

SOUTH AFRICA / JUDGMENT

Fritz v Minister of Safety and Security (2012 (2) SACR 451 (ECG)) [2010] ZAECHGC 135; [2010] ZAECHGC 88 (16 September 2010)

[2010] ZAECHGC 135

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, D Chetty

CASE / FILE NUMBER

CA 411/08

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IN THE HIGH COURT OF SOUTH AFRICA(EASTERN CAPE, GRAHAMSTOWN)Case no: CA 411/08In the matter between:ELTON JOHN

FRITZ.....AppellantvsMINISTER OF SAFETY & SECURITY.....RespondentJUDGMENTMakaula J:A.Introduction:[1] This is an

appeal against an order of absolution from the instance by the magistrate, Port Elizabeth.[2] The plaintiff issued summons against the defendant for (a) wrongful arrest and detention and (b) unlawful search which he contended

constituted a breach of his right to privacy and alleged further that his right to dignity was impaired and invaded. He alleged

that at all times the members of the South African Police Service (SAPS) who arrested him, were acting within the course and scope

of their duties as servants of the defendant.[3] The defendant pleaded that the arrest and detention of the plaintiff was lawful and relied onSection 40(1) (a) of theCriminal Procedure Act 51 of 1977, which provides:“(1)

A peace officer may without warrant arrest any person -(a) who commits or attempts to commit any offence in his presence.”In its plea the defendant alleged that the plaintiff was arrested for riotous behaviour and alleged that this took place in the presence of the arresting officers. It denied that the plaintiff was ever searched by its members. The defendant further admitted

that the arresting officers were acting within the course and scope of their duties at the time of the arrest.[4] Both parties agreed at the beginning of the trial that the onus and duty to begin rested with the defendant.B.Facts:[5]Inspector Riaan Tessnertestified that on 22 January 2005 at about 2am, he was on patrol duties with his colleague,Inspector Killian,atextension 32atBloemendal. Whilst inRensburg Street, they were approached by certain people who reported that they were accosted by men who attempted to rob them. They proceeded to the area where those men were reported to have been. When they got to the spot which happened to be at the corner ofRensburgandLawrence Erasmus Streets, they came across young men amongst whom was the plaintiff. On approaching them, these young men became rude and started to swear at them. He testified that some of them were carrying knives. On realising that they were coming to them, those who were carrying knives threw them in the bush and continued to swear at them.Inspector Tessnertold them that their behaviour was unacceptable and was “oproering”meaning riotous. When they did not stop, they arrested them for “riotous behaviour”and took them to the charge office where he in particular charged the plaintiff for contraveningSection 11(c) of Act 102 of 1982 i.e. riotous behaviour and detained him. He testified that he did not arrest the plaintiff for attempted robbery although under cross-examination he stated that he also arrested the plaintiff to prevent further commission of attempted robberies.[6] The version of the plaintiff is not diametrically opposed to that of the defendant but at variance with his pleaded case. In evidence in chief he testified that on 21 January 2005 at about 22H00, he was at his home in51 Burg Street, Bloemendallooking after his ill father whenInspector Tessnerarrived looking for his brother. He told him that his brother was not at home and did not know his whereabouts.Inspector Tessneraccused him of lying in an effort to conceal his brother. He then arrested him and detained him until 8H40 on 22 January 2005. Given the conflict between the plaintiff’sviva voceevidence and his pleaded case his version concerning the circumstances surrounding his arrest must be rejected as false. The liability of the defendant must accordingly be assessed on the defendant’s

