



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

APPEAL CASE NO. AR107/24

In the matter between:

THE MINISTER OF POLICE

APPELLANT

and

JAIRAJ JAGERROWER NIRGHIN

RESPONDENT

ORDER

On appeal from: Pietermaritzburg Regional Court (sitting as court of first instance):

1. The appeal is upheld with costs on scale B.
 2. The order of the court a quo is set aside and replaced with the following order:
‘The plaintiff’s claim is dismissed with costs.’
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JUDGMENT

Mathenjwa J (Olsen J concurring)

[1] The Minister of Police (appellant) appeals against the decision of the Regional Magistrate (Mr S Paboe) handed down at the Pietermaritzburg Civil Regional Court on 22 August 2023 finding the appellant liable for the unlawful arrest and detention of Mr Jairaj Nirghin (respondent) and awarding damages to the respondent.

[2] The respondent instituted action in the court a quo claiming damages for unlawful arrest and detention based on his arrest and detention by Warrant Officer Khanyile (Khanyile) in the course of his employment with the appellant. The learned Regional Magistrate found that:

- (a) the respondent was wrongfully arrested instead of Mr Archary who was his son in law;
- (b) at the time of arrest there was no reasonable suspicion that the respondent had committed an offence;
- (c) it was highly unlikely that the respondent was pointed out by the complainant to Khanyile; and
- (d) there was no case against the respondent hence the case was not even enrolled in court.

[3] Khanyile testified that when he met with the complainant the case had already been opened and a statement was taken from him by other members of his unit. After taking over the investigation of the matter he approached the complainant and interviewed him. The complainant explained to him that the respondent damaged his motor vehicle. He accompanied the complainant to the respondent's house. Upon their arrival at the respondent's house the complainant pointed out the respondent to him as one of the suspects. He then proceeded to arrest the respondent.

[4] Khanyile obtained a statement from the complainant's wife, Mrs Navisha Siverpershad who stated that on 31 October 2019 she went with the complainant to the respondent's house to enquire whether the respondent knew about the relationship between their granddaughter and the respondent's grandson. An old man from the respondent's house came out of the gate, swore at them and chased them away. About 30 minutes later the very same old man arrived with a group of people at the complainant's house, swore at them and damaged the complainant's motor vehicle which was parked outside the gate of his house. Navisha informed Khanyile that the suspect was her granddaughter's friend's father Mr J Archary. Under cross-examination by the respondent's attorney, Khanyile stated that he arrested the respondent because he was pointed out to him and he is an old man who fitted the description of one of the suspects. In his statement Khanyile stated

that on arrival at the respondent's address the complainant positively identified the suspect to him, Mr J Archary. Under cross-examination by the respondent's attorney Khanyile explained that the complainant did not tell him that the person's name whom he pointed out was Archary, he pointed out the respondent as one of the suspects. He explained that he confused the name of the suspect but not his identity.

[5] The respondent's evidence was that Khanyile and the complainant arrived at his house looking for S Archary. He told them that Archary was not in the house. Khanyile entered all the rooms and searched for Archary. When he did not find Archary he told the respondent that he was arresting him. The respondent's wife brought the respondent's identify document and showed it to Khanyile for him to see that the respondent was not Archary. However, despite having seen the respondent's identify document Khanyile told him that he believed that the respondent was the same person he was looking for, and arrested him.

[6] The issue for determination in this appeal is whether the decision of the court a quo in finding that the respondent was unlawfully arrested and detained was correct. A decision on the question as to whether the appellant was entitled to any of the relief he sought is not reached unless we conclude that at the time of arrest Khanyile did not have a reasonable suspicion that the respondent committed an offence.

[7] Before us Ms *Moola* for the appellant submitted that at the time Khanyile arrested the respondent he had a reasonable suspicion that the respondent had committed the offence. The respondent was positively identified to Khanyile by the complainant. Ms *Moola* disputes that Khanyile did not have sufficient information before him before arresting the respondent. She referred this court to an entry in the investigation diary which shows that on 1 November 2019 Khanyile interviewed the complainant and verified the damage to the complainant's motor vehicle before arresting the respondent on 3 November 2019.

[8] Mr *Marion* for the respondent submitted that Khanyile wrongfully arrested the respondent instead of Mr Archary whom he went to search for at the respondent's house. The argument stemmed from an entry made in the investigation diary on 31

October 2019 where it was noted that the suspect was Mr J Archary. It was contended on behalf of the respondent that at the time of arrest Khanyile had no facts before him justifying the arrest of the respondent because he got involved in the investigation of the matter at a later stage, 3 November 2019, being the date when he arrested the respondent. In support of the contention that there was no case against the respondent, counsel referred to an entry made by the prosecutor in the investigating diary on 4 November 2019 where it is recorded that there was nothing linking the respondent to the offence and Khanyile was instructed to carry on with further investigation, link the respondent to the offence and return the matter to the prosecutor for a decision.

[9] It is common cause that the respondent was arrested without a warrant. It is trite that an arrest without a warrant is *prima facie* wrongful and it is incumbent upon the appellant to justify its lawfulness.¹ Section 40(1)(b) of the Criminal Procedure Act² authorises a peace officer to arrest without warrant any person 'whom he reasonably suspects of having committed an offence referred to in Schedule 1'. The jurisdictional facts which have to exist to justify an arrest without a warrant are:³

- '(i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that that the suspect (the arrestee) committed an offence referred to in Schedule1; and
- (iv) the suspicion must be based on reasonable grounds.'

