



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 426/2023

In the matter between:

NTONI JACOB HLAPE

APPELLANT

and

THE MINISTER OF POLICE

RESPONDENT

Neutral Citation: *Ntoni Jacob Hlope v The Minister of Police* (426/2023) [2024]
ZASCA 68 (3 May 2024)

Coram: NICHOLLS, MOTHLE, WEINER, MOLEFE and KGOELE JJA

Heard: 23 February 2024

Delivered: 3 May 2024

Summary: Civil procedure – unlawful arrest and detention – whether the arrest and detention of appellant was unlawful – whether respondent was liable to compensate appellant for his arrest and detention for a period of three days.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams J and Turner AJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Mothle JA (Nicholls, Weiner, Molefe and Kgoele JJA concurring)

[1] On 31 August 2018, Mr. Ntoni Jacob Hlape (the appellant) issued summons out of the Gauteng Division of the High Court, Johannesburg (the high court), wherein he sued the Minister of Police (the respondent) for damages in the amount of R200 000. The damages arose from appellant's alleged unlawful arrest and unlawful detention by members of the South African Police. The respondent defended the action.

[2] The same summons was re-issued on 23 March 2021 in the Magistrates' Court for the District of Emfuleni, held at Vereeniging (the magistrates' court). The trial commenced on 17 March 2022 in the magistrates' court, which, on 6 May 2022, dismissed the appellant's action with costs. Dissatisfied with the outcome, the appellant lodged an appeal with the high court. On 1 February 2023, the appeal court of the Gauteng Division, per Adams J and Turner AJ (the appeal court), also dismissed the appellant's appeal. Still aggrieved with the outcome, the appellant petitioned this Court for special leave to appeal, which petition was granted on 12 April 2023. It is thus with the special leave of this Court that this appeal is before us.

[3] The background facts in this appeal are largely common cause, either because the version of the respondent was, in part, either corroborated by the appellant or not disputed. The respondent's evidence was presented by three members of the police. These were Sergeant Sibusiso Sibande (Sergeant Sibande) and Constable Sipho Mlungisi Buthelezi (Constable Buthelezi), who testified as the arresting officers, while Sergeant Lebogang MacWilliam Phoofolo (Sergeant Phoofolo) testified in regard to

the appellant's detention. At the time of the appellant's arrest and detention, all three police officers held the rank of constable. During the trial, police officers Sibande and Phoofolo had been promoted to the rank of Sergeant. In this judgment they will be referred to by their rank of 'Sergeant'. The appellant testified as the only witness in support of his claim.

[4] The arresting officers testified that on the evening of 4 May 2018, at approximately 19h00, while on patrol in a marked police van, they were stopped by a community member who informed them that there were males smoking dagga inside a shack at house 6242 in Pelindaba. They went to the house and found the three men smoking. One of them was the appellant. They introduced themselves as members of the police and asked for permission to enter and search the shack. They were granted permission to do so. Sergeant Sibande searched the appellant and found a transparent plastic bag containing dagga in the appellant's front right pocket of his trousers. He asked the appellant what he was doing with dagga. The appellant did not respond. Sergeant Sibande explained the appellant's rights to him, and thereafter informed the appellant that he was arresting him for being in possession of dagga.

[5] Sergeant Sibande took the appellant to the police station where he weighed the dagga in appellant's presence, gave him the notice of rights to sign and handed appellant to the cell commander. During trial and under cross-examination, Sergeant Sibande testified that he informed the appellant that he may apply for bail at court. The appellant disputed the evidence that he was informed of his right to apply for bail. I will return to this aspect later in this judgment. Constable Buthelezi basically corroborated Sergeant Sibande's account on the events of the arrest.

[6] After the appellant was taken to a cell at the police station, Sergeant Phoofolo, who at that time was attached to the crime (investigation) office, took over the docket. He testified that his duties at that time involved conducting a preliminary investigation for the purpose of compiling the profile of the arrestee. In that regard, he had to ascertain whether the person in custody had previous convictions or outstanding cases, or warrants in respect of other offences. All these processes are conducted in order to prepare the arrestee for his initial appearance in court. Sergeant Phoofolo went to the cells to interview the appellant concerning the necessary particulars

required for profiling. During the interview, the appellant declined to provide his name to the officer, but disclosed his date of birth. Consequently, no profile could be compiled. Officer Phoofole testified that he decided to take a warning statement from the appellant, after he informed him of his rights, including the right to be released from custody. The pro forma documents in terms of which he took the warning statement were admitted as evidence in court. The appellant was held in custody for three days. On Monday 7 May 2018, he was released at court, consequent to the prosecutor withdrawing the charge of unlawful possession of dagga.

