

SOUTH AFRICA / JUDGMENT

Matebese v Minister of Police (2224/2017) [2019] ZAECPEHC 37 (18 June 2019)

[2019] ZAECPEHC 37

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

M J Lowe

CASE / FILE NUMBER

2224/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, PORT ELIZABETH
CASE

NO: 2224/2017

Date

heard: 14

to 17 May 2019

and

29 May 2019

Date

delivered: 18

June 2019

In

the matter between:

SIYABONGE
MATEBESE
Plaintiff
and
THE
MINISTER OF POLICE
Defendant

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] Plaintiff instituted action against Defendant for unlawful arrest and detention.
- [2] Plaintiff was arrested without a warrant by the arresting officer, Warrant Officer Olckers, on Friday, 21 October 2016 at approximately 11h20. He was arrested, so it is pleaded by Defendant, in terms of Section 40(1)(a) of the Criminal Procedure Act 51 of 1977 (“the CPA”), it being alleged that the Plaintiff was in possession of Mandrax and/or was resisting arrest. It was pleaded in the alternative that the arrest was in terms of Section 40(1)(b) or (h) of the CPA being in possession of drugs. He was detained until 8h30 on Monday 24 October 2016 and was then released without appearing before a Magistrate purportedly in terms of Section 56 of the CPA. Defendant alleges that the offence was a Schedule 1 offence and became a Schedule 5 offence as he had previous convictions and accordingly that Section 60(11)(b) of the CPA was of Application to bail in the circumstances.
- [3] To qualify as a Schedule 1 offence in these circumstances the charge of possession of Mandrax would have to carry a punishment of more than 6 months imprisonment without the option of a fine.
- [4] Plaintiff pleads further that even if a reasonable suspicion was held relevant to Plaintiff having committed an offence, the arresting officer failed to exercise his discretion to arrest or not to arrest in a fair and rational manner.
- [5] As to the detention after arrest, it was pleaded that this was unlawful due to the alleged unlawful arrest, alternatively, that Plaintiff should have been brought before a prosecutor, after hours, in terms of Section 59A of the CPA forthwith for his release, further alternatively that the South African Police Service members ought to have released him as they knew or ought to have known that he would be released “on warning or on bail” at his first court appearance, and that he was clearly a candidate for release in terms of Section 59A of the CPA.
- [6] Whilst in argument it was contended that Plaintiff ought to have been brought before a court prior to 4pm on the day of his arrest, this was not in fact pleaded but rather that he should have been brought before a Section 59A prosecutor immediately and in any event no later than the evening of his arrest.
- [7] In a Rule 37 Minute it was agreed that this was a Schedule 1 offence (a matter to which I will return in due course).
- [8] Defendant denies all the allegations of unlawfulness, and relevant to release on bail, pleads that Plaintiff, after his rights to bail were explained, did not request same.

[9] In the result in argument it was clear that the following were the real disputes:

[9.1] Whether or not the arresting officer had a “reasonable suspicion” that Plaintiff was in possession of drugs when he was arrested;

[9.2] Whether that reasonable suspicion could have been formed prior to a search having been conducted to establish if Plaintiff was in fact in possession of drugs;

[9.3] Whether the discretion to arrest was lawfully exercised;

[9.4] Whether suspected Mandrax powder was found in the search of Plaintiff at the Police Station (with subsequent further “arrest”);

[9.5] Whether the continued detention of Plaintiff at the Police Station was lawful;

[9.6] Whether at any time between his arrest and release that detention became unlawful.

THE

FACTS

[10] It was common cause that Warrant Officer Olckers was on duty, patrolling in a marked Golf vehicle with Warrant Officer Kleynhans on the morning of the arrest. They saw Plaintiff approach a known drug dealer and witnessed an exchange between the two. They then followed Plaintiff who had walked away and who entered a shop which sold cigarettes. In this regard Plaintiff admitted a purchase transaction with the drug dealer, he purchasing a small amount of dagga he said. He went to the shop to buy tobacco to mix in with the dagga. He was arrested by Warrant Officer Olckers, assisted by Warrant Officer

Kleynhans in the shop.

[11] Here the evidence parts ways.

