IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

7/4/2016.

CASE NO: A763/2014

In the matter between:

MINISTER OF POLICE Appellant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

and

06/04/16....
DATE

SIGNATURE

LAETITIA DYSSEL Respondent

JUDGMENT

Tuchten J:

1 In an action in the court below, the respondent claimed damages from the appellant on the ground that on 24 September 2010 she was unlawfully arrested and detained by a member of the SA Police Services. She was arrested on a charge of dealing in liquor contrary to the provisions of s 167 read with s 154(1) of the Liquor Act, 27 of 1989 (the old Liquor Act). Although the old Liquor Act was repealed by s 46 of the Liquor Act, 59 of 2003 (the new Liquor Act), the provisions of the old Liquor Act remained in force pursuant to art 2 of

Schedule 1 to the new Liquor Act, pending the enactment of provincial legislation covering this field of the law. No such relevant provincial legislation had at the relevant time been enacted in the Western Cape Province, where the arrest in this case was effected. The defence to the charge was that the arrest was justified because the arresting officer reasonably suspected the respondent of having committed the offence in question.

2 The judge below, Avvakoumides AJ, found that while the arresting officer had indeed suspected the respondent of having committed the offence, the suspicion held by the arresting officer was not reasonable and awarded the respondent R90 000, interest and costs. The appeal is against those orders.

3 The appellant was some eight days late in applying for a date for the present appeal. This non-compliance with the Rules formed the subject of an application for condonation, which was opposed by the respondent although no opposing papers were filed. The appellant's attorney explained that the lateness arose because he misread the Rule. No prejudice was occasioned to the respondent by the lateness and as I shall show, the appellant has substantial prospects on appeal. Condonation will therefore be granted but the appellant must

pay the respondent's costs in relation to the application for condonation.

4 Section 40(1)(h) of the Criminal Procedure Act, 51 of 1977 empowers a peace officer to arrest any person whom he reasonably suspects has committed an offence under any law governing, *inter alia*, the supply of intoxicating liquor. A member of the SA Police Services is a peace officer. A member of the SA Police Services was, at the relevant time and in the Western Cape Province, where the arrest was effected, therefore empowered under s 40(1)(h) of the Criminal Procedure Act, 51 of 1977 to arrest any person whom he or she reasonably suspected of unlawful dealing in liquor.

5 The respondent lived in a house which she said was owned by her mother at 10 Bien Donne, Groot Drakenstein (the premises). Her husband also lived on the premises. However, the unchallenged evidence of the witness who testified for the appellant, Warrant Officer Hurst, was that the premises were part of a complex which had in earlier times been used as houses for the warders of a jail and belonged to a firm he called Anfrotech. Nothing turns on the resolution of this dispute. The evidence shows that the respondent's husband was, in the respondent's estimation, something of a ne'er do well who

did not adequately provide his share of household expenses and was a prodigious drinker of beer.

6 WO Hurst was stationed at the Groot Drakenstein police station. His primary task related to the preservation of items seized by or handed in to the police pending criminal proceedings but on the day in question, WO Hurst was entrusted with the execution of a warrant in relation to the premises. In fact WO Hurst had previously been involved in operations at the premises in relation to similar offences. WO Hurst seems to have thought that the warrant enjoined him to arrest persons at the premises but it did not. In fact the warrant was a search and seizure warrant, issued on the ground that there was reason to believe that unlawful dealing in liquor was taking place there.

7 Be that as it may, in the late evening on Friday 24 September 2010, WO Hurst, the only witness to give evidence on behalf of the appellant, went with a number of police officers to the premises. Included in their number was Capt Morina Abrahams, the Groot Drakenstein station commander. WO Hurst knew the respondent from his previous dealings with her both in his capacity as a police officer and personally.

