

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A282/2006

In the appeal between:

MINISTER OF SAFETY AND SECURITY

Appellant

and

TSHEI JONAS SEKHOTO

1st Respondent

OUPA MOSUWU JOSEPH MADONSELA

2nd Respondent

also known as OUPA JOHANNES SIBEKO

CORAM:

HANCKE, *et* KRUGER, *et* VAN ZYL, JJ

JUDGMENT:

HANCKE *et* KRUGER, JJ

HEARD ON:

31 AUGUST 2009

DELIVERED ON:

25 SEPTEMBER 2009

1 INTRODUCTION

[1] The respondents claimed damages for wrongful arrest, unlawful detention and malicious prosecution in the magistrates' court, Vrede. The magistrate upheld the claim for wrongful arrest and granted the first respondent R5 000,00 damages and second respondent R8 000,00. The appellant appealed to this court and the respondents lodged a counter-appeal. The basis for the magistrate holding the arrest unlawful was the following:

“Dit is duidelik dat veral eiser 1 bekend was aan die polisie. Geen getuienis was aangebied dat daar ‘n gevaar bestaan dat of eiser 1 of 2 nie hul verhoor sou bywoon nie, of redes waarom hulle nie gedagvaar of gewaarsku was nie. Intendeel die hof wat borg toegestaan het, het ook so gevoel, daarom dat borg wel toegestaan was.”

2 THE FACTS

[2] Both respondents were arrested by Inspector Van der Watt without a warrant. First respondent was arrested on 15 July 2002 and second respondent on 16 July 2002. Both were detained at the Vrede Police Cells until their court appearances at Vrede on 18 July 2002, whereafter first respondent was again detained at Vrede Police Cells until bail was fixed by the court on 23 July 2002. After 18 July 2002 second respondent was detained at Standerton Prison until his release on 26 July 2002.

3 THE PARTICULARS OF CLAIM

[3] The particulars of claim contained three claims:

“4.

CLAIM I:

On the 15th July 2002 and at Ntshwanatsatsi Cornelia district Vrede, members of the police force, stock theft unit, amongst which was

Captain Odendaal, Sergeant C.A. van der Watt, Inspector Mbongo and Sergeant Tsotetsi unlawfully, intentionally and unreasonably arrested the first plaintiff who had found the said police officers at first plaintiff's father's house. First plaintiff was arrested without a warrant of arrest.

5.

Second plaintiff was also unlawfully, intentionally and unreasonably arrested without a warrant, on the 16th July 2002, by Sergeant Van der Watt and Sergeant Tsotetsi who had driven from Vrede Police Station together with the first plaintiff, to go and arrest second plaintiff at his house at Goedheid farm, district Vrede.

6.

Plaintiffs contend that the said arrests infringe on their liberty and constituted an *injuria*, as a consequence of which each suffered damages in the amount of Fifty Thousand (R50 000,00) rand, for which defendant is held vicariously liable.

7.

CLAIM II:

After the said police officers mentioned in paragraph 4 above, had arrested the first plaintiff, they drove the first plaintiff to Vrede Police Station and detained him until first plaintiff was released on bail on the 25th July 2005.

Second plaintiff was also detained at Vrede Police Station after having been arrested on the 16/7/02, was remanded in custody and transferred to Standerton prison, where he was released on bail on the 26th July 2002.

8.

It is the first and second plaintiffs' contention that their detention was unlawful, intentional and unreasonable and constituted a *injuria* as a

result of which each suffered damages in the amount of twenty five thousand (R25 000,00) rand each. Defendant is held vicariously liable for payment of the said amounts.

9.

CLAIM III:

Both plaintiffs were prosecuted under case number C40/2002 in the Vrede Magistrates' Court sitting at Cornelia on the 3rd November 2002, proceeded again on the 21st January 2003, on the 18th March 2003 and were both discharged at the end of the State case on the 31st March 2003.

10.

It is both plaintiffs' contention that the prosecution was unlawful and malicious alternatively that the prosecution was false and the said police officers knew that the prosecution was false as there was no basis for the said prosecution. As a consequence of the said malicious and/or false prosecution, the plaintiffs suffered damages in the amount fifty thousand (R50 000,00) rand each, for which the Honourable Minister is held vicariously liable."

