IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**
EASTERN CAPE DIVISION – GRAHAMSTOWN

Case No: CA297/2014

In the matter between:

MINISTER OF SAFETY & SECURITY Appellant

and

JAN JOHANNES BOTHMA First Respondent

WESSEL JOHANNES KOLESKY Second Respondent

JUDGMENT

REVELAS J

[1] The two respondents (the first and second plaintiffs in the court *a quo*) sued the appellant out of the Magistrate's Court, Port Elizabeth for general damages in the sum of R100,000.00 for unlawful arrest and detention. The magistrate upheld the respondents' claim and awarded damages to them in the amount of R8,000.00 each. This appeal lies against the whole of the judgment of the magistrate.

[2] The factual background which gave rise to the action in question can be summed up briefly as follows: In the late afternoon of Friday, 12 October 2012, the two respondents paid a visit to a Ms. Webster

("Webster"), a tenant in a flat owned by the second respondent. This flat is situated in a block of flats where the first respondent was employed as the caretaker. The purpose of the visit to Webster was to deliver a notice of eviction as a result of her alleged failure to pay rental. The second respondent had taken his taser[1] with him on this visit, which apparently is his habit when he collects rentals since he owns several flats, and some of his tenants who fall behind on their rental, occasionally do not take kindly to the delivery of eviction notices, as I understood the evidence of the first respondent who proffered this explanation during the trial.

[3] On their arrival at the flat in question, the respondents found the entrance door to the flat open, but the security gate shut. Webster was at home, inside the flat, holding her baby when the respondents first noticed her. She accepted delivery of the eviction notice, presumably through the bars of the closed security gate, because at that time it had not been opened yet. The second respondent wanted Webster to sign the notice as proof that she received it, before returning it to him. She refused to sign and return the document to the second respondent, explaining that she first wanted to go through it. The second respondent insisted that she return the notice to him and when she would not comply, both respondents entered the flat through the

[1] A recent noun and synonym for a portable electric shocking device or *"stun gun"* marketed under the brand name "Taser" – Wikipedia

security gate, which was opened by one of them. There is a dispute as to how the gate was opened (whether by force or not) and by which one of the two respondents, but it was common cause that Webster did not open it. I will return to this aspect later.

[4] Upon entry into the flat, the second respondent started searching for the document inside the flat, *inter alia*, on top of a cupboard. An altercation ensued between the respondents and Webster during which the taser was activated. As to what else transpired during the altercation, those involved gave conflicting versions. The respondents then left the flat. The following day Webster opened a criminal case against the respondents and they, similarly opened one against her. She laid charges of housebreaking, theft and assault against the respondents. The respondents laid charges of assault against Webster. Two separate dockets regarding the incident of the previous day were opened at the Algoa Park Police Station. The facts in dispute were the following:

[5] The respondents corroborated each other about what occurred inside the flat, but their version of events differed materially from Webster's version. The common cause facts and the facts that were in dispute, were all gleaned from the statements made by the respondents and Webster to the police as respective complainants, and

also from the warning statements of the two respondents, made on the day after the incident, 13 October 2012.

[6] In her statement made to the police, in the case where Webster was the complainant, she alleged that the first respondent had *"electrocuted"* her when she did not want to return the second respondent's documents to him, and she fell unconscious. She alleged that the respondents then gained entry into the flat by breaking the security gate lock and began rummaging through her things. She alleged that she had ran out of the flat with her baby and on her return, established that her DVD player, three golden rings and R2,050.00 in cash was missing.

[7] In their warning statements in response to the aforesaid, the respondents denied breaking into the flat, assaulting Webster or stealing anything from her. The first respondent stated that they entered the flat through the security gate, which opened when he merely touched it. The second respondent said in his warning statement, that he pushed the gate open.

[8] In his statement to the police, in the case where he and the second respondent were the complainants, the first respondent described a scenario where Webster, after the respondents had

entered the flat, had tried to assault the second respondent with a large candlestick. In response to the attack, the second respondent activated his taser, merely as a warning to her, but never actually shocked her with it. Webster allegedly grabbed the second respondent's car keys and refused to give it back to him. The second respondent also made a police statement corroborating the aforesaid, except for the allegation that it was he who opened the gate, by pushing it. In his police statement though, (where he was a complainant) the second respondent said he *"forced"* the gate open, according to a note to this effect in the investigation diary.

