THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 576/11

Reportable

In the matter between:-

RADITSHEGO GODFREY MASHILO **FIRST APPELLANT**

MINISTER OF POLICE **SECOND APPELLANT**

and

JACOBUS MICHAEL PRINSLOO **RESPONDENT**

Neutral citation: *Mashilo v Prinsloo* (576/11) [2012] ZASCA 146 (28 September 2012)

Coram: Mpati P, Navsa, Nugent, Tshiqi and Theron JJA

Heard: **17 August 2012**

Delivered: **28 September 2012**

Summary: Interpretation of s 50 (1) (b) (c) (d) and (6) of the Criminal Procedure Act 51 of 1977 – 48 hours – maximum period stipulated - police not always entitled to detain a person until that period expires – an arrested person has the right to be brought before court to enable a bail application as soon as is

reasonably possible – that is the standard to be applied – s 50(1)*(d)* does extend the period of 48 hours if it expires outside normal court hours or on a day when the court does not normally sit – even then the standard is that an arrested person is to be brought before court as soon as is reasonably possible.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Du Plessis AJ sitting as court of first instance):

1 Leave to appeal to this court is granted.

2.1 The appeal is upheld.

2.2 The order of the court below relating to costs is set aside.

3 There is no order as to costs.

JUDGMENT

TSHIQI JA (MPATI P, NAVSA, NUGENT AND THERON JJA CONCURRING)

[1] On Thursday 19 November 2009, Mr Prinsloo - the respondent - in this appeal, brought an urgent application in the North Gauteng High Court for an order for his immediate release, on his own cognisance, alternatively on bail on appropriate conditions. He further sought an order for costs against the first appellant, Mr Mashilo, a detective stationed at Kameeldrift Police Station, Pretoria. Prinsloo had been arrested the previous day on Wednesday, 18 November 2009, at apparently 16h30 by Mashilo, and detained at Kameeldrift Police Station. He was implicated in the murder of his former wife, from whom he was divorced at the time. His being implicated arose as a

result of a confession made by the only state witness, who was his gardener at the time of the death of his former wife. He had spent the night of 18 November 2009 in detention.

[2] The only version before the court below, on what had led to the application, was contained in an affidavit by Prinsloo's attorney of record, Mr Kruger. He stated that he went to the police station on 19 November 2009 after he was called by his client, Prinsloo. At the police station he approached Mashilo in an attempt to arrange for Prinsloo to be taken to court. He asked Mashilo when the latter intended to bring Prinsloo before court. His intention was to ensure that his client was brought to court as soon as was reasonably possible, before the weekend intervened, in order to facilitate an application for bail. The application was intended to ensure Prinsloo's release so that he could care for his two boys, (aged 16 and 18 years respectively) who had been left at home alone. Mashilo's response was that he was busy; that he was entitled to detain Prinsloo for a period of 48 hours prior to him being taken to court and that he would take him to the magistrate's court, Pretoria North, on Monday morning, 23 November 2009. Kruger informed him that it was not necessary to detain Prinsloo for a further four days until that Monday as the latter was not a flight risk and that there was no danger that he would interfere with the State's witness. Mashilo persisted that he was very busy with other things at the time and refused to accede to Kruger's request. Following this exchange Kruger decided to approach the high court.

[3] The application came before Du Plessis AJ, in chambers on 19 November 2009. After a brief discussion, the court made an order directing the National Prosecuting Authority (NPA) and Mashilo, the first and second respondents in the court below, respectively, to take Prinsloo to the Pretoria North Magistrates' Court on or before 14h00 on 20 November 2009, failing which he would be entitled to again approach the high court on the same papers, for appropriate relief. Mashilo was further ordered, in the event of his failure to comply with the court order, to appear before the high court on 20 November 2009, to show good cause why a costs order should not be made against him personally.

[4] On 20 November 2009, Prinsloo was taken to the Pretoria North Magistrates' Court as per the court order. The application for bail was not heard, because, so Mashilo alleged, the magistrate who had been approached to preside over it had taken the confession from Prinsloo's gardener.

