THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE:

(2) OF INTEREST TO OTHERS JUDGES:

(3) REVISED

8/11/16 [signature]

DATE SIGNATURE

8/11/2016

Case no: A401/15

In the matter between:

MATHEBULA TINESS SOLLY **Applicant**

and

MINISTER OF POLICE **Defendant**

Heard: 8th September 2016

Delivered: 8th November 2016

Judgement

Molahlehi J

[1] This is an appeal against the judgement of the magistrate court in the Tshwane Central, Pretoria made under case number 337/2012. The appeal arises from an action in delict which the plaintiff had instituted against the defendant for the alleged arrest and detention by the members of the South African Police Service (SAPS) at the Diepsloot car wash.

[2] It was not disputed that the plaintiff was in fact arrested and detained by the police without a warrant. The defendant opposed the action on the basis that the arrest was justified as the plaintiff interfered with the police officers in performing their duties. The alleged interference with the police officers' duties according to the defendant arose when the police were effecting the arrest of the plaintiff's brother at the car wash for allegedly consuming alcohol in a public area.

[3] The case of the defendant which was presented through the testimony of Constables, Mahlangu and Maswabela was in brief that; on the day in question as they were patrolling the area in Diepsloot they saw the brother of the plaintiff seated next to a car wash with a bottle of alcohol next to him. They assumed that he was consuming alcohol in public. They stopped the vehicle and confronted him about what he was doing. According to them he became aggressive and told them that they did not know how to perform their duties and that they should leave him alone. He then resisted the arrest and in the process assaulted one of the police officers with a broken bottle. It however, appears that he was never charged with that delayed assault.

[4] The two police officers further testified that the plaintiff arrived on the scene during the course his brother resisting arrest. The plaintiff then blocked the officers as they were trying to put the brother into their van. He according to them would close the door every time they tried to get his brother into the van. Apparently the commotion that took place in arresting the brother attracted the attention of the community resulting in a hostile crowd gathering around the scene.

[5] The two police officers felt unease with the situation as it was developing and accordingly called for a backup. It was only after the arrival of the backup that they managed to arrest the brother and the plaintiff.

Legal principles

[6] It is trite that as a general rule an arrest of a person without a warrant is unlawful unless the arresting authority can show that the arrest was in the circumstances justified. It therefore means a plaintiff who claims to have been unlawfully arrested and detained, has the onus of showing that there was an arrest and that it was done without a warrant. Once those jurisdictional are established the onus is on the police to show that even though the arrest was without a warrant they were in law justified in effecting the arrest.

[7] A police officer has the power to arrest without a warrant in terms of section 40 (1) (j) of the Criminal Procedure Act of 1977 (the CPA), where any person obstructs him or her in the exercise of his or her duties. It is trite that in arresting a person without a warrant, the police exercise public power. In exercising that power the police officer has a discretion to decide as to whether or not to effect an arrest.

[8] In exercising the discretion whether or not to arrest without a warrant, a police officer has to be guided by the principles of constitutional legality and the fundamental principle of the rule of law which is the corner stone of our Constitution. This principle was enunciated in the Minister of Justice and Constitutional Development v Zeeland,[1] as follows:

"The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken."

[9] In *Louw v Minister of Safety and Security*,[2] Bertelsmann J said:

"An arrest is a drastic interference with the rights of the individual to freedom of movement and to dignity. In the resent past, several statements made by our Courts and academic commentators have underlined that an arrest should only be the last resort as a means of

[1] 2007(2) SACR 401 (SCA) at paragraph 4.
[2] 2006 (2) SACR 178 (T) at 185b-c.

producing an accused person or a suspect in court – Minister of Correctional Services v Tobani 2003 (5) SA 126 (E) [2001] 1 All SA 370 at 371f (All SA):

> 'So fundamental is the right to personal liberty that the lawfulness or otherwise of a person's detention must be objectively justifiable regardless ... even if whether or not he was aware of the wrongful nature of the detention."

[10] The grounds upon which the exercise of the discretion may be challenged is, as stated in the Minister of Safety and Security v Sekoto and another,[3] restricted. The SCA stated in that case that the arrest will be clearly unlawful if effected for purposes not contemplated in the law.

[11] The underlying consideration when effecting arrest without a warrant must be directed at ensuring that the ends of justice are achieved. In Seketo, the court dealt with whether or not the arresting officer was obliged to consider other ways of bringing the plaintiff before the court. In other words, before resorting to the drastic step of arresting without a warrant the police must, in the exercise of his or her discretion,

[3] 2011(1) SACR 315(SCA).

consider other methods of ensuring that the suspect is brought before the court to answer to his/ her conduct.

[12] It is trite that once an arrest without a warrant is admitted or proved it is for the police, as the defendant, to allege and prove the existence of the grounds in justification of the infraction.[4]

[13] In Mbovane v Minister of Police,[5] the court held:

> "[35] An arresting police officer who relies on Section 40 (1) (j) has to prove the existence of jurisdictional facts justifying the arrest that ensued. Whether an arrestee acted wilfully in obstructing the execution of a duty of a peace officer must be considered objectively. The obstruction must consist of some or other physical conduct, a positive action although conduct need not always be positive."

