



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

Appeal Case No: A3074/2022

(1)	REPORTABLE: YES/NØ
(2)	OF INTEREST TO OTHER JUDGES: YES/NØ
(3)	REVISED
DATE	SIGNATURE

In the matter between:

MINISTER OF POLICE

Appellant

and

EDWARD KEKANA

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 July 2023.

JUDGMENT

CARRIM AJ:

[1] On the morning of Friday, 9 March 2018, at about 10:30, the present respondent, Mr Kekana, then 18 years old, was arrested by the police on a charge of possessing 3 grams of dagga. He was taken to police cells and released at court on the Monday morning three days later. He spent three days and nights in a dirty cell with a toilet which did not work. He shared the cell with hardened criminals. Mr Kekana was a first offender and could not afford bail.

[2] Mr Kekana instituted action, claiming R250 000 for unlawful arrest and detention. During the trial, he conceded that he was found in possession of the dagga and that his arrest was lawful. The claim really proceeded from the premise that he should have been released on warning about two hours after his arrest and that his detention after that was unlawful.

[3] The appellant, Minister of Police, called three witnesses to justify the detention between the Friday afternoon and the release of Mr Kekana at court on the Monday morning, when the matter was diverted from the ordinary criminal process.

[4] All three witnesses were constables at the relevant time. They set out, in some detail the bureaucratic process they alleged was required before the question of Mr Kekana's release could be considered. According to them, their junior rank prevented them from considering the question.

[5] In ***JE Mahlangu and Another v Min of Police***¹ at paragraph 31 the Court held that -

“[31] This approach was affirmed in Zealand in which – as in the instant matter – the focus was on detention. There this Court held that:

“It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In Minister van Wet en Orde v Matshoba, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the rei vindicatio a useful analogy. The simple averment of the plaintiff’s ownership and the fact that his or her property is held by the defendant was sufficient in such cases...The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.” (Footnotes omitted.)

[32] It follows that in a claim based on the interference with the constitutional right not to be deprived of one’s physical liberty, all that the plaintiff has to establish is that an interference has occurred. Once this has been established, the deprivation is prima facie unlawful and the defendant bears an onus to prove that there was a justification for the interference.”

¹ [2021] ZACC 10.

[6] It is trite that for a police officer to justify an arrest under s40(1)(b) of the Criminal Procedure Act² (the CPA), the following jurisdictional facts have to be present namely (i) the arrestor must be a peace officer, (ii) he must entertain a suspicion (iii) a suspicion that the arrestee committed an offence listed in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.³

[7] In **Duncan**⁴ the Court held further “If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i e, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Hoigate-Mohammed v Puke (1984) 1 All E R 1054 (HL) 1057). No doubt the discretion must be properly exercised.”

[8] It is also trite that the suspicion must be objectively justiciable. In **Mvu v Minister of Safety & Security**,⁵ the Court found that the fourth requirement i.e. that the suspicion must rest on reasonable grounds is objectively justiciable.⁶

[9] In **Mvu**, Willis J relying on **Hofmeyer v Minister of Justice and Another**⁷ drew a distinction between a claim for unlawful arrest and unlawful detention and found at para 10 –

² 51 of 1977.

³ *Duncan v Minister of Law & Order* [1986] ZASCA 24; [1986] 2 All SA 241 (A) (24 March 1986).

⁴ Page 818 H.

⁵ 2009 (2) SACR 291 (GSJ).

⁶ 66113/2019 at para [9].

⁷ 1993 (3) SA 131 (A).

“It seems to me that if a police officer must apply his or her mind to the circumstances relating to a person’s detention. This includes applying his or her mind to the question whether detention is necessary at all”.

[10] In **Hofmeyer**, King J as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee’s detention and the circumstances relating thereto and that the failure by a police officer properly to do so is unlawful.

[11] In **Diljan v Minister of Police**⁸ the appellant had been arrested and detained by police officers who were satisfied that she had committed an offence listed in Schedule 1 (malicious damage to property). The Court highlighted that peace officers are vested with a discretion whether to arrest a person, and then with a further discretion whether to detain the arrestee

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“[8] In the present matter, counsel who appeared for the appellant, correctly conceded that, in so far as the appellant’s arrest is concerned, the jurisdictional requirements in s 40(1)(b) were present. He, however, contended that the issue remains whether the arresting officers properly, if at all, exercised the discretion vested in them as required by law.

[9] Once the jurisdictional facts are established, the peace officer has the discretion of whether or not to arrest the suspect. However, if the suspect is arrested, a peace officer is vested with a further discretion whether to detain the arrestee or warn him

⁸ [2022] ZASCA 103 (24 June 2022).

or her to attend court. The arrest and detention of the suspect is but one of the means of securing the suspect's appearance in court."

