IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 149/2008

In the matter between:

MINISTER OF SAFETY AND SECURITY **Appellant**

And

AJ KLEINHANS **Respondent**

NOTES ON JUDGMENT: 17 DECEMBER 2013

LE GRANGE, J

[1] Late one Sunday afternoon on 11 December 2005, the relatively peace and tranquillity of Church Street in Riversdale was disturbed when the police, with some force, arrested and briefly detained the Respondent after he failed to heed a stop sign. One can arguably say the contravention of such a minor offence hardly justifies an arrest and detention of an offender. The accepted practice where an offence of this nature is committed in the presence of traffic officials is the issuing of a fine on the spot. The offender may then elect to pay the fine admitting his/her guilt or appear in a

lower court to contest his/her guilt. A closer scrutiny of the facts and the law, in the present instance, brings however a different perspective to this matter.

[2] The Respondent sued the Appellant for general damages in the sum of R100 000 for an assault and unlawful arrest and detention. The Magistrate upheld the Respondent's claim on the merits and awarded damages in the amount of R60 000 to the Respondent. The appeal lies against the whole of the judgment of the Magistrate's Court.

[3] The factual matrix underpinning this matter can in brief be summarised as follows: The Respondent at the time of the incident was 56 years old and a farmer of Riversdale. On 11 December 2005, late in the afternoon, the Respondent was driving his farm bakkie. He was accompanied by his sister and his two dogs. He approached the intersection at the N2 near Riversdale with his vehicle. There are two versions as to what exactly transpired at the intersection. But on all accounts the Respondent failed to comply with the stop sign. According to the Respondent the wheels of his bakkie skidded on some loose gravel on the road surface which caused him not to stop behind the stop line.

[4] The police officials who testified at the trial had a different version. According to them the Respondent came to stop about halfway into the intersection only after he realised the police and traffic officials were standing a distance away from the intersection.

[5] According to the Respondent, he drove into Church Street, on his way home, which is in Riversdale. He heard the sirens and blue lights of police vehicles behind him and moved to the side of the road. The police stopped him and requested him to get out of his vehicle, which he did. The police thereafter requested him to go with them to the N2 where the stop sign was. He refused. According to him he did nothing wrong. He further testified that the police never told him what he did wrong nor did they ask for his driver's licence. He adamantly refused to go with them. He decided to get back into his vehicle to leave the scene.

[6] It is at this point that events took a turn for the worse. The police officers grabbed him. He was physically dragged out of his car and pepper sprayed. The Respondent was eventually put in the police vehicle and taken to the police station where he was given a fine for failing to stop and riotous behaviour.

[7] The officials who testified in the Appellant's case had an entirely different version of what transpired after the Respondent was stopped in Church Street. It is not in dispute that Constable Moses George, Constable Mogorotse and Reservist-Sergeant Botes were on duty at the main intersection between the N2 – Highway and the Riversdale turnoff on the day in question. According to George, a serious accident could have resulted if cars were travelling on the N2 when the Respondent's vehicle failed to heed the stop sign. George further testified to the sequence of events in Church Street. According to him, he introduced himself to the Respondent. He asked the Respondent why he did not stop at the stop sign. He also requested the Respondent's drivers' licence. After the drivers' licence was produced he requested the Respondent to follow

him to the police station so that he could issue him with a fine. George was unable to issue the fine on the spot because the fine book they had in their vehicle was full. They thus needed to use the fine book at the closest police station. The Respondent was also given the liberty to drive in his own vehicle to the police station, which on all accounts is a few hundred metres away in the same street. After that the Respondent switched on his vehicle with the apparent intention of leaving the scene, and had to be stopped. He requested the Respondent to get out of his vehicle and obey his instructions. Again the Respondent resisted, closed his vehicle's door and was adamant that he was going home. The Respondent became aggressive and force was used to arrest him. He was dragged by his feet and it was only when pepper spray (a single burst) was applied that the two police officers succeeded in restraining the Respondent and managed to put him in the police vehicle. The Respondent was taken to the police station. It appears that the Respondent was detained for approximately 45 minutes. During this period a fine was issued to him where after he was released to go home.

[8] The Magistrate in summing up the evidence came to the conclusion that he was not impressed by any of the witnesses who testified in this case. I am in agreement with the views of the magistrate in this regard. However, regarding the central issue as to whether the Respondent in fact stopped at the intersection of the N2 or not, the evidence of the police officers is far more convincing and probable. The Magistrate's finding that the Respondent did contravene the provisions as contemplated in s 58 of Act 93 of 1996 is on a conspectus of all the evidence unassailable and in my view correct.

[9] The remaining issue for consideration is whether the subsequent arrest and detention of the Respondent was justified. Put differently, did such a minor offence justify the arrest of the Respondent.

