REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***1st February 2023*** Signature: _____

APPEAL CASE NO: A3069/2022

COURT *A QUO* CASE NO: 914/2021

DATE: 1st FEBRUARY 2023

In the matter between:

HLAPI, NTONI JACOB Appellant

and

THE MINISTER OF POLICE Respondent

Coram: Adams J *et* Turner AJ

Heard: 24 January 2023

Delivered: 01 February 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 01 February 2023.

Summary: Appeal – arrest and detention – lawfulness of – s 40(1)(h) of the Criminal Procedure Act and s 4(a) and (b) of the Drugs and Drugs Trafficking Act – possession of dagga – required jurisdictional facts for warrantless arrest

present – discretion arising as to whether or not to arrest – standard for exercise of such discretion not perfection, or even optimum, judged from vantage of hindsight – as long as choice made falling within range of rationality, standard not breached –

Arrestee challenging discretion to plead and discharge evidentiary burden showing discretion improperly exercised by arresting officer – factors to be taken into consideration when exercising such discretion – whether arrestee was the author of his own misfortune – court is at liberty to consider factors, which ought to have been considered by police.

ORDER

On appeal from: The Vereeniging Magistrates Court (Additional Magistrate C Neyt, sitting as Court of first instance):

(1) The appellant's appeal is dismissed with costs.

(2) The appellant shall pay the respondent's costs of this appeal.

JUDGMENT

Adams J (Turner AJ concurring):

[1]. On Friday, 4 May 2018, at about 19:00 in the evening, two police officers from the Sharpeville Police Station were busy patrolling in the vicinity of the Phelindaba area in Sharpeville, when they were informed by a member of the local community that, in a shack at a particular address in the area, there were persons smoking cannabis, colloquially referred to as 'dagga'. At that stage, there was still a blanket prohibition against the possession and the use of dagga. On their arrival at the identified shack, the police officers, Constables Nsibande and Buthelezi, found three male persons smoking dagga. One of these three persons was the appellant – 28 years old at the time, who was also found in possession of 5 grams of dagga. He was thereupon arrested for 'possession of dagga' and

detained in the 'holding cells' at the Sharpeville Police Station until Monday, 7 May 2018, when he was taken to court for what would have been his first court appearance. This, however, did not happen. Instead, in the afternoon at about 15:30 on 7 May 2018, after having been detained in the court cells for the whole morning and for a part of the afternoon, he was told that he was free to go and released.

[2]. On the 31st of August 2018, the appellant sued the respondent ('the Minister') in this Court for damages for wrongful arrest and detention. The said action was subsequently transferred to the Vereeniging Magistrates Court and on the 6th of May 2022, that Court (Additional Magistrate Neyt) held that the arrest and detention were lawful and dismissed the appellant's action with costs. The appellant appeals to this court against the whole of the judgment and the order of the Magistrates Court.

[3]. In issue in this appeal is whether the arrest and detention of the appellant were lawful. Crystalized further, Ms Swart, who appeared for the appellant, identified the questions to be considered by this appeal court as the following: (a) whether the arresting police officers ought to have exercised their discretion in favour of not arresting the appellant; and (b) whether the officers who processed the appellant's detention at the police station, after his arrest, ought to have released him and not detained him over the weekend.

[4]. On both questions, it was argued that the relevant officers, instead of arresting the appellant on what can be regarded as a 'trivial charge', should simply have issued him with a summons or a notice to appear in court in order to face the charge relating to the possession of dagga. These issues are to be decided against the factual backdrop as set out in the paragraphs which follow, the facts in the matter being, in my view, by and large common cause. During the trial of the matter in the Magistrates Court, the two arresting officers and the investigating officer, Sergeant Phoofolo, gave evidence on behalf of the Minister, and the plaintiff himself gave evidence in support of his case.

