



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 746/2021

In the matter between:

AVRIL EDITH DILJAN

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

Neutral citation: *Diljan v Minister of Police* (Case no 746/2021) [2022]

ZASCA 103 (24 June 2022)

Coram: Petse DP and Gorven and Mabindla-Boqwana JJA and Makaula
and Phatshoane AJJA

Heard: 16 May 2022

Delivered: 24 June 2022

Summary: Criminal law and procedure – arrest without warrant – s 40(1)(*b*) of the Criminal Procedure Act 51 of 1977 – failure to exercise discretion whether to arrest upon existence of jurisdictional facts for arrest without warrant – resultant arrest and detention unlawful – determination of appropriate quantum of damages.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Collis J and Phahlane AJ, sitting as court of appeal):

- 1 The appeal is upheld with costs.
 - 2 The order of the high court is set aside and substituted with the following order:
 - ‘1 The appeal is upheld with costs.
 - 2 The order of the trial court is set aside and replaced with the following order:
 - 1 The arrest and detention of the plaintiff are declared unlawful.
 - 2 The plaintiff is awarded a sum of R120 000 for general damages together with interest thereon at the legal rate calculated from 12 February 2020 to the date of final payment.
 - 3 The defendant shall pay the costs of suit.’
-

JUDGMENT

Makaula AJA (Petse DP and Gorven and Mabindla-Boqwana JJA and Phatshoane AJA concurring):

Introduction

[1] This is an appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court). The appellant, Ms Avril Edith Diljan, instituted

an action in the Magistrate's Court for the District of Tshwane, (the magistrate's court), pertaining to a claim of unlawful arrest and detention, which was dismissed with costs. She appealed to the high court, which dismissed the claim on 30 March 2021. The present appeal is with the special leave of this Court granted on 17 June 2021. The issue for determination is whether the peace officers who effected the arrest of the appellant, properly exercised the discretion vested in them.

Background facts

[2] The facts giving rise to the claim are fairly straightforward. On 18 September 2015, Constables Ntombela and Tsile (peace officers) were on patrol duty when they received a telephone call from the Community Service Centre (CSC) about a complaint lodged telephonically by a Ms Goliath in Eldorado Park. They proceeded to the address provided to them by the CSC. Upon their arrival at the scene, Ms Goliath informed them that the appellant had damaged her carport by throwing stones and rubbish through the appellant's first floor window onto the top of her (Ms Goliath's) carport. The officers inspected the carport and observed that it was damaged. The officers were unanimous in their view that an offence of malicious damage to property had been committed by the appellant. As a result, they immediately arrested and subsequently detained her in the holding cells at the Eldorado Police station.

[3] Both officers testified that they detained the appellant because they were satisfied that she had committed an offence listed in Schedule 1¹ of the Criminal Procedure Act 51 of 1977 (the CPA). They further testified that they had no

¹ Schedule 1 lists various offences, one of which is malicious injury to property.

power to release her either on warning or on bail. They asserted that only members of the detective branch and, in particular, the assigned investigating officer were vested with such powers.

[4] For her part, the appellant testified that she was arrested on Friday, 18 September 2015, between 15h30 and 16h00. The officers asked her to accompany them to the police station under the pretext that they were to discuss the complaint lodged against her by Ms Goliath. Upon arrival at the CSC, she was arrested and detained. She was never advised of the reason for her arrest and detention. She was released from custody on Monday, 21 September 2015, without appearing in court. She testified that the conditions under which she was detained were appalling.

[5] At the conclusion of the trial, the magistrate found that:
‘the arresting officer exercised reasonable suspicion as required in section 40 (1)(b) of the CPA on reasonable grounds. There is no basis for concluding that the discretion to arrest was wrongly exercised. Consequently, I find that the arrest and detention of the plaintiff was lawful.’

[6] On appeal to it, the high court confirmed the decision of the magistrate and held that ‘having given a proper and due consideration to all circumstances, this Court cannot find that the court *a quo*, misdirected itself, nor can it be said that the arrest and detention of the appellant was unlawful.’

[7] Section 40(1)(b) of the CPA allows a peace officer to arrest a suspect without a warrant when the said peace officer reasonably suspects that the suspect has committed an offence listed in Schedule 1, other than the offence

of escaping from lawful custody.² The jurisdictional facts required to sustain a s 40(1)(b) defence are: (a) the arrestor must be a peace officer; (b) he or she must entertain a suspicion; (c) the suspicion must be that the suspect committed an offence listed in Schedule 1; and (d) the suspicion must be based on reasonable grounds.³ If these factors are established, the arrestor becomes vested with a discretion as to how best to secure the attendance of the suspect to face the charge. The peace officer may warn the suspect to appear in court, may summon the suspect or may arrest the suspect.

