**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

**Case No: CA93/2021**

In the matter between

**THE MINISTER OF POLICE** **Appellant**

**And**

**LONWABO HASHE** **Respondent**

***Coram: Eksteen J et Pakati J***

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**JUDGMENT ON APPEAL**

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**PAKATI J**

[1] This appeal concerns a claim for damages arising from an alleged unlawful arrest and detention of the respondent, Mr Lonwabo Hashe. He was arrested by Captain Nkosentsha Hilton Toto ("Capt Toto"), of the South African Police Services ("the SAPS") without a warrant, on a charge of assault with intent to do grievous bodily harm on 28 July 2018 at approximately 11:20am, at "M" Street in Tyanti Location, Makhanda. Mr Hashe was kept in custody until Monday 30 July 2018, when he was transported to Grahamstown Magistrate's Court where he was further detained at the court's holding cells pending his appearance before a magistrate. He was subsequently released from the holding cell at approximately 11:00am, without appearing before a magistrate, the prosecutor having declined to prosecute him. Mr Hashe contended that the arrest and subsequent detention were wrongful, unlawful and without justification.

[2] On 26 April 2019 he issued summons against the appellant, the Minister of Police ("the Minister"), in Grahamstown High Court, claiming damages for unlawful arrest

and detention in the sum of R150 000-00. On 24 July 2019 judgment was entered in his favour for the amount of R120 000-00, with interest at the legal rate from 15 November 2018 to date of payment. The Minister was further ordered to pay the costs of the action. No application for rescission was brought to the trial court. Ms Masiza, on behalf of the Minister, and Mr Olivier, for Mr Hashe, confirmed that an application for rescission had been abandoned.

[3] In his particulars of claim, Mr Hashe had delineated his cause of action as a wrongful and unlawful arrest, effected without justification by the members of the SAPS, in the course and scope of their employment with the Minister, on a charge of assault with intent to do grievous bodily harm. He contended that Capt Toto, a Group Commander stationed at Joza Police Station, and his colleague, Constable Sonanzi, invoked their power for an improper purpose with the intention to frighten and harass him by punishing him, with an ulterior motive. They did not consider any explanation or statement from him setting out his side of the story. He argued that they failed to analyse information at their disposal in order to exercise their discretion properly before effecting the arrest. They further failed to consider, so he contended, whether or not he was a flight risk, would interfere with the investigations or stand his trial. He alleged that they failed to assess whether they had a *prima facie* case against him or not and continued with the arrest and detained him, thereby depriving him of his freedom of choice and movement.

[4] The Minister admitted the arrest and detention, but denied that it was unlawful and without justification. He contended that the arresting officer had acted in terms of s 40(1) (b) of the Criminal Procedure Act 51 of 1977 ("the CPA") in that he reasonably suspected that Mr Hashe had committed an assault with intent to do grievous bodily harm, an offence which, he contended, was listed in Schedule 1 of the CPA.

[5] Capt Toto testified that he received the docket on 27 July 2018 and perused the statements therein. He also interviewed the victim. It transpired that the victim did not know the suspect but could point him if he were to see him.

[6] Capt Toto explained that the victim's mother, Ms Lindeka Khatiya, had enquired about the progress of the case, whereupon he told her that he was still searching for witnesses. She then gave him a cell phone number of Ms Nandipha Jodwana, one of the witnesses who happened to be the victim's friend. It is worth mentioning that Ms

Jodwana later refused to depose to a statement saying that she did not want to get involved in this matter. Capt Toto said that he had not expected this witness to be uncooperative, considering that she proffered information regarding the whereabouts of Mr Hashe. When he perused the docket he realised that Sergeant Wayi, who was his colleague, was Mr Hashe's father and had been present at the scene of the alleged offence. However, he did not want to be of assistance regarding the whereabouts of his son.

[7] Capt Toto explained that on 28 July 2018 he received information from Ms Jodwana regarding the whereabouts of Mr Hashe, which he followed up. He proceeded to his home and arrested him, without a warrant, and detained him at Joza Police Station. He said that Mr Hashe did not apply for bail, and even if he had done so a prosecutor would have been the only person who had the authority to release him. However, on that day none were available as it was a weekend. He explained further that Mr Hashe had declined to make a statement and said that he would do so in the presence of his legal representative. Regarding the detention, he asserted that Mr Hashe had been detained and taken to court before the expiry of 48 hours. According to him, he cooperated with him.

