



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES / NO
(2)	☒ OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>20/5/2019</u>	
DATE	SIGNATURE

Case No: 19156/2019

VUSI REGINALD MATHIBELA

Applicant

And

THE DISTRICT COURT MAGISTRATE
MRS MOKEONA
DIRECTOR OF PUBLIC PROSECUTIONS
GAUTENG DIVISION: PRETORIA
NATIONAL COMMISSIONER OF POLICE
MINISTER OF POLICE

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

SARDIWALLA J:

INTRODUCTION:

1. The Applicant sought an order declaring that his arrest and continued detention was unlawful.
2. The issue before this court is to determine whether the arrest was lawful. The arrest took place without a warrant in terms of Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA).

BACKGROUND:

3. On the 13 March 2019, the Applicant was arrested in terms of S40 (1) (b) of the CPA by Sergeant Rapetswa at the Germiston Police Station where the applicant was booked and processed.
4. It is common cause between the parties that the Applicant was arrested after he voluntarily submitted himself over with his attorney at the Germiston Police Station. Prior to his arrest the Applicant's attorney was in constant communication with Investigating Officer Mokaa, who was in charge of the case, regarding arrangements to have the Applicant arrested and booked.
5. Counsel advised this Court that the Second Respondent was satisfied that there was a *prima facie* criminal case against the Applicant regarding the offences that were committed by his two co-accused which warranted his prosecution.
6. In the interests of convenience evidence led before the *court a quo* will not be repeated in this judgment in any great detail unless material to the conclusions reached.

THE PLEADINGS:

7. The claim is based on unlawful arrest and the onus is therefore on the Respondents to show that the arrest was indeed lawful.
8. It is common cause that the policemen who were involved in the arrest were acting within the course and scope of their employment as policemen of the South African Police Services.

9. The Applicant claims to have had his right of freedom and security infringed upon. However this Court was requested to only make a finding on the merits.
10. The Applicant raised certain points *in limine*, insofar as the pleadings were concerned.
11. The Applicant contended that the Second to Fourth Respondents' Answering Affidavits were inadequately pleaded and was founded entirely upon hearsay evidence. That the Respondents have merely pleaded by making a general reference to a statutory provision without pleading any facts supporting their defence.
12. That the Third and Fourth Respondents should have arrested the Applicant using a Warrant of Arrest together with the relevant affidavits used in support of the Warrant of Arrest.

THE EVIDENCE:

Second Respondent

13. The Second Respondent stated that on 14 March 2019 after perusing the docket it came to a conclusion that the Applicant was positively linked to the offences. Second Respondent was satisfied that the Applicant was lawfully arrested and the matter was enrolled. Further that the Applicant is not contesting his arrest was without merit but rather that the crux of the matter is that his arrest was executed without a Warrant in terms of Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977. In support of this submission the Second Respondent indicated that whilst the other accused in the matter had to be traced and arrested, the Applicant was handed in by his own attorney Mr Mkhabela for booking. The Second Respondent submitted that the Applicant had substantial redress at the bail application and the urgent application and therefore his allegation of infringements against his Constitutional Rights cannot stand.

Third and Fourth Respondents

14. The Third and Fourth Respondents indicated that the case was allocated to Sergeant Mokaa an Investigating Officer. That on 8 March 2019 when the police arrived at the Applicant's known address he had fled the premises but the police were able to arrest the other two accused who were also at the premises. After the arrest of the other two accused, the Applicant and his attorney Mr Mkhabela were in constant communication with Sergeant Mokaa. The Third and Fourth Respondent submitted that the constant communication was to the effect that Mr Mkhabela continually promised that he would hand the Applicant to the Police Station to be booked. Further that throughout this process the investigating team had also monitored the Applicant's residence but were unable to locate him. Therefore due to those circumstances they applied for a Warrant of Arrest at the hearing of the first appearance for the other two accused. Further that the Warrant of Arrest has always been in the possession of the Investigating Officer and even in the case docket. However due to a sudden turn of events on 13 March 2019 Mr Mkhabela decided to call Sergeant Rapetswa another member of the investigation team instead of the Investigating Officer as he had previously done. This is the reason why Sergeant Rapetswa booked and processed the Applicant when he was handed over by his attorney. It was submitted that Sergeant Rapetswa bore a reasonable suspicion regarding the Applicant who was handed in by his own attorney at the police station and therefore it would not have made sense to wait to arrest the Applicant using the Warrant of arrest that was issued, as they previously had difficulties in locating the Applicant. Sergeant Rapetswa's arrest of the Applicant was therefore lawfully justified in terms of Section 40 (1) (b) of the CPA.

