IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 7944/2010

In the matter between:-

PERINBAM BEKKER PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY FIRST DEFENDANT

CONSTABLE NONSIKELELO
PURITY MKHIZE SECOND DEFENDANT

JUDGMENT

ROWAN AJ

[1] This is an action for damages claimed by the Plaintiff in an amount of R1.1 million arising out of her alleged unlawful arrest at Pinetown Police Station in July 2009.

[2] During the initial stages of the trial, the issue of liability was separated from the issue of quantum in terms of an order made in terms of Rule 33(4).

[3] The outcome of this matter turns largely on an application of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) to the facts of this case.

[4] The judgment of *Minister of Safety & Security v Sekhoto & another* (Harms DP following *Duncan v Minister of Law and Order* and *Tsose v Minister of Justice*

with a degree of qualification)[1] has now set the ground rules. This case has made it clear that in considering the lawfulness or otherwise of an arrest made in terms of this section there are only four jurisdictional facts that need be satisfied before a discretion on whether to arrest or not arises, viz:

(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 Referred to in Schedule 1; and
(iv) The suspicion must rest on reasonable grounds.

[5] Any reference to a fifth jurisdictional fact first raised obiter by De Vos J in *Ralekwa v Minister of Safety and Security*[2] and followed by Bertelsmann J in the case of *Louw v Minister of Safety & Security*[3] has now been rejected. This is the so called "constitutional approach", that police are obliged to consider, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned.[4]

[6] In accordance with trite principles, as confirmed in *Sekhoto*:

[6.1] the onus of proving the four jurisdictional facts referred to above rests with the Defendants;[5]

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[1] Minister of Safety & Security v Sekhoto 2011 (1) SACR 315 (SCA); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G - H;*Tsose v Minister of Justice & others* 1951 (3) SA 10 (A).
[2] 2004 (1) SACR 131 (T).
[3] 2006 (2) SACR 178 (T).
[4] See: *Gellman v Minister of Safety and Security* 2008 (1) SACR 446 (W); *Oliver v Minister of Safety & Security* 2008 (2) SACR 387 (W) (2009 (3) SA 434); *Le Roux v Minister of Safety and Security and Another* 2009 (2) SACR 252 (KZP) (2009 (4) SA 491); *Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E); *Mvu v Minister of Safety and Security and Another* 2009 (2) SACR 291 (GSJ) (2009 (6) SA 82) and *Minister of Safety & Security v Sekhoto* 2010 (1) SACR 388 (FB). The only dissenting voice was Goldblatt J in *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W).
[5] *Sekhoto* para 7; *Minister of Law and Order & others v Hurley & another* 1986 (3) SA 568 (A) at 589E – F; *Zealand v Minister of Justice and Constitutional Development & another* 2008 (2) SACR 1 (CC) para 24 and 25; *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) para 19.

[6.2] once the required jurisdictional facts are present, the discretion whether or not to arrest would arise, which discretion peace officers are entitled to exercise as they see fit, provided they do so in good faith, rationally and not arbitrarily;[6]

[6.3] the onus of alleging and proving that such discretion was improperly exercised rests with the Plaintiff.[7]

[7] The following ancillary and interrelated issues arise in this matter.

[7.1] At the time of the Plaintiff's arrest in July 2009 the arresting officer (the Second Defendant, Constable Mkhize, hereinafter "Cst Mkhize") was aware that the Plaintiff had one or more previous convictions for a Schedule 1 offence. This brought the provisions of Schedule 5 and section 60(11)(b) of the CPA into play in terms of which an accused faces an onus of satisfying a court that the interests of justice permit his or her release on bail.

[7.2] A "*Nolle Prosequi"* entry was made at a particular stage by the Prosecutor on the docket. Its implications and whether this put an end to the prosecution requires consideration. Whether Cst Mkhize would have held the necessary reasonable suspicion against this backdrop and/or whether in this context she properly exercised her discretion, also require consideration.

[7.3] There was a delay in taking the Plaintiff to court, necessitating an urgent application to be made before the High Court compelling Cst Mkhize to do so. This reflects on whether the decision to arrest and detention was made in good faith and/or whether the delay was unreasonable and caused the detention to become unlawful.

[7.4] Cst Mkhize gave a variety of reasons as to why she arrested the Plaintiff. These need to be considered both individually and collectively, and in context

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[6] *Sekhoto* para 38; *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 23.
[7] *Sekhoto* para 46; *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G – 884B; *Duncan* at 819B – D); *Minister of Law and Order and Another v Dempsey* 1988 (3) SA 19 (A) at 37B – 39F.

to determine whether the arrest was lawful and/or whether the discretion was exercised properly.

A brief chronology of the background facts

[8] In about 2006 the Plaintiff commenced working for the complainant Mr Vishnu Chetty in his Estate Agency business.

[9] On 12 March 2007 a criminal case was instituted against the Plaintiff. The Plaintiff is alleged to have defrauded the complainant apparently by way of maladministration of cheques and making payments to entities serving her own benefit.

[10] During 2007 and 2008 protracted investigations into allegations against the Plaintiff were carried out by members of the First Defendant.

[11] On 6 February 2009 the front page of the docket was inscribed under the printed words "*Date of conviction/Finding*" and *"Finding/Result of Trial"* by a prosecutor *"Nolle Prosequi - complainant is not interested as per A9. Until she/he shows some interest.*"

[12] On 9 February 2009 the Prosecutor apparently signed the docket beneath the above-mentioned inscription.

[13] On 8 February 2009, the day before this signature, a statement was apparently filed by the then investigating officer, Inspector Moodley, as A9, to the effect that the complainant was no longer interested in the matter.

[14] However, on 17 February 2009 the complainant called at the police station in regard to the Prosecutor's decision, a matter about which he was apparently unhappy.

[15] On 20 June 2009, after the investigation into the matter had continued despite the *"Nolle Prosequi"*, and, dragged on yet again until this date when it was referred by a Captain to Cst Mkhize for further investigation.

[16] On 30 June 2009 the Plaintiff's father, a Captain in the South African Police, Captain Rajoo, contacted the newly appointed investigating officer, Cst Mkhize to point out to her that the case was withdrawn.

[17] On 15 July 2009, at the telephonic request of Cst Mkhize, the Plaintiff, who was then working in Johannesburg, flew to Durban in order to be interviewed by Cst Mkhize.

[18] The interview took place during the course of the morning at the Pinetown Police Station during which time the Plaintiff declined to make a statement. She was thereafter arrested and booked into the police cells.

[19] During the course of the afternoon she was taken to the Chatsmed Hospital complaining of feeling ill. The Plaintiff was two to three months pregnant at the time.

[20] On Thursday 16 July 2009, the Plaintiff was taken before court late in the afternoon for a bail application in consequence of a High Court Order following an urgent application that had been launched in the Durban High Court. It was recorded that Cst Mkhize would oppose bail; one of the various reasons given therefor being that the Plaintiff had previous convictions for fraud.