[5]. As already indicated, on the evening of Friday, 4 May 2018, at about 19:00, the appellant and two of his friends were caught by two police officers in the act

of smoking dagga at an address in Sharpeville. They were searched by the policemen and the appellant was found to be in possession of 5 grams of dagga. He was thereupon arrested, taken to the Sharpeville Police Station and detained, after being processed. At the time, the use and possession of dagga were still unlawful and the police were clearly within their rights to arrest and detain the appellant in terms of s 40(1)(a) and (h) of the Criminal Procedure Act ('the CPA')[1], which provides in the relevant part as follows: -

'40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person –

(a) who commits or attempts to commit any offence in his presence;

… … …

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

… … …'.

[6]. Clearly, on the undisputed evidence, the appellant committed the offence of being in possession of dagga in the presence of Constable Nsibande and Constable Buthelezi. Additionally, the arrest was justified on the basis of subsection (1)(h) in that the appellant was reasonably suspected of having committed an offence under the law governing the 'possession … of dependence-producing drugs', that being possession of dagga. The relevant law is the Drugs and Drugs Trafficking Act ('the Drugs Act')[2]. Section 4(a) and (b) read as follows: -

'**4 Use and possession of drugs**

No person shall use or have in his possession-

(a) any dependence-producing substance; or

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,

unless- … …'

[7]. In terms of Part III of Schedule 2 to the said Act, 'cannabicyclohexanol' and 'Cannabis (dagga), the whole plant or any portion or product thereof …' are listed as 'Undesirable Dependence-producing Substances'.

---

[1] Criminal Procedure Act, Act 51 of 1977;

[2] The Drugs and Drugs Trafficking Act, Act 140 of 1992;

[8]. Clearly, on the undisputed evidence, the appellant was in possession of dagga in the presence of Constable Nsibande and Constable Buthelezi. *Prima facie* therefore, the arrest was justified on the basis of subsection (1)(h) in that the appellant was reasonably suspected of having committed an offence under the law governing the 'possession … of dependence-producing drugs', that being possession of dagga. What is more is that the police officers caught the appellant smoking dagga, which, at the time, was also an offence in terms of the provisions of the Drugs Act. The evidence of the police officers was to that effect and this was not disputed under cross-examination. Moreover, that was also confirmed by the appellant when he gave evidence, although he subsequently changed his version in that regard. I accept, as a fact, that they were indeed smoking dagga when the police arrived. The evidence of the plaintiff initially went as follows: -

'Mr Hlapi [Appellant]: I did not want to stress my parents as they are elderly and they are on pension. Also what happened, I thought that I was in a secret place when I was arrested.

Court: Meaning what? I thought I was in a secret place when I was arrested. What do you mean, sir?

Mr Hlapi: I thought I am not guilty for what I was doing at that time, as I was in a secret place, Your Worship.

Court: Oh, okay.

Mr Pooe [Respondent's Attorney]: As the Court pleases, Your Worship. Let the interpreter also finish, there is something that he missed.

Court: You missed something, Mr Interpreter.

Interpreter: I was in a private space. <u>I admit that I smoked dagga</u>. I thought I was on a secret place at the time.' (Emphasis added).

[9]. Therefore, on first principles, the arrest of the appellant by the arresting officers was lawful. The only question remaining is whether they properly exercised the discretion to arrest the appellant, as granted to them by s 40(1) of the CPA. In that regard, the question to be considered is whether there were facts to which the arresting officers ought to have applied their minds in exercising their discretion which should have dissuaded them from making the arrest. Additionally, it should be decided whether the detention of the appellant, after he was arrested, was justified.

[10]. As regards the detention of the appellant, the evidence of Sergeant Nsibande (the arresting officer) was to the effect that, after they arrested the appellant, they transported him to the Sharpeville Police Station, where he was processed. This entailed entering his name into the police cells register, as well as reading to him his rights in terms of the Constitution. The appellant was also issued with a written 'Notice of Rights in terms of the Constitution', which he was required to sign. Thereafter, he was detained in the Police Holding Cells and the case was then handed over to the investigating officer, who interviewed the appellant later on that evening and obtained from him a 'warning statement'.