[8] In the present matter, counsel who appeared for the appellant, correctly conceded that, in so far as the appellant's arrest is concerned, the jurisdictional requirements in s 40(1)(b) were present. He, however, contended that the issue remains whether the arresting officers properly, if at all, exercised the discretion vested in them as required by law.

[9] Once the jurisdictional facts are established, the peace officer has the discretion of whether or not to arrest the suspect. However, if the suspect is arrested, a peace officer is vested with a further discretion whether to detain the arrestee or warn him or her to attend court. The arrest and detention of the suspect is but one of the means of securing the suspect's appearance in court.⁴

² Section 40(1)(b) provides that:

'(1) A peace officer may without warrant arrest any person –

(a)...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'. See also *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 8; 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC) para 77.

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H.

⁴ *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) [2010] ZASCA 141; para 44 (*Sekhoto*).

[10] In *Minister of Safety and Security v Sekhoto and Another*,⁵ the principle was explained by Harms DP in the following terms:

‘Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises . . . In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest.’

[11] In applying the principle restated in *Sekhoto*, the magistrate committed a material misdirection in finding that:

‘. . . it is trite that a person arrested has to be brought to court as soon as reasonably possible and at least within 48 hours, depending on the court hours. Once that is done the authority to detain, that is in the power to arrest is exhausted.’

The issue of whether the arrestee has to appear in court within 48 hours of arrest has no bearing on the exercise of a discretion as to whether or not to arrest and detain the suspect. Furthermore, the question of appearing within 48 hours was not an issue before the magistrate, and neither litigant had pleaded it. In fact, as previously indicated, the appellant never even appeared in court.

[12] Likewise, the high court erred when it reasoned as follows:

‘I am alive to the fact that constable Ntombela indicated during his evidence that he could not warn the appellant or decide on the issue of whether to grant bail or not, as a means of securing her attendance in court. Having said that once the decision has been made to effect an arrest and not consider issuing a warning, it cannot be said that there was no exercise of a discretion. Having a discretion simply means having the freedom to decide what should be done in a particular situation.’

This statement manifests a misconception on the part of the high court as to the nature of the appellant’s case. What emerges from the record is that both

⁵ Ibid para 28.

officers who effected the arrest did not know that they had a discretion. They laboured under the mistaken belief that their obligation was to arrest the appellant once it was reasonably suspected that she had committed a Schedule 1 offence. Thus, they could not have exercised a discretion they were unaware of. Constable Ntombela testified that he could not have warned the appellant because he ‘did not have powers’ to do so. In the same vein, Constable Tsile stated the following: ‘[u]nfortunately we do not have those powers because it is a different department’. Accordingly, that they did not exercise a discretion that they unquestionably enjoyed is beyond dispute. It must therefore follow axiomatically that both the arrest and subsequent detention of the appellant were unlawful. Indeed, counsel for the respondent was ultimately constrained to concede as much.

Quantum

[13] In consequence of the decision reached by the trial court and the high court on the issue of liability, the issue of quantum of damages was not dealt with. Nevertheless, the facts relevant to the assessment of quantum were sufficiently ventilated in the trial court. There was some debate before us as to whether the issue of quantum should be remitted to the trial court for determination. Although this option appeared attractive at first blush, it soon became clear that to remit the matter to the trial court for this purpose would result in a wastage of scarce judicial resources. This was so because, at the end of the day, it seemed that this Court was in as good a position as the trial court to consider the issue of quantum.

[14] Though denied in the plea, the damages sustained by the appellant have not been seriously contested before us. What remains to be decided therefore is

the quantum thereof. On this score, Counsel for the appellant, inter alia, urged this Court to have regard to past awards in assessing the appropriate amount to be awarded. Counsel referred us to several previous judgments, including the judgment of Lopes J in *Khedama v The Minister of Police*.⁶ The plaintiff in that matter had issued summons for unlawful arrest and detention against the defendant, claiming an amount of R1 million. She was arrested and detained for a period of 9 days from 3 December 2011 and released on 12 December 2011.