- [4] As far as claim III is concerned, it is clear from the record that the requirements for malicious prosecution, namely that the arrest or prosecution be instigated without reasonable and probable cause and with malice or *animo iniuriandum* were not satisfied. Mr. Pienaar, counsel for the respondents, in our view correctly conceded that the respondents' claim in this regard has no merit and it is therefore unnecessary to deal with this claim any further.

- [5] The particulars of claim in this case confuse and muddle the issues rather than clarify them. Put simply, what the magistrate had to do was to decide whether the arrest of the first respondent on 15 July 2002 and subsequent detention until he was released on bail on 23 July 2002 were unlawful, and, in respect of second respondent whether his arrest on 16 July 2002 and subsequent detention until 26 July 2002 were unlawful.

4 THE SPECIAL PLEAS

- [6] Appellant's First Special Plea

Against second respondent's second claim (unlawful detention), appellant raised a special plea of jurisdiction, alleging that the Vrede Magistrate's court does not have the power to hear a claim in respect of detention outside its area of jurisdiction.

- [7] Appellant's Second Special Plea

Appellant contended that both respondents were brought before court on 18 July 2002 whereafter the magistrate remanded them in custody. Appellant contended that it is not liable for the detention of the respondents after 18 July 2002; the Minister of

Justice is the party who should have been cited in respect thereof.

[8] Magistrate's judgment on Special Pleas

The magistrate treated both special pleas together in his judgment given at the beginning of the trial before evidence was led. The magistrate held that, as soon as an accused appears before court, the prosecutor is *dominus litis*, and the Minister of Justice should have been cited in respect of detention after 18 July (the date of appearance in court), irrespective of whether such detention was in Vrede, or at Standerton (as was the case with 2nd plaintiff). The magistrate as a result of his findings dismissed the second and third claims; overlooking the fact that the third claim (malicious prosecution) was not subject to any special plea, and the fact that the first special plea concerned only the second respondent. The magistrate's findings on the special pleas are clearly wrong, but in view of our conclusion it is unnecessary to deal with this issue.

5 THE NOTICE OF APPEAL

[9] In its Notice of Appeal appellant advances the ground that the magistrate applied the law on arrest incorrectly by finding that

the respondents had not been lawfully arrested. We have no problem with this ground of appeal.

6 THE NOTICE OF COUNTER APPEAL

[10] After the appellant's appeal was noted, the respondents noted a counter appeal on the following grounds:

“1.

The evidence as a whole favours the respondents' case and the court should have found in favour of the respondents on all claims.

2.

There was no dispute of facts but what was in issue was the interpretation of the law, particularly respondents' constitutional rights.

3.

Once a person's constitutional rights are found to have been transgressed, the onus to justify the actions is upon the appellants. They must place all facts that are indicative of what would, objectively, be found to be “reasonable” and/or reasonable grounds. At all material times the courts ought to approach the evidence through the prism of the Constitution.

4.

As the arrest and the subsequent detention form one and the same continuous conduct, the court erred in separating this one and the same unlawful conduct.

4.1

If the arrest was unlawful and wrongful there will be no reasonable grounds to justify the detention.

5.

The courts take the deprivation of liberty and freedom of a person in a serious light and award substantial satisfaction for plaintiffs. The court erred in its assessment of quantum in its judgment.”

[11] A cross-appeal is for convenience heard at the same time as the main appeal. A cross-appeal, like any other, must therefore be duly noted and a cross-appeal which has not been properly noted, cannot be prosecuted.

[12] The question is whether the notice of appeal against the magistrate’s decision to dismiss claim II (unlawful detention) is in accordance with the law. Rule 49(3) of the Superior Court reads as follows:

“The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.”

[13] The four objects of a notice of appeal are:

- “(a) to enable the magistrate to frame his reasons for judgment;
- (b) to give the respondent an opportunity of abandoning the judgment;
- (c) to inform the respondent of the case he has to meet;
- (d) to notify the Appeal Court of the points to be raised.”