[11]. As regards the granting of bail, Sergeant Nsibande testified that he explained to the appellant, as part of the notification of his Constitutional rights, that he is entitled to apply to be released on 'police bail' in terms of s 59 of the CPA. He went on to confirm that he was however not involved in those processes after he had handed the appellant over to the officer in charge of the holding cells. He also emphasised the fact that appellant never indicated that he wished to apply for police bail. This was also the evidence of Sergeant Phoofolo, who testified that he explained to the appellant his right to be released on bail as part of the 'Notice of Constitutional Rights'. The testimony of Sergeant Phoofolo was also to the effect that the appellant did not ask to be released on bail, despite being advised of his right to do so, and therefore he was not offered or granted police bail.

[12]. The respondent pleaded that the arrest was lawful in terms of s 40(1)(h) of the CPA, which should be read with the provision of the Drugs Act, because the appellant was reasonably suspected of having committed an offence under the law governing the 'possession … of dependence-producing drugs', that being possession of dagga. As already indicated, this averment and the case pleaded by the Minister are confirmed by the evidence. Ms Swart, Counsel for the appellant, conceded as much – rightly so, in my view. It can and should be accepted that, if regard is had to the facts in the matter as alluded to above and all things considered, the Minister had discharged the onus on him of justifying the arrest on the basis of s 40(1)(h) of the CPA. That is also what the Magistrates Court found.

[13]. The point is that not only was the appellant suspected of having committed an offence of unlawful possession in terms of the Drugs Act, but he had in fact committed such an offence – that much is irrefutable and uncontested. Moreover, he had in fact committed an offence or offences in the presence of the arresting officers – as envisaged in terms of s 40(1)(a) of the CPA. That then means that, to use the words of s 40(1)(h) of the CPA, Constable Nsibande 'reasonably suspected' the appellant of having committed an offence in terms of the Drugs Act. He was therefore empowered by the Act to take the appellant into custody without a warrant. The arrest of the appellant was lawful.

[14]. That is however not the end of the matter. The question remains whether the arresting officer and the other members of the South African Police Service properly exercised their discretion to arrest. As per *Minister of Safety and Security v Sekhoto & Another*[3], while the overall onus to prove that the arrest was lawful remains to be on the Minister, once the Minister has established the jurisdictional facts required for a defence based on section 40(1), the arrest is *prima facie* lawful. An arrestee (appellant in this case) who contends that the police officers did not exercise the discretion to arrest lawfully must plead and prove facts which show that the discretion was exercised unlawfully. If the appellant does not do so, the lawfulness of the arrest can be confirmed.

[15]. In that case the SCA held as follows: -

'[49] … … 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. For instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue.

[50] Onus in the context of civil law depends on considerations of policy, practice and fairness; and, if a rule relating to onus is rationally based, it is difficult to appreciate why it should be unconstitutional. Hefer JA also raised the issue of litigation-fairness and sensibility. It cannot be expected of a defendant, he said, to deal effectively, in a plea or in evidence, with unsubstantiated averments of *mala fides* and the like, without the specific facts on which they are based being stated. So much the more can it not be expected of a defendant to deal effectively with a claim – as in this case – in which no averment is made, save a general one that the arrest was

[3] *Minister of Safety and Security v Sekhoto & Another*, [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 7;

'unreasonable'. Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding, that the onus has not been discharged, may ensue. Such a state of affairs, said Hefer JA, is quite untenable.

[51] The correctness of his views in this regard is illustrated by the judgment of the court below (para 35), where the court listed matters it thought the arrestor should have given attention to – without his having had the opportunity to say whether or not he had done so. This amounts to litigation by ambush, something recently decried by this court.

[52] One can test this with reference to the rules of pleading. A defendant, who wishes to rely on the s 40(1)(b) defence, traditionally has to plead the four jurisdictional facts in order to present a plea that is not excipiable. If the fifth fact is necessary for a defence, it has to be pleaded. This requires that the facts on which the defence is based must be set out. If regard is had to para 28 of the judgment of the court below, it would at least be necessary to allege and prove that the arrestor appreciated that he had a discretion whether to arrest without a warrant or not; that he considered and applied that discretion; that he considered other means of bringing the suspect before court; that he investigated explanations offered by the suspect; and that there were grounds for infringing upon the constitutional rights because the suspect presented a danger to society, might have absconded, could have harmed himself or others, or was not able and keen to disprove the allegations. But that might not be enough because a court of first instance, or on appeal, may always be able to think of another missing factor, such as the possible sentence that would be imposed.'

