THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 424/2018

In the matter between

CASPARUS JANSE VAN RENSBURG **APPELLANT**

and

THE MINISTER OF POLICE **RESPONDENT**

Neutral citation: *Van Rensburg v Minister of Police* (424/18) [2019] ZASCA 25 (28 March 2018)

Coram: Ponnan and Leach JJA and Rogers AJA

Heard: 14 March 2019

Delivered: 28 March 2019

Summary: Arrest – lawfulness of – whether arresting officer reasonably suspected appellant of culpable homicide – failure by arresting officer to consider question of negligence – respondent failed to establish reasonable suspicion.

Appeal – duty by trial court to assess whether, in terms of s 17(6)(*a*) of Superior Courts Act, appeal warranted attention of Supreme Court of Appeal – matter manifestly did not warrant attention of Supreme Court Of Appeal.

Costs – amount recovered falling within jurisdiction of regional division of magistrate's court – successful appellant limited in court a quo to costs on magistrate's court scale.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Teffo J sitting as court of first instance).

(1) The appeal succeeds with costs.

(2) The order of the court a quo is set aside and replaced with the following order:

> '(a) The defendant is ordered to pay the plaintiff R150 000 plus interest thereon at the prescribed rate from 9 September 2013 to date of payment.
>
> (b) The defendant is ordered to pay the plaintiff's costs of suit on the magistrate's court scale.'

JUDGMENT

Rogers AJA (Ponnan and Leach JJA concurring)

[1] The appellant, Mr Casparus van Rensburg, sued the respondent, the Minister of Police, in the Gauteng Division of the High Court, Pretoria, for damages for wrongful arrest and detention. The parties agreed that if the arrest was unlawful the appellant was entitled to damages of R150 000. The court a quo (per Teffo J) held that the arrest was lawful and dismissed the appellant's action. The appellant appeals to this court with the leave of the court a quo.

[2] The circumstances of the appellant's arrest are as follows. On the morning of Friday 28 June 2013 the appellant was driving a Ford Ranger bakkie towing a trailer when his trailer struck and killed an 18-year-old cyclist. According to the

appellant, he saw the cyclist and moved over to the right of the road to give him a wide berth. The cyclist suddenly veered to the right. The appellant swerved further to the right. Although he managed to avoid hitting the cyclist with his bakkie, the trailer collided with him.

[3] The appellant did a U-turn, parked his vehicle and summoned the police and ambulance service. The police arrived about half an hour later. The appellant introduced himself to the first responder, Constable Shibambu, and explained briefly what had happened. Shibambu asked to see his driver's licence. The appellant produced it. Shibambu pointed out to him that the licence had expired in February 2013. Upon examining the Ford's licence disc, Shibambu noticed that it had expired in May 2013.

[4] Shibambu and other police officials then joined the paramedics who were busy with the deceased. The appellant's evidence was that after a short time Shibambu returned to him and said that unfortunately the cyclist was dead and that he was arresting the appellant. At the trial Shibambu gave various reasons as to why he executed a warrantless arrest. These included: that the appellant's vehicle was unroadworthy and that his driver's license had expired; that he suspected the appellant of culpable homicide; that he could not get a warrant because it was past 10h00 on a Friday morning; that the appellant's addresses needed to be verified; that the appellant needed to be taken to court; and that he was thinking of the appellant's safety, because the bystanders came from the same community as the deceased cyclist. It appears that Shibambu considered the Ford to be unroadworthy on the sole ground that its disc had expired.

[5] The appellant was detained at the police cells until his first appearance in court on the morning of Monday 1 July 2013 when he was released on bail. His detention lasted about 70 hours. The appellant appeared in court again on 5

August 2013. The prosecutor provisionally withdrew the charges against him. His action for damages was instituted in February 2014.

[6] During September 2014 a criminal summons was issued in which the appellant was charged with three offences: (a) driving without a valid driver's licence in contravention of s 12 of the National Road Traffic Act 93 of 1996 (NRTA); (b) driving an unroadworthy vehicle in contravention of s 42(1) of the NRTA; and (c) culpable homicide. The matter was set down for trial on 5 August 2015. On that day the prosecutor withdrew the second and third charges on the basis that the appellant signed an admission of guilt in respect of the first charge, which the appellant duly did, paying a fine of R300.

[7] The respondent pleaded that the arrest was lawful (a) in terms of s 40(1)(*a*) of the Criminal Procedure Act 51 of 1977 (CPA), because the appellant committed the two NRTA offences in Shibambu's presence; (b) in terms of s 40(1)(*b*) of the CPA, because Shibambu reasonably suspected the appellant to have committed an offence listed in schedule 1 to the CPA, namely culpable homicide.

