THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 649/11

In the matter between: Reportable

NATIONAL COMMISSIONER OF POLICE **First Appellant**

MINISTER OF SAFETY & SECURITY **Second Appellant**

and

JACK COETZEE **Respondent**

Neutral citation: *National Commissioner of Police v Coetzee* (649/11) [2012] ZASCA 161 (16 November 2012)

Coram: MPATI P, CLOETE, PONNAN, BOSIELO and PETSE JJA

Heard: 28 August 2012

Delivered: 16 November 2012

Summary: **Criminal procedure – arrest – legality – refusal of bail does not render otherwise lawful arrest unlawful – no place for *interdictum de homine libero exhibendo* in those circumstances.**

ORDER

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

1 The appeal is upheld with costs, which shall include the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

MPATI P (CLOETE, PONNAN, BOSIELO and PETSE JJA CONCURRING):

[1] This appeal, though against the costs orders made by the court a quo (Du Plessis AJ), involves the question of the authority of a high court to release from custody an arrested and detained person before he or she has been brought before a lower court. It is common cause that during the afternoon of Sunday, 15 November 2009, the respondent was flagged down by a metro police traffic officer, while driving his motor vehicle along Trans-Oranje Road on his way home to Pretoria, from Hartebeespoort Dam. He did not stop. In the vehicle with him were his wife, Ms Hester Coetzee, his son, Vincent, and the latter's girlfriend. The metro police officer, later identified as Constable Frans Sivayi, gave chase and, with the help of reinforcements, managed to stop the respondent, who was then arrested and taken to the Pretoria West Police Station, where he was detained. He was given a SAPD 14A form headed 'NOTICE OF RIGHTS IN TERMS OF THE CONSTITUTION' through which he was informed that he was 'being detained for the following reason: FAILED TO COMPLY WITH INSTRUCTION OF TRAFFIC OFFICER, CRIMEN INJURIA AND DRIVING UNLICENCED AND UNREGISTERED MOTOR'.

[2] Later that evening the respondent's wife engaged the services of an attorney to secure the respondent's release from custody. It appears that there was no notice of motion placed before the court a quo, but in her affidavit in support of the application for the respondent's release, she asserts that '[i]ndien die Agbare hof sal besluit om Borg toe

te staan kan ek R500 bekostig'. Despite this wording counsel for the respondent submitted in this court that what was before the court a quo was not a bail application but an approach to the court for it to consider and to 'ventilate' the common law principle relating to the *interdictum de homine libero exhibendo.* The application was heard at 23h00 and Du Plessis AJ made the following order:

'1. The respondents are ordered to immediately release the applicant from custody at the Pretoria West Police Station, or any other place where the applicant may be held.

2. The respondents are called upon to provide written reasons why the applicant was not given bail or an opportunity to apply for bail, and why the applicant was not given an opportunity to pay a fine for the alleged contravention committed, which reasons shall be presented to the above Honourable Court and judge, in the urgent court on 17 November 2009.

3. The respondents are ordered to provide this Court on 17 November 2009 with the names of the station commander of the Pretoria West Police Station that was on duty during the evening of 15 November 2009, as well as the name of the investigating officer of the applicant.'

The learned acting judge had indicated during argument before him that he intended to issue a rule nisi.

[3] As to what transpired on 17 November 2009 Du Plessis AJ says the following in his judgment delivered on 11 October 2010:[1]

'Further affidavits were then filed by the parties, whereafter the matter was finally argued. I required full reasons why the applicant was not given bail or granted the opportunity of paying a fine by the SAPS after having been arrested, and as to who should pay the costs of the application. The station commander, the Metro policeman, the investigating officer, and the commander responsible that evening for charging persons and granting bail, eventually appeared before me, and they were all represented by the State Attorney and counsel. They were joined as respondents and had the opportunity to file affidavits and be represented.'[2]

The learned acting judge confirmed the order he had made previously and further ordered the station commander, Senior Superintendent Moodley, Superintendent Klopper, Captain Nhlazo and Inspector Dulebu, all of the Pretoria West Police Station and Constable Sivayi

[1] The judgment is reported as *Coetzee v National Commissioner of Police & others* 2011 (2) SA 227(GNP).
[2] Para 7.

to pay the respondent's (applicant in that case) and the first and second appellants' (first and second respondents in that case) costs *de bonis propriis* on the scale as between attorney and own client. He also ordered the appellants to pay any further outstanding costs 'in the event, and only in the event of all execution steps having been taken, finalised and exhausted against the abovementioned officials'. The learned acting judge subsequently dismissed the appellants' application for leave to appeal against the costs orders he made. This appeal is with leave of this court and is against the court a quo's costs orders only.

