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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE DATE: 22 March 2023

Case No. A5018/2021

In the matter between:

MORENA SHADRACK LETSOENYO Appellant

and

MINISTER OF POLICE First Respondent

MEMBERS OF THE SOUTH AFRICAN POLICE SERVICES Second Respondent

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JUDGMENT

WILSON J (with whom MAKUME J and OPPERMAN J agree):

1 On 19 December 2011 the appellant, Mr. Letsoenyo, was arrested at his home on suspicion of theft of a cell phone. On the way to the police station, he exited a moving police car. Mr. Letsoenyo sustained injuries to his right foot. The arresting officers took him to the Khutsong Clinic, from where he was

transferred to the Carletonville Hospital. The arresting officers apparently did not detain him at the hospital, which he left under his own steam after a one-night stay, his right foot having by that time been placed in a cast.

2 Shortly after his release from hospital, Mr. Letsoenyo went to the Carletonville Police Station to lay a charge of assault against one of the arresting officers, a Sergeant Mapitsi. There, he was apprehended again on the charge of theft, and taken back to Khutsong Police Station. He was detained overnight. The Khutsong Magistrates' Court released Mr. Letsoenyo on warning the next day.

3 Mr. Letsoenyo sued in the trial court for wrongful arrest and assault. At trial, it was contended that there were two arrests: one on 19 December 2011 at Mr. Letsoenyo's home, and the other at the Khutsong Police Station on 22 December 2011. It was said that both arrests were wrongful. It was also alleged that Mr. Letsoenyo had sustained his foot injury because Sergeant Mapitsi pushed him out of the moving police car.

4 The trial court rejected all of Mr. Letsoenyo's claims, and dismissed his action with costs. The appeal against that decision is before us with the trial court's leave.

5 Before us, Mr. Letsoenyo persisted in his case that both of the arrests he alleged were wrongful, and that he was unlawfully assaulted when Sergeant Mapitsi pushed him from the moving police vehicle. He also argued that, even if it had not been established that Sergeant Mapitsi intentionally assaulted him, the arresting officers nonetheless failed in their duty of care by allowing him to exit the moving vehicle, at least insofar as they failed to lock the door through which he left the vehicle, and insofar as they failed to handcuff him when he

was placed under arrest. Those negligent omissions, it was argued, were wrongful, and caused Mr. Letsoenyo's injury.

6 In my view, none of Mr. Letsoenyo's contentions can be accepted, and his appeal falls to be dismissed. These are my reasons for saying so.

The arrest of 19 December 2011

7 Mr. Letsoenyo was arrested without a warrant on the authority of section 40 (1) (b) of the Criminal Procedure Act 51 of 1977 ("the Act"). It is trite that an arrest without a warrant under this section is lawful if and only if the arrestor is a peace officer; the arrestor entertains a suspicion; that suspicion is that the arrestee has committed an offence identified in Schedule 1 of the Act; and that suspicion rests on reasonable grounds (see *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H). In an action for wrongful arrest, the onus of establishing these requirements rests on the respondent, the Minister.

8 Once these requirements are present, however, the arresting officer retains a residual discretion, which must be rationally exercised in good faith. The onus of establishing that the arrest was wrongful because of a failure to exercise that discretion, or a failure to exercise the discretion rationally and in good faith, rests on Mr. Letsoenyo (*Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) ("*Sekhoto*"), paragraph 47). In the case of serious crimes, such as those listed in Schedule 1 of the Act, it will rarely, if ever, be irrational or in bad faith to arrest a suspect for the sole purpose of bringing them before court (*Sekhoto*, paragraph 44).

9 Before us, it was accepted that the arresting officers were peace officers, and that they entertained a suspicion that Mr. Letsoenyo had committed a Schedule 1 offence (theft being one of the crimes listed in the Schedule). The decision to arrest Mr. Letsoenyo was assailed on the basis that the arresting officers did not reasonably suspect Mr. Letsoenyo of stealing the cell phone in issue, and that, even if the arresting officers' suspicion was reasonable, the officers' residual discretion not to arrest Mr. Letsoenyo was improperly exercised.

10 Mr. Letsoenyo was pointed out as the thief by the owner of the cell phone said to have been stolen. The complainant took the police to Mr. Letsoenyo's home, and identified Mr. Letsoenyo. Mr. Letsoenyo denied being the thief, but accepted that he was present at the complainant's home when the cell phone went missing. Mr. Mtembu, who appeared for Mr. Letsoenyo before us together with Mr. Khumalo, argued that the arresting officers' suspicion that Mr. Letsoenyo was the thief could not have been reasonable, because they failed to investigate the possibility that another person who was present at the complainant's home at the time the cell phone was stolen might have been the culprit.

11 I do not agree. There is a difference between a reasonable suspicion and an accurate one. Even if Mr. Letsoenyo was not the culprit and the other person present at the complainant's home was the true thief, that does not make the arresting officers' suspicion unreasonable. Faced with an apparently good faith complaint by the victim of a crime who identified Mr. Letsoenyo as the culprit, and in circumstances where Mr. Letsoenyo's presence in the

complainant's home at the relevant time was common ground, the arresting officers' suspicion was plainly reasonable.

12 That leaves the question of whether the arresting officers' residual discretion was improperly exercised. I do not see how. It was suggested that there were other ways to secure Mr. Letsoenyo's attendance at court, but *Sekhoto* made clear that the seriousness of a Schedule 1 crime in itself generally justifies an arrest purely for the purposes of securing the suspect's attendance at court.

