REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA 114/2012

WYCLIFF ZOLA QUNTA Appellant

And

MINISTER OF POLICE Respondent

Coram: **Chetty J, Mageza and Malusi AJJ**

Date Heard: **27 May 2013**

Date Delivered: **5 June 2013**

Summary: ***Criminal Procedure*** *– Arrest - Without warrant – Legality - Trial Court concluding that onus to prove justification for arrest established – Trial court's factual findings clearly wrong – Leave to appeal however only granted on question whether arresting officer exercised a discretion to effect arrest – Notice of appeal confined thereto – Court of Appeal – Power to revisit trial court's factual findings – Permissible where failure not to interfere perpetuates an injustice – Appeal allowed*

JUDGMENT

Chetty, J

[1] This is an appeal against the dismissal of the appellant's delictual claim for damages premised upon his unlawful arrest and detention by a servant of the respondent acting in the course and scope of his official duties. It is not in issue that the appellant was arrested at approximately 19h30 on 18 April 2010 at his home by Inspector *Majolandile Mvula (Mvula)* without a warrant, transported to New Brighton police station where he was briefly detained in a police holding cell until finally incarcerated at the Kwazakhele police station holding cells until his release during the early afternoon of 20 April 2010. In what follows I shall refer to the parties in conformity with their description before the court below.

[2] Although the plaintiff's particulars of claim were inelegantly drafted, it is apparent that the cause of action was predicated not only upon the provisions of section 40 (1) (b) of the **Criminal Procedure Act**[1] (the Act) but, in addition, and in the event of a finding that the requisite jurisdictional facts justified the arrest, whether the arrestor nonetheless exercised a discretion whether or not to arrest the plaintiff. In finding against the plaintiff, the court below concluded that the defendant had established both, the jurisdictional facts for the defence postulated by section 40 (1) (b), and that the arrestor had exercised his discretion whether or not to arrest the plaintiff. The transcript of the proceedings however, demonstrate, quite unequivocally, that the trial court's factual findings are at variance with the evidence adduced. The evidence adduced by the defendant was wholly insufficient to justify the arrest. The trial court moreover failed to

[1] Act No, 51 of 1977

consider the arrestor's own testimony that he was unaware that he was vested with a discretion whether or not to arrest the plaintiff.

The Grounds of appeal

[3] It is apparent from the judgment on the application for leave to appeal that leave was sought against both the aforementioned findings. Although the trial judge, in the introductory portion of the judgment on the application for leave, stated that he remained unpersuaded that there were reasonable prospects that another court may take a different view on whether the defendant had established the jurisdictional facts justifying the arrest, he nonetheless revisited the issue in the concluding portion of the judgment, as appears from the following extract: -

> "[15] The difficulty which arises is whether it can be inferred from the facts and circumstances that, despite not knowing of the discretionary power he had, the arresting officer nonetheless considered whether he should arrest the applicant or not and thereby complied with section 40 (1) (b) of the act, or whether the prevailing circumstances were such that the arrest in question would in any event have been effected by a reasonable arresting officer in the position of the police officer who arrested the applicant.

> [16] It seems to me, that, on these particular facts, another court might reasonably come to another conclusion. In light thereof, I think that leave to appeal should be granted. Mr Dyer submitted that leave should be granted to the full bench of this division and I propose to do so."

[4] It is apparent from the aforegoing that the leave granted was clearly not restricted to the ***"discretion"*** aspect of the plaintiff's claim. The plaintiff's legal representatives however, influenced, no doubt by the ambivalence of the trial court's reasoning, concluded, quite erroneously, that leave to appeal had been granted on the narrow issue whether the arrestor had exercised his discretion whether or not to arrest the plaintiff. The grounds of appeal perpetuated the error.

