

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**Case no: A1174/2006**

**In the matter between:**

**JAN MOTSEI**

**APPELLANT**

**And**

**THE MINISTER OF SAFETY AND  
SECURITY**

**RESPONDENT**

**JUDGMENT**

**POSWA, J**

[1] In this appeal against the judgment of the Magistrate, Wonderboom, Pretoria North, the appellant had brought a civil action against the respondent, claiming damages in the amount of R100 000.00, arising out of an alleged unlawful arrest by members of the South African Police Services, more specifically, Constable

David Vusi Maluleka, on 14 December 2005. It is common cause that Constable Maluleka arrested the appellant at the Sinoville Police Station, at about 18:20. It was also common cause during the hearing that the respondent bore the *onus* to justify the appellant's arrest by Constable Maluleka.

- [2] Having found that the respondent had failed to discharge the *onus* he bore, the Magistrate, nevertheless, dismissed the appellant's claim, with costs. Hence this appeal. The appellant was represented before us by Mr Grant, whilst Mr Kriel appeared for the respondent. Neither of them was involved during the proceedings before the Magistrate's court.
- [3] Although the respondent did not appeal against the Magistrate's finding that he had not discharged the *onus*, Mr Kriel submitted before us that the finding was incorrect and informed the Court that the respondent was appealing against it. Counsel relied, for the respondent's approach, i.e. appealing against the Magistrate's finding without having filed a counter-appeal, on the decision in *Sentrale Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A). Indeed, the Appellate Division ruled, in the latter judgment, that it is not necessary to file a cross-appeal where the party thus appealing is not, thereby, seeking a variation of the order of the court *a quo*. (395F-396A.)
- [4] I now deal with the facts of the case. The entire purpose of the special duties operations on that occasion was for the police to arrest persons suspected of

committing petty crimes, such as urinating in public, drinking in public, gambling in public and being drunk in public. Justification for the arrest of these petty offenders is given by Constable Maluleka as follows:

*“[These petty crimes] have an impact on serious cases that we concentrate on, cases like house robberies, house break-ins, murder, rape and stuff like that. If we **arrest** more people for those petty crimes, they have an impact on the crimes that I have mentioned now, they go down because most of the suspects that go to break those houses, they first get drunk in the public areas and thereafter, later in that day or in the afternoon, then they go and commit those crimes. (Emphasis added.)*

It will be observed that “arrest” of petty offenders was part of the modus operandi of the police team in pursuit of their main mission, control of commission of serious crimes. There is no mention of wanting to bring those arrested for “petty crimes” before courts, for trial.

- [5] The appellant’s friend, Mr Paulos Motlau, was arrested during the operation, outside Pick ‘n Pay, at the Sinoville Shopping Centre, that late afternoon or early evening, and taken to the Sinoville Police Station. The appellant was later arrested at the police station, at a time when Constable Maluleka was busy with administrative aspects at the charge office, regarding Mr Motlau’s detention, subsequent to the latter’s arrest. Although it is not pertinently admitted by the

respondent, the evidence of both the appellant and Mr Motlau, that they were together at the shopping centre prior to Mr Motlau's arrest, that the appellant left Mr Motlau at the shopping centre and that he had just returned to the shopping centre when Mr Motlau was arrested, is uncontested.

[6] There are disputes in respect of the following aspects:

- (a) whether the appellant and Mr Motlau consumed liquor at the shopping centre or anywhere else prior to the arrival of the police;
- (b) whether the appellant and Mr Motlau were drunk at the time of the arrival of the police, during Mr Motlau's arrest at the shopping centre and;
- (c) what transpired on the appellant's arrival at the police station, after Mr Motlau had been conveyed thereto by the police.

[7] Although it is the respondent's version that Constable Maluleka was one of many police officials at the shopping centre when Mr Motlau was arrested, the defendant chose to rely on the evidence of only Constable Maluleka, for reasons unexplained. On his part, the plaintiff relied on his own evidence and that of Mr Motlau.