[8] In order to discharge the onus of justifying the arrest on these grounds (as to which see *Zealand v Minister for Justice and Constitutional Development & another* [2008] ZACC 3; 2008 (4) SA 458 (CC) para 25; *Minister of Safety and Security v Sekhoto & another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 7), the respondent adduced the evidence of Shibambu and his colleague Constable Makgaye. The appellant also testified.

[9] In this court the respondent wisely abandoned the pleaded justification based on s 40(1)(*a*). The driving of a vehicle is an element of both NRTA offences. The appellant did not drive the Ford in Shibambu's presence. He was standing outside his stationary vehicle when the police arrived. The two issues

argued before us were (a) whether the respondent discharged the burden of proving that a warrantless arrest was permissible in terms of s 40(1)(*b*) of the CPA; (b) if so, whether the appellant discharged the burden of proving that Shibambu exercised his discretion to arrest irrationally (regarding the onus resting on a claimant in this respect, see *Sekhoto* paras 45-53). In view of the conclusion I have reached on the first question, it will be unnecessary to consider the second.

[10] In order to make good the pleaded reliance on s 40(1)(*b*), the respondent had to prove on a balance of probability that Shibambu reasonably suspected the appellant of having committed culpable homicide. This entailed proof of two things: (a) that Shibambu in fact suspected the appellant of having committed culpable homicide; (b) that such suspicion rested on reasonable grounds. The second requirement calls for an objective assessment. The test is not whether a peace officer believes he has reason to suspect but whether, on an objective approach, he in fact has reasonable grounds for his suspicion (*Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814D-E; *W v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA) para 8).

[11] Shibambu knew, because the appellant told him, that the cyclist was knocked down by a trailer hitched to a vehicle the appellant was driving. Accordingly, if Shibambu reasonably suspected the collision to have been caused by the appellant's negligence, the case would be one falling within s 40(1)(*b*). In an enquiry into negligence, the fact that the appellant's driver's licence and that the vehicle's licence disc had expired was irrelevant. Neither circumstance pointed to negligence in the act of driving.

[12] Shibambu conceded in cross-examination that the only person who provided him with evidence regarding the accident was the appellant. Although there were bystanders by the time the police arrived, none of them seemingly

witnessed the accident. At any rate, Shibambu and Makgaye confirmed that no statements were taken from any bystanders. The appellant's version as furnished to Shibambu was exculpatory.

[13] The physical evidence at the scene was inconclusive but consistent with the appellant's version. Shibambu acknowledged in cross-examination that the cyclist had been carrying a plastic crate of bottles on the back of his bicycle and that the broken glass and wetness on the road came from the bottles and their contents. He was shown one of the police photographs from which it appeared that the broken glass was concentrated in the middle of the left lane of the road (there was a single lane in each direction), suggestive of a point of impact towards the middle of the lane as stated by the appellant.

[14] I do not consider, in the circumstances, that Shibambu could have formed the reasonable suspicion that the accident was attributable to the appellant's negligence. While Shibambu was not obliged to accept the appellant's say-so, and while further investigation was warranted, he did not have statements and physical evidence pointing to negligence on the appellant's part. Negligence could not be inferred from the sole fact that the trailer struck the cyclist.

[15] Furthermore, there is no indication in Shibambu's evidence that he applied his mind to the question of negligence or even had a conception of the requirement of negligence in relation to the crime of culpable homicide. Although the deficiencies in his evidence may have been partly attributable to the fact that he chose to testify in English, a language in which he was plainly not fully proficient, the fact remains that his evidence as we now have it is of a poor calibre. He was asked in chief what he understood by the offence of culpable homicide. He replied that it is where 'somebody is killed without intention'. He did not add that the crime required proof of negligence and did not at any stage in

his testimony give evidence suggestive of a process of reasoning by which he arrived at a suspicion of negligence.

[16] Shibambu seems to have thought that he should arrest the appellant just because somebody died as a result of his driving a vehicle with an expired licence disc and without a valid driver's licence. When first invited to explain the arrest, Shibambu said he told the appellant

'that due to driving the motor vehicle without a licence, and the motor vehicle also, it is unroadworthy, the motor vehicle due to the unroadworthy and driving without a licence, is an offence within the culpable homicide nature . . .. Yes, I am arresting him for the offences for the motor vehicle and the driver's licence.'

And later, when the judge asked him to explain his reference to culpable homicide, he said:

'I understand that should he have been cautioned into taking consideration that the motor vehicle is unroadworthy and the driver's licence also is invalid, that should have brought him to some certain ideas to take preventative measures so that this type of incident could not happen in future.'

I may add that a vehicle is not rendered unroadworthy by virtue of its licence disc having expired.

