

SOUTH AFRICA / JUDGMENT

Baartman v Minister of Police (CA20/2021) [2021] ZAECHGC 93 (7 October 2021) [2021] ZAECHGC 93

COURT

Eastern Cape High Court, Grahamstown

BEFORE

D O Potgieter, J E Smith

CASE / FILE NUMBER

CA20/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN
CASE NO. CA20/2021

In the matter between:

ROCHAE
BAARTMAN
Appellant
and
MINISTER OF
POLICE
Respondent

JUDGMENT

POTGIETER AJ:

- [1] The appellant instituted action against the respondent in the Port Elizabeth Magistrates' Court for damages in the total sum of R101 699,90 in respect of wrongful and unlawful search and the loss of a cellular telephone (claim

- 1) and wrongful, unlawful and malicious detention (claim 2). The action was dismissed with costs, save for the claim in respect of the loss of the cellular telephone. In respect of the latter claim the respondent was ordered to pay the value of the telephone in the sum of R1699,90 to the appellant.
- [2] The appellant is appealing against the dismissal of the rest of the claims. She is represented by Ms Du Toit and the respondent by Ms Hesselman.
- [3] The relevant facts briefly are that the appellant was arrested (together with two males) without a warrant on Friday, 27 July 2018, at approximately 23h20, by warrant officer Blundel in Ditchling Road, Algoa Park, Port Elizabeth. She was the front seat passenger in a black A4 Volkswagen Golf, being driven at the time and owned by a friend of hers, Ms C Brown. The two males were seated at the back. According to warrant officer Blundel they were both known gang members and the boyfriends of the appellant and Ms Brown. The appellant denied that any one of them was her boyfriend. Nothing much turns on this issue.
- [4] The appellant was initially detained at Algoa Park police station and was later transferred to Mount Road police station. She was charged with the unlawful possession of a fire-arm and ammunition and was taken to New Law Courts, Port Elizabeth on Monday, 30 July 2021, where she was released on the same day without appearing in court.
- [5] It was agreed between the parties at the trial that the defendant had the duty to commence leading evidence. Warrant officer Blundel was the only witness for the respondent. He testified that he has 15 years' experience as a police officer and was stationed at the Port Elizabeth Flying Squad. He was doing crime prevention duties on 27 July 2018. While he and the driver of the police vehicle, warrant officer Msindwana, were on their way to the scene of a shooting incident in Gelvandale, he spotted a black A4 Volkswagen Golf without registration plates approaching them from the opposite direction at high speed. The vehicle took a right hand turn across their line of travel into Ditchling Road travelling towards Algoa Park. He switched on the siren and blue light of the police vehicle and they pursued the Golf, which did not stop but tried to speed away. Their vehicle increased speed and managed to catch up with and travel very close alongside the Golf. Warrant officer Blundel switched on his torch, trying to signal to the driver of the Golf to stop. He was leaning halfway out of their vehicle and managed to shine his torch inside the Golf. He noticed that the occupants were acting suspiciously. He observed the right rear passenger handing a firearm with a fast sudden movement to the left rear passenger who in turn passed it on in between the front seats to the front passenger.
- [6] At that stage warrant officer Msindwana managed to cut off the Golf and force it to stop. Warrant officer Blundel disembarked from the vehicle and approach the front passenger. He ordered all the occupants out of the vehicle. As the front passenger got out of the Golf, he saw a firearm protruding halfway from under the dashboard where the front passenger was seated. It appeared that someone was attempting to conceal the firearm. The occupants disavowed any knowledge of the firearm. The police forensic unit arrived and confirmed

that it was a real firearm. Warrant officer Blundel then warned the front passenger, who was the appellant, and the two male rear passengers and read them their rights, whereafter he arrested them for the unlawful possession of a firearm and ammunition. The reason for arresting the three persons was that he saw them handling the firearm.

[7] Warrant officer Blundel summoned a female officer, Sergeant Grootboom, who was attached to another unit, to assist by searching the appellant and the female driver of the Golf. He searched the two males. Nothing illegal was found during the searches. The driver of the Golf was not arrested. The arrestees were transported to Algoa Park police station where they signed an acknowledgement of receipt of a written notice of their rights. Warrant officer Blundel was not present when they were charged, but is aware that they were detained. He is not sure if they appeared in court or what the outcome of the case against them was. He emphasised in cross-examination that he saw the arrestees handling the firearm and that the appellant was not searched in his presence. This happened out of his sight. At the conclusion of warrant officer Blundel's evidence, the respondent closed its case.

