IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case No: AR 342/2017

In the matter between:

THAMSANQA PHUNGULA **APPELLANT**

and

MINISTER OF POLICE **RESPONDENT**

JUDGMENT

Delivered on: 8 June 2018

Gorven J (Madondo DJP concurring)

[1] The appellant was arrested at his home on 10 November 2015. His mother charged him with the theft of a number of items from their home. The charge was laid on 27 September 2015 under what is referred to as CAS 176/09/2015. After the charge was laid, the appellant absconded. Detective Constable Mahlawe was assigned to investigate the matter. She was based at the Ibisi police station. On 10 November 2015, the mother of the appellant phoned the police station. She informed them that the appellant had returned and that she had locked him in a rondavel on their property. Detective Constable Duma was sent there and arrested the appellant. The arrest was made without a warrant. The appellant was thereafter detained in the cells at the Ibisi police station.

[2] The appellant appeared in the Magistrate's Court, Umzimkhulu, on 12 November 2015. He was there granted bail in the sum of R500. On 13 November 2015, the mother of the appellant paid that amount at that court. She

was given a bail receipt. She took this to the Ibisi police station that day. Despite this, the appellant was not released. He remained in custody until his next court appearance on 7 December 2015. On that occasion, the magistrate presiding was told that bail had been paid but the appellant had not been released. He then very properly ordered that the appellant be released forthwith unless he was being held for another offence. Since that was not the case, the appellant was released. His detention thus lasted from 10 November 2015 to 7 December 2015. The appellant's mother subsequently withdrew the charge against him.

[3] As a result of this, the appellant sued the respondent out of the Magistrate's Court, Umzimkhulu. He claimed damages of R200 000 on the basis that his arrest and detention, alternatively his detention after 13 November 2015, had been unlawful. The defence can be summarised as follows:

(a) On 10 November 2015 the appellant was arrested in respect of business burglary charges under Ibisi CAS 176/09/15 and Ibisi CAS 185/09/15.

(b) The appellant was charged only in respect of CAS 176/09/15 as, at the time, the other docket was with the prosecutorial division in Umzimkhulu.

(c) The arrest was lawful and justified.

(d) The detention of the appellant from 13 November 2015 was lawful and justified.

The claim of the appellant was dismissed with costs on the basis that neither his initial arrest, nor his detention after 13 November 2015 was unlawful.

[4] Section 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the Act) governs the present arrest without a warrant. It provides, in its material parts:

'A peace officer may without warrant arrest any person—

(*b*) whom he reasonably suspects of having committed an offence referred to in Schedule 1 . . .'.

It has long been accepted that the party effecting such an arrest bears an onus to prove the lawfulness of the arrest. In *Duncan v Minister of Law and Order*,[1] the following jurisdictional requirements were set out:

'(1) The arrestor must be a peace officer.

(2) He must entertain a suspicion.

[1] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

(3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence).

(4) That suspicion must rest on reasonable grounds.'[2]

It was then explained that:

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power . . .'.[3]

This case predated the present democratic milieu. Since the onset of democracy, s 12(1)*(a)* of the Constitution of the Republic of South Africa, 1996, forbids the deprivation of freedom arbitrarily or without just cause. It has been affirmed that the approach in *Duncan* remains valid to claims for unlawful arrests.[4]

[5] At the time, Constable Duma was a peace officer. The charge laid by the appellant's mother fell within the ambit of Schedule 1 of the Act. Two of the jurisdictional requirements were thus satisfied. It is the other two aspects on which the appellant relies. It was submitted that Constable Duma did not himself form a suspicion and that, if he did, it did not rest on reasonable grounds. It was further submitted that, if these two issues were decided in favour of the respondent, the arrest of the appellant did not result from the proper exercise of the discretion of Constable Duma.

[6] The evidence concerning the arrest is as follows. The practice at the Ibisi police station was to hold morning parades. At these parades, members of that police station were informed of outstanding investigations. This practice was known as 'reading the docket'. Constable Mahlawe testified that this took place after the charge was laid and the appellant had absconded. She said that 'on the parade I told my colleagues that I am looking for [the appellant].' Constable Duma testified that the docket was read and information about the matter was discussed at that parade. The members present were informed that the appellant had absconded after the charge had been laid. As mentioned, on 10 November 2015, the mother of the appellant telephoned the police station. She reported that the appellant had returned and that

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[2] At 818G-H.
[3] At H-I.
[4] *Minister of Safety and Security v Sekhoto & another* 2011 (1) SACR 315 (SCA) para 6; *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para 44.

she had locked him in a rondavel on the property. Constable Duma went there, met the mother, was taken to the rondavel and then arrested the appellant.

