

SOUTH AFRICA / JUDGMENT

Shongwe v Magistrate Barberton and Others (1948/2018) [2019] ZAMPMHC 15 (16 September 2019) [2019] ZAMPMHC 15

COURT

Middelburg High Court, Mpumalanga

BEFORE

HF Brauckmann, SS Mphahlele

CASE / FILE NUMBER

1948/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION, MIDDELBURG
(LOCAL
SEAT)
CASE
NO: 1948/2018

In

the matter between:

SIPHO
SHONGWE APPELLANT
And
THE
MAGISTRATE BARBERTON
(MR.
MHLANGA) 1ST
RESPONDENT
THE
STATE 2ND
RESPONDENT
THE
ADDITIONAL MAGISTRATE
(Miss.
Mabetwa) 3rd
RESPONDENT

JUDGMENT**(APPLICATION FOR LEAVE TO APPEAL)**

- [1] The applicant applied for leave to appeal against the whole of the judgment and the order, as well as the reasons therefor, which was granted on 14 June 2019. In terms of the said judgment the applicant's application to review and set aside the warrants for his arrest issued by the Magistrate was dismissed.
- [2] The applicant's grounds for leave to appeal was set out in his notice and are:
- "1. The court erred in finding that the applicant is a fugitive from justice;*
2. The finding of the court that civil case law was not applicable regarding the question of a fugitive from justice in criminal proceedings, yet admitting the civil case law submitted by the second respondent was unduly favourable to the latter;
 3. The court erred in finding that it was common cause that the applicant fled South Africa;
 4. The court erred in making finding on the merits of the matter;
 5. The court erred in finding that the first warrant of arrest was properly cancelled;
 6. The court erred in finding that there is no requirement for an affidavit when applying for a warrant of arrest in terms Section 43 of the Criminal Procedure 51 of 1977 ('CPA');
 7. The court erred in finding that the applicant's submission regarding SAPS National Instruction 3 of 2011 and the SAPS National order 324 ought to have been contained in the applicant's founding affidavit or replying affidavit, dismissing the grounds that there was no offence registered against the applicant;
 8. The court erred in failing to consider the applicant's ground of review that the area commissioner had taken a decision to authorise a warrant of arrest in terms Section 39(6)(a) of the Correctional Service Act, Act 111 of 1998 ('CSA') and therefore the third respondent had no jurisdiction to issue the second warrant;
 9. The court erred in finding that the applicant escaped by passing of a fraudulent document."

[3] The applicant raised no new issues in its application for leave to appeal. We dealt with all the issues raised in this application in the original judgment and therefore we do not deem it necessary to repeat those in full.

[4] In terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, the leave to appeal may only be given where the judge or the judges concerned are of the opinion that the appeal would have a reasonable prospect of success.

- [4] Mr Ngwenya, counsel for the applicant, submitted that the court erred in finding that the applicant was a fugitive from justice as he was in custody in the Kingdom of Eswatini, at the behest of the South African Government and any order made by a South African court can effectively be executed in Eswatini. Only where the individual's whereabouts are unknown to the court, or such individual's legal representative, can somebody be regarded as a fugitive from justice in the sense provided for in the judgment Mulligan
- v. Mulligan[1], so goes his argument. What the applicant's representative loses sight of is the fact that the applicant left South Africa immediately after he was "erroneously" released on an alleged forged court order and liberation warrant. The South African Authorities became aware of the applicant's whereabouts due to his arrest on an unrelated charge of murder in Eswatini.
- [5] Even if it could be found that the applicant was not a fugitive from justice, the review application would still fail as the warrant for his arrest was legally and properly issued by the Magistrate.
- [6] Mr. Ngwenya further submitted that due process was not followed in the cancellation of the first warrant, therefor leaving the first warrant "un-cancelled". If this contention by the applicant is found to be correct, then the first warrant of arrest, would for all intents and purpose, remain valid.
- [7] The first warrant was authorised and correctly issued by the Magistrate after a written application by the investigating officer
- based on information obtained under oath that a reasonable suspicion exists that the applicant have committed a crime in the area of jurisdiction of the Magistrate (Barberton).
- [8] Further any of the warrants duly issued in terms of the Criminal Procedure Act are not in any way affected by any warrant in existence already issued in terms of section 39(3) of the Correctional Services Act.
- [9] The purpose of a warrant for arrest in terms of Section 43 of the CPA is to arrest an individual where it is suspected that he or she is guilty of having committed an offence. After the arrest is effected a criminal court will establish whether the person is guilty beyond a reasonable doubt of the said offence or not, and only if found to be guilty will a court sentence such a person appropriately.
- [10] The warrant in terms of the CSA is issued under circumstances where the person is unlawfully discharged or have escaped from lawful custody, and has as purpose the re-arrest of the prisoner to serve the balance of his sentence , as aptly pointed out by applicants counsel by referring to Section 39 (3) and (6) of the CSA.
- [11] The warrants issued in terms of the CPA and CSA are not mutually destructive, and the issuing of the first (or the second warrant) in casu, by the Magistrate, is not unlawful.

- [12] The cancellation of the first warrant had little, if any, effect on any of the applicant's rights. The issuing of the warrant is what is contemplated in the said section. The prosecutor cancelled the first warrant with the consent of the Magistrate. From the Magistrate's supporting affidavit to the application it is clear that she only issued the second warrant after the first warrant was duly cancelled in her presence.
- [13] The act of cancellation (physical cancellation) was done in the presence of the Magistrate and with her consent and blessing as she states in her supporting affidavit that only after the cancellation, in her presence, did she issue the second warrant of arrest, based on the written application as borne out of the facts contained in the sworn affidavit of Lieutenant Colonel NO Mashabela which clearly discloses a reasonable suspicion of an offence having been committed by the applicant.
- [19] Under the circumstances, this court is not convinced that another court would come to a different conclusion, even if it was found that the applicant was not a fugitive from justice.
- [20] The application for leave to appeal is accordingly dismissed.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

I agree

SS MPHAHLELE

JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT : Adv T S Ngwenya

INSTRUCTED BY: JF Shabangu Attorneys

COUNSEL FOR THE RESPONDENT : Adv E Leonard SC

INSTRUCTED BY: State Attorney

DATE OF HEARING: 13 AUGUST 2019

DATE OF JUDGMENT:

[1] 1925 WLD, page 164

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMHC/2019/15.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/shongwe-v-magistrate-barberton-and-others-unknown-topic-ampmhc-2019>

Prepared on 12 October 2026 · Esheria