[12] Plaintiff said that he was at all times accompanied by a friend “Nyoro” to whom he passed the dagga purchased and who waited outside the shop for him. He said that inside the shop he was approached by a police officer who went to him and immediately started manhandling, him throwing him to the ground. He said the arresting officer and two others attempted to search him, but that he resisted the search. He also resisted their attempt to load him into the Golf vehicle. They were assisted by a passerby and eventually they succeeded. His version demonstrates the force and extent of his resistance.

[13] His version is clear evidence of an assault beyond the limits of an arrest – he said that he informed his legal team of all this – but significantly there is not even a hint of this in his claim – no assault alleged and no cause of action based thereon, as would surely have been the case had this been what he had told his lawyer. This part of his evidence smacks of fabrication and he was unable to explain this away.

- [14] He maintained that he was not told why he was being arrested and searched. He maintained he was searched at the Police Station, was assaulted by Warrant Officer Olckers and Warrant Officer Kleynhans during the search and that nothing was found – again no assault was alleged in this regard in his claim.
- [15] His evidence fell apart in cross-examination and he was disclosed as being an extremely poor and unimpressive witness. He flatly contradicted himself on a number of occasions and demonstrated a willingness to fabricate and adjust his version as he went along. As examples he entirely denied being asked by the arresting officer for his personal details later, saying he gave them his name and address. In cross-examination he said he did not know why he was arrested but in chief said he told the detectives that he was arrested for possession of Mandrax. It was patent that his alleged friend in fact never existed nor understandably was this pursued by his counsel. Similarly his allegation of assault. He embellished on the alleged assault, this becoming a trampling under cross-examination and had difficulty in explaining the injury he alleged from the assault.

He denied that a folded paper with a small amount of white powder in it – suspected Mandrax – was found in his shoe. He improbably claimed not to have been read his rights at all by the arresting officer. It should be said that the alleged presence of a friend to whom the dagga was passed, was a desperate last ditch attempt to avoid a possession charge, he claiming to have passed on the dagga immediately it was bought. Once it is accepted that there was no friend (as it must be on the evidence and probabilities) his continued possession of the drugs purchased, again on the probabilities, when he went to the shop is established.

- [16] There can however be little doubt that the cell conditions in which he was kept were appalling with blocked toilet, lice and other occupants – he sleeping sitting up due to the filthy conditions and inadequate bedding. He said that before he was released he was asked if he could post bail but saw he had no money and could qualify only for “free bail”. At one time he said he told the police that he wanted to go home when the investigating officer explained his rights (this for the first time in cross-examination).

- [17] There was no other evidence for Plaintiff.

- [18] Plaintiff’s counsel in argument accepted that the evidence of Warrant Officer Olckers and Warrant Officer Kleynhans could be viewed “collectively”, much of it not being contentious as follows as per counsel’s heads:

“25. They testified that they saw the Plaintiff receive something from a known drug dealer. They decided to follow the Plaintiff who was moving away at that stage.

26. They stopped their marked police vehicle in front of a shop that they saw him enter with the intention of searching him for drugs, which they suspected he had in his possession.

27. Olckers was the first to exit the vehicle and approach the Plaintiff. He testified that the Plaintiff ran past him towards the exit of the shop where Kleynhans was standing at that stage.
 28. He testified that, a couple of seconds later, Kleynhans stopped the Plaintiff from escaping from them and the Plaintiff grabbed hold of the security gate with his arms in front of him at shoulder height.
 29. At that stage he was intent on arresting the Plaintiff instead of searching him while he was in a standing position.
 30. Kleynhans confirmed his evidence to a great extent until this stage.
 31. The Plaintiff was then sprayed with pepper spray as the two officers could not remove him from the gate he had grabbed hold of. A couple of seconds later he released his grip and a passer-by assisted them in subduing and handcuffing the Plaintiff.
 32. Kleynhans's evidence hereof differed in that he was adamant that even after the pepper spray was used the Plaintiff continued to hold onto the gate for several minutes.
 33. The Plaintiff was then taken to the Uitenhage Police Station where he was searched and mandrax powder of about half a tablet was found in his one shoe.
 34. He was arrested again and his rights explained to him.
 35. Olckers took him to the detention cells where he was handed a written Notice of Rights in Terms of the Constitution which he read for about 4 to 5 minutes and then still refused to sign. The cell commander, whose name is not known, signed as witness. The Plaintiff gave his name and address to Olckers.
 36. He was thereafter detained."
- [19] The remaining evidence for the Defendant took the matter little further, save to establish the events and timeline post-arrest.

