

**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

REPORTABLE: **NO/YES**

OF INTEREST TO OTHER JUDGES: **NO/YES**

REVISED

07/02/2024

CASE NO: HCA20/2021

In the matter between:

LULU JOHANNES TLAKA

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

JUDGMENT

NAUDE-ODENDAAL J:

[1] This is an appeal against the whole judgment and order handed down in the Magistrates Court for the District of Elias Motsoaledi held at Groblersdal on the 12th of March 2021 by Magistrate RJ Marais, in terms of which it was found that the arrest and detention of the Appellant was lawful and his claim was dismissed with costs.

[2] The Appellant contended that the Magistrate erred in finding that the offence of negligence - loss of a firearm, carries the maximum penalty of 5 years imprisonment without the option of a fine and is therefore a Schedule 1 offence. Further, the Magistrate erred in taking into consideration that the Appellant

admitted during cross-examination that his arrest was lawful. It was further contended by the Appellant that the Magistrate erred in not taking into consideration whether the arresting officer exercised a discretion to arrest the Appellant or whether he properly exercised such a discretion. According to the Appellant the Magistrate erred in not dealing with the claim for unlawful detention of the Appellant.

[3] The Appellant's Counsel, Adv. T.P. Motlatle, however abandoned the ground that the court a *quo* erred in holding that negligent loss of a firearm is a Schedule 1 offence.

BACKGROUND FACTS:

[4] The Appellant instituted action against the Respondent for his alleged unlawful arrest and detention on or about the 2nd day of April 2017 without a warrant or any just cause to do so by members of the South African Police Services acting in the course and scope of their employment.

[5] The Respondent admitted the arrest and further detention of the Appellant by its members but denied that it was unlawful or without just cause and alleged that the arrest of the Appellant was on a reasonable suspicion that he committed a Schedule 1, Act 51 of 1977, offence.

[6] On or about 2 April 2017 at the Village of Ramogwerane, Constable Mohlala, a member of the South African Police Services, arrested the Appellant. The arrest followed a complaint by members of the public that there was a young man (the Appellant's son) at the tavern of Tiago who is in possession of a firearm pointing at people with the said firearm.

[7] Constable Mohlala went to the tavern and was then pointed to a certain young man called Somandla. They searched him and found a firearm in his possession. When they enquired from him as to whose firearm it was, he answered by stating that it was his father's. The firearm had 10 live rounds in its magazine.

[8] Somandla then showed Constable Mohlala where his parental homestead was. They arrived at the homestead and knocked. The Appellant opened the door. Somandla said that he was his father. The Appellant confirmed that Somandla was his son. Constable Mohlala asked the Appellant whether he had a firearm, where upon the Appellant answered in the affirmative and said that his firearm was in the safe.

[9] Constable Mohlala showed the Appellant the firearm found in possession of Somandla and asked the Appellant whether the firearm was his, to which he answered no. Constable Mohlala then asked the Appellant to show him his own firearm. The Appellant said the firearm was in the room and asked Constable Mohlala to follow him. When they arrived in the room, the Appellant showed Constable Mohlala a blue trunk and in the trunk was a safe.

[10] The safe was not mounted to the floor or the wall. Constable Mohlala asked the Appellant for the keys of the safe to which the Appellant replied that he did not know where the keys to the safe were. Constable Mohlala then picked the safe up and shook it. There was nothing inside. Only after a while and after several more questions were asked by Constable Mohlala, did the Appellant say that the key to the safe was under the carpet.

[11] The Appellant then opened the safe and indeed it was discovered that there was no firearm in the safe. Constable Mohlala further enquired from the Appellant where his firearm was. The Appellant answered by saying that according to him the firearm was kept inside the said safe. Constable Mohlala asked the Appellant for his firearm license. Upon comparing the firearm license and the serial number of the firearm found in the possession of Somandla, it was discovered that it was two different firearms.

[12] Constable Mohlala questioned the Appellant further, but the Appellant could not give any clear explanation about the whereabouts of his firearm. The Appellant

and his son were then arrested after they were informed of their rights and that they are being arrested for negligent loss or handling of a firearm. They were taken to the police station, were charged and locked up at around 05h30 the morning of the 3rd of April 2017. They were taken to court the very same day to appear in court.

