CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 74/06
[2007] ZACC 15

MINISTER OF SAFETY AND SECURITY Applicant

versus

ANTUS VAN NIEKERK Respondent

Heard on : 3 May 2007

Decided on : 8 June 2007

JUDGMENT

SACHS J:

Introduction

[1] The Minister of Safety and Security seeks a ruling from this Court on the powers of police officers to effect arrests. He wishes to accomplish this through the medium of an application for leave to appeal against a judgment

and order of the Port Elizabeth High Court in which a claim for damages based on assault and wrongful arrest and detention was upheld with costs.

[2] On Saturday 9 October 2004 in Bethelsdorp, Port Elizabeth, Mr Van Niekerk (the successful plaintiff in that matter and the respondent in this application) was a member of a group of people that had gathered in a parking lot outside a night club. He arrived between 2pm and 3pm. Music was being played and alcoholic beverages consumed. Approximately two hours after his arrival between 10 and 15 police vehicles appeared. The police officers started taking fingerprints of members of the group to verify whether or not those present had any outstanding warrants of arrest. Twice Mr Van Niekerk broke away from attempts to take his fingerprints, and he was arrested and detained for approximately four hours before being released. He suffered injuries to his face, chin, left ear, elbows, hands, wrists, knees and left shoulder. This much is common cause. However, different versions were given about the circumstances of the arrest.

[3] The issues before the trial Court were whether Mr Van Niekerk was disorderly before the interaction with the police or only became recalcitrant after the police had provoked him, and whether Mr Van Niekerk was injured because of his own conduct or as a result of an assault by the police officers.

[4] The Minister, who is the applicant in this matter, alleged that the fingerprints were taken on a voluntary basis. He denied that the injuries were inflicted by the police officers. According to evidence given on his behalf, Mr Van Niekerk was drunk and disorderly and injured himself after refusing to give his fingerprints, fleeing from the police and then tripping over his own feet. The Minister maintains that because Mr Van Niekerk was drunk and disorderly he was lawfully arrested.

[5] Mr Van Niekerk, on the other hand, states that the police twice forcibly endeavoured to obtain his fingerprints. After having initially objected to having his fingerprints taken, he returned to the officer who was carrying out the procedure. On the second attempt to take his fingerprints there was a struggle between him and the police officer. He pulled loose and ran away. Another police officer caught him from behind, pushed him to the ground, assaulted him, threw him roughly into the police van and locked him up for some four hours.

[6] The trial Court upheld in broad terms the version of Mr Van Niekerk, basing its findings on an assessment of the credibility of the witnesses for both sides and the probabilities of their respective versions. The Minister unsuccessfully applied for leave to appeal to the full bench of the High Court and then to the Supreme Court of Appeal. He has now applied to this Court for leave to appeal against the judgment and order of the trial Court.

Is a constitutional question raised?

[7] In his application for leave to appeal the Minister submitted that the current litigation raises significant questions pertaining to the exercise of the discretion of police officers to effect an arrest under section 40(1)(a) of the Criminal Procedure Act (the CPA).[1] He contended that since the exercise of this discretion concerns the freedom of an individual and the ability of the police to exercise their constitutional duty to maintain law and order, it raises a constitutional question.

[8] More specifically the Minister submitted that the following constitutional point arose from the decision of the trial Court:

> "In circumstances where police officers are entitled to summarily arrest somebody (in this case in terms of Section 59(1)(d) and (e) of the Eastern Cape Liquor Act, No. 10 of 2003, read with the provisions of Section 40(1)(b) of the Criminal Procedure Act, No. 51 of 1977), are they constitutionally obliged to first of all give a written warning to such a person and not to arrest him, notwithstanding the provisions of the said legislation that allow them to arrest such persons?"[2]

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[1] Act 51 of 1977. Section 40(1)(a) provides that "[a] peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence".

[2] Section 40(1)(b) of the CPA provides as follows:

> "A peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody".