(Erasmus: **SUPERIOR COURT PRACTICE** (Service 33, 2009) B1-356A; **BEUKMAN v VAN NIEKERK** 1966 (1) SA 729 (O) at 730 G - H; **KILIAN v GEREGBODE, UITENHAGE** 1980 (1) SA 808 (A) at 815 C - F.)

- [14] The requirements of Rule 49(3) are peremptory. Therefore the court of appeal will exact strict compliance with the requirements of the sub-rule and will relax the prescribed practice only in cases where it is absolutely plain what issue of law is going to be raised under a notice of appeal. (**ELS v MAREE** 1952 (3) SA 758 (O) at 760 E - G.) An invalid notice of appeal cannot be validated by the court of appeal allowing an amendment. (**SONGONO v MINISTER OF LAW AND ORDER** 1996 (4) SA 384 (E) at 385 F – 386 A.)

- [15] A ground of appeal is bad

“...if it is so widely expressed that it leaves appellant free to canvass every finding of fact and every ruling of law made by the court *a quo* in relation to the subject matter of the appeal; or which specifies the findings of fact or rulings of law so vaguely as to be of no value either to the court or the respondent; or which, in general, fails to specify clearly what the grounds of appeal really are, for the respondent is entitled to be informed, in the notice of appeal, in clear and unambiguous terms exactly what case he must be prepared to meet on appeal.”

(Erasmus: **SUPERIOR COURT PRACTICE** *op cit* B1-357.)

- [16] As far as ground 5 is concerned, the notice of appeal is lodged in respect of the amount awarded by the magistrate with regard to claim I. No grounds or reasons are advanced. The first and second respondents failed to specify in clear and unambiguous terms what the grounds of the counter appeal are. Accordingly the counter appeal should be dismissed (KILIAN v GEREGBODE, UITENHAGE, *supra*, at 815 E - F).

7 ARREST AND DETENTION

- [17] A distinction is drawn between arrest and detention. In MAHLONGWANA v KWATINIDUBU TOWN COMMITTEE

1991 (1) SACR 669 (E) where the following is stated on 675 d – f:

“It is clear that the mere act of arrest itself involves deprivation of liberty, but our law recognises a clear distinction between the act of arrest, which may occur anywhere, and the act of detention in custody, which involves incarceration after the arrest, and pending the taking of further procedural steps. The power granted to ‘detain’ may in particular circumstances include the power to arrest. See *R v Moquena* 1932 OPD 52. However, in my view, the power to arrest does not include the power to detain save insofar as such detention may be a concomitant to the arrest itself. Arrest is the act by which a free person is apprehended, if necessary by the use of force. Once the arrest has been effected, the authority of the person effecting the arrest insofar as any further detention is concerned, ceases. *S v Van Vuuren* 1983 (4) SA 662 (T) at 668E. Any subsequent detention, which involves restraint in confinement for a specified or unspecified period of time, must be in terms of an authority to detain, and is not automatically conferred, without such authority, on the person authorised to arrest.”

[18] In the present matter the detention was a result of the arrest and therefore interlinked with each other. The lawfulness (or not) of the detention is therefore dependent on a finding with regard to the lawfulness (or not) of the arrest. Even if arrest and detention can constitute separate causes of action in certain circumstances (as pleaded here in the particulars of claim), the

fact of detention, as well as the length thereof, must have a bearing on damages, if it is found that the arrest was unlawful.

[19] In view of the conclusion reached in this regard, it is unnecessary to decide whether the magistrate's finding was correct in respect of claim II, save to say that the fact that a person is unlawfully detained can be regarded as an aggravating factor in assessing damages.

8 THE LAW ON ARREST WITHOUT A WARRANT

[20] Section 40(1) provides:

“A peace officer may without warrant arrest any person –

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

...

(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;”

[21] The right to arrest without a warrant under section 40(1)(b) is limited to Schedule 1 offences, including “theft, whether under the common law or a statutory provision.” Section 40(1)(b) requires an objective standard of a reasonable person.

(**DUNCAN v MINISTER OF LAW AND ORDER** 1986 (2) SA 805 (A) at 814 D – E). Section 9(1) of the Stock Theft Act 57 of 1959 authorises the arrest of a person “upon reasonable suspicion that such other person has committed the offence mentioned in section two or four” (section 2 refers to a person in possession of stock or produce who cannot give a satisfactory account of such possession).