[8] Capt Toto conceded during cross-examination that he did not know that assault with intent to do grievous bodily harm was, in fact, not an offence listed in schedule 1 of the CPA. He said that he had to arrest a person when he believed that he may not be able get hold of him again and that he had no choice, but to arrest him, as it was his duty to do so. He acknowledged that he did not attempt to arrange for a warrant, by either calling a prosecutor or magistrate in order to obtain one. He also did not consider section 56 of the CPA regarding a written notice to secure his attendance at court. He argued that it was unnecessary.

[9] Regarding the detention, Capt Toto conceded that he did not consider whether Mr Hashe was a flight risk or not. He further admitted that he did not consider whether he was a danger to society, would interfere with investigation or stand his trial. He explained that Mr Hashe's father did not know his whereabouts and did not have his contact number, as he only visited during holidays. He admitted that he could have asked for their contact details but did not, as he did not trust them.

[10] When he was asked what he made out of the contents of the statements contained in the docket Capt Toto said: "A*ll that, pointed to the suspect and it made me not to doubt to arrest him"*. In the arresting statement he deposed to, he said that the reason for the arrest was that Mr Hashe had been pointed out by an eye witness.

[11] The facts of this case are largely common cause, save for the lawfulness or otherwise of the arrest and detention. In the notice of appeal filed on 8 April 2021 the Minister listed grounds of appeal which may be divided into three parts namely;

11.1 The appellant's failure to discharge the *onus* of proving that the arrest and detention were lawful and justified;

11.2 The procedure followed by the Magistrate of finding, on the merits, without allowing the respondent to close his case as required by the Magistrates' Court Rule 29[1]; and

11.3 Costs of counsel's fees at three times the prescribed tariff.

[12] Section 40(1) (b) authorises a peace officer to effect an arrest without a warrant where he entertains a reasonable suspicion that the person has committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. As adumbrated earlier, assault with intent to do grievous bodily harm is not referred to in Schedule 1 of the CPA. However, the schedule does refer to an assault when a dangerous wound has been inflicted. It is clear from this section that the following jurisdictional facts should be present to justify an arrest without a warrant:

(12.1) the arrestor must be a peace officer;

(12.2) He must entertain a suspicion;

(12.3) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1, in this case, an assault in which a dangerous wound has been inflicted; and

[1] Rule 29 (8) of the Magistrates' Court Rules of Court provides that where the burden of proof is on the defendant, the defendant shall first adduce his evidence, and if necessary the plaintiff shall thereafter adduce his evidence.

(12.4) the suspicion must rest on reasonable grounds. Once these jurisdictional facts are present the discretion whether or not to arrest, arises.[2]

[13] The first two requirements are not contentious in this case. The issues which arise are whether Capt.Toto entertained a suspicion as adumbrated in paragraph (12.3) above, and, if he did, whether the requirements of paragraph (12.4) above, which relate to the reasonableness of the suspicion, have been satisfied. Based on the facts of this case the critical question is whether perusal of the docket, interview of the victim and the fact that the respondent was pointed out by an eye witness, were sufficient to give rise to a reasonable suspicion that Mr Hashe had committed an assault in which a dangerous wound had been inflicted.

[15] On behalf of Mr Hashe it was argued that the Minister had failed to discharge the *onus* of proving that the arrest and detention were lawful. It is trite that the arresting officer bears the *onus* to prove the lawfulness of the arrest. In **MINISTER OF LAW AND ORDER v HURLEY AND ANOTHER 1986 (3) 568 (A)**[3] Rabie CJ had this to say:

> "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law."

[17] It is equally trite that the reasonableness of the suspicion of the arresting officer who acts under s 40(1) (b) must be approached objectively.[4]

[18] The Minister bore the *onus* of establishing the jurisdictional facts, on a balance of probabilities. If he did so, the arrest would be lawful, unless Mr Hashe is able to establish that the arresting officer exercised his discretion to arrest in a manner that was unlawful.[5] In **DE KLERK v MINSTER OF POLICE [2018] 2 ALL SA 597 (SCA)**[6] Shongwe ADP held:

> "[11] What is clear is that the arresting officer relied on the statement by the complainant and the J88 only, when she made the decision to arrest. Clearly, seen objectively, that was insufficient. The arresting officer failed to investigate further the circumstances of the assault itself, whether the wound was inflicted intentionally or whether it came about accidentally

[2] Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-H; Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) (2011 (5) SA 367) at para [6].
[3] At 589E-F.
[4] See Minister of Safety and Security v Swart 2012 (2) SACR 226 at para [20].
[5] See Minister of Safety and Security v Sekhoto *supra* at para [30] & [38].
[6] At para [11]; See Mneno v Minister of Police (647/2013) [2016] ZAECBHC 15 (delivered on 14 June 2016).

