IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

NATAL PROVINCIAL DIVISION

CASE NO:

AR436/07

In the matter between :

T LE ROUX **Appellant**

and

THE MINISTER OF SAFETY AND SECURITY **First Respondent**

M NEL **Second**

Respondent

JUDGMENT

MSIMANG, J

1] I have had an opportunity of perusing the judgment of my brother Madondo, J in this matter and, though I concur with the order that he proposes as well as the reasons therefor, for the sake of emphasis, I have decided to add further reasons for that order and the facts will only be repeated in this judgment in so far as that repetition will be necessary to illustrate that emphasis.

2] This is an appeal from a decision of the Magistrate's Court, Newcastle, dismissing appellant's claim for damages arising out of an incident that had occurred on 23 June 2006 during which the appellant had been

arrested and detained at the Magistrate's Court holding cells at the instance of the second respondent, acting in the course and within the scope of his employment with the first respondent. For ease of reference, I shall refer to the parties to this appeal by their respective designations in the Court *a quo.*

3] The facts underlying this appeal are common cause and are the following. The second defendant is a member of the South African Police Service and was allocated a docket and assigned to investigate a certain incident involving a crime of reckless and negligent driving that had occurred on 16 April 2006. Through her investigations she was able to establish that the plaintiff was a suspect in the commission of the offence. Her visit at the plaintiff's residence proved to be fruitless as the plaintiff was not at home. Having interviewed plaintiff's father about the incident, she left a message for the plaintiff to contact her. Indeed, on the same day the plaintiff made telephonic contact with her and, after the allegations against him had been explained, he was requested to see her at the police station. On the following day the plaintiff duly reported at the office of the second respondent and the latter again explained to him the allegations which had been made against him and apprised him of his constitutional rights. In view of the fact that the plaintiff was co-operative and seemed destined to disprove the allegations against him and after having considered all the relevant circumstances, the second defendant decided not to arrest him but informed him that he would be required to attend Court on the following

day, but that before doing so, he should report at the office of the second defendant and the latter would then take his profile and finger prints, obtain a warning statement from him, formally charge him and take him to Court. Indeed, the plaintiff reported at the office of the second defendant on the following morning and, after the procedural requirements had been complied with, the second defendant took the plaintiff to the holding cells where he handed him to her fellow police officers for detention. She thereafter proceeded to the prosecutor with the docket and recommended that, upon his appearance, the plaintiff be released on bail which should be fixed at R500.00. The plaintiff was duly held in the holding cells until he was called upon to appear before Court when bail was fixed and he was released as recommended by the second defendant. Explaining her sudden change of heart regarding the arrest and detention of the plaintiff, the second defendant testified that, had she not arrested and detained the plaintiff, she feared that the black members of the South African Police Service would have accused her of favouring the plaintiff due to the colour of his skin.

4] It was as a result of the aforementioned conduct of the second defendant that the plaintiff instituted action for damages for wrongful and unlawful arrest against the defendants, alleging that, at all material times the second defendant acted in the course and scope of her employment with the first defendant.

5] In dismissing plaintiff's action the Magistrate took into account that, when she arrested and detained the plaintiff, the second defendant had reasonable grounds for suspecting that he had contravened Section 63(1) of the National Road Traffic Act, [1] that is, that he had committed the crime of reckless and negligent driving. He also took into account the penalty provisions for such a transgression as contained in Section 89(5) of the same Act which provides that :-

> "Any person convicted of an offence of subsection (1) read with section 63(l) shall be liable :-
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> (a) in the case where the Court finds that the offence was committed by driving recklessly, to a fine or to imprisonment for a period not exceeding six years; or
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> (b) in the case where the Court finds that the offence was committed by driving negligently, to a fine or to imprisonment for a period not exceeding three years."

and then found that the said crime fell under the catalogue of crimes enumerated in Schedule I to the Criminal Procedure Act [2] and therefore that, in terms of Section 40(1)(b) of that Act, a peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed the said crime. As the second defendant purported to act in terms of the provisions of this section when she arrested and detained the plaintiff, she had accordingly acted lawfully, the Court *a quo* concluded.

