

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A2024-100331

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

4 April 2025

DATE

SIGNATURE

In the matter between:

MINISTER OF POLICE

Appellant

and

RAY ELASTAIR STEVENS

Respondent

JUDGMENT

DU PLESSIS J (with whom MEADEN AJ agrees)

Introduction

[1] This is an appeal against the judgment of the Magistrate's Court, Randfontein, which found in favour of the respondent (plaintiff in the court a quo) and declared

his arrest and detention on 30 December 2019 unlawful. The appellant is the Minister of Police. Although the appeal was filed outside the prescribed period, the Court condones the late filing. The matter was fully argued on the merits, and the respondent was not prejudiced.

- [2] The respondent instituted a delictual claim for damages based on his alleged unlawful arrest and detention. The appellant contends that the arrest and detention were lawful in terms of section 40(1)(h) of the Criminal Procedure Act¹("CPA") for alleged possession of suspected drugs.
- [3] The material facts are largely common cause. The respondent was arrested shortly after midnight on 30 December 2019 and detained at the Randfontein Police Station. He was charged on 31 December and brought before the court on 2 January 2020, where he was released on bail.
- [4] The arresting officer, Constable Morakile, testified that he suspected the respondent of possessing drugs after finding a Ziplock packet containing a glassy, powdery substance in the respondent's jacket. He further testified that he was confident the substance was a drug based on prior experience.
- [5] The arresting officer testified that the possession of drugs, the fact that the appellant tried to flee, and the fact that they acted on a tip-off meant that South African Police Services could arrest the appellant without a warrant in terms of section 40(1) of the CPA.
- [6] The court a quo found that, after the arrest, it was established that the plaintiff had a fixed address, no outstanding warrants, and was working at the community church. All these factors mean that the police could have released the plaintiff on warning to appear in court instead of taking the drastic step to arrest him. The arrest was thus unjustified.
- [7] I agree with the order of the court a quo, although, on appeal, the respondent raised a specific point regarding the exercise of discretion.

¹ Act 51 of 1977.

The law

[8] Section 40(1) of the CPA states that for a warrantless arrest to be lawful, the following jurisdictional requirements must be met:

- a. The arrestor must be a peace officer;
- b. The arrestor must entertain a suspicion that the suspect committed an offence under Schedule 1 of the CPA;
- c. The suspicion must be based on reasonable grounds, and
- d. The officer must exercise discretion whether to arrest.

[9] Once these jurisdictional facts are established, an arrest may be made, but it is not obligatory. In *Minister of Safety and Security v Sekhoto*² the principle was explained by Harms DP in the following terms:

“Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises . . . In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest.”

[10] The jurisdictional facts must be assessed within the prism of the constitutional right not to be arbitrarily deprived of freedom and security of person.³

[11] In *Minister of Safety and Security v Van Niekerk*,⁴ the Constitutional Court emphasised that an arrest should be a measure of last resort and that a peace officer must consider less drastic means to secure the attendance of an accused in court.

[12] In *Raduvha v Minister of Safety and Security*,⁵ the Constitutional Court explained that the requirements in section 40(1) confer a discretion, not a duty. In other words, even if all the requirements in the section are met, the arresting officer

² [2010] ZASCA 141 para 44.

³ Section 12(1).

⁴ 2007 (10) BCLR 1102 (CC).

⁵ [2016] ZACC 24 para 43 to 47.

still has a choice whether to arrest the person. In making that choice, the officer must weigh up all the circumstances of the case and exercise discretion accordingly.

[13] The respondent, however, asserts that the arresting officer did not exercise his discretion as he was not aware that he had a discretion. He refers the court to the transcribed proceedings⁶:

“Mr Lubbe (for the respondent): Sir, are there other ways to bring someone to court, orther than to arrest him?

Mr Morakile: There is no other way that I know of.”

[14] He repeated later that arrest is the only way. Once the requirements of the section were met, the arresting officer was under the erroneous impression that he had to arrest the respondent. The Constable thus did not know he had a discretion, so he could not exercise his discretion in line with section 40(1).

[15] It therefore might well be that the jurisdictional facts existed for a lawful, warrantless arrest, but the fact that the arresting officer did not exercise his discretion at all, especially when regard is had to the constitutional rights to liberty, means that the arrest was unlawful.⁷

[16] It follows,in my view, albeit for slightly different reasons, that the order of the court a quo was correct. While the jurisdictional requirements for a warrantless arrest may have been present, the arresting officer failed to exercise the discretion required under section 40(1) of the CPA. This failure rendered the arrest and subsequent detention unlawful. Therefore, the judgment and order of the Magistrates Court must stand, and the appeal falls to be dismissed.

Order

1. The late filing of the appeal is condoned.
2. The appeal is dismissed,which costs are to be taxed on scale B.

⁶ CseLines 18-340.

⁷ Diljan v Minister of Police [2022] ZASCA 103 para 12.


WJ DU PLESSIS

Judge of the High Court
Gauteng Division,
Johannesburg

Date of hearing:	20 March 2025
Date of judgment:	4 April 2025
For the appellant:	E Mahlangu instructed by the State Attorney, Johannesburg
For the respondent:	E Lubbe instructed by JJ Geldenhuys Attorneys