[7] When he was asked what information he had when he arrested the appellant, he replied, 'His mother said she is suspecting him . . . because she was with him as her house was broken into (and) the items taken.' When asked as to the nature of his suspicion he indicated that he was working according to information discussed at the parade when the docket was read.

[8] Much was made by counsel for the appellant of certain answers given by Constable Duma in evidence. He said that the investigating officer told the members that if someone sees the appellant, he should be arrested. The inference which counsel sought to draw was that Constable Duma was simply acting on orders without himself applying his mind to the matter. This does not accord with his testimony above. Counsel also highlighted that Constable Duma said: 'I think that the investigating officer of the case is the one who knows how the case is going.' After it was then put to him that he had no suspicion of his own, he replied: 'Yes, because I was not the investigating officer. What I was meant to do was to arrest him if I see him as there was a case for him.' He also said that he didn't go 'deep into the merits of the case'.

[9] The nature of the required suspicion has been authoritatively stated:[5]

'This Court has endorsed and adopted Lord Devlin's formulation of the meaning of "suspicion":

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end."'[6]

It is clear from the answers given by him that Constable Duma did have a suspicion that the appellant had committed the offence in question.

[10] The next question is whether the suspicion rested on reasonable grounds. The test for this is objective.[7] In *Minister of Safety and Security v Magagula*,[8] a police officer was asked by the investigating officer to interview a murder suspect and

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[5] *Powell NO & others v Van Der Merwe NO & others* 2005 (5) SA 62 (SCA) para 36 (footnote omitted from the quotation).

[6] The reference is to *Shabaan Bin Hussein and Others v Chong Fook Kam and Another* [1970] AC 942 (PC) ([1969] 3 All ER 1627) at 948B.

[7] *Minister of Safety and Security & another v Swart* 2012 (2) SACR 226 (SCA) para 20.

[8] *Minister of Safety and Security v Magagula* [2017] ZASCA 103.

locate and arrest another suspect, who was said by the first suspect to have taken part in the commission of the offence. This suspect interviewed implicated himself and the appellant. Details of the offence corresponded with what the police officer had been told by the investigating officer. The suspect identified this other person to the policeman, who then arrested him. The Supreme Court of Appeal accepted that the policeman had a reasonable suspicion that the appellant had committed the offence.

[11] As regards the present matter, the following facts are relevant. Constable Duma was told that items had gone missing from the home of the appellant's mother. She had laid a charge on 27 September 2015. After the charge was laid, the appellant had absconded. Constable Duma had listened while the docket was read. The docket would have contained the statement of the appellant's mother. There was discussion after the docket was read. Constable Duma attended at the home of the appellant's mother on 10 November 2015. She there confirmed that the appellant had stolen items from her. There is no confusion about the identity of the appellant. To my mind, the suspicion of Constable Duma rested on reasonable grounds. In the circumstances, the test was satisfied.

[12] Since the jurisdictional facts for an arrest were satisfied, Constable Duma had a discretion as to whether to arrest the appellant or not. It was submitted that he considered that he had no discretion because he was not the investigating officer. But his answer in this series of exchanges shows that he was confused about what was being asked of him. He considered that he was asked when the investigating officer would have charged the appellant. He said that he did not have the docket in his possession at the time. When Constable Duma arrived at the appellant's mother's home, there were a number of community members who wanted to assault the appellant. It was argued that he also said that he 'had to arrest him because the community was going to assault him.' This is correct but it was also part of the sequence of questions which had clearly confused him. In re-examination, he stated that what he considered was that the appellant had committed the offence in the area and if not arrested, he might commit further offences. This shows that he exercised his discretion. On the day of the arrest, persons from the community were present. They wanted to assault the appellant and claimed that he had engaged in a number of criminal acts. The appellant was in fact wanted in connection with a

business burglary as well. It was clearly reasonable to guard against further criminal action in the community by arresting the appellant.