own version. C. Grounds of appeal: [7] The plaintiff premised his appeal on the following grounds: "1 The Magistrate found on the evidence that the plaintiff had not established his case and furthermore found that the defendant also had not established its case. Consequently the Magistrate granted an order of absolution from the instance, with costs; 1.1.2 This order, in law is clearly wrong as the onus was on the defendant to establish its defence, the matter being one of an unlawful arrest and detention; 1.1.3 In the circumstances, given that the magistrate found that the defendant had not established its defence, the order should have been "judgment in favour of the plaintiff" in an appropriate amount, together with costs; 2. There was insufficient basis for the magistrate to reject the version of the plaintiff and in the circumstances the magistrate had incorrectly applied the principles as laid down in *Stellenbosch Farmers Winery Group Ltd & Another v Martel et cie & Others* 2003 (1) SA 11 (SCA). 2.1 There was no inherent reason why the plaintiff's evidence should have been rejected. On the contrary the defendant's witnesses' evidence was fraught with a variety of improbabilities, factual inaccuracies and objective falsehoods; 2.2 The magistrate correctly concluded that the defendant had not established its case, however, as stated hereinbefore, made the wrong order." [8] Mr Jooste, counsel for the plaintiff, submitted in argument that the reasons for the arrest do not support the defence raised by the defendant. He submitted that the arrest was unlawful because the offence for which Inspector Tessner arrested the plaintiff was non-existent, having been repealed and consequently reliance on the provisions of Section 40 (1) (a) of the Act was misplaced. He further argued that the second reason relied upon by the defendant that Inspector Tessner wanted to prevent further attempted robberies cannot be a defence. He submitted that the least the magistrate should have done was to find that the defendant had failed to discharge the onus of proving its defence in terms of Section 40 (1) (a) of the Act and that it was a

misdirection on his part to grant an absolution from the instance.[9] Mr Sandi, counsel for the defendant, argued that it is immaterial that the plaintiff was charged under a repealed act because the police at the time of the arrest had a reasonable suspicion that the plaintiff had committed an offence in their presence. He further argued that by detaining the plaintiff, the police sought to prevent further crimes which could result in the defendant being sued for omission to act. He conceded that the magistrate was wrong in granting an absolution from the instance though he was correct in not upholding the plaintiff's claim.

D. Issues: [10] The issue to be determined herein is whether the plaintiff was lawfully arrested and if so whether his detention was warranted in the circumstances of this case. The defendant proffered two reasons for the arrest. He stated initially that the plaintiff was arrested for riotous behaviour hence he charged him for contravening Section 11 (c) of Act 102 of 1982 and detained him accordingly. [11] The second reason given by the defendant is that the arrest was to prevent further attempted robberies of members of the public. [12] Section 40 (1) (a) of the Act authorises a peace officer to arrest, without warrant, a person who commits or attempts to commit a crime in his presence. Such authority is limited to crimes already completed and attempts to commit crimes.

[13] The evidence by Inspector Tessner that he wanted to prevent the commission of further crimes unconvincing. He had no reason to believe that such offences would be committed. I further do not believe that he could have arrested them for the attempted robbery when he did not even take the people who complained to him along when he went to investigate the complaint. He did not even obtain their particulars. It is surprising that he would be bothered about attempted robberies which had not taken place instead of dealing with the current complaint which led him to the plaintiff. There was no basis therefore for Inspector

Tessnerto

act on the second reason and any arrest pursuant thereto would be unlawful. Furthermore, Section 40 (1) (a) of the Act relied upon by

the defendant is not applicable because the prevention of further attempted robberies would not be committed in the presence of Inspector

Tessner.²[14] It is common cause that Inspector

Tessner arrested

the plaintiff for riotous behaviour in contravention of Section 11 (c) of Act 105 of 1983. It is further common cause between the

parties that this Act was repealed by Section 13 of Act 209 of 1993.

There was thus no such offence committed by the plaintiff.^[15] In *Rudolph v Minister of Safety & Security*³ a member of South African Police Service had instructed the plaintiffs to disperse as according to him they had unlawfully gathered without a permit thus

contravening the provisions of the Regulations of the Gatherings Act 205 of 1993. They failed to disperse after expiry of the period

afforded to them to do so. Plaintiffs were then arrested and detained. The court below accepted that

the plaintiffs had held an unlawful gathering in contravention of the provisions of the Gatherings Act in that they did not have a permit. The trial judge

appeared to have accepted also that the arrest without a warrant was effected in terms of Section 40

(1) (a) of the Act. The plaintiffs

appealed to the Supreme Court of Appeal and on appeal *Mthiyane JA* said

the following at 276 b-e: “14.