Applicant

15. The Applicant did not challenge the version presented by the Respondents nor did he present any version to the contrary.

The Applicant's argument

16. Counsel on behalf of the Plaintiff persisted with *inter alia* the following arguments:
- 16.1 The State failed to prove that the arrest was lawful and justified;
 - 16.2 The State failed to oppose the application in the *court a quo* and the magistrate was thus obliged to find in favour of the Applicant;

- 16.3 The arresting officer bears the onus of establishing the jurisdictional facts;
- 16.4 The Fourth Respondent failed to prove the jurisdictional requirements for a lawful arrest and Counsel referred to *Duncan v Minister of Law and Order*¹;
- 16.5 That an arrestee can challenge his continued detention at any stage and Counsel referred to *Pillay v Minister of Police and Others*²; and
- 16.5.1 That the issue of continued detention should be decided on the facts that were before the Magistrate at the time of the Applicant's first appearance and what transpired in the *court a quo*.

The Respondent's argument

17. Counsel for the Respondents cautioned the court to appreciate the following:
- 17.1 A peace officer is entitled to arrest without a warrant on the basis that it is reasonable to identify the suspect's involvement;
- 17.2 One does not require concrete evidence to establish that an offence has been committed;
- 17.3 There is only a suspicion required, not proof beyond a reasonable doubt;
- 17.4 That the offences that the Applicant were charged with fall under Schedule 1 of the Act; and
- 17.5 That the Applicant's issue rests not in that he was wrongly accused or charged but that his arrest was executed without a Warrant of Arrest despite the fact that he handed himself over voluntarily with his attorney;

ANALYSIS AND FINDINGS:

18. Section 40(1) of the CPA gives peace officers extraordinary powers to arrest. Thus the circumstances surrounding when such arrests are made must be considered carefully otherwise such arrests are considered to be unlawful.
19. In *Duncan v Minister of Law and Order*³, the Court established that jurisdictional facts must exist before such power can be exercised namely:
- a. the arrester must be a peace officer;
 - b. the peace officer must entertain a suspicion;

¹ 1986 (2) SA 80 at 818 F-H

² (5644/2011)[2011] ZAKZPHC 42 (30 September 2011) [11] 16)

³ *supra*

- c. it must be a suspicion that the arrestee committed a schedule 1 offence;
 - d. the suspicion must rest on reasonable grounds.
20. Once these jurisdictional facts are present a discretion arises whether to arrest or not. Such discretion must be exercised in good faith, rationally and not arbitrarily. This is an objective enquiry with relation to the facts of Minister of Safety and Security v Sekhoto and Another⁴
21. Reasonable grounds are interpreted objectively and must be of such a nature that reasonable person would have had a suspicion⁵.
22. The arrestor's grounds must be reasonable from an objective point of view. When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a "reasonable" suspicion before the arrest is made.
23. This test was succinctly summarized in Mabona v Minister of Law and Order⁶ where it was established that what is required is suspicion and not certainty. Such suspicion must make sense otherwise it is frivolous or arbitrary and not reasonable.
24. There must be evidence that the arresting officer formed a suspicion which is objectively sustainable⁷.
25. In Tsose v Minister of Justice⁸ it was emphasized that the arrest must be with the intention of bringing the arrestees before Court. An arrest can take place lawfully, where the arrestor objectively speaking, has a reasonable suspicion against the suspect but has to conduct further investigations after the arrest before finally deciding to charge the arrestee.

