
IN THE HIGH COURT OF SOUTH AFRICA



**GAUTENG DIVISION, PRETORIA
REPUBLIC OF SOUTH AFRICA**

Case No: A31/22

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
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DATE	SIGNATURE

In the matter between:

MINISTER OF POLICE

Appellant

And

BETSIE HENNING

Respondent

JUDGMENT

BOTSI-THULARE AJ

Introduction

[1] This is an appeal brought before the High Court of Pretoria, Gauteng Division, with leave to appeal from the Magistrate Court granted against the whole judgement and order delivered by the Honourable Magistrate M Khoele on 18 November 2021, in which the respondent's claim for unlawful arrest and detention was upheld with costs.

Parties

[2] The appellant is the Minister of Police, a Minister in the Government of the Republic of South Africa, acting in his official capacity as the Executive Authority responsible for policing, safety, and security by the SAPS members in the Republic of South Africa.

[3] The respondent is Ms Betsie Henning, an adult female acting in her legal capacity. The parties will be referred to as the 'Appellant' and the 'Respondent' hereinafter.

Background

[4] On 30 September 2017, Mr. Peter Henning (the respondent's husband) was given the alleged stolen furniture by Mr. Stewart (the complainant). On 19 October 2017, the respondent was then contacted by her husband to remove the furniture from Warmbath to Bela-Bela. The complainant arranged the truck and hired a trailer; he also provided a driver for the truck and several other employees.

[5] However, the complainant opened a case of theft at the police station, based on the allegations that the respondent and her husband have stolen the property under false pretenses that they were selling the farm in Bela-Bela and the seller of the

farm was known to them. Only to find out that the respondent and her husband were allegedly using the furniture to create a home for themselves.

[6] Based on the theft allegations, the respondent and her husband were arrested and detained on 20 February 2018. The respondent was released on the 22 February 2018 due to the case being withdrawn.

[7] The *court a quo* found that the arrest and detention was unlawful. Due to the unlawful arrest and detention, the respondent claimed for damages against the appellant in the Magistrate Court for the District of Tshwane. The *court a quo* ordered the appellant to pay R90 000 to the respondent. The claims amounted to R200 000.00, and they included:

3.1. Humiliation R50 000.00

3.2. *Contumelia* R25 000.00

3.4. Discomfort R25 000.00

3.5. Unlawful Arrest and detention, with malice R100 000.00

[8] Dissatisfied with the Magistrate Court's decision, appellant served the learned Magistrate with a notice to appeal, which was granted in terms of rule 51 of the Magistrate Court Rules. The respondent is also cross appealing against the R90 000.00 award granted by the Magistrate.

Issues for determination

[9] 9.1. Whether the arrest was lawful in terms of section 40(1) (b) of the Criminal Procedure Act 51 of 1977?

In casu

[10] The appellant submits that the arrest and detention was lawful. The appellant bases the defence on section 40(1)(b) of the Criminal Procedure Act 51 of 1977(CPA). The basis of the defence is also placed on the grounds that the arrest and detention was lawful as the police officers caused the respondent to appear before the Magistrate Court on 22 February 2018, within, 48 hours of the arrest.

[11] The appellant also submits that, the arresting police officer (Ramalata) testified that, from the statements of the complainants (Mr and Mrs Stewart or the Stewarts), he inferred that the Stewarts transported their furniture to Bela-Bela willingly, because they were under the impression that the property at Bela-Bela was between Mr Stewart and the Seller in accordance with the verbal agreement.

[12] The appellant submits that the Stewarts did not transport the furniture to Bela-Bela for the benefit of the respondent and her husband, and the respondent and her husband were not given possession of the furniture, although they were under the impression that they were given the furniture. From the moment the Stewarts' attorney told them that the Stewarts want their furniture back, then the respondent and her husband stole the furniture.

[13] The appellant further submits that the respondent's version that she was given the furniture could not possibly be true, regarding the fact that the respondent and her husband averred that they were given the furniture by the Stewarts and who kept insisting that their furniture must be returned.

[14] Regarding not contacting the respondent and her husband before going to their home, the appellant submits that Ramalata testified that he heard Stewarts 'side of the story that the respondent and her husband stole the furniture. He further heard that the Stewarts had been trying without luck to get their furniture back, and therefore he proceeded to go to Bela-Bela without informing the respondent and her husband as they may have left for KZN if he informed them that he was coming to interview/investigate them.