The onus of justifying the arrests and detention of the appellants lies upon the first respondent. See *Zealand*

v Minister of Justice & Constitutional Development & Another.³ In

concluding that the appellants had committed an offence, the court below clearly erred. The first appellant and his group were only

eight in number and the Gatherings Act proscribes an assembly of more than 15 persons in a public place without permission.

The first

appellant and his small group did not constitute a 'gathering' within the meaning of that Act. In s 1, a 'gathering' is defined as follows: "gathering" means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air . . . 'There was therefore no evidence of a 'gathering', no offence had been committed in the presence of Captain Bekker, and the first respondent accordingly failed to discharge the onus of proving that the arrest of the first appellant on 18 July 2003 without a warrant and the subsequent detention of both appellants in a police cell at the Pretoria Moot Police Station were justified." (My underlining) [16] Similarly, in *Minister of Safety & Security v Tyulu* the plaintiff (respondent on appeal) was arrested for being drunk in a public place. He was taken to the charge office and a doctor was called to examine the respondent. The doctor recorded in his report that the respondent was moderately under the influence of alcohol. The report came back recording that the alcohol content in the respondent's blood on the night in question was 0,23 grams per 100 millilitres. Having regard to the definition of "Drunkness", Bosiello AJA held as follows in paragraph 22: "The evidence does not show that the respondent was not in control of his physical or mental faculties or both as a result of his having consumed alcohol at the time when he was arrested. The full bench correctly remarked, the factors relied upon by the appellants are merely indicative of the fact that the respondent may have been under the influence of alcohol, which does not necessarily mean that he was drunk. In the result, I respectfully agree that the respondent's arrest without a warrant for being drunk in public was not justified by s 40 (1) (a)." [17] Incasu, the appellant was arrested for an offence which does not exist. I am accordingly of the

view that the arrest cannot be justified by Section 40 (1) (a). The respondent has failed to discharge the onus which rests on it. In the premises the decision by the Magistrate granting absolution from the instance cannot be sustained. In respect of claim 2, no evidence was adduced by the plaintiff to substantiate this leg of his cause of action. The order of absolution from the instance must therefore stand. In the result I make the following order: 1. The appeal is allowed with costs. 2. The order of absolution from the instance is set aside and substituted with the following order; 2.1 Judgment is granted in favour of the plaintiff in respect of claim 1; _____ M MAKALA JUDGE OF THE HIGH COURT Chetty J: I agree and it is so ordered. _____ D CHETTY JUDGE OF THE HIGH COURT Appellant's Counsel: Mr P E Jooste Appellant's Attorneys: Neville Borman & Botha 22 Hill Street GRAHAMSTOWN Respondent's Counsel: Mr N J Sandi Respondent's Counsel: N N Dullabh & Co 5 Bertram Street GRAHAMSTOWN Heard on: 21 May 2010 Delivered on: 16 September 2010 1 Commentary on the Criminal Procedure Act: Du Toit et al p 5-82 Minister of Safety & Security v Glisson 2007 (1) SACR 131 (E) 134 d-e, Jones J held as follows: "Here, there were no facts present which were apparent to the arrestor and which led to the inference that a crime had been committed. There was no question of the arresting officer supplementing his own observations. Potgieter had made no observations at all of disorderly conduct. He was obliged to rely entirely on the observations of another. In this kind of situation, where reliance is had upon a report by another, there is always the risk of improperly depriving a person of his or her liberty because, where the arresting officer did not have personal knowledge of the alleged criminal conduct, he is not properly in a position to decide whether or not an offence has really been committed." 2002 (2) SACR 271 SCA. 42009 (2) SACR 282

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: CA 411/08

In the matter between: ELTON JOHN FRITZ.....Appellant
.....
vs
MINISTER OF SAFETY & SECURITY.....Respondent
.....

