THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: A209/2017

DATE OF HEARING: 7 DECEMBER 2017

DATE OF JUDGMENT: 28 FEBRUARY 2018

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

28-2-2018
DATE

SIGNATURE

In the matter between:

THE MINISTER OF POLICE Appellant

and

TSHOFOKOLO WILLIAM GQANQASI Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

[1] This is an appeal against the judgment and order of Magistrate L N C Mokoena dated 2 March 2017. The Respondent was ordered to pay to the Plaintiff the sum of R150 000.00 (ONE HUNDRED AND FIFTY THOUSAND RAND) arising from the Respondent's unlawful arrest and detention by the Appellant.

[2] It is common cause that the Respondent was arrested without the issuing of a warrant of arrest of 29 November 2013 and subsequently detained until 2 December 2013, whereafter he was released after his appearance in court.

[3] The Appellant relied on the evidence of two witnesses, Constable Molefe Israel Mafolako (who effected the arrest) and the evidence of Constable Andrew Peter Tshepo Letsapa (who accompanied the arresting officer.

[4] The grounds of appeal are as follows:

[4.1] The Learned Magistrate should have found that Section 40(1)(q) of the Criminal Procedure Act, Act 52 of 1977 (as amended) did find application in justifying the arrest of the Respondent;

[4.2] The Learned Magistrate misdirected himself and erred in awarding an amount of R150 000.00 (ONE HUNDRED AND FIFTY THOUSAND RAND) to the Respondent in damages.

[5] A Court of Appeal is not entitled to set aside the decision of a lower court in the exercise of its discretion, merely because the Court of Appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion. The Court of Appeal may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. See: R v Zackey 1945 AD 505 at 511-2; Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398-9 and National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (SA) 1 (CC) at [11].

[6] The provisions of Section 40 of the Criminal Procedure Act, Act 51 of 1977 (as amended) provide for the following:

[6.1] Arrest by peace officers without a Warrant:

"A peace officer may, without a Warrant, arrest any person –

(a) who commits or attempts to commit any offence in his presence;

(b) who he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody, and further....

(q) where he is reasonably suspected of having committed an act of domestic violence as contemplated in Section (1) of the Domestic Violence Act of 1998, which constitutes an offence in respect of which violence is an element".

[7] The provisions of Section 3 of the Domestic Violence Act, 116 of 1998, relevant to the arrest by peace officers without a Warrant contain the following:

"3. A peace officer may, without a Warrant arrest any suspect at the scene of an incident of domestic violence, who he or she reasonably suspects of having committed an offence containing an element of violence against a complainant".

[8] Counsel for the Respondent drew the court's attention to paragraph 6 of the Appellant's amended plea, more particularly paragraphs 4.2.2 and 4.2.3 wherein the following is contained:

"4.2.2 The Plaintiff was arrested on the reasonable suspicion that he had committed an act of domestic violence, as contemplated in Section 1 of the Domestic Violence Act, Act 116 of 1998, which constitutes an offence in respect of which violence is an element, to wit assault.

4.2.3 *The suspicion that the Plaintiff had committed a* ***Schedule 1*** *offence was based on reasonable grounds."*

[9] It would appear thus that the Appellant, in its amended plea, pleaded that the offence of "*assault*", falls within the ambit of the Schedule 1 offence of the Criminal Procedure Act, Act 51 of 1977. The plea is ill founded and bad in law.

[10] In order for the Appellant (Defendant in the Court *a quo*) to have succeeded with a defence in terms of Section 40(1)(q), the following jurisdictional facts would have had to be present:

[10.1] The arrestor must be a peace officer;

[10.2] The arrestor must entertain a suspicion;

[10.3] The suspicion must be that the suspect or the arrestee committed an act of domestic violence as contemplated in Section 1 of the Domestic Violence Act;

[10.4] **The suspicion must rest on reasonable grounds**. See Duncan v Minister of Law and Order 1986 (2) SA 805 (A).

[11] In Mabona and Another v Minister of Law and Order 1988 (2) SA 654 (SE) at 658F-H, the court formulated the test as follows:

"... in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action... The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain the suspicion which will justify an arrest".

[12] A peace officer who harbours a reasonable suspicion that an offence has been committed, of course has discretion whether or not to arrest the offender, before the requisite jurisdictional requirements for the arrest under Section 40(1) of the Act to be satisfied. But the presence of the jurisdictional facts alone, do not suffice to make the arrest lawful. This is so because even though such facts are present, a discretion whether to arrest or not arises, and that discretion must not only be exercised, it must be exercised properly. See: Duncan v Minister of Law and Order *supra*.

[13] In Minister of Safety and Security v Sekhoto 2011 (5) SA 367 at paragraphs 28 to 29, the Supreme Court of Appeal held the following:

"*Discretion*

[28] *Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in Groenewald v Minister of Justice.*

[29] *As far as s 40(1)(b) is concerned, van Heerden JA said the following in Duncan (at 818H-J):*

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case."

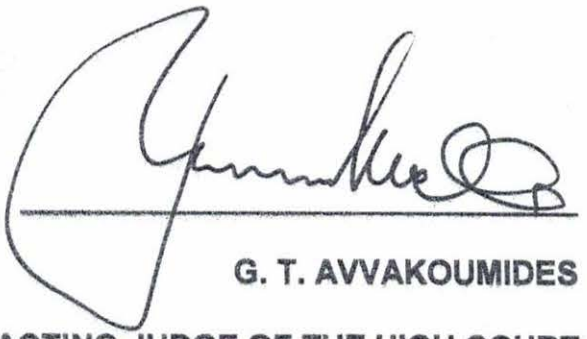
[14] On a proper construction of Section 40(1) of the Act and the wording of Section 3 of the Domestic Violence Act, it is clear that a peace officer may, without a warrant, arrest any suspect and this indicates that the discretion should be exercised before such an arrest can be effected.

[15] I am not persuaded and cannot accede to the line of argument that the Magistrate misdirected himself and erred in finding that the arresting officer did not properly exercise his discretion before effecting the arrest. All the documents forming part of the record indicate that the Respondent was arrested on a charge of *"assault"*. In addition, during cross-examination, Constable Mofalako testified as follows:

"[question]: this woman walked into the police station, she made a statement to a different police officer, he opened or registered the document for assault common, is that correct?"

[answer] correct".

[16] In my view the appeal cannot succeed on the grounds on which it was brought and is accordingly dismissed with costs.



G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 28 FEBRUARY 2018

I agree:

S BAQWA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 28 FEBRUARY 2018

Representation for parties:

For Appellant:	T.T. Tshivhase
Instructed by:	State Attorney
For Respondent:	J. Gerber
Instructed by:	Jan Ellis Attorneys