[4] At the first hearing before the court below during the evening of 15 November 2009 the respondent's attorney, Mr Riaan Meyer (Meyer), testified orally that the respondent 'was arrested . . . for negligent and reckless driving' and that the normal procedure in respect of that offence was that 'one can get a fine of R500 or R1000' (page1). At the second hearing ('return day') it was argued on behalf of the respondent that his arrest and detention were unlawful and that the court had correctly ordered his immediate release.

[5] In his affidavit deposed to on 18 November 2009 the respondent averred that while he was driving along Trans – Oranje Road he saw a person move towards the road from a motor vehicle, which was presumably parked on the side of the road to his left and ahead of him. This person signalled to him to stop, but because he was not convinced that the person was a law enforcement officer (geregsdienaar) he did not stop. He decided to carry on and after a short distance ('n ent verder) persons in a motor vehicle followed him and signalled to him to stop. His son then shouted in the direction of the pursuers – Sivayi and a colleague - saying they should follow them to the police station. The respondent stated that he was aware of certain instances where criminals held themselves out as traffic officers and that he therefore did not want to endanger his wife and his son's girlfriend who were in his vehicle. The court a quo accepted this explanation and held that 'it was justifiable for the [respondent] to have indicated that he was driving to the nearest police station'.

[6] In dealing with the lawfulness of the arrest Du Plessis AJ referred to s 35(1)*(f)* of the Constitution, which provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject

to reasonable conditions. He also referred to s 35(2)*(d)* which provides that everyone who is detained has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. The learned acting judge concluded, correctly so in my view, that the provisions of the Criminal Procedure Act 51 of 1977 (CPA) 'should therefore be considered against the background of these constitutional provisions'. He made the comment that arrest is the most drastic method to secure a person's attendance at his trial and that it ought to be confined to serious cases. Referring to *S v More* 1993 (2) SACR 606 (W) he said that an arrest should be effected only where it is likely that a summons or written notice to appear will be ineffective.

[7] Du Plessis AJ then considered the alleged offences in respect of which the respondent was being detained and held that not one of them was an offence referred to in Schedule 1 to the CPA and that therefore the respondent's arrest 'could only have been an arrest in terms of s 40(1)*(a)* of the [CPA]'[3]. He further said the following:

'In the light of the provisions of the Constitution, read with the provisions of s 59, it is clear that an accused person who has been arrested for minor offences, for which bail may be granted in terms of s 59 of the [CPA], has a right to be treated in such a way that he is considered, for purposes of obtaining bail in terms of s 59 of the [CPA], as soon as possible. Obviously, the same factors will have to be taken into account by such a police officer as those applicable to normal bail applications.'[4]

After referring to the decision of Bertelsman J in *Louw & another v Minister of Safety and Security & others* 2006 (2) SACR 178 (T) the learned acting judge expressed himself thus (para 48):

'Therefore, if a preferable method of an accused's attendance is through a summons, that procedure should be employed. In this regard the risk of the suspect absconding or committing further crime should be considered. An arrest without any rational, reasonable basis should not occur indiscriminately.'

And (para 49):

'It does not matter how severe the alleged criminal offence may be. The person to be arrested is still presumed an innocent person whose rights to freedom, dignity and fair treatment should be upheld.'

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[3] Section 40(1)*(a)* provides that a peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence.
[4] Para 40.

The court concluded that in the present matter the arrest was unlawful. As will become apparent presently, the court below might have confused the arrest of the respondent with his subsequent detention.

[8] Du Plessis AJ made this finding (that the arrest was unlawful) on the basis of an earlier finding he had made that he had no doubt that the respondent, his wife and attorney, Meyer, requested bail to be granted and that it was refused. There was no reason whatsoever, he said, why he should have been approached at 23h00 on a Sunday evening for the release of the respondent if nobody on his behalf, or the respondent himself, had not asked for bail or to be released. He said the following immediately after his finding that the arrest was unlawful:

'As I have mentioned above, those responsible for consideration of granting the applicant bail refused to do so. It follows that the applicant was held unlawfully and detained unlawfully at the Pretoria West Police Station.'[5]

These comments and the conclusion reached by the court a quo are totally inexplicable and can perhaps be ascribed to overzealousness on its part. There was no evidence before it, at any stage, that the respondent, his wife or his attorney ever asked anyone of 'those responsible' for considering bail, whoever they may be, that the respondent be granted bail or that he be released on warning (as contemplated in s 72 of the CPA). In his affidavit in support of the application he launched on behalf of the respondent Meyer merely alleged that he telephoned the investigating officer and enquired from him as to why he had not granted the respondent bail, to which the investigating officer responded that he was off duty, after which he (the investigating officer) put the telephone down. Meyer did not mention the name of the investigating officer in his affidavit. This is not surprising because there was at that stage no investigating officer. The docket relating to the respondent was allocated to a Detective Constable Mtsweni (Mtsweni) only on Monday, 16 November 2009.