JUDGMENT

Makaula J:

Makaula J

:

A.Introduction:

A.

Introduction

- [1] This is an appeal against an order of absolution from the instance by the magistrate, Port Elizabeth.
- [2] The plaintiff issued summons against the defendant for (a) wrongful arrest and detention and (b) unlawful search which he contended constituted a breach of his right to privacy and alleged further that his right to dignity was impaired and invaded. He alleged that at all times the members of the South African Police Service (SAPS) who arrested him, were acting within the course and scope of their duties as servants of the defendant.
- [3] The defendant pleaded that the arrest and detention of the plaintiff was lawful and relied on Section 40(1) (a) of the Criminal Procedure Act 51 of 1977, which provides:

Section 40

Criminal Procedure Act 51 of 1977

“(1) A peace officer may without warrant arrest any person -

- (1) A peace officer may without warrant arrest any person -
- (a) who commits or attempts to commit any offence in his presence.”

In its plea the defendant alleged that the plaintiff was arrested for riotous behaviour and alleged that this took place in the presence of the arresting officers. It denied that the plaintiff was ever searched by its members. The defendant further admitted that the arresting officers were acting within the course and scope of their duties at the time of the arrest.

[4] Both parties agreed at the beginning of the trial that the onus and duty to begin rested with the defendant.

B.Facts:

B.

Facts

[5]Inspector Riaan Tessnertestified that on 22 January 2005 at about 2am, he was on patrol duties with his colleague,Inspector Killian,atextension 32atBloemendal. Whilst inRensburg Street, they were approached by certain people who reported that they were accosted by men who attempted to rob them. They proceeded to the area where those men were reported to have been. When they got to the spot which happened to be at the corner ofRensburgandLawrence Erasmus Streets, they came across young men amongst whom was the plaintiff. On approaching them, these young men became rude and started to swear at them. He testified that some of them were carrying knives. On realising that they were coming to them, those who were carrying knives threw them in the bush and continued to swear at them.Inspector Tessnertold them that their behaviour was unacceptable and was “oproering”meaning riotous. When they did not stop, they arrested them for “riotous behaviour”and took them to the charge office where he in particular charged the plaintiff for contraveningSection 11(c) of Act 102 of 1982 i.e. riotous behaviour and detained him. He testified that he did not arrest the plaintiff for attempted robbery although under cross-examination he stated that he also arrested the plaintiff to prevent further commission of attempted robberies.

Inspector Riaan Tessner

Inspector Killian,

extension 32

Bloemendal

Rensburg Street

Rensburg

Lawrence Erasmus Streets

Inspector Tessner

oproering”

riotous behaviour”

Section 11

[6] The version of the plaintiff is not diametrically opposed to that of the defendant but at variance with his pleaded case. In evidence in chief he testified that on 21 January 2005 at about 22H00, he was at his home in 51 Burg Street, Bloemendaal looking after his ill father when Inspector Tessner arrived looking for his brother. He told him that his brother was not at home and did not know his whereabouts. Inspector Tessner accused him of lying in an effort to conceal his brother. He then arrested him and detained him until 8H40 on 22 January 2005. Given

the conflict between the plaintiff's viva voce evidence and his pleaded case his version concerning the circumstances surrounding his arrest must be rejected as false. The liability of the defendant must accordingly be assessed on the defendant's own version.

51 Burg Street, Bloemendaal

viva voce

C. Grounds of appeal:

C.

Grounds of appeal

[7] The plaintiff premised his appeal on the following grounds:

"1 The Magistrate found on the evidence that the plaintiff had not established his case and furthermore found that the defendant also had not established its case.

1 The Magistrate found on the evidence that the plaintiff had not established his case and furthermore found that the defendant also had not established its case.