[13] In addition, Constable Duma was aware that the appellant had absconded after his mother had laid the charge. This had prevented his arrest for almost two months. It can hardly be argued in the circumstances that there were less onerous means to obtain the attendance of the appellant at court. In the light of this, the discretion to arrest the appellant was properly exercised and cannot be impugned. Accordingly, in my view, the respondent discharged the onus to show that the arrest was lawful and did not infringe s 12(1)*(a)* of the Constitution.

[14] That brings me to the question of whether or not the detention of the appellant was unlawful. Since the arrest was lawful, his initial detention was also lawful. It was not alleged that his detention prior to his appearance on 12 November 2015 was unlawful. The issue is whether, after the amount fixed for bail was paid by his mother on 13 November 2015, his continued detention was unlawful.

[15] In this regard, there was a dispute at the trial as to what took place when the mother of the appellant presented the bail receipt at the Ibisi police station. She testified that she met Constable Duma there. He recognised her as the appellant's mother and, when she said she had come to bail out the appellant, asked for the bail receipt. She gave it to him and he then phoned Constable Mahlawe. He told the appellant's mother that Constable Mahlawe was not prepared to release the appellant because he had other cases pending against him. She then left after requesting Constable Duma to inform the appellant that she had paid bail and come there for his release.

[16] In cross-examination, it was denied that the appellant's mother had met and spoken to Constable Duma that day. Counsel put to her that the appellant could not be released because she did not provide the correct documentation. First, it was contended that the bail receipt recorded the case number as B41/15 whereas it was in fact B416/15. Secondly, it was asserted that she had required a further document before the appellant was entitled to be released. Counsel did not contend that she was told any of this on 13 November 2015, only that this was in fact the case. Her response that she was not told of these supposed problems was not challenged. Neither was any evidence led by the respondent as to the inadequacy of her documentation on either score. These issues were not pleaded. Nor did the

respondent call in evidence the person who allegedly dealt with her that day. Constable Mahlawe confirmed that she had been phoned by someone from the charge office without identifying that person. The identity of that member was known to her. All of this leaves the version of the appellant's mother uncontested.

[17] The Constitutional Court has made clear that s 12(1)*(a)* of the Constitution requires that 'not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons.'[9] It has further held that the Constitution imposes a duty on the State not to perform any act that infringes the entrenched rights of people, including that of freedom and security of the person.[10] This is because:

'The protection of personal liberty has a long history in the common law, both of this country and abroad. It is now entrenched in our law by the guaranteed right of everyone in s 12(1) of the Constitution to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause.'[11]

[18] Even if the version put by the respondent to the appellant's mother withstands scrutiny, it does not assist the respondent. The case number on the bail receipt did differ from that on the charge sheet by the omission of one figure. But this was the only offence for which the appellant was ever charged at the Ibisi police station. It was also the only offence where his mother was the complainant. It was also the only offence for which bail had been granted on 12 November 2015. And it was the only matter postponed to 7 December 2015. All of this could very easily have been established by the respondent when the bail receipt was produced. No evidence was led of any such steps taken by the servants of the respondent.

[19] The fixing of bail meant in this instance that, once bail was paid, the appellant was entitled to his release. Proof of payment by way of the bail receipt was produced on 13 November 2015. Once this was done, a clear duty rested on the respondent and his servants to establish whether or not there was any lawful basis on which to further detain the appellant. This was not done. The onus rested on the respondent to prove that the continued detention of the appellant was lawful. The respondent came nowhere close to discharging this onus even on its own version, let alone on

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[9] *Zealand v Minister of Justice and Constitutional Development & another* 2008 (2) SACR 1; 2008 (4) SA 458; 2008 (6) BCLR 601 (CC) para 43.

[10] *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 44.

[11] *Minister of Home Affairs v Rahim & others* 2016 (3) SA 218 (CC) para 27.

the evidence. This means that the detention of the appellant between 13 November 2015 and 7 December 2015 was unlawful. The learned magistrate erred in finding otherwise without any evidential or legal basis for doing so.

[20] It remains to consider the amount of damages to be awarded for this continued detention. The principles are clear. An award must 'reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.'[12] Comparable awards cannot be looked to as more than a basic guide since facts differ from case to case. An award is 'no more than a crude *solatium* for the deprivation of [liberty]' and courts are not extravagant in arriving at such awards.[13] All relevant facts must be taken into account, not only the length of the deprivation of liberty.[14]

[21] In *Rahim*,[15] a number of persons were wrongfully detained as illegal immigrants for periods varying between 4 and 35 days. The Supreme Court of Appeal granted damages ranging from R3 000 to R25 000. These awards were not interfered with by the Constitutional Court.

