

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: A3033/22

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED NO |

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| | 1 February 2023 |
| SIGNATURE | DATE |

In the application between:

SIMELANE, MNCEDISI LUVUYO

Appellant

and

MINISTER OF POLICE

Respondent

Coram: Adams J *et* Turner AJ

Heard: 26 January 2023

Delivered: 1 February 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 1 February 2023.

Summary: Appeal – arrest and detention – lawfulness of – s 40(1)(h) of the Criminal Procedure Act and s 4(a) and (b) of the Drugs and Drugs Trafficking Act – possession of methamphetamine

Discretion arising as to whether or not to arrest once required jurisdictional facts for arrest without a warrant present – appellant required to plead and prove facts to show discretion exercised unlawfully – appellant failing to show unlawful exercise of discretion

ORDER

On appeal from: The Protea Magistrates Court, Soweto (Magistrate Evans), sitting as Court of first instance):

- (1) The appellant's appeal is dismissed with costs.
- (2) The appellant shall pay the respondent's costs of this appeal.

JUDGMENT

TURNER AJ (ADAMS J concurring)

[1] The Appellant appeals against the decision of Magistrate Evans sitting at Protea Court, Soweto in which the Learned Magistrate dismissed the Appellant's claim for damages against the defendant ("the Minister"). The Appellant (as plaintiff) alleged that he had suffered an *injuria* as a consequence of unlawful arrest and detention by police officers acting in the course and scope of their employment. His pleaded claim is for R100,000 but in the heads of argument before the Learned Magistrate, the sum claimed was R30,000 plus interest and costs.

- [2] There were many factual disputes at the trial but the facts which may be accepted as undisputed are the following: the Appellant was arrested by Constable AS Zwane late on the evening of 1 April 2019 (the precise time is disputed); and the Appellant was detained overnight at Meadowlands Police Station and released at 11h00 the following day – 2 April 2019, approximately 12 hours after his arrest.
- [3] The Appellant's claim is made under the *actio iniuriarum* and, as it is a claim in delict, liability for damages arises if the plaintiff can show wrongful, culpable conduct by a person that factually caused harm to the plaintiff that is not too remote.¹ To impose liability on the Minister, the impugned conduct must have been performed in the course and scope of the person's employment as a police officer.
- [4] The act of arresting and detaining a person is an intentional act which would satisfy the requirement of culpability. Although the quantum of the damages may be debated, the nature of the damages claimed – deprivation of liberty; loss of dignity and humiliation; inconvenience and discomfort; and contumelia arising from the arrest – necessarily are causally linked to the impugned conduct. There is no dispute that Constable Zwane was acting in the course and scope of his employment as a police officer when he effected the arrest.
- [5] Therefore, the sole issue to be determined on the merits is whether the arrest and detention was unlawful. It is well established that the onus rests on the Minister to establish the lawfulness of an arrest :

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person

¹ *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) at [13].

who arrested or caused the arrest of another person should bear the onus of proving his action is justified in law.”²

[6] *Sekhoto’s* case provides clear guidance on how the evidence in an unlawful arrest case should be assessed in order to determine whether the arrest was unlawful. In effect, it is a two-stage process :

6.1 First, the Minister is obliged to establish the jurisdictional facts which must be present before a police officer may effect an arrest without a warrant in terms of s 40(1) of the Criminal Procedure Act.³

6.2 Section 40(1) of the CPA provides that once those four jurisdictional facts are present, a police officer may, without a warrant, arrest a person. This means that, once these jurisdictional facts are established, the police officer has the statutory power to exercise his discretion on whether the person should be arrested and detained or not.

6.3 The second factual enquiry assesses whether the discretion was lawfully exercised, taking into account all relevant facts applicable to the exercise of that discretion, in the context of the particular case.

[7] In the current matter, the Minister relies on sub-section 40(1)(h) to justify the arrest. This sub-section provides (in relevant part) as follows:

“A police officer may without warrant arrest any person –

(h) who is reasonably suspected of committing or having committed an offence under any law governing the making, supply, possession or conveyance of dependence-producing drugs,”

² *Minister of Law and Order and others v Hurley and Ano* 1986 (3) SA 568 (A) at 489 E-F; confirmed in *Minister of Safety and Security v Sekhoto and Ano* 2011 (5) SA 367 (SCA) at [7].

³ Criminal Procedure Act 51 of 1977.

[8] To succeed in this s40(1)(h) defence, therefore, the jurisdictional facts to be established by the Minister are that, at the time the arrest was effected: (i) the arrestor was a police officer; (ii) the arrestor entertained a suspicion; (iii) the suspicion was that the suspect was committing or had committed an offence under a law governing the supply, possession of conveyance of a dependence-producing drugs; and (iv) the suspicion rested on reasonable grounds.⁴

[9] The Minister's case, supported by the evidence of the arresting officer Constable Zwane, was that the defendant was arrested after he was found by Constable Zwane to be in possession of a dependence-producing drug – methamphetamine, also known as “crystal meth”. Although Constable Zwane would not have known for sure at the time that the crystals which he found in the small plastic bag in the plaintiff's right hand were drugs, the police officer's experience allowed him to recognise the drugs “known as crystal” which, in my view, established a reasonable suspicion as contemplated in *Duncan*.⁵ If the evidence of Constable Zwane is accepted, this evidence would satisfy the test for the reasonable suspicion justifying an arrest without a warrant and the Minister will have established compliance with the requirements in s40(1)(h).

