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

**CASE NO: A3148/2018**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

**15 MARCH 2019** **RT SUTHERLAND**

In the matter between

**JACOBUS KOTZE** **APPELLANT**

and

**THE MINISTER OF POLICE** **RESPONDENT**

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**JUDGMENT**

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**Sutherland J:**

[1] The appellant, who was the plaintiff a quo, sued the respondent for damages arising from an alleged unlawful malicious arrest and detention of the appellant on 26

August 2010. The arrest and detention were common cause. The crime alleged was a contravention of section 1(a)(ii) of the Intimidation Act 72 of 1982. That provision reads that it is a crime if a person:

> " ...in any manner threatens to kill, assault, injure or cause damage to a person or persons of a particular nature class or kind."

[2] The Court *a quo* dismissed the claim in inappropriate terms. The rationale for the dismissal given by the Magistrate was that having heard two versions from single witnesses, neither version could be accepted as true or rejected as false, whereupon, "absolution from the instance" was granted. This order was granted after both sides had presented their cases. Plainly, this order is incorrect. Absolution from the instance can be granted at the end of the plaintiff's case if the Court takes the view that no cause of action has been substantiated. Such an order cannot be given after both parties have presented their respective cases. Moreover, the judgment a quo, given *ex tempore*, makes no reference to the onus resting upon the respondent to prove a lawful arrest, the arrest and detention being established on the pleadings. The order is plainly irregular and must be set aside. The Court of appeal is accordingly left to ascertain, on the record, whether the onus to prove a lawful arrest and detention was discharged.

[3] The facts giving rise to the controversy are thus:

3.1 The appellant was a police warrant officer. He had an encounter with a fellow officer, Colonel Radebe. They were the only relevant witnesses. The case rests wholly upon the credibility of Radebe and of the appellant.

3.2 Radebe's function is human resources manager. On the day in question, according to Radebe, the appellant entered his office. The appellant had been absent for about three months. There is a tangential dispute about whether he was absent without leave or had permission to be absent whilst receiving treatment for stress. It is unnecessarily in this case to make a firm finding about that dispute. It is common cause that appellant was a troubled man.

3.3 The appellant asked Radebe why he had stopped his salary. The fact that the salary had been stopped is not in dispute. Radebe's understanding was that the appellant was absent without leave. Radebe says he told the appellant that he should approach his direct commander to answer his question. According to Radebe: – the appellant:

> *" [said he] does not have money, he is struggling then he will shoot someone. I said who will you shoot. he said you, then he came to me as aggressive. I stood up as I was seated, he grabbed me and I also grabbed him with his clothes and I even checked whether he was in possession of a firearm. Then after I have notice he was not in*

*possession of a firearm, I immediately took him to the office of the Station Commander."*

3.4 Radebe spoke to a colleague and related the episode. The colleague said a case of intimidation must be opened. Radebe then, after calling for assistance, arrested the appellant shortly thereafter in the Station Commander's office.

3.5 The appellant in turn laid a charge of assault against Radebe. Radebe denies any assault; the worst he did, so he says, was to grab the appellant by the clothes in self-defence, as described already.

3.6 The appellant says he had been absent on authorised stress leave. He went to an ATM to draw cash. He discovered to his horror there was no money. According to the appellant, his immediate commander and Radebe knew all about the circumstances of his indisposition. He claims Radebe phoned him at a time when he was in hospital. Radebe denies knowledge of the appellant whereabouts and the alleged telephone call was not put to Radebe in cross examination.

3.7 The appellant says he went to see Radebe to ask why his salary had been stopped. At the office, the appellant stood in the doorway and greeted Radebe. Radebe told him to leave and see Krige. Krige is the chaplain. Thereupon, the appellant, so he says, said that, in that case, he would get legal advice and walked away. This is the sum of the appellant's account of this episode.

3.8 Moments later, whilst walking in the corridor, Radebe came at him from behind and grabbed him and pushed him against the wall. This caused scratches on his arms. Radebe said he was going to arrest him. Why Radebe acted, thus is unexplained. Moreover, the incident was not put in cross examination to Radebe.