[22] In *Woji v Minister of Police*,[16] the appellant had been wrongfully detained between 20 November 2007 and 13 January 2009. He was forced to endure appalling conditions while detained. Apart from overcrowded cells, he was raped twice and witnessed other prisoners being variously raped and stabbed. He was awarded R500 000.

[23] In *Seymour*,[17] the 63 year old respondent was detained for five days at a police station. He had access to his family and medical advisor. After the first 24 hours he was moved to a hospital. The Supreme Court of Appeal reduced an award of R500 000 to R90 000. Apart from his detention, there were no further degrading factors.

[24] In *Rudolph & others v Minister of Safety and Security & another*,[18] the first and second appellants were detained for three nights in a police station. The cell was not cleaned during this time, the blankets supplied were dirty and infested with insects, they were unable to wash, had no access to drinking water, were not allowed visitors

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[12] *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26.
[13] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 20; approved in *Rahim* para 33.
[14] *Tyulu* para 25.
[15] See footnote 11.
[16] *Woji v Minister of Police* 2015 (1) SACR 409 (SCA).
[17] See footnote 13.
[18] *Rudolph & others v Minister of Safety and Security & another* 2009 (5) SA 94 (SCA).

at all and one of the appellants was without his medication for diabetes. They were awarded R100 000 each and the first appellant, who was re-arrested and detained for a further two nights in similar conditions, save that his wife could visit and bring his medication, was awarded a further R50 000.

[25] In *Tyulu*,[19] a magistrate was arrested and detained for less than a few hours for being drunk in public. An improper motive led to his arrest. His standing in the community was specifically taken into account in arriving at the award of R15 000.

[26] In *Minister of Safety and Security v Scott & another*,[20] the first respondent was awarded R75 000 by the high court. This on the basis that he was detained overnight during which he suffered trauma and severe anxiety, was given no medication despite reporting an injury and spent a sleepless night in the cell due to his fear of the other inmates. The Supreme Court of Appeal reduced this to R30 000 because relevant factors had not been considered by the high court. Adverse credibility findings had been made against the first respondent, he was held to have been an aggressor in an assault incident, the arrest was rendered wrongful only on the basis of a 'technicality' and the circumstances of the arrest favoured the version of the appellant. The alleged conditions in his cell were disputed as was the issue whether his injuries required immediate medical attention. In addition, he was detained for a relatively short time.

[27] In *Seria v Minister of Safety and Security & others*,[21] the appellant, an architect in his fifties, had been entertaining guests at his home. He had been wrongfully arrested in the presence of his guests. He spent three and a half hours in full view of the public at the local police station and was then detained overnight in the police cells, mostly with a drug addict. He was awarded R50 000.

[28] The following factors are relevant in the present matter. The unlawful detention endured from 13 November 2015 to 7 December 2015. There was nothing adverse about the conditions of his detention during this period. He admitted having been involved in a number of criminal activities prior to his arrest. He admitted having been caught red-handed in a business burglary for which he would have been arrested had the docket in that matter not been sent to the prosecutorial division. Taking into account these facts and weighing them against the right of the

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[19] See footnote 12.
[20] *Minister of Safety and Security v Scott & another* 2014 (6) SA 1 (SCA).
[21] *Seria v Minister of Safety and Security & others* 2005 (5) SA 130 (C).

appellant not to be arbitrarily deprived of his liberty, I consider the sum of R75 000 to be an appropriate award of damages.

[29] In the result, the appeal is upheld with costs and the order of the Magistrate's Court, Umzimkhulu, is set aside and replaced with the following order:

'1. The defendant is directed to pay damages to the plaintiff in the sum of R75 000 for his wrongful detention between 13 November 2015 and 7 December 2015.

2. The defendant is directed to pay interest on that sum at the legally applicable rate between the date of service of summons and the date of payment.

3. The defendant is directed to pay the costs of suit.

4. The balance of the plaintiff's claim is dismissed.'

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Gorven J

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Madondo DJP

Date of Hearing: 1 June 2018

Date of Judgment: 8 June 2018

Appearances

For the Appellant: DP Crampton, instructed by SM Zwezwe Attorneys

For the Respondent: R Nirghin, instructed by the State Attorney