THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 226/2022

In the matter between:

THE MINISTER OF POLICE **APPELLANT**

and

VUYANI GOODMAN GQAMANE **RESPONDENT**

Neutral Citation: *Minister of Police v Gqamane* (226/2022) [2023] ZASCA 61 (3 May 2023)

Coram: DAMBUZA AP, MOLEMELA and MBATHA and GOOSEN JJA and SIWENDU AJA

Heard: 3 March 2023

Delivered: 3 May 2023

Summary: Civil procedure – unlawful arrest and detention – arrest in terms of ss 40(1)*(b)* and 40 (1)*(q)* of Criminal Procedure Act 51 of 1977 – assault with intent to commit grievous bodily harm – domestic violence – discretion to arrest – failure to plead – onus – whether issue was fully canvassed at trial – whether arrest lawful.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda, (Naidu AJ with Mjali J concurring), sitting as court of appeal:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

JUDGMENT

Siwendu AJA (Dambuza AP, Molemela and Mbatha and Goosen JJA concurring):

[1] This appeal involves a discretion to arrest and raises the question whether a court on appeal can *mero motu* determine the issue based on the evidence led at the trial. Ancillary to this is whether, in an action for damages for unlawful arrest, the plaintiff must discretely plead the failure to exercise the discretion to arrest.

[2] The appeal emanates from a decision of the Eastern Cape Division of the High Court, Makhanda (the high court), which upheld an appeal against an order dismissing a claim for damages for unlawful arrest and detention, brought by Mr Gqamane (the respondent) against the Minister of Police (the appellant). The high court found that the trial court had failed to consider whether Warrant Officer Erasmus (W/O Erasmus), the arresting officer in this case, had exercised a discretion to arrest the respondent. It found that the arresting officer failed 'to reasonably apply his discretion in deciding to arrest the [a]ppellant' and held

that the decision to arrest him was therefore ‘irrational and arbitrary’. The high court held the appellant liable for damages in the sum of R160 000. The appeal is with the special leave of this Court.

[3] The respondent was arrested without a warrant shortly after midnight on 17 February 2017, following a police raid on suspects in Kwazakhele Township, Gqeberha. On 7 February 2017, Ms Mini (the complainant), with whom the respondent was in a romantic relationship, lodged a complaint at the Kwazakhele Police Station. She alleged that on 4 or 5 February 2017, the respondent assaulted her when she went to collect her lounge suite from his home. She was admitted at Dora Nginza Hospital (the hospital) for two days and was treated for a broken arm. She alleged that the respondent attacked her by grabbing her from behind, hitting her with his hands several times on the face and kicked her with booted feet on her body. A charge of assault with intent to commit grievous bodily harm was recorded. The case docket was also marked with a special ‘domestic violence’ sticker and assigned to Warrant Officer Gumbi.

[4] On 14 February 2017, the case docket was transferred to the New Brighton police station and was assigned to W/O Erasmus. It contained the statement made by the complainant. On 15 February, W/O Erasmus visited the complainant to interview her, but found she had gone back to hospital for further treatment. He attempted to obtain a J88 medical report from the hospital’s liaison office, but the office was closed.

[5] The respondent worked part time as a car guard and lived with his then 15-year-old son. The complainant and the respondent lived in proximity, some 20 meters away from each other in what appears to have been disused classrooms at Old Lwandlekazi School in Kwazakhele. At the time of his arrest,

the complainant pointed him out to identify him to the arresting officer. He was detained in police cells over the weekend until the Monday when he was taken to New Brighton Magistrates Court. He was released directly from the cells at about 14h00 without a court appearance.

[6] In April 2017, the respondent instituted a claim for damages in the Regional Court, Port Elizabeth (the trial court), against the appellant for damages arising from his arrest and detention. He alleged, in his particulars of claim, that:

(a) The arrest without a warrant was wrongful and unlawful;

(b) There was no reasonable suspicion that he committed a Schedule 1 offence;

(c) The arresting officer failed to explain his constitutional rights; and

(d) He was detained arbitrarily without just cause.

With regards to the detention, he alleged that:

'11.1 the arresting officers . . . failed to apply their minds, in respect of [his] detention and the circumstances relating thereto;

11.2 there were no reasonable and/or objective grounds justifying [his] subsequent detention;

11.3 . . . none of the Defendant's employees took any or reasonable steps to release [his] . . .; and

11.4 he was not brought before a court of law, as soon as reasonably possible.'

He claimed an amount of R240 000 plus interest, as damages.

[7] The appellant's defence was that:

(a) The victim was a complainant as defined in the Domestic Violence Act 116 of 1998 (the DVA).

(b) The assault constituted an incident of domestic violence with an element of violence.

(c) The arresting officer was entitled to arrest without a warrant in terms of s 40(1)*(q)*[1] of the Criminal Procedure Act 51 of 1977 (the CPA) read with s 3 of the DVA[2].

