THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 557/2021

In the matter between:

EARL RENSBURG **APPELLANT**

and

THE MINISTER OF POLICE **FIRST RESPONDENT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

Neutral citation: *Earl Rensburg v Minister of Police and Another* (557/2021) [2022] ZASCA 105 (29 June 2022)

Coram: MOLEMELA, CARELSE and MOTHLE JJA and TSOKA and PHATSHOANE AJJA

Heard: 6 May 2022

Delivered: 29 June 2022

Summary: Criminal law and procedure – section 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 – arrest without a warrant – whether respondents' conduct in arresting and detaining the appellant was wrongful, unlawful and unjustified.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Revelas J and Notyesi AJ, sitting as a court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Tsoka AJA (Molemela, Carelse and Mothle JJA and Phatshoane AJA concurring):

[1] At issue in this appeal is whether the arrest of the appellant, Mr Earl Rensburg (Mr Rensburg), without a warrant on 15 September 2016 by members of the South African Police Service (the police) and his detention until his first court appearance on 19 September 2016 was wrongful, unlawful and unjustified. Linked to this issue is whether his subsequent detention after his first court appearance until his release from detention on warning on 23 September 2016 was also wrongful, unlawful and unjustified.

[2] Mr Rensburg, as the plaintiff, instituted a delictual claim for damages for his alleged unlawful arrest and detention in the Eastern Cape Regional Court, Port Elizabeth (the regional court), against the first respondent, the Minister of Police (the Minister), as the first defendant, and the second respondent, the National Director of Public Prosecutions (the NDPP), as the second defendant.

[3] At the conclusion of the trial in the regional court, the magistrate found in favour of Mr Rensburg, as she concluded that Mr Rensburg's arrest and detention from 15 September 2016 until his first court appearance on 19 September 2016 was wrongful, unlawful and unjustified. The magistrate, however, found that Mr Rensburg's

subsequent detention from 19 September 2016 until his release on warning on 23 September 2016 was not wrongful and unlawful, and thus absolved the NDPP.

[4] In respect of the unlawful arrest and detention, Mr Rensburg was awarded the amount of R300 000 as damages. Despite the fact that the NDPP was successful in defending the action against it, the magistrate did not make an order of costs in its favour.

[5] Aggrieved by the judgment and order of the regional court, the Minister and the NDPP appealed to the Eastern Cape Division of the High Court, Grahamstown (the high court). The NDPP's appeal was only directed at being denied an order of costs despite being a successful party. The high court upheld the appeal with costs.

[6] Dissatisfied with the outcome of the order of the high court, Mr Rensburg brought an application for leave to appeal, which application was unsuccessful. He then petitioned this Court for special leave to appeal order of the high court, which petition for leave to appeal was granted by this Court on 5 May 2021.

[7] The facts underpinning the appeal are, in the main, common cause. They are as follows. On Thursday, 15 September 2016, Mr Rensburg was brought to Humewood Police Station by three male persons, Mr Kirsten Ingram, Mr Renaldo Jaftha and Mr Christeden Williams, who alleged that he had stolen a laptop. The trio were referred to Humewood Police Station by another police station (Mount Road Police Station).

[8] At Humewood Police Station, the trio spoke to Sergeant Nomakosazana Cimani (Sgt Cimani). Mr Ingram explained to Sgt Cimani that they brought Mr Rensburg to her for the theft of the laptop. However, Sgt Cimani, dissatisfied that the owner of the laptop was not among the three male persons, refused to arrest Mr Rensburg. She demanded that the owner of the laptop be brought to her to be interviewed and for confirmation that her laptop was stolen. Mr Ingram fetched the complainant, Ms Gwendoline Camelia Mohamed (Ms Mohamed), who confirmed to Sgt Cimani that Mr Rensburg admitted to

her that he stole her laptop and that he apologised to her for stealing the laptop. Mr Ingram, Mr Jaftha and Mr Williams informed Sgt Cimani that, in the motor vehicle, while driving to the police station, Mr Rensburg also admitted to them that he stole Ms Mohamed's laptop. As she reasonably suspected that Mr Rensburg had committed an offence, she arrested and detained him. She further testified that, as theft is a schedule 1 offence in terms of the Criminal Procedure Act 51 of 1977 (the CPA), she, without a warrant, arrested and detained Mr Rensburg in terms of the provisions of s 40(1)*(b)* of the CPA. She opened a docket, which docket contained the statements of Mr Ingram and Ms Mohamed.