[16]. I have quoted extensively from *Sekhoto* for the simple reason that the case of the appellant on appeal was primarily based on the contention that the arresting police officers failed to properly exercise the discretion to arrest. It bears repeating that Ms Swart accepted, rightly so, that *in casu* the jurisdictional requirements for an arrest in terms of s 40(1)(h) of the CPA had been met and there is therefore no need to dwell on those aspects of the matter any longer.

[17]. *Sekhoto* also held that it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily, which, in turn, meant 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 optimally 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 hind-sight – so long as the discretion is exercised within this range, the standard is not breached'.

[18]. It is the case of the appellant that the police did not exercise the discretion in good faith. In fact, so the appellant contends, the discretion was not exercised rationally, but arbitrarily. In support of this contention, Ms Swart pointed out that the arresting officer gave evidence to the effect that at their Police Station, bail applications relating to cases involving drugs and drug trafficking offences were only done at court and not at the Police Station. He also testified that the reason why he arrested the appellant was because he had found him in possession of dagga and, therefore, he (the appellant) needed to explain to a Court of law why he had been in such possession.

[19]. Ms Swart accordingly submitted that, because the arresting officer regarded arrest as the only option to ensure the appellant's attendance at court, and because no evidence was tendered to suggest that the arresting officer considered any other options to secure the appellant's attendance at court, the discretion was not exercised properly. Moreover, so Ms Swart submitted, the arresting officer made no enquiries as to whether the appellant was a flight risk and whether his attendance at court could be secured by other means. Also, so the argument continued, no evidence was tendered to confirm that the arresting officer appreciated that he had a discretion to arrest without a warrant or not – no evidence was tendered that the arresting officer considered and applied that discretion. In support of these submissions, the appellant relied on the following extract from para 52 of the *Sekhoto* judgment: -

'If regard is had to paragraph 28 of the judgment of the court below, it would at least be necessary to allege and prove that the arrestor appreciated that he had a discretion whether to arrest without a warrant or not; that he considered and applied that discretion; that he considered other means of bringing the suspect before court; that he investigated explanations offered by the suspect; and that there were grounds for infringing upon the constitutional rights because the suspect presented a danger to society, might have absconded, could have harmed himself or others, or was not able and keen to disprove the allegations. But that might not be enough because a court of first instance, or on appeal, may always be able to think of another missing factor, such as the possible sentence that would be imposed.'

[20]. The reliance on this extract was misplaced because it does not reflect the ratio or even the views of the SCA. Instead, in this passage, the SCA was setting out the thesis that had been adopted in the Court *a quo*, which the SCA rejected in upholding the appeal.

[21]. One of the main contentions on behalf of the appellant is that the arresting officer, Constable Nsibande, did not apply his mind to the matter or exercised his discretion at all. Therefore, so the contention was developed further, the court *a quo* should have interfered with the exercise of that discretion as it cannot be said that the arresting officer exercised his discretion in good faith and rationally.

[22]. Bearing in mind that the burden rests on the appellant to plead facts and lead evidence to prove that the discretion was not exercised properly by the arresting officer, I am not persuaded by these submissions. The appellant did not identify any facts that were known to the arresting officer which ought to have persuaded him not to arrest and detain the appellant, let alone facts which show that the decision to arrest was made in bad faith, irrationally or arbitrarily.

[23]. The uncontested evidence on behalf of the Minister was to the effect that at the Police Station in question, drugs related offences were considered serious offences which required suspected offenders to be arrested. It appears to be sensible to provide guidelines to police officers on patrol, which identify the facts that should weigh heavily when they are deciding whether to arrest or not. While the primary purpose of an arrest is to bring the arrestee to justice (*Sekhoto* at para 30), the interests of victims, the safety of the community and many other similar considerations, beyond those personal only to the arrestee, are relevant when a decision to arrest and detain is made. In the circumstances, applying a guideline which considers and places emphasis on the seriousness of the suspected offence cannot be criticised.

