REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

Case No: CA 429/2012

In the matter between:

G.C DOMINGO **Appellant**

and

THE MINSITER OF SAFETY & SECURITY **Respondent**

Coram:	**Chetty J and Malusi AJ**
Date Heard:	**31 May 2013**
Date Delivered:	**5 June 2013**
Summary:	***Criminal Procedure*** *– Arrest with warrant – Legality – Section 44 of Criminal Procedure Act 51 of 1977 not intended to preclude police from exercising discretion not to effect arrest – member in casu unaware that he had such a discretion – Arrest unlawful – Appeal upheld – Damages assessed at R40 000.00*

JUDGMENT

CHETTY, J

[1] This is an appeal against a judgment of the Magistrates' Court, Port Elizabeth dismissing the appellant's action for damages against the respondent for unlawful arrest and detention. For ease of reference I shall henceforth refer to the parties as in the court below, *viz*, plaintiff and defendant. Two cardinal issues arise in this appeal, firstly, whether, pursuant to a warrant of arrest authorised by a magistrates' court, the person authorised to execute the warrant has a discretion whether or not to arrest and secondly, whether the failure on the part of the arrestor to hand a copy of the warrant to the arrestee when requested to do so, renders the arrest, and a fortiori, the detention itself unlawful. The court *a quo*, seemingly oblivious of the aforementioned averments in the plaintiff's particulars of claim, delivered a judgment not only bereft of reasoning, but moreover records an incorrect narrative of significant portions of the testimony adduced. Inexplicably, it furthermore made no findings of credibility *vis-a-vis* the witnesses. Notwithstanding the aforegoing, the trial court's *ratio,* in dismissing the action, appears, from an unintelligible terse statement, to be – ***"The police officer's duty was to execute a warrant that was ordering him to go and arrest the plaintiff and there was nothing more to investigate. The arrest of the plaintiff was therefore lawful."***

[2] The trial court's approach to the issues raised in the pleadings and evidence adduced is, to say the least, perplexing. In ***S v Ngabase***[1], I was constrained to lament the unfortunate practice of some magistrates in failing to comply with their judicial obligation to provide reasons for their decisions. Those remarks, although made in a criminal context, are of equal application

[1] 2011 (1) SACR 456 (EC)

in civil matters. Litigants are by right entitled to the reasons underlying a court's judgment, for without it, both the aggrieved party and the court of appeal, should the matter venture further, would be oblivious why the court below reached the decision it did.

[3] The trial court's finding that, once armed with a warrant of arrest, the arrestor, Constable *Hermanus John Kock (Kock)*, was duty bound to arrest the plaintiff without further ado, was wrong and amounts to a clear misdirection. Although the trial court referred to the case of ***Minister of Safety and Security v Sekhoto and Another***[2] in its judgment, it is obvious, from the terms of the judgment, that the trite principle of law enunciated therein was clearly not comprehended. Under the rubric, ***"Discretion"***, Harms J.A stated the legal position thus: -

> "[28] 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. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. 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. This was made clear by this court in relation to s 43 in *Groenewald v Minister of Justice.*
> [29] As far as s 40(1)*(b)* is concerned, Van Heerden JA said the following in *Duncan* (at 818H – J):
> 'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohammed v Duke* [1984] 1 All ER 1054 (HL) at 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.'"

[4] It is common cause that the warrant *Kock* was entrusted to execute reflected the plaintiff's address as being 71 Aubrey Street, Gelvan Park, Port

[2] 2011 (5) SA 367 (SCA); [2011] 2 ALL SA 157 (SCA)

Elizabeth. When *Kock* and his colleague arrived at the address to execute the warrant, the occupant apprised them that the plaintiff was no longer resident at the premises and provided them with details concerning the plaintiff's home. On their arrival, they found the sliding gate partially opened, but, on knocking at the front door and eliciting no response, realised that the home was unoccupied. Whilst waiting, a passerby informed them that the occupants were at church. To pass time, they drove around and after a while returned to the home and observed movement therein. A knock at the door elicited the presence of the plaintiff's wife, who, once the purpose for the visit had been conveyed, summoned the plaintiff. *Kock's* evidence that he furnished the plaintiff with the warrant which the latter duly read and thereupon voluntarily accompanied them to the police station was disputed by the plaintiff.

[5] The latter's version was that when *Kock* fleetingly brandished the warrant before his eyes, he decried all knowledge about it and informed him that although he previously resided at 71 Aubrey Street, he was now resident at his present address. The plaintiff further testified that when he enquired from *Kock* whether he could not go to court on the Monday morning to ***"solve the problem"*** the latter's response was to the effect that he had a duty to arrest him. The plaintiff's testimony thereanent was never challenged, but, the trial court paid scant regard thereto.

[6] By his own admission, *Kock* made no enquiries to establish when the plaintiff had moved to his present address nor did he give any consideration

whatsoever to the fact that, *ex facie* the warrant, it had been authorised some seven months previously. What emerges clearly from his evidence is that he failed to exercise any discretion whether to effect the arrest or not. Paragraph 3.3 of the **Police Standing Order** (G) 341, which provides that: -

> "A member, even though authorised by law, should normally refrain from arresting a person if –
>
> (a) the attendance of a person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or
>
> (b) the member believes on reasonable grounds that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette, (at present R1500.00), in which event such member may hand to the accused a written notice (J534) as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 1977."

in plain and unambiguous language conferred a discretion upon *Kock*. Regrettably, as his evidence attests to, he was unaware that he was vested with such a discretion.

[7] On appeal before us, Mr *Sandi*, for the defendant was constrained to concede that *Kock* did not exercise any discretion. That failure rendered the arrest unlawful. Consequently, the need to consider the further question

whether *Kock's* refusal to hand a copy of the warrant to the plaintiff rendered the arrest unlawful, (See **Theobald v Minister of Safety and Security and Others**, 2011 (1) SACR 379 (GSJ) at [294]) does not arise.

Damages

[8] In assessing an appropriate award for general damages a number of factors enter the equation, not merely the length of the detention. The plaintiff described his incarceration as an ordeal and I accept that he was deeply traumatised and disturbed at being whisked away from his home shortly after his arrival from church. The distress he suffered on his arrest was exacerbated by his subsequent detention until his release the following day. In the result the following orders will issue: -

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

"1. The defendant is ordered to pay the plaintiff the sum of R40 000.00 as and for damages;

2. Interest on the aforesaid amount at the legal rate of 15.5% from date of judgment to date of payment;

3. The defendant is ordered to pay the plaintiff's costs of suit;

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D. CHETTY

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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