IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CA299/2019

HEARD ON: 28/08/2020

DELIVERED: 15/09/2020

In the matter between:

MINISTER OF POLICE **APPELLANT**

and

SINOVIA CLAASEN **RESPONDENT**

JUDGMENT

MTSHABE AJ:

INTRODUCTION:

[1] This is an appeal against the judgment and order granted in favour of the Respondent by the Magistrate sitting in the Regional Court, Port Elizabeth. The Respondent instituted an action against the Appellant for

payment of damages in the sum of R300 000-00, together with costs against the Appellant for alleged unlawful arrest and detention. The arrest and detention of the Respondent were not in dispute, resulting in the Appellant bearing the onus to prove lawfulness which attracted the duty at the trial to begin with the leading of evidence. It is common cause that the Respondent was detained for 38 hours. The arrest and detention took place from 18 May 2013 to 20 May 2013.

[2] The grounds of Appeal are set out in the **Notice of appeal** as follows:

"The Honourable Magistrate erred in that:

2.1 She misdirected herself in finding that the jurisdictional requirements for the finding of a lawful arrest without a warrant as provided in section 40(1)(a) of the Criminal Procedure Act No. 51 of 1977 have not been satisfied.

2.2 The Learned Magistrate incorrectly rejected the arresting officer's version that the Respondent told him that the dagga that was found was her dagga.

2.3 The learned Magistrate should have found that the jurisdictional requirements for an arrest in terms of section 40(1)(a) of the CPA were present and dismissed the Respondent's claim.

2.4 In the event that the Appeal Court finds in favour of the Respondent on the merits of the claim, the Appellant contends that the award for damages in the amount of R150 000-00 in respect of arrest and detention for about 2 days is grossly excessive and the Learned Magistrate failed to take into account that the primary purpose of the assessment of the damages for the unlawful arrest and detention is not to enrich the aggrieved party but to offer him or her so much needed solatium for his/or her injured feelings. Given the social background of the Respondent, the award for damages to the Respondent has the effect of enriching the Respondent and does not only offer her so much needed solatium for her injured feelings.

2.5 The learned Magistrate misdirected herself by finding that the Respondent was justified in securing the services of Counsel to represent her and awarding the Respondent Counsel fee at two (2) times the

Regional Court tariff. The case was not at all complicated which justified the appointment of Counsel and the matter was simple enough to justify it being conducted by an attorney.

2.6 The Learned Magistrate misdirected herself by awarding interest from the date of demand and should have awarded interest from the date of judgment."

3. **THE FACTS: THE RESPONDENT'S ARREST AND DETENTION**

3.1 The Respondent was arrested on 18th May 2013 by Sergeant Mbasa (Mbasa), who at the time was in company of a female officer namely; Constable Williams. In the main the reason for the arrest of the Respondent was that she was found in possession of dagga. According to the evidence of Sergeant Mbasa she informed him that the dagga he alleged he found inside the house belongs to her. He then informed the Plaintiff that he was arresting her. She was then transported to the Police Station. Whilst at the Police Station an informer contacted Mbasa telephonically and communicated to him that the Respondent said that the dagga belonged to her in order to protect the "rightful" owner of the

dagga, her boyfriend, because the latter was on parole. Sergeant Mbasa arrested her because she confirmed that the dagga belonged to her.

[4] The Respondent testified that the police who entered the house in which she was never asked for permission to search the house. They just started searching the house. According to the respondent, the plastic bag which turned out to contain dagga was brought by Mbasa's colleagues from outside. According to her, the police never asked who the owner of the house was. She stated that she was a visitor at the said house and did not stay there. Her sister stays in the house. She denied that she informed Sergeant Mbasa that the dagga belonged to her. She also denied that she was covering for her boyfriend who was out on parole. She informed the court that at the time of her arrest her 5 year old child was crying for her.

[5] During cross examination Sergeant Mbasa contradicted himself in many respects. At one stage he stated that he did not recall the incident pertaining to the arrest, however a commencement of the cross examination he stated unequivocally that he remembered the particular

incident very well despite his bold statement, Sergeant Mbasa quickly resorted to:

"I can't remember" When asked about the details of what happened that day.

