

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

NOT REPORTABLE

Case no: CA 66/2022

In the matter between:

WAYNE PIETERS

Appellant

and

THE MINISTER OF POLICE

Respondent

JUDGMENT

Govindjee J

[1] The appellant was arrested without a warrant by members of the South African Police Service at 07h10 on 8 December 2018. He was charged with ‘drunk and disorderly’ conduct and detained at the Kabega Park Police Station until 15h45 that day. He instituted an action against the respondent for wrongful and unlawful arrest without a warrant. The respondent denied liability, averring *inter alia* that the arrest was justified and that the appellant had not suffered any harm as a result of his arrest and detention.

[2] The appellant agreed to commence proceedings before the court a quo on the basis that his *locus standi* had been placed in issue. Despite the onus on the respondent to prove the justification for the arrest, the appellant proceeded to

present his entire case for the sake of convenience, before the respondent led its evidence.

The trial proceedings

[3] The respondent admitted the arrest of the appellant on a charge of drunk and disorderly conduct in a public place. The respondent averred that the arrest and subsequent detention were lawful, relying on s 40(1)(a), alternatively s 40(1)(b) of the Criminal Procedure Act, 1977.¹ The alternative basis was seemingly jettisoned during the trial.

[4] The appellant's version was that he had not consumed any liquor on the day in question. He had taken a taxi from his home in Gelvandale to Schauderville and had walked from there to Malabar for a work-related appointment. It was during the time that he was walking to Malabar that he was arrested, placed in a police van and taken to a police station. His girlfriend, Ms M[...], testified that he had left home at 05h00 that morning and had not been drinking.

[5] Constable Nel was the only witness called by the respondent. On his version, the appellant had been lying asleep on a pavement in the Kabega Park area, with his feet in the street. The appellant was smelling of alcohol and was not easily woken. Constable Nel tried to assist him to his feet but was met with resistance. The appellant was arrested on the basis that he had been sleeping in a manner that was a nuisance and a danger to himself and to motorists. During cross-examination, Constable Nel testified that another police officer had been driving the police van on the day of the incident. He vaguely recalled that this was Sergeant Oosthuizen, as confirmed by the entry in the SAP 15 register.

The judgment of the court *a quo*

[6] The magistrate's analysis of the evidence presented at trial was terse:

¹ Act 51 of 1977.

'The Plaintiff testified and called one witness C[...] M[...], who testified on his behalf. Constable Anrich Nel testified on behalf of the Defendant...

There are two mutually destructive versions before the Court...both cannot be true. Only one can be true. Consequently the other must be false.

The Plaintiff's witness confirms that she was with the Plaintiff on the Friday evening: that she was present when he left for work on the Saturday morning. Her evidence does not take the case any further. She was not present when he was arrested.

In cases in which the onus of proof rests upon the Plaintiff and the Court at the end of the case is unable to determine which side has spoken the truth, it must order absolution from the instance.

If at the conclusion of the case the Court is unable to reject either the Plaintiff's or the Defendant's version and the Court cannot determine what happened, he will order absolution from the instance.

In this case such an Order is made and it is ordered that each party pay its own costs.'

The appeal

[7] The appellant submitted that the magistrate had erred and misdirected himself by dealing with the case on the basis that the onus of proof rested on him. In addition, it was argued that the magistrate failed to scrutinise the mutually destructive versions of the appellant and Constable Nel properly. Ms M[...]’s unchallenged evidence regarding the appellant’s state of sobriety was not afforded due consideration and, finally, an adverse inference ought to have been drawn from the respondent’s failure to call Sergeant Oosthuizen to testify.

Analysis

[8] It is lamentable that the court a quo made no effort to apply the accepted technique used to resolve two irreconcilable versions, as described in *SFW Group Ltd & Another v Martell et Cie & Others*.² No findings of credibility were made. There were neither remarks about the candour and demeanour of the witnesses nor a reflection of the probabilities or improbabilities of the respective versions. The court a quo seemingly embraced the path of least resistance in concluding that it was unable to determine what had transpired. The magistrate proceeded to use his understanding of the onus to conclude that the appellant had failed to make his case, so that the respondent was absolved from liability. Here too the magistrate erred.