[5] I interpolate to say that this is not a case where, on appeal, the plaintiff sought to raise new matter not covered by the notice of appeal. Rule 49 (3) is couched in peremptory terms and obligates an appellant to clearly, succinctly, and in unambiguous terms specify the grounds of appeal to enable the court and the respondent to be properly informed of the case it seeks to make out. As adumbrated hereinbefore however, the plaintiff's case on appeal, as evidenced by the heads of argument, was limited to the question whether, in arresting the plaintiff, *Mvula* had exercised his discretion. During the hearing of the appeal, I invited leading counsel for the plaintiff, Mr *Dyke's*, response as to whether a court of appeal was precluded from considering the correctness of a trial court's judgment, where, *ex facie* the transcript of the proceedings, its findings appeared

to be clearly wrong. Neither Mr *Dyke*, nor lead counsel for the defendant, Mr *Beyleveld*, suggested that a court of appeal's powers were in any way so limited. Although Mr *Beyleveld* submitted that had the defendant raised the issue in the notice of appeal, opposition to the appeal may not have eventuated and the costs of the appeal avoided, the plaintiff, it must be stressed, did not raise the matter on appeal. This court invited submissions thereanent.

[6] The Constitutional Court affirmed the principle that it would be inimical to the interests of justice for an Appellate tribunal to uphold a wrong order. In ***Alexkor Limited and Another v The Richtersveld Community and Others***[2] the court stated the following: -

> "42. In this Court Alexkor contended that the SCA erred in holding that the Richtersveld Community held "a customary law interest" in the subject land which was akin to ownership under common law and that this right included the ownership of minerals and precious stones. But, according to the judgment of the SCA, Alexkor and the government conceded this issue. The preliminary question which arises is whether it is open to Alexkor to revive this issue on appeal in this Court.
>
> 43. The applicable rule is that enunciated in *Paddock Motors (Pty) Ltd v Igesund.* In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal.

[2] 2004 (5) SA 460 (CC)

> The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong. As the court put it:
>
> "If the contention the appellant now seeks to revive is good, and the other two bad, it means that this Court, by refusing to investigate it, would be upholding a wrong order."
>
> 44. It is therefore open to Alexkor and the government to raise in this Court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld Community. The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal. In terms of that rule "it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness . . . and raises no new factual issues."

[7] Although the aforegoing passages from the judgment relate to the revival, on appeal, of a matter expressly conceded in the Supreme Court of Appeal, I can conceive of no rational basis which would preclude appellate interference where a trial court's judgment and order is palpably wrong. During his address, Mr *Beyleveld* in fact properly conceded that the trial court's factual findings could not

be supported. Notwithstanding the concession however, it is necessary to succinctly state the reasons for concluding that the defendant failed to justify the plaintiff's arrest.

The trial court's approach to the evidence

[8] In its analysis of the testimony adduced, the trial court found, that in as much as the evidence proffered by the plaintiff and the defendant were mutually destructive, the probabilities favoured the defendant and hence vouchsafed *Mvula's* truthfulness. The difficulty I have with this finding is that, upon a holistic appraisal of the evidence, the trial court, not only overlooked material deficiencies in the version deposed to by *Mvula*, but, moreover, in its estimate of the credibility of the plaintiff, whilst acknowledging that the plaintiff's evidence was corroborated (euphemistically termed ***"supported"*** in the judgment) by his witness, Ms *Ethel Kutwan*, completely ignored her evidence.

[9] As adumbrated hereinbefore, it is common cause that the plaintiff was arrested without a warrant by *Mvula* on 18 April 2010 whilst at his home situate at 218 Connacher Street, New Brighton, Port Elizabeth. In his particulars of claim the plaintiff alleged that the arrest and subsequent detention was wrongful and unlawful and that there existed no reasonable grounds therefore. Additionally, he alleged that in the event of a finding by the trial court that the jurisdictional facts to found an arrest without a warrant were present, the members of the South

African Police Services who effected the arrest, were unaware that they had a discretion whether or not to effect an arrest and detain the plaintiff and, consequently, failed to exercise their discretion.