[8] In his judgment, the Magistrate, when dealing with the question of the *onus* borne by the defendant, said the following at page 48:

*“Wat die verweerder se saak betref kan die hof nie net die eedsverklaring ‘Bewysstuk A’ enigsins miskyk of ignoreer nie. Die verweerder nie skuil*

*agter 'n verduideliking dat hulle baie besig was en dat daardie korrekte pro-forma vorms dan nou nie daar was nie en hy nie werklik goed in Afrikaans is nie en dat hy dan nou lateraan 'n tweede verklaring gemaak het nie. As 'n Suid-Afrikaanse polisiebeampte moet hy weet en het hy dit ook so erken, dat hy weet indien hy 'n eedsverklaring aflê dat dit net die waarheid moet bevat en hierdie verklaring strook dan nie met die getuienis vanoggend nie en waaroor hy dan die eiser gearresteer het, naamlik vir dronk in die openbaar nie”.*

- [9] My understanding of this paragraph, in summary, is that the Magistrate did not accept the respondent's explanation of the conflict between the contents of Exhibit 'A' - to the effect that the appellant was arrested for drinking in public - and his evidence in court - that he arrested the appellant for being drunk in public, i.e. at a police station, and that he informed him so. The Magistrate did not accept Constable Maluleka's explanation for that discrepancy, viz. that they, the police, were too busy and that he did not, therefore, find the appropriate *pro forma* form for someone who is drunk in public and that he, consequently, used the form for drinking in public. The Magistrate similarly did not accept Constable Maluleka's excuse, regarding his inadequate knowledge of Afrikaans being the reason for using the incorrect form. It is, indeed, a contradiction, in my view, for Constable Maluleka to suggest that, time permitting, he would have

used the appropriate form and to yet claim that it is his inadequate knowledge of Afrikaans that caused the use of an inappropriate form.

[10] Because the respondent bore the *onus* to justify the arrest, he also had the duty to begin adducing evidence. Consequently, Constable Maluleka was the first witness to give evidence before the Magistrate. Mr Grant submits, on the appellant's behalf, that the Magistrate correctly found that the respondent failed to discharge the *onus* and that he, therefore, failed to justify the plaintiff's arrest. In the circumstances, so is it submitted by Mr Grant, the Magistrate should have dismissed the action, regardless of the nature of the evidence given by the appellant and Mr Motlau.

[11] Mr Kriel, on the respondent's behalf, submits that the Magistrate's finding that the respondent failed to discharge the *onus* is incorrect. Consequently, he submits that the Magistrate's dismissal of the appellant's claim, based on contradictions between the plaintiff and Mr Motlau, is correct.

## **THE LAW**

[12] Quite clearly, the answer as to which of the two submissions is correct will be found in the applicable law with regard to arrest without a warrant. Section 40 of the Criminal Procedure Act 51 of 1977 ("the Act") authorises a peace officer to effect an arrest without a warrant, if a person, commits an offence in his or her presence if the peace officer has a reasonable suspicion that an offence referred to

in Schedule I has been committed (s 40 (1) (a)). Arrest without a warrant is an area of extreme conflict in various courts in the country, especially in this Division, the TPD and the WLD. Before dealing with some of the relevant cases, I shall, briefly, set out the background and facts in the context whereof this case must in, my view, be discussed.

### **Facts**

[13] It is, in my view, not necessary to deal with facts with a view to determine whether there are, indeed, material factual contradictions between the appellant's and that of his friend and witness, Mr Motlau. It is common cause that Constable Maluleka arrested the appellant and that the respondent bore the onus to justify his arrest. Had there been no conflict in the respondent's version as to the reason for the arrest and if the case against the appellant had not been withdrawn, the appellant might have been under an evidential duty to give his own version as to how he got to be arrested. His evidence, on the one hand, and Mr Motlau's, on the other hand, would then have required scrutiny. In that event, material contradictions in their evidence might have had a bearing on whether or not the respondent had discharged the *onus* of justifying the appellant's arrest. It makes no difference, in my view, whether there are contradictions or otherwise in the between the appellant and Mr Motlau if the respondent cannot justify the appellant's arrest.

[14] If the respondent has not discharged the onus they bear, the appellant need not have given evidence on the question as to whether or not his arrest was justified. It would have been sufficient, in my view, if he merely confirmed, in evidence, that he is the plaintiff and that he was arrested by Constable Maluleke. It is not required of him to prove lack of justification. Nothing can be said by an arrested person in such circumstances to cure defects in the Minister of Safety and Security's case, once the latter has failed to justify the arrest. In such circumstances, if a plaintiff gives evidence, trying to demonstrate that he or she was unjustifiably arrested, as happened in the instant case, the trial court cannot non-suit him or her on account of contradictions of the nature raised in the present case on the ' behalf. A discussion of applicable legal principles in cases of arrest without a warrant and some provisions the Constitution of the Republic of South Africa, 1996 ("the Constitution") should illustrate this point.