[22] Section 40(1)(b) of Act 51 of 1977 uses the word “may”. In **TSOSE v MINISTER OF JUSTICE AND OTHERS** 1951(3) SA 10 (A) at 17F – H Schreiner JA said:

“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 arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons.”

And at 17H:

“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.”

[23] Counsel for respondents submits that, in view of the Constitution, there is now a rule of law that requires the milder method of bringing a person to court, whenever possible, with reference to **RALEKWA v MINISTER OF SAFETY AND SECURITY** 2004 (1) SACR 131 (T) par [11] – [12]. Apart from the appellant's onus to prove that the arresting officer believed on reasonable grounds that the arrest is objectively justifiable, by virtue of the Bill of Rights there is also an onus on appellant to prove that there were objective reasonable grounds for the infringement of the suspects' rights under the Constitution (**LOUW AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS** 2006 (2) SACR 178 (T) at 185a – e and 187e – f).

[24] Counsel for appellant does not disagree with the proposition that the arrest should also be assessed in terms of the Constitution. Counsel for appellant says the freedom of the suspects (first and second respondents) as stipulated in section 12 of the Constitution had to be weighed up against the protection and security of the property of the community as provided for in section 205 of the Constitution. Section 12(1)(a) of the Constitution reads:

“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”

Section 205 (3) of the Constitution states:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

In the Regulations for the South African Police Service relating to the Code of Conduct for members (Government Gazette 27642 of June 2005) it is provided that every member of the police service must sign a form with inter alia the following content:

“2(3) In order to achieve a safe and secure environment for all the people of South Africa I undertake to –

...

- (e) uphold and protect the fundamental rights of every person

...

- (g) exercise the powers conferred upon me in a responsible and controlled manner; ...”

From sections 12 and 205 of the Constitution, as well as the undertaking signed by members of the police service in compliance with the Code of Ethics, it is clear that arresting officers have a duty to uphold constitutional rights, including the right to freedom. This includes the right not to be arrested when there is no need for arrest.

- [25] In **TSOSE v MINISTER OF JUSTICE AND OTHERS** (*supra*) at 17H (quoted above) Schreiner JA said that 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. This statement was held to correctly set out the existing law by Goldblatt J in **CHARLES v MINISTER OF SAFETY AND SECURITY** 2007 (2) SACR 137 (W) at 144a. In **RALEKWA v MINISTER OF SAFETY AND SECURITY** (*supra*) par [11] De Vos J after quoting the above statement from **TSOSE**, held that the enquiry now “starts off on the premise that the right of an individual to personal freedom is a right which should be jealously guarded”. The statement in **TSOSE** (*supra*) that an arresting officer is entitled to use the harsher means of initiating a prosecution, is no longer good law post-constitutionally (**RALEKWA** (*supra*) *loc cit*). In **LOUW v MINISTER OF**

SAFETY AND SECURITY AND OTHERS (*supra*) at 185i – 186c Bertelsmann J echoed the sentiments of De Vos J.

- [26] The “milder method” argument harks of the least restrictive alternative found e.g. in mental health law. The real intent is to state that there should not be an infringement of liberty if that can be avoided. The point of departure at arrest should not be the search for the mildest form of infringement and then to find that if the mildest (or even a milder) form of infringement was not used, the action was unlawful. The enquiry should rather be to consider all the circumstances in the light of legislative provisions and constitutional rights.
- [27] The Constitution provides that a court, when interpreting legislation (e.g. section 40), must promote the spirit, purport and objects of the Bill of Rights. A person’s right not to be deprived of freedom arbitrarily or without just cause is a basic right (section 12(1)(a) of the Constitution). Section 205(3) of the Constitution makes it clear that members of the police service must protect and secure the inhabitants of the Republic and uphold and enforce the law (including the Constitution). Rather than a weighing up of the interests of the community against the

rights of citizens, the investigation should turn on the question whether the rights of persons have been infringed in the circumstances of the particular case. An arrest should be considered in the light of the circumstances of the specific case. As stated by the Constitutional Court, “the constitutionality of an arrest will almost invariably be heavily dependent upon its factual circumstances.” (**MINISTER OF SAFETY AND SECURITY v VAN NIEKERK** 2008 (1) SACR 56 (CC) par [17]).