[8] The appellant was also called to testify. She confirmed her arrest on 27 July 2018 as testified to by warrant officer Blundel. Her version differed only in a few material respects from that of warrant officer Blundel. She testified that she was the front seat passenger in the Golf. They were aware of the police vehicle travelling behind them in Ditchling Road with its siren and blue light on, but did not realise that the police were pursuing them. The police vehicle caught up with them and drove next to the Golf. When the police officer shone his flashlight at them, she told their driver to stop. The driver, her friend Charne Brown, brought

their vehicle to an immediate stop. Warrant officer Blundel came straight to her side, opened the door and ordered her to get out of the car. All the occupants got out. There were two male passengers seated at the back. One of them asked for a lift to go look for the girlfriend of the other male. They were acquaintances of hers. She denied that they were her and the driver's boyfriends.

[9] While they were standing one side, warrant officer Blundel shone his torch into the Golf, called her and asked whose firearm was inside the Golf. The firearm was in the console at the side of the gearlever. She said that she did not know whose firearm it was. Warrant officer Blundel then called for backup. When the other police arrived, female sergeant Grootboom was requested by warrant officer Blundel to search the witness. The search took place in the presence of all the police officers at the scene. They all saw

what happened. Sergeant Grootboom loosened the zipper of her jacket and lifted up her T-shirt exposing her stomach and breasts. She said that warrant officer Blundel was present at that stage and that she does not know how warrant officer Blundel can say that he did not see what was happening. After she was searched the police took her cellular telephone and placed her into the back of a police van together with their two male companions. The telephone was never returned to her. She was never informed of the reason for her arrest and was merely told at the police station to sign the notice of rights. She was then placed in the cells at our Algoa Park police

station. The cells were smelly and messy and the blankets were full of fleas. The food she was given was inedible. Her mother was allowed to see her for a few minutes the next day and she was transferred to Mount Road police station later in the day. A statement was taken from her on 29 August 2021 in which she basically repeated the version that she does not know where the firearm came from. She also denied in her testimony that she handled the firearm.

- [10] She further indicated that she was traumatised by the incident and felt mistreated and humiliated.
- [11] Under cross-examination she confirmed that she did not know warrant officer Blundel before her arrest and that he had nothing against her. She also could not think of a reason why he would fabricate evidence against her. It appeared that warrant officer Blundel had indeed warned her of her rights at the scene and informed her that she was being charged for the unlawful possession of a firearm. At the police station she was charged with the unlawful possession of a firearm together with the two males. She confirmed that the police had to wait until the Monday to take her to court. She also indicated that the cover of the console of the Golf was broken by warrant officer Blundel to expose the firearm. The firearm was not visible when she got out of the Golf. After the conclusion of the appellant's testimony her case was closed.
- [12] The magistrate undertook a careful and thorough assessment of the evidence and analysis of the applicable law. She found that warrant officer Blundel was a credible witness who made a favourable impression in the witness box and his version was devoid of any inherent improbabilities or material contradictions. The magistrate concluded that warrant officer Blundel was a reliable and trustworthy witness.
- [13] Although the magistrate analysed the appellant's evidence, she did not make any express findings with regard to the credibility or quality of the appellant's version. It is, however, clear that she preferred the version of warrant officer Blundel above that of the appellant where such versions conflicted. She accordingly accepted warrant officer Blundel's version that he saw the appellant handling the firearm and that the appellant was not searched in his presence or within his sight. The magistrate concluded that warrant officer Blundel cannot be criticised for arresting the appellant and in effect found that the arrest was lawful. She furthermore found that the appellant was brought to court within 48 hours after her arrest as provided for in section 50(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the CPA"). She held that the fact that the appellant did not actually appear in court was not material and that appellant's detention was not unlawful. With regard to the search, the magistrate found that the averments in the particulars of claim that the search was aggressive and had occurred in the presence of the general public, were not supported by the evidence. She concluded that it was highly improbable under the circumstances appearing from the evidence that the search was humiliating, invasive or devoid of decency. As indicated, apart from directing the respondent to compensate the appellant for the loss of the cellular telephone, the magistrate dismissed the action with costs.