### **The Law**

[15] It has always been the approach of the courts in this country, long before 1994, that the freedom of person, the liberty of every individual (*harbeus corpus*) was of the utmost importance (see *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A); *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A), at 291-294). In *Brand v Minister of Justice and Another* 1959 (4) SA 90 (A), referring to an arrest without a warrant, it was stated that the *onus* is on a peace officer

who relies on the statute, in this regard, to establish that an offence was, indeed, committed in his presence. In *Minister of Justice v Hofmeyr* 1993 (3) SA 121 (A) the following is stated on page 153:

*“The plain and fundamental rule is that every individual’s person is inviolable. In actions in damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are **prima facie** illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction”. (See also, *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A)).*

[16] The Constitution, which took over from the Interim Constitution (the Constitution of the Republic of South Africa, 200 of 1993), specifically stipulates, on the freedom and security of the person, as follows, in s 12(1)(a) and (b);

*“12(1) Everyone has the right to freedom and security of the person, which includes the right*

*(a) not to be deprived of freedom arbitrarily or without just cause;*

*(b) not to be detained without trial.”*

[17] The importance of the freedom and security of the person is further illustrated in s 35(1)(f) of The Constitution, where the following is stated:

“35(1) *Everyone who is arrested for allegedly committing an offence has the right:*

*(f) to be released from detention if the interests of justice permit, subject to reasonable conditions. ”*

The effect of section 35(1)(f) is that every arrested person, except one arrested in respect of a Schedule 6 offence, has *a right to be released from detention*, if in the interests of justice so permit. It was held, in this regard, that the *onus* of showing that the interests of justice do not permit the release of an arrested person is on the State or the Police. (*S v Dlamini, S v Dladla and Others; S v Joubert; Skietekart* 1994 (4) SA 623 (CC.)

[18] In that case (*Dlamini*), the Court stated, *inter alia*, the following, at [53] 658F-G;

- (a) Section 35(1)(7) of the Constitution “presupposes a deprivation of freedom by arrest that is constitutional.
- (b) Referring to circumstances under which an arrested person may be denied bail, the Court pointed out that a risk that the detainee will commit a fairly serious offence can be taken into account. The Court emphasised in that regard that:

*“The important proviso throughout is that there has to be a likelihood, i.e., a probability, that such risk will materialise. A possibility or suspicion will not suffice. Absent a proper **basis** for the original arrest, it (detention) will be set aside” (emphasis added.)*

Whilst *Dlamini* is about bail principles, where justification of the arrest is not in issue, sentiments expressed therein concerning justification for continued detention of the arrested person provide, in my view, a good illustration of the importance attached to of a person’s liberty and the need to justify deprivation thereof.

[19] Although s 40 of the Criminal Procedure Act has not been amended after the enactment of both the Interim Constitution and the Constitution, the interpretation thereof must, in my view, now be influenced by the provisions of the sections of the Constitution that I have mentioned, s 12(1)(a) and (b) and s 35 (1)(f), respectively. In this regard it must be borne in mind that, in s 2 of the Constitution, under the heading “Supremacy of Constitution”, the following is enacted:

*“2 The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”*

I am of the view that case law that precedes the Interim Constitution must, similarly, be interpreted with this in mind. In this regard, I find myself in full agreement with sentiments expressed by Bertelsmann, J, in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) at 185b-187e, where he also quotes, with approval, a passage from the judgment of De Vos, J, in *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (T), [9] and [11]-[12]. Although Bertelsmann, J quotes only the first sentence of para [12], it is evident from his judgment that he agrees with all that De Vos J says in that paragraph, including her reliance on *S v Makwanyane and Another* 1995 (6) BCLR, at para [156]. So do I.

