**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION, MAKHANDA)**

**CASE NO. CA170/2021**

In the matter between:

**ROGER MCEWAN**

And

**THE MINISTER OF POLICE**

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**JUDGMENT**

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**GQAMANA J:**

[1] This appeal is against the judgment of the Regional Magistrate, Ms Reddy, wherein she granted a judgment in favour of the defendant (the respondent herein) with costs. As a short background, the appellant (the plaintiff in the court a quo) sued the respondent, the Minister of Police, for damages arising out of an alleged unlawful arrest and detention. The appellant was unsuccessful in his quest to hold the respondent

vicariously liable for the actions of the police that arrested and detained him. Dissatisfied with the aforesaid judgment, the appellant approached this court.

[2] There are sixty three grounds of appeal as set out in the notice of appeal, but trimmed to the bone, the real herein issues are;

(a) the lawfulness of the arrest in that, whether the arresting officer entertained a reasonable suspicion that the appellant committed a Schedule 1 offence;

(b) the detention of the appellant beyond the 48 hours period;

(c) the lawfulness of the detention, and

(d) the costs awarded by the Magistrate in favour of the respondent.

[3] Before I consider these issues, it is necessary to sketch out the appellant's claim as set out in his pleadings. The appellant's claim stems from his arrest and ensuing detention by the police. It is common cause that the appellant was arrested by the police without a warrant in the early hours (shortly after midnight)[1] on Friday, 5 October 2018. He was thereafter detained at Gelvandale police station. He appeared at court on Monday, 8 October 2018. His case was then remanded for the following day. On 9 October 2018, it was further postponed by the presiding officer for "*SAP 69's + profiles*."[2] Thereafter on 16 October 2018, his case was withdrawn by the Prosecutor.

[4] On the heels of the withdrawal of the criminal charges against him, a notice in terms of s 3 of Act 40 of 2002 was served on both the National and Provincial Commissioners.[3] Subsequent thereto summons was issued on 5 December 2018. In the particulars of claim, the appellant pleaded that the arrest and ensuing detention were unlawful and consequently he claimed damages in the total sum of **R350 000.00**.

[5] The respondent resisted liability and relied on the provisions of s 40 (1)(b) of the Criminal Procedure Act, 51 of 1977 ("the CPA") as the justification for the arrest. It

[1] Record Vol 1, p43, para 1.15.
[2] Vol II, p120.
[3] Vol 1, pp 14, 26 both letters are dated 31 October 2018.

was furthermore pleaded by the respondent that the object of arresting the appellant was to investigate the matter and to bring him before a court of law.[4]

[6] Because the arrest and ensuing detention were admitted, the onus was on the respondent to justify the lawfulness of the arrest and detention.[5] However, in respect of the claim for loss of income, the plaintiff retained the onus and the duty to begin.

[7] It is well-established that the jurisdictional facts for a section 40(1)(b) defence are that; (i) the arrestor must be a peace officer, (ii) he/she must entertain suspicion, (iii) the suspicion must be that the arrestee committed a Schedule 1 offence, and (iv) the suspicion must rest on reasonable grounds.[6] The onus is upon the arresting officer to establish these jurisdictional facts. The question of discretion only arises once the jurisdictional facts have been established.

[8] The first three jurisdictional facts are not in issue herein. The appellant's main contention is that the arresting officer's suspicion was not based on reasonable grounds.

[9] Mr *Mackenzie* on behalf of the appellant argued that, even if the information at the disposal of the police was sufficient to effect the arrest, when the appellant gave them an exculpatory statement, the reasonableness of their suspicion ceased then and there, and accordingly there was an obligation on the arresting officer to investigate it. For that proposition, Mr *Mackenzie* relied upon the judgment by the Supreme Court of Appeal in *Brits v Minister of Police & Another* (759/2020) [2021] ZASCA 161 (23 November 2021). That judgment is of no assistance to the appellant herein, because it is distinguishable on the facts. In that matter the SCA concluded that the High Court erred on the facts and in law in that, there was no evidence justifying the findings that, *prima facie* the appellant exercised constructive control of the goods suspected to be

[4] Vol 1, pp 33–34, para 3.3.
[5] *Minister of Law and Order & others v Hurley and another* 1986 (3) SA 568 (A) at 589 E–F and *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC).
[6] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G–H

stolen through his employee, and further that, its reliance on the judgment in *S v Wilson* 1962 (2) SA 619 (A) was misplaced. It further held that the arresting officer had made up his mind to arrest the appellant long before his arrival and did not apply his mind to the appellant's explanation. In the instant matter, the police officer that physically effected the arrest denied that there was any exculpatory statement made by the appellant at the time of the arrest. Furthermore, even at the police station when the warning statement was taken from the appellant, he declined to make a statement.