Schedule 1 includes the following offences: treason; sedition; public violence; murder; culpable homicide; rape; indecent assault; bestiality; robbery; kidnapping; childstealing; assault, when a dangerous wound is inflicted; arson; malicious injury to property; breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; theft, whether under the common law or a statutory provision; receiving stolen property knowing it to have been stolen; fraud; forgery or uttering a forged document knowing it to have been forged; offences

[9] At the hearing counsel for the Minister conceded that if Mr Van Niekerk had not committed the offence of being drunk and disorderly, as the High Court held to be the case, there was no basis for the arrest. Accordingly, if this Court does not upset the findings of fact by the trial Court, no constitutional question would be reached. He contended, however, that the facts were sufficiently connected to a constitutional issue to give this Court jurisdiction. He therefore urged the Court to reappraise the factual findings. Alternatively if the Court were not itself disposed to re-examine the facts, it should remit the matter to the Supreme Court of Appeal for it to reconsider the facts.

[10] This Court, as any court of appeal, would be slow to interfere with findings of fact by a trial court based on a careful assessment of the credibility of witnesses and the probabilities of their respective versions. These findings established that Mr Van Niekerk had not been disorderly prior to his arrest, and that he had not committed the offence for which he was arrested. The constitutional question of how to balance out the rights of the individual as against the duties of the police to protect the community, accordingly did not arise. Although there can be circumstances where a clear mistake of fact can possibly justify the re-examination by this Court of a factual finding made by a

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relating to the coinage; any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine; escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in Schedule 1 or is in such custody in respect of the offence of escaping from lawful custody; and any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1.

trial court,[3] this is not one of those cases. And since this is not a case where the facts are sufficiently connected to a constitutional issue as to render it in the interests of justice to re-examine the factual finding, it is not necessary to consider whether this Court has the power to remit the matter to the Supreme Court of Appeal to reconsider the factual findings made by the trial Court.

[11] Confronted with these difficulties, counsel for the Minister indicated that he had a second string to his bow. He submitted that the trial judge had directly raised a constitutional issue in his judgment when he held that, even if he was to accept that Mr Van Niekerk was drunk and disorderly, the police officer, given his constitutional duties, did not exhaust the option of using a written notice to ensure the presence of Mr Van Niekerk in court. The High Court had further remarked that an unqualified application of the police practice of keeping inebriated people in detention for four hours to sober up could never pass constitutional scrutiny, because the constitutional guarantee of dignity and liberty mandated at the very least that police officers apply their minds to the specific circumstances of each person. The trial judge went on to state that:

> "In this regard I am in respectful agreement with the approach adopted by BERTELSMANN, J, in the unreported matter of ANNELE LOUW & ANOTHER v THE MINISTER OF SAFETY AND SECURITY & FOUR OTHERS, a decision in the High Court of South Africa in the Transvaal Provincial Division with Case No. 8835/03, more particularly at pages 11 to

[3] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 52.

> 18 of the judgment. Thus as I stated even on its own version, I am of the opinion that the defendant has not discharged its onus as regards the arrest and detention of the plaintiff."[4]

He emphasised that on the police version itself, Mr Van Niekerk was sufficiently sober to understand his rights when they were read to him, which indicated that a written notice could have been served on him instead of his being arrested and detained.

[12] I am satisfied that in this respect the trial judge did advance propositions which clearly have a constitutional dimension, and on this ground we have jurisdiction to hear the matter. The question remains, however, whether it is in the interests of justice for us to do so.

The interests of justice

[13] Ordinarily it is not in the interests of justice to grant leave to appeal where the evidence clearly shows that no practical relief can be given to the applicant. Nevertheless, the Minister submits that it would be in the interests of justice for this Court to hear the appeal, since the current matter impacts substantially on questions relating to the maintenance of law and order by the police in our democratic society. He refers to two conflicting judgments by the Pretoria and Johannesburg High Courts respectively, and contends that the effect of this conflict is to obscure the legal position pertaining to the

[4] *Antus van Niekerk v Minister of Safety and Security* (SECLD) Case No 1212/05, 15 June 2006, unreported at 24.

obligations of police officers when exercising their discretion to make an arrest. He asserts that it is in the interests of justice for this Court to articulate constitutionally correct criteria applicable to arrests, and by so doing elucidate the legal position decreed by the Constitution.

