



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

CASE NO.: CA 117/2021

In the matter between:

MINISTER OF POLICE

Appellant/Respondent in respect of
Cross-Appeal

and

RYAN SYCE

First Respondent/Appellant in respect of
Cross-Appeal

SEBASTIAN CARL BLIGNAUT

Second Respondent

Coram: D van Zyl DJP & Ah Shene AJ

Dates heard: 20 May 2022

Delivered: 4 October 2022

APPEAL JUDGMENT

AH SHENE AJ

INTRODUCTION

- [1] This is an appeal against the decision of the Magistrate's Court for the district of Port Elizabeth (now known as Gqeberha). The first respondent instituted action for damages against the appellant arising out of a claim for unlawful arrest and detention and a further claim for an unlawful search conducted by members of the South African Police Services. The second respondent's claim was limited to what he alleged was an unlawful search of his person by the same police officers. The Magistrate delivered judgment, pursuant to which she dismissed the first respondent's claim for unlawful arrest and detention, with no order as to costs. Both the respondents were successful in their claims for an unlawful search, for which they were awarded R30 000.00 in damages each plus costs, with interest running from the date of summons. These orders form the basis of the appeal and cross appeal by the first respondent.

APPELLANT'S GROUNDS OF APPEAL

- [2] The appellant contends that the court erred in the following respects:
- [2.1.] by awarding interest in respect of the unlawful search, from the date of summons, and should have ordered that interest run from the date of judgment since damages were assessed at its present value at the date of judgment; and
- [2.2.] by failing to award costs in favour of the appellant in respect of the unlawful arrest and detention claim.

GROUNDS OF THE CROSS APPEAL BY THE FIRST RESPONDENT

- [3] The first respondent's cross-appeal pertains to the trial court's (the court) finding that the arrest and detention were lawful, and the grounds of appeal can be summarised as follows:
- [3.1] that the Magistrate misdirected herself in finding that the first respondent's arrest and detention was lawful and justified;

- [3.2] the Magistrate erred in failing to deal with the issue of discretion;
- [3.3] the arrest was wrongful, in that the arresting officer failed to read the first respondent's Constitutional rights to him at the time of his arrest, and that the Magistrate failed to place sufficient weight on the versions, improbabilities and contradictions contained in the evidence of the witnesses;
- [3.4] alternatively, in the event of a finding by this Court that the initial arrest and detention was lawful, that the Magistrate erred in finding that the first respondent's detention for the entire period in police custody was lawful and justified.

THE PLEADINGS

- [4] At paragraph 14 of the particulars of claim, the first respondent pleaded as follows:

- “14. Plaintiff's arrest was wrongful, unlawful and malicious in that, *inter alia*:**
- 14.1 he did not commit an offence in the presence of a peace officer;**
- 14.2 there was no reasonable suspicion that he had committed a schedule one offence;**
- 14.3 the arresting officer failed to explain plaintiff's constitutional rights to him; and**
- 14.4 the arresting officer failed to comply with sections 4(8) of the Police Standing Order G341.**
- 15. After plaintiff's arrest, without a warrant, he was detained arbitrarily and without just cause at the Walmer Police Station on the said charge under Walmer CAS99/12/2014.**
- 16. On 7 December 2014, plaintiff was eventually released from custody at the Walmer Police Station on a SAP496 and warned to appear in court on 6 July 2015.”**

- [5] The first respondent further pleaded that the plaintiff's detention and incarceration at the Walmer Police Station was wrongful, unlawful and malicious and under the prevailing circumstances, *inter alia*:

- “17.1 There was no reasonable and/or objective grounds justifying plaintiff’s subsequent detention after his blood was drawn at the hospital and his personal particulars were obtained by the arresting officer;**
- 17.2 The arresting officer, as well as the police officers at the Walmer Police Station, failed to apply their minds, in respect of the plaintiff’s detention and circumstances relating thereto; and**
- 17.3 He was not promptly informed of his right to institute bail proceedings, as required by Section 50(1)(b) of the Criminal Procedure Act, 51 of 1997.”**

[6] During the course of the trial after the conclusion of the first respondent’s evidence in chief, the attorney for the first respondent asked for an amendment to the particulars of claim deleting paragraphs 14.1 and 14.2. and replacing it with the following:

- “ 14.1 the plaintiff’s arrest is wrongful, unlawful and malicious in that inter alia, the arresting officer informed the plaintiff that he was obliged to arrest him;**
- 14.2. the arresting officer refused to listen to the plaintiff’s request that he be allowed to walk to the third (sic) plaintiff’s home, leave his vehicle at the garage, not the scene, at the nearest petrol station “**

TRIAL PROCEEDINGS

[7] The evidence relevant to this appeal is briefly summarised. Constable Tom, the arresting officer, testified on behalf of the appellant. She and Constable Grimsel, on 6 December 2014, were patrolling in the Walmer area of Gqeberha, when they received information on the police radio that a silver VW Polo, with no registration number, was transporting drugs in and around the Fig Tree Centre. Constables Tom and Grimsel stopped the vehicle and approached the driver. They introduced themselves and advised the first respondent who was the driver of the said vehicle, that they had received information that a silver Polo was, transporting drugs. They enquired from the driver if they could search the vehicle. Constable Tom could smell alcohol on his breath and the first respondent admitted to having consumed alcohol. As a result, she administered a breathalyser test, which yielded a result of 0.45 mg. She then advised the first respondent of her intention to arrest him and explained his Constitutional rights to him.

- [8] The first respondent was arrested, taken to the Walmer Police station, and thereafter to Livingstone Hospital for a blood test to be administered. He was later detained at the Walmer police cells and released on warning at 12h10, the following day, being 7 December 2014.
- [9] Under cross-examination, Constable Tom was questioned about her discretion to arrest the first respondent given that he had requested not to be arrested. He could walk to a friend's house close by and leave his vehicle at the petrol station. The witness stated that such a request was never made to her but in any event *“he had alcohol in his body”*.
- [10] Sergeant Theron was not present at the time of the arrest. Constable Grimsel testified that he was doing duty with Constable Tom, when they received a description of a silver Polo motor vehicle that had been parking in the area known as the Fig Tree. This vehicle was possibly involved in the transportation of drugs.
- [11] They approached the silver VW Polo vehicle, pulled it off the road and asked the driver if a search could be conducted. After having obtained the driver's consent, the vehicle was searched. Sergeant Theron confirmed that Constable Tom was the arresting officer. He too smelt alcohol on the first respondent's breath and confirmed that Tom administered a breathalyser test. He further testified that a breathalyser test is only administered when a person is suspected of having been drinking.

ANALYSIS

Cross Appeal by the first respondent

- [12] The appellant pleaded that the first respondent was arrested in terms of Section 40(1)(a), alternatively section 40(1)(b) of the Criminal Procedure Act (the CPA).¹ The magistrate in the court, based her judgment on section 40(1)(b).

¹ Act 51 of 1977.

[13] Police officers are given extraordinary powers of arrest. An arrest is always an infringement of liberty and human dignity unless, of course, it is justified.

[14] In *The Minister of Safety & Security v Van Niekerk*² the court held that nuanced guidelines exist as to when to arrest without a warrant and when not to. This must be read in light of *MR v Minister of Safety and Security*³ and *Minister of Safety and Security v Sekhoto*.⁴

[15] In respect of section 40(1)(b), the position is set out as follows in *Minister of Police v Dhali*:⁵

*"In Duncan v The Minister of Law and Order*⁶, it was held that the jurisdictional facts for a section 40(1)(b) defence are that:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (ii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1, and
- (iv) the suspicion must rest on reasonable grounds."

[16] Whether or not a suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA is an objective test.⁷

[17] In *Mvu v Minister of Safety and Security*⁸ the court stipulated:

"the fourth requirement ie that the suspicion must rest on reasonable grounds is objectively justifiable: " the test is not whether a policeman believes that he has a reason to suspect, but whether on the objective approach he in fact has reasonable grounds for his suspicion."

[18] Justification for the detention after an arrest, until the first appearance, continues to rest on the police.⁹ It is trite that a trial court's findings of fact and credibility

² 2008 (1) SACR 56 (CC).

³ 2016 (2) SACR 550 (CC).

⁴ 2010 (1) SACR 388 (FB).

⁵ (unreported ECD CA 327/2017 delivered on 26 February 2019).

⁶ 1986 (2) SA 805 (A).

⁷ *Minister of Safety and Security v Swarts* 2012(2) SA SACR 226 (SCA) at para [20].

