REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case NO: 5644 / 2011

In the matter between:

PERUMAL PILLAY — Applicant

And

MINISTER OF POLICE — First Respondent

DIRECTOR OF PUBLIC PROSECUTIONS: KWAZULU-NATAL — Second Respondent

STATION COMMANDER: MARGATE POLICE STATION — Third Respondent

WARRANT OFFICER J. KOEGELENBERG — Fourth Respondent

J. BESTER N.O. — Fifth Respondent

JUDGMENT

Delivered on: 30/9/2011

Z P NKOSI AJ

INTRODUCTION

[1] This is an application for an urgent interdict *de libero homine exhibendo*. On 17 June 2011, a rule *nisi* was issued calling upon the respondents to show cause, on 20 June 2011, why the applicant's detention should not be declared unlawful

and why the applicant should not be released from custody forthwith. The application was opposed by the first, third, and fourth respondents. The second and fifth respondents chose to abide the court's decision.

[2] On 20 June 2011 I heard oral argument and, due to the urgency of the matter, I ordered the immediate release of the applicant from custody. I now provide the reasons for this decision.

FACTUAL BACKGROUND

[3] On 17 June 2010 the applicant was arrested at his home by the fourth respondent pursuant to a warrant of arrest. The applicant was subsequently charged with three counts of fraud. He was, however, never given a copy of the warrant of arrest, which formed the basis for his arrest and detention, despite having requested it.

[4] Thereafter, on 21 June 2010, the applicant appeared before the Magistrate's Court, Port Shepstone, and was remanded into custody pending the bail hearing on 30 June 2010. On that day the Magistrate hearing the bail application refused to consider the lawfulness of the applicant's arrest and instead stated that he was only interested in considering the issue of bail. The Magistrate then postponed the bail application to 9 July 2010 on which date the applicant was refused bail.

[5] In a subsequent application to the Regional Court, it was found by the court that the applicant's initial detention was unlawful due to the failure by the fourth respondent to provide him with a copy of the warrant of arrest after he had

requested it. Nevertheless, the fifth respondent, who presided over that court, concluded that the applicant's detention became lawful upon being remanded into custody on 21 June 2010. The applicant then sought his immediate release from custody. When the matter came before me, I assumed jurisdiction and ruled that the Regional Magistrate had no jurisdiction to decide the application.

ISSUE

[6] It is common cause that the arrest did not comply with procedural requirements and that the initial detention was therefore unlawful. The only remaining issue is whether the orders for the further detention of the applicant, which where authorised by the Regional Magistrate before whom he subsequently appeared, legally validated the otherwise unlawful detention.

EVALUATION

[7] Arrest is fully regulated by legislation. Section 39(2) of the Criminal Procedure Act 51 of 1977 provides for the procedural requirements upon an arrest of a person pursuant to a warrant. It reads as follows:

'The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.'

In this context, '*immediately*' means '*as soon as practically possible*' and any longer delay caused by the inability of the arresting officer to comply with the

arrested person's request will not satisfy the requirements [*Minister van Veiligheid en Sekuriteit v Rautenbach* 1996 (1) SACR 720 (A) 731G – H].

[8] The legal effect of the compliance with the aforementioned precept is contained in sub-section 3 which states:

'The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.'

It goes without saying that non-compliance with the aforementioned precept, despite adequate opportunity to do so, will render an arrest and subsequent detention in custody unlawful.

[9] An arrest still has to be justifiable according to the demands of the Bill of Rights as part of the Constitution of the Republic of South Africa, 1996. An arrest seriously infringes upon an arrestee's right to his or her freedom, dignity, and privacy enshrined in Chapter 2 of the Constitution. Consequently, such an infringement should occur only within the confines of statutory prescripts through which such an infringement is justified.

[10] I now turn to deal with the merits of the application. Counsel for the respondents, Mr *Naidoo*, conceded that the arrest of the applicant was unlawful, but he proposed that once the applicant appeared in court and his further detention was authorised by the court, the detention became lawful [*Isaac v Minister van Wet en Orde* 1996 (1) SACR 314 (A)]. In his view, the applicant's right to challenge the unlawfulness of his arrest and detention lapsed upon his

first appearance in court, at which stage, he submitted, the detention was validated. The argument is rather specious.