[9] It is true that in his affidavit the respondent stated that his attorney (Meyer) telephoned 'someone', obviously Sivayi, on the number which Sivayi had given to the respondent's wife, and that that person refused to identify himself, but simply refused bail. These assertions were confirmed by Meyer in a confirmatory affidavit. It should be noted,

however, that these affidavits (respondent's affidavit and Meyer's confirmatory affidavit) were deposed to after the 'return day', which was on 17 November 2009. It is not clear how they became part of the record.

[10] Mtsweni deposed to an opposing affidavit on 17 November 2009 in which he alleged that the telephone number on which Meyer allegedly called 'the investigating officer' was that of Sivayi's mobile phone. Clearly, Meyer must have spoken to Sivayi, who, according to Mtsweni, in any event 'did not have the necessary powers to release the [respondent] on bail, as he [was] not a member of the South African Police Service'.[6] In addition, Sivayi was only a constable at the relevant time. Mtsweni averred further:

'The applicant did not require urgent medical attention, and neither his attorney nor his wife advanced any special circumstances why he should be released. In the absence of any formal request by the applicant, his family or his attorney for bail, there existed no reason for this court to exercise its powers in favour of the applicant.'

He attached to his affidavit the relevant pages of the occurrence book in which there was no indication of any request for bail by the respondent or anyone else on his behalf. I should mention that in his oral testimony before the court a quo Meyer made no mention of requesting, or applying for bail from any police officer, but merely stated that he had telephoned the investigating officer on a number given to him by the respondent's wife; that the investigating officer 'did not want to tell [him] his surname' and that he said he was not on duty and then 'dropped the phone on my ear'. In my view, the respondent's version as contained in his affidavit of 18 November 2009, which is not at all in line with Meyer's own version, though confirmed by him, may simply be rejected on the papers.[7] The assertion that bail was refused was clearly an afterthought. It follows that the finding by the court below that those responsible for considering bail refused to grant bail was plainly without foundation.

[11] To justify its decision to release the respondent, the court a quo invoked the

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[5] Para 51.

[6] Section 59(1)*(a)* of the CPA reads: 'An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.'

[7] *Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C.

interdictum de homine libero exhibendo, a remedy used to protect the liberty of the subject from being restrained unlawfully by the State.[8] As has been mentioned above, the court found that the arrest of the respondent was unlawful, hence the order for his release. I have already held that finding to have been without foundation because no request was ever made to a police official for the respondent's release on bail. But there were other comments made by the court a quo which require attention. It remarked, after referring to the Constitution which 'places a very high premium on the right to human dignity and freedom':

'The Spirit of the Constitution, the recognition of basic human rights, and the right to freedom in particular, enshrined in the Constitution, should not be compromised in any way whatsoever through the actions of government officials.

The courts should therefore jealously guard these rights and act decisively upon the infringement thereof. Furthermore, it is important that those who act with impunity, and who think that they can do as they please, simply because they have the force of the whole law - enforcement system behind them, should be brought to book and restrained. The whole wrath of the legal system, the rule of law, the courts and the public should be brought upon such officials.'[9]

After this exhortation the court urged that 'other possibilities should be considered to deter police services and Metro Police services from breaching the enshrined rights held dear by everybody in this country' and that '[t]he public must be protected'. It is for these reasons that the court awarded the costs orders that it did.

[12] But more importantly, and as I have mentioned above (para 8), the court's conclusion that the respondent's detention was unlawful followed the finding by it, albeit erroneous, that those responsible for considering bail refused to do so. I find it difficult to comprehend how a refusal by a police officer to grant bail could render an otherwise lawful arrest and subsequent detention unlawful. As the court a quo itself acknowledged, a peace officer is entitled, in terms of s 40(1)*(a)* of the CPA, to arrest a person without a warrant. And in this court counsel for the respondent did not argue that Sivayi was not

[8] See *Wood & others v Ondangwa Tribal Authority & another* 1975 (2) SA 294 (A) at 308C-311A.
[9] Paras 44 and 45.