[14] The first case to which he refers is *Louw and Another v Minister of Safety and Security and Others.*[5] In this matter Bertelsmann J held that if an accused or a suspect does not present a danger to society, will in all probability stand his or her trial, will not harm himself or herself or others, and may be able and keen to disprove the allegations against him or her, an arrest will ordinarily not be the appropriate way of ensuring his or her presence at court.[6] He stated that the pre-constitutional approach reflected in *Tsose v Minister of Justice and Others* had to be revisited,[7] and that if there was no reasonable apprehension that the suspect will abscond or fail to appear in court should he or she not be arrested, then it is constitutionally untenable to exercise the power of arrest.[8]

[5] 2006 (2) SACR 178 (T).

[6] Id at 185c/d-d/e.

[7] Id at 186b-c read with 185h. In *Tsose v Minister of Justice and Others* 1951 (3) SA 10 AD at 17F/G-G/H it was held that even though an arrest is a harsher method of initiating a prosecution than a summons, if circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him or her to court, such an arrest is not unlawful even if it is made because the arrestor believes that the arrest will be more harassing than the summons.

[8] *Louw* above n 5 at 187d-e.

[15] In *Charles v Minister of Safety & Security*,[9] on the other hand, the judgment in *Louw* was rejected as wrong.[10] Goldblatt J held that the legislator granted a peace officer the right to make an arrest in the circumstances set out in section 40 of the CPA, and created a situation where due compliance with that section by the peace officer is lawful and affords him or her protection against an action for unlawful arrest.[11] He stated that a court had no right to impose further conditions on peace officers. To do so would, he held, open a Pandora's box where the courts would be called upon to enquire into the reasonableness of the exercise of the discretion to arrest in a variety of circumstances and peace officers would be called upon to make value judgments every time they effect an arrest.[12]

[16] The Minister claims that this matter presents a viable test case for this Court to clarify the law pertaining to arrest, and to establish the criteria that the Constitution commands. He asserts that the fact that hundreds of wrongful arrest claims are awaiting the outcome of this application attests to the significance of this application for the law pertaining to arrest.

[17] To my mind the present matter is far from constituting a viable test case as claimed. On the contrary, it demonstrates that the constitutionality of an

[9] [2006] JOL 17224 (W).

[10] Id at 11.

[11] Id at 12.

[12] Id.

arrest will almost invariably be heavily dependent on its factual circumstances. Nothing in the judgment of the trial Court supports the proposition that that Court purported to establish a general rule concerning the issuing of a warning instead of making an arrest. The judgment itself is based on the notion that the lawfulness of an arrest is highly fact-specific. Such conflict as may exist between *Louw* and *Charles* is simply not raised by the facts of this case.

[18] Furthermore, those involved in the day-to-day exercise and supervision of the power to make arrests are usually best positioned to establish appropriate operational parameters concerning the discretion to arrest. This is an area where internal regulation should be encouraged. Indeed, there has in fact been extensive internal regulation concerning arrests.

[19] Counsel for Mr Van Niekerk pointed out that the Minister was fully alive to the dilemma of how to control the discretion of police officers under section 40, and referred this Court to Standing Order (G) 341 dealing with arrest and the treatment of an arrested person.[13] This Standing Order makes it clear that

[13] Standing Order (G) 341, issued under Consolidation Notice 15/1999 and entitled "Arrest and the Treatment of an Arrested Person until Such Person is Handed Over to the Community Service Centre Commander", provides as follows:

> "1. Background
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> Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution, 1996 (Act No. 108 of 1996), the Criminal Procedure Act, 1977 (Act No. 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated, must therefore be strictly adhered to.
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> . . .
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> 3. Securing the attendance of an accused at the trial by other means than arrest

(1) There are various methods by which an accused's attendance at trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.

(2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3) below.