(d) The arresting officer reasonably suspected the respondent of having committed a Schedule 1 offence and as such, he could lawfully arrest the respondent without a warrant in terms of section 40(1)*(b)* [3]of the CPA.

[8] Only the respondent and the arresting officer testified at the trial. Even though the appellant bore the onus to prove the lawfulness of the arrest, the respondent was the first to adduce evidence. He denied the assault alleged by Ms Mini. His testimony centred on his request to the arresting officer to be 'merciful with him'; the request to be taken to court on the same day; the poor over-crowded conditions in the cells; and his concern about his son who he claimed was left without adult care.

[9] The evidence by W/O Erasmus was largely confined to those issues raised in the respondent's evidence. He testified that the seriousness of the offence prompted the decision to arrest and detain the respondent. He feared that given the appellant's proximity to the complainant's place of abode, 'something might happen again'. He confirmed that when he arrested the respondent, certain witness statements were still outstanding, as well as the J88

[1] Section 40(1)*(q)* provides:
'(1) A peace officer may without warrant arrest any person—
. . .
(q) 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.'

[2] Section 3 states that:
'(1) A peace officer who attends the scene of an incident of domestic violence, may without a warrant, arrest any respondent who such peace officer reasonably suspects of having committed an act of domestic violence which constitutes an offence in terms of any law.'

[3] Section 40(1)*(b)* provides:
'(1) A peace officer may without warrant arrest any person—
. . .
(*b*) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'

medical report on which the injuries sustained by the complainant were recorded. He disputed that the respondent's son was left without adult care. He insisted that special arrangements were made with a neighbour before the arrest to look after him. He was not present in court when the respondent was released.

[10] The trial court found that the arrest was lawful in terms of s 40(1)*(q)*, and that it was based upon a reasonable suspicion that the respondent had committed an act of domestic violence as contemplated by s 1 of the DVA[4]. It found on the probabilities that the respondent was informed of his constitutional rights as he had signed the notice of rights provided to him by the arresting officer. The thrust of the appeal to the high court was directed at the jurisdictional findings under s 40(1)*(q)*. The respondent argued that the fact that the arrest occurred 12 days after the incident, belied the reasons alleged for the arrest. He submitted that there had been no further incidents of domestic violence reported, even though the respondent lived near the complainant. These issues were raised for the first time during the appeal.

[11] The high court confirmed the decision by the trial court that the appellant met the jurisdictional requirements to arrest the respondent. It held, however, that the trial court 'failed to address the issue of discretion at all [and this] failure caused the trial court to reach 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.'

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[4] The DVA provides an expanded definition of domestic violence which includes but is not limited to physical, sexual, emotional, and psychological abuse but includes economic and spiritual abuse, intimidation and harassment, coercive and controlling behaviour amongst others

[12] The appeal turns on the narrow question whether the high court was correct to *mero motu* determine the question of the lawful exercise of a discretion to arrest. The respondent contended that a discretion to arrest is inherent to the question of the lawfulness of the arrest. A court on appeal can consider the issue if it was canvassed fully at the trial. The complaint by the appellant is that the issue was not pleaded. Its attention was directed to one case at the trial and thereafter, the respondent impermissibly attempted to canvass a different case on appeal to the high court.[5]

[13] It is trite that a party is bound by his or her pleadings and ordinarily, he or she will not be allowed to raise a different or fresh case without a due amendment. A court is equally bound by those pleadings and should not pronounce upon any claim or defence not made in the pleadings by the parties.[6] A court may relax this rule where the issue involves a question of law which emerges fully from the evidence or is apparent from the papers. This Court, in *Minister of Safety and Security v Slabbert*,[7] held that:

'There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial.'[8]

[14] The case pleaded by the respondent centered on whether the arresting officer formed a reasonable suspicion which would entitle W/O Erasmus to arrest him.[9] It was premised on a denial that he committed a Schedule 1 offence.

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[5] *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A.

[6] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 898E-J citing from Jacob and Goldrein on *Pleadings: Principles and Practice* at 8–9.

[7] *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA).

[8] Ibid para 12. See also *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 15.

[9] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 (SCA) this Court explained the nature of civil litigation in our adversarial system. It held that it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the Court to adjudicate upon those issues.

The respondent did not place the improper exercise of the discretion to arrest him in issue. He raised the issue in respect of his detention. During cross-examination of the respondent, counsel for the appellant asked why the respondent believed the arrest was unlawful. This might have brought the issue of the exercise of a discretion to arrest to the fore, despite the pleadings. However, the respondent's counsel objected to the question on the grounds that the respondent was a lay person, and that issue was a question of law.

