



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 28 June 2024

Status: Immediate

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Minister of Police v Sabisa and Another (725/2023) 2024 ZASCA 105 (28 June 2024)

Today the Supreme Court of Appeal (SCA) dismissed with costs, including the costs of two counsel where so employed, an appeal against the decision of the Eastern Cape Division of the High Court, Mthatha (the high court).

The respondents, Mr Thandekile Nelson Sabisa and Mr Lawrence Nzimeni Mambila instituted claims for damages in the high court, against the appellant, the Minister of Police (the Minister) for unlawful arrest, unlawful detention and assault. The high court found in their favour and awarded each R400 000 for unlawful arrest and detention and R110 000 for assault, torture and *contumelia*. It granted leave to appeal to the SCA.

On 18 April 2016, the respondents, who were councillors of the OR Tambo District Municipality (the Municipality), were arrested by members of the South African Police Service (SAPS) at the offices of the Municipality at Myezo Park in Mthatha. At the time, Mr Sabisa served as the Deputy Executive Mayor while Mr Mambila was a member of the Mayoral Committee responsible for technical services.

The respondents pleaded that they were arrested without warrants of arrest by the members of the SAPS; that the police officers did not produce any warrants for their arrest; and that there was no justification for executing the warrants, even if those were available. They further pleaded that after the arrests they were detained by members of the SAPS for nine days, without a reasonable and probable cause and with the intention to injure them, and were assaulted and tortured which caused them pain, shock and injuria, amongst other things. As a result, they claimed to have suffered damages of R10 million each.

The Minister filed a plea in which he admitted the arrests but denied that they were unlawful. He averred that the respondents were arrested in terms of valid warrants of arrest which were shown to them and that the police were justified in executing the warrants. The Minister admitted that the respondents were detained by the police on 18 April 2016 and on 19 April 2016 they were admitted to hospital where they remained under guard until 26 April 2016. The Minister averred further that the respondents remained in hospital on the authority of the Court. He denied that the respondents were assaulted and tortured by the police.

The respondents' evidence was that on the day of their arrests, they were attending a Mayoral Committee meeting at the Municipality's office. At approximately 15h00 a team of more than ten armed police officers arrived in about a dozen vehicles. These were apparently members of the Hawks and other several unidentified police officers. Three of the police officers went into the boardroom where the meeting was held. They pointed at the respondents and advised the meeting that the respondents

were required in connection with the attempted murder of one Mr Xolile Kompela and the murder of his bodyguard (the Tsolo case). Mr Kompela was the Speaker of the Mhlontlo Local Municipality.

The respondents were thereafter instructed to board separate motor vehicles. The police left with them and drove towards the N2 East London direction. All the police vehicles that had arrived at the Municipality's offices drove in a convoy. They stopped by some office in Butterworth. The distance between Mthatha and Butterworth is approximately 120 kilometres. It is about a one and a half to two-hour drive. The respondents were taken inside the office in Butterworth, which is not a police station. There, they were interrogated about the Tsolo case, assaulted and tortured.

At approximately 22h00, the convoy departed to Mthatha Central Police Station (the Police Station). They arrived at the Police Station close to midnight and were booked in and placed in the cells. On 19 April 2016, at approximately 03h00 in the morning, Mr Mambila was visited by an attorney in the cells. He told his attorney that he had been injured and requested him to arrange for him to be seen by a doctor. Mr Sabisa also reported the assault to his attorneys and requested them to take the necessary steps to have those responsible face the law.

That afternoon, the police arranged for the respondents to be taken to a doctor, following the requests made by their attorneys. The respondents were booked out of the cells and taken to a doctor. Mr Mambila had difficulty walking to the vehicle. He had to make use of a walking stick. The doctor recommended that the respondents be admitted to hospital. Mr Mambila was given an injection and was transported to the hospital in an ambulance. The respondents were admitted to the same ward. They were shackled to their beds and guarded by the police. They had to get permission from the police if they needed to relieve themselves.