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[1] No. 3 of 1996;
[2] 51 of 1977;

6] It is against this finding of the Court *a quo* that the plaintiff launched the present appeal and, as I understood Mr. **Crampton,** who appeared for the plaintiff before us, it is common cause that, at all material times, the arresting officer *in casu* had reasonable grounds to entertain a suspicion that the plaintiff had committed the crime of reckless and negligent driving, a crime which is referred to in Schedule I to the Criminal Procedure Act. However, inspite of these admitted facts, Mr. **Crampton** submitted, the arresting officer, in the circumstances of the present case, acted unlawfully as she ought not to have been satisfied with mere compliance with the provisions of Section 40(1)(b) when making a decision to arrest the plaintiff, but that she ought to have taken other factors into consideration, including, among others, that, throughout his interaction with the arresting officer the plaintiff had been co-operative, even voluntarily presenting himself at the office of the arresting officer on 23 June 2006, that he did not present any danger to society, that he appeared to be keen to disprove the allegations against him and was therefore unlikely to evade the trial and, finally, that he did not present any harm to others.

7] The crisp point to be determined in this appeal is therefore whether compliance with the provisions of Section 40(1)(b) of the criminal Procedure Act alone is sufficient to render an arrest lawful or whether more care and diligence is required from an arresting officer before she or he takes a decision to arrest a suspect.

8] The approach which applied in the pre-constitutional era seems to be the one that is satisfied with mere compliance with the provisions of this section. For instance, in the well-known decision of the then Appellate Division in **Tsose v Minister of Justice and others** [3] **Schreiner JA** pronounced himself as follows on the issue :-

> "An arrest is, of course, in general a harsher method of initiating a prosecution than citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such an arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal." [4]

9] It would appear that, with the advent of the Constitution, the courts began to express doubt or uneasiness at the views expressed in **Tsose.** For instance, in **S v van Heerden en ander sake** [5] though he reserved his comments on the **Tsose** pronouncement, **van der Walt J** continued to remark as follows :-

> "Die vraag kan gevra word of die arrestasie van verkeersoortreders by die mobiele hof slegs en uitsluitlik ten doel gehad om die oortreders voor die hof te bring. Dit lyk vir my of daar 'n element van terrorisering daarin vervat is wat ook die doel sou hê om die boete insameling te vergemaklik. Want as die boete nie betaal word nie word die oortreder in die gevangenisbus aangehou……..
> Onwettig sou die arrestasie nie wees nie, maar seer sekerlik laakbaar en dit kan alleen dien om die agting wat lede van die publiek vir die regsproses moet hê in gedrang te bring". [6]

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[3] 1951(3) SA 10 (A);
[4] Ibid. 17 G-H;

[5] 2002(1) SACR 409 (T);
[6] Ibid. 416 f-h;

10] In **Ralekwa v Minister of Safety and Security** [7] **de Vos J** was even more forthright. After referring to the **Tsose** pronouncement, she opined :-

> "(11) The question is whether, in view of the fact that we now have a Constitution that restricts the exercise of public power through a justiciable Bill of Rights, the last statement of the quotation can be correct. There can be no doubt that an examination into the lawfulness of an arrest against the backdrop of a statement that there is no rule of law requiring the milder method of bringing a person into court will be different from an enquiry which starts off on the premise that the right of an individual to personal freedom is a right which should be jealously guarded.
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> (12) I am of the view that the demands of the Constitutional State must be taken into account when applying the general test in cases such as these ….."[8]

11] The Constitution with its justiciable Bill of Rights heralded a new era. The new order was no longer subjected to the parliamentary sovereignty. All laws now had to be interpreted in consonant with the Constitution and those which were contrary to the provisions of the Constitution and its Bill of Rights had to be declared invalid and therefore of no force and effect. Section 40(1)(b) of the Criminal Procedure Act is no exception. Its provisions must also yield to the superior imprimatur of the Constitution. The relevant clause of the Constitution provides that :-

> "12(1) Everyone has the right to freedom and security of the person, which includes the right :-
>
> (a) not to be deprived of freedom arbitrarily or without just cause……."