[15] The appellant therefore submits that when Ramalata went to Bela-Bela on the 20 February 2018, he went to conduct the investigation by speaking to the respondent first to solicit the information on their side of the story. The subsequent arrest should not negate that fact and it is not a requirement for a police officer to contact a person before interviewing them.

Respondent's submission

[16] The respondent submits that the alleged stolen furniture was given to them on 30 September 2017. Subsequent to the above, she was contacted by her husband to remove the furniture, which was pointed out by the complainant. As soon as the furniture being pointed out, the furniture was removed as instructed by the complainant.

[17] The respondent then further to that, and to their surprise, eight police officers arrived at their premises on 20 February 2018, together with the complainant, his attorney, and his brother. All the police officers were heavily armed. Her husband was immediately handcuffed. The respondent was informed that she was under arrest for stealing furniture and the investigating officer wanted to handcuff her immediately.

[18] The respondent contends that she informed the police officer that the furniture was not stolen, it was given to them. She wanted to explain their position about the furniture, but she was told by the investigating officer that she will get her chance in court, and she should not attempt to teach him his job. The respondent was given a document to sign and was not informed about bail.

[19] The respondent submits that she was arrested on 20 February 2018 at 15:30 in Bela-Bela and released on 22 February 2018 at 13:30. The respondent further contends that the conditions in the cell that she was in were appalling, and she could not sleep the first night as she was scared. She was then taken to Hatfield Court, and she was detained with six other prisoners. From the Hatfield Court she was taken to the Magistrate Court in Pretoria in the back of a police van. She was detained in the police cells with fifty to sixty other detainees, the conditions of the cells were appalling,

and she was humiliated. She only saw her legal representative in the evening of 21 February 2018.

Condonation

[20] The appellant is applying for condonation in terms of rule 27(1) of the Uniform Rules of Court. The rule states that:

“In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

[21] The appellant submits that its grounds for late filing was that, upon the delivery of the judgement by the Magistrate, they obtained instructions to appeal and requested the Magistrate to provide reasons in terms of rule 51(8) of the Magistrate Court. Unfortunately, the appellant was not served the reasons on time as the appellant’s candidate attorney was told that the Magistrate has not yet provided the notice.

[22] The appellant has shown good cause for the late filing and since the matter is of interest to both parties, the condonation should be granted.

Grounds for appeal and analysis of the appeal

[23] 23.1. The court *a quo* ought to have found that the arrest and detention was lawful since Ramalata established reasonable suspicions that the respondent committed a schedule 1 offence. The appellant submits that the court *a quo* erred in finding that the arrest and detention was unlawful.

23.2. The court *a quo* also erred in finding that the arresting officer should have been aware from the statement given by the complainant that the furniture was transported willingly, there was no theft.

23.3. The court *a quo* erred in finding that, the arresting officer (Ramalata) was aware of that the respondent and her husband were under the impression that the furniture was given to them.

23.4. The court *a quo* erred in finding that Ramalata should have attempted to call the respondent to hear her side of the story during the investigations.

23.5. The court *a quo* erred in finding that Ramalata relied on the complainant's statement and verbal agreements and failed to reach the respondent telephonically. The court *a quo* ought to have found out that the complainant referred to the furniture as hers all the time.

23.6. The court *a quo* erred in finding that Ramalata maintained no suspicion of any offence committed when he went to the respondent's place for investigations.

23.7. The *court a quo* erred in finding that Ramalata did not know his standing order and that Ramalata was given instructions by his senior to trace the suspects and the property and to further arrest the respondent and her husband.

Law applicable to the facts

Lawful arrest and detention

[24] In terms of section 40(1)(b) of Criminal Procedure Act 51 of 1977(CPA):

“Arrest by peace officer without warrant. —

(1) A peace officer may without warrant arrest any person—

(a)...Who has committed an offence under schedule one

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly

*obtained, and whom
having committed an offence with*

*the peace officer reasonably suspects of
respect to such thing;”*

Reasonable suspicion to arrest

[25] The arrest without a warrant was wrongful and unlawful. There was no reasonable suspicion that she committed a Schedule 1 offence. The arresting officer failed to explain the respondent 's constitutional rights, and she was detained arbitrarily without just cause. In the court a quo it was clear that there was no offence of theft committed because the complainants wilfully relocated their furniture to Bela-Bela. If the accused were refusing same, they should have followed the civil route for recourse.