[13] Under cross-examination, it was put to Constable Mohlala that the Appellant explained to him that his firearm was seized from him during the year 2011 at Witpoort Police Station. Constable Mohlala denied that the Appellant ever told him that his firearm was confiscated by Witpoort Police Station. Constable Mohlala stated that his role was only that of an arresting officer because the Appellant could not explain the whereabouts of his firearm.

[14] The Second Witness called on behalf of the Defendant was Constable Msiza. She was the investigating officer in the matter concerning the Appellant. She confirmed that the Appellant informed her that his firearm was seized by the Lephalale Police and that she later went to Lephalale to investigate the matter. She however could not find the Appellant's firearm.

[15] It only transpired later that the Appellant's firearm was seized by the Police at Witpoort Police Station. The seized firearm was returned to the Appellant after his arrest on 13 December 2017.

[16] The Appellant testified that the reason for his arrest was because his son had an illegal firearm and when the police questioned his son about the firearm, he informed them that it was the Appellant's. The Appellant further testified in chief that he went with the police officers to his home. When they arrived at his house, the police officers asked him where his firearm was, and he (the Appellant) told them that it was inside the safe. The police officers then asked him to open the safe, but when he opened the safe the firearm was not there.

[17] In a follow up question in examination in chief, the Appellant changed his version and said that the police asked him where his firearm was. He then testified

that he informed them that his firearm was at Lephalale. They asked him to open the safe, but it was empty.

[18] The police officers then asked the Appellant to go to the police station with them. It was around half past three in the morning. The Appellant confirmed that he was taken to court the very same day. It was a Monday. His case was not on the roll and subsequently he was released.

[19] Under cross-examination the Appellant confirmed that he was indeed arrested in the early hours of Sunday morning, 3 April 2017. He stated in cross-examination that he informed the arresting officer that his firearm was at Witpoort Police Station - which is contradictory to what he testified in examination in chief.

[20] In a follow-up question under cross-examination, the Appellant stated that he only told the Investigating Officer where his firearm was and not the Arresting Officer.

[21] The Appellant under cross-examination further confirmed that he is not disputing that the police did not arrest him wrongfully and unlawfully, in other words, he admitted that his arrest was lawful.

THE LAW:

[22] The Respondent raised its defence in terms of **Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended**. **Section 40(1)(b)** provides that, *"a peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."*

[23] Having admitted the arrest of the Appellant without a warrant of arrest, the onus to prove that the arrest was lawful, rest on the Respondent. The Respondent had to prove on a preponderance of probabilities that the Arresting Officer at the time of the arrest, harboured a reasonable suspicion that the Appellant had

committed a Schedule 1 offence, which must be objectively justifiable.

[24] The jurisdictional pillars for reliance on **Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977**, has to be met by the Respondent. The legal position regarding the justification of a warrantless arrest in terms of **Section 40(1)(b) of the Criminal Procedure Act, 51 of 1977** was stated as follows in **Duncan v Minister of Law and Order 1986 (2) SA 805 (A)** at 818G-H:-

"The so-called jurisdictional facts which must exist before the power conferred by s40(1)(b) of the present Act may be invoked, are as follows:

- 1) The arrestor must be a peace officer.*
- 2) He must entertain a suspicion.*
- 3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence) .*
- 4) That suspicion must rest on reasonable grounds.*

*If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i e, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf **Hoigate-Mohammed v Puke (1984) 1 All E R 1054 (HL) 1057**). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case. All that need be said for the purposes of the point under consideration is that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly*

*invokes the power to arrest for a purpose not contemplated by the legislator. But in such a case, as is generally the rule where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee (cf **Divisional Commissioner of S A Police, Witwatersrand Area, and Others v S A Associated Newspapers Ltd and Another 1966 (2) SA 502 (A) 512; Groenewald v Minister van Justisie 1973 (3) SA 877 (A) 884**)"*

[25] In the present matter, it is common cause that the arresting officer was Constable Mohlala. The Appellant when confronted with the allegations by Constable Mohlala that the weapon which his son Somandla was in possession of and pointed at people at the tavern was his, he told Constable Mohlala that his firearm was inside the safe. When the safe was examined by Constable Mohlala it was found that there was no weapon in the safe. The serial number of the weapon that was used by Somandla at the tavern and the serial number that the Appellant's license had were different.