THE LEGAL ISSUES RELEVANT TO ARREST AND SUBSEQUENT RELEASE

- [20] Counsel for Plaintiff in argument correctly conceded that on the acceptable common cause evidence the police officers concerned indeed had reason to suspect that Plaintiff was involved in the purchase of drugs from the dealer, identified by, and well known to the police. What was argued, however, was that the suspicion was not a reasonable suspicion until a search of Plaintiff had been carried out and the drugs actually found in his possession as, so it went, required by Section 40(1)(a) and (h) of the CPA – which he argued had never occurred.

- [21] In respect of Section 40(1)(a) police officers are given extraordinary powers of arrest. This is of course, unless justified, an infringement of liberty and human dignity. In *Minister of Safety and Security v Van Niekerk*[1] the Court held that nuanced guidelines exist as to when to arrest without a warrant and when not. This must be read in the light of *MR v Minister of Safety and Security* [2] and *Minister of Safety and Security v Sekhoto and Another* [3].
- [22] This subsection requires that a particular factual situation must exist to justify an arrest. If it does then the arrest may be made, if not then it cannot. This does not require a reasonable suspicion which requires an objective standard to be applied. However good faith or reasonable mistake does not help, absent the established particular factual situation, being a crime committed, or attempted to be committed, in his presence.
- [23] The arresting officer must have personal knowledge of the conduct and facts relevant and the test for establishing the relevant facts being in existence is objective[4]. An acquittal or non-prosecution is not relevant.
- [24] The following must be established.
- [24.1] the arresting officer is a peace officer.
- [24.2] an offence committed or an attempt.
- [24.3] the said offence, or attempt, must be in the peace officer's presence.
- [25] In *Scheepers* (supra) it was pointed out that the requirement of Section 40(1)(a) is a determination of whether the facts observed by the arresting officer
- “as a matter of law prima facie establish the commission of the offence in question”. He may act on reasonable inferences[5]. He may take into account what he observed immediately before the arrest with his cognisance of the surrounding circumstances. If a reasonable interpretation of the facts observed lead him to the conclusion that a crime is being committed in his presence, the crime is deemed to be committed for the purposes of Section 40(1)(a)[6]. He must have acted on objective reasonable grounds. It is not necessary that the crime is shown later to in fact have been committed[7], e.g. driving under the influence of alcohol[8].*
- [26] The suggestion that Tyulu changed the above was dealt with in *Scheepers* as being an incorrect view, the position remaining “that is sufficient that the facts observed by the peace officer prima facie constitute the offence in question”. I agree entirely with this. The police bear the onus in this regard.
- [27] In respect of Section 40(1)(b) and (h) the position is generally set out in *Minister of Police v Dhali* [9] as follows:
- “[9] In Duncan v Minister of Law and Order [10], it was held that the jurisdictional facts for a Section 40(1)(b) defence are that (i) the arrestor must be a peace officer, (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.[11]*

[10] The suspicion that must be held must, in order to be a reasonable one, be objectively sustainable, in the sense that it must rest on reasonable grounds.[12]

[11] The jurisdictional fact for an arrest without warrant in terms of these provisions remains a suspicion. In *Mabona & Another v Minister of Law and Order and Others*[13], the following was said in relation to how a reasonable suspicion is formed:

“Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”[14]

[12] In *Minister of Police and Another v Du Plessis*[15] Navsa ADP stated as follows:

“[14] Police bear the onus to justify an arrest and detention. In Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589E – F the following is stated:

'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.'

[15] Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.

[16] In *Zealand v Minister of Justice and Constitutional Development and Another* [2008] ZACC 3; 2008

(2) SACR 1 (CC) (2008 (4) SA 458; 2008 (6) BCLR 601) para 24 the following is said:

'The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily

or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.'

[17] Justification for the detention after an arrest until a first appearance in court continues to rest on the police. Counsel for the appellants rightly accepted this principle. So, for example, if shortly after an arrest it becomes irrefutably clear to the police that the detainee is innocent, there would be no justification for continued detention.”“

[28] It is trite that police officers purporting to act in terms of Section 40(1)(b) of the Act should investigate exculpatory explanations

offered by a suspect before they can form a reasonable suspicion for the purpose of lawful arrest.