- [20] In the present case, the appellant and Mr Motlau were detained at the police cells, overnight, and appeared in the Magistrate's Court the next morning. It is common cause that the public prosecutor withdrew the charges in respect of each of them, without there being any explanation for that course. Mr Kriel, on the respondent's behalf, conceded that the respondent could not explain why the charges were withdrawn. He submitted, however, that the withdrawal should not affect the question as to whether or not Constable Maluleka was justified in arresting the appellant and, subsequently, causing him to be detained. Even if the public prosecutor came to the conclusion that available evidence could not support conviction of the appellant, that, so submitted Mr Kriel, did not

necessarily render the arrest unlawful. There is some authority in support of that proposition, in *Minister of Justice and Others v Tsose* 1950 (3) SA 88 (T). In that case, Malan, J says the following at 92 - 93:

*“If a peace officer, as a result of observations, honestly and reasonably comes to the conclusion that a crime is being committed, he **may act upon such opinion or belief even though in subsequent proceedings, whether civil or criminal, it is not proved that a crime was in fact committed.**”*

(Emphasis added.)

[21] In *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A), *supra*, however, the Appellate Division (as it then was), hearing an appeal against Malan, J’s above decision, stated the following at 18C-H:

*“As I have indicated above, the Transvaal Provincial Division held that, even if no offence was committed in the presence of Sergeant Gentle, the tenth respondent who effected the arrest on 21<sup>st</sup> and 23<sup>rd</sup> July 1949, the arrests were nevertheless legal because the sergeant ‘entertained the honest and reasonable belief that at the time of the arrest the law was being contravened’. This proposition was not supported by counsel for the respondent in this Court and it is sufficient to say that the English decisions, on which Malan J relied, are not authority for any generalisation that in English law an honest and reasonable belief that the*

*law is being contravened justified an arrest without warrant. The scope of each statute relied upon as rendering an arrest lawful must be deduced from the language of each provision read in their proper context. (See **Barnard and Another v Gorman 1941 AC 378**).*

*The context here is the codification of a piece officer's powers in Sections 26 and 27 which specifically and especially authorise arrest on reasonable suspicion in certain cases only. Those sections make ample provision for summary arrest where there is danger that a suspected wrongdoer may disappear and so escape prosecution. In the present case **if no offence was committed in the presence of sergeant Gentle, the arrests were unlawful.***" (Emphasis added.)

[22] In our country, with its history of the obnoxious detention without trial in political cases, the notion of a suspect being arrested and detained and then being simply released in court without much more is, to say the least, revolting. Section 35 of the Constitution contemplates three phases to be ordinarily undergone by a suspect who gets confronted by the police, viz., (a) lawful arrest, (b) lawful detention and (c) trial as an accused person.

[23] According to s 35(3), every accused person has the right to a fair trial, which includes categories itemised in paragraphs (a) to (o) of that sub-section. It is the

court, and not the police, that ensures that an accused person has a fair trial. In that regard, the manner in which the accused person has been handled by the police, from the time they confront him or her, and the manner in which he or her is detained by those keeping him or her in detention after his or her arrest is relevant in determining whether or not the accused person has had a fair trial or otherwise (Cf. *The State and Pike Raymond Hlongwane and Others*, Case no: A2093/03 (unreported decision of the TPD, dated 17 May 2005), at pages 14-15.) Consequently, it is, for example, important to know whether he or she was “informed promptly of the reason for being arrested” (s35(2)(a)), or has been informed of his or her right to remain silent (s35(1)(a) and (c)), or whether he or she was brought before court, “as soon as reasonably possible”, within 48 hours after his or her arrest, (s35(1)(d)), to mention just some of the rights of an arrested person according to s 35(1) and (2) of the Constitution. Where the case against an accused person who was in custody is simply withdrawn, without much more, the court cannot determine whether his or her constitutional rights were observed up till then. Such rights include the question whether or not the accused person’s arrest was justified.

- [24] A police official who comes to the conclusion, after an honest assessment of the circumstances surrounding his or her encounter with a suspect, that the only way in which to deal with the suspect is to have him or her arrested, in order to bring

him or her to the charge office, must, in my view, as soon as possible on arriving at the police station, consider the question whether or not further detention of the suspect is necessary. If, having made such an assessment, he or she is not certain that a *prima facie* case exists against the suspect, the police official should immediately release him or her (See, in that regard, *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A), at 821G-I.)