[11] In *Isaac* it was held that the fact that a person's arrest is unlawful does not mean that his or her further detention pursuant to an order made in terms of section 50(1) of the Criminal Procedure Act would also be unlawful [*Isaac, supra,* at 321i – 322a]. However, the court's reasoning was based on the following interpretation of the section:

'Die funksie van hierdie bepaling is oorweeg in *Minister of Law and Order v Kader (supra*). Dit is tweërlei, hoewel daar 'n mate van oorvleueling is. Eerstens vereis die artikel dat 'n gearresteerde person binne 'n kort tydperk voor die hof gebring word. Hierdeur word heimlike en onreëlmatige inhegtenisnemings en aanhoudings ontmoedig. Die gearres-teerde persoon word 'n geleentheid gee om in die openbaar die wyse en omstandighede van sy inhegtenisneming te bevraagteken, en om aansoek te doen om op borg of waarskuwing vrygelaat te word *supra* 49F-G). Hoe die hof in so 'n geval sal reageer sal natuurlik afhang van die aard van die gearresteerde se versoek of klagte.'

[12] The *ratio* of this finding is that an arrested person is entitled to question in public the lawfulness of his arrest. This was done by the applicant, according to his founding affidavit, and the magistrate rebuffed him by stating that he was only interested in considering the issue of bail. It appears, therefore, that the information about the applicant's unlawful arrest and detention was brought to the attention of the magistrate who decided to ignore it. The approach taken by

the magistrate is misdirected and cannot be countenanced. In my view, the fact that a court has authorised further detention does not change the unlawfulness of a detention. A court ordering further detention well aware that the arrestee was unlawfully arrested and detained fails in its duty to protect its citizens against an infringement of their constitutional rights by those exercising power on behalf of the state.

[13] Section 39(2) of the Bill of Rights provides that when interpreting any legislation and when developing common law or customary law, every court must promote the spirit, purport and objects of the Bill of Rights. Section 12(1)(a) of the Bill of Rights provides that everyone has the right to freedom and security of person, which includes the right not to be deprived of freedom arbitrarily and without just cause.

[14] In *S v Coetzee and Others* 1997 (1) SACR 379 (CC) at para 159, O'Regan J aptly stated as follows:

'They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom ... our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.'

[15] Section 35(1)(e) of the Bill of Rights reads:

'Everyone who is arrested for allegedly committing an offence has the right at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released'

Section 50(6)(a) of the Criminal Procedure Act contains similar provisions. Upon his first court appearance, the applicant was neither served with an indictment nor is there any evidence that the court properly informed him of the charge(s) for which he had to be further detained. The undisputed allegation made by the applicant is that the arresting officer told him he was being arrested under a warrant for a crime allegedly committed on 12 February 2010. No such warrant was ever produced. The only warrant, which was produced several months later, pertained to a crime allegedly committed on 15 March 2010.

[16] Section 35(2)(d) of the Bill of Rights reads:

'Everyone who is detained, including every sentenced prisoner, has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released'

It is clear from this provision that the accused's right to challenge the unlawfulness of his arrest and detention does not lapse upon his first appearance in court.

[17] The applicant raised the issue of the lawfulness of his detention at the first court appearance, through a lawyer, as he was entitled to do so. The court before which he appeared brushed it aside. In my view, the challenge obliged the court,

in administering equal justice to all, to conduct a prompt but short inquiry to verify the allegation and to include such information into the factual matrix when making a decision as to whether the applicant should be detained further. This apparently did not happen. That did not require a full contested hearing. Had the court conducted a short inquiry, it would have been better informed about the unlawfulness of the initial detention and would have considered the release of the applicant on his own recognisance pending trial instead of considering bail.

[18] From the aforegoing, it is my view that the encroachment on the applicant's physical freedom was not carried out in a procedurally fair manner and was unlawful. The mere fact that a number of magistrates issued orders remanding the applicant into custody is not sufficient to establish that the detention was not procedurally unfair.

[19] In the result, in order to confirm the order I made earlier for the immediate release of the applicant, I make the following order:

1. The rule *nisi* issued on 17 June 2011 be and is hereby confirmed.

2. Costs of suit against the first, third, and fourth Respondents, jointly and severally, the one paying the others to be absolved.

Z P NKOSI AJ