[9] The following day, 16 September 2016, the docket was handed over to Lieutenant Colonel Marlene Lynette Burger (Lt Col Burger). Lt Col Burger testified that, upon perusing the docket, she realised that there was still outstanding investigations that needed to be finalised. The further investigations included witnesses' statements and the warning statement of Mr Rensburg. She also needed to take Mr Rensburg's fingerprints, verify his profile and establish whether he had previous convictions or other pending cases. She had to also verify Mr Rensburg's residential address that he had furnished to the police.

[10] She stated further that, once the outstanding information was obtained, with the exception of the verification of Mr Rensburg's residential address, she was satisfied that the matter was ready to serve before court on 19 September 2016. Although the address furnished to the police by Mr Rensburg, which was contained in the bail information form, was confirmed, it had not yet been verified. According to Lt Col Burger, the verification of an address entails visiting the address in order to verify that the address furnished to the police was indeed correct and that Mr Rensburg lived thereat. He pertinently stated that a telephonic confirmation of an address is not the same as a verification of an address. That is the reason why Warrant Officer Arthur Smouse (W/O Smouse) visited Mr Rensburg's address on 21 September 2016 in order to verify same. On that day, W/O Smouse found no one at home, with the result that the address could not be verified.

[11] On 19 September 2016, Mr Rensburg appeared in court for the first time. The court explained to him that, since his address had not yet been verified, he could not be considered for bail. On 21 September 2016, W/O Smouse visited number 3 Serona Street, Gelvandale, Port Elizabeth, where he found the owner of the premises, who confirmed that Mr Rensburg is her grandson, but that he did not live with her. Mr Rensburg's grandmother informed W/O Smouse that Mr Rensburg resided with his girlfriend at an address unknown to her.

[12] It is not disputed that on 19 September 2016, when Mr Rensburg appeared in court for the first time his legal rights were explained to him and he elected to engage the services of a Legal Aid attorney to conduct his defence. According to the public prosecutor, on perusing the docket, she was satisfied that the charge against Mr Rensburg was a schedule 1 offence in terms of the CPA, and that the State had a *prima facie* case against him. The public prosecutor stated that the presiding magistrate had, in terms of s 60(11)B of the CPA, enquired from Mr Rensburg whether he had previous convictions or other pending cases. His attorney informed the magistrate that his client had neither previous convictions, nor pending cases. However, the public prosecutor testified that, on perusing the docket, she discovered that Mr Rensburg has previous convictions for possession of dagga. According to her, this information still had to be verified before Mr Rensburg could be considered for bail. It was on this basis that she applied to court for the matter to be postponed to 28 September 2016, to verify the information in her possession. As a result, neither Mr Rensburg's attorney, nor the public prosecutor considered the issue of bail. The magistrate, in exercising her judicial discretion, refused to postpone the matter to 28 September 2016, but stood the matter down until 20 September 2016 instead.

[13] On 20 September 2016, Mr Rensburg was still represented by an attorney from Legal Aid, and the State represented by Ms Melanie Hammet (Ms Hammet). Ms Hammet testified that on perusing the docket, she also concluded that there was a *prima facie* case against Mr Rensburg. And, as Mr Rensburg's address had still not yet

been verified, the matter stood down to the following day for the purposes of bail application. Given that the address had still not been verified by 21 September 2016, the matter was postponed to 23 September 2016, on which date Mr Rensburg's cousin, Ms Maurisha Alexander, gave an undertaking to the court that Mr Rensburg could be released into her custody. The undertaking was accepted by the court. Mr Rensburg was released on warning on the same date. The matter was then postponed to 12 October 2016, ostensibly, for the purposes of trial.

[14] On 12 October 2016, the charges against Mr Rensburg were withdrawn. He subsequently instituted a damages claim against the Minister and the NDPP for unlawful arrest and detention from 15 September 2016 until his first court appearance on 19 September 2016, and for his further unlawful arrest and detention from 19 September 2016 until his release on warning on 23 September 2016. As already mentioned, these claims were partially successful. Consequently, the Minister and the NDPP appealed the regional court's order to the high court. The matter served before Notyesi AJ and Revelas J. The high court upheld the appeal and set aside the regional court's order by replacing it with an order dismissing Mr Rensburg's claims with costs. The high court further made an order disentitling the Minister and the NDPP to recover more than 25% of counsel's fees in respect of preparation of their heads of argument. This was on the basis that such heads of argument, though helpful, were prolix. The Minister and the NDPP, however, did not seek leave to cross-appeal the order depriving them of 75% of their legal fees in respect of the drawing of the heads of argument. Accordingly, this aspect should not detain this Court any further. The only issue for determination is whether Mr Rensburg's arrest and detention was unlawful.