[5] The application resumed before the high court on the afternoon of 20 November 2009, as per the court order. Kruger informed the court that there had been non-compliance with its earlier order and he was therefore persisting with an application for Prinsloo's release. He further informed the court that he had abandoned the prayer for costs against Mashilo and would, instead seek a costs order against the NPA as the application was now in effect against the NPA. At that stage counsel for Mashilo, the station commander at Kameeldrift and the Minister of Safety and Security were all absent. They had earlier asked Kruger to request the court to excuse them, because

they thought their presence in court was no longer necessary. Presumably, their perception was influenced by the fact that on resumption, there was no longer any costs order sought against them. Kruger indeed conveyed their request to the court.

[6] After hearing argument, the high court granted an order effectively releasing Prinsloo on certain conditions. It further ordered him inter alia, to appear before the magistrates' court on Monday for a bail hearing. Full reasons for the order were provided in writing on 11 October 2010. In that judgment the court further granted a costs order, not against the NPA as prayed for in the subsequent application, but against Mashilo in his personal capacity. A subsequent application for leave to appeal against such an order was refused by the learned judge.

[7] On 1 December 2011, this court, (per Navsa and Bosielo JJA), referred the application for leave to appeal for oral argument in terms of s 21(3)*(c)*(ii) of the Supreme Court Act 59 of 1959. It further ordered the parties to be prepared, if called upon to do so, to address the court on the merits.

[8] The application for leave to appeal did not pertain to the earlier order by the high court but to the subsequent order releasing Prinsloo and the costs order against Mashilo. As Prinsloo had already been released, the essence of the application for leave to appeal was not to set aside such an order. Such an exercise would have been academic. It was directed at the costs order made against Mashilo. In this court counsel

for Prinsloo conceded that the costs order against Mashilo should not have been made as Prinsloo had abandoned his prayer for costs against Mashilo. But because that costs order was based on an alleged misinterpretation by the court below of the provisions of s 50 of the Criminal Procedure Act, counsel for the appellant submitted that this court should consider the merits of the matter. What was sought to be achieved was a definite interpretation of that section. After the concession pertaining to the costs order against Mashilo was made, it followed that such an order was an obvious error. In such circumstances it stands to be rectified in terms of s 22 of the Supreme Court Act.

[9] This then brings me to the interpretation of the provisions of s 50(1) and (6) of the Criminal Procedure Act which reads as follows:

'50(1) *(a)* Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph *(a)* shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph *(d)*, if such an arrested person is not released by reason that-

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A,he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires-

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

…

(6) *(a)* At his or her first appearance in court a person contemplated in subsection (1) *(a)* who-

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60-

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released; or ….

[10] Section 50(2) defines 'a court day' to mean a day on which the court in question normally sits as a court and 'ordinary court day' has a corresponding meaning. 'Ordinary court hours' is defined as meaning the hours from 9h00 until 16h00 on a court day. If the aforesaid 48 hours expire–

(a) on a day which is not a court day or on any court day after four o'clock in the afternoon, the said period is deemed to expire at four o' clock in the afternoon of the next succeeding court day;

(b) on any court day before four o' clock in the afternoon, the said period is deemed to expire at four o'clock in the afternoon of such court day.[1]

[11] Section 50 was designed, even before the advent of the new constitutional dispensation, to encroach in the least restrictive manner on a potential accused's right to freedom. Subsection 50(1)*(a)* is the beginning of steps to be taken to expedite the workings of the criminal justice system.[2] First, an arrested person has to be brought to a

[1] Section 50(1)*(d)* and (2) of the Criminal Procedure Act; Alfred V Lansdown & Jean Campbell *South African Criminal Law and Procedure* Vol v (supra).

[2] See *South African Criminal Law and Procedure* (Formerly Gardiner and Lansdown) volume 5, Alfred V Lansdown & Jean Campbell *Cirminal Procedure and evidence* (1982) at page 261 to 262.

police station as soon as possible after his or her arrest. Second, that person is required, in terms of s 50(1)*(b)* to be informed of his or her right to institute bail proceedings 'as soon as reasonably possible'. Section 50(1)*(c)*(ii) requires that an arrested person be brought before a lower court 'as soon as reasonably possible', but not later than 48 hours after the arrest. This is to ensure court oversight and to enable a bail application to be brought.

[12] Section 35(1) of the Constitution gives new impetus to the expedition that has to be brought to bear in dealing with an arrested person. Section 35(1)*(d), (e)* and *(f)* of the Constitution reads as follows:

'(1) Everyone who is arrested for allegedly committing an offence has the right-

. . .