Consequently the Magistrate granted an order of absolution from the instance, with costs;

1.1.2 This order, in law is clearly wrong as the onus was on the defendant to establish its defence, the matter being one of an unlawful arrest and detention;

1.1.3 In the circumstances, given that the magistrate found that the defendant had not established its defence, the order should have been "judgment in favour of the plaintiff" in an appropriate amount, together with costs;

2. There was insufficient basis for the magistrate to reject the version of the plaintiff and in the circumstances the magistrate had incorrectly applied the principles as laid down in *Stellenbosch Farmers Winery Group Ltd & Another v Martel et cie & Others* 2003 (1) SA 11 (SCA).

Stellenbosch Farmers Winery Group Ltd & Another v Martel et cie & Others

2003 (1) SA 11

2.1 There was no inherent reason why the plaintiff's evidence should have been rejected. On the contrary the defendant's witnesses' evidence was fraught with a variety of improbabilities, factual inaccuracies and objective falsehoods;

2.2 The magistrate correctly concluded that the defendant had not established its case, however, as stated hereinbefore, made the wrong order."

[8] Mr Jooste, counsel for the plaintiff, submitted in argument that the reasons for the arrest do not support the defence raised by the defendant. He submitted that the arrest was unlawful because the offence for which Inspector Tessner arrested the plaintiff was non-existent, having been repealed and consequently reliance on the provisions of Section 40

- (1) (a) of the Act was misplaced. He further argued that the second reason relied upon by the defendant that Inspector Tessner wanted to prevent further attempted robberies cannot be a defence. He submitted that the least the magistrate should have done was to find that the defendant had failed to discharge the onus of proving its defence in terms of Section 40 (1) (a) of the Act and that it was a misdirection on his part to grant an absolution from the instance.

Mr Jooste,

Inspector Tessner

[9] Mr Sandi, counsel for the defendant, argued that it is immaterial that the plaintiff was charged under a repealed act because the police at the time of the arrest had a reasonable suspicion that the plaintiff had committed an offence in their presence. He further argued that by detaining the plaintiff, the police sought to prevent further crimes which could result in the defendant being sued for omission to act. He conceded that the magistrate was wrong in granting an absolution from the instance though he was correct in not upholding the plaintiff's claim.

Mr Sandi,

D. Issues:

D.

Issues

[10] The issue to be determined herein is whether the plaintiff was lawfully arrested and if so whether his detention was warranted in the circumstances of this case. The defendant proffered two reasons for the arrest. He stated initially that the plaintiff was arrested for riotous behaviour hence he charged him for contravening Section 11 (c) of Act 102 of 1982 and detained him accordingly.

[11] The second reason given by the defendant is that the arrest was to prevent further attempted robberies of members of the public.

[12] Section 40 (1)

- (a) of the Act authorises a peace officer to arrest, without warrant, a person who commits or attempts to commit a crime in his presence. Such authority is limited to crimes already completed and attempts to commit crimes.¹

[12] Section 40 (1)

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1

[13] The evidence by Inspector Tessner that he wanted to prevent the commission of further crimes unconvincing. He had no reason to believe that such offences would be committed. I further do not believe that he could have arrested them for the attempted robbery when he did not even take the people who complained to him along when he went to investigate the complaint. He did not even obtain their particulars. It is surprising that he would be bothered about attempted robberies which had not taken place instead of dealing with the current complaint which led him to the plaintiff. There was no basis therefore for Inspector Tessner to act on the second reason and any arrest pursuant thereto would be unlawful. Furthermore, Section 40 (1) (a) of the Act relied upon by the defendant is not applicable because the prevention of further attempted robberies would not be committed in the presence of Inspector Tessner.²

[13] The evidence by

that he wanted to prevent the commission of further crimes unconvincing. He had no reason to believe that such offences would be committed. I further do not believe that he could have arrested them for the attempted robbery when he did not even take the people who complained to him along when he went to investigate the complaint. He did not even obtain their particulars. It is surprising that he would be bothered about attempted robberies which had not taken place instead of dealing with the current complaint which led him to the plaintiff. There was no basis therefore for

to act on the second reason and any arrest pursuant thereto would be unlawful. Furthermore, Section 40 (1) (a) of the Act relied upon by the defendant is not applicable because the prevention of further attempted robberies would not be committed in the presence of

.