⁸ 2009 (2) SACR 291 SACR (GSJ) at para [9], and the authorities referred to in fn 16.

⁹ *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) at para [17].

are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies.¹⁰

[19] A pertinent feature of the evidence led before the court was the first respondent's admission that he consumed alcohol earlier. This, along with the breathalyser test, confirmed Constable Tom's suspicion that the first respondent was under the influence of alcohol whilst driving and therefore based on objective facts, she entertained a reasonable suspicion that the first respondent had committed an offence referred to in Schedule 1, which led to his arrest. The Magistrate cannot be criticised for coming to this conclusion.

[20] I now turn to whether the magistrate considered the issue of discretion. On a reading of section 40(1)(b) it has two separate and distinct issues each with its own onus of proof. The first issue deals with the existence of the power to effect an arrest in the circumstances contemplated in the section. The power to arrest arises when the four jurisdictional facts referred to in paragraph [15] above are found to be present. The second issue deals with the exercise of that power. The arresting officer "may" arrest, that is, he has discretion to exercise his power of arrest without a warrant once it is found that the four jurisdictional facts are present.¹¹ Unlike in the case of the existence of the power to arrest, the onus is on the first respondent to prove that the arresting officer failed to properly exercise her discretion in arresting the first respondent. In *Minister of Safety and Security v Sekhoto and Another*,¹² Harms DP at para 49 stated that:

"A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This is the position whether or not the right to freedom is compromised. For instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue."

¹⁰ *Rex v Dhlumayo* 1948 (2) SA 677 (A) 705; *S v Hadebe* 1997 (2) SACR 641 (SCA).

¹¹ *Supra* at fn 4 at para [25].

¹² *Supra*.

[21] Not unlike any other exercise of a discretionary power, the power to arrest must be exercised *inter alia* in good faith, rationally and not arbitrarily.¹³ As stated by Harms DP in *Sekhoto*,¹⁴ the principle of litigation fairness demands not only that the ground(s) on which it is contended there had been an improper exercise of a discretion must be pleaded, but the specific facts on which those grounds are based must be stated, ***“It cannot be expected of a defendant ... to deal effectively, in a plea or in evidence, with unsubstantiated averments of mala fides and the like, without the specific facts on which they are based being stated.”***¹⁵ Harms DP referred with approval to the pronouncements of Hefer JA in *Minister of Law and Order v Dempsey*¹⁶ with regard to the drawing of a distinction between jurisdictional facts for the existence of a power, and the improper exercise of that power once found to exist. This, Hefer JA stated, means that there are two separate and distinct issues, each having its own onus.

[22] In the present matter, the first respondent had failed to pertinently allege an improper exercise of a discretion, or the grounds on which such an improper exercise of a discretion is based. The amended pleading goes no further than that the arrest was wrongful, unlawful and malicious in that the arresting officer told the first respondent that she was obliged to arrest him, and did not listen to him when he asked to be allowed to walk home. The first aspect was not substantiated by the evidence, and the second aspect cannot be said to have raised the issue of the improper exercise of the power to arrest with the required clarity and specificity so as to alert the appellant thereto. The result was that the evidence in chief and the cross-examination of Constable Tom shows that she was ill prepared to deal with the issue of an exercise of a discretion. She clearly did not understand the questions put to her and an attempt by her to seek clarity on the nature of the issue that was raised with her, was effectively rebuffed.

¹³ The grounds are the traditional common law grounds of review and the Constitutional principle of rationality. *Sekhoto* supra at paras [32] to [36] and *Naidoo v Minister of Police and Others* 2016 (1) SACR 468 (SCA) at paras [40] to [41].

¹⁴ Supra.

¹⁵ Supra at para [50].

¹⁶ 1988 (3) SA 19 (A) at 37 B – 39 F.

