

SOUTH AFRICA / JUDGMENT

Minister of Police v Sabisa and Another (725/2023) [2024] ZASCA 105; 2024 (2) SACR 553 (SCA) (28 June 2024)

[2024] ZASCA 105

COURT

Supreme Court of Appeal

BEFORE

Mocumie, Mabindla-Boqwana, Koen, Coppin, Smith

CASE / FILE NUMBER

725/2023

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FLYNOTES:ADMINISTRATIVE PERSONAL INJURY – Unlawful arrest and detention – Assault – Warrant must be in possession of arrestor at arrest – Taken to office and not police station – Interrogated, assaulted and tortured – Shackled by police in hospital for nine days – Not brought before lower court to appear, nor was authorisation sought for their detention in hospital – High Court making awards for unlawful arrest and detention, assault, torture and contumelia – Appeal by Minister dismissed – Criminal Procedure Act 51 of 1977, ss 39(2), 50(1)(c) and 50(1)(d).

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 725/2023

In the matter between:

MINISTER OF POLICE APPELLANT

and

THANDEKILE SABISA FIRST

RESPONDENT

LAWRENCE NZIMENI MAMBILA

SECOND RESPONDENT

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

Coram: MOCUMIE and MABINDLA-BOQWANA JJA and KOEN, COPPIN and SMITH AJJA

Heard: 23 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 28 June 2024.

Summary: Delict – unlawful arrest and detention – Criminal Procedure Act 51 of 1977 (the Act) – execution of arrest with a warrant must comply with s 39(2) of the Act – arrested person must be taken to the police station or any other place expressly stated in the warrant of arrest in terms of s 50(1)(a) of the Act – arrested person to be brought before a lower court in compliance with ss 50(1)(c) and 50(1)(d) of the Act – further detention of the arrested person to be authorised by the court on application by the prosecutor.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Nhlangulela DJP, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

Mabindla-Boqwana JA (Mocumie JA and Koen, Coppin and Smith AJJA concurring):

Introduction

[1] The respondents, Mr Thandekile Nelson Sabisa and Mr Lawrence Nzimeni Mambila instituted claims for damages in the Eastern Cape Division of the High Court, Mthatha (the high court), against the appellant, the Minister of Police (the Minister) for unlawful arrest, unlawful detention and assault. Their matters were consolidated and heard by Nhlangulela DJP, who found in favour of the respondents and awarded each R400 000 for unlawful arrest and detention and R110 000 for assault, torture and contumelia. He granted leave to appeal to this Court.

Background

Facts

- [2] 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.
- [3] 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.

- [4] 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.
- [5] The respondents' evidence was as follows. On the day of their arrests, they were attending a Mayoral Committee meeting at the Municipality's offices. 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, namely, Detective Warrant Officer Xolile Mdepa, Colonel Loyiso Mdingi and Captain Batandwa Hanise went into the boardroom where the meeting was held. Col Mdingi pointed at the respondents and advised the meeting that they 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.

- [6] Col Mdingi instructed the respondents to accompany the police officers to their motor vehicles that were parked outside. The police seized the respondents' licenced firearms and cell phones. 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.
- [7] 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.
- [8] Mr Sabisa was instructed to remove his clothes until he was left with just his underwear on. There were policewomen present and this embarrassed him a great deal. As this was taking place, he was told to speak the truth. His hands were cuffed around the back of the chair, a tube was placed over his face and pulled at the back of his neck, to the point that he could not breathe. The police officers kept asking him where he got the money he gave to Mr Mambila. He told them that he knew nothing about the money, but they continued hitting him with fists and kicking him on his back. Tears started flowing and he felt embarrassed, having to sob in front of women. Capt Hanise kicked him hard with a knee on his private

parts which led to excruciating pain and increased body temperature.