[10] The question to be determined then is whether Constable Zwane's evidence is to be believed as the version given by the Appellant's witnesses were completely irreconcilable with the version given by Constable Zwane.

[11] The key facts on which the evidence differed were the following:

⁴ Cf *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H.

⁵ *Duncan v Minister of Law and Order* (supra)

11.1 The Appellant asserted that he was approached and arrested inside the house at 11B, Zone 2, whereas Constable Zwane alleges that he noticed the appellant acting suspiciously next to the outside wall of the house at 11B. This suspicious conduct drew his attention to the appellant and he approached, searched and arrested the plaintiff on the street outside the house.

11.2 The Appellant asserted that there were no drugs found during the search whereas Constable Zwane's evidence was that drugs were found on the plaintiff during the search.

[12] There was also a dispute over the time of the arrest – whether it was at approximately 22h30 or 23h40. In my view, very little turns on this.

[13] In relation to the location at which the Appellant was found, searched and arrested, it is useful to consider the documentation that was prepared contemporaneously together with the other oral evidence given at the trial.

[14] The appellant has not suggested any reason (and I cannot see any reason on the evidence) to suspect that Constable Zwane was motivated to lie on the documents he completed at the time of the arrest. On his handwritten statement, Constable Zwane states that he “*approached a suspicious man who was standing next to a wall of house 11B Zone 2 ...*” The statement of Sgt. Mabaso who was with Zwane, but did not give evidence at trial, records that he saw the suspect “*standing next to house No. 11B ...*”. On the printed form “Statement”, the “Scene of Crime” was identified as being “*next to house No. 11B, Zone 2.*”

[15] This documentary evidence supports Constable Zwane's version in his oral evidence. There is also an improbability in the appellant's version, namely that the police officers entered the house without any cause to do so. Constable Zwane was asked whether he knew the accused prior to the arrest and he confirmed that he did not. This evidence was not challenged or contradicted by the Appellant. Constable Zwane's evidence that there was "nothing special" about the house at 11B which would have caused him to enter that one if the appellant had not been outside was also not challenged on any credible basis.

[16] To add to these factors, there were minor inconsistencies in the versions of the appellant's witnesses, on issues that undermine the weight that might otherwise be given to the evidence of two witnesses over the evidence of one witness. While the two stories were consistent on the major points which they concentrated on in their evidence in chief – such as who was in the house and that Mr Zwane was searched and arrested inside the house – inconsistencies emerged when they were examined on minor aspects such as, which police officer arrested Mr Maphike and whether the other occupants of the house remained present when the two of them were arrested. These inconsistencies undermine the reliability of their evidence and their credibility.

[17] In relation to the dispute over whether drugs were found in the search, the documentary evidence is also relevant. Both Sgt Mabaso and Constable Zwane's contemporaneous statements confirm that the drugs were collected as evidence at the scene. The statements identify the evidence bag reference number 13/414/2019 and PA4001649632, linked to the case No. CAS16/04/2019 which was allocated to the matter. The contents of the

evidence bag which was later inspected in the forensic science laboratory bore the same numbers which appeared on the statements.

[18] The contemporaneous statements of the police officers, read with the contemporaneous statement of the officer responsible for receiving evidence on 1 April 2019 and with the later laboratory report, show that evidence was collected and submitted by Constable Zwane on the night of the arrest and that the sealed evidence bag, when opened and its contents analysed in the laboratory, proved to contain “crystal meth”.

[19] Although in cross examination of Constable Zwane, the Appellant’s attorney noted that the defendants denied he had found drugs in his search, the Appellant’s attorney never put to Constable Zwane that he was being untruthful. Instead, the cross examination was directed at the failure to exercise a discretion at the time of the arrest, notwithstanding the drugs having been found.

[20] The magistrate preferred the evidence of Constable Zwane and rejected the evidence of the plaintiff and his witness on the following basis:

“5.1 The evidence of the defendant’s witnesses was clear, concise and to the point. He did not contradict himself in any material way. His evidence was more probable than the plaintiff’s version.

5.2 He also testified that the reason he suspected the plaintiff was because when the plaintiff saw the police vehicle he wanted to move away. He thus had a reasonable suspicion that the plaintiff committed an offence. This suspicion was verified by him finding the drugs in his possession.

...