[28] In assessing the lawfulness of an arrest made without a warrant the enquiry entails the following:

(a) Were the jurisdictional facts required by section 40 present?

The jurisdictional facts are:

- (1) The arrester must be a peace officer.
- (2) The arrester must entertain a suspicion.
- (3) It must be that the arrestee committed an offence referred to in Schedule I (other than escaping).
- (4) That suspicion must rest on reasonable grounds.

(**DUNCAN** (*supra*) 818 F – H).

(b) Was the purpose of the arrest to bring the arrested person before court?

OR:

- (i) to frighten or harass such person (**TSOSE** (*supra*) at par 17 C – D; as with e.g. arrest to appear before mobile traffic courts with the intent to expedite the payment of fines (**S v VAN HEERDEN EN ANDER SAKE** 2002 (1) SACR 409 (T) at 416g-h)).
- (ii) to prove to colleagues that the arrester is not a racist (as in **LE ROUX v MINISTER OF SAFETY AND SECURITY AND ANOTHER** 2009 (4) SA 491 (N) par [41]).
- (iii) To punish the plaintiff by means of arrest (as in **LOUW v MINISTER OF SAFETY AND SECURITY** (*supra*) at 184j).
- (iv) To force the arrestee to abandon the right to silence in section 35(3)(h) of the Constitution (as in **RAMPHAL v MINISTER OF SAFETY AND SECURITY**, Eastern Cape High Court case CA203/2007 18 February 2008 per Plasket J, par [11]).

If the arrest was made for any of these reasons, or for another purpose not falling within the jurisdictional ambit

of section 40, the arrest will for that reason alone be unlawful.

- (c) The lawfulness of a arrest is fact-specific (**MINISTER OF SAFETY AND SECURITY v VAN NIEKERK** 2008 (1) SACR 56 par [17]).

- (d) Did the arrester appreciate that an arresting officer has a discretion whether to arrest without a warrant or not, and did the arrester consider and apply that discretion? (**GELLMAN v MINISTER OF SAFETY AND SECURITY** 2008 (1) SACR 446 (W) par [94]; **RAMPHAL** (*supra*) par [10]. An arresting officer must investigate explanations offered by the suspect (**LOUW** (*supra*) at 184 b – c).

- (e) Were there grounds to infringe upon the constitutional rights as to security of the person which every person has under section 12 of the Constitution? (**LE ROUX v MINISTER OF SAFETY AND SECURITY** (*supra*) par [43]). If a suspect –
 - (i) does not present a danger to society
 - (ii) will not abscond

- (iii) will not harm self or others
- (iv) is not in danger of being harmed by others
- (v) may be able and be keen to disprove the police allegations

arrest will ordinarily not be the appropriate way of ensuring the suspect's presence in court (**LOUW** (*supra*) at 185 d – e).

- (f) Did the arrester consider other means to bring the suspect before court? Section 38 of The Criminal Procedure Act refers to means of securing attendance of the accused in court, and refers to arrest, summons, written notice and indictment. The latter can be left out of consideration because it deals with securing the attendance of the accused in high courts (section 144). A written notice is used where the anticipated fine will not be more than R2.500 (section 56; GN 239 in GG 24393 of 14 February 2003). Summons can be used where arrest is not to be made (section 54). A method not mentioned in the Act, but used by the police in practice is simply to warn a suspect to be at court on a given day at a particular time, otherwise he or she will be arrested and brought to court.

This is the sensible way of dealing with persons in respect of whom there is no fear that they will abscond, and who normally have a fixed abode and place of work. It can be used in all cases – especially in respect of petty charges, and even in respect of some serious charges, depending on the circumstances of the case.