- [9] Mr Mambila was also instructed to remove the clothes on his upper body and was handcuffed behind his back. He was also suffocated with a tube which covered his eyes and nose and was beaten all over his body. A foot was placed on his hands, which resulted in his chair falling over backward. He felt pain on his chest.
- [10] 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.
- [11] 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.
- [12] 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.
- [13] On 28 April 2016, the respondents attended the offices of the Hawks in Mthatha, by arrangement, for the purpose of having summonses served on them in respect of the Tsolo case. In terms of the summonses, the respondents had to appear in the Tsolo Magistrates' Court (the magistrates court) on 19 May 2016.
- [14] On 19 May 2016, the respondents appeared in the magistrates' court, after which the case was remanded on various occasions, with them warned to appear on the subsequent remand dates. The charges were withdrawn against Mr Sabisa during October 2016, and against Mr Mambila on 20 February 2017.
- [15] All three policemen who were present at the time of the arrest, namely, Warrant Officer Mdepa, Col Mdingi and Capt Hanise, testified on behalf of the Minister. They admitted the arrest in the boardroom, the drive to Butterworth and the detention of Messrs Sabisa and Mambila in hospital, albeit denying that those were unlawful. Their evidence, which I deal with in my analysis, was not cohesive in many respects. For current purposes, their evidence

was that the warrants of arrest were obtained on the strength of information obtained from a confession in the Tsolo case, which implicated the respondents in a plot to kill Mr Kompela. The respondents were informed of their constitutional rights during the arrest.

- [16] 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, 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.
- [17] In its reasons for granting leave to appeal, the high court seemed to confine the appeal to whether it had misapplied ss 44 and 51(1)(a) of the Act. To the extent that it is not clear which aspects of the judgment are to be appealed against, the approach I take favours the Minister. The Minister did not appeal the quantum awarded.

On appeal

- [18] 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. He referred to the recent Constitutional Court decision of *Groves N.O. v Minister of Police*[1] which held that s 43(2)[2] of the Act 'places a positive duty on an arresting officer to arrest the person identified in the warrant with the use of the word "shall"'

The Constitutional Court held that a peace officer executing a warrant has no discretion but to act in accordance with the terms of the warrant. However, bearing in mind the principle of rationality, there may be situations where the arresting officer will have to make value judgment but that would only be:

'[W]here the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be effected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.'[3]

- [19] In my view this case has 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. There are questions about whether the warrants were ex facie defective by failing to indicate where the arrested persons should be taken. It is however not necessary to decide that issue. The matter can be disposed of on the factual basis, namely, whether the manner and effecting of the arrests complied with the law.

Was the arrest of the respondents lawful?

[20] In terms of s 39(1) of the Act an arrest may be effected with or without a warrant, except if the intended arrestee submits to custody.

Relevant for our purposes is s 39(2) which provides that:

‘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.’ (Emphasis added.)

[21] This section deals with two alternative requirements, ie the communication of the reason for the arrest or in the case of an arrest effected by virtue of a warrant, the handing over of a copy of the warrant upon demand. Non-compliance with s 39(2) renders the arrest unlawful. [4] These alternative conditions must occur at the time of the arrest or immediately thereafter. The latter signifies an occurrence ‘as soon as reasonably possible in the circumstances’.[5]

[22] In *Minister van Veiligheid en Sekuriteit v Rautenbach*[6] (Rautenbach), this Court held that it is imperative that the persons arrested be informed, as soon as is practically possible, of the reason for the drastic infringement of their fundamental right to liberty. To achieve this objective, a strict rather than a loose application of the statute’s requirements must be adopted.

[23] In the Rautenbach matter, the arresting officer had told the suspect that he was arresting him on a warrant. The intended arrestee asked where the warrant was, and the arresting officer told him he would give it to him as soon as the suspect had accompanied him to the police station. The intended arrestee refused to go until he saw the warrant. The arresting officer arrested him anyway. The Court held that s 39(2) assumes that the arrestor has a copy at hand when arresting so that he or she can hand it over at the request of the arrestee. The Court found that the arrestor had no intentions to comply with s 39(2) at the time of the arrest.

[24] Turning back to this case, the respondents alleged that they were arrested without a warrant and if there was one, it was not shown to them at the time or immediately after they were arrested. In the first instance, 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 else would they know to request a copy? If they are not told, it is reasonable for them to assume, as the respondents did, that they were being arrested without a warrant.

[25] Counsel for the Minister submitted that it is sufficient that a warrant was obtained, even if not in the possession of the arrestor at the time of the arrest. Such a reading of the provision is untenable and goes against the primary object of the section. The existence of a warrant ‘somewhere’ does not (by itself) make the execution of the arrest lawful. The arresting officer must be able to exhibit it to the intended arrestee, at the time of the arrest or immediately thereafter, otherwise the object of s 39(2) is defeated.

