ARRESTS WITHOUT WARRANT: THE SCA BRINGS CLARITY

Minister of Safety and Security v Sekhoto 2011 1 SACR 315 (SCA); [2011] 2 All SA 157 (SCA)

1 Introduction

Section 40(1) of the Criminal Procedure Act 51 of 1977 provides for a number of different instances where a peace officer may effect an arrest without an arrest warrant. A perusal of the reported case law pertaining to the lawfulness of arrests without warrant reveals that section 40(1)(b) of the Act, in particular, has received much attention from the courts. In terms of this subsection a peace officer may arrest without warrant 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. It is settled law that any deprivation of freedom is regarded as *prima facie* unlawful. The arrestor therefore bears the *onus* of proving that the arrest was justified (*Minister of Law and Order v Hurley* 1986 3 SA 568 (A) 589E-F; and *Ralekwa v Minister of Safety and Security* 2004 1 SACR 131 (T) par [9]). The following jurisdictional facts must be present for a peace officer to rely on the defence created by section 40(1)(b) of the Criminal Procedure Act in cases, where it is alleged that the arrest was unlawful: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect committed an offence in Schedule 1; and (iv) the suspicion must rest on reasonable grounds (*Duncan v Minister of Law and Order* 1986 2 SA 805 818G-H). For a discussion of the different types of jurisdictional facts provided for in section 40(1) see Watney ("'n Klemverskuiwing by Inhegtenisneming Sonder Lasbrief" 2009 *TSAR* 734-735).

In *Louw v Minister of Safety and Security* (2006 2 SACR 178 (T) 187C-E) Bertelsman J held, with reference to the right to personal liberty, that arresting officers are under a constitutional obligation to consider whether there are no less invasive options to bring the suspect to court than the drastic measure of arrest, thereby effectively requiring a further jurisdictional fact for successful reliance by a peace officer on the provisions of section 40(1). If a reasonable apprehension exists that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his or her arrest, or a written notice or summons to appear in court is obtained, then the arrest would be constitutionally untenable and unlawful. Bertelsman J relied on academic opinion and an *obiter* remark made by De Vos J in *Ralekwa v*

Minister of Safety and Security (*supra* par [11]) and held that the approach in *Tsose v Minister of Justice* (1951 3 SA 10 (A) 17G-H) that there is no rule that requires the milder method of bringing a person to court if it would be as effective as arrest, could no longer be acceptable in a constitutional dispensation. This approach was followed in a number of reported High Court judgments (see *Gellman v Minister of Safety and Security* 2008 1 SACR 446 (W); *Olivier v Minister of Safety and Security* 2008 2 SACR 387 (W); *Ramphal v Minister of Safety and Security* 2009 1 SACR 211 (E); *Mvu v Minister of Safety and Security* 2009 2 SACR 291 (GSJ); *Le Roux v Minister of Safety and Security* 2009 2 SACR 252 (KZP); and *Coetzee v National Commissioner of Police* 2011 1 SACR 132 (GNP)) but not approved of in *Charles v Minister of Safety and Security* (2007 2 SACR 137 (W)). In *Minister of Safety and Security v Van Niekerk* (2008 1 SACR 56 (CC) par [17]) the Constitutional Court found it not to be in the interests of justice on the facts of the case before it to pronounce on the constitutional tenability of the approach in *Tsose*, but nevertheless held that the constitutionality of an arrest will be dependent upon its factual circumstances. Watney succinctly discusses some of the abovementioned developments (Watney 2009 *TSAR* 736-740).

However, on 19 November 2010 the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto* (2011 1 SACR 315 (SCA), also reported in [2011] 2 All SA 157 (SCA)) held that the approach of the different high courts requiring a further jurisdictional fact for the lawfulness of an arrest did not have proper regard for the principles in terms of which statutes must be interpreted in the light of the Bill of Rights and that they have conflated the issue of jurisdictional facts with the issue of discretion. This lucid judgment brings clarity to the issue of the lawfulness of arrests without warrant.