- [25] That a police officer who encounters a suspect is the person to determine whether or not the officer's powers of arrest under s 40 of the Act should be resorted to, is evident from the following passage in the *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 36 (CC), at [18], 61g-62a, which reads:

“[18] Furthermore, *those involved in the day-to-day exercise and supervision of the power to make arrests are usually best positioned to establish appropriate operational parameters concerning the discretion to arrest.*”

- [26] It would, in my view, be incongruous if it made no difference that one was arrested and possibly also detained when, in fact, he or she had committed no offence, simply because the police officer concerned had honestly, but mistakenly, assumed that an offence had been committed. Hence the conclusion by the in AD, in *Tsose (supra)*, that: “if no offence was committed ... the arrests were unlawful.” (Cf. also *Dlamini (supra)*). Moreover, as I have already

indicated, it is important, once an accused person has been brought before court, to allow the court to determine whether or not he or she has gone through a fair trial process, from the time of arrest.

[27] If, therefore, the public prosecutor decides to withdraw the charge or charges against him or her, the court, should, in my view, know why that is so, especially as to why he or she had, in the first place, been deprived of his or her liberty. (For a full discussion of the provisions of s 12 (1) of the Constitution, see *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 754 (CC)), at paras 145-147; *S v Coetzee and Others* 1997 (3) SA 527 (CC), at para [159]; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC), at paras 17-28, (the judgement of Ackermann, J).

[28] Section 12(1) of the Constitution that raises two aspects, viz (a) reasons for which the state may deprive one of his or her freedom and (b) the method of depriving one of one's freedom where it is appropriate to do so. It is, by now, trite that the state may not deprive a citizen of his or her liberty for reasons that are not acceptable and that it may not, when it deprives one of freedom for acceptable reasons, do so in a manner which is procedurally unfair. (*Bernstein*, paras [145]-[147].)

[29] It appears to me that Bertelsmann, J, had, *inter alia*, the above in mind, when, in *Louw, supra*, he said the following at 186b:

*“I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed and even if the arresting police officers believes on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an **arrest forthwith**”(emphasis added.)*

- [30] In *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W), at 143j - 144e Goldblatt, J, totally disagrees with sentiments expressed by Bertelsmann, J and his decision in *Louw*. He expresses himself thus, in that regard:

*“Before an arrest can lawfully be exercised, the reasonable suspicion that a Schedule 1 crime has been committed must be considered by a reasonable investigating officer, and it must be considered whether the suspect will attend the court hearing if summonsed or warned. Only if there are reasonable grounds to suspect that the suspect will abscond if an application for a warrant is first made may the power contained in s40 of Act 51 of 1977 be exercised.*

*I do not believe that this places an undue burden on the police. It requires no more than an honest exercise of their duties. If they bona fide fear that a suspect will evade justice, then an arrest is obviously the correct option.*

*But, by the same token, this test makes an arrest **ultra vires** when exercised against a suspect under circumstances where the suspect is perfectly willing to come to court on warning, on notice or summons.*

*I do not agree with the conclusion reached by Bertelsmann J, despite his full and careful reasons therefor and am of the view that it is clearly wrong.*

*In my view the final sentence of the quotation from Schreiner JA in **Tsose's** case **supra** quoted by Bertelsmann J correctly sets out the existing law.*

*The learned Judge of Appeal said:*

*‘But there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective.’*

*The Legislature having granted a peace officer the right to make an arrest in the circumstances set out in s 40 has created a situation where **due compliance with such section** by a peace officer is lawful and affords such peace officer protection against an action for unlawful arrest. In my view, the court has **no right to impose further conditions on such persons**. To do so would open a Pandora's box where the courts would be called upon in cases of this type to have to enquire into what is reasonable in a variety of circumstances and further **where peace officers would be called upon***

*to make value judgments every time they effect an arrest in terms of s40. These judgments which they would have to make would later have to be considered and tested by judicial officers attempting to place themselves in the shoes of the arresting officer.*

*While s 40 exists in its present form it offers protection to those who legitimately rely upon it. Obviously the position will be different if the action of the policeman is **mala fide** or an abuse of the right given to him, but I need not deal with the possible exceptions, as they do not arise in the present case (see **Duncan v Minister of Law and Order** 1986 (2) SA 805 (A) at 818G-819B.)”*