3.9 The appellant then went (apparently unaccompanied) to the office of the station commander. The commander was absent. Radebe and another officer entered the office and arrested him for intimidation.

3.10 The criminal charges against both men were not persisted with. Radebe says he dropped the intimidation charge when the appellant withdrew his assault charge against him. The appellant says the charges were dropped at court. This difference was not resolved on the record. Later, the appellant was charged departmentally for insubordination and discharged. No other details are known.

[4] It is trite that every arrest must be justified. The diametrically opposed versions require evaluation in terms of the probabilities. In my view, the probabilities are, demonstrably, in favour of accepting Radebe's version.

4.1 On the appellant's version an utterly unprovoked attack in the corridor took place. It is unexplained on that version.

4.2 Radebe's version is coherent and the anger and indignation of the appellant is fully explained. More particularly, Radebe's subsequent actions are wholly consistent with threats having been made.

[5] The next question is whether the actions of the appellant could *bona fide* and reasonably be construed as a contravention of the Intimidation Act. Radebe was obliged to act within the confines of section 40(1)(b) of the Criminal Procedure Act 51 of 1977. That section provides that a police officer may 'without warrant arrest any person.... whom he reasonably suspects of having committed an offence referred to in schedule 1 ...." Intimidation is such a crime.

[6] The extravagant threats to shoot "someone" and to shoot Radebe are regrettably not of a type that experience teaches, is not carried out in earnest. To play down such utterances would not have been prudent. The physical altercation between the two men could only exacerbate the sense of danger and the appellant's seriousness of intent. In my view, a police officer faced with a fellow officer who is upset, is threatening to shoot people, and resorts to physical violence, is under a duty to apply his mind to that behaviour and enforce the law.

[7] In my view, the action of the appellant meets the threshold provided for in the Intimidation Act for the commission of a crime. The decision is *Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA)* addresses the legal obligations of a police officer in these circumstances. The act of arrest does not violate the rights of a person to liberty, provided that the person is brought before a court

timeously.[1] When questioned about why he had decided it was "necessary" to arrest the appellant, the answer given by Radebe was that he did so to bring him before court. This is the only sensible reason that can be given. The decision to arrest follows on the exercise of a discretion to do so.[2] A court testing the exercise of a discretion, approaches the matter thus as set out in *Sekhoto:*

> " [38].... it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily.
>
> [39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. 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 — so long as the discretion is exercised within this range, the standard is not breached.
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> [40] 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. Where the statute is silent on how they are to be exercised, that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner described by Langa CJ in *Hyundai.*
>
> [41] In this case the legislature has not expressed itself on the manner in which the discretion to arrest is to be exercised: that must be discovered by inference. And in construing the statute for that purpose, the section cannot be viewed in isolation, as the court below appears to have done.
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> [42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice, the arrest is only one step in that process. Once an arrest has been effected, the peace officer must bring the arrestee before a court as soon as reasonably possible; and at least within 48 hours, depending on court hours. Once that has been done, the authority to detain, that is inherent in

[1] Sekhoto at [24]
[2] Sekhoto at [28]

> the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.

[8] In my view, the arrest was within the bounds authorised by section 40(1)(b) of the Criminal Procedure Act and carried out *bona fide* and reasonably. The decision not to pursue the charges does nothing to colour the circumstances when the arrest was carried out.

[9] In the circumstances:

9.1 The version of Radebe is to be preferred.

9.2 The arrest and detention were lawful.

9.3 The claim must be dismissed.

[10] **The Order**

The appeal is dismissed with costs.

**ROLAND SUTHERLAND**
**Judge of the High Court**
**Gauteng Local Division, Johannesburg**

N J.

**LINDI NKOSI-THOMAS**
**Acting Judge of the High Court**
**Gauteng Local Division, Johannesburg**

Date of Hearing: 11 March 2019
Date of Judgment: 19 March 2019

For the Appellant:
Attorney A S Marais

For the Respondent: Adv A Ramlaal
Instructed by Attorney H Ngobeni of
The State attorney, Johannesburg.