⁴ 2011 (1) SACR 315 SCA

⁵ R v Heerden 1958 (3) SA 150 (T)

⁶ 1988 (2) SA 654 SEC

⁷ Ralekwa v Minister of Safety and Security 2004 (1) SACR 313 (T) ¹

⁸ 1951 (3) SA 10A

26. Arrests can therefore take place even if the arrester realised that at the time of the arrest he does not have sufficient proof for a conviction⁹.
27. It should be noted that the events subsequent to the arrests do not have any bearing upon whether their suspicion was reasonable. Therefore this Court will not deal with the evidence pertaining thereto.
28. The crux of the dispute between the parties was whether the suspicion that the Applicant had committed a schedule 1 offence was established on reasonable grounds to justify his arrest without a Warrant. However the Applicant does not state which of these jurisdictional facts, the Fourth Respondent did not satisfy.

Objective test

29. This test was set out in the *Mabona* matter *supra*. The test of whether the suspicion is reasonably entertained within the meaning of section 40(1)(b) of the CPA is objective. The enquiry is therefore - would a reasonable man in the particular Defendant's position who possessed the same information, have considered that there were good and sufficient grounds for suspecting that the Plaintiffs were guilty of the offence for which he sought to arrest the Plaintiff?
30. In evaluating such information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. It was held that;

"The reasonable man will therefore analyse and assess the Quality of the information at his disposal critically and will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However the suspicion must be based upon solid grounds..."

⁹ *Songono v Minister of Law and Order* 1996 (4) SA 384 SEC

(my underlining)¹⁰.

31. In applying the test objectively the conduct of the police officer prior to effecting the arrest therefore must be closely examined.
32. Since the arrest of the other two accused it was Investigating Officer Sergeant Mooka who communicated with the Applicant's wherein the Applicant's attorney Mr Mkhabela promised to submit the Applicant for booking. Sergeant Mooka also had in his possession in the case docket the Warrant of Arrest for the Applicant which was applied for after it became apparent that they experienced difficulty in securing his arrest despite the attorneys' constant reassurances.
33. However due to a sudden change of events by the Applicant's attorney the Applicant decided to contact another member of the investigating team Sergeant Rapetswa and had called him from the Germiston Police Station. It was submitted by the Respondents that given the fact that the Applicant had evaded arrest after several attempts were made to locate him, it was reasonable for Sergeant Rapetswa to seize the opportunity and arrest the Applicant under Section 40 (1) (b) of the CPA, which he is lawfully allowed to do as a peace officer as it had become apparent that to release him would be futile to their investigation. Further that as he since Sergeant Rapetswa was also a part of the investigating team that was investigating the Applicant, he was therefore certain that the Applicant was the same person that they were searching for. This certainty was further confirmed by the fact that the Applicant was presented to the Police Station by his own attorney Mr Mkhabela. There was and can be no doubt that the correct person was arrested. Further that at no stage during the processing of the Applicant did the Applicant or his attorney challenge that a Warrant of Arrest was not used in the execution of his arrest and processing.
34. Was this sufficient to establish there were reasonable grounds existed to form the suspicion?