2 Brief factual background

The respondents were arrested by police officers on suspicion of a contravention of certain provisions of the Stock Theft Act 57 of 1959. They were detained for a period of ten days before they were released on bail. At their trial they were discharged at the end of the State's case. A co-accused was convicted (par [2]-[3]). The respondents issued summons in a magistrates' court against the Minister of Safety and Security based on their alleged unlawful arrest, unlawful detention and malicious prosecution (par [4]). In their plea before the trial court the appellants relied on the provisions of sections 40(1)(b) and 40(1)(g) of the Criminal Procedure Act. The provisions of section 40(1)(b) were already mentioned above. Section 40(1)(g) provides for a warrantless arrest of any person who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce. The magistrate held that the Minister had established the jurisdictional facts for a defence based on sections 40(1)(b) and 40(1)(g) but found that the Minister was unable to prove the additional jurisdictional fact laid down by Bertelsman J in the *Louw* case, and was therefore liable for damages (par [10]). A Full Bench of the Free State High Court considered the matter on

appeal, followed the decision in *Louw* and dismissed the appeal. The judgment of the Full Bench is reported as *Minister of Safety and Security v Sekhoto* (2010 1 SACR 388 (FB)).

3 Judgment

The SCA restated the manner in which statutes ought to be interpreted in view of the Bill of Rights and held it was not clear whether the additional jurisdictional fact required by the High Courts was a result of the direct application of the Bill of Rights, by developing the common law or by way of interpreting section 40(1) of the Criminal Procedure Act (par [14]-[15]). The court held that, where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it has to be preserved (par 15). The court confirmed once again that any deprivation of freedom is *prima facie* regarded as unlawful and therefore the rule exists that the plaintiff need only allege the deprivation of his or her freedom and the defendant must plead and prove justification (par [16]). The SCA held that there is in fact no additional jurisdictional fact provided for in the words of section 40(1)(b) and because legislation overrides the common law, the High Courts could not have changed the meaning of a statute by developing the common law (par [22]). In this regard the court also referred to section 43 of the Criminal Procedure Act which deals with the issue of arrests with a warrant. The court held that if the additional jurisdictional fact is part of section 40(1)(b), it must also form part of section 43 of the Act but the wording of section 43 cannot be manipulated to achieve such a result (par [23]). The court held that the high courts could not read anything into the clear provisions of the Act absent a finding of unconstitutionality of the said provisions (par [24]). The court held that a lawful arrest in terms of section 40(1)(b) cannot be held to be arbitrary or without just cause in conflict with the Bill of Rights (par [24]-[26]).

The court then turned its attention to the issue of the discretion of the arresting officer. Relying on *Groenewald v Minister van Justisie* (1973 3 SA 877 (A) 883G-884B) which deals with arrests upon a warrant the SCA held that once the jurisdictional facts for arrest (either with or without a warrant in terms of the provisions of the Criminal Procedure Act) are present, a discretion whether or not to arrest, arises. The peace officer is not obliged to effect the arrest (par [28]). With reference to *Duncan v Minister of Law and Order* (*supra* 818H-J) the SCA reaffirmed that the discretion of the peace officer must be properly exercised (par [29]). If the officer exercises the discretion to arrest knowingly for purposes not contemplated by the legislator the arrest will be unlawful. The decision to arrest must be made to bring the arrested person to justice. Arrest to threaten or harass the suspect, to punish the arrestee or to force him or her to abandon the right to silence as well as instances where the arrestor knew that the state would not prosecute are examples of arrests for purposes other than bringing the accused to justice (par [30]). Thus, if the power of arrest is used for an ulterior purpose (*ie*, not bringing the accused to justice), the arrest is not *bona fide* and consequently unlawful. The court emphasized the importance of the distinction between

the object of the arrest and the arrestor's motive. It stated that the object of the arrest is relevant while motive is not. The validity of an arrest is not affected by the fact that the arrestor, in addition to bringing the suspect before court, wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion against the suspect (par [31]). Furthermore, the discretion must be exercised in an objectively rational manner (par [32]-[38]). The court pointed out that the standard of rationality is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices open to the officer may fall within the range of rationality (par [39]).