entitled to arrest the respondent. Nor was the lawfulness of the arrest ever in issue before the court a quo. It is in effect the lawfulness of the detention that was in issue, although the court, in the course of its judgment, said that the arrest of a person without a warrant 'may not necessarily be the right procedure to follow'. (My underlining.) It was never the respondent's case that his arrest was unlawful. In his statement dated 15 November 2009, which was attached to Mtsweni's affidavit, Sivayi stated that on the day in question he was on duty and in full uniform when he was doing road policing and 'tried to pull a white Mercedes Benz with registration No: LHY 035 GP over'. The driver failed to stop and, instead, accelerated towards him. He alerted his colleagues and, accompanied by another colleague, gave chase. At a certain stage, when they were right next to the respondent's vehicle he used what he called 'a micro-phone' (presumably a loud hailer) to command the respondent to stop. The respondent hurled insults at them and refused to do so. In so doing the respondent also failed to obey traffic lights. Sivayi stated that when the respondent was eventually stopped he (Sivayi) explained to him that he was arresting him for 'failing to comply with instruction of [a] traffic officer (failed to stop), crimen injuria, failing to comply with road traffic light and driving [an] unlicensed and unregistered motor vehicle'. In these circumstances Sivayi was clearly empowered to arrest the respondent without a warrant, in terms of s 40 of the CPA.[10]

[13] I nevertheless agree with the court a quo that arrest, being the most drastic method to secure a person's attendance at his trial, 'ought to be confined to serious cases', that is, it should be confined to cases where such person faces a relatively serious charge. Indeed, that is what is desirable.[11] But where a peace officer does effect a lawful arrest in terms of s 40(1)*(a)* of the CPA for what may not be considered to be a serious offence, as may be the position in the present instance, the arrest, or subsequent detention, does not become unlawful, thereby entitling a high court to order the release of the arrested person, merely because a summons, or notice to appear in court, would have been equally effective in ensuring his or her attendance at court,[12] or because bail has been refused.

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[10] Failure to comply with an instruction or direction of a traffic officer is a punishable offence under s 3J, read with s 89, of the National Road Traffic Act 93 of 1996.
[11] See *S v More* 1993 (2) SACR 606 (W) at 608*e-j* and authorities there quoted.
[12] Compare *Tsose v Minister of Justice & others* 1951 (3) SA 10 (A) at 17G-H.

[14] The jurisdictional facts necessary for an arrest under s 40(1)*(a)* are: (i) the arrestor must be a peace officer, (ii) an offence must have been committed or there must have been an attempt to commit an offence, and (iii) in his or her presence. The arresting officer is not required to conduct a hearing before effecting an arrest. Whether an arrested person should be released, and if so, subject to what conditions, arises for later decision by another person[13] and that is the safeguard to the arrestee's constitutional rights. Once the jurisdictional requirements are satisfied the peace officer has a discretion as to whether or not to exercise his or her powers of arrest.[14] Obviously, the discretion must be exercised properly. But the question as to whether in this case Sivayi properly exercised his discretion does not arise. That issue was not raised before the court a quo and the court never considered it.

[15] Section 50(1)*(b)* of the CPA provides that:

'[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.'[15]

And s 50(1)*(c)* reads:

'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 [by a police official of above the rank of non-commissioned officer] or 59A [by a Director of Public Prosecutions or a prosecutor],

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.'[16]

The section thus makes provision for the procedure to be followed where bail has not been granted, whether or not it was requested and refused. The best the court a quo could have done in the instant case, assuming that its finding that bail was sought and refused was correct, was to issue a mandamus directing the police official responsible for considering bail at the Pretoria West Police Station on the night in question, to reconsider bail, or that the respondent be brought before a lower court on the next day (Monday),

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[13] *Minister of Safety and Security v Sekhoto & another* 2011 (5) SA 367 (SCA) para 44.
[14] Ibid. para 28 and the cases there cited.
[15] Paragraph *(a)* provides that any person who is arrested with or without a warrant for allegedly committing a crime shall be brought to a police station as soon as possible.
[16] Paragraph *(d)* deals with the procedure to be followed when the period of 48 hours expires outside ordinary court hours, etc.

since a person arrested with or without a warrant 'is not entitled to be brought to court outside ordinary court hours'.[17] The *interdictum de homine libero exhibendo* invoked by the court is a remedy employed where the detention of the person sought to be released was *ab initio* unlawful.[18] That was not the case here.