(3) A member, even though authorised by law, should normally refrain from arresting a person if—

(a) the attendance of a person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or

(b) the member believes on *reasonable grounds* that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Government Gazette*, (at present R1500-00), in which event such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 1977.

4. The object of an arrest

(1) General rule

As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. A member may not arrest a person in order to punish, scare, or harass such person.

(2) Exceptions to the general rule

There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined below and constitute exceptions to the general rule that the object of an arrest must be to secure the attendance of an accused at his or her trial. These exceptions must be studied carefully and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.

(a) Arrest for the purposes of further investigation

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(b) Arrest to verify a name and/or address

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(c) Arrest in order to prevent the commission of an offence

. . .

(d) Arrest in order to protect a suspect

. . .

(e) Arrest in order to end an offence

. . .

arrest is a drastic procedure which should not be used if there are other effective means of ensuring that an alleged offender could be brought to court.[14] They do not suggest, and the trial Court did not hold, that drunk and disorderly persons who are not in a state to receive and understand a written warning to appear in court, should not be arrested. As the trial Court indicated, much depends on the circumstances of the case.[15] It should be borne in mind that should the Minister wish to provide greater guidance to police officers concerning their powers of arrest under section 40 of the CPA, he has executive and legislative options available to him.

> 6. Manner of effecting an arrest
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> . . .
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> (2) Arrest without a warrant
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> (a) It is only in exceptional circumstances where a member is specifically authorised by an Act of Parliament (for example, sections 40 and 41 of the Criminal Procedure Act, 1977) to arrest a person without a warrant, that a person may be arrested without a warrant. Any arrest without a warrant, which is not specifically authorised by law, will be unlawful."

[14] The Standing Order is not the only proactive step which had been taken by the Minister in providing substantive criteria to be applied by police officers when evaluating the options available. Counsel for Mr Van Niekerk pointed out that training and text books are also provided to police officers that substantially deals with the exercise of the discretion to arrest. He referred to Joubert (ed) *Applied Law for Police Officials* 2 ed (Juta, Lansdowne 2001) Ch 12.

[15] In this respect the recent US Supreme Court decision in *Atwater et al v City of Lago Vista et al* 532 US 318 (2001) is clearly distinguishable. In that case a mother of two young children was arrested for failing to fasten her seatbelt and that of her children. The Supreme Court divided five to four. The majority felt that a "bright line" had to be drawn, and if a police officer had probable cause to believe that a person had committed an offence in his or her presence, independently of the circumstances, a warrantless arrest was consistent with the Fourth Amendment. The minority held that the value of clarity should not be sought at the expense of liberty and privacy, and that what flexible arrest rules lacked in precision they made up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values of that Amendment, further, that the flexible rule overturned by the majority had been workable and easily applied by officers on the street for the preceding 30 years.

In the light of the values of the Constitution and the provisions of section 40 of the CPA and the Standing Orders, it is clear that South African law would not justify an arrest on the facts in *Atwater*.

[20] I conclude therefore that nuanced guidelines already exist. In the circumstances it would not be desirable for this Court to attempt in an abstract way divorced from the facts of this case, to articulate a blanket, all-purpose test for constitutionally acceptable arrests. As the guidelines themselves underline, the lawfulness of an arrest will be closely connected to the facts of the situation.

[21] I accordingly hold that it is not in the interests of justice for the application for leave to appeal to be granted.

[22] The Minister has unsuccessfully sought to have this matter dealt with as a test case and must pay the costs incurred by Mr Van Niekerk, such costs to include those occasioned by the employment of two counsel.

Order

The application for leave to appeal is dismissed with costs, such costs to include costs occasioned by the employment of two counsel.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, O'Regan J, Skweyiya J and Van der Westhuizen J concur in the judgment of Sachs J.

For the Applicant:	Advocate MJ Lowe SC, Advocate JD Huisamen and Advocate RB Laher instructed by The State Attorney, Port Elizabeth.
For the Respondent:	Advocate HJ van der Linde SC and Advocate PH Mouton instructed by GP van Rhyn, Minnaar & Kie Ing.