[15] The Minister's defence, as set out in his plea, was that the arrest was lawful, as it was carried out within the contemplation of s 40(1)*(b)* of the CPA, which provides:

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

. . .

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

[16] In *Minister of Safety and Security v Sekhoto and Another*,[1] the court reasoned thus:

'As was held in *Duncan v Minister of Law and Order*, 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.'

[17] It is now convenient to assess whether the arrest effected by the arresting officer, namely Sgt Cimani, passes muster. It is undisputed that Sgt Cimani is a peace officer who, after interviewing Mr Ingram and his friends, including Ms Mohamed, entertained a reasonable suspicion that Mr Rensburg committed theft of Ms Mohamed's laptop, which offence, in terms of the CPA, is a schedule 1 offence. That, having regard to the statements obtained from Mr Ingram and Ms Mohamed, the suspicion of Sgt Cimani was rested on reasonable grounds, is beyond any doubt. It must be borne in mind that, at the beginning, when the report was made to her by Mr Ingram that Mr Rensburg stole Ms Mohamed's laptop, Sgt Cimani was not keen to effect the arrest until the owner of the laptop had been interviewed and a statement obtained from her confirming that her laptop was indeed stolen by Mr Rensburg. In addition, Mr Ingram and his friends told Sgt Cimani that, while travelling to the police station with Mr Rensburg, in the motor vehicle, he admitted that he in fact stole the laptop, which information corroborated Ms Mohamed's allegations against him. When Mr Rensburg was confronted with these serious allegations, implicating him in the theft of the laptop, instead of him refuting them, as one would have expected, he elected to remain silent. In these circumstances, it cannot therefore be contended that Sgt Cimani's suspicion was unreasonable.

[18] In my view, Mr Rensburg's arrest without a warrant was justified. Sgt Cimani's suspicions were rested on reasonable grounds. The Minister can, therefore, not be held liable for the contended damages resulting in Mr Rensburg's alleged wrongful, unlawful and unjustified arrest. The high court cannot, thus, be faulted for concluding that

[1] *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) para 6.

Mr Rensburg's arrest in terms of s 40(1)*(b)* of the CPA was not unlawful, and for finding that the claim against the Minister ought to have been dismissed by the regional court.

[19] Counsel for Mr Rensburg submitted that the Minister should be held liable for the contended damages suffered by Mr Rensburg after his first appearance in court, since the police were remiss in not agreeing to him being released on bail. The contention was that because Sergeant Pumza Vinjwa had telephonically confirmed Mr Rensburg's address, the further postponements after 19 September 2016 until 23 September 2016, when he was released on warning, were unreasonable. Counsel's contentions are unfounded. As it turned out, on 21 September 2016, when W/O Smouse visited Mr Rensburg's address, his grandmother reported to the police that her grandson was not living with her even though Mr Rensburg's address, as stated in the bail form, was telephonically confirmed. The police cannot, therefore, be faulted for detaining Mr Rensburg until his residential address had been verified.

[20] Having found that prior to 19 September 2016 the police acted lawfully, could it then be contended that the subsequent postponements that resulted in Mr Rensburg being remanded in custody without being released on bail be attributable to the unlawful conduct of the police? In my view, the answer to this question is that the police, did not act unlawfully in detaining him and thus depriving him of his liberty. This view is fortified by the following observation made by the Constitutional Court in *De Klerk v Minister of Police*:[2]

'. . . The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand*, a remand order by a Magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.'

And the Constitutional Court further stated that:

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[2] *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC); 2021 (4) SA 585 (CC) paras 62 and 63.

‘In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.’

[21] When the court stood the matter down until the following day, it was with the consent of Mr Rensburg and his attorney. At no stage did Mr Rensburg or his attorney raise the issue of bail with the magistrate. Furthermore, the issue of Mr Rensburg’s previous convictions had still not been resolved and his address had not been verified, with the result that he could not therefore be considered for bail until these issues had been resolved. Once those outstanding issues had been resolved, and the undertaking given to the court by his cousin to reside with her, the court, in the exercise of its discretion, released him on warning.

