THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 327/2008

THE MINISTER OF SAFETY AND SECURITY Appellant

and

M TYULU Respondent

Neutral citation: *Minister of Safety and Security v Tyulu* (327/08) [2009] ZASCA 55 (27 May 2009)

Coram: FARLAM, VAN HEERDEN, MHLANTLA JJA, BOSIELO and TSHIQI AJJA

Heard: 7 May 2009

Delivered: 27 May 2009

Updated:

Summary: Unlawful arrest and detention – s 40(1)(a) and (f) – Criminal Procedure Act 51 of 1977 – whether the appellant had adduced sufficient evidence to justify the respondent's arrest and detention – The appropriate quantum of damages in respect of respondent's arrest and detention – Award reduced on appeal.

ORDER

On appeal from: High Court, Cape of Good Hope Provincial Division (Cleaver, Motala and Le Grange JJ sitting as Full Bench).

The following order is made:
(a) The appeal is successful only in respect of the issue of quantum.
(b) Part (b) of the order made by the Full Bench is set aside and substituted with the following:
'The defendant is ordered to pay the sum of R15 000 (fifteen thousand rand) to the plaintiff as damages.'
(c) The appellant is ordered to pay the costs of appeal, including the costs occasioned by the employment of two counsel.

JUDGMENT

BOSIELO AJA (FARLAM, VAN HEERDEN, MHLANTLA JJA and TSHIQI AJA concurring):

[1] The respondent (Mr Tyulu) instituted an action against the appellant in the Cape of Good Hope Provincial Division, claiming damages in the sum of R400 000 for unlawful arrest and detention. The High Court awarded him damages in the total amount of R280 000. On appeal, the Full Bench overturned the court *a* quo's finding on the merits regarding the second arrest and detention. Concerning the first arrest, the Full Bench confirmed the judgment on the merits but reduced the amount of damages to R50 000. This appeal, which is by special leave of this Court, is against the judgment of the Full Bench.

[2] The facts of this case are neither complex nor controversial. The respondent is a 48 year old magistrate stationed at the Cape Town Magistrate's Court. At the time of this incident, he had been a magistrate for 12 years and was performing his duties in

the Juvenile Court in Cape Town.

[3] According to the respondent, in the early hours of the morning on Sunday, 12 October 2003, he left his home on foot to go to a nearby filling station on Bosmansdam Road in Milnerton to buy a soft drink. There is a 24 hour convenience store with an ATM machine at this filling station. He estimates the walking time from his home - which is in Elegance Road - to the filling station to be five to seven minutes. As he was walking across the forecourt of the filling station *en route* to the store, a vehicle stopped next to him. Two people (later identified to be police officers) alighted, grabbed him and put him into the back of this vehicle. Upon his enquiry regarding the reason for his arrest, a police officer whom he later identified as Captain Cordier told him that he was being arrested for being drunk in public. They then drove with him to a point near the Shoprite Centrepoint Shopping Centre on Koeberg Road. During this journey he was seated in the backseat with a police officer, who was holding his head down.

[4] Upon arrival at what he later came to know to be the scene of a motor vehicle collision near Shoprite Centrepoint, Captain Cordier alighted and called a person over to the vehicle. Whilst the respondent remained seated in the vehicle, this person (later identified to be Mr Hendricks) said 'ja, it is him', in response to a question posed to him by Captain Cordier. As the respondent was sitting with his head pressed down, he was unable to see this person but he heard him saying that he (Tyulu) 'was the person who drove the car that was standing there'. He denied that he had driven the vehicle in question, but his protestations fell on deaf ears. He was then transported to the Milnerton Police Station where he was charged with and detained for driving a motor vehicle on a public road whilst under the influence of intoxicating liquor.

[5] It is common cause that whilst at the police station, the respondent was examined by Dr Nel, the district surgeon, who also took a sample of his blood. This examination lasted from 02h44 to 03h07. By mutual agreement, Dr Nel's report was admitted into the record of the proceedings. Dr Nel recorded in his report, amongst other things, that the respondent was moderately under the influence of alcohol and further that it was possible that he had been under the influence of alcohol during the

incident, which he (Dr Nel) had been told occurred at 02h10. Furthermore the forensic report of the blood analysis was also admitted by mutual agreement. According to this report, the concentration of alcohol in the respondent's blood on the night in question was 0,23g per 100 millilitres.