[7] The appeal turns on the appellant's contentions, first, that the arrest was unlawful, because, as he alleged, Sergeant Sibande did not exercise the discretion required of him before effecting an arrest. Second, that his detention was unlawful, as he had a right to be released on bail, but was not informed of this right. Third, the quantum of the damages claimed, for the alleged unlawful arrest and detention. I turn to deal, first with the appellant's arrest and thereafter his detention for three days, and if the arrest and/or detention is upheld, the quantum of damages.

[8] In regard to his arrest, the appellant pleaded in paragraph 5 of his particulars of claim as follows:

'The Plaintiff pleads that the arresting officer did not apply his/her mind when he/she executed the arrest of the Plaintiff as he/she failed to exercise his/her discretion whether or not to arrest the Plaintiff.

The arresting officer failed to consider other methods to secure the Plaintiff's attendance in court.'

[9] Section 38(1) of the Criminal Procedure Act 51 of 1977 (the CPA) provides that arrest is one of the four methods of securing the attendance of an accused in court for purposes of trial.¹ Because of its intrusive nature on the privacy and liberty of the arrestee, an arrest has to be effected on the authority of a warrant, or, under certain circumstances, without a warrant.² Consequently, the onus rests on the arrestor to

¹ Section 38(1) provides:

'Subject to section 4(2) of the Child Justice Act, 2008 (Act 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.'

² Section 39 of the CPA.

justify an arrest. In *Minister of Law and Order and Others v Hurley and Another*,³ this Court stated thus:

‘An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.’

[10] Section 40 of the CPA provides that a police officer may arrest any person without a warrant, if the person is reasonably suspected of committing or of having committed an offence as listed in items (a) to (q) of s 40(1). Of relevance to this appeal, is s 40(1)(h), which provides:

‘(1) A peace officer may without warrant arrest any person —

...

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession, or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition. . .’

In this instance, the relevant law was the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act), in particular s 4, dealing with the illegality of the use and possession of dagga.

[11] This Court, in *Duncan v Minister of Law and Order (Duncan)*,⁴ set out four jurisdictional requirements which flow from s 40(1) of the CPA, which authorises arrests without a warrant. They are: that the person arresting must be a peace officer, who entertained a suspicion, that the suspicion was that the arrestee had committed a schedule 1 offence and that the suspicion rested on reasonable grounds. Applying these jurisdictional facts to this appeal, Sergeant Sibande was a police officer, who entertained a suspicion after a community member informed him of some male persons smoking dagga in a shack. Possession of dagga was, at that time, an offence in terms of s 4 of the Drugs Act. The suspicion rested on reasonable grounds that whoever was smoking dagga in that shack, used and logically therefore, had that dagga in his possession. The appellant confirmed in his evidence that he had dagga

³ *Minister of Law and Order and Others v Hurley and Another* [1986] ZASCA 53; [1986] 2 All SA 428 (A); 1986 (3) SA 568 (A) at 589E-F.

⁴ *Duncan v Minister of Law and Order* [1986] ZASCA 24; [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H.

in his possession. It is thus not disputed that, when the appellant was arrested, the four jurisdictional prerequisites of s 40(1) of the CPA were present.

[12] The question that arises is whether Sergeant Sibande, in executing the arrest, exercised a discretion. In *Minister of Safety and Security v Sekhoto (Sekhoto)*,⁵ this Court established three important principles in the exercise of a discretion when effecting an arrest. The first is that once the required jurisdictional facts that flow from s 40(1) of the CPA, as stated in *Duncan* are present, a discretion arise as to whether or not to arrest.⁶ Second, and related to the first, is where a party alleges the failure to exercise a discretion to arrest, that party bears the onus to prove that allegation.⁷ Third, that the general requirement is that any such discretion must be exercised in good faith, rationally and not arbitrarily.⁸ The court in *Sekhoto* further stated thus⁹:

‘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. The 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 and so long as the discretion is exercised within this range, the standard is not breached.’ (Footnotes omitted)

[13] These principles were confirmed by the Constitutional Court in *Groves NO v Minister of Police*,¹⁰ thus:

‘The officer making a warrantless arrest has to comply with the jurisdictional prerequisites set out in section 40(1) of the CPA. In other words, one or more of the grounds listed in paragraphs (a) to (q) of that subsection must be satisfied. If those prerequisites are satisfied, discretion whether or not to arrest arises. The officer has to collate facts and exercise his discretion on those facts. The officer must be able to justify the exercising of his discretion on those facts. The facts may include an investigation of the exculpatory explanation provided by the accused person.

⁵ *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA).

