

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2023-009958

- (1) REPORTABLE: Yes  / No   
(2) OF INTEREST TO OTHER JUDGES: Yes  / No   
(3) REVISED: Yes  / No

Date: 15 September 2023

WJ du

In the matter between:

**TSHEPO JIMMY MOFOKENG**

**APPELLANT**

and

**THE MINISTER OF POLICE**

**RESPONDENT**

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**JUDGMENT**

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**DU PLESSIS AJ**

[1] This is an appeal against the finding of the learned Magistrate, Mr AW Morton, who found the Respondent, the Minister of Police, not liable for the unlawful arrest and detention of the Appellant, Mr Mofokeng.

[2] The Appellant was arrested and detained without a warrant of arrest. The Respondent pleaded that the arrest was made in terms of s 40(1)(b) of the Criminal Procedure Act<sup>1</sup> after the Appellant assaulted (the Appellant refers to it as “reprimanding”) his then 14-

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<sup>1</sup> 51 of 1977.

year-old stepdaughter. The Appellant and Sgt Mwale, a police officer stationed at the Family Violence and Child Protection Services at Vereeniging and the arresting officer, gave evidence of what had transpired.

[3]The following facts emerge from the dockets and evidence: On 17 September 2019, angry at his stepdaughter for not sleeping at home, the Appellant hit her with a belt, using the buckle. The victim sustained injuries on her face, around her upper hands and on her legs. The victim's mother could not immediately take her to the doctor as she did not have money.

[4]Sgt Mwale testified that he was on standby when he received the docket on 20 September 2019. He met the complainant and her mother at a park, where he interviewed them. He then took the victim to the Levai Mbatha Clinic to have her injuries attended to as "she sustained severe injuries, because this child was in pain".<sup>2</sup> Sgt Mwale testified that the injuries were severe as he could see the reddish colour of the blood. This was not in the docket or his statement filed in the docket, and the J88 indicated old bruises on the left area, left arm and left thigh.

[5]He confirmed with the mother of the victim that they were not staying with the Appellant at that time. They did not have a stable place to stay as they were scared to return home after what had transpired. Based on the information received from the victim as well as the J88, and on instruction from his superiors, he decided to arrest the Appellant so that he can appear before court to take responsibility for his actions, and to give the complainant and her mother the opportunity to occupy the house safely.

[6]The case docket indicates that the Appellant was arrested for "assault: grievous bodily harm" ("GBH"). The Appellant claims that this arrest was unlawful because, in terms of s 40(1)(b), there must be a suspicion that the arrested person committed a Schedule 1 offence, and assault GBH is not a Schedule 1 offence.

[7]The Appellant was arrested on Wednesday, 25 September 2019. Sgt Mwale testified that when they tried to arrest the Appellant, he tried to flee. Sgt Mwale upon arrest, informed the Appellant that he was arrested for GBH and explained his rights to him.

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<sup>2</sup> Transcript page 13 line 24.

The “statement regarding interview with suspect” filled in after his arrest stated “assault with intent to cause grievous bodily harm committed on 17 September 2019”. The matter was not enrolled on 25 September 2019, as the prosecution needed certain information before prosecuting. The Appellant was then released.

[8] Sgt Mwale, under cross-examination, stated that he did not know the contents of s 40(1) (b). After reading the Criminal Procedure Act schedules, he confirmed that he arrested the Appellant for a Schedule 1 offence and that assault GBH (a Schedule 7 offence) and assault when a dangerous wound is inflicted (a Schedule 1 offence) are the same.

[9] The Appellant denies that he was trying to escape arrest. This information is not contained in the bail information completed at the police station by an officer present at the arrest. The Appellant’s version is that he walked past his own house to borrow a phone and was at no time fleeing. The Appellant denies that it was explained why he was arrested or that his rights were read to him. He stated that he was only given a piece of paper in the cells and did not understand what he was reading. After being arrested, the Appellant gave a statement stating that he was only trying to discipline his stepdaughter. It was not his intention to hurt her.

[10] He further states that after the arrest, he was not given the opportunity to go to the police station on his own or to attend the court on a warning. The Appellant was charged on the Friday. Sgt Mwale did not consider bail due to his rank, and his captains stated that they are not the court and do not give bail to persons. The Appellant was eventually released on Monday after 3 o’clock without the case being enrolled.

**[11] Court a quo finding**

[12] The Magistrate found the Respondent’s version more probable than the version of the Appellant. He did so by stating that the jurisdictional requirements for s 40(1)(b) and (q) of the Criminal Procedure Act<sup>3</sup> were met, namely that he had a reasonable suspicion that an act of domestic violence, as contemplated in the Domestic Violence Act,<sup>4</sup> was

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<sup>3</sup> 51 of 1977.

<sup>4</sup> 116 of 1998.

committed. This is an objective standard of the reasonable person based on a reasonable suspicion or presumptions.

[13] He found that Sgt Mwale was aware that he had a discretion to arrest and that he exercised that discretion with the facts at hand, namely the wounds of the complainant, and decided that the wounds needed medical attention. He took them to the clinic for that reason. He regarded the fact that there were wounds (even if a closed wound) as possibly indicating serious internal injuries that required attention. This was due to abusive acts toward the child, which he regards as an abnormal type of reprimanding for discipline.

[14] Furthermore, the arresting officer did not have to consider less drastic measures than arrest to bring the Appellant before a court because while completing the bail information form, the Appellant confirmed that he would make threats against witnesses. There was a possibility that he might intimidate them. The arresting officer further sits with the objective or positive burden to ensure the safety and security of all persons and respect victims of crime by understanding their needs. This he did by considering the degree of violence towards the victim as evident from the docket and the J88 form, the threat of violence made, the resentment towards the complainant, and his disposition towards violence. This should all be regarded in the context of family murders in South Africa committed by spouses. All this indicates that the arresting officer executed his duties as expected from a reasonable police officer in the reasonable interest of justice when he arrested the Appellant.

**[15] Ad lawfulness of arrest**

[16] In *S v Hadebe*<sup>5</sup> the court held that unless the trial court made a demonstrable and material misdirection, the findings of fact are presumed to be correct and can only be disregarded if the recorded evidence shows them to be clearly wrong. Nothing in the record shows that the trial court's findings of fact were clearly wrong.

[17] Section 12(1) of the Constitution makes it clear that everybody has a right to freedom and security of the person. Within the constitutional framework, such freedom and

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<sup>5</sup> 1997 (2) SACR 641 (SCA).

security may only be taken away by lawful means. One lawful means is by arresting a person in line with legislation. If the arrest was indeed unlawful, the unlawfully arrested may have a delictual claim against the Minister of Police for such unlawful arrest.

[18] *De Klerk v Minister of Police*<sup>6</sup> set out the requirements for such a delictual claim to be successful:

- “(a) the plaintiff must establish that their liberty has been interfered with;
- (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;
- (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not;
- (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.”

[19] The onus thus rests on the defendant to show that the arrest and detention were lawful. The defendant in its case pleaded s 40(1)(b) of the Criminal Procedure Act.<sup>7</sup> Section 40(1)(b) of the Criminal Procedure Act<sup>8</sup> allows for arrest by a peace officer without a warrant if the peace officer suspects that a person has committed a Schedule 1 offence. *Duncan v Minister of Law and Order*<sup>9</sup> set out the requirement for an arrest in terms of s 40(1)(b), namely that

1. The arrestor must be a peace officer;
2. The arrestor must entertain a suspicion;
3. The suspicion must be that the suspect committed an offence referred to in Schedule 1; and
4. The suspicion must rest on reasonable grounds.

[20] Whether the suspicion was reasonable is an objective test. Once these jurisdictional facts are present, a discretion arises. In other words, the peace officer may then elect whether he wants to exercise the power to arrest. The exercise of such a discretion must be objectively rational in that the decisions must be related to the purpose for which the power was given.<sup>10</sup>

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<sup>6</sup> [2019] ZACC 32.

<sup>7</sup> 51 of 1977.

<sup>8</sup> 51 of 1977.

<sup>9</sup> 1986 (2) SA 805 (A) at 818G-H.

[21] In this case, the Magistrate found that objectively the jurisdictional prerequisites for s 40(1)(b) and (q) were met. In other words, on the evidence before the Magistrate, he was satisfied that the injuries of the complainant were severe enough to find that the assault does fall under Schedule 1 in that the wound was a dangerous wound inflicted because the blood under the skin can be an indication of internal injury that might become life-threatening.<sup>11</sup> Notably, the Magistrate also found that what transpired falls under s 40(1)(q) which allows an officer of peace to arrest without a warrant of a person reasonably suspected of having committed an act of domestic violence.