[26] As was held in *Duncun v Minister of Law and order*¹ the jurisdictional facts for a section 40(1)(b) defence 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 (the arrestee) committed an offence referred to in Schedule 1; and*
- (iv) the suspicion must rest on reasonable grounds.”*²

[27] The arrest must be based on a reasonable suspicion that confirms that the arrestee has on *prima facie* committed the said crime. It is in this way that the peace officer may exercise his or her discretion and effect an arrest.³ *The object of the arrest is to bring the accused person before the court, not to punish them for an offence they did not commit.*⁴

[28] The court in *Minister of Safety and Security v Sekhoto*⁵ held that, while the peace officer may exercise its discretion on reasonable suspicion, it is also stated that

¹ [1986] 2 All SA 241 (A).

² *Ibid* p248.

³ *Ibid* p249.

⁴ *Macdonald v Kumalo* 1927 EDL 293 p 301.

⁵ [2010] ZASCA 141 (SCA); 2011 (1) SACR 315 at para 39.

they should exercise their discretion within the bounds of rationality. The court further held that:

*“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 and so long as the discretion is exercised within this range, the standard is not breached. This does not tell one what factors a peace officer must weigh up in exercising the discretion. An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute read in the light of the Bill of Rights.”*⁶

[29] In order to effect arrest without warrant, the police officer ought to have fulfilled the precepts of section 40(1)(b)(e) of the CPA, the requirements are reasonable suspicion and the offence committed must be under the ambit of schedule 1, the person must be found in possession of the stolen property.

Theft

[30] Theft is defined as an unlawful and intentional appropriation of another’s movable corporeal property, or of such property belonging to the thief in respect of which somebody else has a right of possession or a special interest.⁷ The elements of the offence are therefore the following:⁸

- (a) *actus reus* or appropriation (or *contrectatio*);
- (b) property capable of being stolen;
- (c) unlawfulness; and
- (d) intention (or *animus furandi*)

[31] The term theft was also defined in *R v Sibiyi*⁹ the court held that:

⁶ *Ibid* at para 39-40.

⁷ SV Hoor, ‘The Law of South Africa (LAWSA) Criminal Law’ vol 11 Third edition (31 January 2023)

⁸ SV Hoor ‘LAWSA’.

⁹ [1955] 4 All SA 312 (A); 1955 4 SA 247 (A).

“The more cumbersome yet famous definition of Gardiner and Lansdown Criminal Law and Procedure 2 1652 reads as follows: “Theft is committed when a person, fraudulently and without claim of right made in good faith takes or converts to his use anything capable of being stolen, with intent to deprive the owner thereof of his ownership, or any person having any special property or interest therein of such property or interest.”¹⁰

[32] The offence of theft is straightforward and unambiguous. The conduct requires that the person should be in possession of movable property that does not belong to them, and in which they have taken without consent of the owner of the said property, under fraudulent, intentional and unlawful circumstances.

[33] It is trite that the onus rests on a defendant to justify an arrest after he has exercised the jurisdictional discretion of an arrest.¹¹ In *Mahlangu and another v Minister of Police*,¹² the court held that:

“The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. The State is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights. They are also part of the founding values upon which the South African constitutional State is built.”¹³

[34] An arrest deprives a person’s freedom of movement and security, it invades a person’s liberty, and also infringes the right to human dignity. It is a prerequisite that the peace officer who avers that he or she exercised jurisdictional discretion and had a reasonable suspicion that a crime was committed, bears the onus to justify the arrest.

¹⁰ *Ibid* at para 347

¹¹ *Ibid* para 45.

¹² [2021] ZACC 10 (CC).

¹³ *Ibid* para 25.

[35] The arresting officer averred that he did the investigations and traced the stolen items and the suspects, but later contradicted his statement and stated that he had an idea where the stolen goods were, and that the complainant confirmed the respondent's address. The police officer stated that he did not call the respondent and her husband first as he was told that by the complainant that the respondent's husband is from Kwa-Zulu Natal, and if the respondent and her husband became aware that the police were coming, they would have moved back to KZN, somewhere where the police would not find them.