- (g) The need for further investigation after the suspect has been arrested is a subsidiary factor which can be borne in mind. Although arrest should be made for the purpose of assuring the accused's presence in court, and not for some ulterior motive, one must not lose sight of the fact that the effect of arrest is detention for up to 48 hours before bringing the accused before court (section 50 of Act 51 of 1977). The legislature contemplated that further investigations subsequent to arrest could lead to the arrestee's release or prosecution (**DUNCAN** (*supra*) at 819 G – I). An arrest without a warrant is not unlawful merely because the arrester intends to make further investigations before deciding to release the arrestee or to proceed with a prosecution contemplated by section 50 (1) of Act 51 of 1977 (**DUNCAN** (*supra*) at 820 B – C).

However, if obtaining information from the arrestee is the main purpose, section 205 of the Criminal Procedure Act 51 of 1977 should be used, not an arrest without a warrant.

- (h) The fact that two or more persons are involved in the criminal activity being investigated, is a relevant factor. When members of a gang or syndicate or racketeering enterprise are sought because of a suspicion against them, it can be important, from a crime investigation point of view, that they be arrested simultaneously, also if they are at separate places so as not to be able to communicate with each other, which communication could prejudice the investigation. Evidence may be destroyed or alibis fabricated. The fact that persons are arrested on related charges is a relevant consideration in assessing the lawfulness of the arrest.
- (i) The possibility that exhibits can be destroyed or hidden is a relevant factor.

Police standing order (G) 341 lists further exceptions to the general rule that the object of arrest should be to secure attendance at a trial (Standing Order (G) 341 is quoted in footnote 13 in **MINISTER OF LAW AND ORDER v VAN NIEKERK** (CC) (*supra*). The approach of the arresting officer should be as set out in **GELLMAN** (*supra*) par [97].

9 THE ARRESTS

[29] The detailed facts in this case are the following. The two respondents were arrested on consecutive days by the same police official without a warrant. Inspector Van der Watt, who was no longer in the police service when he testified, received a report of stolen stock from an informer. On 15 July 2002 he and two colleagues went to first respondent's father's place of abode. In an outbuilding they found bags with seven sheepskins in them. Sekhoto Senior told them those skins belonged to his son, first respondent. When first respondent arrived the police asked him for an explanation but first respondent said he could not remember where he bought the skins, he buys sheep at many places. First respondent had no identification certificates in respect of the skins. The seven sheepskins were all marked with an "N". Van der Watt found it

strange that a person who had seven skins with the same mark could not remember where he got them. He arrested first respondent under section 2 of the Stock Theft Act. Section 2 reads:

“2. Failure to give satisfactory account of possession of stock or produce. – Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.”

[30] The next day, 16 July 2002 sergeant Tsotetsi informed Van der Watt at the police station that first respondent wanted to talk. First respondent told Van der Watt that he would take them to the person from whom he had got the sheep. He took them on the dirt road to Cornelia. First respondent sat on the back of the bakkie. At all the intersections first respondent indicated through the rear window of the bakkie where they should go. It was quite a long distance with many turns. Eventually they turned in at a farm where first respondent said they would find the person. Sergeant Tsotetsi spoke to a woman there, who said the Sibeko they were looking for was her husband, and told them where they could find him. They left in the bakkie and

found second respondent. Van der Watt told second respondent that a person they had arrested had informed them that he had got sheepskins from him. Second respondent denied this and said he had never given any sheep or skins to first respondent. First respondent then told second respondent to tell the truth. Van der Watt arrested second respondent. Van der Watt informed second respondent he was arresting him because he was stealing sheep together with first respondent. They were detained in the police cells that night. On the 17th the police took the two respondents to their offices and on the 18th they were taken to court. The court did not grant bail and they were remanded in custody. On 23 July 2002 the respondents were granted R1 000 bail. First respondent went out on bail on 23 July 2002. A few days later, first respondent paid second respondent's bail, and second respondent was released on 26 July 2002. After a few postponements the criminal trial took place at Cornelia. Both respondents were discharged at the end of the state case.