- [26] In this case, the evidence of the Minister's witnesses was inconsistent in material respects. Firstly, 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. Warrant Officer Mdepa testified that he was the arresting officer. He stated that he displayed the warrants to the respondents and informed them of their constitutional rights and that they were being arrested in connection with a case of murder.
- [27] Col Mdingi, on the other hand, in his evidence in chief mentioned a warrant only in relation to Mr Sabisa. It was only in cross examination that he spoke about Warrant Officer Mdepa having warrants for both respondents. Capt Hanise testified that Col Mdingi was the arresting officer and that he had informed the respondents of their constitutional rights and their right to remain silent. Most importantly, he stated that Col Mdingi had no warrant of arrest in his possession when informing the respondents about their rights.
- [28] These contradictions were compounded further by the fact that, despite Warrant Officer Mdepa's testimony that he had shown the warrants to the respondents, he wrote on the warrants themselves that they were executed on 19 April 2016, which is contrary to the alleged date of execution, namely, 18 April 2016.
- [29] Furthermore, there was no mention in the investigation diary that the warrants had been obtained by Warrant Officer Mdepa in Tsolo on 18 April 2016 and/or that they were available and in his possession at the time of the arrest as required by the Standing Order (General) 323 Investigation Diary (SAPS 5) (the Standing Order).[7] The Standing Order required completion of the investigation diary, inter alia, to contain a complete chronological record of all work done in the case, including when a house or other place is visited, and the name and address of the person visited or searched.
- [30] Weighing the respondents' evidence against that adduced on behalf of the Minister on this issue, the probabilities favour the respondents' version that they were not informed of the existence of warrants by virtue of which their arrests were to be effected. The Minister, accordingly, failed to show that the arrests were lawful.

Were the respondents lawfully detained after the arrest?

- [31] The purpose of the arrest is to bring the arrested person before a court to face justice. Section 50 regulates the process after arrest. 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 warrant, to any other place expressly mentioned in the warrant'.

- [32] The warrants in this case do not indicate where the arrested persons had to be taken. Most importantly, they did not direct that the respondents be taken to Butterworth. At best for the Minister, although there was no indication of which place the respondents must be taken to, on the warrants, they ought to have taken them to a police station. It is not clear why they were not immediately taken to the Police Station, but on a long trip to Butterworth, only to return later to Mthatha where they were then detained.
- [33] The Minister's witnesses stated that the respondents were taken to the offices of the Butterworth Crime Intelligence for questioning. Col Mdingi testified that the reason why the respondents were taken to Butterworth was that, because there were factions in the African National Congress, he did not know what would happen if people found out that their leaders were arrested. According to Warrant Officer Mdepa, the respondents were prominent individuals, and their arrest could create chaos in the community. This does not make any sense. The community would have found out sooner or later about the respondents' arrests. The important issue, in any event, is that police officers are bound to act in accordance with the law.
- [34] The Minister's witnesses testified that the interviews in Butterworth were short. In that case, it makes no sense, why the respondents would be kept there for approximately five hours when they had indicated early on, at the mayor's office, that they wanted legal representation. To aggravate matters, there was no satisfactory explanation in the evidence of the three policemen as to what actually transpired in Butterworth, nor of any warning statements taken from the respondents. Warrant Officer Mdepa testified that he only took the warning statements on 19 April 2016 at the hospital, an occurrence which was also not recorded in the investigation diary.
- [35] The respondents, on the other hand, explained that they 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 detention in Butterworth after the arrest was, consequently, unlawful and not in compliance with the requirements of s 50(1)(a) of the Act.

Was the further detention lawful?

- [36] Section 50(1)(c) of the Act 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. Subsection (d)(i) states that if the period of 48 hours expires outside ordinary court hours, the person may be brought before a lower court not later than the end of the first court day.
- [37] In terms s 50(1)(d)(ii) (the most relevant section for our purposes), if the 48-hour period expires at the time when the arrested person cannot be brought before a lower court, because of physical illness or condition, the court to which he or she would have been brought, but for the illness, may on application by the prosecutor:

‘authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court.’

