**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OFSOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**APPEAL CASE NO. A3087/2021**

COURT *A QUO* CASE NUMBER 1890/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

DATE

In the matter between:

**BAFANA JOSEPH SESHOKO** **APPELLANT**

And

**THE MINISTER OF POLICE** **RESPONDENT**

---

**JUDGMENT**

---

**MANAMELA AJ (Strydom J concurring)**

[1] This is a civil appeal against the whole judgment handed down by Magistrate AW Morton on 7 July 2021 at the magistrates' court of Emfuleni under case number 1890/2019 in which the court *a quo* dismissed the Appellant's claim for damages for unlawful arrest and detention, with costs.

[2] The Appellant filed an appeal on the following grounds - *that* (i) the Magistrate erred in finding that the arrest of the Appellant is lawful by not considering the Defendant's defense which was based on section 40(1)(q) of the Criminal Procedure Act, 51 of 1977, as amended (hereinafter referred to as the "CPA"); (ii) *that* the Magistrate misdirected himself in finding that the arrest was lawful, in that considered the lawfulness of the arrest base on section 40(1)(a) and (b) of the CPA; (iii) *that* the Magistrate erred in finding that the arresting officer did apply his discretion in good faith rationally and not arbitrarily when executing the arrest; (iv) *that* the Magistrate erred in that he failed to consider the lack of evidence to justify the unlawful detention of the Appellant; (v) *that* alternatively, the Magistrate erred in finding that the internal directive of the South African Police Service supersedes the Criminal Procedure Act, which is sufficient to deny a detainee bail where the detainee qualifies to be release on bail.

[3] The Appeal was heard on 21 February 2022, with the Appellant represented by Ms L Swart, and the respondent represented by Ms M Moropa.

[4] The issues to be determined by the appeal court are whether the presiding magistrate made a correct finding based on the evidence let in the court *a quo*, in particular, on whether the arrest and detention was lawful and whether the Appellant did prove his claim for damages and as fully set-out under the grounds of appeal mentioned above.

[5] The facts of this matter are that, the Appellant ("the Appellant in the main action") instituted a claim for damages in the sum of R150 000.00 based on allegations of unlawful arrest and detention against the Minister of Police (as "the Defendant"). The Appellant was arrested at his place of residence, without a warrant on 20 January 2017, by a member of the South African Police Services at approximately 21:30 and detained until Monday, 23 January 2017.

[6] Prior to the arrest, a certain Ms Doreen Segametse Jakada (hereinafter referred to as "the complainant"), with whom the Appellant was in a domestic relationship called the arresting officer and pointed the Appellant

to the officer following an altercation between her and the Appellant, leading to his arrest. On 15 January 2017, five days prior to the arrest, the Appellant assaulted the complainant, which he denies. The complainant received medical attention for the injuries on 18 January 2017, when she also gave a sworn statement that her boyfriend assaulted her, supported by a J88 form a medical report stating the nature of the injuries. On the date of the arrest the complainant also pointed the Appellant to the arresting officer. The Appellant was released before he could appear in court, due to the fact that the complainant did not give her co-operation.

[7] In his particulars of claim the Appellant pleads that –

"*5.*

*The arrest of the Plaintiff was unlawful as the Plaintiff did not commit the crime of "Assault GBH" and his arrest is not justified under the provisions of section 40 of the Criminal Procedure Act 51 of 1977.*

*6.*

*Alternatively, the Plaintiff pleads that in the event that the court finds that the Plaintiff's arrest is justified under the provisions of section 40 of the Criminal Procedure Act (which is denied), then the Appellant pleads that his arrest is unlawful as the arresting officer knew that the purpose of the*

*arrest was not to take the Plaintiff to court and that the Plaintiff would not be prosecuted"*