8 According to WO Hurst, the servants' quarters were separate from the main house although the two sections were connected by a lean to. He said he found the respondent's husband in the servants' quarters and the respondent herself in the main house. The respondent's version is that she was in bed with her husband in the servants' quarters when the police arrived. The judge below believed the respondent on this issue. It is common cause, however, that in the open plan kitchen and lounge in the main house the police found sixteen full 700ml bottles of Black Label beer and 90 empty beer bottles stacked in some eight crates. The respondent was asked for an explanation.

9 WO Hurst said that the respondent told him that the beer was left over from a previous party. The respondent's evidence was that she told the police that the beers were the property of her husband and that he and his friends used to drink vast quantities of beer so that the presence of 16 full bottles was not significant. She said too that her husband used to do his friends a service by getting empty beer bottles filled or, I rather think more accurately, handing in empties and buying full ones.

10 WO Hurst formed the belief that the respondent was unlawfully dealing in liquor. He said that he arrested her, seized all the beer bottles and took her back to the Groot Drakenstein police station where, it is not disputed, he attended to the voluminous paper work which was necessitated by the arrest.

11 The respondent, however, testified that she was arrested by Capt Abrahams, who did not give evidence. This is an important dispute because the appellant's defence was that the respondent was arrested by WO Hurst and the appellant sought to justify the arrest on the basis of the suspicion held by WO Hurst that the respondent was guilty of unlawfully dealing in liquor. While the court below did not deal with this dispute directly, it seems from passages in the judgment, particularly at para 42, that WO Hurst's evidence on this issue was accepted.

12 The probabilities favour WO Hurst's version on this issue. It was established that it is the duty of the arresting officer to attend to the paperwork arising from an arrest. All the paperwork was done by WO Hurst. The paperwork included a statement by WO Hurst, a notice of constitutional rights, the material required to book in the beer bottles as exhibits and the completion of the investigation diary in the docket. It is in my view improbable that WO Hurst would have done the

paperwork if he had not been required to do so. As WO Hurst put it, it would have been illegal for another officer to do the paperwork and take responsibility in his or her own name for an arrest effected by another officer. I can see no reason why WO Hurst would have acted illegally, as he saw it, in these circumstances.

13 On Sunday 26 September 2010, the respondent made a statement admitting having sold liquor. She said in evidence at the trial before the court below that her admission was false and that she had made it in the hope that she would be allowed to pay an admission of guilt fine and be released.

14 The respondent was however not released on the Sunday. Instead, she appeared in the local magistrate's court on 27 September 2010 and was released on bail. During the course of 2011, the charges against the respondent were withdrawn.

15 In *Duncan v Minister of Law and Order,*[1] the Appellate Division laid down the jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the Criminal Procedure Act may be invoked: the arresting officer must be a peace officer, the arresting officer must entertain a suspicion; the suspicion must be one referred to in

---

1 1986 2 SA 805 A at 818F-I

Schedule 1 to the Criminal Procedure Act; and the suspicion must rest on reasonable grounds. Section 40(1)(h) is in terms identical to s 40(1)(b) save that the offences referred to in the former subsection differ from those in the latter. The jurisdictional requirements for a lawful arrest under s 40(1)(h) are therefore equivalent to those for an arrest sought to be justified under s 40(1)(b) and the reasoning in *Duncan, supra,* is applicable to the present facts.

16 The issue on the merits at the trial was whether the suspicion which it was accepted by counsel for the parties and, it seems, by the court below had been present was a reasonable suspicion. The adduction of evidence in the court below was complicated by a ruling made by the trial judge early in the trial. It was common cause that the respondent was well known to the officers at the Groot Drakenstein police station as a dealer in liquor and that the respondent had a record of several convictions, for which she paid admission of guilt fines, for unlawful dealing in liquor. But when counsel for the appellant began leading evidence of these convictions and the fact that they were known to WO Hurst when he went to the premises on 24 September 2010, counsel for the respondent objected on the ground that they constituted similar fact evidence and were thus inadmissible. The judge below upheld the objection and ruled that evidence of these previous convictions might not be adduced. But then the litigants

proceeded to ignore this ruling, lead evidence of these previous convictions and, on the part of the respondent, testify that she had reformed and no longer dealt unlawfully in liquor. And the judge below referred to the fact of the previous convictions in his judgment.