[9] Warrant Officer Kleynhans ("Kleynhans") investigated the matter. He had taken over the docket pertaining to the charges leveled against the respondents by Webster (as the complainant) from another police officer. He was not tasked with the investigation of the case in which the respondents were the complainants. During the course of his investigations Kleynhans contacted the two respondents on Saturday evening, 13 October 2012, requesting the two of them to come to the Algoa Park Police Station in connection with the case. They arrived at about 20h30.

[10] Kleynhans testified at the trial that the reason why he wanted to see the respondents was to clear up the apparent discrepancy in their

statements regarding the security gate at Webster's flat and the manner in which it was opened. Following their discussions, he decided to arrest the respondents but was of the opinion that they need not be detained. The respondents then left the police station at about 22h40, bail having been set at R300.00 for each respondent. On Monday, 15 October 2012, when the respondents and Webster appeared at court, both as accused and as complainants in the two respective cases, all charges were withdrawn by the prosecutor in both cases.

The Magistrate's Findings

[11] The respondents and Kleynhans testified at the trial. The magistrate found that the two respondents corroborated each other in all respects, except with regard to the question whether it was the first or the second respondent opened the security gate. He held the discrepancy to be immaterial and criticized Kleynhans for basing his suspicion, and thus the justification for his arrest of the respondents on this contradiction. This error, the magistrate found, caused Kleynhans to prefer the version of Webster which had to be false since Webster, on her own version, was unconscious and could therefore not have observed how the respondents entered the flat or what they did once they had entered. The magistrate concluded that, given the facts

before him, Kleynhans' suspicion was unreasonable, did not justify the arrest and consequently the arrest was unlawful.

[12] The magistrate further found the arrest to be unlawful for a second reason: In circumstances where Kleynhans did not find it necessary to incarcerate the respondents overnight, having accepted that they would stand trial, Kleynhans exercised his discretion unreasonably and accordingly the arrest was unjustified.

Applicable Principles

[13] In terms of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended *("the Act")*, a peace officer may, without a warrant arrest a person who he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act, other than the offence of escaping from lawful custody. The purposes of an arrest must be based on the intention to bring the arrested person to justice. The jurisdictional facts for a successful defense under section 40(1)(b) are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect, or the person about to be arrested, committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.[2] The test for determining the reasonableness of a suspicion under

[2] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G – H.

section 40(1)(b) of the Act is an objective one.[3] The police officer in question must therefore show that he was in possession of information which, objectively viewed, would lead a reasonable person in his position to form the suspicion that the arrestee had committed the relevant offence.[4]

[14] The only issue between the parties in relation to the cause of action contended for by the respondents, was whether the peace officer, Kleynhans, had reasonable grounds for the arrest, and whether he exercised his discretion in good faith, rationally and not arbitrarily and in accordance with the general requirements pertaining to any discretion. [5] Harms DP, in *Sekhoto* held that the aforesaid principles meant that a peace officer is entitled to exercise his discretion as he deems fit, provided that:

> "[he stays] within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight — so long as the discretion is exercised within this range, the standard is not breached." [6]

[3] *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) 658 C – E.

[4] *Duncan, (supra)* at 241.

[5] *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA); 2011 (5) SA 367; [2011] 2 All SA 157, para [38] at 330 b – d.

[6] *Sekhoto* at para [39] at 330 c – f.

Conclusion

[15] The magistrate's conclusion that Kleynhans had unreasonably relied on an immaterial contradiction between the versions of the respondents with regard to the opening of the security gate as justification for the arrest is, with respect, simply wrong. Kleynhans' focus was not on the identity of the person (either the first or the second respondent) who opened the gate, but the *manner,* in which it was opened (whether force was used or not). That aspect was not immaterial at all, particularly because the respondents were not given permission by Webster to enter the flat, a fact that was common cause. By pushing the gate open or using some kind of force to gain entry into the flat to retrieve an item, clearly constituted the offence of housebreaking with the intention to trespass or trespassing at the very least. The first respondent fully associated himself with the second respondent's conduct by also entering a flat where they were not welcome and the security gate was shut. According to Webster's statement the gate was locked. Although the second respondent explained in his warning statement, that the lock had been broken by the police on a previous occasion, Kleynhans could not have known what the real condition of the gate was at the time and it hardly mattered, because the entry was unlawful.