[15] In *Khedama*, the court, in large measure, had regard to the appalling conditions in the country's detention facilities, such as lack of water, blocked toilets, dirty and smelling blankets, sleeping on the cement floor, bad quality of food, and lack of sleep. Having considered various heads of damages, Lopes J awarded damages for wrongful arrest and detention of R100 000, deprivation of liberty and loss of amenities of life of R960 000 (R80 000.00 per day for 12 days);⁷ defamation of character including embarrassment and humiliation of R500 000 and general damages in an amount of R200 000. In total, he assessed the total damages suffered at R1, 760 000. However, because the amount claimed was limited to R1 000 000 he was awarded the latter amount.

[16] The primary purpose of compensation for damages of the kind claimed in this case was succinctly stated by Bosielo AJA in *Minister of Safety and Security v Tyulu*⁸ as follows:

'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her

⁶ *Khedama v The Minister of Police* 2022 JDR 0128 (KZD) (Unreported case) (*Khedama*).

⁷ The period is actually 9 days as reflected in paragraph 14 hereof.

⁸ *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85; 2009 (2) SACR 282 (SCA); [2009] 4 All SA 38 (SCA) para 26.

some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. I readily concede that it is impossible to determine an award of damages . . . with . . . mathematical accuracy.’

[17] Thus, a balance should be struck between the award and the injury inflicted. Much as the aggrieved party needs to get the required solatium, the defendant (the Minister in this instance) should not be treated as a ‘cash-cow’ with infinite resources. The compensation must be fair to both parties, and a fine balance must be carefully struck, cognisant of the fact that the purpose is not to enrich the aggrieved party.

[18] The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.

[19] Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in *Protea Assurance Co. Ltd v Lamb*:⁹

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of

⁹ See *Protea Assurance Co. Ltd v Lamb* 1971 (1) SA 530 (A) at 535H-536A-B. See also *Minister of Safety and Security v Seymour* [2006] ZASCA 71; [2006] SCA 67 (RSA); [2007] 1 All SA 558 (SCA) at para 17. See also the case of *Rudolph and Others v Minister of Safety and Security and Others* [2009] ZASCA 39; 2009 (5) SA 94 (SCA); 2009 (2) SACR 271 (SCA); [2009] 3 All SA 323 (SCA) para 26 where this Court held that ‘[t]he facts of a particular case need to be looked at as a whole and few cases are directly comparable’.

compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their *sequelae* may have been either more serious or less than those in the case under consideration.'

[20] A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be 'thumb-sucked' without due regard to the facts and circumstances of a particular case. Practitioners ought to know the reasonable measure of previous awards, which serve as a barometer in quantifying their clients' claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles enunciated above.

[21] The facts relating to the damages sustained by the plaintiff in *Khedama* are largely similar to those in this matter. However, the excessive amount awarded in *Khedama* cannot serve as a guide in a matter like the present. Even the length of the period during which Ms Khedama was incarcerated, was overstated and, as a result, she was awarded an amount which was, in my view, significantly more than what she deserved.

[22] I now revert to the facts of the present case. For purposes of determining quantum, the relevant factors in this matter are the appalling circumstances under which the appellant was detained being; the condition of the police cell in which she was detained which was filthy with no hot water; the blankets were dirty and smelling; the toilet was blocked; she was not provided with toilet paper, and she was not allowed visitors. She could not eat the bread and peanut butter that was the only food provided to her. She was deprived of visitation rights by her family, and that resulted in her not receiving medication for her heart condition. Furthermore, the humiliation she endured at the time of her arrest, which was exacerbated by the presence of the occupants of the neighbouring apartments (including her children and grandchildren); she was also deprived of her liberty for 3 days; her standing in the community as a community caregiver was impaired. As previously indicated, her compensation should be commensurate with the damages she suffered and also be a reasonable amount. Taking into account all relevant factors, I am satisfied that a fair and reasonable amount in the circumstances is R120 000.

Costs

[23] It remains to say something about the fact that the appellant was represented by two counsel, the lead counsel being senior counsel. This matter is manifestly not complicated. The issues for determination were crisp, and therefore the employment of two counsel was, in my view, not warranted. Counsel fairly conceded this much on behalf of the appellant. Therefore, costs of only one counsel will be allowed.

[24] In the result, I make the following order:

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and substituted with the following

order:

- ‘1 The appeal is upheld with costs.
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 - 3 The defendant shall pay the costs of suit.’

M MAKAULA
ACTING JUDGE OF APPEAL

APPEARANCES

For the appellant:	J Hollard-Muter SC (with L Swart)
Instructed by:	J J Geldenhuys Attorney c/o Du Plessis & Eksteen Attorney, Pretoria Symington De Kok, Bloemfontein
For the respondents:	T Maluleke (with L Tyatya)
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein