REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A198/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

24-03-2020 P. D. PHAHLANE

DATE SIGNATURE

In the matter between:

SAMUEL MOGALE **APPELLANT**

and

THE MINISTER OF POLICE **RESPONDENT**

JUDGMENT

PHAHLANE, AJ

[1] The appellant instituted a claim for damages based on unlawful arrest and detention and the respondent admitted that the appellant was arrested without a warrant and relied on the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA). The court *a quo* found that the arrest of the appellant without a warrant and his subsequent detention was lawful and his claim was dismissed with costs. This appeal is against the whole judgment granted by the Learned Magistrate on the 29th of March 2019.

[2] The appellant was arrested and detained on 12th October 2014 by members of the South African Police Services ("SAPS"). It was alleged that the appellant paid with a counterfeit R100 note at Barbens nightclub after the bartender had placed it under the validating machine. When the appellant was informed by the bartender that the money was fake, he opted to pay with another note and did not say anything. Upon his arrest, he explained that he did not know that the money was fake as he received it from his friends. The arresting officer did not see the validating machine the bartender used to check the money with, and neither did he see the alleged counterfeit R100 note before arresting the appellant. It is common cause that no criminal proceedings were instituted against the appellant as the complainant withdrew the charges and made a statement to that effect, and as such, no investigations were done by the investigating officer.

[3] In its judgment, the court *a quo* held that: "the complainants (ie. the bartender and the owner of the nightclub) believed the money to be fake and they had "some sort of expertise with regards to identifying counterfeit money[1] and that the appellant did not challenge that". She further held that: "the fact that a complaint was laid, is not necessarily a reasonable ground for arrest, but the arresting officer had a duty to investigate the matter before effecting arrest[2]".

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[1] Para 85
[2] Page 175 para 82

[4] The court *a quo* also referred to Standing Order G431 relating to arrest. The respondent argued that the arrest was justified in terms of section 40(1)(b) of the CPA. This section provides for an arrest by a peace officer without a warrant of any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act. The respondent having admitted that the arrest and detention of the appellant was without a warrant of arrest, had the onus to prove that the arrest and detention was lawful[3].

[5] The right to freedom and security is enshrined in section 12(1) of the Constitution and any arrest and detention of a person amounts to prima facie infringement of these rights[4]. When a statute provides that a public power may be invoked and deprive a person of his right of liberty, our law demands that those who exercise public power subscribe to a culture of justification[5].

[6] In ***Duncan v Minister of Law and Order***[6] it was held that there are four jurisdictional pre-requisites to be established before an arrest is determined to be in accordance with the section. These are the following:

(i) The arrestor must be a peace officer.

(ii) The arrestor must entertain a suspicion.

(iii) The suspicion must be that the suspect (the arrestee) committed an offence

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[3] Minister of Safety and Security & another v Marius Schuster & another (114/2018) [2018] ZASCA 112 (13 September 2018) at para 11 stated that: "The Constitutional Court's judgment in Zealand v Minister for Justice and Constitutional Development & another [2008] ZACC 3; 2008 (4) SA 458; 2008 (6) BCLR 601; 2008 (2) SACR 1 (CC) para 24, affirms that the onus naturally rests on the Minister to justify an arrested person's loss of liberty". See also Minister of Safety and Security v Slabbert [2010]2 All SA 474 (SCA) at para 20

[4] See, for example, Ingram v Minister of Justice 1962 (3) SA 225 (WLD) at 227; [1962] 3 All SA 76 (W) at 79; Shoba v Minister van Justisie 1982 (2) SA 554 (C) at 559; [1982] (4) All SA 153 (C) at 155; Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589; [1986] 2 All SA 428 (A) at 443; During NO v Boesak and Another 1990 (3) SA 661 (A) at 673-4; [1990] 2 All SA 347 (A) at 355; Masawi v Chabata and Another 1991 (4) SA 764 (ZH) at 771-2; [1991] 4 All SA 544 (ZH) at 550; Minister of Justice v Hofmeyr 1993 (3) SA 131 (A) at 153; [1993] 2 All SA 232 (A) at 244; Moses v Minister of Law and Order 1995 (2) SA 518 (C) at 520; [1995] 3 All SA 98 (C) at 98; and Bentley and Another v McPherson 1999 (3) SA 854 (E) at 857; [1999] 2 All SA 89 (EC) at 91.

[5] Prinsloo v. Van der Linde & Another 1997 (3) SA 1012 (CC) at paragraph 25 quoted by Tuchten J in an unreported Full Bench Judgement of this Division in the Minister of Police & Another v. Morgan Gombakomba & Another Case No. A945/14 dated 5 April 2016 at 21

[6] 1986 (2) SA 805 (A) at 818

referred to in Schedule 1; and

(iv) The suspicion must rest on reasonable grounds.