[16] It is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify on arrest.[17]

[29] All the above is of course subject to the discretion to arrest as explained in MR supra [18]. In short police officers are never obliged to effect an arrest, when all the jurisdictional factors are present, in the conduct of their discretion whether to do so.[19] Section 39(1) of the CPA authorises the arrestor, if the circumstances require, to use force by “forcibly confining his body”. [20]

[30] Once an arrest has been lawfully executed without a warrant the question arises as to an arrestee’s rights thereafter.

[31] Generally this is governed by Section 50 of the CPA, but must be read with Section 59 and 59A thereof.

[32] In *Minister of Police v Ndaba and Others* (unreported Gauteng Division A553/2014 delivered on 6 May 2014) the following was said:

“[19] The first portion of section 50, leading up to subsection (d)(i), provides as follows:

"Procedure after arrest

50(1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.

(b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

(c) Subject to paragraph (d), if such an arrested person is not released by reason that –

(i) no charge is to be brought against him or her; or

(ii) bail is not granted to him or her in terms of section 59 or 59A (my note: these sections do not apply for present purposes)

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.

(d) If the period of 48 hours expires –

(i) outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not

later than the end of the first court day;

(ii) ..." (Emphasis added.)

[20] Subsection (2) of section 50, containing the relevant definitions, reads as follows:

"(2) For purposes of this section –

(a) 'a court day' means a day on which the court in question normally sits as a court and 'ordinary court day' has a corresponding meaning; and

(b) 'ordinary court hours' means the hours from 9:00 until 16:00 on a court day.'"

[33] The Court referred to the judgment in *Mashilo and Another v Prinsloo*[21] as follows:

"[34] The present case which is the subject of the appeal which came before us, was heard in March 2014, and the judgment handed down on 2 April 2014.

[35] The judgment in *Mashilo and Another*, mentioned above, was heard in August and September 2012 and, as appears from the citation, already reported in 2013. However, the learned Judge in the matter before us, was clearly not referred to that judgment, to which I will refer as "*Mashilo and Another*". This was the *Prinsloo* case to which I have referred.

[36] When leave to appeal was refused in the *Prinsloo* case (evidently the appeal was only directed at the costs order granted against *Mashilo*) the latter and the prosecuting authority applied to the Supreme Court of Appeal for leave to appeal which was granted, and the appeal was upheld at the same time.

The basis upon which the matter came before the Supreme Court of Appeal ("SCA") is described as follows in the judgment at 651d-g:

"The application for leave to appeal did not pertain to the earlier order by the High Court, but to the subsequent order releasing *Prinsloo* and the costs order against *Mashilo*. As *Prinsloo* had already been released, the essence of the application for leave to appeal was not to set aside such an order. Such an exercise would have been academic. It was directed at the costs order made against *Mashilo*. In this court, counsel for *Prinsloo* conceded that the costs order against *Mashilo* should not have been made, as *Prinsloo* had abandoned his prayer for costs against *Mashilo*. But because that costs order was based on an alleged misinterpretation by the court below of the

provisions of section 50 of the Criminal Procedure Act, counsel for the appellants submitted that this court should consider the merits of the matter. What was sought to be achieved was a definite

interpretation of that section ..."

The court then proceeded to interpret sections 50(1) and (6).

Subsection (6), with respect, is not directly in point for present purposes. It provides:

"(6)(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who –

(i) was arrested for allegedly committing an offence shall, subject to this section and section 60 –

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released on bail; ..."

Section 60 deals with bail applications.

[37] In *Mashilo and Another*, the learned Judge of Appeal says the following at 653c-f:

"Section 50(d)(i) was clearly intended to extend the 48-hour outer limit during which an arrested person could be detained. That is made plain from the language of the subsection and has, during the last thirty five years since the introduction of the Act, always been understood to be so. This is clear from one of the earlier, foremost authorities on criminal law and procedure, namely the work by Lansdown & Campbell *South African Criminal Law and Procedure* vol 5: Criminal Procedure and Evidence op cit at 299-300. See also the interpretation given by Eksteen J in *Hash and Others v Minister of Safety and Security* [2011] ZAECPHC 34 in paragraph 71. The legislative purpose in extending the 48 hours, if it is interrupted by a week-end, appears to me to be fairly obvious. It is because the logistics of ensuring an appearance before court over a week-end are difficult. Put differently, it is difficult to co-ordinate police, prosecutorial and court administration and activities over a week-end. This was especially true at the time that the legislation was introduced. It continues to be true today." (Emphasis added.)