[24]. Also, when he was taken to the Meadowlands Police Station, the appellant, according to the evidence of Sergeant Phoofolo, could not be ‘profiled’ because he was not able to provide to him, as the investigating officer, his identity number. This then meant, so Sergeant Phoofolo explained, none of the appellant’s particulars relevant to whether or not he should be released from

custody, could be verified, which translated into a higher risk that the appellant would have disappeared into the proverbial ‘crowds’ upon his release. This reasoning makes eminent sense to me. Accordingly, I have difficulty in accepting the proposition that the police acted irrationally.

[25]. Moreover, to borrow from *Sekhoto*, this appeal court can think of other reasons or factors why the arresting police officers should have exercised their discretion in favour of arresting the appellant. Those include the fact that there could be little, if any doubt that the appellant had committed a criminal offence in terms of the Drugs Act – he was caught in the act. Sight should also not be lost of the fact that the appellant, who shortly before being arrested had been smoking dagga, which may have affected his faculties, which in itself may have been a reason for the police not to release him from custody. Importantly, on his own version, the appellant, who probably realised that he was caught red-handed in the act of committing a criminal offence, was so embarrassed that he had been arrested, that he probably would not have been able to communicate with members of his family to arrange for bail. Then, there is also the fact that the appellant was found smoking dagga at a ‘secret place’ – and not his place of residence. This means that the arresting officer would probably have considered this factor as a risk factor favouring the arrest of the appellant.

[26]. There is no reason to disbelieve the police officers’ evidence that they told the appellant that he could ask to be released on bail. This was in addition to them giving the appellant ‘Notice of his Constitutional Rights’, which included notice to the effect that he could be released from custody. The appellant’s evidence was that he did not want to tell his family that he had been arrested. As a release on bail would have required his family to make a bail payment, this unwillingness to tell them of the arrest is a probable reason why he did not ask to be released on bail. The police officers’ evidence that they were of the view that the appellant would not want to opt to be released on bail was not challenged. How then can it be said that they acted in bad faith, irrationally or arbitrarily? For all of these reasons, I am not convinced that the appellant had discharged the burden on him to prove that the police officers did not exercise the discretion to arrest and detain properly.

[27]. I conclude that the respondent has discharged the burden of proving that a warrantless arrest was permissible in terms of s 40(1)(h) of the CPA, read with the above provisions of the Drugs Act. Conversely, I am of the view that the appellant had failed to discharge the burden of proving that the arresting officer exercised his discretion to arrest in bad faith, irrationally or arbitrarily.

[28]. In the circumstances, the appeal against the order of the Magistrates Court should fail.

Costs

[29]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[4].

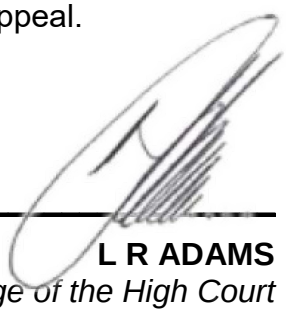
[30]. I can think of no reason why we should deviate from this general rule. The respondent should therefore be awarded the cost of the appeal.

Order

In the result, the following order is made: -

(1) The appellant's appeal is dismissed with costs.

(2) The appellant shall pay the respondent's costs of this appeal.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

---

[4] *Myers v Abramson*, 1951(3) SA 438 (C) at 455;

HEARD ON:	24th January 2023
JUDGMENT DATE:	1st February 2023 – judgment handed down electronically
FOR THE APPELLANT:	Advocate L Swart
INSTRUCTED BY:	J J Geldenhuys Attorneys Inc, Noordheuwel, Krugersdorp
FOR THE RESPONDENT:	Attorney Reggie Pooe
INSTRUCTED BY:	The State Attorney, Johannesburg