[10] In its plea, the defendant, whilst admitting that the plaintiff was arrested without a warrant on a charge of theft and domestic violence, denied the unlawfulness of both the arrest and detention. Furthermore, in response to the discretion element of the claim, the defendant denied that its members were unaware of such discretion and pleaded that the arresting officers exercised their discretion ***"in a manner that was rationally related to the purpose for which the power was given,"*** having regard to section 40 of the Act as amended.

[11] Section 40 (1) (b), under the rubric ***"arrest by peace officer without warrant"*** provides as follows: -

> **"40 Arrest by peace officer without warrant**
> (1) A peace officer may without warrant arrest any person-
> *(a)* . . .
> *(b)* whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;"

It is not in issue that the plaintiff was arrested by *Mvula* on a charge of theft, an offence falling within the purview of Schedule I of the Act. It is trite that the defendant bore the onus to justify the arrest but, for reasons altogether unclear,

the plaintiff commenced leading evidence. Be that as it may however, it is necessary, given the incidence of the onus, to analyse the evidence of *Mvula* to determine whether the jurisdictional facts for the defence predicated upon the provisions of section 40 (1) (b) were established by the defendant.

[12] It is not in dispute that on 16 April 2010, a statement was minuted from a certain Ms *Andiswa Ntsaluba* at the New Brighton police station, wherein she stated: -

> "I am an adult female with DOB 1987-12-20, 22 years of age residing at 5791 Renxe Site and Service, Kwazakhele, PE with cell no 073 930 4931, I am unemployed.
>
> I am the biological daughter of Mziwakhe Winston Dlabantu who passed away on 2009-10-26 and my father Mziwkahe Winston Dlabantu that was owner of the house in 218 Connacher Street, New Brighton, PE. My father has a trust at Sanlam Insurers which shows beneficiary of the entire estate and that states that he was unmarried and had only one child.
>
> But now my father's brother Zola Quta is staying in the house and he is not supposed to be in the house and he removed some of the property from the house. He took all the appliances from the house and only left the built in cabinets.
>
> My father's brother Zola Quta has no right to remove anything from the property until the assets of the estate is finalised.
>
> I have a witness Lindelwa Yako who stay at 218 Connacher Street who saw Zola Quta taking the stuff "Appliances".

> I gave no one permission to take the property of my father since I'm the only child he has. The stuff that was in the house before my uncle took some of it was written down by Sanlam Insurers.
>
> The following items I noticed that is missing is the fridge ± R2000 (Two Thousand Rand) and microwave ± 1500 (One Thousand Five Hundred) and dishes and spoons and pots ± 1200 (One Thousand Two Hundred Rand) and ornaments ± R85 (Eighty five rand) and kitchen table ± R400 (Four Hundred Rand)
>
> The total value of the missing items is R5185.00 (Five Thousand One Hundred and Eighty Five Rand). I desire police investigation in this matter."

[13] It is common cause that a docket was opened and handed to *Mvula* by his commanding officer sometime during the course of the following day for investigation. Although *Mvula* seemed to suggest that he in fact minuted the statement, it is apparent from the statement itself, and the annexure thereto, (the list of apparently stolen items) that it was in fact minuted by one student Constable *Booysen*. *Mvula* testified that after receiving the docket he went to 218 Connacher Street, New Brighton ***"to see if I can't find the complainant or the suspect"***. He further testified that when he arrived at the premises, he found a person in the yard of the house washing clothes and informed him that he was investigating a case of theft and enquired about the whereabouts of "*Andiswa"* and "*Qunta"*. The person's riposte, (whom it is now common cause was the plaintiff), was that he did not know "*Qunta"*. He then returned to the police station

and thereafter telephoned the cell number found in the docket. The call was answered by a person who informed him that *Andiswa* was not present but that she could be found at the address which she then furnished. *Mvula* proceeded to the address, but, on arrival, was informed by the occupant that *Andiswa* was not resident there but at the family home situate at Block 7, White Location. It is uncertain whether he in fact proceeded to the given address thereafter, but, from his narrative, it appears that he found her at some unspecified place the following day and asked her to accompany him, as it turned out, to the plaintiff's home. Prior to their departing however, the latter implored him to fetch her uncle at New Brighton in order for the latter to calm the plaintiff. *Mvula* acquiesced, proceeded to the uncle's home where he and a friend were picked up and they accompanied *Mvula* and *Andiswa* to the plaintiff's home.