On 26 April 2016, the respondents noticed that the police guards had left without any explanation. Their shackles were removed, and they were no longer detained in custody. They however remained in hospital. Mr Mambila was discharged from hospital on 28 April 2016 while Mr Sabisa was transferred to the Mthatha General Hospital, as his medical aid cover would be exhausted on 1 May 2016.

The high court found the arrest and detention of the respondents unlawful because they were not brought before a court within 48 hours as envisaged in s 50 of the Criminal Procedure Act 51 of 1977 (the Act). Furthermore, that they were detained in hospital in custody without an order of court authorising their continued detention beyond the mandatory 48-hour period. The high court further found the warrants to be defective 'to the extent that they did not authorize the arrestor to take the plaintiffs to Butterworth'. As regards the assault, the high court accepted the respondents' version.

On appeal, counsel for the Minister submitted that the police were armed with warrants of arrest, the validity of which was not challenged, and that they had no discretion but to arrest. The SCA held that this case had less to do with whether the arresting officer had a discretion to give effect to the warrants, but more with whether the execution of the arrest, complied with the law.

The SCA found that the arresting officer failed to comply with s 39(2) of the Act, which provides that: '[t]he 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'.

The SCA stated that to give effect to s 39(2), the respondents had to be told that they were being arrested on the authority of a warrant, otherwise how would they know to request a copy? If they were not told, it was reasonable for them to assume, as the respondents did, that they were being arrested without a warrant. The SCA further held that the arresting officer must be able to exhibit the warrant to the

intended arrestee, at the time of the arrest or immediately thereafter, otherwise the object of s 39(2) would be defeated.

The SCA found the evidence of the Minister's witnesses to be inconsistent in material respects. Firstly, that they contradicted each other as to who the arresting officer was, and secondly, on whether the respondents were informed that they were arrested on the authority of a warrant, and on whether it was exhibited to them.

The SCA found the detention in Butterworth after the arrest to be unlawful and not in compliance with the requirements of s 50(1)(a) of the Act. Section 50(1)(a) provides that any person arrested 'shall as soon as possible be brought to a police station or, in the case of an arrest by a warrant, to any other place expressly mentioned in the warrant'. The respondents were arrested at approximately 15h00 and arrived in Butterworth at approximately 17h30. They were interrogated in Butterworth until 22h00 when the convoy returned to Mthatha. They were only booked in the Police Station at approximately midnight (23h55). There was no lawful purpose to take the respondents to Butterworth.

The SCA further found that the police did not comply with s 50(1)(c) of the Act which requires an arrested person to be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. The respondents were shackled by the police in hospital for nine days, from 19 April 2016 after being booked out of the police cell in Mthatha until 26 April 2016. The period of 48 hours expired at 16h00 on 20 April 2016. Neither of the respondents was brought before a lower court to appear, nor was authorisation sought on 20 April 2016 or thereafter for their detention in hospital. There was no evidence of any court order in terms of s 50(1)(d)(ii) to that effect.

Counsel for the Minister sought to place reliance on s 39(3). The SCA held that s 39(3) provides for detention from the time of arrest until the first court appearance. That first detention must itself be lawful, which requires that it must have been preceded by a lawful arrest. In other words, the section presupposes that s 39(2) would have been complied with. Reading s 39(3) in any other way would deprive s 39(2) of any force.

The SCA held that the subsection does not allow for perpetual detention, even when the arrest was unlawful. Such a construal of the provision would infringe upon the detainee's fundamental right to liberty. In addition, it would directly offend against the provisions of s 50(1) that require an arrested person to be brought before a lower court without delay and no later than 48 hours. Further, it would confer unbridled power upon arresting police officers.

As to whether the assault took place, the SCA found that the probabilities favoured the respondents. They were kept in an office in Butterworth for approximately five hours with no clear justification for such length of detention being given by the Minister's witnesses. No plausible explanation was provided as to why the respondents were only booked into the police cells, at the Police Station, just before midnight, having been arrested at about 15h00. The SCA found the respondents' evidence was clear and cogent, and it was supported by the entries in the occurrence book and the common cause facts.

For these reasons, the SCA dismissed the appeal.

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