The court provided useful guidelines as to the factors which a peace officer must consider in exercising the discretion to ensure he or she complies with the requirement of rationality. It pointed out that the discretion to arrest must be exercised with regard for the limits of the authorizing statute read in the light of the Bill of Rights (par [40]). Once an arrest has been effected the officer must bring the arrestee before a court as soon as possible and at least within 48 hours, depending on the court hours. Once that has been done, the authority to detain that is inherent in the power to arrest has been exhausted. The purpose of the arrest is to bring the suspect to trial but the arrestor is not required to determine whether the suspect ought to be detained pending a trial. The power to arrest may be exercised only for the purpose of bringing the suspect to justice. This, however, is only one step in the process (par [42]). One of the factors that must be considered in exercising the discretion is whether the case is one in which the decision to further detain or to release the accused, ought to be properly made by a court or senior police officer as is provided for in the provisions regarding bail in the Criminal Procedure Act. If a peace officer were to be permitted to arrest only once he or she is satisfied that the suspect might not otherwise attend the trial the statutory structure relating to bail will be frustrated (par [42]-[43]). The court held that the enquiry is not how best to bring the suspect to trial but whether the case is one in which that decision ought be made properly by a court or a senior officer. The rationality of the decision depends on the particular facts of each case. The court, however, stated that in cases of serious crimes a peace officer could seldom be criticized for arresting a suspect for the purpose of bringing him or her before court. Schedule 1 offences, referred to in section 40(1)(b) of the Criminal Procedure Act, are in fact serious. There will, however, also be cases especially where the offence is trivial where it would be clearly irrational to arrest (par [44]).

Regarding the *onus*, the court held that the party who alleges that the discretion was not properly exercised, where the jurisdictional facts are present, bears the onus of showing that the exercise of the discretion was in fact unlawful (par [49]). Since the four jurisdictional facts required for a defence under section 40(1)(b) of the Criminal Procedure Act were established in the trial court and since the proper exercise of the police officer's discretion was never in issue, the SCA upheld the appeal of the

Minister of Safety and Security and ordered the order of the Magistrates' Court to read "absolution from the instance" (par [57]-[59]).

4 Discussion

The court emphasized that an important factor to determine the rationality of the decision to arrest without warrant is whether a court or a senior police officer should decide whether or not to grant bail to the accused. If this factor is not considered the statutory provisions relating to bail may be frustrated. The court did not elaborate on this issue, but it is clear that it had in mind the provisions of Chapter 9 of the Criminal Procedure Act. Bail applications by an accused in court are specifically regulated by section 60 of the Act. The Constitutional Court held that this chapter "creates a complex and inter-locking mechanism that is clearly designed to govern the whole procedure whereby an arrested person may be conditionally released from custody …" and furthermore that bail is a "unique judicial function" (*S v Dhlamini, S v Dladla; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) par [9] and [11]). The Criminal Procedure Act provides for the circumstances where the refusal to grant bail are not in the interests of justice and tabulates various criteria that bear on the question whether bail ought to be granted or not (s 60(4)-60(8A)). The court must also weigh the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody (s 60(9)). Even where the prosecution does not oppose the granting of bail the court retains a duty to weigh up the personal circumstances of the accused against the interests of justice (s 60(10)). Offences listed in Schedule 5 and Schedule 6 of the Criminal Procedure Act are subject to a particularly stringent statutory regime. Where an accused is charged with an offence in Schedule 6 of the Criminal Procedure Act he or she must adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release (s 60(11)(a)). In cases where the accused is charged with a Schedule 5 offence, the accused must adduce evidence which satisfies the court that the interests of justice permit his or her release (s 60(11)(a)). A relatively minor offence, such as theft of an item of little value, may become a Schedule 5 offence. For instance, if the accused is charged with having committed an offence referred to in Schedule 1, and he or she has previously been convicted of an offence referred to in Schedule 1, the accused must adduce evidence that the interests of justice permit his or her release. Failing this, the court must order the accused to be detained in custody.