2

[14] It is common cause that Inspector Tessner arrested the plaintiff for riotous behaviour in contravention of Section 11

- (c) of Act 105 of 1983. It is further common cause between the parties that this Act was repealed by Section 13 of Act 209 of 1993. There was thus no such offence committed by the plaintiff.

[14] It is common cause that

arrested the plaintiff for riotous behaviour in contravention of Section 11

- (c) of Act 105 of 1983. It is further common cause between the parties that this Act was repealed by Section 13 of Act 209 of 1993. There was thus no such offence committed by the plaintiff.

[15] In *Rudolph v Minister of Safety & Security*³ a member of South African Police Service had instructed the plaintiffs to disperse as according to him they had unlawfully gathered without a permit thus contravening the provisions of the Regulations of the Gatherings Act 205 of 1993. They failed to disperse after expiry of the period afforded to them to do so. Plaintiffs were then arrested and detained. The court below accepted that the plaintiffs had held an unlawful gathering in contravention of the provisions of the Gatherings Act in that they did not have a permit. The trial judge appeared to have accepted also that the arrest without a warrant was effected in terms of Section 40

- (1) (a) of the Act. The plaintiffs appealed to the Supreme Court of Appeal and on appeal Mthiyane JA said the following at 276 b-e:

[15] In

Rudolph v Minister of Safety & Security

3

a member of South African Police Service had instructed the plaintiffs to disperse as according to him they had unlawfully gathered without a permit thus contravening the provisions of the Regulations of the Gatherings Act 205 of 1993. They failed to disperse after expiry of the period afforded to them to do so. Plaintiffs were then arrested and detained. The court below accepted that the plaintiffs had held an unlawful gathering in contravention of the provisions of the Gatherings Act in that they did not have a permit. The trial judge appeared to have accepted also that the arrest without a warrant was effected in terms of Section 40

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Mthiyane JA

said the following at 276 b-e:

*“14. The onus of justifying the arrests and detention of the appellants lies upon the first respondent. See *Zealand v Minister of Justice & Constitutional Development & Another*.³ In concluding that the appellants had committed an offence, the court below clearly erred. The first appellant and his group were only eight in number and the Gatherings Act proscribes an assembly of more than 15 persons in a public place without permission. The first appellant and his small group did not constitute a ‘gathering’ within the meaning of that Act. In s 1, a ‘gathering’ is defined as follows:*

14. The onus of justifying the arrests and detention of the appellants lies upon the first respondent. See

Zealand v Minister of Justice & Constitutional Development & Another.

In concluding that the appellants had committed an offence, the court below clearly erred. The first appellant and his group were only eight in number and the Gatherings Act proscribes an assembly of more than 15 persons in a public place without permission. The first appellant and his small group did not constitute a 'gathering' within the meaning of that Act. In s 1, a 'gathering' is defined as follows:

"gathering" means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air . . . '.

gathering"

means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air . . . '.

There was therefore no evidence of a 'gathering', no offence had been committed in the presence of Captain Bekker, and the first respondent accordingly failed to discharge the onus of proving that the arrest of the first appellant on 18 July 2003 without a warrant and the subsequent detention of both appellants in a police cell at the Pretoria Moot Police Station were justified." (My underlining)

There was therefore no evidence of a 'gathering', no offence had been committed in the presence of Captain Bekker, and the first respondent accordingly failed to discharge the onus of proving that the arrest of the first appellant on 18 July 2003 without a warrant and the subsequent detention of both appellants in a police cell at the Pretoria Moot Police Station were justified ."