*7.*

*Alternatively, in the event that the honourable court finds that the Plaintiff's initial detention for purposes of processing the Plaintiff administratively was lawful (which is denied) then the Appellant pleads that his further detention after being possessed was unlawful in that the arresting officer alternatively, the senior officer on duty and or investigating officer on duty during the Plaintiff's detention incorrectly alternatively failed to exercise his or her discretion in favour of releasing the Plaintiff on warning in terms of the Criminal Procedure Act…or on bail…"*

[8] The Issues that are in disputed between the Appellant and the Defendant includes, whether there was assault, the time of release from detention, whether the Appellant was informed of his rights to apply for bail and ultimately the lawfulness of his arrest and detention. The issues that are not in dispute includes *locus standi*, jurisdiction, and the service of a Notice in terms of section 3 of Act 40 of 2002.

[9] Generally, unlawful arrest is when a police officer exceeds his/her authority or when a person's freedom of movement is unjustifiably restricted by an

officer of the law. The State, bears the onus to prove that the arrest was lawful[1]. In the determination of the lawfulness of the arrest, one has to envisage what was in the mind of the arresting officer at the time of the arrest. The main factor to be considered is whether the arresting officer entertained a reasonable suspicion or not. The test for that is objective[2] and can only be adduced from the evidence.

[10] The presiding magistrate considered the evidence led by the arresting offer, Constable Phillip Jafta Motogako, who testified that he has been a police officer for almost 12 years' and has 8 years' experience as an investigator. He was investing a charge of assault with intent to cause grievous bodily harm. A case docket waw opened and also has a medico-legal examination report. The complainant called the officer on the 20th January and reported that the Appellant was harassing her. Upon arrival the complainant pointed the Appellant as the person who is harassing her. The officer further explains that in the exercise of his discretion he foresaw that if he does not arrest the Appellant he might continue with the domestic violence on the complainant.

[1] *Minister of Law and Order v Hurley 1986 (3) 568 (A) et 589E-F*
[2] Kidson v Minister of Police (76732/2010) [2015] ZAGPPHC 812 (24 November 2015)

[11] The officer further testifies that he informed the Appellant of his constitutional rights and the charges against him. With regards to bail the officer testifies that he did not consider bail in a directive from the station that restricted bail for domestic violence cases.

[12] Counsel for the Appellant argues that there was no imminent danger to prompt arrest. Imminent harm is described as '*the danger of harm of certain degree of immediacy that activates the protection ...that is to a harm which is impending threating ready to overtake or coming on shortly*'[3]. She further agues that the failure on the part of the arresting officer to take statements from other witnesses, like the Appellant's father, compromised the quality of the investigations and led to the unlawfulness of the arrest. From the evidence of the arresting officer he testified he was the injuries suffered by the complainant, he witnessed an argument and proceeded with the arrest.

[13] On the question of whether the Appellant was informed of his rights to apply for bail and ultimately the lawfulness of his arrest and detention, I find that it is sufficient to note that the arresting officer informed the Applicant of his constitutional rights, and that in the application of his

[3] *Seria v Minister of Safety and Security and others 2005 (5) 130 (CPD)*

discretion to arrest he anticipated the eminency of a possible danger that may affect the complainant. In addition to that he took guidance from the standing policy against bail to domestic violence suspects.

[14] The presiding officer correctly found that the arrest effected by the offers without a warrant was in terms of section 40(1)(q) of the CPA[4]. The requirements for an arrest without a warrant, as contemplated in section 40(1)(q) of the CPA, are that –

a. *The arrestor must be a peace officer;*

b. *He must entertain a suspicion;*

c. *There must be a suspicion that the arrested person committed an offence referred to in section 1 of the Domestic Violence Act 116 of 1998 (hereinafter referred to as "Domestic Violence Act") and*

d. *The suspicion must rest on reasonable grounds.*

[15] The presiding magistrate accepted the evidence that the Officer received a call from the complainant on 20 January 2017, that there was a of harassment against the Appellant, which led to a decision to arrest the Appellant. I find that the arresting officer's suspicion was reasonable. In the