Analysis of Unlawful arrest

[36] The court in *De Klerk v Minister of Police*,¹⁴ defined an unlawful arrest as a:

"A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote. When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the actio iniuriarum (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered."¹⁵

[37] The court in *Madingana v Minister of Police*¹⁶ made an elaboration on damages to be awarded for unlawful arrest and detention and held that:

"The context of an award of damages for unlawful arrest and detention must always be informed by the constitutional right to freedom and security of the person. The balance must be struck between upholding and enforcing such rights and ensuring that the award corresponds accurately to the circumstances of the matter and does not amount to the over-compensation."¹⁷

¹⁴ **[2019] ZACC 32 (CC); 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC).**

¹⁵ *Ibid* para 13.

¹⁶ [2023] ZAECGHC 29.

¹⁷ *Ibid* on para 22.

[38] The court in *Abrahams v Minister of Police*¹⁸ found that the relevant facts were trite, and the balance was evident. This court made reference to an unreported case of *Olgar v Minister of Safety and Security*, where Jones J observed that:

*“a just award of damages should express the importance of the constitutional right to individual freedom. At the same time, the award should properly consider the facts of the case, the personal circumstances of the victim, and the nature extent, and degree of the affront to his or her dignity and sense”*¹⁹ (own emphasis)

[39] In order to declare an arrest and detention unlawful, the arrest must have deprived a person’s liberty and personal interest. The arrest must have been affected without reasonable suspicion and the arrestee’s human dignity must have been infringed in the process and during the arrest.

[40] The respondent was firstly arrested at her home in front of her tenants and grandmother even though she explained that the furniture was not stolen. Secondly, she was transported by van to Pretoria Hatfield Police Station and driven for more than 60km radius while being handcuffed. Thirdly, she was taken to a police cell where there were other detainees. Fourthly, she was put in a cell where she could not eat or sleep and given one slice of bread and she slept on the floor. Lastly, the bathroom was very dirty. This circumstance indicates at face value that her constitutional rights were infringed. The respondent suffered humiliation and emotional trauma throughout this process.

[41] It is common cause that the respondent was arrested and detained by the appellant without warrant of arrest in terms of section 40(1) (b) of the CPA.

[42] Given the circumstances of the case, it is respectfully submitted that the appellant does not have a leg to stand on in this appeal. The appellant did not form a reasonable suspicion based on *prima facie* evidence for the commission of the crime

¹⁸ 2018] JOL 40536 (ECP).

¹⁹ *Ibid* para 20.

of theft. However, he initiated the arrest and detained the respondent. I find that the arrest and detention have been unlawful, considering that, the crime of 'theft' in which the respondent allegedly committed, requires that the movable property be removed intentionally and unlawfully without the owner's consent.

[43] The property in question was removed with the consent of the complainant, who even hired transportation to remove the property from Warmbath to Bela-Bela. The complainant was aware of the whereabouts of the property and where the respondent is keeping the property.

[44] The arresting officer's arrest was not based on reasonable suspicion, because if this was the case, he would have interviewed the respondent to establish the facts from both parties and established the truth before effecting the arrest. Instead, the arrest was premised on one side of the story, which is the side of the complainant. In his testimony, he agreed that he knew that the furniture was voluntarily moved to Bela-Bela, yet he effected the arrest and detention. If anything, the arrest was premised on the opinion that since the respondent's husband is from KZN, they might flee to KZN and hide where the police will not find them moreover he was on parole.

[45] *Based on the submission and evidence, the investigating officer had formed a deliberate intention to arrest the appellant, and this is borne out by the arrangement of eight heavily armed police officers and additional back-up drivers, without giving reasons for the visit sought to arrest the appellant and her husband. The foregoing reflected an alleged reasonable suspicion for unlawful arrest.*

[46] The respondent lodged a cross appeal, against the findings of the learned Magistrate awarding R90 000.00 only for a period of detention of 3 days. The ground for this appeal is that the learned Magistrate did not award counsel fees on a higher scale and within the discretion of the taxing master.

[47] As recorded earlier, the respondent had filed a cross appeal in respect of the order of damages. As recorded earlier, the respondent has filed a cross appeal in

respect of the award of damages, to the extent that the award lies entirely within the discretion of the court and that her arrest and detention was unlawful.

[48] In respect of the cross appeal it is our view, bearing in mind all circumstances that the court of appeal should not interfere with its findings.

Order

[49] The following order is made:

1. The appeal is dismissed with costs.
 2. The cross – appeal is dismissed with costs.
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DM BOTSI THULARE AJ
ACTING JUDGE OF THE HIGH COURT

I agree and so ordered

C VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of hearing: 13 April 2023

Date of judgment: 16 August 2023

For the Appellant: Adv MN Kgare
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