[7] Advocate Zietzman argued that the appellant was arrested on hearsay information received from the bartender without any further investigations and that there was no onus upon the appellant to challenge the existence of the machine and the results of the machine's findings. He insisted that the arresting officer did not form a reasonable suspicion that the offence of fraud had been committed by the appellant because he did not investigate or observe the alleged R100 note and the alleged validating machine. He further argued and submitted that the court *a quo* should have found that the arrest and detention of the appellant was unlawful, more particularly because neither the machine nor anyone who operated the machine came before the court *a quo*.

[8] The respondent on the other hand argued that the court correctly held that the police who arrested the appellant formed a reasonable suspicion based on the information he received from the bartender. It was further argued that the police had an independent reasonable suspicion that an offence has been committed, after being informed by the complainant that the appellant had attempted to purchase drinks using counterfeit note. Counsel insisted that the appellant failed to give an exculpatory explanation and that in the absence thereof, the complainant's words had to be believed and that it was not necessary that there should be certainty that the offence had been committed.

[9] The test whether the police officer has a reasonable suspicion is an objective one[7]. During the trial proceedings at the court a quo, when asked what he understands about a reasonable suspicion, the arresting officer, Sergeant Tsheletshele testified that after receiving information from the complainant that he had checked the money and confirmed it to be fake, he then 'formed a suspicion that the appellant committed the offence when he bought with the money that was not real'. Under cross-examination, the following questions were asked[8]:

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[7] Woji Minister of Police [2015]1 All SA 68 (SCA) at para 8

[8] At page 52 and 53

Question: "So effectively what you are telling this court is that the complainant formed a suspicion that the suspect was committing an offence. It wasn't you that formed the suspicion it was the complainant?"

Answer: "Yes. Because the complainant also said he checked the money with the machine, and I don't have any knowledge of that machine that checks money".

Question: "Did you have a look at that machine? What does it look like?"

Answer: "I did not even see the machine"

Question: "Then for what reason did you just have to believe him, everything he told you?"

Answer: "Because the complainant cannot just pick up his phone and phone the control telling him lies about the incident".

Question: "You have testified moments ago, and I put it clearly to you that you arrested the suspect because of the suspicion that the complainant had. You confirmed it wasn't your suspicion?"

Answer: "Yes".

Question: "All right so you did not yourself harvest a suspicion? You just acted on the information of the complainant?"

Answer: "Yes".

[10] In ***De Klerk v Minister of Police*** **(329/17) [2018] ZASCA 45 (28 March 2018)** at para 11, the court stated that:

> *"What is clear is that the arresting officer relied on the statement by the complainant and the J88 only, when she made the decision to arrest. Clearly, seen objectively, that was insufficient".*

[11] I therefore do not agree with the respondent's submission that Sergeant Tsheletshele had an independent reasonable suspicion that an offence has been committed because he confirmed under cross-examination that he did not form or harvest a suspicion that the appellant had committed an offence, but rather that such a suspicion was formulated by the complainant. It was not sufficient for Sergeant Tsheletshele to form the reasonable suspicion on the basis of the complainant's statement alone.

[12] It was also immaterial whether the appellant opted to pay with another note or whether he disputed buying with a counterfeit note. What was required of the police before effecting arrest was to exercise a discretion based on reasonable and objective grounds after checking whether the information at his disposal would justify an arrest. I am of the view that Sergeant Tsheletshele did not apply his mind properly before effecting arrest. His actions fall short of the exercise of a discretion based on reasonable and objective grounds.

[13] In ***Mabona & Another v Minister of Law and Order and Others***[9] *Jones J said the following:*

> *".....The reasonable man will analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest".*

[14] In ***Gellman v Minister of Safety and Security***[10] the court stated that:

> *"While considering whether there are reasonable grounds to suspect the person to be arrested has committed an offence in Schedule 1, a policeman should analyse the evidence at his disposal critically. More often than not it would not suffice to form the required reasonable suspicion on the basis of a witness' statement alone. It is advisable to find evidence that corroborates such a statement".*

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[9] 1988 (2) SA 654 (SE) at 658 D
[10] 2008 (1) SACR 446 (W) at 97.2-3

[15] As stated above, the court *a quo* referred to Standing Order (G) 431, which provides that: "there are various methods by which an accused's attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should regard it as a last resort". In my view, Sergeant Tsheletshele had a duty to first investigate, by verifying the existence of the R100 note and the validating machine, in order to apply his mind to the information given to him.

[16] In determining whether to effect an arrest, the arresting officer should carefully consider the standing orders which provides for the exception to the rule relating to arrest. Where he exercises a discretion in violation of standing orders, that may in itself be an indication that the discretion was not properly exercised and that the warrantless arrest was unlawful. Under the circumstances, I find that the arrest and detention by Sergeant Tsheletshele were unlawful.