17 The reason the fact of the previous convictions was important was because their existence was an important factor operating upon WO Hurst's mind when he formed the suspicion that the respondent was unlawfully dealing in liquor. In my view, the judge below confused the test for admissibility of such evidence at a trial where the evidence is tendered to prove bad character, a *modus operandi*, propensity or something similar with the test for admissibility in civil proceedings of the present nature.

18 In *Powell NO and Others v Van der Merwe NO and Others*,[2] the Supreme Court of Appeal endorsed certain *dicta* of Lord Devlin in *Shabaan Bin Hussein and Others v Chong Fook Kam and Another.*[3] Paragraphs 36 and 37 of the judgment in *Powell,* to the extent relevant for present purposes, read as follows:[4]

---

2 2005 (5) SA 62 SCA paras 36 and 37

3 [1970] AC 942 (PC) [1969] 3 All ER 1627

4 Footnotes omitted

> [36] This Court has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':
> 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.'
> [37] ... Lord Devlin went on to point out
> 'another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. ... Suspicion can take into account also matters which, although admissible, could not form part of a *prima facie* case.

19 Whether a reasonable suspicion existed must be considered objectively. Reasonable grounds of suspicion are those which would induce a reasonable person to have the suspicion.[5] In my view, the judge below was wrong in concluding that evidence of previous convictions may not be taken into account in the evaluation of whether the suspicion formed by WO Hurst was reasonable. In this case the evidence was not tendered to prove bad character or the like. It was tendered to prove what was known to WO Hurst at the time of the arrest and in support of the case for the appellant that the suspicion in the mind of WO Hurst was reasonable. If the question of prejudice is in this context at all relevant, which I doubt, the prejudice to the

---

5 *R v Van Heerden* 1958 3 SA 150 T 152E, referred to with approval in *Duncan, supra*, 814E.

appellant if the evidence were to have been excluded is obvious: the appellant would have been precluded from relying on a factor which significantly informed WO Hurst's decision to arrest and on which the appellant relied to establish the reasonableness of WO Hurst's suspicion. The fact of previous convictions for offences of unlawfully dealing in substances may show to a reasonable person that the suspect is likely to offend again. A reasonable person may also legitimately conclude that because the suspect previously got off with a fine rather than a custodial sentence, the suspect thought that the risk of being caught and punished was outweighed by the prospect of profit from the unlawful activity in question. Lest I be misunderstood, I must make plain that I do not think that it was in the present circumstances necessarily objectively correct to draw these conclusions. I say that a reasonable person was entitled to come to these conclusions.

20 WO Hurst testified, and it was not disputed, that he personally had been involved in operations at the premises on "quite a few" occasions since 2009. On each such occasion liquor had been found on the premises and on no less than four such occasions, the respondent had admitted guilt and paid a fine. The impression I formed from his evidence was that the events of 24 September 2010 took place in a parochial rural context where the social circumstances

of the respondent and her husband were fairly well known to WO Hurst and other officers at the Groot Drakenstein police station.

21 It is implicit in this evidence that the respondent on no previous occasion disputed the allegation that she was the owner of the liquor or suggested that her husband rather than she was the owner. A reasonable person was thus entitled to suspect, as WO Hurst did, that the substantial quantity of unconsumed liquor at the premises together with the large number of empty beer bottles was indicative of a course of dealing in liquor rather than a party or other innocent explanation and that the version that the beer belonged to the respondent's husband was untrue. A reasonable person was entitled equally to consider untrue the version advanced by the respondent at the trial that the respondent's husband, as was put by her counsel

> ... sometimes goes around and he buys beers for his friends, they consume them wherever they are and then they bring them back and they stack them there and he, at some stage goes and buys and fills them up again.