Evaluation /Analysis

[14] In considering the case of the plaintiff the magistrate in the present instance, based on the above principles, had to firstly determine whether or not there was an arrest and also whether it was effected

[4] Minister of Justice v Hofmeyer 1993(3) SA 131 (A) of 153 E
[5] (23852/11) [2013] ZAGPJHC 270 (30 October 2013).

without a warrant. The arrest without a warrant having been admitted, the next enquiry was to determine grounds justifying such an arrest.

[15] The arrest without a warrant was clearly established through the pleadings in which the defendant conceded that the plaintiff was arrested on 24 March 2012 and that was effected without a warrant. This was confirmed by the legal representative of the respondent in the opening statement during the trial. It follows that there was no need for the plaintiff to lead *viva voce* evidence to discharge his onus.

[16] On the basis of the above the plaintiff had discharged his onus of showing that he was arrested without a warrant. It follows therefore that the onus was then on the respondent to show that the arrest was in the circumstances justified.

[17] It is apparent from the reading of the magistrate's judgment that instead of applying his mind to the above, he took into account irrelevant consideration which resulted in a misdirection. This is that misdirection, which, in my view serves as a basis for this Court to interfere with the Magistrate's decision.

[18] The fact that the plaintiff's arrest was initially linked to that of his brother, is in my view, irrelevant and this includes the fact that the plaintiff did not call his brother as a witness to testify on his behalf.

[19] The issue which the magistrate ought to have concerned himself with was whether the defendant had made out a case justifying the arrest of the plaintiff.

[20] In my view, the magistrate ought to have found that there was no justification for the manner in which the police exercised their discretion of arresting the appellant. In this regard I have already mentioned that there is no evidence from the two police officers that they warned the plaintiff that, what they allege he was doing, was an offence and that if he persisted he would be arrested. There is also no evidence that the plaintiff caused any physical harm to the police in the conduct he is alleged to have seen involved in. In addition they do not explain why they could not subdue him once the reinforcement had arrived. The defendant presented no evidence that if indeed the appellant was involved in the conduct as alleged, he did that wilfully.

[21] There is a suggestion from the police version that they could not subdue the plaintiff because of the crowd that had gathered at the scene due to the uproar that took place as they were arresting the

plaintiff. If this is to be believed then the question which the police did not answer in their testimony is what happened when the reinforcement arrived.

[22] In my view the approach adopted by the two police officers was not consistent with the promotion of the values of an open and democratic society based on human dignity, equality and freedom. In other words they failed in the performance of their duties to uphold the constitutional values of dignity, equality and freedom.

[23] In my view, the two officers in exercising their discretion conferred by section 40(1) (j) of the CPA failed to do so within the prescript of the Bill of Rights and acted irrationally and arbitrarily.

[24] In conclusion on this issue, I find that, in evaluating the evidence before this Court the defendant has failed to discharge its duty of showing that the arrest of the appellant was justified. As concerning the detention of the appellant the defendant tendered no evidence as to why it was necessary to detain him for the period that they did. There is in this regard no evidence of reasonable apprehension that the appellant would abscond or fail to attend court if he was summoned to do so. This means the police officers in exercising their discretion failed to consider other less invasive options than the

detention of the appellant. The discretion to arrest and detention the appellant was thus exercised without due regard to the norms and values of the Constitution.

[25] In Louw and Another v Minister of Safety and Security and Others, [6] the court said:

> "What these statements mean is that the police are obliged to consider, in each case when a charge had been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest."

[26] It therefore follows that the defendant is liable for the unlawful arrest and detention of the appellant.

[27] Turning to the issue of quantum for damages, the appellant in the particulars of claim prayed for payment in the amount of R100 000,00.

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[6] 2006 (2) SACR 178 (T).

In the heads of argument and oral submission, the appellant relying on a number of cases dealing with this issue prays for damages in the amount of R85 000,00. The defendant made no submission in as far as this issue is concerned. I see no reason why I should not accept the version of the appellant in relation to amount of damages suffered by the appellant. This amount appears to me to be fair and equitable in the circumstances of this case.

Costs

[28] The defendant advanced no reason as to why costs should not follow the results. I have, however, not been persuaded that in the circumstances of this case it would be proper to award punitive costs as prayed for by the appellant.

Order

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

1. The appeal succeeds.
2. The decision of the magistrate dismissing the claim of the appellant is set aside and substituted with the following:

   a) Judgment is entered in favour of the appellant.

b) The defendant is ordered to pay the appellant the amount of R85 000, 00.

c) The defendant is to pay the prescribed interest rate on the amount of R85 000,00 from the date of the statutory demand being 16 April 2012 to date of payment.

d) The respondent is to pay the costs of the plaintiff on the opposed magistrate's court scale.

3. The defendant is to pay the costs of the appellant for this appeal on party-to-party scale.

Molahlehi AJ
Acting Judge of the South Gauteng High Court

I agree and it is so ordered

pp M Twala AJ
Acting Judge of the South Gauteng High Court

APPEARANCES

APPLICANT: T NKOSI

RESPONDENT: The State Attorney (MR NKUNA)