[12] In *Diljan* two police officers had testified at trial that they had no power to release the appellant either on a warning or on bail. They asserted that only members of the detective branch, and in particular the assigned investigating officer were vested with such powers.⁹

[13] The Court found that both officers who effected the arrest did not know that they had a discretion, in the first instance to effect an arrest, and then in the second instance, to release the appellant, at para [12] –

"What emerges from the record is that both officers who effected the arrest did not know that they had a discretion. They laboured under the mistaken belief that their obligation was to arrest the appellant once it was reasonably suspected that she had committed a Schedule 1 offence. Thus, they could not have exercised a discretion they were unaware of. Constable Ntombela testified that he could not have warned the appellant because he 'did not have powers' to do so. In the same vein, Constable Tsile stated the following: '[u]nfortunately we do not have those powers because it is a different department'. Accordingly, that they did not exercise a discretion that they unquestionably enjoyed is beyond dispute. It must therefore follow axiomatically that both the arrest and subsequent detention of the appellant were unlawful. Indeed, counsel for the respondent was ultimately constrained to concede as much."

⁹ At paragraph 3.

[14] Compare *Min of Police and Another v Siphon Zweni*¹⁰, where it was accepted that the arrest was lawful. In evaluating whether the initial detention was lawful the court found at para [6] that the appellants had produced sufficient evidence to justify the respondent's initial detention, when the arresting police officer (a constable at the time) testified that "*the alleged offence was a Schedule 6 offence - a very serious offence - and the police officer did not have the authority or the mandate to give the suspect a warning to appear in court that would only be the court's decision*". In that case the suspect had been charged with rape of a minor which is both a Schedule 1 and 6 offence.¹¹

[15] The evidence of both Constable Mydwe and Constable Molefe was that they did not have the authority to release the plaintiff. Both had limited knowledge of the provisions of section 56, 59 and 59A of the CPA. In their view had the plaintiff asked to be released on bail or warning they would have escalated the matter to the station commander or a senior police officer. As peace officers they were unaware of the discretion vested in them and therefore could not have exercised such discretion. Constable Ntsoelengoe admitted that the plaintiff, by reason of the offence he was charged with did qualify for police bail. However, he did not have the power to release suspects on bail. He testified that had the plaintiff indicated to him that he wanted to be released on bail or warning he would have escalated the request. Thus, the

¹⁰ [2018] ZASCA 97 (1 June 2018).

¹¹ Criminal Procedure Act 51 of 1977 (the CPA).

discretion vested in him as a peace officer was fettered by the bureaucratic process of the police station.

[16] As to whether the station commander had applied his or her mind to whether the plaintiff should be detained further or at all beyond Friday 12h00, no evidence was led by the appellant. The fact that the plaintiff was held until Monday morning suggests that no such discretion was exercised by the station commander.

[17] Under section 56 of the Criminal Procedure Act, 51 of 1977-

“56. Written notice as method of securing attendance of accused in magistrate’s court.—(1) If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate’s court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall—”

[18] An 18-year-old, in possession of 3 grams of dagga is precisely the kind of person the Legislature had in mind when enacting the section. Mr Kekana was co-operative with the police and was a first offender. Mr Kekana’s inability to afford bail was an additional reason for the police to release Mr Kekana on notice.

[19] In this case, the police not only had a discretion to release Mr Kekana, but they had a duty to exercise that discretion in Mr Kekana's favour.

[20] In my view, the detention of Mr Kekana, beyond about 2 hours of his arrest was unlawful and he is entitled to damages.

[21] In ***Mahlangu and Another v Minister of Police***¹² amounts of R550 000 and R500 000 were awarded as general damages for assault, torture and eight months and ten days in detention, including time spent in solitary confinement. This equates to roughly R2 200 per day.

[22] The learned Magistrate referred to the ***Mahlangu*** decision but not in the context of quantum. The learned Magistrate awarded R75 000.

[23] In my view, if the amount awarded is properly before us, the correct quantum in the present case would perhaps need to be substantially lowered. The notice of appeal by the Minister seeks to appeal only the merits of the case and no grounds are set out why quantum should be reduced. The heads of argument by the Minister do not challenge quantum. Accordingly, the quantum is not before us.

¹² (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021).

ORDER

1. The appeal is dismissed with costs.

Y CARRIM

**Acting Judge of the High Court
Gauteng Division, Johannesburg**

I agree

GC WRIGHT

**Judge of the High Court
Gauteng Division, Johannesburg**

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