The reasonableness of the suspicion is determined objectively.⁴ The suspicion must be based on specific facts and trustworthy information,⁵ but need not necessarily be based on certainty or adequate proof.⁶ The police officer is 'merely required to have regard to the facts and circumstances at his disposal, and, where reasonably possible, to satisfy himself of the merit thereof'.⁷ If, on a consideration thereof, there are reasonable grounds to suspect that an offence has been committed, he is entitled to arrest the suspect without a warrant.⁸

¹ *Minister of Police v Gqamane* [2023] ZASCA 61 para 16.

² Criminal Procedure Act 51 of 1977.

³ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para 6.

⁴ *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) para 20.

⁵ *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA) paras 34-35.

⁶ *Mananga and Others v Minister of Police* 2021 (2) SACR 225 (SCA) para 8.

⁷ *Ibid* para 16.

⁸ *Ibid*.

[10] I do not agree with the contention of respondent's counsel that the mere fact that Khanyile took over the investigation of the matter later on resulted in him lacking sufficient information and facts to arrest the respondent. Khanyile had stated that he worked as a team with other police officers and members of his crew who initially interviewed and obtained the complainant's first statement. Before effecting the arrest Khanyile had interviewed the complainant, verified the damage to the complainant's motor vehicle, and went with the complaint to the respondent's house where the complainant positively pointed out the respondent to him as one of the suspects who damaged his motor vehicle. Therefore, the jurisdictional facts justifying the arrest of the respondent without a warrant existed at the time Khanyile arrested him.

[11] In my view the court a quo misdirected itself in finding that Khanyile arrested the wrong person (the respondent) instead of Mr Archary whom he came to arrest at the respondent's house. In his examination in chief, Khanyile stated that he confused the name of the respondent, however he took the complainant with him to point out the respondent to him because he did not know him. Khanyile explained that although he had confused the respondent's name he did not confuse his identity. On 31 October 2019 when the complainant laid the complaint an entry was made in the investigation diary that the suspect was Mr J Archary. Both entries regarding the name of the suspect in Khanyile's statement and investigation diary was incorrect because there was no person by the name of J Archary, in fact the respondent's son-in-law was S Archary. Therefore, it is clear that even though the respondent's name was not known to the complainant at the time of arrest, he was nevertheless positively identified by the complainant. Furthermore, the respondent's description fitted the description given by the complainant's wife that an old man was one of the suspects. Therefore, Khanyile's suspicion that the respondent committed the offence was based on reasonable grounds.

[12] Furthermore, the court a quo's finding that "the plaintiff's request to produce his identity document to show that he was not his son-in-law fell on deaf ears" is not supported by the evidence that was led before the court. On the contrary the record shows that the respondent's wife showed his identity document to Khanyile and after

looking at the identity document Khanyile said that he was still arresting the respondent. My conclusion in this regard is supported by the respondent's evidence in chief when he stated that when he enquired from Khanyile why he was arresting him even after he had confirmed that he was not Mr Archary whom he was looking for, Khanyile acknowledged that he was looking for Archary but believed that the respondent was the same person he was looking for. Therefore, it is not correct that Khanyile did not look at the respondent's identity document; he did, but nevertheless entertained a suspicion that the respondent was the same person who was the suspect in the commission of the offence.

[13] The court a quo misdirected itself in finding that it was highly unlikely that the respondent was pointed out to the police by the complainant. Khanyile's evidence that the respondent was pointed out to him by the complainant was not disputed. When the respondent testified in court he did not dispute that the complainant pointed him out to Khanyile. Instead he corroborated Khanyile's evidence to the extent that he accepted that the complainant was present at the respondent's premises when he was arrested. During the court's re-examination of the respondent the issue of the pointing out of the respondent to Khanyile was never brought up.

[14] Respondent's counsel relied on the entry made by the prosecutor in the investigating diary in support of his submission that the court a quo was correct in finding that there was no case against the respondent. On 4 November 2019 the prosecutor made an entry in the investigation diary stating that there was nothing linking the respondent to the offence and instructing Khanyile to conduct further investigation and submit the case for a decision. However, the appellant's counsel referred to another entry made in the investigation diary on 27 March 2020 at 08h30 where it is recorded as follows: 'Docket for court. Complainant and suspect wish to mediate the matter at court'. The respondent misconstrues the nature of the inquiry. It is not required of a police officer to be certain that the accused will be successfully prosecuted. He is merely required to entertain a suspicion based on reasonable grounds that the accused committed the offence.

[15] Although it is not clear how the matter was settled between the parties., it is clear from the investigation diary that it is not correct that the matter was not enrolled

since on 27 March 2020 the case was due to be heard in court but was settled between the parties. The entries in the investigation diary were not brought to the attention of the learned Regional Magistrate.

[16] The issue is not whether the arresting officer was certain that the respondent would be successfully prosecuted it is whether a reasonable police officer who had the same facts at his disposal would have suspected the respondent of committing the offence and placed him under arrest. No evidence was led in the court a quo about the merits of the matter, therefore the court erred in making the finding that there was no case against the respondent. Therefore, the court a quo was wrong in its findings.

Order

[17] The following order is made:

1. The appeal is upheld with costs on scale B.
2. The order of the court aquo is set aside and replaced with the following order:
'The plaintiff's claim is dismissed with costs.'

Mathenjwa J

I agree.

Olsen J

Appearances

Applicant's counsel:	S Moola
Instructed by:	State Attorney KwaZulu- Natal
Respondent's counsel:	M Marion
Instructed by:	Anthoo, Marion and Associates Pietermaritzburg
Date of hearing:	14 February 2025
Date of judgment:	25 April 2025