- [38] The application envisaged in this section must set out the circumstances relating to the illness or condition which the arrested person suffers from and be accompanied by a certificate of a medical practitioner. Court orders for further detention at the said place may be similarly sought.[8]
- [39] 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. The Minister pleaded that the respondents were detained in hospital on judicial authority. There is, however, no evidence of any court order in terms of s 50(1)(d)(ii) to that effect.
- [40] Counsel for the Minister argued that the words ‘Acc 3 and in absentia – reported to be admitted in hospital’, appearing in the record of the proceedings of 20 April 2016, in the magistrates’ court, should be read as a court order remanding the respondents in hospital. This statement is a far cry from being a court order, let alone a court order complying with the requirements of s 50(1)(d)(ii). Firstly, there was no application by the prosecutor supported by a medical certificate. Secondly, there was no court order authorising and specifying the place and the period of detention.
- [41] The record of proceedings of 26 April 2016 in the magistrates’ court puts paid to the Minister’s case. The magistrate ordered the release of the respondents on the strength of the submissions by the respondents’ counsel, who appeared in the magistrates’ court, that their further detention contravened s 50(1) of the Act.
- [42] Confronted with these difficulties, counsel for the Minister, for the first time, and at the hearing of the appeal, placed reliance on s 39(3) of the Act which provides:
- ‘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.’
- [43] He submitted that by virtue of this provision the respondents were in lawful custody until they were released by the court order on 26 April 2016. This, he contended, must be considered with the fact that the court had at the previous hearing remanded the respondents ‘in absentia’. Based on this new argument, he moved for an amendment to the plea to include this new defence.
- [44] An amendment of the plea will not assist the Minister, on the simple basis that, counsel’s interpretation of s 39(3) is incorrect.

In *Minister of Justice and Constitutional Development and Another v Zealand*, [9] this Court said:

‘Section 39(3) provides for lawful detention during the period between lawful arrest and the first court appearance.’ (Emphasis added.)

[45] Section 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.

[46] The subsection does not allow for perpetual detention until the court has ‘finally spoken’, 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. The Minister’s counsel’s interpretation is clearly untenable on any reading, also because it would confer unbridled power upon arresting police officers. In the circumstances, the further detention of the respondents after the expiry of the 48-hour provision, was unlawful.

Were the respondents assaulted?

[47] The probabilities regarding whether the assault took place favour 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. As stated, 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.

[48] The respondents’ evidence on the other hand was clear and cogent. It was supported by the entries in the occurrence book. They told their attorneys at the first available opportunity that they had been assaulted and were injured. The occurrence book reflects that at 10h30 and 11h00 on 19 April 2016, the respondents’ attorneys consulted their clients and requested that the police accompany the respondents to hospital as they were complaining of body pains. Mr Mambila testified that he had to use a walking stick to go to the vehicle. The respondents were taken to a doctor who recommended that they be taken to hospital. Mr Mambila had to be transported by an ambulance from the doctor’s examination room to hospital, due to his serious condition. The fact that the doctor was not called to testify or that the full medical record of Mr Mambila was not presented, is of no moment given the common cause facts which amply support the respondents’ evidence of assault.

[49] For these reasons, the appeal must fail. It is accordingly dismissed with costs, including those of two counsel where so employed.

N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Appearances

For the appellant: V Notshe SC with A Magadla

Instructed by: State Attorney, Mthatha

State Attorney, Bloemfontein

For the respondents: N Mullins SC with L Kroon

Instructed by: Mvuzo Notyesi Inc, Mthatha

Phalatsi & Partners, Bloemfontein.

[1] Groves N.O. v Minister of Police

[2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC) paras 56 and 60.

[2] Section 43(2) states that '[a] warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section 50'.

[3] Groves N.O. fn 1 para 60.

[4] Minister of Law and Order v Kader 1991

(1) SA 41 (A) at 46A-B.

[5] Minister van Veiligheid en Sekuriteit v Rautenbach 1996 (1) SACR 720(A) at 729C-D.

[6] Ibid.

[7] Issued by Consolidation Notice 44 of 2012.

[8] Section 50(1)(d)(ii).

[9] Minister of Justice and Constitutional Development and Another v Zealand [2007] ZASCA 92; 2007

(2) SACR 401 (SCA) para 10.

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