- 5.6 As far as the plaintiff's version is concerned, the court found his version highly improbable. It is highly improbable that the police will arrest the plaintiff and his witness for 'talking and knowing too much'.
- 5.7 The plaintiff's version also does not account for the drugs found in his possession. According to him and his witness nothing was found in the house or in their possession.
- 5.8 The plaintiff and his witness also materially contradicted each other as far as who arrested them. According to the witness they were arrested by two different police officers and according to the plaintiff by the same police officer.
- 5.9 The sale register on page 43 of Exhibit 'A' does not prove that the plaintiff and his witness was arrested for the same offence but they were arrested and detained in the cells on the same night."

[21] In the absence of some evidence that would suggest that the police officers had prior knowledge of the Appellant and the occupants of the house and/or had a illegitimate reason to go into that house and arrest those occupants, it seems highly improbable that they would do so unless they had seen something suspicious during their patrol. The evidence given by Constable Zwane, that he observed the Appellant acting suspiciously outside the house and that this triggered the approach appears to me to be more probably true. I also see no reason to disturb the findings of the magistrate in relation to the impression created by the witnesses.

[22] In the circumstances, I find that the defendant established each of the jurisdictional facts to bring himself within s 40(1)(h) and to show that *prima facie*, the arrest was authorised by the CPA and therefore lawful.

[23] The next question involves assessing whether there are facts in evidence which indicate that Constable Zwane's conduct in arresting the Appellant was

nevertheless unlawful because of the manner in which he exercised his discretion. A plaintiff that seeks to impugn the manner in which a police officer exercised his discretion to arrest without a warrant must plead and prove facts on which the court might come to the conclusion that the discretion was not exercised *bona fide*, or that it was exercised irrationally or arbitrarily.⁶

[24] The appellant's ability to undermine the lawfulness of the discretion is significantly weakened by the credibility of his witnesses. Having been disbelieved on the key facts about how and where the arrest took place, the substratum of the appellant's attack on Constable Zwane's *bona fides* cannot be accepted as it rests on the same (disbelieved) evidence surrounding the arrest.

[25] Further, once the Court has accepted that the appellant was in possession of crystal meth and that he was arrested at a location away from his own home, Constable Zwane cannot be criticised for exercising his discretion in favour of arresting the appellant and detaining him at the police station until a duly authorised person, such as a senior police officer, a prosecutor or a magistrate, made the decision to release the appellant. Certainly, exercising his discretion in the manner in which he did cannot be considered irrational or even unreasonable.

[26] Before concluding, I should deal briefly with the argument made by the appellant's counsel there was no evidence before the court to conclude that the Respondent's witness exercised discretion at all before detaining the Appellant

⁶ Sekhoto at [31].and [38]

because, so the argument went, Constable Zwane “*admitted that he did not use discretion before he detained the Appellant*”.

[27] First, the argument cherry-picks from the evidence without considering the evidence preceding the extract relied on.

27.1 The extract relied upon by the appellant records:

“MR KHUMALO: So you arrest and detain without exercising discretion?”

MR ZWANE: What discretion must I use? When I have arrested someone I must detain him.”

27.2 But it is preceded by the following exchanges in relation to the arrest:

“MR KHUMALO: So tell me, before you arrest someone the police officer must exercise a discretion, is that correct, that is one of requirements for lawful arrest?”

MR ZWANE: Yes.

MR KHUMALO: So in this case you did not exercise discretion.

MR ZWANE: Drugs are an offence, that is why I arrested him.

MR KHUMALO: So my question is that as you failed to ask where he was staying, what he was doing there, his occupation , failure to ask those questions, which means you did not have any information about the plaintiff therefore you did not exercise the discretion before you arrested him, so after you allegedly found those drugs you immediately arrested him?”

MR ZWANE: I found drugs on him and I arrested him.

MR KHUMALO: I put it to you that failure to exercise discretion it results in your arrest being unlawful.

MR ZWANE: No, what I did was lawful.

[28] This evidence establishes that the key fact which weighed heavily with Constable Zwane when exercising his discretion to arrest and detain was the seriousness of the crime involved. The appellant has not identified any other facts that were or ought to have been known by Constable Zwane and ought to have trumped this important fact. In my view, there is no basis on which to conclude that Constable Zwane failed to exercise the necessary discretion or that he exercised that discretion unlawfully.

[29] Second, the appellant was arrested late at night on 1 April and it was probably after midnight once his arrest and the evidence had been processed at the Meadowlands Police Station. It was not suggested that Constable Zwane was authorised to release the appellant on bail or on other conditions, such authority rests with others and no case was made that other employees acting in the course and scope of their employment acted unlawfully towards the appellant. In the circumstances, detaining the appellant until 11h00 the following day, when he was released pending the trial, cannot be criticised as mala fide, irrational or arbitrary.

[30] The Minister has been successful in all respect in resisting this appeal and I see no reason why the costs should not follow the result.

Order

[31] In the circumstances, I make the following order:

(1) The appeal is dismissed.

(2) The appellant is liable to pay the respondent's costs in the appeal.

TURNER AJ

Counsel for the appellant: T. Khumalo (Attorney)

of: Themba Kumalo Incorporated; Johannesburg

Counsel for the respondent: No appearance

Instructed by:

Date of hearing: 26 January 2023

Date of Judgment: 1 February 2023