REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3100/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

30 January 2023 ....
DATE
SIGNATURE

In the matter between:

NGAKO PATRICK KEETSE	Appellant
And	
MINISTER OF POLICE	Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 January 2023.)

JUDGMENT

MIA, J

INTRODUCTION

[1] This appeal is against the judgment handed down on 21 August 2019 in the Regional Court, Tembisa, Ekurhuleni North, Gauteng. The court *a quo* found that the respondent proved that the arrest and detention of the appellant was lawful and dismissed the appellant's claim with costs.

The appeal is against the court *a quo*'s decision. The appellant cited an extensive list of errors he relied on to support the grounds of appeal. They are as follows:

"1.1 the learned magistrate committed an error of law in finding that a charge of "assault" falls under Schedule one of the Criminal Procedure Act 51 of 1977;

1.2 the learned magistrate erred in deciding that a charge for assault enjoys the protection of section 41(1)(b) of the Criminal Procedure Act;

1.3 the court *a quo* erred in finding that the respondent had satisfied the requirements of section 41(1)(b) of the Criminal Procedure Act;

1.4. the appellant in his particulars of claim pleaded the issue of discretion and same was canvassed during the trial and the learned magistrate made no finding insofar as the issue of discretion is concerned, he, therefore, erred in not making any findings regarding the issue of discretion;

1.5 the learned magistrate overlooked the following facts which in my view were paramount insofar as the question of discretion was concerned.

1.5.1. That Constable Meso, the arresting officer conceded during the trial that the complaint statement needed to be corroborated, but he did nothing to corroborate said statement.

1.5.2. the alleged attack took place in full view of the public but the arresting officer never visited the crime scene let alone interviewing the people residing in the area where the alleged assault took place.

1.5.3. The complaint in paragraphs 5, 7 and 8 mentions that appellant's friend Tshepo arrived during the assault and he took them to the police station; as per this paragraph it's clear that Tshepo witnessed the alleged assault, however Tshepo was never questioned by the police and his statement was never taken. Tshepo's evidence would have assisted in strengthening the respondent's suspicion, but the respondent did nothing to investigate Tshepo's whereabouts.

1.5.4. Constable Meso conceded during his testimony that he believed the complainant's story and he had no reason to doubt the complaint because there was a statement made

under oath and that he was shown the injuries by the complainant. This shows clearly that the witness was biased towards the complainant to the extent that he never even bothered to question the absence of the J88. Inside the docket.

1.6 The learned magistrate erred in overlooking the fact that Constable Meso arrested the appellant based on the statement made by the complainant. Yet he was not aware of the following allegation that was made on the statement;

1.6.1. That on the 27th of August 2017 the complainant went to Tembisa Police Station twice, together with the appellant and Tshepo but she did not open any case against the appellant. Yet she was badly injured as stated in her statement and confirmed by Constable Meso this to me is untoward. However, the court *a quo* overlooked this evidence.

1.6.2. that after having arrived home, she contacted the police and they came to a room, however they refused to open a case and said they advised her to open the case the following day.

1.7. The alleged incident or assault took place on 27 August 2017 at around 19h00 and the case was only opened the following day on 28 August 2017 at around 15h00. With this evidence before the court, it was placed on record that the court *a quo* erred in overlooking the possibility of the complainant being assaulted by someone else, not the Appellant and she could have been assaulted between 19h00 when she last saw the appellant to 15h00 when she opened the case.

1.8 The complainant in her statement alluded that on 27 August 2017, after the assault, she contacted the police and they arrived at her place and she [related] the story to them, however they refused to assist her in opening the case and advise her to return to the police station the following day. A person with injuries as outlined in her statement and confirmed by Constable Meso I find it untoward and doubtful that police would refuse to assist her in opening a case and I put it on record that the learned Magistrate erred in overlooking this evidence and the possibility that during this period the complainant had no injuries and that she was calling the police just as a way to frustrate the Appellant since the Appellant had already approached the police regarding the complainant behaviour”

[2] The appellant's extensive list raises a range of points in his appeal against the dismissal of the claim in the court *a quo.* It was submitted on behalf of the appellant that in the event that this Court upheld the appeal that his claim for damages be confirmed against the respondent, the Minister of Police for damages in the amount of R103,200 arising out of the unlawful arrest and detention by employees of the respondent from the 28 August 2017 until the 29 August 2017, without referring the matter back to the Regional Court for determination. Counsel for the respondent indicated that the respondent would abide the court's decision.

FACTS

[3] It is necessary to provide the background facts of the matter before considering the appeal. The appellant and the complainant were in a relationship with each other. On 27 August 2017, an altercation ensued between the appellant and the complainant. On the appellant's version, the complainant became unruly and aggressive and damaged property at his home. He thus sought the assistance of the neighbours including the complainant's landlord, as the altercation occurred in full view of the public. He also called his friend, Tshepo and requested his assistance to help him to take the complaint to the police station. When Tshepo arrived they took the complaint to the police station. Upon their arrival at the police station, and after the appellant explained that the complainant was being abusive, the police officers informed him that she was not assaulting him then so he should return home and call them if problems arose if she presented with problematic behaviour. When he enquired about obtaining a protection order, the police officers informed the appellant there was nothing they could do at that stage as the complainant was not disruptive or abusive and gave him their telephone number and advised him to call should the appellant's girlfriend persist with the disruptive behaviour. The appellant returned to his place of residence, upon his arrival he found the complainant at

his home. She was angry and threw stones into his room which resulted in his television being damaged.

[4] On 28 August 2017, at approximately 17h00 the police arrived at the appellant's place of employment and informed him that he was under arrest for assaulting the complainant. He tried to explain to them that he had been at the police station the previous day requesting their assistance to apply for a protection order against the complainant abuse directed at him. However, the police ignored his explanation and proceeded to arrest him. They detained the appellant at Tembisa police station from 28 August 2019 until 29 August 2019 when he was released.

ISSUES FOR DETERMINATION

[5] The issues for the court to determine as follows:

5.1. whether the court *a quo* erred in in determining the lawfulness of the arrest and detention;

5.2 in the event that question 5.1 is upheld, whether the quantum of damages should be referred back to the court *a quo* for determination.

THE LAW

[6] Section 40 of the Criminal Procedure Act 51 of 1977 (the CPA) provides for an arrest by a peace officer without a warrant of a 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 of the CPA includes the offence of assault described as follows:

> "Assault-
>
> (*a*) when a dangerous wound is inflicted;
>
> *(b)* involving the infliction of grievous bodily harm; or
>
> *(c)* where a person is threatened-
>
> (i) with grievous bodily harm; or

(ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act 15 of 2013)."

[7] The arresting officer must provide evidence which indicates that the arrest and detention was *prima facie* lawful. This requires that the jurisdictional facts indicate that the arresting officer believed that the person arrested and detained had committed an offence in Schedule 1 other than the offence of escaping from custody. The jurisdictional facts required to be proved are referred to in *Duncan v Minister of Law and Order*[1] which set out the jurisdictional facts for a s 40(1)(b) defence at 818H – J as follows: -

"(i) the arrestor must be a peace officer;

(ii) the arrestor must entertain a suspicion;

(iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

(iv) the suspicion must rest on reasonable grounds. "

This was also confirmed in *Minister of Safety and Security v Sekhoto and another*[2].

[8] In *Minister of Safety and Security v Sekhoto and another*[3], the Court notes[4] that the police officer has a discretion whether to exercise the power to arrest. When the discretion is exercised that the power must be properly exercised.

[9] I am mindful of the view in *R v Dhlumayo*[5] where the Court said:

> "The Trial Judge has advantages-which the Appellate Court cannot have- in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity to observe their demeanour, but also their appearances and the whole personality. This should never be overlooked"

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[1] *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A)
[2] *Minister of Safety and Security v Sekhoto and another* 2011(5) SA 367(SCA)
[3] Ibid
[4] At paragraph [29]
[5] 1948[2] SA 679 [AD]

ANALYSIS

[10] When regard is had to the jurisdictional facts for the arrest in the present matter, the respondent bore the onus to prove that the discretion was exercised in an appropriate manner. Counsel for the appellant submitted that the appellant was arrested unlawfully. Counsel for the appellant submitted that the circumstances of the present matter do not fall within the schedule 1, in that assault is not listed under scheduled 1 of the CPA and the arrest was not justified without a warrant. Moreover it was submitted that in exercising a discretion to effect an arrest, the discretion must be lawfully exercised in good faith rationally and not arbitrarily. This was not so as the appellant was charged with the offence of assault which was not an offence listed in Schedule 1 in the CPA.

[11] The court *a quo* found that the arrest was justified as it was carried out in compliance with section 40 (1)(b) and section 50 of the CPA.[6] It then considered the versions of the appellant and respondent finding that the evidence presented was mutually destructive version and applied the decision in *Stellenbosch Farmer's Winery Group and Another v Martell et Cie*[7] to the evidence presented.

[12] I agree with the view expressed in *Dhlumayo*[8] that court *a quo* was best suited to evaluate evidence in respect of the witnesses demeanour and candour. The trial court indicated that the purpose of the arrest was to take the [appellant] to court to answer the charge of assault. No further reference is made to Schedule 1.

[13] Upon perusal of the record and Schedule 1 of the CPA, a peace officer or police officer may effect an arrest in the context when the assault is of a particular nature and is described as:

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[6] Record, Caselines 006-140, Judgment, para [15]
[7] *Stellenbosch Farmer's Winery Group and Another v Martell et Cie* 2003(1) SA 11 SCA
[8] 1948[2] SA 679 [AD]

"Assault-

(*a*) when a dangerous wound is inflicted;

(b) involving the infliction of grievous bodily harm; or

(c) where a person is threatened-

(i) with grievous bodily harm; or

(ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act 15 of 2013)."