[31] Before discussing the conflict between *Louw* and *Charles*, I find it necessary to quote in detail what Schreiner, JA said in *Tsose*, *supra*, at 17C-G:

*“If the object of the arrest, though professedly to bring the arrested person before the court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt, unlawful. But if the object of the arrestor is to bring the arrested person before the court in order that he may be prosecuted to conviction and so may be led to cease to contravene the law the arrest is not rendered illegal because the arrestor’s motive is to frighten or harass the arrested person into desisting from his illegal*

conduct. *An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after arrest to bring the arrested person duly to prosecution. In such a case the only remedy of the arrested person would be an action for malicious prosecution in which he would have to prove not only an improper motive but also the absence of reasonable cause for the prosecution. An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal*” (emphasis added.)

[32] The learned judge of appeal went on to qualify his statement as follows, at 17H;

*“What I have said must not be understood as conveying approval of the use of arrest where there is no urgency and the person to be charged has a fixed and known address; in such cases it is generally desirable that a summons should be used. But there is no rule of law that requires the*

*milder method of bringing a person into court to be used whenever it would be equally effective.”*

[33] It seems to me appropriate to interpret Shcreiner, JA’s remarks, with regard to there being no rule that a less invasive way of bringing a person before court, other than arrest, be resorted to whenever possible, in the context of the intervention of the constitutional dispensation that was ushered in in 1994. I have already stated that I am of the view that regard must be had to that significant change in the jurisprudence of our country. Section 2 of the Constitution, in particular, must, in my view, be borne in mind when interpreting decisions made before the coming into being of the Interim Constitution and, later, The Constitution. In light thereof and of the provisions of s 12 and s 35 of The Constitution, it must, in my view, now be the approach of any police official who deals with a suspect to consider the question as to whether or not there is not a less invasive method of bringing the person to the police station, where it is genuinely the intention of the police official to have the suspect questioned relatively early. The provisions of any statute, including s 40 of the Criminal Procedure Act, are subject to the provisions of the Constitution, because the Constitution is the supreme law of the country (s 2 of the Constitution). This, in my view, is the answer to Goldblatt, J’s concern, in *Charles*, about a court imposing a further qualification to that provided by s 40 of the Act. Besides that

being what, in my view, The Constitution ordains, I do not regard that requirement as overburdening both the arrestor and the court that is called upon to determine whether the arrest was justified or otherwise.

[34] Even if the Schreiner, JA's dicta, on there bring no rule of law requiring a "milder method" than arrest, remains good law, it is clear that he, and, therefore, the AD, preferred the use of a summons where there is a fixed and known address. Goldblatt, J, himself, says that the arrest of a suspect who is willing to come to court is *ultra vires*.

[35] I therefore, find myself in respectful disagreement with Goldblatt, J's judgment in *Charles*. I am of the view that it is clearly wrong. It follows that I agree with Bertelsmann J's judgment view in *Louw*. (See also *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (W) in which Horn, J allies himself with the approach in *Louw*). It should, in my view, now be the norm that a suspect be ordinarily not arrested, in order to bring him or her to the police station or before court, when there is a less invasive method of ensuring that. Such alternative measures include issuing the suspect with a summons, where that is reasonably possible. Whether it is reasonably possible to do that must be determined on the facts of each case. It is, in my view, the function of every police official who arrests someone to, not only to prove that he or she honestly believes that an offence has been committed but also to, establish and state that

arrest was the only option available to him or her to bring the suspect before court. (See *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C). in that case, Meer, J, comments with regard to an arresting officer choosing to arrest a suspect, instead of warning him to appear in court. The arresting officer, dealing with a husband who had contravened a protection order issued in terms of the Domestic Violence Act 106 of 1998, chose to act under s 8 (4)(d) of the Act, thus arresting the plaintiff, instead of acting under s 8 (4) (c), which would have entailed merely handing the plaintiff a summons to appear in court, to answer the charge of contravening the protection order. That decision appears to be in conflict with Goldblatt's sentiments in *Charles*.