- [16] Similarly, in *Minister of Safety & Security v Tyulu* the plaintiff (respondent on appeal) was arrested for being drunk in a public place. He was taken to the charge office and a doctor was called to examine the respondent. The doctor recorded in his report that the respondent was moderately under the influence of alcohol. The report came back recording that the alcohol content in the respondent's blood on the night in question was 0,23 grams per 100 millilitres. Having regard to the definition of "Drunkness", Bosiello AJA held as follows in paragraph 22:

- [16] Similarly, in

Minister of Safety & Security v Tyulu

the plaintiff (respondent on appeal) was arrested for being drunk in a public place. He was taken to the charge office and a doctor was called to examine the respondent. The doctor recorded in his report that the respondent was moderately under the influence of alcohol. The report came back recording that the alcohol content in the respondent's blood on the night in question was 0,23 grams per 100 millilitres. Having regard to the definition of

Drunkness",

Bosiello AJA

held as follows in paragraph 22:

"The evidence does not show that the respondent was not in control of his physical or mental faculties or both as a result of his having consumed alcohol at the time when he was arrested. The full bench correctly remarked, the factors relied upon by the appellants are merely indicative of the fact that the respondent may have been under the influence of alcohol, which does not necessarily mean that he was drunk. In the result, I respectfully agree that the respondent's arrest without a warrant for being drunk in public was not justified by s 40 (1) (a)."

The evidence does not show that the respondent was not in control of his physical or mental faculties or both as a result of his having consumed alcohol at the time when he was arrested. The full bench correctly remarked, the factors relied upon by the appellants are merely indicative of the fact that the respondent may have been under the influence of alcohol, which does not necessarily mean that he was drunk. In the result, I respectfully agree that the respondent's arrest without a warrant for being drunk in public was not justified by s 40 (1) (a)."

[17] Incasu, the appellant was arrested for an offence which does not exist. I am accordingly of the view that the arrest cannot be justified by Section 40 (1) (a). The respondent has failed to discharge the onus which rests on it. In the premises the decision by the Magistrate granting absolution from the instance cannot be sustained. In respect of claim 2, no evidence was adduced by the plaintiff to substantiate this leg of his cause of action. The order of absolution from the instance must therefore stand.

casu,

In the result I make the following order:

1. The appeal is allowed with costs.
2. The order of absolution from the instance is set aside and substituted with the following order;

2.1 Judgment is granted in favour of the plaintiff in respect of claim 1;

M MAKAULA

JUDGE OF THE HIGH COURT

Chetty J: I agree and it is so ordered.

D CHETTY

Appellant's Counsel: Mr P E Jooste

Appellant's Attorneys: Neville Borman & Botha

22 Hill Street

GRAHAMSTOWN

Respondent's Counsel: Mr N J Sandi

Respondent's Counsel: N N Dullabh & Co

5 Bertram Street

Heard on: 21 May 2010

Delivered on: 16 September 2010

1Commentary on theCriminal Procedure Act: DuToitet alp 5-8

Commentary on theCriminal Procedure Act: DuToit

Criminal Procedure Act: Du

et al

p 5-8

2Minister of Safety & Security v Glisson2007

- (1) SACR 131(E)134 d-e, Jones J held as follows:“Here, there were no facts present which were apparent to the arrestor and which led to the inference that a crime had been committed. There was no question of the arresting officer supplementing his own observations. Potgieter had made no observations at all of disorderly conduct. He was obliged to rely entirely on the observations of another. In this kind of situation, where reliance is had upon a report by another, there is always the risk of improperly depriving a person of his or her liberty because, where the arresting officer did not have personal knowledge of the alleged criminal conduct, he is not properly in a position to decide

whether or not an offence has really been committed.”

2Minister of Safety & Security v Glisson2007

- (1) SACR 131(E)134 d-e, Jones J held as follows:

Minister of Safety & Security v Glisson

2007

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(1) SACR 131(E)

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whether or not an offence has really been committed.”

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whether or not an offence has really been committed.”

32002 (2) SACR 271SCA.

2002 (2) SACR 271SCA.

2002 (2) SACR 271

42009

(2) SACR 282

2009

(2) SACR 282

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