(d) to be brought before the court as soon as reasonably possible, but not later than-

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

(e) 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; and

(f) to be released from detention if the interest of justice permit, subject to reasonable conditions.'

[13] Section 50*(d)*(i) was clearly intended to extend the 48 hour outer limit during which an arrested person could be detained. That is made plain from the language of the subsection and has, during the last 35 years since the introduction of the Act, always been understood to be so. This is clear from one of the earlier foremost authorities on Criminal Law and Procedure, namely the work by Lansdown and Campbell *op cit* at 299 to 300. See also the interpretation given by Eksteen J in *Hash v Minister of Safety and Security* [2011] ZAECPEHC para 71. The legislative purpose in extending the 48 hours, if it is interrupted by a weekend, appears to me to be fairly obvious. It is because the logistics of ensuring an appearance before court over a weekend are difficult. Put differently, it is difficult to co-ordinate police, prosecutorial and court administration and activities over a weekend. This was especially true at the time that the legislation was introduced. It continues to be true today.

[14] In interpreting the section, the court below said in its judgment:

'[20] … Artikel 50 (1)(d)(i) bepaal dat indien die periode van 48 uur verstryk buite gewone hofure of op 'n dag wat nie 'n gewone hofdag is nie, die beskuldigde voor 'n laer hof gebring moet word nie later nie as die einde van die eerste hofdag.

[21] In hierdie geval het die 48 uur verstryk om 16h30 op Vrydag, 20 November 2009. Na my mening beteken die verwysing na eerste hofdag nie 'n hofdag na verstryking van die 48 uur nie, maar 'n hofdag in die eerste gedeelte van die 48 uur….

[22] Ek is dus van mening dat op 'n behoorlike interpretasie van artikel 50 (1)(d) van die Strafproseswet, 'n gearresteerde persoon, indien die 48 uur verstryk buite gewone hofure of op

‘n dag wat nie ‘n gewone hofdag is nie, voor ‘n hof gebring moet word gedurende en nie later nie as die einde van die eerste hofdag na sy arrestasie.’

[15] This interpretation was erroneous. In arriving at his conclusion, the learned judge in the court below failed to consider not only what is set out in the preceding paragraphs, but in having regard to constitutional values, he failed to take into account s 35(1)*(d)*(ii) which, itself, recognises that the 48 hour period may be extended if interrupted by a weekend.

[16] The matter could have been decided in the court below without resorting to a strained interpretation of s 50(1)*(d)*. The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hour expires before or during the weekend. Expedition relative to circumstances is what is dictated by the subsection and the Constitution. Deliberately obstructive behaviour, as was evidenced by Mashilo, is not tolerated. On that basis alone, the court below could quite easily have ordered that he be brought to court immediately to facilitate a bail application.

[17] In the present matter Prinsloo was arrested on 18 November 2009. The period of 48 hours within which he should have been brought before a magistrate was to end at

16h30 on Friday, 20 November 2009, which time would be outside the ordinary court hours as prescribed in terms of s 50(2). The ordinary court hours would have expired at 16h00 that afternoon. This means that he was only entitled to appear before court the next court day (Monday). Whether or not Prinsloo should have been made to wait that long is not relevant for purposes of this appeal as he has already been released. All that need be said is that Mashilo (and probably many other police officers at the police force) clearly misunderstands the provisions of s 50. His response to Kruger that 'he was entitled to detain the applicant for 48 hours before he had to be brought to court for the first time', was ill-conceived.

[18] That then brings me to the issue of costs. The present appeal was brought by the NPA in order to gain clarity on the proper interpretation of s 50(1) and (6) of the Criminal Procedure Act. To the extent that the interpretation by the court below has been corrected, its appeal succeeds. The appeal by Mashilo also succeeds as the costs order against him has been set aside. It would be unfair to burden Prinsloo with the costs of an appeal, pursued for the present purposes. An appropriate costs order therefore would be that there should be no order as to costs.

[19] In the result, I make the following order:

1 Leave to appeal to this court is granted.

2.1 The appeal is upheld.

2.2 The order of the court below relating to costs is set aside.

3 There is no order as to costs.

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For the Appellants:	T.P. Krüger (with L. le Roux) Instructed by: State Attorney, Pretoria State Attorney, Bloemfontein
For Respondent:	L.S. de Klerk SC Instructed by: Rynhart Kruger Attorneys, Pretoria Honey & Partners Inc, Bloemfontein