[6] Sergeant Mbasa was unable to say where he found the dagga and when it was put to him that the Police who came from the back of the house, brought in the dagga to the house, Sergeant Mbasa stated:

"I don't know" His evidence was inconsistent he seemed to have a selective memory. He was unable to recall whether his partner, Constable Williams did speak to anyone present in the house and he stated:

"I never saw her talking to a lady there" yet under cross examination Sergeant Mbasa contradicted himself by confirming that the respondent did in fact have a chat with Ms Williams, because she had to take some clothing in preparation for her arrest.

[7] Sergeant Mbasa was unable to establish that the respondent's right were explained to her immediately after the arrest. The respondent testified that no constitutional rights were explained to her by Sergeant Mbasa immediately after the arrest.

[8] I must also mention that during the trail in the court *a quo,* Constable Williams was never called in order to collaborate the evidence of Sergeant Mbasa. Furthermore the matter in the court *a quo* was at some stage postponed so that the said Constable Williams could be available in court in order to testify. Despite that she was never called.

[9] I agree with Mr Wessels who appeared on behalf of the Respondent that the failure to call a material witness e.g. Constable Williams justified an adverse inference to be drawn to the effect that the evidence of Constable Williams could not have been favourable to the Appellant's case.

[10] The authorities concerning the failure by a litigant to call an available witness are clear. ***In Durban City Council v SA Board Mills Ltd 1961(3) S 397(AD) 405 E-G***, the court quoting from the case of **Sampson v Pim 1918 AD 657** stated the following:

"The inference is irresistible that his evidence would not have supported the Plaintiff's case. It might of cause have been negative, as he may not have been keeping a look-out and so may not have been able to assist

the court one way or the other. But if he could have given evidence favourable to the Plaintiff it is inconceivable that he should not have been called".

[11] Furthermore, in the matter of ***Munster Estates Pty (Ltd) v Killarney Hills (Pty) Ltd 1979(1) SA 621(AD),*** the court made reference to the well-known case of ***Elgin Fireclays Ltd v Webb 1947(4) SA 744(A)*** in which Watermeyer JA stated at 749-750 the following:

" {a] It is true that if a party fails to call the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him. But the inference only proper one if the evidence is available and if it would elucidate the facts.

[12] The issues to be considered on this appeal are the following:

[12.1] The lawfulness of the arrest:

[12.2] The lawfulness of the detention;

[12.3] In the event that the arrest and /or detention being found to be unlawful, then the quantum;

[12.4] The date from which interest should run; and

[12.5] Whether the respondent was justified in securing the services of Counsel to represent her and for the Magistrate to have awarded Counsel's fee at two times the Regional tariff, are to be considered.

DISCUSSION: LEGAL PRINCIPLES APPLICABLE

[13] It is trite that the deprivation a person's liberty through an arrest and detention by the Police is *prima facie* unlawful. In ***Minister of Justice v Hofmeyr 1993 (3) SA 131(A) 153 D-E***, the then Appellant Division, Hoexter JA held:

"The plain and fundamental rule is that every individual's person is in violable. In actions for damages for wrongful arrest or imprisonment our Courts adopted the rule that such infractions are prima facie illegal".

[14] In an action for wrongful arrest and detention, the Plaintiff need only prove the arrest and detention. In the case before us it is common cause that the Respondent did prove arrest and detention and that was not

denied. In the case of ***Reliant Trading (Pty) Ltd v Showe and another [2007] 1 ALLSA 375(SCA)*** the Supreme Court of Appeal stated the following:

"To succeed in an action based on wrongful arrest the Plaintiff must show that the Defendant himself, or someone acting as his agent or employee deprived in of his liberty. In the case of ***Minister of Justice v Hofmeyr(supra)*** *the court further held:*

"Once the arrest or imprisonment has been admitted…It is for the Defendant to allege and prove the existence of grounds in justifying the infraction". This pronouncement was also made in the case of ***Minister of Law and Order & others v Hurley & another 1986(3) SA 568(A)*** where the court stated the following: *"An arrest constitutes an interference with the liberty of the individual concerned and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law".*

[15] Furthermore, in a recent judgment of this division, per Mbenenge JP and Bloem J in Van Rooyen v Minister of Police (CA 322/2018(2020) ZAECGHC 44 (26 March 2020) the following was stated:

*"The onus of justifying the detention rested on the respondent, (*the Minister of Police)*".* It follows therefore that if the arrest was unlawful the detention until the first appearance in court would be unlawful. See: ***Minister of Safety and Security v Tyokwana 2015(1) SACR 597(SCA)***.