22 I may add that the version I have just quoted was not the only version given by the respondent at the trial. In evidence in chief she said that she had told Capt Abrahams that the empty beer bottles had been brought by her husband and his friends and the beer in them drunk

away from the premises, after which the empties were just left in her husband's car. These empty bottles were then stacked in the kitchen because he could not just leave them in his car.

23 The respondent also said in evidence in chief that she told Capt Abrahams that she had bought the sixteen full beers for her husband and that these sixteen beers were her beers. As her husband was a heavy drinker, sixteen 700 ml bottles of beer (quarts as they are sometimes called) was "soos niks vir hom te drink nie."

24 Counsel for the respondent pointed out in argument that WO Hurst must have appreciated that when he and the other officers raided the premises late that Friday evening, there was no evidence, other than the presence of the beer and the empties, that the premises were being used as a tavern or other drinking place. There were no persons present other than the respondent and her family and no money, indicative of takings for the sale of liquor, was found on the premises. The difficulty with this submission is that neither of these facts was put to WO Hurst and one can therefore not determine if indeed he suspected the respondent of operating a tavern. The offence of unlawfully dealing in alcohol of course does not require that the offender be doing so at a tavern and WO Hurst was not asked if he suspected the respondent of operating a tavern or the like.

25 In my view, therefore, the judge below erred in concluding that the suspicion which WO Hurst held was not a reasonable suspicion. I find it proved that it was. It follows that the arrest was therefore justified and that the appeal must succeed. In these circumstances it is unnecessary to consider the attack upon the quantum of the award of damages.

26 There are certain further matters I should mention. The first relates to the validity of the warrant of arrest on the strength of which WO Hurst entered and searched the premises. There are suggestions in the judgment of the court below that the warrant might be invalid. Properly formulated, I think what was meant was that there might have been grounds upon which the warrant might have been declared invalid. But that was no basis for a criticism of WO Hurst. A police officer, and indeed any person who is required by order of court to perform, or refrain from performing, any act may not ignore such a court order. WO Hurst's plain duty under the warrant was to execute it. And I may add, no steps were taken to set the warrant aside.

27 Counsel for the respondent submitted that even if the requisites for the valid exercise of a s 40(1)(h) discretion were found to be present, WO Hurst should be found to have exercised his discretion improperly, either because of some ulterior motive or because the

appellant should have been brought to court by some less drastic means or because she ought to have been admitted to bail during the weekend following her arrest or because conditions in the holding cells at the Groot Drakenstein were so disgusting that it was unconscionable that the respondent, or any person, could lawfully be detained there.

28 The difficulty in the way of acceptance of these submissions is that these additional, discrete causes of action were not pleaded. Nor was any notice that the appellant was at risk in relation to these additional causes of action, an essential precursor to any action under s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, given to the appellant. It was argued for the respondent that the matters in question were fully ventilated at the trial. But they were not. Counsel for the appellant objected to evidence relevant to these causes of action at the trial. The judge below acknowledged that the allegations did not form part of the respondent's cause of action but ruled that such evidence might be tendered as relevant to quantum. Because the appellant was correctly held at the trial not to be at risk in relation to these unpleaded causes of action, they cannot avail the respondent on appeal.

29 Costs in the court below and on appeal must follow the result. I propose the following order:

1 The late application by the appellant for a date for the hearing of this appeal is condoned. The appellant must pay the costs of the application for condonation.

2 The appeal is upheld with costs against the respondent.

3 The judgment of the court below is altered to read: There will be judgment for the defendant against the plaintiff. The plaintiff must pay the defendant's costs of suit.

NB Tuchten
Judge of the High Court
6 April ~~March~~ 2016

I agree. It is so ordered.

MW Msimeki
Judge of the High Court
6 April ~~March~~ 2016

I agree.

HJ De Vos
Judge of the High Court
30 March 2016

MinPolDysselA763.14