13 It was also argued that the complaint ought to have been more thoroughly investigated before Mr. Letsoenyo was arrested. We were taken, in argument, to an extract from the investigation diary in which a number of tasks, such as the taking of a further witness statement and the electronic tracing of the stolen cell phone, had been listed for the investigating officer's attention. What the performance of these tasks would have yielded was not explored in evidence or argument before the trial court, but it was suggested before us that these tasks ought to have been carried out before any decision to arrest Mr. Letsoenyo was taken.

14 However, I do not think that the failure to carry out these tasks meant that the decision to arrest Mr. Letsoenyo was taken irrationally or in bad faith. The arresting officers had a complainant ready to identify the suspect, the location of their suspect and, when they confronted Mr. Letsoenyo, an admission that he was present at the complainant's home when the cell phone went missing. It is hard to criticise the rationality or the good faith of Mr. Letsoenyo's arrest in these circumstances.

15 There was, in reality, no basis for impugning the arresting officers' discretion pleaded or proved before the trial court, and accordingly no basis for suggesting that the trial court was wrong to conclude that the arrest of 19 December 2011 was lawful.

Mr. Letsoenyo's detention on 22 December 2011

16 It was argued that Mr. Letsoenyo's apprehension at Carletonville Police Station on 22 December 2011 constituted a wrongful arrest. I do not think that is correct. Arrest and detention are not the same thing. The purpose of an arrest is to place a person under legal constraint until such time as their case can be assessed by a court or an appropriately empowered police official. Once that happens, the arrest comes to an end, and the legal status of the erstwhile arrestee changes. The mere fact that an arrestee is not under the effective control of the police does not bring the arrest to an end. The arrest is only brought to an end once the arrestee is unconditionally released, released on warning, bailed, remanded in custody, convicted, acquitted or otherwise dealt with according to the applicable law.

17 In this case, the fact that Mr. Letsoenyo was apprehended at Carletonville Police Station on 22 December 2011 does not mean that he was arrested again. And if, as I have found, his arrest on 19 December 2011 was lawful, there was nothing unlawful about his detention on 22 December 2011.

The assault claim

18 The trial court, having heard all the evidence, having considered the probabilities and having assessed the witness' credibility, found that Mr.

Letsoenyo was not pushed out of the police car after his arrest, but that he jumped out of the car in an effort to escape custody. Mr. Mtembu could not identify any basis on which the trial court's factual conclusions on this point were vitiated by a legal mistake, or by a factual misdirection that would entitle us to substitute our own factual findings for those of the trial court.

19 It follows from this that we must accept the trial court's conclusion that Mr. Letsoenyo caused his own injuries while trying to escape. The trial court noted that the arresting officers' version that Mr. Letsoenyo jumped out of the car – and was not pushed – was left unchallenged by Mr. Letsoenyo's counsel. Wisely, that conclusion was not assailed on appeal. The trial court was clearly right to reject Mr. Letsoenyo's version.

The duty of care point

20 It was finally contended that the police failed in their duty of care by allowing Mr. Letsoenyo to jump from the car. That obviously in itself entails a concession that Sergeant Mapitsi did not push him.

21 Be that as it may, this part of Mr. Letsoenyo's case appears to depend upon the assertion that the arresting officers were negligent in failing to handcuff him and in failing to lock the door through which he attempted to escape. We were pressed to conclude that those negligent omissions were also wrongful, and were accordingly the actionable cause of Mr. Letsoenyo's injury.

22 The first problem with this case is that it was not pleaded. Mr. Letsoenyo did plead that the arresting officers breached their duty of care, but the contention underlying that allegation in Mr. Letsoenyo's particulars of claim was that

Sergeant Mapitsi pushed Mr. Letsoenyo out of a moving vehicle. A case based on a negligent omission to secure the vehicle or Mr. Letsoenyo himself, in order to prevent Mr. Letsoenyo coming to any self-inflicted harm, is nowhere in sight in Mr. Letsoenyo's particulars of claim.

23 That is not in itself fatal to considering and upholding such a claim on appeal, if the matter was fully investigated at trial, and if there is no unfairness to the Minister in entertaining the claim at this late stage (see *Middleton v Carr* 1949 (2) SA 374 at pages 385 to 386). In this case, however, the matter was far from fully investigated. A case based on a negligent omission entails establishing that the defendant had a duty to act. In these circumstances, a duty to act only exists if the failure to act was unreasonable (*Minister van Polisie v Ewels* 1975 (3) SA 590 (A)).

24 The issue of whether it was unreasonable in all the circumstances not to handcuff Mr. Letsoenyo and to leave the car door unlocked was not fully explored before the trial court. The reasonableness of the arresting officers' conduct in a case like this is plainly a very fact-sensitive issue, on which detailed evidence would have to have been led. Not only was that evidence not led, but there was scant indication before closing argument in the trial court that this would be Mr. Letsoenyo's case. Mr. Letsoenyo's case was always that he had been pushed out of the car, not that he had been wrongfully and negligently allowed to jump.

25 Of course, in a proper case, it is conceivable that the Minister might be held liable for an arresting officer's negligent failure to prevent an arrestee from harming themselves. But this is not that case. The evidence was not led to

sustain it, and the consideration of the case on appeal would be grossly unfair to the Minister, who was given wholly inadequate warning that he would be required to meet it.

Order

26 It follows from all this that the trial court was correct to dismiss Mr. Letsoenyo's claim. The appeal is likewise dismissed with costs.

S D J WILSON
Judge of the High Court

HEARD ON:	1 February 2023
DECIDED ON:	22 March 2023
For the Appellant:	AM Mtembu BM Khumalo Instructed by Mamathuntsha Inc
For the First Respondent:	T Mabuza Instructed by the State Attorney