[10] As a point of departure, the arresting officer does not have to be convinced that there is in fact evidence proving the guilt of the arrested person beyond reasonable doubt. The question of whether the arresting officer entertained a reasonable suspicion has to be approached in the matter postulated by *Jones* J in *Mabona and another v Minister of Law and Order Others,*[7] and that is:

> "*The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1)(b) is objective … Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff's 'were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, something which otherwise would have an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or* ***without checking it where it can be checked****. **It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.** This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but no certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion*."

[11] Although her judgment is not well drafted, the trial Magistrate holistically considered all the evidence without losing sight of where the onus rests. From the appeal record, it is evident that the police testified that there was a sworn statement made by the

[7] 1988 (2) SA 654 (SE) at 658 E–H.

complaint about the rape incident and the appellant was implicated therein as the perpetrator. The appellant was well known by the complainant. The medical report (form J88) also did not exclude rape/sexual assault. Further it is evident from the content of the complainant's statement, that there were no other person(s) that witnessed the rape incident. There was also the first report statement. The object of arresting the appellant was to bring him before court to be dealt with in accordance with justice. When the police took his warning statement, the appellant refused to make a statement and said that he will make the statement in court. Based on the aforesaid evidence, the Magistrate was accordingly satisfied that the arresting officer exercised a reasonable suspicion. I have indicated in paragraph 8 above that the police denied that the appellant gave exculpatory statement that required to be investigated or checked before arresting him.

[12] Having regard to the totality of the evidence at the disposal of the trial magistrate, her findings that the arresting officer entertained a reasonable suspicion were correct. The information at the disposal of the arresting officer was sufficient to effect the arrest. The information does not have to be of such a nature that it proves the guilt of the arrested person. It is sufficient if it is based on reasonable suspicion and not certainty. The appellant was unable and not keen to rebut the rape allegations against him. The object of arresting the appellant was to bring him before court. Accordingly Mr *Mackenzie*'s submissions that the magistrate erred on her findings in respect of this jurisdictional fact on this aspect have no merits.

[13] With regard to the exercise of the discretion by the arrestor, the onus was upon the appellant, even though the arrest itself comprises a person's right to freedom. In *Minister of Safety and Security v Sekhoto and Another*,[8] *Harms* DP at para 49 stated that:

> "*A party who alleges that a constitutional right has been infringed bears the onus.* ***The general rule is also that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This is the position whether or not the right to freedom is compromised.*** *For instance, someone who wishes to attack an adverse parole decision bears the onus of showing that the exercise of*

[8] 2011 (1) SACR 315 (SCA).

*discretion was unlawful. The same would apply when the refusal of a presidential pardon is in issue.*"

[14] In the particulars of claim (at para 13.4) a bold allegation was made that the arresting officer failed to exercise any discretion at all, alternatively, failed to exercise his discretion in a rational manner.[9] There was no evidence led by the appellant to show either that there was no urgency to use the arrest method to bring him before court or that other milder methods of bringing him to court would have been equally effective. Based on the evidence and pleadings herein, the exercise of discretion by the arresting officer to use the arrest method to bring the appellant to court cannot be faulted.

[15] I now proceed to consider the issue of detention. Mr *Mackenzie* argued that the appellant should have been brought before court on Friday, 5 October 2018, that is, the date of his arrest. Section 50 (1)(c) and (d)(i) of the CPA reads:

> "(c) *Subject to paragraph (d), if such an arrested person is not released by reason that–*
>
> *(i) no charge is to be brought against him or her; or*
> *(ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonable possible, but not later than 48 hours after the arrest.*
>
> *(d) If the period of 48 hours expires–*
> *(i) Outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day…"*

[16] An arrested person must be brought before a lower court as soon as reasonably possible but not later than 48 hours after his arrest. However, what is reasonably possible depends on the facts of each case. It is common cause that the appellant was arrested in the early hours (at 00h15) on Friday, 5 October 2018.[10] The bail information form and other administrative procedures were completed on Saturday, 6 October 2018 by the Investigating Officer. The Investigating Officer died before the trial and was unavailable to testify and provide explanation on why the appellant was not brought to

[9] Vol 1, p 11, para 13.4.
[10] Record Vol 1, p 45 para 1.15.

court on the date of his arrest. However the objective evidence presented before the trial court shows that on the first appearance, the appellant's criminal profiles were still outstanding. There were allegations that such profiles were readily available or that the police were remiss in their duties by not ensuring that the profiles were available earlier.