[14] Counsel for the appellant, Ms Du Toit, submitted in respect of claim 1 (wrongful and unlawful search) that the magistrate erred by failing to take into consideration that the respondent called no witness to gainsay the evidence of the appellant with regard to the search and that appellant's version in this regard was unchallenged. In respect of claim 2 (unlawful arrest and detention) Ms Du Toit submitted that the version of warrant officer Blundel that he could see the occupants handling the firearm inside the Golf is highly improbable. She argued that his version that he was leaning out of the police vehicle at the time, was clearly fabricated because it was not mentioned in his witness statement. She further submitted that the magistrate erred in not properly assessing the evidence on the probabilities and failed to consider the possibility that the evidence of warrant officer Blundel was fabricated. The magistrate, moreover, erroneously placed emphasis on the appellant's evidence that warrant officer Blundel did not follow the correct procedure given the fact that there was no onus on the appellant to disprove that the arrest and detention were justified. The magistrate failed to take into consideration that the respondent, on whom the onus rested in this regard, neglected to call any witness concerning the detention. An adverse inference should have been drawn against the respondent and the magistrate was entitled to find in the circumstances that the detention was unlawful. Ms Du Toit submitted that the court should interfere with the magistrate's erroneous findings that the arrest was reasonable, that appellant's

version was not credible, and that the appellant's claims should be dismissed.

[15] Counsel for the respondent, Ms Hesselman, submitted that the magistrate correctly dismissed the claim for wrongful and unlawful search. The appellant was searched by a female officer after a lawful arrest. This was authorised by section 23 of the CPA. She submitted that it was incorrect that the appellant's version concerning the search went unchallenged. Warrant officer Blundel testified that the appellant, contrary to her version, was not searched in his presence in order to protect her dignity. With regard to claim 2, Ms Hesselman submitted that the arrest and detention were lawful since the jurisdictional facts set out in sections 40(1)(a) and 40(1)(h) of the CPA were established. She supported the magistrate's finding that warrant officer Blundel was a reliable and trustworthy witness. She submitted that warrant officer Blundel clearly stated that he saw the appellant handling the firearm. This established the requirement in section 40(1)(a) that the offence should have been committed in the presence of the peace officer. She submitted that the criticism is unfounded of warrant officer Blundel's evidence that he was leaning out of the police vehicle merely because it was not mentioned in his witness statement. She relied in this regard on the following dicta in *S v Mahlangu & Another* (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012):

"Police statements and statements obtained from witnesses by the police are notoriously lacking in detail, are inaccurate and often incomplete. A witness statement is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witnesses to call on which issues. It would be absurd to expect a witness to say exactly in his

statement what he will eventually say in court. There will have to be indications other than a mere lack of detail in the witness' statement to conclude that what the witness said in court was unsatisfactory or untruthful. There is no law that compels a witness what to say and what not to say in his statement. The witness tells it as he sees it. He is not expected to relate in his statement what he saw in the minutest detail.

...

The test is: were the differences material, always bearing in mind that a witness' testimony in court will almost without exception be more detailed than what the witness said in his written statement."

- [16] Ms Hesselman further submitted that the detention of the appellant was justified in terms of section 39(3) of the CPA given the lawfulness of the arrest. This issue is dealt with more fully below.
- [17] It is common cause that the onus rested on the respondent to justify the arrest and detention and on the appellant in respect of the search. As indicated, the respondent relied on sub-sections 40(1)(a) and 40(1)(h) of the CPA to justify the arrest. Section 40(1)(a) authorises peace officers, such as warrant officer Blundel, to arrest without warrant any person who commits or attempts to commit an offence in their presence. Section 40(1)(h) in turn authorises these officers to arrest without a warrant any person who is reasonably suspected of committing or having committed an offence under any law, inter alia, governing the possession or disposal of arms or ammunition.
- [18] Furthermore, section 23(1)(a) of the CPA authorises peace officers who effect an arrest, to search the arrestee. A lawful arrest would justify a search conducted in accordance with the prescripts of section 29 of the CPA, which require amongst others that strict regard should be had of decency and order in executing a search.
- [19] Section 39(3) of the CPA provides that the effect of an arrest is that the arrestee shall be in lawful custody and shall be detained in custody until lawfully discharged or released from custody. This is premised on a lawful arrest and subject to the arrestee being released or brought before court within the period of 48 hours prescribed by section 50(1)(b) of the CPA.
- [20] The test applicable to appeals is well established and of considerable vintage [cf R v Dhlumayo & Another 1948(2) SA 677 (A)]. It can be summarised as follows: the trial court has seen and heard the witnesses and as a result such court's findings on facts and credibility will not be easily disturbed. In the absence of a misdirection of fact, it is presumed that the conclusion of the trial court is correct and it will only be disturbed if the appeal court is convinced that it is wrong. Even where the correctness of the conclusion is in doubt, it will be upheld. The appeal court will come to its own conclusion only where there is a misdirection of fact or other facts or probabilities have been overlooked by the court a quo. In order for the appeal to succeed, it must be shown that there was some miscarriage of justice or the violation of a principle of law or procedure.