[38] After dealing with the interpretation adopted by the learned Judge in the court below, in the urgent court, the learned Judge of Appeal said the following at 653i-j:

"This interpretation was erroneous. In arriving at his conclusion the learned Judge in the court below failed to consider not only what is set out in the preceding paragraphs, but also in having regard to constitutional values. He failed to take into account section 35(1)(d)(ii) which, itself, recognises that the 48-hour period may be extended if interrupted by a week-end."

Here the learned Judge of Appeal refers to section 35(1)(d) of the Constitution which reads as follows:

"Everyone who is arrested for allegedly committing an offence has the right –

...

- (d) to be brought before the court as soon as reasonably possible, but not later than –
- (i) 48 hours after the arrest; or
- (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day." (Emphasis added)

This provision also clearly flies in the face of the interpretation preferred by the learned Judge in the court below in *Prinsloo*, and followed by the learned Judge in the court below in the matter before us: in this case, the 48 hours expired on Monday evening and the arrested persons were taken to court the next morning, namely "the first court day after the expiry of the 48 hours" as directed by the Constitution.

[39] In *Hiemstra's Criminal Procedure* (loose leaf edition) at 5-30, the learned author recognises that the decision by the court below was overturned by the SCA in *Mashilo and Another* and observes:

"In section 50(1)(d)(i) the 'first court day' means the first court day after expiry of the 48 hour period."

[40] In conclusion, however, it seems to me to be appropriate to make the remark that the judgment in *Mashilo and Another* has a proverbial "sting in the tail". It seems to provide that the arrested person ought not to be detained for the entire period if he can be brought to the court earlier.

At 654a-c the following is stated by the learned Judge of Appeal:

"The matter could have been decided in the court below without resorting to a strained interpretation of section 50(1)(d). The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it can be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hours expired before or during the week-end. Expedition relative to circumstances is what is dictated by the subsection and the Constitution. Deliberately obstructive behaviour, as was evidenced by *Mashilo*, is not tolerated. On that basis alone the court below could quite easily have ordered that he be brought to court immediately to facilitate a bail application."

[34] After arrest then the arrestee is entitled to be informed as soon as reasonably possible of his right to institute bail proceedings (Section 50(1)(b)).

[35] Bail can be granted by the police, the Director of Public Prosecutions, a person authorized by the Director of Public Prosecutions, a Magistrate and the High Court, depending on the circumstances.

- [36] Section 59A of the CPA provides inter alia that an authorized prosecutor may, in respect of Schedule 7 offences, in consultation with the investigating officer authorise the accused release on bail. Section 59 applies to “Police Bail” before appearance before a Court other than in respect of an offence referred to in Part II or Part III of Schedule 2 – this being such an offence, not being relevant.
- [37] The offence in this matter is indeed a Schedule 7 offence being an offence in terms of any law relating to the illicit possession of dependence producing drugs.
- [38] The offence is not a Schedule 1 offence as argued as the offence is not one for which “... the punishment may be a period of imprisonment exceeding six months without option of a fine”. (As read with the Drugs and Drug Trafficking Act 140 of 1992, Sections 4 as read with Section 13 and 17).
- [39] In the result this offence is not a Schedule 5 offence, and this being a matter of law, I ignore the parties’ incorrect agreement hereon.
- [40] Section 50(6)(b) of the CPA deprives an accused of any right to have bail considered by a Court after hours.

THE ARREST

- [41] In this matter the common cause facts are set out above as to Plaintiff’s arrest at the shop.
- [42] This is the crucial moment of arrest and was undoubtedly an arrest flowing from the arresting officer’s observations, and the facts, consequent thereupon. It is indeed Plaintiff’s own evidence that he indeed bought a drug (dagga) from a known drug dealer shortly before his arrest.
- [43] Applying Stellenbosch Famers’ Winery Group Ltd and Another v Martell et Cie and Others[22]. It is not a difficult matter to establish the essential factors justifying the arrest under at least Section 40(1)(a).
- [44] Plaintiff was seen approaching and effecting an exchange with a well known drug dealer. He was clearly unaccompanied, on the evidence of the two excellent police officers, who made a good impression with good demeanour – the difference between them on detail being entirely explicable in the dangerous moving scene which ensued and the gathering and potentially threatening crowd. Even Plaintiff admitted the purchase of a drug – albeit dagga – a prohibited substance in these circumstances. On the acceptable evidence there was clear evidence of facts observed by the arresting officer which, objectively viewed, prima facie constituted the offence in question. In the absence of the alleged friend he was certainly on the probabilities still in

possession of whatever he had purchased. There was no need to effect a search to confirm same nor do I accept for a moment that Plaintiff was thrown to the ground as he suggested but rather that he attempted to flee, and then when arrested using the force necessary, he fought a battle justifying the steps taken to restrain him.