[17] One cannot conclude that Shibambu subjectively suspected the appellant of culpable homicide merely because he had the label 'culpable homicide' in his mind. The label is a shorthand reference to the essential elements of the offence. An arresting officer cannot be said to suspect a person of culpable homicide unless the officer, among other things, suspects that the suspect acted negligently in causing the deceased person's death. Since the respondent did not establish that Shibambu subjectively thought that the appellant had negligently caused the cyclist's death, the respondent failed to prove that Shibambu in fact had the suspicion alleged in the plea. And for the reasons I have given, any such

subjective suspicion by Shibambu would in any event not have been based on reasonable grounds.

[18] It follows that the respondent therefore failed to discharge the onus of justifying the arrest. It is thus unnecessary to consider whether the decision to arrest was not in any event vitiated by the other grounds which, on Shibambu's evidence, played a part in his decision to arrest the appellant.

[19] The court a quo does not appear to have found that the arrest was justified on the basis of a reasonable suspicion of culpable homicide. The court seemingly relied on the two NRTA offences. While acknowledging that the commission of those offences would not ordinarily justify a warrantless arrest, the court a quo considered that there were 'aggravating factors' in the present case, namely that the appellant's vehicle was involved in an accident and that the accident was fatal to the cyclist. I am doubtful of the proposition that the statutory offences were aggravated by the circumstance that the vehicle was involved in an accident. Be that as it may, the respondent only relied on the two NRTA offences as a justification in terms of s 40(1)(*a*) of the CPA, a justification which was only available if those offences were committed in Shibambu's presence, which they were not.

[20] It follows that the appeal must succeed. As to costs in the court a quo, there was no justification for the appellant to have brought his action in the High Court. In his summons, which was issued in February 2014, some eight months after the incident, he claimed damages totalling R465 000 comprising (a) legal expenses in the criminal proceedings of R10 000; (b) past and future medical expenses of R55 000; (c) past and future loss of earnings of R200 000; and (d) general damages of R200 000. By the start of the trial he had abandoned all these claims save for general damages which were agreed in the sum of R150 000. The

evidence does not show that the appellant's 70-hour detention could have caused any loss of earnings or medical expenses, and this would have been known by the time summons was issued.

[21] In February 2014 the monetary jurisdiction of regional divisions of the magistrates' courts was R300 000, this amount being increased to R400 000 with effect from 1 June 2014. Any amount the appellant could plausibly have recovered would have fallen within the regional division's jurisdiction. Although in a pre-trial conference both sides agreed that the matter should not be transferred to another court, the parties' agreement, while a relevant consideration, cannot dictate the appropriate costs order. One must also take into account the effect on the administration of justice in the High Court of litigating low-value claims in that forum. In this particular case one must also bear in mind that any costs the respondent is ordered to pay will come from the public purse. I thus consider that in the court a quo the appellant should be limited to costs on the magistrate's court scale.

[22] As to the costs in this court, each side used a single advocate below but two advocates here. This was not reasonably necessary. The case was a straightforward one and the amount of damages modest. Indeed, the appellant can be criticised for having sought leave to appeal to this court and the court a quo for having granted it. We were informed by the appellant's counsel that the court a quo did not give reasons for its order on the application for leave to appeal. If the court a quo simply acceded to the appellant's request, it failed in its statutory duty. Section 17(6)(*a*) of the Superior Courts Act 10 of 2013 requires a trial court to send an appeal to a full court unless it considers:

'(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision.'

Counsel were quite unable to explain why any of these tests were thought to have been satisfied in the present case.

[23] I wish to make two concluding remarks about the conduct of the trial. First, there was inappropriate acrimony in the exchanges between counsel (being the appellant's present lead counsel and the respondent's present junior counsel). Such behaviour is contrary to professional decorum and does not serve the administration of justice. Second, the trial judge intervened far too often. On virtually every page of the transcript she is recorded as making three or more interruptions. Although her interventions were not biased and may have been well meant, they must have made counsel's task very hard, since they were unable to develop any flow. It is not always possible or even desirable for a judge to hold back his or her questions until the end of a witness' testimony, but interruptions to obtain clarity should be kept within reasonable bounds so that counsel may pursue legitimate lines of questioning without interference.

[24] The following order is made.

(1) The appeal succeeds with costs.

(2) The order of the court a quo is set aside and replaced with the following order:

> ‘(a) The defendant is ordered to pay the plaintiff R150 000 plus interest thereon at the prescribed rate from 9 September 2013 to date of payment.
>
> (b) The defendant is ordered to pay the plaintiff’s costs of suit on the magistrate’s court scale.’

O L Rogers

Acting Judge of Appeal

APPEARANCES

For Appellant	E Botha (with him T Mogale) Instructed by Gildenhuys Malatji Inc, Pretoria Honey Attorneys, Bloemfontein
For Respondent	A C Ferreira SC (with him L Pretorius) Instructed by State Attorney, Pretoria State Attorney, Bloemfontein