[22] The conclusion reached is that the Minister can, thus, not be found to have acted unreasonably, wrongfully, unlawfully and unjustifiably in depriving Mr Rensburg of his liberty. The actions of the police, post the first court appearance were, in my view, lawful.

[23] The further contention that Mr Rensburg should have been released on bail earlier, or at his first court appearance on 19 September 2016 is also unfounded and without merit. Section 50 of the CPA provides that:

‘(1)*(a)* Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph *(a)* shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph *(d)*, if such an arrested person is not released by reason that –

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A,

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.'

[24] In the present matter, Mr Rensburg was brought to court within a reasonable time, having regard to the fact that he was arrested late on Thursday, 15 September 2016. When he appeared in court on 19 September 2016, the 48-hour period referred to in terms of s 50 of the CPA had not yet expired, as the previous two days fell on a weekend and were *dies non* for the calculation of this period. Soon thereafter, the police took steps to verify his address, but could not do so, for reasons already alluded to earlier in the judgment. The result reached is that the police cannot be faulted for bringing Mr Rensburg to court on 19 September 2016, which, in my view, was within a reasonable time. Mr Rensburg appeared in court on the first available court day being Monday, 19 September 2016.

[25] In my view, the police acted correctly, lawfully and justifiably in effecting the arrest of Mr Rensburg without a warrant authorising such arrest. So was his further detention until his release on 23 September 2016. The Minister cannot, therefore, in the circumstance of this matter, be said to be the cause of Mr Rensburg's contended damages.

[26] Although s 12(1)*(a)* of the Constitution enshrines the right to freedom and security of a person, which right includes the right not to be deprived of that freedom arbitrarily or without just cause, this does not mean that if any person, such as Mr Rensburg, contends that their right to freedom and security has been infringed, they should necessarily be compensated. Where, such as in the present matter, the police acted within the prescript of the law in preventing, combating and investigating crime, maintaining public order, protecting and securing the inhabitants of the Republic and their property, and to uphold and enforce the law,[3] no fault should be attributed to them.

[3] See s 205(3) of the Constitution of the Republic of South Africa, 1996.

To hold otherwise would be placing unreasonable constraints on the police when carrying out their duties to enforce the law for the benefit of all.[4]

[27] The Ministry of the Police is an organ of state which is obliged, in terms of the Constitution, to uphold the law, protect and promote the rights enshrined in the Bill of Rights. It is, however, not a court of law. Its function is to act reasonably and within the confines of the law. And, in appropriate circumstances, to arrest any person suspected of committing a schedule 1 offence without a warrant. If the suspicion is founded on reasonable grounds, that is sufficient. It is only courts of law that are obliged to apply a higher standard of proof in either a civil or criminal trial, on a balance of probabilities or beyond reasonable doubt respectively, before returning a verdict, not the police. Where in a case such as the present, a police officer acted, objectively viewed, on reasonable suspicion, that is the end of the matter. Such police officer cannot by any stretch of the imagination be said to have acted wrongfully, unlawfully and unjustifiably, and thus be liable for damages.

[28] To conclude, I find no misdirection in any of the findings of the high court. The finding of the high court that the police acted correctly and lawfully cannot be faulted. There is thus no reason to hold the Minister liable for the contented unlawful arrest and detention of Mr Rensburg until 23 September 2016. In the result, the appeal must fail. In my view, there is no reason to depart from the general rule that costs must follow the result. But, given the simplicity of the matter, the employment of two counsel was therefore unreasonable. There is therefore no justification for the costs of two counsel.

[29] In the result, the following order is made:
The appeal is dismissed with costs.

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M TSOKA
ACTING JUDGE OF APPEAL

[4] *Minister of Police v Bosman and Others* [2021] ZASCA 172 (SCA) para 32.

Appearances

For the appellant:	M du Toit
Instructed by:	Carol Geswint Attorneys, Port Elizabeth
	Webbers Attorneys, Bloemfontein
For the respondents:	F Peterson (with L Hesselman and B Ndamase)
Instructed by:	State Attorney, Port Elizabeth
	State Attorney, Bloemfontein