[6] Although the respondent admitted that he had consumed six beers during the course of the Saturday evening and early hours of the Sunday morning, he denied that he was drunk. He testified that he did not cause any danger or disturbance or nuisance to anybody. According to the respondent, he was ultimately detained in the cells at Milnerton police station for drunken driving. He was released on his own recognisance the following day by one Inspector Papa, the investigating officer in the matter.

[7] Three witnesses testified on behalf of the appellant, *viz* Superintendent Cordier, Inspector Dell and Mr Hendricks. Cordier testified that he has been a police officer for 21 years and a captain for seven years at the Milnerton Police Station. He, together with (Female) Inspector Dell, were doing patrol duties on 12 October 2003 when they came upon the scene of a motor vehicle collision on the corner of Koeberg and De Grendel Roads in Milnerton. Upon further enquiry, Cordier was advised that the driver of the vehicle which had caused the collision had fled the scene on foot in the direction of Milnerton Police Station. Mr Hendricks, the driver of the other car involved in the collision, described the driver who fled as a black man, wearing long khaki shorts and spectacles.

[8] Cordier, together with Dell, then proceeded in the direction which was pointed out to them in search of the driver, turning into Bosmansdam Road from Koeberg Road. Approximately 300m along Bosmansdam Road but before the Corsair Road intersection, Cordier saw a man (now known to be the respondent) walking in the middle of the road, moving in the face of oncoming traffic. He stopped his vehicle and called the respondent over. Instead of obliging, the respondent asked him what he wanted and requested him to leave him alone. As Cordier got out of his vehicle, the respondent approached him. He then smelt alcohol on the respondent's breath. He then ordered the respondent to get into the police vehicle, as in his opinion he was under the influence of intoxicating liquor. The respondent refused to do so and instead

asked him if he knew who he (the respondent) was. Cordier informed the respondent that he was arresting him for being drunk in public because he was a danger to both himself and others. The respondent refused to get into the police vehicle, but he calmed down and did so voluntarily after Dell got out of the police vehicle to assist Cordier. He was driven back to the scene of the accident. According to Cordier, whilst they were travelling back to the scene, the respondent was alone in the back seat whilst Dell occupied the front passenger seat.

[9] After Hendricks had positively identified him at the scene as the driver of the offending vehicle, the respondent was taken to Milnerton Police Station. After he had been taken into the charge office, Hendricks, once again, confirmed to Cordier that the respondent was indeed the driver of the offending motor vehicle. It was at this stage that Cordier decided to charge the respondent with drunken driving and advised the respondent accordingly. He telephoned Dr Nel, the district surgeon, who came to examine the respondent and take his blood sample. The respondent was then detained in the holding cells. It suffices to state that the evidence of Dell corroborates that of Cordier on all the material aspects of the latter's evidence.

[10] Hendricks testified that he was returning from a party with some friends at approximately 2h00 on 12 October 2003 when another vehicle drove straight across the lane in which he was driving, causing Hendricks to drive into that vehicle. He testified that the respondent was the driver of the other vehicle. He described the respondent to Cordier – who arrived on the scene with another police officer in a police vehicle shortly after the collision - as a short and chubby Black man wearing long khaki shorts, a sweater and with spectacles. After the collision, the respondent got out of the vehicle and ran towards the Milnerton Police Station. According to Hendricks, after he had spoken to Cordier at the scene, the police officers drove off in the direction of Bosmansdam Road. They later returned to the scene with a person in the backseat of the police vehicle and, at Cordier's request, he identified that person (the respondent), as the driver of the offending vehicle. A little later Hendricks confirmed to Cordier that the respondent, whom he had seen again when the latter was brought into the charge office by the police, was indeed the driver of the other vehicle. Hendricks conceded in cross-examination that he could not say definitely that this was a case of drunken

driving, although it looked like that to him at the time.

[11] It is common cause that no criminal proceedings were instituted against respondent as the Director of Public Prosecutions declined to prosecute.

[12] In his defence to the respondent's claim based on unlawful arrest and detention, the appellant admitted that the respondent was arrested without a warrant. Relying on the provisions of ss 40(1)(a) and 40(1)(f) of the Criminal Procedure Act 51 of 1977 (CPA), his counsel asserted that the arrest was lawful. In essence, the appellant averred that the respondent was initially arrested in terms of s 40(1)(a) of CPA as he was found to have been drunk in public in contravention of s 154(1)(c) of the Liquor Act 27 of 1989 ('the Act'). Concerning his arrest for drunken driving, the appellant sought refuge under s 40(1)(f) of CPA, alleging that the respondent was found by night in circumstances which gave the police officers concerned reasonable grounds to believe that he had committed an offence of drunken driving.