[4] ***Section 40(1)(q) of the CPA*** *- "who is reasonably suspected of having committed an act of domestic violence as contemplated in Section (1) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.*

case of **Duncan v Minister of Law and Order 1986 (2) SA 805 (A)** the court put the dilemma faced by arresting officers aptly when it stated: "*The power of arrest without a warrant is a valuable means of protecting the community*". This power is not without limits, it must be rational. From the evidence by the arresting officer the complainant was under eminent harm at the time of the arrest. The officer formulated a reasonable suspicion to make an arrest, at the time of complaint. In **Kinson v Minister of Police (76732/2010) [2015] ZAGPPHC 812 (24 November 2015)**, *the court held that a reasonable suspicion is formed based on evidence the peace offer had and this suspicion must then be objectively sustainable. The suspicion must be that of the peace officer making the arrest.*

[16] The officer testifies that following the arrest he took a warning statement from the Appellant, and that he did not consider bail because of the standing station policy directive that bail should not be granted were domestic violence is committed.

[17] The Supreme Court of Appeal in **Minister of Safety and Security v Sekhoto** 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. 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 number of 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.

[18] It is trite law that any deprivation of freedom is regarded as *prima facie* unlawful and that 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]).**

[19] 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[5]. There are different types of jurisdictional facts provided for in section 40(1). 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.

[20] The constitutionality of an arrest will be dependent upon its factual circumstances. The court held in **Sekhoto** that "*but even if the Act does*

[5] *Duncan v Minister of Law and Order 1986 2 SA 805 818G-H*

*not apply, it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily".*

[21] The presiding magistrate gave considerations to the Constitutional rights entrenched under the Bill of Rights[6], the provisions of sections 13 and 14 of the South African Police Service Act 68 of 1995, the provisions of section 40 of the CPA in its entirety, Section 50 of the CPA[7], and on the basis of the underlying complaint he also considered the Domestic Violence Act, which I shall not repeat herein. In addition to the above provisions the Appellant has a right in terms of section 35(1) of the Constitution, in terms of which an arrested person has the right to be brought before court as soon as reasonably possible but not later than 48 hours after arrest (depending on court hours) and to be released from detention subject to reasonable conditions if the interests of justice so permit.

[22] The uniqueness of domestic violence cases, requires exceptional attention. Domestic violence are prevalent in our society. The courts remain limited in their ability to solve the problem of domestic violence.

[6] *Sections 10,12,14, and 205 of the Constitution*

[7] *Section 50 of CPA - Procedure after arrest (1 (a) Any person who is arrested with or without warrant for allegedly committinwg 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*

Domestic violence cases must be treated with the utmost diligence and care that it deserves. The sensitivity of domestic violence cases calls for constant vigilance in ensuring that its substance and procedures are well-tailored to the needs of victims of domestic violence. This entails that the freedom of the suspects as stipulated in section 12 of the Constitution had to be weighed up against the protection and security of the property of the community as provided for in section 205 of the Constitution. Section 12(1)(a) of the Constitution reads: "*Everyone has the right to freedom and security of the person, which includes the right –(a) not to be deprived of freedom arbitrarily or without just cause".* Section 205 (3) of the Constitution states: "*The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*" I find that it was rational and justifiable for the arresting officer to arrest and detain the Appellant in this case. The Respondent discharged its onus to proof that the arrest and detention was lawful and therefore the Appellant cannot succeed with his claim for damages.

[23] There is no basis of dealing with the quantum sought by the Appellant.

Order -

The appeal is dismissed with costs.

_____

**PN MANAMELA**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION**

**JOHANNESBURG**

I concur,

_____

**RÉAN STRYDOM**

**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION**

**JOHANNESBURG**

Date of hearing: 21 February 2022

Date Judgment delivered: 18 March 2022

**Appearances**

On behalf of the Appellant: Adv. L. Swart

| | |
|---|---|
| Instructed by: | JJ GELDENHUYS ATTORNEYS |
| | |
| On behalf of the Respondent: | Adv. M. Moropa |
| Instructed by: | THE STATE ATTORNEY |