[16] Furthermore, I must mention that it is now settled that the purpose of arrest is to bring the arrestee before the court, for the court to determine whether the arrestee ought to be detained further for example pending further investigations or trial. See: the matter of ***Minister of Safety & Security v Sekhoto & another 2011(5) SA 367(SCA)***. An arrest will accordingly be irrational and consequently unlawful if the arrestor exercises his discretion of arrest for the purpose not contemplated by the law.

[17] The court *aquo*, relying upon section 40(1)(a) of the Criminal Procedure Act stated as follows:

"It grants a peace officer the authority to arrest without a warrant a person who commits or attempts to commit a crime in his presence. The mere intention to commit a crime or actions which although suspicious

do not amount to such an attempt are not sufficient for an arrest in terms of section 40(1)(a) of the Criminal Procedure Act.".

[18] The jurisdictional factors necessary for an arrest under section 40(1)(a) of the Criminal Procedure Act are the following:

(i) The arrester must be a peace officer;

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

(iii) The offence or the attempted offence must be committed in his or her presence.

[19] It is trite that where an arrest without a warrant is admitted, the onus rests upon the defendant to allege and prove facts which provide legal justification for the arrest. The second requirement of section 40(1) (a), is whether the respondent committed the offence of "**being in possession of dagga",** requires the existence of a particular factual situation before the peace officer's power to arrest without a warrant can come into an existence. In this matter Sergeant Mbasa clearly did not recall the incident pertaining to the arrest of the Respondent. When

he was asked under cross examination how well he remembers the matter, he stated:

"I still remember what transpired. I cannot forget". Later though he stated that he could not remember the person that entered the house whether it was himself and his partner. He could not recall a number of other details, namely – where exactly the dagga was found inside the house. How many rooms the house had. How many police officers entered the house. He could not recall if he testified against the respondent during the criminal trial. She could not recall whether in addition to female Constable Williams Constable Ferreira was there. He could not recall if a lady by the name of Roseline who is said to have been the owner of the house was there. Yet in an additional statement he submitted he indicated that apart from the respondent and her boyfriend there was another lady.

[20] It is common cause that the dagga was not fond on the person of the respondent. The respondent denied that she admitted possession of dagga. The dagga was also not found in her boyfriend's possession and so it does not make sense that she would take the rap for him. Respondent's evidence was to the effect that the plastic bag was

brought to the house by the police after the men who were in the house with the Respondent, her boyfriend and sister ran out when the police were trying to open the front door – they fled through the back door.

[21] The court *aquo* correctly found that the jurisdictional requirements for the finding of lawful arrest without a warrant as provided in section 40(1)(a) Criminal Procedure Act have not been satisfied by the Appellant.

[22] The court's powers to interfere with the findings of fact of a trial court are limited. This Court can only interfere, if it finds that the trial Court misdirected itself. I cannot find any misdirection.

QUANTUM OF DAMAGES

[23] The unlawful arrest and detention constitute a violation of the respondent's right to dignity, liberty and freedom. In addition, the respondent suffered a humiliation of spending the night in the cells. A cell which, moreover according to her, was dirty with a toilet that was not in working order.

[24] In ***Thandani v Minister of Law & Order 1991(1) SA 702(E) at 707 B***, the court stated the following:

"In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious in road into the freedom and rights of an individual."

[25] In the case of ***Minister of Safety and Security v Tyhulu 2009(2) SA 282 SCA at para 26***, the court stated the following:

"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 part 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 any arbitrary deprivation of

personal liberty is viewed in our law. I readily concede that it is impossible to determine and award for damages of this kind of injuria with any kind of any mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach is slavishly followed can be treacherous. The correct approach is to have regard to all the factors of the particular case and to determine quantum of damages on such facts. See also: **Rudolph & others v Minister of Safety & security 2009(5) SA 94 SCA.***"*

[26] The court *a quo* correctly considered the awards that were made in previously decided cases, and correctly awarded the respondent an amount of R150 000-00 for damages in respect of unlawful arrest and detention.

[27] During the hearing of this matter Mr Petersen who appeared on behalf of the Appellant correctly conceded that respondent was correct in appointing Counsel. He also conceded that the award for costs for award on a party scale not exceeding two times the Regional court tariff were correct. What he was not comfortable with was the rate of interest. The

court *a quo* in awarding the rate of interest referred to section 2 A of the Prescribed rate of Interest Act 55 of 1975 which reads as follows:

"(1) Subject to the provisions of this section the amount of every liquidated debt as determined by the court of law…shall bear interest as contemplated in section 1.