- [23] The onus was on the first respondent to show that the arresting officer's exercise of her discretion was improper on any of the specific grounds such as irrationality, arbitrariness or *mala fides*. No evidence of that nature was elicited. The evidence does not show that Constable Tom had any other objective, other to ensure that the first respondent was brought to justice. The first respondent testified that he was close to his destination, Fairview Links, and that it was in walking distance from the Figtree where he was arrested. The fact is that a blood sample of the first respondent had to be obtained. There was no evidence that the first respondent volunteered to accompany the police to the hospital for that purpose and that he would agree to give such a sample, without him being placed under arrest, or that he would accompany them to the police station for him to be formally charged.
- [24] The suggestion that the arresting officer did not have to arrest the first respondent, but could have released him prior to the blood test, was untenable. Releasing him, without taking the blood sample would be a clear dereliction of her duty as a police officer. The decision to arrest must be found to fall within the bounds of rationality. Taking into account the facts she was faced with, Constable Tom cannot be faulted for arresting the first respondent at the time.
- [25] Given the totality of evidence before the magistrate, I am satisfied that she did not misdirect herself in this regard as the first respondent not only failed to properly raise the issue for determination, but must on the facts be found to have failed to discharge the onus of proof in relation to the issue of discretion.
- [26] Mr McKenzie, for the first respondent, however argued that should it be found that the arrest and initial detention was lawful, it should find that the detention at the Walmer Police Station after the blood was drawn and the first respondent's personal particulars were obtained, was wrongful and unlawful. The grounds upon which it is contended that the detention was unlawful, were in my view not adequately pleaded, and even if it was, there is no evidence on which to base a finding that his arrest became unjustifiable and unlawful.

[27] As stated, the onus to justify the detention of a person rested on the appellant. However the issue of the lawfulness of the continued detention of an arrested person will only arise when it is pleaded. **“The onus can arise only after the issue itself has arisen.”**¹⁷ This means that the grounds on which it is based must be pleaded. It should at least be made clear in the pleadings when and at what stage it is contended that the detention of the arrested person become unlawful. A failure to do so may result in trial prejudice.¹⁸ In *Sandi v Minister and Security and Another*, Eksteen J said the following:

“The grounds upon which it is contended that the detention is unlawful must therefore be pleaded in order to alert the defendant to the issue in respect of which the defendant bears the onus.”

As stated by Eksteen J in *Jacobs v Minister of Safety and Security*,¹⁹ once the initial arrest and detention is found to be lawful, it must follow *ex lege* **“that the ensuing detention was lawful unless and until it becomes unlawful for some other reason. If the appellant, on the facts of this case, wished to rely on extraneous circumstances, outside of the arrest itself, for the contention that the detention became unlawful at some subsequent stage it was incumbent upon the appellant to plead this.”** A failure to plead this issue with the required particularity would otherwise result in the untenable situation that the appellant would be required to prove facts which justify the entire duration of the detention.

[28] It is trite that an arrested person must be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. The first respondent was released on 7 December at 12h10, 16 hours after his arrest and well before the expiry of the 48 hours. It is not clear from the pleadings when exactly during the 16 hours the first respondent contended his detention became unlawful, save for alleging that his further detention was not justified after his blood was drawn and his personal particulars were obtained.

¹⁷ Minister of safety and Security v Slabbert [2010] 2 All SA 474 (SCA) at para [21].

¹⁸ With regard to the function of pleadings, see *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107 C – E.

¹⁹ (Case no CA 327/2012) [2013] ZAECHGHC 95 (23 September 2013).

[29] The purpose of an arrest is to bring the arrestee to justice.²⁰ It is for the court or a police officer of, or above the rank of non-commissioned officer as contemplated in sections 59 and 72 of the CPA, to determine whether the arrestee should be detained pending his or her trial.²¹ It “**is the role of the court (or in some cases a senior officer)**” to determine whether the suspect ought to be detained pending his or her trial.²² This is not a matter when subsequent to the arrest of the arrestee it became evident that there was insufficient evidence to charge him or her, that is, that the purpose of the arrest had fallen away. What the first respondent in essence is attempting to allege is that a determination whether the first respondent ought to be detained pending his trial could reasonably have been made some time earlier before his actual release in terms of the relevant section of the CPA by the police officer concerned.²³

[30] On the assumption that an unreasonable delay before a determination is made as contemplated may render the continued detention of an arrestee unlawful, I am not convinced that such a finding is justified on the evidence placed before the court. It is a factual question which must be determined on the facts of each case and with the purpose for which the period of detention after arrest is used in mind.²⁴ The evidence shows that the first respondent was detained for a relatively short period of time during which a number of steps were taken before his release on warning in terms of section 72 of the CPA. He was arrested after 8 pm on the Friday. After his arrest he was taken to a hospital for his blood to be drawn. It was after 9 pm that he was detained at the Walmer Police Station. That same evening, he was advised of his rights as a detainee in writing by the completion of a document known as “**Notice of Rights in Terms of the Constitution,**” which the first respondent acknowledged by signing a certificate to that effect. The next morning at 8 am his warning statement was taken by an investigating officer to which the matter must have been allocated in the meantime. Shortly after 12 pm on the same day, the first respondent was

²⁰ Sekhoto supra at para [42].