[17] In advancing his submission on this point Mr *Mackenzie* placed reliance on the judgment in *Minister of Safety and Security v Faizel Jacobs.*[11] The facts in *Jacobs* were as follows: the respondent was arrested on Thursday, 19 February 2009 at 21h00 for a robbery incident that took place in October 2008, i.e. a period of approximately four months. The investigating officer failed to take him to court on Friday because he was busy. He was only taken to court on Monday, 23 February 2009. He was kept in the court cells and was not brought before court because the case docket was left at the police station. He was released in the afternoon at 16h00 without even appearing in court. The court found both explanation inexcusable and that nothing prevented the investigating officer to take the respondent to court on Friday within the 48-hours period.

[18] The facts in this matter are completely distinguishable. The evidence as pointed out in the preceding paragraph above, shows that there was an investigation going on and the appellant's criminal profiles were still outstanding. During the hearing of the appeal, we pointed to Mr Mckenzie these objective facts. Despite that, in his desperation to resuscitate his already demised submission, Mr *Mckenzie* sought to persuade us that, although the criminal profiles were essential and vital to the issue of bail, the investigating officer could have obtained them sooner in a shorter period of time, because the appellant's identification document was in the possession of the police. Such submission was superficially attractive but not borne out by the case pleaded on behalf of the appellant. Without the allegations and evidence supporting such submission it has no merit.

[19] If an arrested person is not released as contemplated in sub-section (1)(c) and it is not reasonably possible to bring him to court within 48 hours, he must be brought before

[11] Unreported judgment, ECHC (Grahamstown) Case No: CA07/2011, 15 December 2011.

court by no later than the end of the first court day, if the period of 48 hours expires outside the ordinary court hours.[12] The appellant was brought to court on Monday, 8 October 2008 and that was within the time period stipulated in sub-s (1)(d)(i).

[20] Mr *Mackenzie* also argued that the ensuing further detention was unlawful. We pointed out once again to him that the pleadings lack specific averments setting out the grounds upon which the detention was contended to be unlawful.

[21] In *Sandi v Minister of Safety and Security and another,*[13] *Eksteen* J at para [6] said the following:

> "The grounds upon which it is contended that the detention is unlawful must therefore be pleaded in order to alert the defendant to the issue in respect of which the defendant bears the onus."

[22] At the hearing of the appeal, we invited Mr *Mckenzie* to direct us to the record the date at which, and the circumstances upon which he contends further the detention of the appellant became unlawful. He was unable to do so. If the arrest is lawful, the ensuing detention is *prima facie* lawful until the arrested person is brought before a court.[14] The facts upon which the aggrieved person contends that the detention was unlawful must be specifically pleaded. None were pleaded herein nor was evidence given to support the contention that the detention was unlawful. Therefore, there was no misdirection on the part of the Magistrate in her findings that the entire detention was lawful.

[23] On the issue of costs awarded by the trial Magistrate, it is well established law that the award of costs falls wholly within the discretion of the court of first instance and the court of appeal will not interfere with a costs order made by the trial court unless the latter failed to exercise a proper and judicial discretion.[15]

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[12] See section 50(1)(d)(i) of the CPA.
[13] Unreported judgment, ECG Case No: 272/2012 (13 September 2017).
[14] Section 39 of the CPA.
[15] *Beinash v Wixley,* 1997 (3) SA 721 (SCA) at 739 G–H.

[24] The power of the appeal court to interfere with a costs order is limited to cases of vitiation by misdirection or irregularity or absence of grounds on which a court, acting reasonably could have made such an order.[16] Whether the appeal court would not have awarded the same order is not a ground for interference with the costs order of the trial court.[17]

[25] On the facts herein it cannot be said that the trial Magistrate failed to exercise a proper and judicial discretion in awarding the costs against the appellant. The respondent was fully successful in resisting the appellant's claim in the trial court, and the Magistrate exercised her discretion and awarded the costs in favour of the respondent including counsel's fees.

[26] With regard to the costs of this appeal there are no reasons to depart from the general rule that the costs follow the result. The respondent is accordingly entitled to his costs of the appeal.

[27] In the circumstances the following order is issued:

1. The appeal is dismissed with costs.

**N GQAMANA**
**JUDGE OF THE HIGH COURT**

[16] *Attorney General Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670 D–F.
[17] *Protea Assurance Co. Ltd v Matinise* 1978 (1) SA 963 (A) at 976 H.

I agree

**D VAN ZYL**

**DEPUTY JUDGE PRESIDENT OF THE HIGH COURT**

**APPEARANCES:**

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| Attorney for the Appellant | : | *Mr P Mckenzie* |
| Instructed by | : | C/o Gold and Stone Inc. Attorneys<br>Grahamstown |
| Counsel for the Respondent | : | *Adv M Pango* |
| Instructed by | : | State Attorneys<br>Gqeberha |
| Date heard | : | 04 February 2022 |
| Date judgment delivered | : | 19 April 2022 |