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[7] 2004(1) SACR 131 (T);
[8] Ibid. at 135 a-b;

12] Interpreting the equivalent provision of the Interim Constitution [9] O'Regan J remarked :-

> "In my view, freedom has two inter-related constitutional aspects: the first is a procedural aspect which requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed…. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable". [10]

13] The same sentiments were expressed as follows by **Ackermann J** in **De Lange v Smuts NO and others** :- [11]

> "It can therefore be concluded that Section 12(1) in extending the right to freedom and security of the person, entrenches the two different aspects of the right to freedom referred to above. The one that O'Regan J has, in the above-cited passages, called the right not to be deprived of liberty 'for reasons that are not acceptable' or what may also conveniently be described as the substantive aspect of the protection of freedom is given express entrenchment in Section 12(1)(a), what protects individuals against deprivation of freedom 'arbitrarily or without just cause' "

14] The notion of "arbitrariness" as a benchmark for wrongful detention finds expression in the **International Covenant on Civil and Political Rights,** 1966 which, in its article 9(1), provides, *inter alia,* that :-

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention ….."

15] The words "arbitrary arrest" contained in Article 9(1) were explained as follows by the United Nations Human Rights Committee :-

> "Arbitrariness is not to be equated with 'against the law'. But must be interpreted more broadly to include elements of

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[9] Section 11(1) of the Interim Constitution;
[10] Bernstein and others v Bester and others NNO 1996(2) SA 751 (CC) at para 145;
[11] 1998(3) SA 785(CC) at para 22

> inappropriateness, injustice, lack of predictability and due process of law…… This means that remand in custody pursuant to lawful arrest, must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime ". [12]

16] The manual refers to a decision in **A W Mukong v Cameroon.** [13] In that case the applicant alleged that he had been arbitrarily arrested and detained for several months, an allegation rejected by the State Party on the basis that the arrest and detention had been carried out in accordance with domestic law of Cameroon. The committee concluded that article 9(1) had been violated since the detention was neither reasonable nor necessary in the circumstances of the case. For instance, the State Party had not shown that the remand in custody was necessary to prevent flight, interference with evidence or the recurrence of crime.

17] The Fourth Amendment to the United States Constitution guarantees the right to be free from unreasonable searches and seizures. In that jurisdiction an unreasonable arrest is aptly termed "a pointless indignity arrest" that serves no discernable State interest. [14] In evaluating the reasonableness of police activity for purposes of the Fourth Amendment the court should, *inter alia,:-*

> "….. evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to

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[12] Professional Training Series No. 9 – Human Rights in the Administration of Justice: A manual on human rights for Judges, prosecutors and lawyers – 2003 – at 165;

[13] Ibid. at 166;

[14] Atnater et el v City of Lago Vista et al 532 US 318 dissenting opinion of Justice O'Connor at 360;

which it intrudes upon an individual's privacy and, on the other, the degree to what it is needed for the promotion of legitimate governmental interests." [15]

18] The question posed by **de Vos J** in **Ralekwa (supra)** finds an answer in the above-quoted jurisprudence of the Constitutional Court, the United States law as well as international law. Mere compliance with domestic law is no longer sufficient. To pass Constitutional muster the arrest and detention must also be found to have been reasonable and necessary for the promotion of legitimate governmental interests. There shall therefore be a balancing act involving :-

> "……the rights of the individual as against the duties of the police to protect the community ….." [16]

Should such a balancing act be performed, no doubt the reprehensible arrests which are likely to bring our system of justice into disrepute to which **van der Walt J** referred in **van Heerden** will be eliminated.