[10] The Magistrate found that the offence did not justify the arrest of the Respondent. Relying on Minister of Safety and Security v Sekhoto & Another 2011(5) SA 367 (SCA) he found that the arresting officer George did not exercise his discretion to arrest the Respondent on a rational basis. The Magistrate's reasoning in this regard was framed in Afrikaans as follows:

> *"In die feite wat ek bevind het in hierdie saak dat daar wel volgens die weergawes van beide die eisers, sowel as die eerste verweerder se getuienis, 'n misdaad soos gelys in Skedule 1 gepleeg was. En dat hierdie misdaad inderdaad dit daar stel, was die oortreding van artikel 58 Wet 93 van 1996, versuim om by 'n stopteken te stop, is dit my bevinding dat hierdie misdaad inderdaad so, om die Regter aan te haal, …(onduidelik) was, dat dit nie arrestasie regverdig nie.*
>
> *Die arrestasiebeampte in hierdie aangeleentheid, konstabel George het dan ook mynsinsiens geensins sy diskresie behoorlik uitgeoefen nie. Want volgens sy eie weergawe was die bestuurderslisensie van mnr Kleynhans versoek. En as hy die bestuurderslisensie kon versoek het, kon hy hier ook mnr Kleynhans, die eiser se woonadres versoek het. En kon hy 'n klagte aanhangend gemaak het en 'n dagvaring op die betrokke eiser laat beteken het.*
>
> *Dit is derhalwe hierdie hof se bevinding dat die eerste verweerder nie daarin geslaag het om aan hierdie hof oppenower (sic) van waarskynlikhede te bewys, dat sy arrestasie van die eiser inderdaad regmatig was nie."*

[11] Counsel for the Appellant, Mr O' Brien, in brief argued that the evidence of George clearly demonstrates that he acted at all times reasonably. Moreover, the criticism that he failed to ask the residential address of the Respondent, which could have resulted in an alternative method of securing his attendance at court, is unwarranted. According to Mr O' Brien the Respondent was adamant that George never asked for his drivers' licence. Moreover, given the Respondent's conduct and attitude on the day, he would in all probability not have given his residential details to the police. Furthermore, the standard of rationality is not breached when an officer exercises his discretion in a manner other than that deemed optimal by the Court.

[12] The principal submission of the counsel for the Respondent, Mr TD Potgieter SC, was that the offence the Respondent committed was so relatively trivial that his arrest and detention, in the present circumstances, could never be regarded as rational, fair or *bona fide*. Mr Potgieter conceded that the request by the arresting officers to the Respondent to accompany them to the police station was not unreasonable but contended that the magistrate's approach and conclusion in the matter cannot be faulted.

[13] In terms of s 40(1)(a) of the Criminal Procedure Act 51 of 1977, a peace officer may without a warrant arrest a person who commits or attempts to commit an offence in his/her presence. The jurisdictional requirements which must be met before the power conferred in terms of s 40(1)(a) may be exercised are as follow:-

(1) The arrestor must be a peace officer;

(2) An offence must have been committed or there must have been an attempt to commit an offence; and

(3) Such commission or attempt must have been in his or her presence

[14] This section clearly requires the existence of a particular factual situation before the peace officer's power to arrest without a warrant can come into existence. If the factual circumstances do not arise the peace officer has no right to embark upon an arrest. Although arrest is the most drastic method to secure a person's attendance at his trial and should ordinarily be confined to cases where such persons face a relatively serious charge, the power of arrest without warrant covers all offences, no matter how trivial, when committed in the presence of a peace officer.

[15] In the present instance the Magistrate quite correctly found that the Respondent contravened the provisions of section 58 of the National Road Traffic Act 93 of 1996 by failing to stop at a stop sign. In this regard, s 58 provides as follows:-

"(1) Subject to subsection (3), no person shall, unless otherwise directed by a traffic officer, fail to comply with any direction conveyed by a road traffic sign displayed in the prescribed manner.

(2) In any prosecution for a contravention of or failure to comply with a provision of subsection (1), it shall be presumed, in the absence of evidence to the contrary, that the road traffic sign concerned was displayed by the proper authority under the power conferred by this Act and in accordance with its provisions".

[16] On a proper reading of the provisions of s 58 of the National Road Traffic Act and the regulations promulgated under the same Act, the jurisdictional requirements of s 40 (1) of the Criminal Procedure Act, in the present instance, were clearly satisfied.