[26] The Appellant did not have the licensed firearm in his possession or on his person and the firearm was not in the safe as required by law. The Appellant violated a comprehensive and effective system of firearms control established in terms of the Firearms Control Act, 28 of 2006.

[27] In **Duncan v Minister of Law and Order 1986 (2) SA 806 (A) at 8140-E**, the following was held:-

"The test is not whether a policeman believes he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion."

[28] In **Minister of Safety and Security v Sipho Owen Magashulu 2015 (1) SA SACR 409 (SCA)** it was held that, *"the suspicion of the arresting officer is reasonably held if, on the objective approach, the arresting officer has reasonable*

grounds for his suspicion."

[29] In the present matter, the Appellant on his own version confirmed that he only told the Investigating Officer that his firearm was at Lephalale, and later he changed his version to Witpoort. It is common cause that the Investigating Officer, Constable Msiza, only became involved after the Appellant was arrested. At the time of the arrest, the Appellant failed to give a reasonable explanation about the whereabouts of his firearm.

[30] After the Appellant told Constable Mohlala that his firearm was in the safe, and Constable Mohlala, after having been shown the safe, did not find the firearm in it, Constable Mohlala had reasonable grounds for his suspicion.

[31] The test whether a suspicion is reasonably entertained within the meaning of Section 40(1)(b) is objective. The question is whether a reasonable man in Constable Mohlala's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the Appellant was guilty of negligent loss or handling of a firearm. (See **S v Nel and Another 1980 (4) SA 28 (E) at 334; also see Mabola and Another v Minister of Law & Order 1988 (2) SA (SE) at 658 E-H.**)

[32] In the present matter, Constable Mohlala entertained a belief that was reasonable when he arrested the Appellant after the Appellant told him that his firearm was in his safe, which was found to be empty and after the Appellant could not give him a reasonable explanation of where his firearm was.

[33] Considering the time of arrest, the fact that a firearm, which was alleged to belong to the Appellant by his son, for which the Appellant did not have a license, and considering the fact that the Appellant failed to give a reasonable explanation of the whereabouts of his firearm at the time of arrest and in fact what emanates from the record, attempted to play cat and mouse with Constable Mohlala in telling him at first that the firearm was in his safe, then he did not know where the key to the

safe was, later he informed Constable Mohlala that the key to the safe was under the carpet, and once the safe was opened, it was found to be empty, it should be found that Constable Mohlala exercised his discretion properly when arresting the Appellant. It should be borne in mind that this arrest in fact occurred in the early hours of the Monday-morning, 3 April 2017 and the Appellant was immediately taken to court the very same day.

[34] In this court's view, the court *a quo* was correct in dismissing the Appellant's claim. The court *a quo* did not misdirect itself when it found that the Respondent proved on a balance of probabilities that the arresting officer had a reasonable suspicion that the Appellant committed a Schedule 1 offence and the resulting arrest without a warrant was lawful.

[35] This court is further of the view, that under the circumstances in the present matter, the police officers exercised their discretion properly when they detained the Appellant for a very short period (at most approximately 3 hours) to bring him before court on the very same day. Constable Msiza testified that she consulted with the Appellant at around 07h00 to 07h30 am on the morning of the 3rd of April 2017. The Appellant was charged and taken to the cells. In the result the appeal stands to fail.

[36] Accordingly, this court therefore makes the following order:-

1. The appeal is dismissed with costs.

NAUDE-ODENDAAL J:
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

I AGREE:

M.F. KGANYAGO
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON: 10 NOVEMBER 2023
JUDGMENT DELIVERED ON: 7 FEBRUARY 2024

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