[15] It is not apparent from the high court judgment what aspects of the evidence led by both parties it accepted or rejected and the reasons for that choice. The reason for the conclusion that W/O Erasmus did not exercise his discretion is not discernible. Nowhere did the high court deal with the findings of the trial court that Erasmus was correct in taking into account the seriousness of the offence committed by the respondent. Nor did it discuss the fact that the appellant pleaded justification for the arrest, not only under s 40(1*)(b)* but also under s 40(1*)(q).* This would have assisted this Court to decide whether or not the order of the high court is correct.[10] Given this, a fuller treatment of the facts is necessary.[11]

[16] An arrest without a warrant is prima facie wrongful. Consequently, it was incumbent upon the appellant to justify its lawfulness.[12] The submission by the respondent that the discretion to arrest is inherent to the determination of the lawfulness or otherwise of the arrest conflates the jurisdictional requirements to carry out a warrantless arrest, with the exercise of a discretion which arises once those jurisdictional facts are established. It also ignores the incidence of the

[10] *Mphahlele v First National Bank* of South Africa 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) para 12.
[11] *Knoop NO v Gupta* 2021 (3) SA 88 (SCA) para 13.
[12] In *Minister of Law and Order v Hurley* [1986] 2 All SA 428 (A); 1986 (3) SA 568 (A) the Court stated the following at 589E-F: 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the *onus* of proving that his action was justified in law'.

onus. In *Minister of Safety and Security v Sekhoto and Another*[13] *(Sekhoto)*, this Court held that:

'A party who alleges that a constitutional right has been infringed bears the onus. The general rule is also that a party who attacks the exercise of discretion where the jurisdictional facts are present bears the onus of proof.'[14]

[17] The high court similarly conflated the onus to prove the jurisdictional requirements to arrest (which rested on the appellant) and the overall onus to prove other elements of the claim, including improper exercise of discretion to arrest (which rested on the respondent). Once the high court found that the jurisdictional requirements to arrest the respondent were met, the appellant discharged the onus, which rested on it to justify the arrest. This was dispositive of the case pleaded by the respondent. The high court, however, despite finding that the trial court was correct regarding the jurisdictional facts, held that it ought to have considered whether the discretion was properly exercised. The implication of the decision by the high court is that the onus to prove the proper exercise of the discretion to arrest rested with the appellant rather than the respondent. This is contrary to the decision in *Sekhoto*. The high court erred on this score.

[18] W/O Erasmus was criticised for the 12-day delay in effecting the arrest even though on the objective evidence, he acted timeously after receiving the docket from Kwazakhele. The facts to account for the delay were not within his knowledge. The danger of a litigation by 'ambush' and the prejudice that could arise from reasoning pertinent questions backwards, is manifest. Whether or not the discretion was properly exercised cannot be judged based on facts not known at the time, against the standard of what is best in hindsight, based on a

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[13] *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) (*Sekhoto*). The conflation identified by the court was in *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T).

[14] *Sekhoto* ibid para 49.

standard of perfection.[15] If it was intended to found the case upon an alleged improper exercise of a discretion to arrest, then that ought to have been pleaded unambiguously. The high court would have determined the issue based on established facts.

[19] We were urged to determine the issue afresh should we find there was a misdirection by the high court. The submission was that there had been no subsequent acts of violence post the incident. It was further contended that notwithstanding the close living arrangements, there was no imminent harm or risk of harm justifying an arrest and all these factors pointed to an improper reason for the arrest. The submission is unsound and implies that the respondent must have exhibited a recurrent pattern of violent behaviour in order to effect the arrest. Furthermore, it misses an important connection between an arrest made pursuant to s 40(1)*(b*) and one effected under s 40(1)*(q)* of the CPA. An arrest made in terms of s 40(1)*(q)* explicitly refers to 'an offence in respect of which *violence* is an element' while an arrest made pursuant to s 40(1)*(b*) requires that there be allegations of a commission of a schedule 1 offence. (Emphasis added.) The jurisdictional requirements for arrest are the same. A crucial difference is that, unlike an arrest under s 40(1)*(b),* the degree or extent of the violence referred to in s 40(1)*(q)* is not bounded, justifiably so, to afford the maximum protection intended by DVA. The offence for which the respondent was arrested fell under both ss 40(1)*(b)* and 40 (1)*(q)*.

[20] For the reasons above, the high court conflated the onus and pertinent questions about the lawful exercise of the discretion to arrest the respondent, which were neither pleaded nor fully canvassed at the trial. The high court therefore erred.

[15] *Barnard v Minister of Police and Another* [2019] 3 All SA 481 (ECG) para 10 and *Sekhoto* fn 8 above para 39.

[21] What remains is the issue of costs which must rightly follow the result. The appellant contended that if successful, we should grant it the costs of two counsel. I am not persuaded. The matter is not complex to justify such an award, and the appellant did not advance any cogent reasons for doing so.

[22] In the result, I make the following order:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

N T Y SIWENDU

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	V Madokwe and M M Ndamase The State Attorney, Gqeberha The State Attorney, Bloemfontein
For the respondents:	M du Toit Peter McKenzie Attorneys, Gqeberha Webbers Attorneys, Bloemfontein.