[9] It is trite that where an arrest without a warrant is admitted, the onus rests on a defendant to justify the jurisdictional facts for a lawful arrest:³

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law.’

The fact that the appellant accepted a duty to begin has no bearing on the onus in respect of proving the jurisdictional facts for a lawful arrest.⁴ It was for the respondent to do so. There is no cross-appeal against the magistrate’s finding that the probabilities of the respective versions were evenly balanced. Accepting that to then be the case, it was the respondent that failed to discharge its onus to prove the jurisdictional facts for a lawful arrest on a balance of probabilities. The subsequent detention was, as a result, also unlawful. The consequence of that must be that the appellant ought to have succeeded in his claim, and the magistrate’s decision to the contrary must be set aside.

[10] This outcome is supported when considering certain aspects of the evidence presented at trial. In particular, M[...]’s evidence that she had seen the appellant in a sober state at 05h00 on the day of his arrest was unchallenged. There is no

² *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) para 5.

³ *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F.

⁴ See *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 paras 7, 8, 45-53.

apparent basis for rejecting that evidence, which was material. The court *a quo* erroneously placed no emphasis on this in weighing the evidence presented. The consequence is that it is highly improbable that the appellant would have been in the advanced stage of intoxication described by Constable Nel approximately 90 minutes later. His evidence on the point stands in stark contrast to that of the appellant, supported by M[...].

[11] In addition, as argued by *Mr Wessels*, the magistrate erred in failing to draw an adverse inference from the respondent's failure to call Sergeant Oosthuizen, who was present at the time that the appellant's arrest, to testify. The SCA has confirmed that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before the trial court, this failure may lead to an inference that it fears that such evidence may expose facts which are unfavourable to its case.⁵ Whether or not an inference ought to be drawn depends upon the facts of the matter, and the strength or weakness of the case is a relevant factor for consideration. In this instance the probabilities certainly did not favour the respondent strongly. Sergeant Oosthuizen cannot be said to have been a witness equally available to both parties. There is no indication that he was unable to testify. His evidence may have been crucial in respect of material aspects of the dispute between the parties. The respondent should have called him to testify and the court *a quo* erred in failing to draw an adverse inference from the failure to do so.

Quantum

[12] The appeal must, for all these reasons, be upheld with costs. As for quantum, the appellant was detained in a dirty and smelly cell for approximately eight and a half hours. His fundamental right to dignity was impaired as a result of his wrongful arrest and warrants an appropriate award of damages. That award should provide a measure of satisfaction for the injustice he has suffered.

[13] *Mr Wessels* argued that an award between R60 000 and R70 000 would be equitable. He provided a brief analysis of the varying amounts ordered by different

⁵ *Dlanjwa v The Minister of Safety and Security* [2015] ZASCA 147 para 29.

courts in comparable cases. It is the facts of the case that predominantly determine what is appropriate. The appellant was detained during the day and for a relatively short period of time. There is a paucity of information regarding the actual conditions he experienced while incarcerated. An award of general damages in the sum of R35 000 is considered to be an appropriate sum to ameliorate the infringement of his rights.

Order

[14] In the result:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and is replaced with the following:
 - ‘1. The defendant is ordered to pay to the plaintiff the amount of R35 000, as and for damages.
 2. The defendant is ordered to pay interest on the aforesaid amount at the legally prescribed rate, from the date of service of summons to date of payment.
 3. The defendant is ordered to pay the plaintiff’s costs of suit, including increased fees for counsel but limited to twice the tariff for consultation and trial, together with interest calculated thereon at the legally prescribed rate, from a date fourteen (14) days after taxation to the date of payment.’

A GOVINDJEE

JUDGE OF THE HIGH COURT

EKSTEEN J:

I agree.

JW EKSTEEN

JUDGE OF THE HIGH COURT

Heard: 10 March 2023

Delivered: 14 March 2023

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