> during the scuffle. The nature and the seriousness of the wound was never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in these circumstances was not lawfully permissible. In my view the respondent failed to establish the jurisdictional facts, in particular that the appellant committed an offence referred to in Schedule 1. I find that the appellant succeeded to prove that the discretion was exercised in an improper manner. (See Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA) at para [46] and Duncan at 819B-D)."

Notably, only Capt Toto testified on behalf of the Minister.

[19] Thring AJ, in **BOBBERT v MINISTER OF LAW AND ORDER 1990 (1) SACR 404 (C)**[7] **,** held that, for purposes of an arrest without a warrant by a peace officer in terms of s 40(1) (b), it is necessary that the peace officer reasonably suspects such a person of having committed an offence referred to in Schedule 1 of the CPA. For an assault to fall under Schedule 1, a dangerous wound must have been inflicted. Any attempt to commit an offence referred to in Schedule 1 also constitutes an offence under that Schedule. The concept '*grievous bodily harm*' and '*dangerous wound*' as formulated by the courts in the context of assault are, however, not synonymous. Thus, where the sole basis for an arrest in terms of s 40(1) (b) is the arrestor's suspicion, based upon an entry seen in a police register of suspects, that the arrestee has allegedly committed an assault with intent to inflict grievous bodily harm, there is no reasonable ground for the arrestor to suspect: (1) that an assault in which a dangerous wound was inflicted, has in fact been committed; or (ii) that such an assault has been attempted. It stands to reason that a person who commits an assault with intent to do grievous bodily harm does not necessarily attempt to commit an assault in which a dangerous wound is inflicted and such arrests are unlawful under s 40(1) (b).

[20] Capt Toto focussed, in his evidence, on whether he entertained a reasonable suspicion that Mr Hashe had committed an offence of assault with intent to do grievous bodily harm, when he decided to arrest him. No evidence was led to establish that the offence committed was listed in Schedule 1 of the CPA and that the suspicion that he

[7] At 453 the Court concluded as follows: "I conclude that there was no reasonable ground on which Antha could have suspected, simply because the plaintiff was sought by the police on a charge of assault with intent to do grievous bodily harm, that he was guilty of an attempt to commit an assault, when a dangerous wound is inflicted.' His arrest of the plaintiff, being a statutory function, could, to use the words of Hefer JA in Minister of Law and Order and Another v Dempsey (supra at 38B-C) only be validly performed within the limits prescribed by the statute itself'. In the absence of a reasonably grounded suspicion on Antha's part that the plaintiff had committed or attempted to commit such an assault, it follows, in my view, that his arrest of the plaintiff was unlawful."

entertained rested on reasonable grounds which would have entitled him to exercise a discretion whether to arrest or not.[8]

[21] Requirement (iii) of the jurisdictional facts mentioned above, which justifies an arrest without a warrant in terms of s 40(1) (b) of the CPA, has not been met. As I have said, for an assault to fall within the ambit of Schedule 1, a dangerous wound must have been inflicted. For purposes of an arrest without a warrant by a peace officer in terms of s 40(1) (b) the Minister was required to establish, on a balance of probabilities, that Capt Toto held a suspicion, resting on reasonable grounds, that Mr Hashe had inflicted a dangerous wound. No such evidence was led by Capt Toto. Because he believed that assault with intent to do grievous bodily harm was referred to in schedule 1 to the CPA, he never directed his mind to the issue.