[21] Although the Plaintiff appeared before the Magistrate late that afternoon, the bail application could not be heard on that day and it was agreed that the Plaintiff would be detained in hospital for the night and appear in the Magistrates Court the following day.

[22] That following morning, Friday 17 July 2009, following a bail hearing at which Cst Mkhize testified, bail was eventually granted, consensually as between the prosecution and the defence counsel subject to certain conditions.

[23] The Plaintiff apparently lost her baby on 17 July 2009 allegedly in consequence of the trauma and stress of her arrest and detention.

[24] Summons for the allegedly unlawful arrest was issued on behalf of the Plaintiff during July 2010. The Defendants filed their plea in September 2010.

[25] In the meantime the criminal case continued to be investigated and was referred to the forensic science institution in Pretoria. Again the matter dragged until some four years later. On 24 July 2013 a reference to the issue of a summons is contained in the investigation diary.

[26] However, it is common cause that the Plaintiff has not as yet been formally called upon to plead before a court of law in respect of the crimes of fraud which have been alleged against her.

Issues Raised and Onus

[27] As will become evident from what follows there are various issues that arose in the unfolding of this matter. Certain issues arise from the pleadings; others were raised during the course of the evidence and yet others in argument. Some are interrelated. None of the parties was ambushed by what only arose only in evidence and argument and all of these various issues require consideration.

[28] In the Particulars of Claim a considerable amount of evidence and factual allegations were pleaded sketching the background to the Plaintiff's arrest. This lead to the following allegations being made in the concluding paragraphs:

[28.1] that the "*Plaintiff's arrest and detention by the Second Defendant was effected due to the fact that she (Plaintiff) elected to remain silent" (*para 21);

[28.2] that the *"arrest of the plaintiff was wrongful and unlawful* (with no mention of the "detention") *and was effected for the sole purpose of punishing the plaintiff*" (para 22);

[28.3] that "*The arrest and detention of the plaintiff was malicious* (para 23)."

[29] Based on the trite principles mentioned above, the onus in respect of the issues raised by these allegations is as follows:

[29.1] the onus of proving that she was arrested due to her election to remain silent (para [28.1] above), an improper motive, rests with the Plaintiff;

[29.2] the onus in proving the four jurisdictional facts relating to the lawfulness of the arrest of the Plaintiff (para [28.2] above), rests with the Defendant;

[29.3] the onus in proving whether the sole purpose for effecting the arrest was for purposes of punishing the Plaintiff (para [28.2] above), raising an improper motive, rests with the Plaintiff;

[29.4] the onus regarding the arrest and detention being malicious (paragraph [28.3]), an improper motive, rests with the Plaintiff.

[30] This alleged improper motive element is inextricably interwoven with an element which requires very close and careful consideration, viz whether the discretion to arrest was properly appreciated by Cst Mkhize and if so, whether it was properly exercised and/or made bona fide.

[31] Not pleaded but keenly pursued in evidence and strongly relied upon by counsel for the Plaintiff in argument was the fact that the words *"Nolle Prosequi"* were entered on the face of the docket by a Prosecutor. This, it was contended, was a reason why the Cst Mkhize was not entitled to arrest the Plaintiff for purposes of re-instituting charges against her. The Plaintiff would bear the onus of proving that this proved to be an insuperable barrier to her being lawfully arrested and/or that it reflects on the propriety of how Cst Mkhize exercised her discretion.

[32] The Defendants' initial plea contained nothing more than a bare denial. However, as already stated above, it is trite that in an action for unlawful arrest the Defendant bares the onus of proving the lawfulness of the arrest. In an amended

plea filed thereafter, the Defendants introduced the provisions of section 40(1)(b) of the CPA as a basis for justifying the arrest.

A summary of the evidence

[33] It has oft been stated that the lawfulness or otherwise of an arrest is strongly dependent on the facts of each particular case.

[34] Sachs J in the Constitutional Court judgment of *Minister of Safety & Security v Van Niekerk*[8] in dealing with the conflict as may exist between *Louw*[9] and *Charles*[10] said the following:

'…it demonstrates that the constitutionality of *an arrest will almost invariably be heavily dependent on its factual circumstances*. Nothing in the judgment of the trial court supports the proposition that that court purported to establish a general rule concerning the issuing of a warning instead of making an arrest. The judgment itself is based on the notion that the lawfulness of *an arrest is highly fact-specific.*' (My emphasis)

[35] It thus becomes necessary to record the respective versions in some detail.

Ms Yashni Chetty's version

[36] Ms Yashni Chetty, the first witness called on behalf of the Defendants is the complainant's daughter.

[37] On the evidence given by her a strong *prima facie* case of fraud and forgery against the Plaintiff was made out. The total amount involved is some R 250,000. She pointed to an Acknowledgement of Debt for an amount of R 73,000 that the Plaintiff had signed in connection herewith.

[38] She denied under cross-examination that her father had been conducting an extramarital relationship with the Plaintiff and declared that the Plaintiff was lying. The

[8] 2008 (1) SACR 56 (CC) para 17.
[9] *Louw v Minister of Safety & Security supra.*
[10] *Charles v Minister of Safety and Security* 2007 (2) SACR 137 (W).

witness's allegations implicating the Plaintiff were not seriously attacked under cross-examination. She indicated the reason her father had not come to testify was because he had undergone an operation.

[39] She was an impressive witness and gave every impression of one who was telling the truth.

Cst Mkhize's version

Evidence in Chief

[40] Cst Mkhize's version, as recorded in the Court's manuscript notes as it unfolded, is laid out in some detail below, (albeit that it is repetitive), particular regard being had to the "fact specific circumstances" on which each case must eventually turn.

[41] Cst Mkhize took over the investigation of the case on 20 June 2009, after a Captain in her division had given her the docket for further investigation.

[42] Of particular importance in considering Cst Mkhize's conduct, her reasonable suspicion as to whether a Schedule 1 offence had been committed and how she went about exercising her discretion on whether to arrest, is the period between the time when she was handed the docket through until she arrested the Plaintiff on 15 July 2009. The investigation diary contains numerous entries by Mkhize relating to investigations performed by her.

[43] She told the court in her evidence in chief that at the time she took over the docket there was no indication that the Plaintiff had been charged criminally or brought before a court of law, and she investigated this.

[44] Asked in her evidence in chief why exactly she had decided to arrest the Plaintiff she said, that having conducted her investigations, the evidence showed clearly that this was a serious offence falling under Schedule 1, that at the time she was an officer in the South African Police and that section 40 provided that she could arrest the Plaintiff without a warrant, and, further that upon her further investigations she found that the Plaintiff had committed an offence other than the one that she was arresting her for and actually had been previously convicted.

[45] She further maintained that having discovered previous convictions, this case then fell under Schedule 5. She contended that once the offence fell under Schedule 5 it would not have been competent for her to release the Plaintiff on warning. She said that this was because according to bail legislation she was entitled to have the Plaintiff arrested and kept until this aspect of her previous convictions came before court and then it was for the court to decide whether to grant bail.

[46] She also suggested that she required a statement from the Plaintiff in order to have something before the Prosecutor to consider. She reiterated that the Plaintiff's refusal to make a statement was not the only reason for arresting her but it was because of the evidence she had in the docket and that the matter fell under Schedule 5, and because of other offences that she had committed.

[47] It is noteworthy that Cst Mkhize repeatedly relied on the fact that the offence fell under Schedule 5 and that it would not have been competent for her to release the plaintiff on warning.

[48] She further admitted that she had made a promise to the Plaintiff that if she came to see her she would take a statement and submit it to the Prosecutor and had seemingly given the indication that she would not arrest her. She conceded that she did not keep her promise.

[49] She continued to emphasise that in order to submit the docket to the Prosecutor she required a statement from the Plaintiff so that the Prosecutor would have something to compare or refer to in order to see whether the docket should "*be kept in court*".

[50] It was put to her that she had alleged that she had arrested the Plaintiff because of her refusal to give a statement. In response she stated "*that's not the only reason for arresting her*". When asked what else, she replied that it was because of the evidence she had in the docket.

[51] There was some dispute as to whether Cst Mkhize was aware of the previous conviction at the time that she arrested the Plaintiff and there was a dispute about whether she was processing the proceedings so that the Plaintiff could be taken before court as soon as possible, or, whether she was simply relying on the full 48 hour period that she had at her disposal. According to Cst Mkhize a delay in taking her to court was occasioned by the Plaintiff not feeling well and because she had to take her to a doctor.

[52] She said that on 16 July she was attempting to establish information from someone in Pretoria regarding the address of the Plaintiff.

[53] She was asked why she objected to the Plaintiff being released on bail and advised that it was because she did not have proof of the place where the Plaintiff was residing, because the evidence in the docket was such that it would have caused the Plaintiff, if released, not to come back to face trial and that the Plaintiff was not aware of the evidence against her or the seriousness of the charge.

[54] She also suggested that the Plaintiff was making threats against the complainant and that may have disturbed the smooth running of the trial. According to Cst Mkhize the Plaintiff had advised her that she would go and tell the complainant's family that she was having a love affair with him. She denied that she arrested the Plaintiff in order to punish her.

[55] She closed her evidence in chief by confirming that she arrested the Plaintiff so that she could be brought before the court.

Cst Mkhize's version under cross-examination

[56] Under cross-examination Cst Mkhize was questioned as to why she had come to arrest the Plaintiff after the Prosecutor had declined to prosecute her. She responded by pointing to the docket and contended that the charges had been withdrawn because the complainant had lost interest, whereas this was not in fact so. She added that she discovered the fact that the Plaintiff had a previous conviction before she arrested her.

[57] It was put to her that a reasonable investigating officer would have submitted the docket to the prosecuting authorities and would not simply have arrested the Plaintiff. In response Cst Mkhize mentioned that it would have been easier if the Plaintiff had made a statement for the Prosecutor to draw comparisons after which the Prosecutor could have issued a summons, but she said she could not make that decision.

[58] It was suggested then that she had arrested the Plaintiff simply because she did not make a statement, in response to which the Cst Mkhize said that she could not issue a summons if a statement had not been made. The suggestion here, so it seemed, was that if she had a statement countering the complainant's version, or, explaining the Plaintiff's side of the story as to the charges against her, Cst Mkhize may have been able to issue a summons.

[59] She was taken to various pages in the transcript from the bail application (Exhibit A) where at times it appeared that she had arrested the Plaintiff because she had opted to remain silent. On page 8 she confirmed that "*the procedure is that if she decides to remain silent, then I have to detain her for her to appear in court."*

[60] Asked in the cross-examination why she arrested the Plaintiff she said it was because of the evidence which clearly stated that the offence was serious, and furthermore previous offences had been committed by the Plaintiff and she had a previous conviction and that made this offence fall under Schedule 5.

[61] It was pointed out that those reasons were not what she stated at the bail application and she was referred to the bottom of page 7 of the application relating to her arresting the Plaintiff because she had not made a statement. Cst Mkhize responded emphatically saying *"yes, that was one of the reasons."* She reiterated that if the Plaintiff failed to give her a statement then summons could not be issued.

[62] When asked, she was unable to name or list offences which fell under Schedule 1 other than to say "*I know that it is serious offences.*"

[63] In answer to a question from the Court she said that section 40 (1) of the CPA as read with Schedules 1 and 5 obliged her to arrest the Plaintiff. She also conceded to the Court that she lured the Plaintiff down to Pinetown under false pretences. It was suggested to her by Plaintiff's counsel that Schedule 5 is not a ground for summary arrest.

[64] Cst Mkhize was adamant that when she arrested the Plaintiff it was not as if "*nothing had changed*" in that she had conducted further investigations and interviewed various certain people.

[65] Asked who had instructed her to arrest, she said no one, she did this because of the evidence in the docket. She agreed that she did not phone anyone to take advice and said that the investigations were sufficient and she had a suspicion. She reiterated that the evidence in the docket was sufficient to arrest.

[66] She was asked whether she was aware of the National Prosecuting Authorities Act 32 of 1998 and section 20 to the affect that only a director of the National Prosecuting Authority could review a *nolle prosequi* decision. Cst Mkhize was unaware of this.

[67] Badgered as she was in cross-examination on the provisions of section 40 (1) of the CPA she gave an explanation to the following effect. She said she understood what counsel was saying about the section. But the case she was investigating had never been brought before court before and it was the Senior Public Prosecutor (the SPP) who declined to prosecute and there were reasons as to why he withdrew, one of the reasons was a statement by the investigating officer. She investigated what was contained in the docket and the statement. The reason for the SPP withdrawing the charge was because of a statement which said the complainant was no longer interested. She got a complaint from the complainant. She did investigate that complaint. She said that what he said to me "was contradicting" what had been stated by the first investigating officer. And furthermore if a complainant wishes to withdraw a case he must give a statement to that effect. There was no statement contained in the docket. And the charge had not been withdrawn before court. But the SPP declined for those reasons to prosecute.

[68] It was contended that she had wrongfully or unlawfully and maliciously arrested the Plaintiff and that she needed to forward the docket to the Prosecutor as it was not her decision as a policewoman. She agreed that if it had been withdrawn before court but in respect of this case it was because of the suspicion she had which made her believe that a crime had been committed and that made her believe that she could arrest the Plaintiff.

[69] She again conceded that she had lied to the Plaintiff in telling her that she merely wanted to get a statement from her. But in the bail application (page 8 line 2) she, under oath, stated that she did not lie because at that stage the Plaintiff was willing to give a statement. She went on to declare that *"the procedure is that if she decides to remain silent, then I have to detain her for her to attend court.*"

[70] Questioned further about the provisions of Schedule 5 and what it was alleged she was obliged to do, she said it "entitled" her to have the suspect arrested or detained until he or she appeared in court. Then the court would decide whether to further detain or not.

The Plaintiff's version

[71] The Plaintiff told the court that she was working in Johannesburg when the investigating officer Mr Moodley requested her to come down to the Pinetown Police Station in order to make a statement. She did so and he then said he needed to take the docket to the Public Prosecutor for a decision. She went with him to the "courthouse" and Mr Moodley

went into the offices of the Public Prosecutor. He thereafter approached her to say that the Public Prosecutor had declined to prosecute and that she could go.

[72] That is the last she had heard about the matter until July 2009 when Cst Mkhize phoned her to say she was going forward with the investigation. She asked the Plaintiff to come down in order to give her a statement. The Plaintiff said she would phone her attorneys and phone Cst Mkhize back.

[73] In the telephonic exchanges that followed the Plaintiff stated that Cst Mkhize said she just wanted to take a warning statement which she would take to the Public Prosecutor in order to get a decision.

[74] The Plaintiff agreed under those circumstances to come down but requested as to whether she could do it on an earlier date than that requested by Cst Mkhize, Wednesday 15th July, because of her being busy at work the suggested Friday. This was agreed. Once she arrived at the police station she was taken into a room where Cst Mkhize put various questions to her.

[75] She advised Cst Mkhize that the complainant was giving her money because of a relationship they were having. She maintained that she was his mistress. She maintained that Cst Mkhize said that she was lying and that this was not what she wanted to hear.

[76] During the interchange between them the Plaintiff asked if she could speak to her attorney which request Cst Mkhize refused. The Plaintiff told Cst Mkhize that she had abdominal pains. After further requests and the Plaintiff being distressed and crying, Cst Mkhize did eventually take her to a doctor, after lunch.

[77] The Plaintiff maintained that Cst Mkhize did not advise her that she was under arrest until after she, the Plaintiff, had told Cst Mkhize that she was not going to make a statement. She said that when Cst Mkhize took her fingerprints she said to her that all of this could have been avoided if she had given a statement.

[78] Late in the afternoon of 16 July 2009 (the day after her arrest) the Plaintiff was taken to the Pinetown Magistrate's Court and it was recorded that Cst Mkhize would oppose bail, one of the various reasons given therefor being that the Plaintiff had previous convictions for fraud.

[79] Because there was no stenographer her case could not be heard. She was later taken to a hospital under the orders of the court. She spent the night at hospital under police guard.

[80] On the night of 15 July she had been detained at the Pinetown Police cells and on the night of the 16th at Chatsmed Hospital. She said that she went to hospital in a police van in handcuffs.

[81] Under cross-examination she admitted that the previous investigating officer Mr Moodley had not taken her fingerprints and did not charge her. She said that Mr Moodley did not take a written statement from her and that she explained her position to him verbally. She said that she did not know what Mr Moodley had told the Public Prosecutor. She said that she didn't know that Mr Moodley had written that the complainant was not interested.

[82] The Plaintiff admitted that she could not dispute that Cst Mkhize had information that she had committed a fraud and that Cst Mkhize's suspicion had arisen from the docket. She was taken to page 28 of Annexure B, the Defendants Bundle where an entry had been made that "charges W/D provisionally".

[83] There was no re-examination of the Plaintiff and her case was then closed.

The *Nolle Prosequi* Argument

[84] It would be appropriate at this stage to deal with the argument strongly contended for that because the words "*Nolle Prosequi*" appear on the docket, this precluded Cst Mkhize from lawfully arresting the Plaintiff and placing her back before the court on these same charges.

[85] Although not pleaded by the Plaintiff, it was contended during the evidence and in argument that once this decision has been taken by the prosecution, namely not to prosecute, such decision stands in the way of a valid prosecution until such decision is reviewed and set aside either by the National Director of Public

Prosecutions in terms of the provisions of section 179 (5) of the Constitution of South Africa, 1996, or presumably by a court.[11]

[86] So the argument continued, because the purpose of arrest was to place the arrestee before a court for the purposes of a prosecution, it follows that the arrest was unlawful and/or malicious the arrestor was not vested with any power to arrest in view of the facts of the case.

[87] It was agreed that documents put up would, without further proof, serve as evidence of what they purport to be. The content of the investigation diary forming part of the docket was handed up during the evidence as part of Exhibit B and extensively cross referenced. This continuous record of entries was randomly referred to by both parties during the evidence, in acceptance that the entries and their content formed a basis for consideration and cross-examination.

[88] That this matter was thereafter investigated over a period of close on two years is an unfortunate reflection on police investigating services. The investigation diary indicates that on 13 February 2009 the docket was referred to a Captain "*for filing SPP Declines to prosecute Nothing o/s*" (outstanding).

[89] However, despite this so called lack of interest by the complainant, the continuous record of the investigation diary reveals that the complainant made further enquiries on 17 February 2009 about the decision that had been made by the Prosecutor. This is indicative of the fact that he had most certainly not lost interest in this matter. As much was confirmed by the complainant's daughter Yashni Chetty when she testified on behalf of the defendants.

[90] The so called "A9" statement by the first investigating officer Inspector Moodley became a focus of interest and the Court made enquiries during the evidence as to its whereabouts. It was reasonably assumed that this was a statement confirming that the complainant was "not interested" in the matter, and, one would have thought, endorsed by him. However the Court was advised that the

[11] *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SACR 111 (GNP); *National Director of Public Prosecutions & others v Freedom Under Law Law* 2014 (4) SA 298 (SCA).

"A9" which Inspector Moodley had allegedly compiled had apparently gone missing from the docket, as had certain other statements and documents.

[91] Despite the *"Nolle Prosequi"* the docket and investigations conducted into this matter remained alive and well. The continuous record in the investigation diary reveals that further investigations were conducted, statements received, including the "acknowledgment of debt" from the Plaintiff, reflected in Exhibit B.

[92] According to an entry on 3 May 2009 the matter was referred back to the SPP to consider various documents.

[93] Subsequently and on 30 June 2009 the docket was delivered to Cst Mkhize, for further investigation.

[94] This investigation diary of Exhibit B contains numerous entries by Cst Mkhize relating to investigations performed by her. Of particular importance is the period between the time when she was handed the docket, through until she arrested the Plaintiff, which came under scrutiny during the evidence.

[95] In an entry on 30 June 2009 reference is made to the intervention by the Plaintiff's father, who contacted Cst Mkhize to advise her that the case had been withdrawn by the complainant. It is recorded that the Plaintiff's attorney also contacted Cst Mkhize advising that they had made representations to the Court and that the matter was withdrawn.

[96] Whatever may have been happening behind the scenes, it seems unlikely that the complainant had suddenly, and in February 2009, after investigations had been on-going for some two years, withdrawn the fraud charges or lost interest.

[97] The insertion of the words *"Nolle Prosequi"* was qualified by the words "*Complainant is not interested as per A 9. Until she/he shows some interest"*. Quite clearly this was not intended to be a final decision by the prosecution. It was tantamount to a withdrawal of the prosecution in the interim pending further events.

[98] Regard being had to what has been stated above, the insertion "*Nolle Prosequi"* on the docket, in any event, came about under very strange and, I would

go so far as to say, suspicious circumstances which probably warrant further investigation. The Plaintiff was never formally taken before Court and told that the prosecution had been stopped.

[99] In the circumstances under which this insertion was made, it would be untenable to slavishly follow the words *"Nolle Prosequi"* only and start looking to the provisions of the National Prosecuting Authority Act and the Constitution as the Plaintiff has sought to do, to suggest that the prosecution had been brought to a formal standstill.

[100] There was no special magic intended by the use of the words "*Nolle Prosequi*"in these circumstances and neither is there any to be found. It certainly could not have founded a "*Nolle Prosequi"* Certificate to enable a private prosecution as envisaged by section 7 of the CPA.

[101] The complainant did indeed show further interest and had been seemingly showing interest all along. Once Cst Mkhize re-established this for herself and the condition causing the "*Nolle Prosequi"* had been satisfied, she was quite clearly entitled to continue with her investigations and invoke the provisions of section 40(1)(b) of the CPA in appropriate circumstances.

[102] In my view the "*Nolle Prosequi"* argument that these words, inserted as they were on the docket, conditionally, and in the circumstances under which they came to be inserted precluded Cst Mkhize from arresting the Plaintiff, is without substance and is rejected.

Analysis of the Evidence and Discharge of Onus

The four jurisdictional facts

[103] It is common cause or could not be seriously contested that the arresting officer in this matter, Cst Mkhize, was a peace officer at the time of the arrest and that she entertained a suspicion with regard to the Plaintiff having committed fraud, a Schedule 1 offence. The fourth jurisdictional ground, whether the suspicion

entertained by Cst Mkhize rested on reasonable grounds, however, requires closer consideration.

[104] Whether the suspicion rested on reasonable grounds must be viewed against established legal principles and the pertinent facts of this matter.

[105] Legal principles on how one established a "reasonable suspicion" are amply set out in Du Toit's *Commentary on the Criminal Procedure Act* at 5 -12A and 12B. Supported by case law it is contended that:

'The question as to whether the suspicion of the person effecting the arrest is reasonable, must be approached objectively. Accordingly the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a First Schedule offence.'[12]

[106] The docket and its content were before Cst Mkhize. This in my view reveals at the very least a prima facie case of fraud against the Plaintiff. Even if this Court was precluded from having regard to the entire docket, as has been referred to in disposing of the *"Nolle Prosequi*" argument above, and regard is only had to those pages specifically referred to during the course of the evidence, there was sufficient evidence before this Court to be satisfied that on an objective analysis of what Cst Mkhize had before her, that there was a more than adequate basis for her to form a reasonable suspicion that the Plaintiff had committed the crime of fraud.

[107] Yashni Chetty told the Court that the extent of the fraud amounted to some R250 000.00. The Plaintiff alleged during her evidence that she had been having an affair with the complainant and that the monies she had obtained from him were monies he was paying to her in consequence of their affair.

[108] However, during the course of the evidence of Ms Yashni Chetty, she pointed to the previously mentioned acknowledgement of debt in which the Plaintiff had acknowledged her indebtedness to the complainant's business in an amount of R73,000.00. The acknowledgment was dated 20 February 2007. In the context of

[12] See too *Mvu v Minister of Safety & Security* 2009 (2) SACR 291 (GSJ).

this matter, such an acknowledgement does not seem consonant with the conducting of an affair, with monetary reward to the Plaintiff as a consequence.

[109] It was against this background Cst Mkhize invited the Plaintiff to a meeting with her.

[110] The Plaintiff's refusal to make a statement was entirely consistent with her constitutional rights and that cannot be held against her. However it did mean that her persistence in relying on the affair and her failure to give Cst Mkhize any other plausible explanation left Cst Mkhize with no effective counter to the other evidence on which she was to base her reasonable suspicion.

[111] I would mention that I find it somewhat alarming in the circumstances that the Plaintiff has not been brought before a criminal court to answer the case contained in the docket. My view is that this warrants further investigation at a high level in both the Police and Justice departments. The drawn out investigation into what appears to be a rather straightforward matter, the mysterious disappearance of the A9 statement made by the first investigating officer as well as other statements, the alleged disinterest by the complainant which was not so, the manner in which the Public Prosecutor came to make an entry on the docket face "*Nolle Prosequi"* and the role played by the Plaintiff's father are all factors which arouse considerable suspicion.

[112] Objectively assessed, the suspicion that the Plaintiff had committed a First Schedule offence was reasonable. The Defendants have accordingly rebutted the onus resting on them in respect of the four jurisdictional facts they were required to satisfy, en route to proving the lawfulness of the arrest.

<u>The exercise of the discretion whether to arrest or not as set out in *Sekhoto*</u>

[113] In accordance with the *Sekhoto* principles, it is at this point Cst Mkhize was required to exercise her discretion as to whether or not to arrest.

[114] Had there been a fifth jurisdictional fact to consider as espoused in the *Louw* judgment and the numerous cases that followed this approach over a period of some

6 years, this would have been an easy matter to decide. Had Cst Mkhize been obliged to consider whether there were less invasive options to bring the Plaintiff before the court than her immediate arrest and detention, the decision whether to declare this arrest and detention unlawful would be straightforward and obvious. She had various more suitable options open to her, whether it be section 54 of the CPA or simply warning her to appear in court the next day under threat of arrest if she did not or referring this matter to a senior officer for his consideration, or referral to the Prosecutor.

[115] But this is not a jurisdictional fact. Nonetheless, it is, in my view, a fact to be taken into consideration in reflecting on an arresting officer's exercises of his or her discretion.

[116] As has already been pointed out peace officers are entitled to exercise their discretion as they see fit, provided they do so in good faith, rationally and not arbitrarily

[117] The *Sekhoto* judgment[13] deals extensively with principles of law relating to the exercise of a discretion.

[118] Certain important principles relating to the exercise of a discretion as are contained in *Sekhoto* (and other case law referred to therein) are applicable to the facts and circumstances of this matter:

[118.1] '…the officer, it should be emphasised, is *not obliged to effect an arrest*.'[14]

[118.2] '…the discretion must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case.'[15]

[13] Sehoto paragraphs [28] – [44].
[14] *Sekhoto* para 28.
[15] *Duncan* at 818H – J.

[118.3] '…exercise of the discretion in question will be clearly unlawful *if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature*.'[16]

[118.4] '…the decision to arrest must be *based on the intention to bring the arrested person to justice*.'[17]

[118.5] 'It is at this juncture that most of the problems in the past have arisen. Some instances were listed in the judgment of the court below, namely an arrest to frighten or harass the suspect, for example, to appear before mobile traffic courts with the intent to expedite the payment of fines (*Van Heerden* at 416g – h); to prove to colleagues that the arrestor is not a racist (*Le Roux* in para 41); to punish the plaintiff by means of arrest (*Louw* at 184j); or *to force the arrestee to abandon the right to silence* (*Ramphal* in para 11). To this can be added the case where the arrestor knew that the State would not prosecute.'[18]

[118.6] 'Now it is settled law that *where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result*. …There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, *if he had not applied his mind to the matter or exercised his discretion at all,* or if he had *disregarded the express provisions of a statute* — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'[19]

[118.7] 'The question whether *a decision is rationally related to the purpose for which the power was given calls for an objective enquiry*. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.'[20]

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[16] *Sekhoto* para 30 with reference to Van Heerden JA in *Duncan.*
[17] *Sekhoto* para 30.
[18] *Sekhoto* para 30.
[19] Innes ACJ in *Shidiack v Union Government* 1912 AD 642 at 651 – 652.
[20] Chaskalson P in *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) paras 85 – 86.

[118.8] '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*. T*he 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.'[21]

(My emphasis).

Schedule 5 Considerations in the context of exercising a discretion

[119] It is necessary to carefully consider the effect of Schedule 5 of the CPA as it applies to section 60(11), in respect of the lawfulness or otherwise of the arrest by Cst Mkhize and how she went about exercising her discretion.

[120] It was argued on behalf of the Defendants that "*it is trite that an accused who is facing an offence that falls under Schedule 5 has to be detained until such time that he or she is brought before the lower Court where he or she will have to satisfy the Court that the interests of justice justify his or her release on bail."* Reference was also made to section 60 (11) (b) of the CPA as well as paragraphs 43 and 44 of the *Sekhoto* judgment. There was furthermore argument to the effect that in cases where the offence ordinarily attracts long terms of imprisonment, arrest would clearly be justified.

[121] Section 60(11)(b) reads:

'(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so,

[21] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 (2007 SCC 41) para 73.

adduces evidence which satisfies the court that the interests of justice permit his or her release.'

The relevant portion of Schedule 5 lists as one of the offences referred to in this Schedule:

'An offence referred to in Schedule 1-

(a) and the accused has previously been convicted of an offence referred to in Schedule 1;…'

[122] With the Plaintiff's previous conviction for fraud and her now being charged for fraud, she fell into this category.

[123] In her evidence Cst Mkize repeatedly relied on Schedule 5 as being one of the reasons for the arrest. But she also went so far as to say that she was "compelled" under the circumstances to arrest. In these circumstances and on her interpretation of the Schedule and the CPA, she thus did not require another reason to arrest.

[124] The provisions of this section are quite clearly a very strong indication, in my view, that as a general rule, in exercising a discretion in such circumstances, the arrestee should indeed be detained, rather than for instance leaving it for such arrestee to be summonsed in terms of section 54 of the CPA. This would then enable the court within whose discretion the right to bail vests, to assess all the available evidence and decide where the interests of justice lay.

[125] However summonsing an accused, by way of example, would not prevent the court from applying the provisions of section 60(11) of the CPA in exercising its discretion to remand an accused in custody once the accused came before the court. The detention of an accused at that stage is a function that must be performed by such court. It is not a role to be played by Cst Mkhize and whilst Schedule 5 read with section 60(11)(b) is a strongly influential factor in exercising her discretion, it would not, in my view, eliminate her independent discretion, assessing all the surrounding circumstances, as to whether or not to arrest a suspect.

[126] I bear in mind what is stated in the *Sekhoto* judgment at para 42, and the cited paragraphs 43 and 44 which the Defendant's counsel has urged me so consider. I find nothing in these paragraphs which impinges on the independence of a peace officer to effect an arrest within the parameters of section 40(1)(b).

[127] On the evidence given by Cst Mkhize she gave the impression that by virtue of the provisions of Schedule 5 as read with section 60(11) she was divested of her discretion and that she had no alternative, but to arrest. But in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*[22]:

"A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate."

[128] In this respect, in my view, Cst Mkhize erred. In the circumstances her discretion can not only be described as "improperly exercised". Indeed, it was not exercised at all.

[129] As already stated above, per Innes CJ in the *Shidiack* case:

'There are circumstances in which interference would be possible and right. If for instance such an officer had… not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief.'

<u>Further considerations with regard to the exercise of the discretion</u>

[130] There are however other significant considerations and most alarming statements that emerged from the evidence of Cst Mkhize.

[131] The Plaintiff has contended that the Cst Mkhize was a pathetic witness and was being blatantly dishonest in her evidence as to the reason for Plaintiff's arrest.

[22] 2005 (6) SA 182 (SCA) per Scott JA at para 20

[132] I did not find Cst Mkhize to be a “pathetic witness”. She was a quietly spoken, assertive and a seemingly intelligent witness. She was in the witness box for a number of hours over a period of two days and in certain respects left a favourable impression on the Court as being a diligent police officer.

[133] However, over and above what has already been mentioned above, there were certain statements made by her which cannot be disregarded in the context of her exercising a bona fide, rational, non-arbitrary and lawful arrest.

[134] In answer to questions from the Court she admitted that she lured the Plaintiff to Durban knowing full well in advance that she intended to arrest her, whatever happened. She did not warn the Plaintiff or her attorneys that this may or would happen. That in my view is underhanded and in bad faith.

[135] What it also signals is that she did not intend to exercise her discretion depending on developments arising from her interview with the Plaintiff. Her mind was already made up. Whether this was because she was labouring under the impression that because this was a Schedule 5 offence and therefore she had no alternative but to arrest or for other motives or reasons, it nonetheless underscores her bad faith.

[136] The background and somewhat unique facts and circumstances pertaining to this case required the exercise of a discretion sensitive to such facts and circumstances.

[137] Of importance is the fact that the Plaintiff was pregnant; the investigation of the case against her had dragged for over two years; she was easily contactable as Cst Mkhize had established through telephonic contact she made with her in Johannesburg; she was co-operative and agreed to voluntarily come and see Cst Mkhize on a date earlier than requested and especially flew down to see her; she was legally represented and Cst Mkhize had ready and easy contact with her legal representatives; her family lived in Durban and her father was a senior member of the Police Force who would also have been readily contactable.

[138] The cumulative effect of all of this is that, despite Cst Mkhize's evidence to the contrary, the Plaintiff was not a flight risk, she had fixed employment and on the face of it there was no suggestion that she was going to threaten or interfere with witnesses and/or intimidate them in any way. Her version that she had conducted an affair with the complainant was already on record. This could hardly be used to further intimidate the complainant or his family. There was no allegation that she was going to destroy or interfere with documentary or other evidence. She was not an immediate danger to the public. Although the previous "*Nolle Prosequi"* had been qualified there was nothing preventing Cst Mkhize from consulting with the Senior Public Prosecutor or another prosecutor again or a senior officer to satisfy herself that arrest would be the correct way of exercising her discretion.