⁶ *Sekhoto* Ibid para 28.

⁷ *Sekhoto* Ibid para 49.

⁸ *Sekhoto* Ibid para 38

⁹ *Sekhoto* Ibid para 39.

¹⁰ *Groves NO v Minister of Police* [2023] ZACC 36; 2024 (1) SACR 286 (CC); 2024 (4) BCLR 503 (CC) paras 52 and 60.

...

Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and “[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries”. An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.’

[14] In this case, the burden to prove, on a balance of probability, that Sergeant Sibande did not exercise a discretion, is on the appellant. In this regard, the appellant did not tender any evidence to prove that Sergeant Sibande failed to exercise a discretion to arrest. Sergeant Sibande’s evidence-in-chief concerning the arrest, went as follows:

‘MR SIBANDE: When I opened the said plastic, that is when I discovered there is dagga inside. I then asked this one that I was searching: “what is he doing with this dagga.”

MR POOE: What was his response?

MR SIBANDE: *He did not respond.* I then explained his rights, telling him that I am arresting him, because he is in possession of dagga, and it is unlawful to be in possession of dagga.’ (Emphasis added.)

[15] The evidence in the preceding paragraph was not disputed. The appellant confirmed in his testimony that he was in possession of dagga. Due to the appellant failing to respond to the officer’s question, there were no facts placed before Sergeant Sibande in order for him to exercise a discretion or a value judgment to consider other means, other than an arrest, of securing the appellant’s presence in court. The appellant did not present evidence that, by arresting him, Sergeant Sibande acted in bad faith, arbitrarily or irrationally, as his intention would then have presumably been not to secure the appellant’s attendance at court. On the contrary, Sergeant Sibande testified during cross-examination that he informed the appellant of the reason he was arresting him and further stated as follows:

'MR GELDENHUYS: Sir, what was the purpose of your arrest?

MR SIBANDE: He was in possession of the said drug. *He had to be arrested to explain in the court of law why was he in possession.*' (Emphasis added.)

Therefore, the decision to arrest the appellant was aimed at securing the appellant's attendance at court, which in fact happened. In that regard, the high court found, correctly in my view, as follows:

'... the appellant did not identify any facts that were known to the arresting officer which ought to have persuaded him not to arrest and detain the appellant, let alone facts which show that the decision to arrest was made in bad faith, irrational or arbitrarily.'

There is therefore no evidence supporting the allegation that there was no exercise of a discretion to arrest, or that the arrest was made in bad faith, irrationally or arbitrarily. The appellant's claim that the arrest was unlawful must, on the evidence, fail. This brings me to the question of appellant's detention.

[16] The appellant's second claim was that his detention after the arrest was unlawful. He in essence contended first, that when he was arrested, the arresting officer did not inform him of his right to be released on bail. Further, that the police failed to pro-actively release him on bail. It was thus a denial of his constitutional right to liberty. Second, that the conditions under which he was held in custody at the police station were in essence appalling and intolerable. He alleged that he was held in custody over the three-day period, in a dirty cell which contained a smelly toilet as it did not flush; there were no towels and warm water to wash, and the inmates were only served two unhealthy meals per day. The conditions of his detention, so he contended, thus harmed his rights to health and dignity. I will deal first with the issue of bail, and thereafter if necessary, with the damages arising from the condition of his detention.

[17] Section 39(3) of the CPA links the arrest to the detention. It provides thus:

'The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.'

The phrase 'released from custody' includes being released on bail by the police or at court. In regard to bail by the police, s 59(1)(a) of the CPA provides:

'An accused who is in custody in respect of any offence, other than an offence –
(i) referred to in Part II or Part III of Schedule 2;

. . .

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.'

[18] The appellant contends that both the arresting officer and the preliminary investigating officer never informed him of his right to be released on bail. This version, which was put to both officers under cross examination, was refuted. Sergeant Sibande testified that at the time he arrested the appellant, he held the rank of constable, therefore he was not qualified to grant any arrestee bail. He further testified that he informed the appellant at the police station, of his right to be released on bail. In support of this evidence, he referred to the notice of rights which he handed to the appellant who read and signed it. Item 3(e) of the notice of rights reads:

'(3) As a person arrested for the alleged commission of an offence, you have the following rights: . . . (e) you have the right to be released from detention if the interest of justice permit, subject to reasonable conditions.'

[19] The appellant confirmed the evidence of Sergeant Sibande that he was given the notice of rights document and that he read and signed it. He never informed the police officer that he did not understand the notice of rights, nor did he ask the officer to explain the content to him. When he testified in court, he stated that his highest school qualification was grade 11. It could, in all probability, be inferred that he could read and write. The magistrate, with reference to item 3(e) of the notice of rights, correctly concluded thus:

'If the Plaintiff had read the document properly he could have noticed these aspects and could then have exercised his right to request being released on bail.'