[45] In the result I find the arrest to have been lawfully affected in terms of Section 40(1)(a) of the CPA.

[46] It is unnecessary accordingly to consider the alternative grounds pleaded relevant to the arrest.

[47] I should say however that had I been obliged to do so I would have concluded that on the facts and circumstances pertaining at the time, the arresting officer most certainly entertained the necessary reasonable suspicion as required in Section 40(1)(h) on reasonable grounds. There was no need for a search to confirm same more especially as Plaintiff resisted same. Further there is no basis for concluding that the discretion to arrest was wrongly exercised.

THE DETENTION

[48] Plaintiff's first argument was that he ought to have been brought before a Court for a bail hearing before 16h00 on the day of his arrest – a Friday.

[49] This I have little difficulty in rejecting.

[50] He was arrested at 11h20 on the Friday and then taken forthwith to the Police Station for searching and processing. He was, I accept on the totality of acceptable evidence, found in possession of a small quantity (a crushed half tablet) of suspected Mandrax.

[51] The first detective on the case, after Plaintiff had been booked into the police cells after his search and warning of his Constitutional Rights (which I accept occurred), received the docket at about 15h00, he taking a warning statement and fingerprints. Outstanding was confirmation of Plaintiff's alleged address. His shift ended at 18h00 and he said that he had insufficient time to check the address, this being attended to by policeman Camagu at 23h30 on the same day.

[52] There was little explanation as to the period it took the docket to get to the Detective between 13h20 and 15h00, beyond this needing to be checked by the CSC Commander and be entered into the system by a data-capturer.

[53] In my view it was more than reasonable for the Police to act as they did after the arrest and most certainly not required of them to do more than take reasonable steps to proceed with Plaintiff's processing with reasonable expedition and efficiency.

[54] In my view in the circumstances it is entirely unreasonable to suggest that the fact that Plaintiff was not brought before a Court before 4pm on the day of his arrest, is an actionable delay to hold so and would place an unrealistic burden upon the police in the

circumstances.

[55] The first argument fails accordingly.

[56] Plaintiff argued further that once Plaintiff's address was verified he became eligible, not for release on bail by the police (Section 59(1)(c)), the offence not qualifying therefor, but in terms of Section 59A of the CPA and as he was not released in terms thereof (before his Monday release) he was wrongly detained for far a longer period than was legally justified.

[57] The fact of the matter is however that an accused person cannot be released on warning but only on bail in terms of Section 59(A).[23] Section 59A(3) is unequivocal and clearly does not authorise release on warning. The directive issued by the National Director of Public Prosecutions Policy Manual presumably in terms of Section 59A(2) make it clear so Defendant's Counsel contends that release on warning is not permitted. Bail must be put up in cash or by bank guarantee.

[58] Plaintiff's Heads of Argument argue that:

"72. The Plaintiff was arrested at 11:20AM. From the shop to the police station took no more than 10 minutes. There the search took place and the Plaintiff was taken to the cells. At the cells he was required to sign the SAP14A appearing on page 7 of bundle A. The time on this document reads 11:40AM. Immediately after this the Plaintiff was detained.

73. Olckers and Kleynhans then made their statements and handed the docket over to the charge office commander at 13:20.

74. The charge office commander's only duty regarding the docket is to hand it over to crime office commander.

75. From the Investigation diary on page 27 of bundle A it can be seen that it was only received by the next person at 14:20. No justification for this delay is given.

76. From the evidence, the only attention that this docket received after 13:20 was between 15:00PM and approximately 16:00PM when Zinto attended to charging the Plaintiff, taking his warning statement and taking his finger prints.

77. One must take into account that all the members dealing with the matter must have known that, if the docket and Plaintiff was not taken to court on the Friday, he would be limited to the afterhours prosecutor and, as Camagu testified, in the case of detained persons who could not afford an attorney, would have to wait until they are taken to court on the next available court day, which would be Monday 24 October 2016, some three nights and two days later.