[13] The relevant part of s 40 provides that:

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

(a) who commits or attempts to commit an offence in his presence;

(b) . . . .

(c) . . . .

(d) . . . .

(e) . . . .

(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence.'

[14] Section 154(1)(c) of the Liquor Act 27 of 1989 provides that-

'a person who is drunk in or near

(i) any road, street, lane, thoroughfare, square, park or market;

(ii) any ship, warehouse or public garage

shall be guilty of an offence.'

[15] The trial court found that both arrests were unlawful and awarded the respondent R280 000 as total damages. The respondent had claimed R400 000 made

up as follows, *viz* R300 000 for contumelia and R100 000 for loss of liberty. The learned judge rejected the appellant's version and found in fact that the respondent was 'arrested not because he has done anything wrong, but because he was a black man in the wrong place at the wrong time . . . .'

[16] The appeal by the appellant to the Full Bench succeeded in part. The Full Bench found that the first arrest at the filling station was unlawful as there was insufficient evidence to discharge the onus of establishing that the respondent was drunk. However, the Full Bench found that the second arrest for drunken driving was lawful and justified in terms of s 40(1)(f) as there were sufficient facts which established reasonable grounds for the police officers in question to believe that the respondent had committed the offence of drunken driving. This finding was based on the fact that the respondent seemed to have fitted the description given by Hendricks and was found in the vicinity of where the offending driver was reported to have fled. He smelt of alcohol and was unsteady on his feet. On their return to the scene, Hendricks confirmed that the respondent was the driver who had fled. Thereafter, Hendricks saw the respondent being brought into the charge office and again confirmed to Cordier that the person who had been brought in was the driver of the other vehicle.

[17] After having carefully considered the amount of damages awarded and comparing it with previous comparable cases, the Full Bench reduced the award from R280 000 to R50 000.

[18] The appellant raises two issues on appeal before us. First, he attacks the finding that the respondent's first arrest did not comply with s 40(1)(a) and was therefore unlawful. Secondly, he argues that the award of R50 000 is excessive and startlingly disproportionate to awards made in similar cases.

[19] The appellant's counsel argued that the Full Bench erred in finding that the appellant failed to bring the arrest within the ambit of s 40(1)(a) of the CPA. He submitted that Cordier was justified by the prevailing circumstances in arresting the respondent as he did. He relied on the fact that, according to Cordier and Dell, the

respondent had been walking in the middle of Bosmansdam Road in the face of oncoming traffic; that he was unsteady on his feet; that he smelt of alcohol and, quite importantly, that his blood alcohol content was subsequently determined to be 0,23g per 100 millilitre, more than twice the legally permissible limit. Based on this, he argued that there was clearly a high degree of intoxication on the respondent's part.

[20] The above argument is, however, not supported by the clear and uncontroverted evidence of Dr Nel to the effect that the respondent was only moderately under the influence of alcohol when he examined him shortly after the arrest. This evidence, it will be recalled, was admitted by consent. Moreover, counsel for the appellant conceded that no evidence was tendered to explain what a blood alcohol content of 0,23g per 100 millilitre actually meant as regards state of intoxication.

[21] It is correct, as the Full Bench found, that the appellant bore the onus of establishing the lawfulness of the respondent's arrest on a balance of probabilities (*Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) at 38B-C and *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC) paras 24 and 25). Therefore the appellant had to prove that the respondent was drunk in public in the presence of Cordier and/or Dell. I agree with the Full Bench that the evidence tendered by the appellant falls far short of establishing that the respondent was drunk. Drunkenness was defined in *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 522B-H, in a passage with which I agree. This passage reads:

'The word "drunk" is not defined in the Act, and it is well established that drunkenness differs markedly from being under the influence of alcohol. A familiar definition, which appears in Landsdown's *South African Liquor Law* 5th ed at 476, is the following:

"A man is drunk who, by reason of the alcohol which he has consumed, has lost control of his mental or physical faculties, or both, to such an extent as to render him incapable of comporting himself, or of performing any act in which he is engaged, with safety to himself or with that regard to the rights of others which the law demands."