[16] Courts must guard against and resist the temptation to impose duties on police officials under the guise of an alleged protection of rights guaranteed in the Bill of Rights, which existing law, in this case the CPA, does not impose. It is well to repeat what Stegmann J said in *S v Baleka & others* 1986 (1) SA 361 (T) at 374H - 375A:

'The Supreme Court has inherent powers under the common law, exercised particularly by way of the *interdictum de homine libero exhibendo*, to protect the liberty of the subject, and to ensure that interference by the State with individual liberty does not go beyond the proper exercise of the State's lawful powers. Nevertheless, when a person has lawfully been arrested and charged with the commission of an offence, the question of his right to apply for his release on bail pending his trial or the outcome thereof, is a question which is exhaustively governed by statutory provisions. No room remains for the exercise of the court's inherent common law powers in that respect, save, perhaps, to the extent that such powers can be exercised within the framework set by the statutory provisions.'

The same applies, in my view, where the arrested person has not as yet been charged, as was the case with the respondent in this instance.

[17] The conclusion I have reached above, that the finding of the court a quo that the detention of the respondent was unlawful had no foundation, means that the substratum or basis for the costs orders it made has collapsed. The orders must accordingly be set aside. But I must stress that I have grave difficulty in understanding why, in any event, costs orders – let alone the unprecedented punitive costs orders – were made against the station commander of the Pretoria West Police Station, senior superintendent Moodley, and his assistant, superintendent Klopper. Their sin, it seems, was a failure to explain or to give reasons on the 'return day' 'why no member of the SAPS considered the [respondent's] position and why the complaints commanders, Nhlazo and Dulebu did not take any action', and 'why the station commander on duty at the time did not do anything

[17] Section 50 (6)(b).
[18] *Minister of Home Affairs & another v Dabengwa* 1984 (2) SA 345 (ZSC) at 359C-D and 360A-B.

pertaining to the [respondent's] position'.[19] Although these officers, including Captain Nhlazo and Inspector Dulebu, did not depose to any affidavits, the court a quo concluded that they 'had been joined as respondents to the proceedings, because they were represented by counsel and also because they opposed the relief sought, and even argued that the arrest and detention were lawful . . .' and that they 'infringed upon the constitutional right of the [respondent] not to be detained unlawfully . . . '. The fact of the matter, though, is that the officers were invited by the court a quo to provide it 'with further facts pertaining to the events at the police station'. Captain Nhlazo was apparently on duty at the time the respondent was detained and Inspector Dulebu took over from him at 19h00. (The same costs orders were made against them.) The implication is that Inspector Dulebu should, upon coming on duty, have enquired from each and every detainee held at his police station what the reason for his or her arrest was and to consider whether or not to grant bail. Much as that would be a most desirable exercise, it would, to my mind, be an onerous duty to impose on the police. It is a well-known fact that the police service suffers from an acute shortage of personnel. The reasoning of the court a quo is, with respect, untenable.

[18] As to Sivayi, I have already mentioned that as a metro police officer he had no authority to grant bail in terms of s 59 of the CPA. In any event, as the arrestor he had a limited role in the process. As I pointed out in general terms in para 14 above, he, as the arresting officer, was not called upon to determine whether the respondent ought to be detained pending a trial as that was the role of a police official as contemplated in s 59 of the CPA, or a court. It follows that the appeal must succeed.

[19] Counsel for the respondent urged us 'to bring the provisions of s 3I*(b)* of the National Road Traffic Act 93 of 1996 into line with the requirements of [s 13(8) of the South African Police Service Act 68 of 1995] . . . by affording the Legislature a reasonable opportunity of 6 months to bring about the amendment'.[20] Counsel submitted that the

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[19] Para 19 of the judgment.

[20] Section 3I*(b)* of the National Road Traffic Act provides that a traffic officer may, subject to the provisions of that Act or any other law and when in uniform, require the driver of any vehicle to stop. Section 13(8) of the SA Police Service Act empowers the National or Provincial Commissioner to issue a written authorisation to a member under his or her command, set up a road block or cause one to be set up on a public road.

‘most rational’ requirement - which the Legislature should be directed to bring about – is that it should be prescribed that roadblocks ‘must be discernible in the form of a proper sign, barrier or object’. But this court has no power to direct the Legislature to effect amendments to legislation.

[20] In the result, the following order is made:

1 The appeal is upheld with costs, which shall include the costs of two counsels.

2 The order of the court below is set aside and replaced with the following:

‘The application is dismissed with costs.’

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L Mpati

President

APPEARANCES

For the Appellants:	T P Kruger (with him L le Roux) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
Respondent	J R Bauer Instructed by: Riaan Meyer Inc, Pretoria McIntyre & van der Post, Bloemfontein