²¹ Sekhoto supra at para [44].

²² Sekhoto supra at para [44].

²³ See for example *Rensburg v the Minister of Police and Another* (557/2021) [2022] ZASCA 105 (29 June 2022).

²⁴ *Rensburg* supra at paras [23] to [24].

released on warning. The facts do not speak to their having been an unreasonable delay.²⁵

[31] Finally, concerning the fact that the police failed to inform the first respondent of his Constitutional rights, the Magistrate would have had the advantage of seeing and hearing the evidence. Constable Tom's evidence was that she read the constitutional rights to the first respondent at the time of the arrest and later at the police station. This was corroborated by Constable Grimsel. The first respondent contended that his rights were never explained to him. That his rights were explained by him at the police station is borne out by the declaration signed by him as referred to in the previous paragraph. Having considered all the evidence, the court also concluded that the witnesses were reliable and truthful. The court was therefore in the best position to determine this issue²⁶ and therefore, could only have accepted that the rights were adequately explained to the first respondent. Having considered the conspectus of evidence before, the Magistrate, this court has no reason to conclude that the first respondent's constitutional rights were not explained to him.

[32] The cross-appeal must therefore fail.

Appeal

[33] I now turn to the appellant's submissions in respect of the two grounds of appeal raised.

[34] With regard to the appeal against the order of the Magistrate that the interest was to run on the amounts of compensation awarded to the respondents from the date of service of summons, in *Minister of Police and Another v Muller*²⁷ the court stated the following:

²⁵ Rensburg v The Minister of Police at para [24].

²⁶ Supra at fn10 at para [18]

²⁷ (Case No. CA148/2017) GHTZA (3 May 2018).

“..... In matters where a plaintiff successfully sues in delict, generally the claim is for an unliquidated amount as and for damages. The damages ultimately awarded was for a non-pecuniary loss. That kind of damages is generally assessed at the time of judgment. This case is no different. Therefore interest ought to run from the date of judgment.”

Damages in matters such as the present are assessed at the date of judgment according to present values, and not in depreciated currency. The effect is that the respondents did not suffer any loss which required as a matter of justice that they be compensated by an order that interest should run from the date of service of summons.

[35] In respect of the second ground of appeal, namely that the Magistrate erred in failing to award costs to the appellant, as he was the successful litigant in respect of the unlawful arrest and detention claim, it is trite that a court has a discretion whether or not to award costs. The power of an appeal court to interfere with a costs order is limited to cases of vitiation by misdirection or irregularity or absence of grounds on which a court, acting reasonably could have made such an order.²⁸ The fact that the appeal court would not have made the same order, is not a ground for interference with a costs order of the trial court.²⁹ The respondents were substantially successful in their claims, and I see no reason to interfere with the order of the court made in the exercise of its judicial discretion.

[36] In respect of the costs of this appeal, there are no reasons to depart from the general rule that costs follow the result. The appellant, who is the respondent for the purposes of the cross-appeal, is entitled to the costs of the cross-appeal.

[37] In conclusion, I make the following order:

1. The appeal is upheld with costs.

²⁸ Attorney General Eastern Cape v Blom 1988 (4) SA 645 (A) at 670 D-F

²⁹ Protea Assurance Co. Ltd v Matinise 1978 (1) SA 963 (A) at 976 H.

2. The orders of the Magistrate with regards to the interest awarded to the two respondents are set aside, and substituted with an order in respect of each respondent that:

“The defendant is directed to pay interest on the amount of R30 000.00 to be calculated at the prescribed rate of interest from a date fourteen days after the date of judgment to date of payment.”

3. The appeal in respect of the costs of the action is dismissed.
4. The first respondent’s cross-appeal is dismissed with costs.

SIGNED

L. AH SHENE
ACTING JUDGE OF THE HIGH COURT

I agree:

SIGNED

D. VAN ZYL
JUDGE OF THE HIGH COURT

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Date delivered:

4 October 2022