[16] The following undisputed facts ought to have been taken into account by the magistrate in his assessment of the justifiability of Kleynhans' suspicions and the exercise of his discretion to arrest the respondents: The respondents went to the flat armed with a taser which was activated by one of them in the presence of Webster and her baby, after their unlawful entry into the flat.

[17] In retrospect, having heard the evidence during the trial, it may be said with some justification that Webster conducted herself rather poorly (on the respondents' version). However, questions as to whether her own conduct was unlawful or that she may have been untruthful about the respondents' actions, are questions which could not have been determined by Kleynhans during his investigations, with the same degree of clarity as could the triar of fact during the civil trial where Webster did not testify. The magistrate's assessment of Kleynhans' actions prior to the arrest, ought to have been based on the information Kleynhans had available to him at the time, and not on the evidence as presented at the trial.

[18] Webster's statement to the police, that she was *"electrocuted"* with the taser, may have been an embellishment borne from an inadequate vocabulary, or perhaps untruthfulness, but if one has

regard to the respondents' version, i.e. that the taser was indeed activated in her presence, Kleynhans had no cause to reject Webster's statement out of hand as simply false.

[19] The offences in question were by no means trivial as submitted by the attorney of the respondents. Based on the facts and information at his disposal, viewed objectively, Kleynhans, had reasonable grounds to suspect the respondents of having committed an offence, and a sufficiently serious offence to justify arresting them. Accordingly there is no merit in the contention that he exercised his discretion irrationally.

[20] The magistrate's second reason for concluding that the arrest was unlawful, namely because Kleynhans himself believed there was no reason to detain the respondents further, does not withstand scrutiny either. The magistrate's reasoning in this regard seems similar to the reasoning in *Louw v Minister of Safety and Security*,[7] where a fifth jurisdictional fact to justify an arrest was postulated, namely that there must have been no less invasive options (other than arrest) available in order to bring the suspect before court. The existence of such a jurisdictional fact as a requirement for a lawful arrest was decisively rejected in *Sekhoto.*[8] The power to arrest is exercised for the

[7] 2006 (2) SACR 178 (T).

[8] at 326 b – f.

purpose of bringing the suspect to justice and once that has been effected, a peace officer must bring the arrestee before court as soon as possible; and at least within 48 hours.[9] Once that has been done, the authority to detain that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is within the court's discretion.[10]

[21] The respondents only remained at the police station for two hours and fifteen minutes, during which time they were questioned, their fingerprints taken, and bail was set. Kleynhans decided not to detain and incarcerate them until the Monday when they appeared in court. He was nonetheless of the opinion that he had to secure their presence at court and it was for that purpose he arrested them and set bail. He therefore chose to exercise his discretion to arrest the respondents in the least invasive manner open to him in the circumstances and simultaneously exercised one of the choices open to him that fell within *"the range of rationality"* as envisaged in *Sekhoto*.

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[9]Section 50(1) of the Act.

[10]*Sekhoto* at 331 b – e.

[22] The magistrate's conclusion that the decision not to incarcerate the respondents until Monday rendered the arrest unlawful is accordingly misconceived.

[23] In the circumstances and for the reasons set out herein, the respondents failed to demonstrate a cause of action and the appeal should succeed.

[24] In the result the following order is made:

1. The appeal is upheld.

2. The order of the magistrate is set aside and replaced with an order in these terms:

> "The plaintiffs' claim is dismissed with costs."

E REVELAS
Judge of the High Court

LOWE, J

I agree.

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M J LOWE
Judge of the High Court

Appearances:

For the appellant, Adv N J Sandi instructed by Yokwana Attorneys, Grahamstown

For the respondents, Mr R P O'Brien instructed by Whitesides Attorneys, Grahamstown

Date heard: 11 September 2015

Date delivered: 08 October 2015