78. It is respectfully submitted that the explanation given by the members of the Defendant in relation to the Plaintiff's detention falls far short of what is expected of them. In *The Minister of Safety and Security v Faizal Jacobs*, an unreported decision of the Grahamstown High Court under case number CA 07/2011, delivered on 15 December 2011, the court reasoned

as follows at paragraph 7:

"The only explanation given by the investigating officer as to why the Respondent was not taken to court on Friday 20 February 2009 was that he was not dealing only with the respondent's docket. By implication, apart from the fact that he was a very busy man, nothing prevented him from ensuring that the respondent was taken to court even by another police official."

79. If the court finds that the lapse of time was reasonable and that not sufficient time was available to present the Plaintiff to a prosecutor at court, section 59A of the CPA comes into operation."

[59] In *Jacobs (supra)* however the Plaintiff was arrested on a Thursday at 21h00, the Court finding he should have been taken to Court on the Friday. This matter is entirely distinguishable. The time set out is correct but the conclusion relevant to a court appearance on the Friday is not.

[60] Counsel went on as follows:

"81. It was confirmed by Camagu that a prosecutor is on standby and available to the detectives on duty twenty-four hours a day outside of normal court hours."

82. The offence of possession of mandrax or drugs is an offence listed in Schedule 7 of the CPA.

83. In the matter of *Sethlapelo v Minister of Police* 2015 JDR 0952 (GP) the court stated as follows:

"I am of the view that once the jurisdictional facts for the consideration of police bail in terms of s 59(1) (a) of the CPA are present, the police has a constitutional duty to ascertain as soon as reasonably possible after the arrest whether the arrestee wishes bail to be considered. If the arrestee wishes to apply for police bail, the senior police official, in consultation with the investigating police official, must consider bail as a matter of urgency. A failure to inform the arrestee of his constitutional right to apply for bail or a failure to consider bail or any unreasonable delay in the process could, depending on the circumstances of the case, render the arrestee's further detention until his first appearance in court unlawful."

See also: *Scheepers and Others v Minister of Police* Case no. 1889/17 and 4447/16, a recent unreported decision of the Port Elizabeth High Court (attached)

84. Similarly, in this matter, the fact that the offence with which the Plaintiff was charged falling in the ambit of Schedule 7 of the CPA, required steps by the Defendant's members to bring him before an afterhours prosecutor forthwith.

85. The fact that Camagu, who confirmed the address of the Plaintiff and thereby rendering it ready for presentation to prosecutor, did not even speak to the Plaintiff for the duration of his shift shows that the Plaintiff was not informed that he was a candidate for presentation to a prosecutor for consideration of release on such terms as the prosecutor deemed fit.”
- [61] I agree in principal with this. In this matter the prosecutor should ordinarily have been approached, however as bail was beyond Plaintiff’s means this clearly would not have resulted in his release, nor could he have furnished a guarantee.
- [62] It was not challenged that Plaintiff, on his own evidence, did not have any money and could not have posted whatever bail was set. As I have said he could not have been released on warning had such an application been brought, in terms of Section 59A, which does not permit same.
- [63] Plaintiff argues that the standby prosecutor, had he been approached, would have released Plaintiff. Apart from the views of one police witness that usually charges in such circumstances are withdrawn pending testing of the suspected drugs there was no evidence of what a Prosecutor would have done if approached. This Plaintiff had previous convictions relevant to possession of drugs which would have played a role. Even if I am prepared to accept that on the facts it is probable that the standby prosecutor would have authorised his release on bail (not on warning) which is far from clear on the evidence, had bail been authorised Plaintiff would have been unable to meet same and would then inevitably have been held over until his court appearance on the Monday. Hiemstra[24] in dealing with Section 59A of the Criminal Procedure Act, 51 of 1977, quotes the following from Part 10 (under the heading “Release of Bail by prosecutors”) of the Policy Manual of the National Prosecution Authority of South Africa:
- “1. ...
16. Bail should as a general rule not be granted in the case of multiple or repeated offences, or where the accused is an escapee or out on parole”.
- [64] This issue and the question of causation were addressed by both parties in supplementary heads which I called for as this had not been traversed in argument. Essentially submissions for Plaintiff rest upon an attempt to establish a forced interpretation of Section 59A as allowing release on warning.
- [65] I do not agree herewith as set out above. Reference to Section 72 of the CPA takes the matter no further as this specifically refers only to Section 59 or 60 and not Section 59A. Essentially Plaintiff had no answer to the factual causation issue set out further below.
- [66] Even if assuming that a Prosecutor would have granted bail, this raises a factual causation difficulty for Plaintiff.
- [67] The Law of Delict[25] sets out the issues relevant to factual causation as follows:

“The causing of damage through conduct, or, in other words, a casual nexus between conduct and damage, is required for delict. A person cannot thus be liable if he had not caused any damage. The question of whether there is a causal nexus in a particular case is a question of fact that must always be answered in light of the available evidence and relevant probabilities and that may in suitable instances be dealt with first in the course of a trial. A causal nexus is simply something which (factually) exists or does not exist and it appears that no amount of theorising can take the matter any further.

There can be no question of delictual liability if it is not proved that the conduct of the wrongdoer or defendant caused the damage to the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from

available facts and relevant probabilities. The important question in this regard is: how should one determine whether such a casual nexus exist, in other words, what is the correct test for determining causation? At the outset it must be emphasised that in most of the cases that occur in practice there is no problem in determining in one way or another whether the conduct of the defendant has caused harm to the plaintiff or not. The courts usually succeed admirably in determining, on the basis of the evidence and the probabilities of the given case, whether a causal link exists between the wrongdoer’s conduct and the damage. The method employed by the courts in practice, although frequently expressed in the terminology of the condition sine qua non, is the obvious one, ie to inquire whether one fact follows from another. This is indeed the natural way to determine a causal

link.” [26]

[68] Clearly it follows that had the standby prosecutor been approached and had he authorised release on bail this would not have in fact resulted in Plaintiff’s release as he was unable to post bail – he could not have been released on warning until he appeared before a court. The causal nexus on the facts as required has not thus been established on the appropriate test set out above.

[69] In the circumstances Plaintiff’s claims are dismissed with costs.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo Plaintiff: Adv

J D le Roux

Instructed by: Lessing,

Heyns, Keyter & Van der Bank Inc.,

Port Elizabeth

Obo Defendant: Adv F Petersen

Instructed by: State

Attorney, Port Elizabeth

[1] 2008

(1) SACR 56 (CC)

[2] 2016

(2) SACR 540 (CC)

[3] 2010

(1) SACR 388.

[4] Scheepers v Minister of Safety and Security 2015

(1) SACR (ECG) [17] and [18]

[5] Minister of Justice and Others v Tsose 1950

(3) SA 88 (T).

[6] Commentary on the CPA : Du Toit 5-14

[7] Minister of Safety and Security v Mhlana and Another 2011

(1) SACR 63 (WCC) [15]

[8] Minister of Safety and Security v Tyulu 2009

(2) SACR 282 (SCA)

[9] Minister of Police v M D Sahalam Dhali (unreported ECD CA327/2017 delivered on 26 February 2019)

[10] 1986

(2) SA 805 (A).

[11] At 818H-I; See also Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA).

[12] Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818H

[13] 1988

(2) SA 654 (SE)

[14] At 658 E-H.

[15] 2014

(1) SACR 217 (SCA) at paragraphs 14 – 17.

- [16] Louw & Another v Minister of Safety and Security & Others 2006
- (2) SACR 178 (T); Liebenberg v Minister of Safety and Security [2009] ZAGPPHC 88 (18 June 2004).
- [17] Mabona (Supra)
- [18] [40] – [48]
- [19] Cf Sekhoto supra [22] and MR supra at [57]-[65].
- [20] See also Section 49(2). Macu v Du Toit 1983
- (4) SA 629 (A).
- [21] 2013(2) SACR 648 (SCA)
- [22] 2003
- (1) SA 11 (SCA) at 14–15
- [23] Commentary on the Criminal Procedure Act Du Toit 9-20
- [23] Commentary on the Criminal Procedure Act
- [24] Kruger: Hiemtra's Criminal Procedure, Updated May 2018, Chapter 9, Bail, Section 59A Attorney-General may authorise release on bail.
- [25] Neethling – Potgieter – Visser, 7th Edition, P183
- [26] See also more recently: Barley and Another v Moore and Another [2017] 3 All SA 799 (WCC) [66]. Za v Smith and Another [2015] 3 All SA 288 (SCA)
- [26] See also more recently: Barley and Another v Moore and Another [2017] 3 All SA 799 (WCC) [66].
- Za v Smith and Another [2015] 3 All SA 288 (SCA)

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