[17] The court having said or pronounced that "the fact that a complaint was laid, is not necessarily a reasonable ground for arrest but that the arresting officer had a duty to investigate the matter before effecting arrest", should have found in favor of the appellant.

[18] Having regard to the above, I find that the respondent failed to prove that (1) the arrest and detention of the appellant was lawful; (2) that a reasonable suspicion existed that appellant committed a schedule 1 offence; and (3) that the suspicion rested on reasonable grounds.

[19] Turning to the issue of quantum, though the court *a quo* was called upon to deal with both merits and quantum, the issue of quantum was not addressed during the appeal proceedings, but rather in the heads of argument by counsel for the appellant. The respondent did not address this issue both in court and in its heads of argument. It

appears in the Particulars of Claim that the amount claimed for damages suffered as a result of the unlawful arrest and detention is R60 000,00. It is trite that in assessing the amount to be awarded, the facts of the case must be looked at as a whole. The total period of incarceration of the appellant was 33 hours.

[20] In assessing quantum to be awarded to the plaintiff, the court in ***Minister of Safety and Security v Tyulu***[11] stated that:

> *"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safely and Security v Seymour 2006 (6) SA 320 (SCA) at 325 para 17; Rudolph and Others v Minister of Safety and Security and Another 2009 (5) SA 94 (SCA) ([2009] ZASCA 39) paras 26-29)."*

[11] 2009 (5) SA 85 (SCA), at para 26

[21] In ***Sithole v Min of Police & NDPP***[12] Mali J said the following:

> *"When determining the quantum of damages to be awarded for unlawful deprivation of liberty, courts are essentially being asked to balance the interests of the litigant and those of the public purse. There is nothing unusual in courts playing this role. What is notable, however, in my opinion, is that courts often lean heavily in favour of protecting the public purse and thereby fail to pay sufficient attention to the constitutional rights of the litigant before court. This would seem to emanate from the obiter dictum of Holmes J in* ***Pitt v Economic Insurance Co. Ltd 1957 (3) SA 284 (D) at 287E-F,*** *where the judge, in relation to the assessment of damages, opined: "I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour our largesse from the horn of plenty at the defendant's expense".*

[22] In ***Minister of Safety and Security v Seymour***[13], the Court said:

> *"Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection."*

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[12] Unreported Case 63897/2011 at paragraph 24
[13] 2007 (1) ALL SA 558 (SCA) at para 20

[23] In ***Rahim and 14 others v The Minister of Home Affairs***[14] it was held that:

> *"[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court ex aequo et bono. Inter alia the following factors are relevant:*
>
> *27.1 circumstances under which the deprivation of liberty took place.*
>
> *27.2 the conduct of the defendants; and*
>
> *27.3 the nature and duration of the deprivation".*

[24] In ***Olgar v The Minister of Safety and Security***[15] the court stated that:

> *"In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the "horn of the plenty", at the expense of the defendant.'*

[25] In *casu* the appellant was arrested at a Club in full view of the public. The appellant was transported to the police station in the back of a police van, which is in itself

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[14] 2015 (7K6) QOD 191 (SCA), at para 27
[15] 2008 JDRJ 582 (E) at para 16

embarrassing and has an impact on one's dignity and inherent self-worth. At the police station the appellant was searched, told to remove his shoelaces and thereafter he was put in a holding cell.

[26] The appellant's mother visited him at the police cells, which no doubt caused him further embarrassment and shame. The appellant was kept in a cell with 20 to 30 other suspects. He testified that the cell was too small to accommodate the number of people and he had to sleep next to the toilet in the cell. The appellant testified that he was terrified.

[27] The appellant was 25 years at the time and an electrical apprentice. He had to write a mathematical test on the Monday, which he missed due to his unlawful arrest and detention. The appellant testified that due to his inability to write the test, he forfeited a whole year of his studies.

[28] In the view of circumstances *supra*, I am satisfied that an award of R 60 000, 00 will be fair and reasonable.

ORDER

In the circumstance, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and substituted with the following order:
   "The defendant is ordered to pay the plaintiff:
   1. The amount of R 60 000, 00.
   2. Interest on the aforesaid amount at a rate of 10,5% per annum from date of service of summons to date of payment.
   3. Costs of the action".

P.D. PHAHLANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Appellant	: ADV. C ZIETSMAN
Instructed by	: JAN ELLIS ATTORNEYS
	BROOKLYN, PRETORIA
For the Respondent	: ADV TAKALANI MASEVHE (Ms)
Instructed by	: THE STATE ATTORNEY
	PRETORIA
Date Heard	: 19 February 2020
Judgment Delivered	: 24 March 2020