¹⁰ Mabano supra at p 658

35. Counsel for the Applicant has not indicated to this Court that a proper investigation process was not followed nor has he alleged which of the jurisdictional facts required in Duncan were not satisfied by the Fourth Respondent. The Applicant does not even allege that the Respondents did not have any proof of his association to the offences that he was charged with. To the contrary the Applicant does not even allege that his arrest was wrongful but only that the procedure of not affecting his arrest by execution of a Warrant was unlawful. In fact the Applicant requests in prayer 8 and 9 of the notice of motion that he can only be arrested by way of a Warrant of Arrest issued in terms of the provisions of Section 43 of the Criminal Procedure Act 51 of 1977 and that such Warrant be served on him together the affidavits used in support of the application for the Warrant of Arrest.
36. The Respondents however have provided this Court with a version of events arising from the date of the arrest of the other two arrested suspects up until the date of the arrest of the Applicant. These versions were detailed and corroborated each other in many material respects. It is significant to point out at this stage that the Applicant has presented no contrary version of those events and certainly has not challenged any of the Respondents versions.
37. The Respondents have further provided clear and concise reasons as to why the arrest of the Applicant was effected without a Warrant of Arrest and instead by using the Section 40 (1) (b) of the CPA procedure in that until the time that the Applicant's attorney presented him to the Germiston Police Station, there was severe difficulty in securing his arrest. Therefore it was reasonable to arrest him using section 40 (1)(b) of the CPA when the opportunity arose instead of waiting to arrest him by execution of the Warrant of Arrest.
38. Having regard to the evidence before this Court and in light of the aforesaid authorities, I am satisfied that a reasonable suspicion was established. There was nothing more required by the Fourth Respondent particularly in light of the fact that they relied on the Applicant's attorney physical submission of the Applicant for arrest at the Germiston Police Station on 13 March 2019 to confirm their

suspicion that the Applicant was the person they were searching for. Surely they were not expected to critically question the Applicant who had voluntarily submitted himself to arrest after several prior arrangements to do so.

39. The suspicion had to be based on solid grounds. They were expected to make certain enquiries and investigate the accuracy of the information before acting upon it which I am satisfied that the Fourth Respondent did in fact do.

40. Harms DP in the Sekhoto¹¹ matter at 327b-c held that:

"once the required jurisdictional facts are present, the discretion or not to arrest arise. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. The standard was not breached because an officer exercised the discretion in a manner other than that deemed optimal by the Court. The standard was not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached".

41. Counsel for the Applicant relied on the Sekhoto matter which however also held that the arrestor was not called upon to determine whether or not a suspect ought to be detained pending trial, that was for the Court to determine, and the purpose of an arrest was simply to bring the suspect before Court so as to enable it to make that determination¹²; the missing link shall remain that the suspicion was reasonable.

42. Consequently this Court is convinced that the arrest was lawful if one has regard to the conduct of Sergeant Mokaa and Sergeant Rapetswa prior to the arrest of the Applicant. They had the requisite knowledge of the Applicant's involvement in the associated offences and had analysed the information accordingly prior to his arrest.

43. This Court further had regard to the fact that the Fourth Respondent has pleaded the jurisdictional facts particularly that the suspicion rested on reasonable grounds

¹¹ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA)

¹² *Sekhoto* matter *supra* at 331c-332a

and has proven that Sergeant Rapetswa's actions were reasonable and rational.

44. It is trite law and as Harms DP in the Sekhofo matter at page 333 succinctly held that,

"if a defendant wishes to rely on s40(l)(b) defence, he has to plead the four jurisdictional facts. This requires that the facts on which the defence is based must be set out. "

44. This Court is therefore not satisfied that the pleadings lacked the jurisdictional requirements and the facts supporting thereto as alleged by the Applicant.

Onus

45. It is well established principle that the onus rests on the arresting officer to prove the lawfulness of the arrest. In this case the Fourth Respondent has adequately shown that they exercised their suspicion reasonably, that is they met the jurisdictional requirements¹³. Moreover this Court is aware that arrests without warrants are not always made upon written affidavits. In certain cases police officers rely on oral testimony. What was crucial is what had they done to establish that solid grounds existed for the suspicion.

CONCLUSION:

46. This Court's finding therefore is that the Respondents have sufficiently proven on a balance of probabilities that the arrest was lawful.

ORDER:

The following order is therefore made:

The application is dismissed with costs.

¹³ *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 SCA



SARDIWALLA J
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	29 March 2019
Date of judgment	:	22 May2019
Applicant's Counsel	:	AM Van Den Heever L Phasha
Applicant's Attorneys	:	Mathopo Attorneys
Second Respondent's Counsel	:	SR Sibara
Third and Fourth Respondent's Counsel	:	HA Thenga
Respondent's Attorneys	:	State attorney Pretoria