- [36] In the present case, it is clear that the only or primary purpose for arresting the persons found outside the Pick 'n Pay Supermarket, by Constable Maluleka and his colleagues, was to forestall their being involved in the commission of more serious crimes, which are usually committed by people who have committed lesser crimes, such as drinking or being drunk in public. I find it odd that one should be arrested, not so much for the "petty offence" he or she has allegedly committed, viz, drinking or being drunk in public, but merely because the lesser offence makes him or her a candidate for commission of a more serious offence, which he or she may commit. That object perhaps explains why the charge

against the appellant was withdrawn at court. It was probably never the intention of the police to have him tried.

[37] Constable Maluleka nowhere mentions that the purpose of arresting the persons who were arrested outside Pick ‘n Pay was to have them brought before court, as a way of discouraging commission of such petty offences. In the light of my finding that the Magistrate correctly held that Annexure “A” contains the reason chosen and given by Constable Maluleka for the appellant was arrested for a petty crime. Constable Maluleka never entertained the question as to whether the appellant would or would not have attended court if he had been given a summons requiring him to do so. Let me repeat that I am of the view that the Magistrate correctly held that the respondent failed to prove that the appellant was arrested for being drunk in public, contrary to what Constable Maluleka stated in his evidence. The official reason for his arrest, as stated in Annexure “A”, is drinking in public, from which reason Constable Maluleka distanced himself. That, therefore, leaves his arrest without a reason and thus without justification. The respondent failed to discharge the *onus* of justifying the arrest.

[38] Another important consideration, in my view, apart from the appellant’s liberty, is that prisons and police stations are filled with offenders or would-be offenders who should not have been incarcerated, in the first place. Pages 12 and 13 of the

occurrence book, the “FIRST INFORMATION OF CRIME” book, concerning 14 December 2005, (which is on pages 40 and 41, respectively, of the paginated papers), for instance, contains no less than 22 names of persons who were incarcerated for either drinking or being drunk in public. In all probability, they are more than the number I give because the portion that indicates the purpose of detention, on page 14 of that, book is illegible. This consideration is not, however, the reason for my judgment. I merely point out the impropriety of filling police cells with so many petty offenders.

[39] Everything else I have said above notwithstanding, I find it difficult to fault the Magistrate’s reasons for finding that the respondent failed to discharge the *onus* of establishing justification for the appellant’s arrest. There is no doubt that the police, including Constable Maluleka, were of the view that there is a difference between drinking in public, on the one hand, and being drunk in public, on the other hand. As already pointed out, Constable Maluleka was adamant that the appellant was not arrested for drinking in public. That is the end of the story. Even if, therefore, the approach adopted in *Charles*, is the correct one, it does not avail the respondent in the present case.

[40] An important aspect was omitted by both parties, in their pleadings, in their heads of argument and in their submissions before us. That is the fact that the offence of drinking in public or being drunk in public, for that matter, is not listed

in Schedule 1. I can think of no reason why this Court may not, *mero motu*, take that into consideration, either alone or in addition to other aspects. I agree with Zilwa, AJ's emphasis, in *Mhaga v Minister of Safety and Security* 2001 (2) All SA 534, that a peace officer must not only have a reasonable suspicion that an offence has been committed, but that it must be a Schedule 1 offence. (See also *Charles*, at 143j. Consequently, the appellant should, in my view, have succeeded in his claim even on this basis alone.

- [41] In the circumstances, I am of the view that the appellant's appeal should succeed and that the respondent's cross-appeal should fail. The Magistrate's judgment should, therefore, be upheld with regard to the respondent having failed to discharge the *onus* and be set aside with regard to the appellant having failed in his claim.

### **Quantum**

- [42] In view of his approach and his conclusion with regard to the appellant's claim, the Magistrate did not deal with quantum. Both counsel submitted, correctly in my view, that this Court is at large to deal with that aspect. Both counsel addressed the Court accordingly.
- [43] In his supplementary heads of argument, Mr Kriel referred to a number of decisions, on the basis whereof he submitted that the appellant should, in the event of his appeal being successful and that of the respondent being

unsuccessful, be awarded R5000-00 damages. The cases referred to are those of *Ngcobo v Minister of Police* 1998 (4) SA (D) where, the plaintiff was awarded R1500-00, having been in custody for three days, which amount would, today, according to Mr Kriel, be R9400-00; *Todt v Ipser* 1993 (3) SA (A), where the appellant was awarded R4000-00 (R13000-00, today), having been detained overnight; *Mthimkhulu and Another v Minister of Law and Order* 1993 (3) SA 432 (E), where two plaintiffs were each awarded a total of R40, 000-00, having each been detained for a total of one hundred and forty four (144) days. That evidently means to that each was awarded about R2, 700-00 for each day spent in custody.