[21] As indicated, the magistrate found that warrant officer Blundel was a credible, reliable and trustworthy witness. She accepted his version that he saw the appellant handling the firearm and by necessary implication rejected the appellant's denial in this regard. In my view, the magistrate has not misdirected herself. She had undertaken a careful and thorough assessment of the evidence and the probabilities. The versions of the appellant and warrant officer Blundel largely coincided in material respects, save for the issue whether or not she handled the firearm and the circumstances surrounding her search. Appellant confirmed that warrant officer Blundel shone his torch into the golf and came directly to the appellant after he alighted from the police vehicle. This supported his version that the appellant was the last person that he saw handling the firearm. The firearm was, furthermore, found

partly concealed where the appellant was seated. The criticism is unfounded that warrant officer Blundel's version that he leaned out of the police vehicle is fabricated because this was not referred to in his witness statement. He correctly indicated in response that there were a lot of finer details that he did not regard as necessary to include in the statement. I am in agreement with the approach set out in the extract from *S v Mahlangu* referred to in paragraph 14 above. The mere fact that this aspect was not referred to in his statement does not render the evidence of warrant officer Blundel either untruthful or unsatisfactory.

[22] I accordingly agree with the magistrate's finding that the arrest was justified in terms of section 40(1)(a) of the CPA, in that the appellant at the very least committed the offence of unlawful possession of a firearm in the presence of warrant officer Blundel. The facts could also, in my view, sustain a finding that the requirements of section 40(1)(h) of the CPA have been satisfied, in that warrant officer Blundel held a reasonable suspicion that the appellant committed an offence relating to the possession of firearms. It follows that the magistrate correctly found that the appellant's arrest was not unlawful.

[23] The onus in respect of the search rested on the appellant. Given the lawfulness of the arrest, the search would have been justified in terms of section 23(1)(a) of the CPA, unless the requirements of section 29 of the CPA have not been complied with. The appellant averred in this regard in her particulars of claim that the search was invasive, aggressive and humiliating and was conducted without due regard to decency and order and in the presence of male police officers and the general public. The magistrate correctly found that there was no evidence that the search was aggressive or that it had occurred in the presence of the general public. It is common cause that female sergeant Grootboom conducted the search. The issue was whether this occurred in the presence and within sight of warrant officer Blundel and the other male officers. Warrant officer Blundel testified that this was not the case. His

version was accepted by the magistrate. This finding cannot be assailed in my view. It is readily apparent that the gravamen of the complaint concerning decency and order was the appellant's allegation that her stomach and breasts were exposed in the presence and within sight of warrant officer Blundel and the other male officers. Should this indeed have occurred the search might very well have been indecent or even lacking order. However, this did not occur and nothing

further needs to be said about it. The manner in which the search was in fact conducted by a female officer (on the appellant's version which must be accepted in this respect) by unzipping the appellant's jacket and lifting her t-shirt above her breasts does not strike me as being indecent or lacking order in the prevailing circumstances. It is difficult to comprehend how else the search could have been conducted. Apart from section 29, we were not referred to any other prescripts regulating this situation and none have come to my attention. Searches are inherently invasive and can even be experienced as being humiliating by many people, but this does not necessarily render them unlawful. Each case must be considered in the light of its own peculiar facts and circumstances. No rigid rules can be ordained regulating all searches. That is patently the intention of section 29. In the circumstances I agree with the magistrate's conclusion that the appellant has failed to establish that the search was wrongful or unlawful. Warrant officer Blundel clearly had reasonable and probable cause for securing the assistance of Sgt Grootboom who conducted a lawful search of the appellant in the circumstances.

[24] In my view, the detention of the appellant from 27 to 30 July 2018 was justified in terms of section 39(3) of the CPA. She was lawfully arrested in the late hours of Friday night, 27 July 2018 and detained until Monday morning, 30 July 2018 when she was taken to the New Law Courts in Port Elizabeth. She was released without appearing in court. I agree with the conclusion of the magistrate that the appellant's detention was lawful in the circumstances and that her claim for unlawful detention should be dismissed.

[25] It follows in my view that the appeal should be dismissed and that costs should follow the result.

[26] I accordingly make the following order:

"The appeal is dismissed with costs".

D O POTGIETER

JUDGE OF THE HIGH COURT (ACTING)

I agree.

J E SMITH

JUDGE OF THE HIGH COURT

For the appellant:

Ms M du Toit, instructed by Messrs N N Dullabh & Co Attorneys, Grahamstown.

For the respondent:

Ms Hesselman, instructed by the State Attorney, Port Elizabeth.

Date heard:

20 August 2021

Date of delivery of the judgment: 07 October 2021

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