19] There are two conflicting South African High Court decisions on the issue. One is the decision in **Louw v Minister of Safety and Security** [17] wherein **Bertelsmann J** took a view that an arrest, being as drastic an invasion of personal liberty as it is, must be justifiable according to the demands of the Bill of Rights. He then continued to hold that :-

> "…. The police are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than immediate detention of the person

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[15] Ibid. at 361;
[16] Per Sachs J in Minister of Safety and Security v van Niekerk 2008(1) SACR 56 (CC) at 59c;
[17] 2006(2) SACB 178 (T);

concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest". [18]

20] Not so, according to **Goldblatt J** in **Charles v Minister of Safety and Security,** [19]

> **"**The Legislature having granted a peace officer the right to make an arrest in the circumstances set out in Section 40 has created a situation where due compliance with such section by a peace officer is lawful and affords such peace officer protection against an action for unlawful arrest. In my view, the court has no right to impose further conditions on such persons". [20]

In **van Niekerk (supra)** the Constitutional Court was invited to resolve the conflict between these two decisions. **Sachs J,** however, declined the invitation, holding that such conflict as that may exist between the two decisions was not raised by the facts of the case before him". [21]

21] The **Charles'** pronouncement on the issue smacks of the system of parliamentary sovereignty of the pre-constitutional era. We have fortunately outlived that era and now live under a new Constitutional dispensation wherein :-

> "….. every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear imposed by the force a its command ……" [22]

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[18] Ibid. at 187 c-d;
[19] 2007(2) SACR 137 (W);
[20] Ibid. at 144 b;
[21] See van Niekerk (supra) at para 17;
[22] Etienne Mureinik "A Bridge to where?" Introducing the interim Bill of Rights – Vol 10 S A Journal on Human Rights 31 at 32;;

22] The views expressed in **Louw (supra)** are in sync with the Constitution and are therefore to be preferred.

23] The Court *a quo* accordingly erred when it found that mere compliance with the provisions of Section 40(1)(b) of the Criminal Procedure Act was sufficient to render the arrest and detention *in casu* a lawful one.

24] It is common cause that, mindful of the dilemma faced by the police officers when exercising their discretion under Section 40 of the Criminal Procedure Act, the Minister of Safety and Security issued a standard order (G) 341 which deals with arrest and the treatment of arrested persons. [23] The standing order makes provision for the general rule that the object of an arrest is to secure the attendance of a person at his or her trial and that a member may not arrest a person in order to punish, scare, or harass such a person. Thereafter the order sets out exceptional circumstances during which a person can be arrested even if the purpose for such an arrest is not to secure such a person's attendance at his/her trial. Those circumstances are an arrest for the purposes of further investigation, an arrest to verify a name and/or address, or arrest in order to prevent the commission of an offence, an arrest in order to protect a suspect or an arrest in order to end an offence.

25] During cross-examination the second defendant was questioned as to whether she had been aware of the existence of this standing order

[23] Standing Order (G) 341;

and she answered in the negative. However, in his judgment and seemingly purporting to use the provisions of the standing order as a bench mark the learned Magistrate concluded as follows :-

> "In this instance taking into account that the second defendant had difficulty in tracing the plaintiff and she had spoken to the senior public prosecutor and also the manner in which she handled the situation. I am satisfied that she was not *male fide* or that her actions were unreasonable in the circumstances".
> [24]

26] Apart from the fact this finding was unintelligible, as was rightly pointed out by **Sachs J** in **van Niekerk,** this standing order contained departmental guidelines to guide the officers in the exercise of their discretion under Section 40. Those guidelines can certainly not stand in the way of a Constitutional imperative. It would seem that in the circumstances of the case, such a finding cannot stand.

27] **It is for the aforementioned additional reasons that I concur with the order made by my brother Madondo J upholding the appeal and referring the matter back to the Court *a quo* for that Court to reconsider the issues pursuant to the reasons given in our respective judgments. I also agree that the costs of the appeal should be borne by the respondents, jointly and severally, the one paying, the other to be absolved.**

MSIMANG, J:

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[24] Page 4 of the judgment at page 92 of the record.

For the Appellant: Adv. D Crampton (instructed by Acutt & Worthington c/o Botha & Olivier Inc.)

For the Respondents: Adv. Hadebe (instructed by State Attorney)

Matter argued: 22 August 2008

Judgment delivered: 17 March 2009.