[22] Regarding the infliction of a dangerous wound, Ms Masiza conceded that no evidence relating to the infliction of a dangerous wound that threatened the life or limb of the victim was tendered by Capt Toto. As adumbrated earlier, during cross-examination, Capt Toto said that he had perused the docket and decided that he would arrest Mr Hashe if he found him. He further said: "*When you get the dockets and look at the dockets, you make an arrangement and those who will be arrested on that particular weekend, or need to be arrested. And also the plaintiff was in that list and there were also others*." Again, Ms Masiza acknowledged that in the circumstances as testified to by Capt Toto, the arrest could not be justified in terms of s 40(1) (b). A policeman who does not substantiate his suspicion where he is able to do so, does not act reasonably.[9] For these reasons the arrest was unlawful, with the result that the subsequent detention was also unlawful.

[23] Clearly, Capt Toto wrongly assumed that the offence of assault with intent to do grievous bodily harm falls under Schedule 1. He did not testify that during the interview of the complainant he enquired from him about the nature and seriousness of his injuries.[10] He also did not claim to have information upon which he could have suspected that Mr Hashe had inflicted a dangerous wound on him, nor did he see the injuries. The description of the injuries as recorded in the injury statement compiled by Ms Ntomboxolo Ndzima is: "*long stitched wound on the right hand, three stitched*

[8] See Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818I.
[9] See Nkosi v Minister of Police & Another (unreported, GP case no 51083/2015, 2 August 2017 at [24].
[10] See Goliath v Minister of Police (CA107/2017) [2017 ZAECGHC 119 (14 November 2017).

*wounds at the back of the shoulder on the right side and wound at the lower back*." No medical evidence was available in the docket as to the severity of these injuries or the potential threat which they may have posed to life or limb. The description does not suggest that those injuries constituted a dangerous wounds and photographs attached to the injury statement were unclear.

[24] The Minister failed to establish that Capt Toto entertained a reasonable suspicion that Mr Hashe had committed an offence referred to in Schedule 1. Therefore, the reliance on section 40(1) (b) has no merit.

[25] Regarding the second ground of appeal namely, the procedural step taken by the court *a quo*, of giving judgment at the close of the Minister's case, without Mr Hashe first closing his case is concerned, it was argued that Mr Hashe had failed to place evidence before court, which renders the Minister's evidence unchallenged. However, Mr Olivier contended that it was unnecessary for him to lead evidence after the Minister had closed his case. The record shows that the parties agreed that the plaintiff would testify after the close of the case for the Minister. Before the Magistrate, Mr Olivier submitted that the Minister had failed to prove that the arrest and detention were lawful and that that would be the end of the case. Mr Jokwe, for the Minister, accepted that at the close of his case heads of argument had to be filed on the merits of the case. This was conceded by Ms Masiza.

[26] In **CLAUDE NEON LIGHTS (SA) LTD v DANIEL [1976] ALL SA 347(A)** the Court stated that the test to be applied when absolution from the instance is sought at the close of plaintiff's case, is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

[27] In **SIKO v ZONSA (1908, T.S. at 1013)** the Court dealt with a case where the *onus* lay on the defendant and where at the close of his evidence the plaintiff had neither closed his case nor testified. Solomon J (Mason J concurring) remarked that it would be useless waste of time to proceed with the matter further. This principle was confirmed in **MOENG V MINISTER OF POLICE CIVAPP3/2016) [2016] ZANWHC 49 (30 JUNE 2016).**

[28] De Waal JP in **HODGKINSON v FOURIE 1930 TPD 740**[11] also confirmed the principle applied in Siko *supra* and held:

> "At the close of the case of the one side upon whom the *onus* lies, the question which the judicial officer has to put to himself is: "Is there evidence on which a reasonable man might find for that side."

[29] The same principle is applicable *in casu*. Therefore, the attack on the Magistrate's procedural step of giving judgment at the end of the Minister's case in favour of Mr Hashe has no merit. In my view, it would have been a useless exercise and waste of time to proceed with the matter further when there was no evidence on which the Court could find for the appellant. I am therefore unpersuaded that the Magistrate erred in this regard.

**COSTS**

[31] Both parties were *ad idem* that the court *a quo* erred in not advancing reasons when awarding costs at three times the Magistrates' Court tariff. They requested us to make a fresh consideration regarding costs. Ms Masiza submitted that it was not prudent to appoint counsel in this matter as the merits and quantum were not complicated. According to her, the appointment of counsel by Mr Hashe prejudiced the Minister, who was not represented by counsel. She conceded that awarding costs at a higher rate would still give the taxing master a discretion. However, she stated that the award should be limited to what was necessary.

