SACHS J ABRIDGED JUDGMENT

Minister of Safety and Security v Van Niekerk

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.

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 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.* 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. He stated that the pre-constitutional approach reflected in *Tsose v Minister of Justice and Others* had to be revisited, 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.

15. In *Charles v Minister of Safety & Security*, on the other hand, the judgment in *Louw* was rejected as wrong. 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.

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 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. This Standing Order makes it clear that 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. 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. 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.

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.