(2) (a) subject to any other agreement between the parties and the provisions of the National Credit Act 2005 the interest contemplated in subs(1) shall run from the date on which payment of the debt is claimed by the service on the debtor or a demand or summons which ever date is earlier.

(3) …

(4) …

"5" Notwithstanding the provisions of this Act but subject to any other law or agreement between the parties, a court of law …may make such an order as it appears just in respect of the payment of the

interest on an unliquidated debt, the rate of which interest shall run."

[28] I am of the view that the court *aquo* did not misdirect itself in so far as the rate of interest and the date from which such interest must be paid. There is no misdirection by the court that the interest is to run from the date of demand as claimed by the Plaintiff, that is, from the date of demand at the prescribed rate of interest of 15.5% to the date of payment.

CONCLUSION

[29] It is trite law that a court of appeal for obvious reasons does not lightly interfere with the findings of the trial court. The principles which should guide a Court of Appeal in an appeal purely upon facts were conveniently summarized by Davis AJA as he then was in the case of ***R v Dhlumayo & Another 1948 (2) SA 677(AD) at 705-706***, as follows:

"(1) An Appellant is entitled as of right to a rehearing, but with limitation imposed by these principles; this right is a matter of law and must not be made illusory.

(2) Those principles are in the main matters of common sense, flexible and such as not to temper with the appellate court in doing justice in the particular case before it.

(3) The trial Judge has advantages - which the appellate court cannot have- in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanor, but also their appearance and whole personality. This should never be overlooked.

(4) Consequently, the appellate court is very reluctant to upset the findings of the trial Judge.

(5) The mere fact that the trial Judge has not commented on the demeanor of the witnesses can hardly ever place the appeal court in as good a position as he was.

(6) Even in drawing inferences the trial Judge may be in a better position that the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed the trial.

(7) Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him;

(8) Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

(9) In such a case, if the appellate court is merely left in doubt as to the correctness as of the conclusion, then it will uphold it.

(10) There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

(11) The appellate court is then at large to disregard his findings on fact, and even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case and to come to its own conclusion on the matter.

(12) An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all- embracing, and it

does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

(13) Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a Civil or Criminal case.

(14) Subject to the difference, as to onus, the same general principles will guide and appellate court both in civil and criminal cases.

(15) In order to succeed, the appellant has not to satisfy an appellate court that there has been "some miscarriage of justice or violation of some principle of law or procedure".

(16) The English practice in regard to "concurrent findings of fact by two courts" has no application in South Africa."

[30] It was stated in ***S v Monyane & others 2008(1) SACR 543 SCA*** that:

"This courts' powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

[31] In my view, the reading of the Magistrate's Judgment and order does not reveal any misdirection that would justify interference by this court.

[32] Furthermore in the case of ***Minister of Police v Dlwathi (20604/14) [2016] ZASCA 6, (2 March 2016) paragraph 8*** the court stated, *"It is well established that an assessment of an appropriate award for general damages (sometimes also referred to as non-pecuniary damages) is a discretionary matter and has its objective to fairly and adequately compensate the injured party. See: Protea Assurance CO. Ltd v Lamb 1971(1) SA 530(A) @ 534 H-535A and Road Accident Fund v Marunga 2003(5) SA 164 (SCA).*

An appellate court will interfere with an award for general damages in instances of a striking disparity between what the trial court awarded and what the appellate court considers ought to have been awarded. It will also interfere where there has been an irregularity or misdirection. A misdirection might sometimes appear from the court's reasoning and other instances it might be inferred from a grossly excessive award."

[33] I am of the view that the award is not so disproportionate that the appeal court can infer that the discretion accorded to the trial court was not properly exercised. It is my opinion that there is nothing on the record to suggest that the Magistrate exercised her discretion capriciously or that there was any misdirection in her judgment in respect of the determination of the quantum. The Magistrate correctly analyzed the evidence before her and correctly awarded the fair and reasonable amount in the circumstances, guided by authorities cited in her judgment.

[34] As I have indicated above I have not found any misdirection in the judgment of the Magistrate.

[35] Accordingly, the appeal is dismissed with costs.

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N.R. MTSHABE

ACTING JUDGE OF THE HIGH COURT

EASTERN CAPE DIVISION

I agree.

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N.G. BESHE

JUDGE OF THE HIGH COURT

EASTERN CAPE DIVISION

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