[32] However, Mr Olivier submitted that counsel's costs at a higher rate have been allowed in the past in the Magistrate's Court and therefore should not be reduced and relied on

[11] At 745. See also Pather v Minister of Police (14512/13) [2016] ZAGPPHC 215 (31 March 2016) at para 31.1-31.3 where the Court held: "…Plaintiff is entitled to apply for judgment at the close of the Defendant's case without leading evidence and without closing its case. It was submitted on her behalf that the test to be applied is similar to that of absolution from the instance where a Plaintiff has not discharged its *onus*. It was further submitted that if a Defendant upon whom the *onus* of proof rests has failed to lead such evidence in discharge of that onus to the effect that a reasonable man could have not cone to the conclusion that it might be accepted, the court would be entitled to give judgment for the Plaintiff."

Rule 33 (8) of the Magistrate's Court Rules.[12] He conceded though that costs at three times the prescribed tariff does raise the ceiling.

[33] It is trite that the award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.[13] It is also trite that the purpose of an award of costs to a successful party is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation as the case may be.[14]

[34] Jones J (Schoeman J concurring) in **ROAD ACCIDENT FUND v FORBES (CA 197/05) [2006] ZAECHC 47 (28 September 2006)[15],** an unreported judgment, held:

> "[6] The courts frown upon unwarranted interference with the taxing master's discretion with regard to the fees which should be allowed when he taxes a bill. The emphasis is on interference which is *unwarranted*. The tariff itself places fetters on this discretion by fixing a maximum fee. The court has no alternative but to place a similar fetter when it exercises its discretion to allow a higher fee in terms of note (b). As it is, the taxing master still retains a proper measure of discretion when he comes to tax the bill in this case. The tariff provides, for example, for a trial fee *not exceeding* the amount set out in the tariff (item 22). That must be read in this case as a fee not exceeding three times the amount set out in the tariff. It seems to me that the taxing master has the same degree of discretion that he always has in deciding upon the reasonableness of fees charged. The only difference is that the ceiling has been raised."

[35] The learned Judges found that an award of party and party costs, including counsel's fees at three times the amount of the tariff, is not incompetent. That is so because the taxing master still retains his proper discretion. In **BRAND V ROAD ACCIDENT FUND (CA 170/09) [2009] ZAECGH 85 (30 November 2009)**[16] Kroon J (Plasket J concurring) remarked:

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[12] Rule 33(8) of the Magistrates' Court Rules provides: "(8) The court may on request made at or immediately after giving of judgment in any contested action or proceedings in which –
(a) is involved any difficult question of law or of fact; or
(b) the plaintiff makes two or more claims which are not alternative claims; or
(c) the claim or defence is frivolous or vexatious,
Award costs on any scale higher than that on which the costs of the action would otherwise be taxable."

[13] Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A) at 149A-B. See also Merber v Merber 1948 (1) SA 446 (A) at 453.

[14] Die Meester v Joubert 1981 (4) SA 211 (A) at 218G-H; Zeelie v General Accident Insurance Co Ltd 1993 (2) SA 776 (E) at 779D-F

[15] At para 6.

[16] At para [14].

> "Suffice it to say that the Magistrate's approach can clearly not be endorsed. The restriction of the engagement of counsel to "special cases" enjoys no foundation in the rules of the Magistrate's court nor in the practice followed in that court, and is clearly unacceptable. I may add that, as will appear below, the engagement of counsel in the matter was in fact a proper and prudent course for the Appellant to have adopted. It need hardly be commented that the inference is inescapable that the Magistrate's unacceptable attitude towards the briefing of counsel to appear in his court featured largely in his coming to the decision reached by him."

[36] The award of costs by the Magistrate does no more than to indemnify the successful party for the reasonable expenses he was obliged to incur in being forced into court to exercise his rights. In my view, the award made by the Magistrate is fair and not incompetent and should stand.

[37] In the circumstances I would dismiss the appeal with costs.

**B M PAKATI**

**JUDGE OF THE HIGH COURT**

EKSTEEN J:

I agree. The appeal is dismissed with costs.

**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

**Date Heard:** **17 September 2021**

**Date Delivered:** **07 December 2021**

Appearances:

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| For Appellant: | Adv A N Masiza instructed by the State Attorney c/o Joko & Co. Inc, Makhanda |
| For Respondent: | Adv W H Olivier instructed by N N Dullabh Attorneys, Makhanda |