[20] It was put to Sergeant Phoofolo, during cross-examination, that, since as a constable then, he did not qualify to grant the appellant bail, why he did not recommend to his senior officers to grant the appellant bail. Sergeant Phoofolo answered that if the appellant had provided him with at least his identity number, he would have compiled his profile. Sergeant Phoofolo, conceding that on that charge, the appellant did qualify to be released on bail. He further stated that after the appellant

was informed of his right to be released on bail, he did not request that he be granted bail. Apart from providing the officer with the date of birth, the appellant simply did not co-operate when his particulars, such as name, identity number and address were sought. It can thus be inferred from Sergeant Phoofolo's evidence, though not stated explicitly, that the appellant's refusal to co-operate with the officer in providing information sought for his profiling, was the reason the officer did not recommend to his superiors, that the appellant be released on bail.

[21] Further during cross-examination, the appellant's legal representative suggested to the officer that had the appellant being informed of his right to be released on bail, he would have applied for bail. That suggestion was somewhat contradicted when the appellant testified that when he was held in custody, he was worried about his parents, they had no idea where he was. In that regard, his evidence-in-chief went as follows:

'MR GELDENHUYS: When you arrived home and you saw your parents for the first time, how did that make you feel?

MR HLAPE: I did not know what to say to them. Eventually *I even lied to them*, but then they heard the truth from the street and they discovered the truth from the street. I had to confess what actually happened.

MR GELDENHUYS: How did you feel that your parents discovered from the street? That you did not tell them? Why did you not want to tell them, let me ask you that? Why did you not want to tell your parents?

MR HLAPE: I did not want to stress my parents as they are elderly and are on pension. Also what happened, I thought that I was in a secret place when I was arrested.

COURT: Meaning what? I thought I was in a secret place when I was arrested. What do you mean, sir?

MR HLAPE: I thought I am not guilty for what I was doing at that time, as I was in a secret place, Your Worship.' (Own emphasis.)

[22] The appellant admitted under oath that he lied to his parents, in order to conceal the fact that he had been arrested for being in possession of dagga. The evidence of Sergeant Phoofolo that the appellant did not provide his name, identity number and address was neither challenged nor disputed. The appellant in his evidence also failed to explain, or offer a comment on his refusal to respond to the police officer. It was

thus evident that the appellant did not request to be released on bail, as he did not want to admit to his parents that he had been arrested.

[23] The magistrates' court found in its judgment, with reference to the respondent's witnesses, thus:

'There is no reason for the court to not believe the evidence of the witnesses. They did not come across as being untruthful at all. They have nothing to gain by arresting the Plaintiff and keeping him in custody until his first court appearance.'

Apart from making a bare denial on the question of bail, the appellant made no intimation, including through his counsel during the cross-examination, that the police officers were lying. It is a trite principle of this Court, from as far back as *Rex v Dhlumayo and Another*,¹¹ and followed by a long line of the decisions of this Court, that, out of deference to the trial court, an appeal court should be slow to interfere with or upset the findings of the trial court on the facts, as well as on the credibility of witnesses. The rationale is obvious: the magistrate or judge 'has advantages – which the appeal court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial.'¹² However, there is an exception to this principle. The appeal court may interfere if it appears from the transcript of the trial record that the magistrate or judge committed a misdirection. In this particular case, there is no misdirection, because the magistrate's finding of credibility on the evidence of the police officers, is buttressed by the transcript of the record of the trial proceedings.

[24] I am persuaded that, while the conditions of the detention were appalling, on the evidence which the respondents did not seriously dispute, the detention of the appellant was lawful. The lawfulness was as a result of the appellant's consistent failure to respond to the police officer, to provide basic facts, to enable them to exercise a discretion or value judgment not to arrest him or to have him released from detention on bail. I therefore conclude that the claim that the detention was unlawful, must also fail and the appellant's appeal should be dismissed.

¹¹ *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A).

¹² *Ibid* at 705.

[25] Under the circumstances, there is no need to deal with the question of quantum of damages. As regards costs, these should follow the result.

[26] The following order shall issue:

The appeal is dismissed with costs.

S P MOTHLE
JUDGE OF APPEAL

Appearances

For the appellant: L Swart
Instructed by: JJ Geldenhuys Inc., Krugersdorp
Symington De Kok Attorneys, Bloemfontein

For the respondent: M Gwala SC
Instructed by: State Attorney, Johannesburg
State Attorney, Bloemfontein