[17] This however is not the end of the enquiry. A further very important consideration arises once the jurisdictional facts are present and that is whether the police officer properly exercised his/her discretionary power to arrest or not. In this regard see Sekhoto *supra* at paragraph [28]. This discretion must be exercised rationally in relation to the power of arrest and not arbitrarily or in bad faith. This is an objective enquiry with relation to the facts and the circumstances under which the arrest took place. In Sekhoto *supra* at paragraph [39] the following was held:-

> *"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."*

[18] In my view the magistrate, although referring to the Sekhoto decision, adopted the incorrect approach in coming to his conclusion. The present law regarding arrest without a warrant can be summarised as follows:-

(i) the jurisdictional prerequisites for s 40(1)(b) must be present;

(ii) the arrester must be aware that he or she has a discretion to arrest;

(iii) the arrester must exercise that discretion with reference to the facts;

(iv) there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

(See also Hiemstra's Criminal Procedure [Issue 6] 5-8)

[19] Although the magistrate criticised the quality of the evidence given by all the witnesses in the matter, on a reading of the record, the version of events proffered by the Respondent and probabilities at the time of the arrest do not favour him. According to the Respondent the police officials never informed him why they stopped him. They did not ask for his drivers' licence and when he refused to go with them they immediately grabbed and assaulted him. The magistrate, on the probabilities correctly in my view, did not rely upon this version.

[20] On the other hand, the version as advanced by George is far more plausible. The magistrate appears to have also found on the probabilities in favour of George's version and accepted that he must have asked the Respondent's drivers' licence. If this is the case, then the objective enquiry whether the exercise of the discretion to have embarked upon an arrest without a warrant was rational and justified, must be determined on the version advanced by the Appellant. The reasons advanced by George for the arrest were the following:-

1. He requested the Respondent to follow him to the police station so that he could issue him with a fine;

2. He also requested the Respondent to follow the police vehicle to the police station;
3. The Respondent refused and indicated that he was going home;
4. After that the Respondent switched on his vehicle with the apparent intention to leave the scene so he had to be stopped;
5. George requested the Respondent to get out of his vehicle and obey his instructions. Again the Respondent resisted;
6. The Respondent resisted this and closed his vehicle's door;
7. The Respondent became aggressive and force was applied to arrest him.

[21] On these accepted facts, viewed objectively, the criticism of the two arresting officers' conduct by the magistrate in my view was unwarranted and not capable of a finding that the discretion to arrest was exercised *mala fide*, irrationally or in an arbitrary manner. The intention and conduct of the arresting officers was clearly aimed at bringing the Respondent to justice. There is no room for the suggestion, given the peculiar circumstances of this case, that it was incumbent upon the arresting officers to have first considered an alternative method of ensuring the Respondent's attendance at Court, before effecting the arrest. To view it differently will, in my view, result in unintended consequences that may be open to serious abuse and possibly unethical behaviour. As was pointed out in Sekhoto, *supra* the standard of rationality is not breached when an officer exercises the discretion in a manner other than that deemed optimal by the Court. The standard is not perfection or even the optimum, judged from the vantage of hindsight. Moreover, George's evidence is clear that the Respondent would not have been arrested if he had followed his instructions and that it was the

intention always to issue the Respondent with a fine. Furthermore, there is no supporting or credible evidence from the Respondent that he was detained in the police cell as he claims. In fact he went home after the fine was issued. There is also no evidence to suggest that the arresting officers used excessive force to negate the Respondent's resistance.

[22] During argument, an issue arose whether the arrest of the Respondent by taking him to the police station for the sole purpose of issuing him a fine (rather than bringing him before a magistrate) was lawful. Counsel submitted further written submissions in this regard.

[23] As already mentioned, the police officials in the present case relied on the power of arrest conferred by s 40(1)(a) of the Criminal Procedure Act. Section 50 of the same Act regulates the procedure to be followed after arrest. Section 50(1) provides that any person who is arrested for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station and informed of his or her right to institute bail proceedings; and if the person is not released on bail, he or she must be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest.

[24] It is no doubt this statutory scheme which led Harms DP to say the following in paragraph [44] of Sekhoto (my underlining):

> *"While the purpose of the arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon*

> *to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspects to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime… a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand, there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest…".*

[25] The provisions of s 56 of the Criminal Procedure Act allow a peace officer, who believes on reasonable grounds that an offence has been committed and that a magistrate, on convicting such a person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time in the Gazette whether that offender is in custody or not, to issue a written notice to such an offender whereby he or she may admit guilt in terms of s 57 of the CPA without appearing in court. The offender may decide not to pay the fine but contest his guilt by appearing in court. In terms of s 56(2), if the offender is already in custody, the effect of a written notice handed to him shall be that he be released forthwith from custody. According to the commentary by **Hiemstra, Criminal Procedure,** the section envisages the saving of time and money (for both arrested persons and the State) incurred because of unnecessary detentions and court appearances. The written notice to appear offers a person the opportunity to avoid detention from the beginning or to end it in the police station, as well as to avoid later court appearance as long as the person pays the

determined admission-of-guilt fine. These written notices are usually used for relatively minor offences where a peace officer is of the view that the court will not impose a fine greater than R5 000 (GM R62 in Government Gazette 36111 of 30 January 2013).