[14] It is not in dispute that *Andiswa* was not resident in the plaintiff's home. In the *pro forma* documents set in type and constituting the preamble to her statement, *Booysen* had recorded her address as being 579 Remxe Street, Site and Service, Kwazakhele, Port Elizabeth and the alleged crime scene as 218 Connacher Street, New Brighton, Port Elizabeth. Although the plaintiff acknowledged that *Mvula* had visited his home and enquired about *Andiswa*, he emphatically disputed both that *Mvula* had made enquiries concerning him and that he had refrained from affirming his identity. The trial court accepted *Mvula's* testimony hereanent on the basis that it was improbable that *Mvula* had gone in

search of *Andiswa* at the plaintiff's address – the likelihood, the trial court reasoned, was that he had gone there in search of the plaintiff.

[15] In finding that *Mvula* had not repaired to the plaintiff's home in search of *Andiswa* on the Saturday, the trial court ignored *Mvula's* own testimony that he had done so. In concluding that the probabilities thus favoured the defendant's version, the trial court clearly misdirected itself. It is furthermore highly improbable that *Mvula* would have set off in search of the plaintiff prior to interviewing *Andiswa*. By his own admission the docket had been assigned to him for investigation and logic dictated that he first interview the complainant. In my judgment, the probabilities clearly favoured the plaintiff's version that *Mvula* merely enquired about *Andiswa's* whereabouts and nothing more.

[16] The trial court further found that upon being questioned by *Mvula* concerning the whereabouts of the list of items *Andiswa* had reported stolen, the plaintiff's refusal to proffer any explanation ***"raised a clear suspicion that the plaintiff had something to answer for and that a crime of theft to which he was connected, had been committed"***. Although the plaintiff denied having been questioned in his home, the trial court rejected his evidence. The fact of the matter is that the list of items ostensibly stolen by the plaintiff were his property and in his home during the arrest. It is improbable in the extreme that the plaintiff, facing imminent arrest, would, under such circumstances, not point out the allegedly stolen items to *Mvula* but voluntarily subject himself to arrest and incarceration. In my judgment, the trial court's factual findings, were, as fairly

conceded by Mr *Beyleveld*, clearly wrong. *Mvula's* evidence was wholly insufficient to discharge the onus resting upon the defendant to justify the arrest. Furthermore, and by his own admission, he was unaware that he was vested with a discretion whether or not to effect an arrest. It follows as a matter of logic that consequently, he would not have exercised it.

Quantum

[17] In assessing an appropriate award for the wrong done to the plaintiff, I fully subscribe to the notion expressed by Nugent J.A in ***Minister of Safety and Security v Seymour***[3], that ***"[20] Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss.***" Counsel were *ad idem* that given the facts, a fair award would be in the region of R55 000.00 and that is the amount I propose to award the plaintiff. In the result the following orders will issue: -

1. The appeal is upheld with costs.
2. The judgment of the court below is set aside and replaced by the following order: -

   "1. Judgment is granted in favour of the plaintiff as follows –

   (a) Payment of damages in the sum of R55 000.00.

[3] 2006 (6) SA 320 at para [20]

(b) Interest on the aforesaid amount, at the legal rate of 15.5% per annum from date of judgment to date of payment.

(c) The defendant is ordered to pay the plaintiff's costs of suit."

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D. CHETTY
JUDGE OF THE HIGH COURT

Mageza, AJ

I agree.

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P. MAGEZA
ACTING JUDGE OF THE HIGH COURT

Malusi, AJ

I agree.

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T. MALUSI
ACTING JUDGE OF THE HIGH COURT

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