[22] Thus, if the Magistrate erred in finding that the requirements for s 40(1)(b) were met, it is undeniable that the arrest falls under s 40(1)(q). This section should also be understood with full consideration of s 12(1)(c) of the Constitution, which states that “[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources”. Reprimanding a child by hitting them entails violence, whether moderate or extreme. It also constitutes domestic violence, as the Appellant has a parental responsibility for the complainant and shares the same residence. The Appellant hitting his stepdaughter with the buckle of a belt is a form of domestic violence. This Court need hardly stress that gender based violence is a scourge in South Africa and any form of domestic or gender based violence deserve strong censure by the Courts.

[23] During cross-examination, the Appellant was extensively asked about the assault on the complainant. He continuously referred to it as reprimanding the complainant but did not deny that he assaulted the complainant. Later, when he was asked whether the police were correct to arrest him for committing an offence of assaulting a minor, he agreed but disagreed with the procedure and not having his side of the story heard.

[24] His defence of “merely reprimanding” the child can not hold. In the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,<sup>12</sup> the Constitutional Court found that parental chastisement, no matter how moderate, does

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<sup>10</sup> *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte Application of President of the RSA* 2000 (2) SA 674, 2000 (3) BCLR 241 (CC) paras 85-86.

<sup>11</sup> Caselines 01 -116.

<sup>12</sup> [2019] ZACC 34.

not pass the limitation analysis. In other words, parental chastisement infringes a child's s 12(1)(c) right.

[25] The statements filed contain many references to threats made against the complainant and her mother, including various threats that he will kill himself and her mother.<sup>13</sup> It also has multiple references to domestic violence.<sup>14</sup>

[26] In their leave to appeal, the Appellants stated that the Magistrate erred in relying on s 40(1)(q) as it was not pleaded and since no evidence was led in this regard. This cannot hold. It is up to the arresting officer to give the facts on which he exercised his discretion and to show that this discretion was exercised within the limits of the authorising statute read with the Bill of Rights. Sgt Mwale testified that he is not well acquainted with s 40(1)(b), and that he arrested the Appellant because of the assault of the complainant and because she and her mother were not safe. All the facts necessary to justify an arrest based on s 40(1)(q) were before the court, which enabled the learned Magistrate to form an opinion on the real issue that emerged during the trial.

[27] Having found that the arrest could be affected without a warrant in terms of s 40(1)(q), the question is whether the arresting officer exercised his discretion correctly. In this regard, Sgt Mwale testified how he exercised his discretion to arrest by stating that:

“We saw that there was a danger for these two particular, the mother and the child, because they were no more residing at their place as they were scared of this plaintiff and there is a lot that happening around these days, whereby women and children got killed. So, the only way or the only best solution, it is for me to detain him, so that they can have a place of staying”

[28] The bail information further indicated that he might interfere with the witnesses and is a danger to his family. The arresting peace officer considered all this before exercising his discretion rationally.

[29] In *Louw v Minister of Safety and Security*<sup>15</sup> the court found that arrest should only be used as a last resort in ensuring that an accused person attends court. However, this

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<sup>13</sup> Statement by complainant, Caselines 01-27.

<sup>14</sup> Statement by complainant, Caselines 01-28.

<sup>15</sup> 2006 2 SACR 178 (T) 187C-E.

was rejected by the Supreme Court of Appeal in *Minister of Safety and Security v Sekhoto*.<sup>16</sup> After going into the question in detail, the court stated<sup>17</sup>

“[I]t seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or a senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime - and those listed in Schedule 1 are serious, not only because the legislature thought so - a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest.”

[30] Domestic violence is a serious crime, making such arrest rational.

[31] It was also for the arresting officer to determine whether the decision regarding further detention of the arrestee must be made by a senior police officer (so-called police bail) or the court. The nature of the offence might influence the exercise of such a discretion. Typically, trivial offences are for the police, while the more severe cases warrant the court's consideration. Again, domestic violence, especially where threats of killing were made, is a serious crime. Leaving it for the court to decide is rational. The fact that it was not enrolled could not have been foreseen. Accordingly, I find that the Magistrate was correct in finding that the arrest and detention was lawful.

**[32] Order**

[33] I, therefore, make the following order:

1. The appeal is dismissed, with costs.

I agree

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**WJ DU PLESSIS**

Acting Judge of the High Court

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<sup>16</sup> [2010] ZASCA 141.

<sup>17</sup> Para 44.

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**J MOORCROFT**

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Ms L Swart
Instructed by:	JJ Geldenhuys Attorneys
Counsel for the Respondent:	No appearance
Instructed by:	The State Attorney
Date of the hearing:	08 August 2023
Date of judgment:	15 September 2023