that the respondent should not be granted bail. Msesiwe, who was said to have read the docket was not called. Indeed Prince conceded under cross-examination that anyone properly applying their mind to the matter at hand would have realised that the respondent was not a flight risk. Nor was Buthi called, who was said to be the source of the entry in the 'Bail Information Form' that the respondent had furnished a false address. The inevitable consequence of these evidentiary short-comings is that the evidence of the appellants, who bore the onus to justify the deprivation of the respondent's liberty, came nowhere near discharging that onus. Quite clearly had the police conscientiously performed their duties, given that the respondent's freedom was at stake, they would have realised that the respondent had a fixed address and was thus not a flight risk. Moreover the appellants' problems are also compounded by the fact that the respondent was granted bail on his second appearance before court even though his circumstances had not changed.

[16] In *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 51A-C this court held:

'. . . I consider, that when s 50(1) speaks of further detention for the purposes of trial being ordered by the court "upon a charge of any offence", this does not contemplate that the matter would be ready for trial at the first appearance of the arrested person, or that a properly formulated charge must then be preferred against him . . . All that the section contemplates is that the purpose of the detention throughout must be to secure the attendance of the accused at his trial upon the charge, which, it is expected, will be preferred against him. It goes without saying that *it is the function of the judicial officer to guard against the accused being detained on insubstantial or improper grounds* and, in any event, to ensure that his detention is not unduly extended.' (My emphasis.)

In this case it is common cause that the 'reception court' never embarked on any judicial evaluation because, as a matter of course, its function was merely to postpone cases and without, it would seem, enquiring whether or not an accused person ought to be detained pending a trial. It can thus hardly be contended that the unlawful detention of the respondent ceased when he was brought before the 'reception court' which ordered his further detention. It follows that this appeal must fail.

[17] It remains to deal with one final aspect. It was common cause before us that the order of the high court has to be corrected. Judgment was entered in favour of the respondent for his unlawful:

(a) arrest and detention for the period 21 to 23 October 2008 in the sum of R55 000; and

(b) detention for the period 24 to 31 October 2008 in the sum of R175 000.

Although the order does not make it plain, in respect of (a), judgment could only have been entered against the first appellant. That would also hold true in respect of the interest and costs that flow from that award. And in respect of (b), judgment, interest and costs ought to have been entered against the appellants jointly and severally. It is thus necessary that the order be amended to reflect that. To avoid further confusion it may simply be more convenient to set aside the order in its entirety and replace it with the correct order. Save for correcting the

order, the appeal must otherwise be dismissed with costs including the costs of two counsel, it being agreed between the parties that the employment of two counsel was justified.

[18] The following order is made:

1 The appeal is dismissed with costs, including the costs of two counsel to be paid jointly and severally by the appellants, the one paying the other to be absolved.

2 The following order is substituted for the order of the court below:

‘(1) Judgment is entered in favour of the plaintiff:

(a) against the first defendant for:

(i) payment of the sum of R55 000;

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(i) payment of the sum of R175 000;

(ii) interest at the prescribed legal rate *a tempore morae;*

(iii) costs.’

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X M PETSE
JUDGE OF APPEAL

Appearances:

Appellants:	M J Louw SC
	N J Sandi
	Instructed by:
	Nkuhlu Khondo Incorporated, Grahamstown
	The State Attorney, Bloemfontein
Respondent:	A Beyleveld SC
	D Niekerk
	Instructed by:
	Whitesides, Grahamstown
	Naudes Attorneys, Bloemfontein