- [44] In *Olivier*, the plaintiff, a highly placed police officer, was arrested in full view of his colleagues. His office was searched, so also his home, in his presence and in front of his wife and children. He was detained for five (5) to six (6) hours, in all, was not placed in the police cells or handcuffed. In awarding damages, the Court stated that, having regard to the facts of the case, as well as to previous awards in similar matters, an amount of R50 000, 00 was fair to all parties. In an unreported judgment of this Court, *Francina Maria Killan v minister of Safety and Security*, Case No. 2605/05, Southwood, J awarded the plaintiff R50 000,00. She was arrested in broad daylight, in the presence of her colleagues, in the Department of Home Affairs, where she had been in employment as a marriage

officer for thirteen years. She was placed into the rear of a police van in the full view of her colleagues and driven to the police station, where she was detained for a period of twenty five (25) hours.

[45] It is not possible to determine a common method of arriving at appropriate and similar awards of damages for similar cases. No two cases are really identical. Guidelines are mentioned in, *inter alia*, Neethling's *Law of Personality*, 2<sup>nd</sup> ed, para 2.4. I have taken those into account. Most of the cases I have been referred to were finalised more than a decade ago, at a time when the economy of the country was much firmer and the value of the rand was much stronger than it currently is. It follows that the awards should now be substantially higher, somewhere in the vicinity of the awards in *Olivier* and *Killan*. It is true that the delay in the finalisation of this judgment, for no fault of the ', will prejudice them, in the sense that they would probably have had to pay somewhat less than now. On the other hand, it is not the appellant's fault that the judgment was delayed and he should be protected from the vagrancies of the economy of the country or the world. Absent his arrest, the defendants would not be facing such fluctuations.

[46] I am of the view that, on the facts of the appeal before us, a similar award is justified. The appellant is an educated person. It is not stated what his level of education is, except that he worked for a firm of attorneys – his attorney, Andre

Grobler's firm of attorneys. He, in all probability, has some high school education. He had been in such employment for ten (10) years as at the time of his arrest. He normally worked from about 16:30 to 17:00 and was arrested at about 18:30. He was in police custody until his release at court the next morning. It is common cause that he was refused permission to telephone his employer, after his arrest, and that he told constable Maluleka that he was supposed to go on duty the next morning. This demonstrates that he is a responsible person, who cares about his job and source income. He was locked and detained in a "holding cell", at the Sinoville Police station until the next morning. Conditions in police cells are notorious. Constable Maluleka has no personal knowledge of what happened after the appellant's incarceration. It is common cause, however, that he was taken to court, where the case against him was withdrawn.

[47] No details are given of the court proceedings, except that he was released at about 10:00. Counsel for the respondent could not say, before us, why the case was withdrawn. The appellant was, therefore, in custody for a minimum of fifteen (15) hours and thirty (30) minutes. Most of that time was spent inside the holding cell. The appellant had had no opportunity to inform his employer and next of kin about his predicament and what would happen to him the next day.

[49] Mr Kriel submitted, in details I need no repeat, that the appellant's circumstances are less deserving of an award of damages in the region of R50 000,00 than was the case in *Olivier and Killan*. I disagree and am of the view that R50 000,00 is an appropriate award in the appellant's case. In the circumstances I make the following order:

- (a) The appellants appeal against the Magistrate's order, dismissing his claim, succeeds;
- (b) The respondent's counter-appeal against the Magistrate's finding, that he failed to discharge the *onus* bore, is dismissed;
- (c) The appellant is awarded damages in the amount of R50, 000, 00, to be paid by the respondent;
- (d) The Magistrate's order that each party was to pay its own costs is set aside;
- (e) The respondent is ordered to pay
  - (i) costs of the action for proceedings in the Magistrate's court; and
  - (ii) costs of this appeal.

  
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**J.N.M POSWA**  
**JUDGE OF THE HIGH COURT**

I agree

  
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**T.J RAULINGA**  
**JUDGE OF THE HIGH COURT**