10 THE ONUS OR DUTY TO ADDUCE EVIDENCE IN RELATION TO ARRESTEE'S CONSTITUTIONAL RIGHTS

[31] This question is relevant at two stages: at arrest and when the court is dealing with a claim for wrongful arrest. Because deprivation of freedom is *prima facie* unlawful, there has never been doubt that the burden to prove lawful arrest in a court of law is on the defendant (arrestor) (**MAY v UNION GOVERNMENT** 1954 (3) SA 120 (N) at 124 G – H; **INGRAM v MINISTER OF JUSTICE** 1962 (3) SA 225 (W) at 227 D – E). The arrestor bears the onus to prove that the arrest was justified in law (**MINISTER OF LAW AND ORDER AND OTHERS v HURLEY AND ANOTHER** 1986 (3) SA 568 (A) at 589 E – F). The next question relates to the stage of the arrest. When effecting an arrest, a police official must make basic enquiries to ensure that constitutional rights will not be infringed by an arrest. Such would relate to a place of abode, employment, family, passports – all pointing to whether the suspect is likely to abscond and the ease or difficulty of tracing such person.

[32] Mr Pienaar contends that the police did not give any reasons why arrests were necessary. Inspector van der Walt gave no details of enquiries he had made relating to the risk of flight. Mr

Pienaar argues that the burden was on the police to place evidence before the court that they could not use a milder method to secure the respondents' presence at court.

- [33] There is not an onus on a person to prove a constitutional right: the duty is on the court to enforce such right. Courts have the duty to enforce constitutional rights, as provided in section 39(2) of the Constitution. The arrester must show that constitutional rights were not infringed by the arrest. That entails, at the stage before arrest, to make enquiries whether arrest is necessary and whether the arrest will infringe upon the arrestees' constitutional rights. There is a duty on the arrester to adduce such evidence and such evidence forms part of the onus on the arrester to prove lawfulness of the arrest.

11 APPLICATION OF THE LAW TO THE FACTS

(a) Jurisdictional requirements of section 40.

- [34] Many cases dealing with arrest without a warrant under section 40 interpreting constitutional rights were decided on the basis that the jurisdictional requirements of section 40, as these have existed since pre-constitution days, and as set out in **TSOSE** (*supra*) in 1951, were not complied with. Some are referred to

under the discussion of section 40 above, where arrests were made for other reasons than to bring the suspect into court. In this case the magistrate found that Inspector van der Watt had reasonable grounds to arrest the respondents. That finding appears to be correct.

(b) Respondents' Constitutional rights

[35] The next question is whether Inspector van der Watt appreciated that he had a discretion to arrest or not, and whether he applied that discretion, or whether the constitutional rights of the respondents were infringed by the arrest with reference to the criteria set out above. The main thrust is the danger of flight.

[36] The facts here were that the first respondent was described as unemployed but he operated a taxi without a permit. It appears that the police knew the first respondent as a person who operated a taxi. Inspector van der Watt should have made enquiries to determine whether the first respondent was likely to abscond, and whether he would stand his trial. No reasons were given why further investigations into the alleged crime could not be made while the first respondent was out on

warning. As to the second respondent, he was implicated by the first respondent and further investigation was needed. The only evidence against him at arrest was the allegation of the first respondent. Second Appellant had a fixed abode and fixed employment on the farm where he lived. Van der Watt made no enquiries to determine the risk of flight. Van der Watt did not appreciate that he had a discretion and he did not exercise such discretion. If Van der Watt used his discretion and made further enquiries about the respondents, he would have realised that they had fixed abodes, were known to the local police, posed no threat of flight, and would stand their trial. By not making those enquiries and by not using his discretion, the constitutional rights of the respondents were infringed. The arrests were unlawful, and the magistrate's order should stand. As to the quantum, it is not clear on what basis and for what reasons the magistrate made his awards. The awards appear low, but there are no grounds upon which we can interfere.

12 ORDER

1. The Appeal is dismissed with costs.
2. The Counter Appeal is dismissed with costs.

3. For the benefit of the taxing master it is recorded that the counter-appeal took up less than 10% of the argument on appeal.

SPB HANCKE, J

I concur.

A KRUGER, J

I concur.

C VAN ZYL, J

On behalf of appellant:

Adv. A. Bester
Instructed by:
State Attorney
BLOEMFONTEIN

On behalf of respondents:

Adv. C.D Pienaar
Instructed by:
Lovius-Block
BLOEMFONTEIN