It is not clear from reading the record, nor is it evident from the reasons of the trial court that its decision was based on independent evidence that the complainant sustained a serious or dangerous wound. The trial court however accepted the complainant's evidence that she sustained a serious injury. This evidence appears to have been corroborated by the evidence of the police officer who saw the complainant when she lodged her complaint and pointed out the appellant at the time of the arrest. These injuries were not disputed by the appellant when the complainant testified or when the evidence of the police officer was led. The version was different.

[14] In considering the mutually destructive versions of the appellant and the defendant's witnesses, the trial court found that the appellant presented a hostile demeanour when the police arrived. His response to the police and the complainant's arrival was directed at the complainant. He accused her of wanting to harm him by stating "you wanted to get me fired". The evidence of the complainant's injuries, their romantic relationship, the evidence of their altercation which the appellant also reported to the police seeking a protection order, satisfied the trial court that the appellant committed an assault which necessitated the arrest of the appellant.

[15] The trial court in its analysis indicated that the arrestor must know with certainty that the arrestee assaulted the complainant and was required to analyse and assess the information before him/her. In considering all the evidence and the submissions, the trial court accepted:

15.1 the complainant's version that she was assaulted by the arrestee;

15.2 the complainant sustained injuries on her head and hands;

15.3 the complainant was in a romantic relationship with the appellant;

15.4 the appellant reprimanded the complainant in the presence of the police;

15.5 the appellant relied on a protection order but could not produce it to the police. It transpired later that it did not exist.

15.6 the appellant relied on the assistance of his friend "Tshepo" the previous evening and failed to call this witness to corroborate his version or any other witness he referred to. Moreover, it turned out that there was in fact no protection order in existence[9].

[16] The trial court considered the evidence that the complainant presented with injuries. She testified that she sustained the injuries when the appellant assaulted her. The appellant did not challenge this evidence. Thus, the trial court concluded from the evidence that there was evidence of an offence of assault as referred to in Schedule 1 of the CPA.

[17] The trial court referred to the authority it relied upon to determine whether the arrestor applied a discretion reasonable or not.[10] It had regard to the consideration that the circumstances of the arrest must justify such arrest and that the discretion must be objectively rational and rationally related to the purpose for which the power was given. The trial court had regard to the case of *Duncan v Minister of law and order for the Republic of South Africa* 1986(2) All SA 241 (AD), where the Court noted the four requirements for a lawful arrest without a warrant:

1) The arrestor must be a peace officer.

2) S/he must entertain a suspicion.

[9] Record, Caselines 006-145, Judgment para [25]

[10] *Duncan v Minister of law and order for the Republic of South Africa*1986 (2) All SA 241 (AD)

3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1.

4) That suspicion must rest on reasonable grounds."

It is evident from the record that the trial court in considering the respondent's onus to prove the lawfulness of the arrest had regard to the relevant section and considered the totality of the evidence. This is so because section 40(1) (b)(iii) makes provision for the arrest where "*(iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1".* Constable Meso was a peace officer who entertained a reasonable suspicion based on the evidence indicated in paragraph [15] above.

[18] The fourth requirement that the suspicion must rest on reasonable grounds and must be just objectively justiciable is referred to in *Mvu v Minister of Safety and Security and Another* 2009 (2) SACR 291 Gauteng. This test too was positively met as the trial court concluded it was a reasonable conclusion, correctly so that there was objectively a reasonable suspicion that the appellant committed the offence.

[19] I move now to the question of damages. It was submitted on behalf the appellant that the claim for damages be confirmed against the respondent, the Minister of Police in the amount of R103,200.00 arising out of the unlawful arrest and detention by employees of the respondent from the 28 August 2017 until the 29 August 2017, without referring the matter back to the Regional Court for determination. On behalf of the appellant it was submitted that in *Marumo v Minister of Police* (37401/2011) where the plaintiff was detained overnight for violation of a protection order, the court found that the arrest and detention was unlawful as the defendant had failed to establish imminent harm and awarded R55,000 in damages. In *Khumalo v Minister of Safety & Security*, the plaintiff was detained overnight for eight hours for disturbing the peace and was awarded damages of R50,000. Consequently, it was submitted the appellant should be

awarded damages and it was submitted the appropriate amount of damages as adjusted for the prison time is deemed to be R80,000.

[20] In view of the reasons given above I am unable to find that the trial court erred in it finding and am unable to consider the request to award damages.

[21] Consequently the following order is made:

1. The appeal is dismissed.

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S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I AGREE

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C S P OOTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the appellant	: Adv M. Mbambo
Instructed by	: E. Talane Inc
On behalf of the respondent	: Adv M Tsita
Instructed by	: State Attorney
Date of hearing	: 01 September 2022
Date of judgment	: 30 January 2023