[26] In the present case George and his colleagues did not arrest the Respondent with the purpose of enabling a magistrate or senior officer to determine whether the Respondent should be detained in custody pending his trial or rather released on bail. They arrested him for the purposes of getting him to the police station and detaining him there long enough so that they could issue to him a fine, ie the written notice contemplated in s 56 of the Criminal Procedure Act. However, I do not think that the passage I have quoted from Sekhoto should be read as laying down that an arrest is impermissible unless exercised for the purpose of enabling a court or senior officer to determine whether the offender should be granted bail or further detained. In most cases that will indeed be the enquiry, because in most cases it will be envisaged that the procedure prescribed by s 50 will need to be followed pursuant to the arrest. However, the more general purpose of an arrest is to bring the suspect to justice (Sekhoto para [42]). That can be achieved in more than one way. The issuing of the written notice contemplated in s 56 is one of those ways, but in order for that method to be followed the peace officer needs to have the materials to issue a notice in the form prescribed by that section. If, as in the present case, the peace officer does not have the necessary materials (because his fine book is full), it is permissible in my view for him to arrest the offender for the purposes of taking him to a police station so that a s 56 notice can be issued. The arrest in such a case still has the purpose of bringing the offender to justice. Section 56 itself contemplates that the recipient of the notice

might be in custody, because subsection (2) provides that if the accused is in custody the effect of the written notice shall be that he is released forthwith from custody. In the case of minor offences where a written notice in terms of s 56 suffices, it will ordinarily be an abuse of power (as paragraph [44] of Sekhoto indicates) to arrest the suspect, because ordinarily the peace officer would be able to issue to the suspect, on the spot, a s 56 notice. Here, however, George and his colleagues did not have a fine book from which they could issue a s 56 notice. In those unusual circumstances, the arresting of the Respondent for the limited purposes of keeping him in custody until the notice could be issued was not in my view unlawful.

[27] On the version of George, there can be little doubt that he exercised his power of arrest for the sole purpose of bringing the Respondent to justice in taking him to the police station whilst he was under arrest. It is common cause that the Respondent was released after the written notice was handed to him. In my view, this clearly demonstrates that the conduct of George in arresting the Respondent was *bona fide* to make sure that the Respondent either paid the fine or appeared in court. Moreover, the Respondent failed to comply with an instruction or direction given to him by the police officials, which objectively viewed, was not unreasonable, irrational or unlawful.

[28] During argument, it appeared that the Respondent wanted to rely on the exercise of an improper discretion that perhaps should have been pleaded. In Sekhoto *supra* at para [49] the Court held that *"The general rule is also that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This is the position whether or not the right to freedom is compromised."*

[29] For the reasons already advanced, it is in my view unnecessary to discuss whether the Respondent properly pleaded that the arresting officers exercised their discretion improperly in the present instance. The appeal in my view must succeed as the objective evidence supports the conclusion that the arresting officers were not *mala fide*, unreasonable and irrational in exercising their discretion to arrest the Respondent.

[30] During oral argument Mr O'Brien submitted that even if the police officials had not been entitled to arrest the Respondent for the purpose of taking him to the police station to issue him a fine, they had been entitled in terms of s 3J of the National Road Traffic Act to instruct him to follow them to the police station and that his failure to comply with the instruction was in terms of s 3J itself an offence for which they could arrest him. Both counsel submitted a supplementary note on this aspect. The Respondent did not plead reliance on s 3J. In view of my conclusions on the case as pleaded, it is unnecessary to consider the s 3J point.

[31] The only remaining issue is costs. It appears the appeal was originally set down for hearing on 30 August 2013. The Respondent adopted the view that it should not be saddled with a costs order for that day as it was the Appellant's responsibility to prosecute the appeal. According to the Appellant both parties were ready to proceed with the appeal on the allocated date only to learn on the day in question that the appeals clerk failed timeously to submit the file to the Judge-President to allocate the matter.

[32] In this division, we as Judges are acutely aware of unnecessary delays in the finalisation of matters. It is for that very reason that the Judge-President and Deputy Judge- President, in conjunction with all Judges, formulated and spearheaded a very successful case flow management system in this Division. The non-allocation of this matter on the previous date can therefore not be blamed on the non - availability of Judges. For this reason it would also be unjust and inequitable to blame the Appellant for an administrative blunder by the appeal clerk. In my view the most appropriate order would be that each party pay its own costs in respect of the wasted costs occasioned by the postponement.

[32] In the result, the following order is made:-

1. The Appeal is upheld with costs, except for the wasted costs occasioned by the postponement on 30 August 2013, where each party is ordered to pay its own costs.

2. The order of the court *a quo* is set aside and replaced by the following order:

   "The Plaintiff's claim is dismissed with costs"

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LE GRANGE, J

I agree.

ROGERS, J