Landsdown adds that the only absolutely infallible test of drunkenness is a positive reaction for alcohol in the cerebro-spinal fluid, a test which is of course wellnigh impossible to secure in practice. In the present case on appeal, no blood test of any kind was performed to determine

the level of intoxication of appellant. The entry in the arresting officer's pocketbook to the effect that appellant was arrested for purposes of 'uitdroging' or 'drying out', and the absence of any entry in the crime register, make it plain that it was never intended to proceed with the charge against appellant, and for that reason there would, of course, have been no reason to test his blood. However, the absence of such a test removes one of the bases upon which the State might have established drunkenness on the part of the appellant.

There is no evidence on record before us to show that appellant was drunk in the sense defined by *Landsdown*. Warrant Officer Barnard's evidence-in-chief was that appellant's behaviour was such as to indicate that he was "onder die invloed van drank". According to him, appellant smelt of intoxicating liquor and his speech was impaired. The other arresting officer, Dell, makes no mention of appellant's speech being impaired, nor any redness of his eyes, relying simply on the smell of liquor and appellant's aggressive behaviour. The other policeman, Warrant Officer De Kock, was also under the impression that appellant was under the influence, because he had known appellant for many years and regarded him as a very quiet person under normal circumstances.

This evidence falls far short of proof that appellant was not in control of his mental or physical faculties in the sense described in the definition referred to above. I am accordingly of the view that for this additional reason there was no lawful basis for an arrest under s 154(1)(*c*)(i) of the Liquor Act and it follows that appellant was entitled to resist both a search and an arrest in terms of that section.'

[22] The evidence does not show that the respondent was not in control of his physical or mental facilities or both as a result of his having consumed alcohol at the time when he was arrested. As the Full Bench correctly remarked, the factors relied upon by the appellant are merely indicative of the fact that the respondent may have been under the influence of alcohol, which does not necessarily mean that he was drunk. In the result, I respectfully agree that the respondent's arrest without a warrant for being drunk in public was not justified by s 40(1)(a).

[23] I am also of the view that there were no reasonable grounds to believe that the respondent was drunk. The result is that s 40(1)(f) can also not be relied on to justify an arrest for contravening s 154(1)(c) of Act 27 of 1989. It follows that the first arrest of the respondent was unlawful.

[24] I now turn to the issue of quantum. The appellant attacked the award of R50 000 on the basis that it was excessive and displayed a striking disparity to awards made in similar and comparable cases. Much emphasis was placed on the fact that the respondent was only detained after the first arrest for about 15 minutes and further that this first arrest did not attract much publicity. On the other hand the respondent submitted that the amount of R50 000 was fair and reasonable as his arrest was accompanied by some aggravating factors. These included the fact that the respondent, who is a magistrate, was arrested by people with whom he normally works; that he was manhandled and dragged unceremoniously in public into a police vehicle; that he was taken back to the accident scene where he was made out to be a criminal; and further that he was arrested for an improper motive, namely so that he could be taken back to the scene of the accident to be identified by Hendricks.

[25] There can be no doubt that, as a magistrate, the respondent is a man of considerable standing in the community. For him to be arrested in the manner in which he was arrested, must have inevitably caused him serious embarrassment and humiliation. Although it is true that the detention was for a relatively short period, I am of the view that the length of time for which a person is detained after arrest is not the only factor to be considered in determining damages. All the surrounding circumstances deserve to be accorded proper consideration. It cannot be doubted that this arrest must have caused him serious shock with concomitant mental anguish and stress.

[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve

as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (*Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) 325 para 17; *Rudolph & others v Minister of Safety and Security & others* (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29).

[27] Having given careful consideration to all relevant facts, including the age of the respondent, the circumstances of his arrest, its nature and short duration, his social and professional standing, the fact that he was arrested for an improper motive and awards made in comparable cases, I am of the view that a fair and appropriate award of damages for the respondent's unlawful arrest and detention is an amount of R15 000.

[28] It is clear from the order of this Court granting leave to appeal that the appellant was ordered to pay the costs of this appeal irrespective of its outcome. This was a condition of the special leave to appeal granted to the appellant. This Court cannot deviate therefrom.

[29] In the result the following order is made:

(a) The appeal is successful only in respect of the issue of quantum.

(b) Part (b) of the order made by the Full Bench is set aside and substituted with the following:

'The defendant is ordered to pay the sum of R15 000 (fifteen thousand rand) to the plaintiff, as damages.'

(c) The appellant is ordered to pay the costs of appeal, including the costs of two counsel.

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L O BOSIELO
ACTING JUDGE OF APPEAL

APPEARANCES:

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G R PAPIER

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