In *S v Mabena* (2007 1 SACR 482 (SCA) par [5]) it was pointed out that the potential factors for and against the granting of bail listed in the Act are no less relevant than the assessment of bail in relation to Schedule 6 offences than they are in relation to lesser offences. In *S v Mabena* (*supra* par [7]) the court also stated that the legislative scheme for the grant of bail, whether generally or in relation to Schedule 6 offences, necessarily requires a court to determine what the circumstances are in the particular case and to evaluate them against the standard provided for in the Act. Although a bail

enquiry is less formal than a trial and the court is offered greater inquisitorial powers, it remains a procedure essentially adversarial in nature. The failure of a court to conduct a proper bail inquiry constitutes a serious irregularity (*S v Mabena supra* par [28]). The finding in *Sekhoto*, that once the arrest is effected the power of arrest has been exhausted and it is for the court to consider the accused's further detention, must be viewed in light of the above.

In *Sekhoto* the court also pointed out that a police officer may grant bail in certain limited circumstances. Section 59 of the Criminal Procedure Act provides for the granting of bail by a senior police official (of or above the rank of non-commissioned officer) after consultation with the police officer in charge of the investigation of the matter. Bail may not be granted by a police officer for offences listed in Part II or Part III of Schedule 2 of the Act (s 59(1)(a) of the Criminal Procedure Act). In this regard reference should be made to *Mvu v Minister of Safety and Security* (*supra*), where the statutory jurisdictional facts for a lawful arrest were present, but it was nevertheless held that the accused's subsequent detention was unlawful. This was a case suitable for a non-commissioned officer to consider bail. Notwithstanding the fact that such an officer was on duty there was a failure to consider the bail application. This failure, however, did not render the arrest unlawful. A further possible factor which was not explicitly mentioned by the court is the granting of bail by the prosecuting authority. In terms of section 59A of the Criminal Procedure Act a Director of Public Prosecutions or a prosecutor authorized thereto in writing, may authorize the release of the accused on bail in respect of offences referred to in Schedule 7 subject to certain preconditions.

To these factors can be added the "operational parameters" concerning the discretion to arrest by those involved in the day-to-day exercise and supervision of the power to effect arrests. In this regard the internal regulation and the standing orders of the police may also be an indication whether the conduct of the police was rational (*Minister of Safety and Security v Van Niekerk supra* par [18]-[20]). In the *Sekhoto* judgment the Supreme Court of Appeal gave content to the statement made by the Constitutional Court in *Minister of Safety and Security v Van Niekerk* (*supra* par [17]) that the constitutionality of an arrest will depend heavily on its factual circumstances.

5 Conclusion

In view of the above it seems that an arrest effected without warrant will be lawful if the following conditions are met:

(i) The jurisdictional facts required by the statute in terms of which the arrest is effected, must be present.

(ii) Once the jurisdictional requirements are present, the peace officer has a discretion whether or not to effect the arrest.

(iii) The decision to arrest must be based on the intention to bring the arrestee to justice and must not be for an ulterior purpose.

(iv) The exercise of the discretion to arrest must be objectively rational. In this regard peace officers must exercise their discretion within the limits of the authorizing statute and should also consider whether the decision regarding the further detention of the arrestee must be made by a senior police officer or the court. The nature of the offence is a further factor that must be considered in the exercise of the discretion. An arrest for a trivial offence may be indicative of an irrational exercise of the discretion. Furthermore the guidelines set by the relevant authorities as to the circumstances wherein an arrest may be effected, may also be an important factor.

(v) Ultimately the lawfulness of the arrest will have to be determined with reference to the factual circumstances of the particular case before the court.

Pieter du Toit
North-West University, Potchefstroom Campus