[139] Cst Mkhize's evidence to justify the arrest on certain of the grounds mentioned above was shallow and unconvincing. There was simply no need to act in haste.

[140] The post constitutional approach to the exercise of a discretion to arrest has been sharpened. In Sekhoto[23] a dictum from the pre-constitutional era (Tsose)[24] to the effect that "… *there is no rule of law that requires the milder method of bringing a person into court to be used whenever it would be equally effective*'" has been held to not reflect the pre-constitutional law in full, and, to the extent that it has, it has now again been qualified.

[141] The post constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognisance of the provisions of the fundamental right to the freedom[25] and the dignity[26] of the individual. Section 7(1) highlights that "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of *human dignity*, equality and *freedom*. Section 7(2) directs the State to "… *respect, protect, promote and fulfil the rights in the Bill of Rights*; section 8(1) *"The Bill of Rights applies to all law, and binds …. all organs of state."*

[23] @ para 56
[24] Tsose v Minister of Justice and Others 1951 (3) SA 10 (A) per Schreiner JA
[25] S12
[26] S9

[142] In Sekhoto[27], Harms DP quotes from an English decision[28]:

'*The court may not interfere with the exercise of an administrative discretion* on substantive grounds save where the court is satisfied that the decision is *unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker*. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. *The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'*
(My emphasis)

[143] The Sekhoto[29] judgment also reaffirms the influence of the Bill of Rights:

An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute, *read in the light of the Bill of Rights*.

[144] This is supported by a further English law decision:[30]

'(A)lthough Article 5 of the European Convention of Human Rights does not require the court to evaluate the *exercise of discretion* in any different way as it evaluates the exercise of any other executive discretion, *it must do so in the light of the important right to liberty which is at stake*.'

<u>Police Standing Orders in the exercise of a discretion</u>

[145] Police Standing Orders were not directly referred to in this matter. However they are a well known feature of “wrongful arrest” cases. The wording of such Orders is instructive and should, if applied properly by members of the Police, allay fears by members of the public of being indiscriminately arrested. They applied to Cst Mkhize at the time she made this arrest.

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[27] @ para 37 pg 329 - 330
[28] In R v Ministry of Defence, Ex parte Smith and other appeals [1996] 1 All ER 257 CA ([1995] EWCA Civ 22 [1996] QB 517).
[29] Para [40] page 330
[30] Paul v Humberside Police [2004] EWCA Civ 308 para 30:

[146] In the Constitutional Court case of *Minister of Safety and Security v Van Niekerk*[31] Sachs J made direct reference to a Police Standing Order (G) 341 *"dealing with arrest and the treatment of an arrested person"*.

[147] Concerning the discretion to be exercised on whether to arrest, Sachs J in *Minister of Safety and Security v Van Niekerk supra*, reassuringly stated as follows[32]:

'[18] …This is an area where internal regulation should be encouraged. Indeed, there has in fact been extensive internal regulation concerning arrests.

[19] … *This Standing Order makes it clear that arrest is a drastic procedure which should not be used if there are other effective means of ensuring that an alleged offender could be brought to court*.' (My emphasis)

[148] The more relevant wording of this Standing Order is as follows, with due italicised emphasis:

'Standing Order (G) 341, issued under Consolidation Notice 15/1999 and entitled 'Arrest and the Treatment of an Arrested Person until Such Person is Handed Over to the Community Service Centre Commander', provides as follows:

"1. Background

Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996 (Act 108 of 1996), the Criminal Procedure Act, 1977 (Act 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated, must therefore be strictly adhered to.

. . .

3. *Securing the attendance of an accused at the trial by other means than arrest*

(1) 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 therefore regard it as a last resort.*

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[31] 2008 (1) SACR 56 (CC).
[32] at paragraphs 18 and 19

(2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. *A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subpara (3) below.*

(3) A member, even though authorised by law, should normally refrain from arresting a person if -

(a) the *attendance of a person may be secured by means of a summons as provided for in s 54* of the Criminal Procedure Act, 1977; or

4. *The object of an arrest*

(1) General rule: As a general rule, the object of an arrest is to *secure the attendance of such person at his or her trial*. A member may not arrest a person in order to punish, scare, or harass such person.

(2) Exceptions to the general rule There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined below and constitute exceptions to the general rule that the object of an arrest must be to secure the attendance of an accused at his or her trial. These exceptions must be studied carefully and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.

(a) Arrest for the purposes of further investigation . . .
(b) Arrest to verify a name and/or address . . .
(c) Arrest in order to prevent the commission of an offence . . .
(d) Arrest in order to protect a suspect . . .
(e) Arrest in order to end an offence . . .

6. Manner of effecting an arrest

. . .

(2) Arrest without a warrant

(a) *It is only in exceptional circumstances where a member is specifically authorised by an Act of parliament (for example, ss 40 and 41 of the Criminal Procedure Act, 1977) to arrest a person without a warrant, that a person may be arrested without a warrant.* Any arrest without a warrant, which is not specifically authorised by law, will be unlawful.'"[33]

[149] The wording and the directive arising therefrom are also of considerable significance in considering whether an arresting officer has properly exercised the discretion vesting in him/her. Indeed it was stated in *Le Roux v Minister of Safety & Security*:[34]

'In determining whether or not to effect an arrest, the arresting officer should carefully consider his/her standing orders. Where a police officer exercises discretion in violation of standing orders, that may itself be an indication that the discretion was not properly exercised and that the warrantless arrest was unlawful.'

[150] In deciding this matter, careful regard is had to what is contained above, with particular prominence given to the Constitutional Court's remark by Sachs J in *Minister of Safety and Security v Van Niekerk* at paragraph 19 as quoted above.

Delay in taking Plaintiff to court

[151] There is a further factor which strongly and adversely reflects on the bona fides off the discretion which Cst Mkhize exercised in deciding to arrest the Plaintiff.

[152] Not pleaded but contended for in argument on behalf of the Plaintiff was the following:

[149.1] that the purpose of arrest was *"to bring the Accused before court as soon as possible after arrest to stand Trial*";

[33] *Minister of Safety and Security v Van Niekerk supra* footnote 13.
[34] 2009 (2) SACR 252 (KZP) para 34.

[149.2] that the Second Defendant "*failed dismally in this regard and only brought Plaintiff to Court after being ordered by the High Court";*

[149.3] that "*To date hereof Plaintiff has not stood Trial with regard to the charge that formed the subject of her arrest on 15 July 2009."*

[153] There was reference in the Particulars of Claim (paragraph 18) to the "interdict", (more properly a "mandamus"), that was obtained in the High Court obliging the Station Commissioner for the South African Police Services in Pinetown to comply with the provisions of section 50(1)(c) of the CPA by bringing the Plaintiff before a lower court by 16 July if *"reasonably possible to do so, and if not, by no later than 09h00 hours on 17 July 2009."*

[154] The Constitution, section 35(1)(d), reads as follows:

'(1) Everyone who is arrested for allegedly committing an offence has the right-

(d) to be brought before the court as soon as reasonably possible, but not later than -

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.'[35]

[155] Even if, for arguments sake, the Plaintiff had been lawfully arrested, the failure to bring her to court as soon as reasonably possible would, in my view, constitute an infringement of her constitutional rights and her rights under the CPA. This would occur from the time it would have been reasonably possible to take her to court, until she actually appeared in court, or was otherwise released.

[156] In *Mashilo & another v Prinsloo*[36] paragraph 16:

'The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it can be

[35] See too section 50(1)(c) of the CPA.
[36] 2013 (2) SACR 648 (SCA).

done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hours expire before or during the weekend. Expedition relative to circumstances is what is dictated by the subsection and the Constitution. Deliberately obstructive behaviour, as was evidenced by Mashilo, is not tolerated. On that basis alone the court below could quite easily have ordered that he be brought to court immediately to facilitate a bail application.'

[157] The Plaintiff, in her pleadings, did not specifically rely on a prolonged detention and a breach of section 35(1) of the Constitution and/or s 50(1)(c) of the CPA which obliged the police to bring an arrested person before court as soon as reasonably possible, as constituting a possible separate cause of action for damages.

[158] But why was she not brought to Court the afternoon after she was arrested, or at least by the following morning?

[159] There is a dispute as to when exactly the Plaintiff arrived at the police station and when precisely she was placed under arrest.

[160] According to one of the statements made by Cst Mkhize, both handed up, the Plaintiff had arrived to see her at approximately 10:30 a.m. It records that after a certain amount of discussion relating to her alleged relationship with the complainant and consultations with her legal practitioner and their advice to her to remain silent, she was then arrested.

[161] It was then that the Plaintiff was told of her constitutional rights. The Warning Statement reflected the time "12.12". She remained detained from then until she was released on the morning of Friday 17th July at the Pinetown Magistrate's Court, and, although she spent Thursday night in hospital, she effectively remained in police custody.

[162] The transparently thin averment by Cst Mkhize that she had to take the Plaintiff to a doctor during the afternoon after she had arrested the Plaintiff, when she could quite easily and preferably have taken her to Court, and, that on the following day she was checking on her address through a contact she had in the

Police Force in Pretoria simply does not wash. They are strongly indicative of a police official who had decided in advance that she intended to arrest, which Cst Mkhize in any event conceded to, who was going to make maximum use of the 48 hours she believed she had available to her to keep the Plaintiff behind bars.

[163] According to the Plaintiff she was taken to hospital in a police van in handcuffs. I have no reason to disbelieve this. This was totally unnecessary and displays an element of malice.

[164] Whether the prolonged detention may be a factor to consider as a separate cause of action upon which a claim for damages is to be founded, if it were found that the arrest itself was lawful, is not an issue I need to decide given the conclusion I have come to tin this matter. It is a strong reflection on the bona fides of Cst Mkhize or the lack thereof, and her motives in arresting the Plaintiff. It suggests mala fides and an intention to harass and punish the Plaintiff, whether it was because she refused to make a statement or for whatever other reason Cst Mkhize may have had in mind.

[165] Cst Mkhize appears not to have taken into account the Constitutional Court words of Sach J regarding arrest being a drastic procedure which should not be used if there are other effective means of ensuring that an alleged offender could be brought to court. She seems not to have appreciated the impact of the Bill of Rights on the exercise of her discretion or taken due cognisance of Commissioner of Police's Standing Orders.

[166] She gave a variety of reasons for arresting the Plaintiff. One of these reasons, that she had to arrest the Plaintiff if she did not make a statement was confusing and contradictory. Apart from this suggesting that she arrested the Plaintiff "because" she did not make a statement, which in itself would make for an unlawful arrest, it contradicts her concession to the Court that she had decided to arrest her before she had even left Johannesburg. It taints her discretion and suggests that she was not bona fides.

[167] The Plaintiff was a satisfactory witness and I had no reason to disbelieve her where her evidence remained uncontradicted. On balance therefore I am satisfied that the Plaintiff has discharged the onus of proving that Cst Mkhize did not exercise her discretion properly, or at all, and that the arrest was accordingly unlawful.

Costs

[168] As to costs, and for the reasons given in this judgment, the extent to which the Plaintiff will prove her damages and particularly the quantum thereof bearing in mind the strong allegations of fraud against her remains uncertain. This however, is an issue to be decided by another court dealing with the issue of damages.

[169] In *Van der Spuy v Minister of Correctional Services*[37] the following was stated by Leach J, as he then was, now a Judge of the Supreme Court of Appeal:

"That brings me to the question of costs. The relevant question here is whether a costs order should issue at this stage the proceedings. Where the merits of a dispute are decided as a separate issue at the outset with the issues relevant to the quantum of the damages standing over, the Courts have, in appropriate cases, issued a costs order in favour of the plaintiff who succeeds on the merits - see, for example, Baptista v Stadsraad van Welkom 1996 (3) SA 517 (O), Faiga v Body Corporate of Dumbarton Oaks and Another 1997 (2) SA 651 (W) at 669 and Grootboom v Graaff-Reinet Municipality 2001 (3) SA 373 (E) at 381 - 2. However, this is not an inflexible rule, and the facts of each case must be taken into account to consider whether it is appropriate in any given case for a costs order to issue at this stage. One of the relevant factors to be taken into account is whether the plaintiff will ultimately recover costs on the High Court scale and it would certainly be grossly unfair to the defendant to award the plaintiff High Court costs at this stage of proceedings when there is the possibility of the ultimate award falling within the jurisdictional limits of the magistrate's court.

In casu, although there is no detailed medical evidence before me, I know that the plaintiff suffered a gunshot wound of the arm. It is certainly premature for me to comment on the advisability of his actions in suing in the High Court, but his injuries do not appear to me to

[37] 2004 (2) SA 463 (SE)

be so severe that he will undoubtedly recover costs on the High Court scale notwithstanding the amount of his claim being far in excess of the upper jurisdiction of the magistrate's court.

In these circumstances I think it is fair to both parties to reserve the question of costs for final determination once the quantum of damages has been resolved.

[170] I am aware that there are other reported cases which reason differently on this score. I prefer to follow the approach of Leach J in the circumstances of this case.

Order

[171] In the premises the following order is made:

1. The First Defendant is held to be liable to Plaintiff in respect of such damages as she may be able to prove arising out of her unlawful arrest on 15 July 2009, including her subsequent detention until 17 July 2009.

2. Costs are reserved for the decision of the Court hearing the issue of damages.

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ROWAN AJ
ACTING JUDGE OF THE HIGH COURT
DURBAN AND COAST LOCAL DIVISION

Dates of hearing : 11, 14, 20 November 2013
Date of Judgment : 31 July 2014

Counsel for Plaintiff : Baijnath A
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