

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A5002/2015

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

1 JUNE 2016

FHD VAN OOSTEN

In the matter between

MAKHOSEMBI SIYABONGA DLAMINI

APPELLANT

And

THE MINISTER OF SAFETY AND SECURITY

RESPONDENT

Delict - unlawful arrest and detention - police officer investigating complaint of domestic violence - nature of duty in the exercise of discretion to arrest discussed - no duty on arresting officer to conduct full investigation of all facts and circumstances - appellant properly arrested and not arbitrarily or without lawful cause - appeal dismissed.

J U D G M E N T

VAN OOSTEN J:

[1] The appellant instituted an action for damages against the respondent for alleged unlawful arrest and detention. The trial of the matter came before Wright J, who having heard the evidence adduced on behalf of the parties and argument, dismissed the appellant's claim with costs. The appeal before this court is against the whole of the judgement and order and is with leave of the court a quo.

[2] The facts which gave rise to this matter can be summarised as follows: The appellant and his wife were embroiled in divorce proceedings although they were still living together. On 27 October 2012 the appellant's wife, Jill Anna Turnbull, accompanied by a friend, arrived at the Linden police station. At 09h15 she made a written statement in which she graphically described violent behaviour by her husband towards her the previous day at 19h40 after she had arrived home from the airport. The appellant, according to the statement, had thrown her clothes and rubbish bags on her bedroom floor which she picked up and placed on the couch. The appellant arrived, took her cell phone from her pocket and while he was pushing her, threw it against the wall and then smashed the cell phone with a baseball bat in front of the children. He then proceeded to the kitchen where he took a knife and put it in his pocket. He went outside and poured petrol over her car. He returned, took out the knife from his pocket, put it back and pushed her down the steps resulting in an injury to her foot which caused her to limp. He went back to her car and threatened to set it alight. Their little daughter screamed for him to stop but he took the knife from his pocket and slashed the tyre of her car. He warned her that the worst was still to come.

[3] That same morning, at approximately 09h40, Sergeant Letsoalo, who was stationed at the Linden police station, was on patrol duty when he received a call from the client service centre at the police station that a case of domestic violence had been opened and that the complainant would point out the suspect to him. He returned to the police station and met Turnbull who informed him that she was there to lay a charge. He was shown the docket in the matter and realised that it concerned a case of domestic violence. The statement Turnbull had made was in the docket and he read it. He came to the conclusion that she had been assaulted and that the appellant had damaged property by stabbing the wheel of her car with a knife. He accordingly suspected the commission of the offences of assault and malicious injury to property with threats of domestic violence 'on top of that' which 'made me arrest him [the appellant] because he was threatening that he can do something dangerous to the victim or the complainant'. Turnbull informed him that she had left the children at home and he, accompanied by Sergeant Mphahlele, proceeded to the family home in an area he was well acquainted with, followed by Turnbull in her friend's motor vehicle.

[4] Upon their arrival at the house he observed that Turnbull was afraid to enter the house. She stayed behind him and the appellant was standing at the entrance door. Turnbull pointed the appellant out to him as the man who had assaulted her. He greeted the appellant and introduced himself and his colleague. He explained to the appellant that his wife had laid a charge against him at the police station and that for that reason he was there to arrest him on charges of domestic violence, malicious injury to property and intimidation. The appellant responded in saying that there was no problem. He started explaining his constitutional rights to him but the appellant interjected and said that, being an attorney, he was well aware thereof. The appellant asked to be given the opportunity to get properly dressed and he was allowed to do so. The appellant was not handcuffed as he was co-operative. They then proceeded to the Linden police station and the appellant was handed to the office commander. He appeared in court on 29 October 2012 but the case against him was eventually withdrawn at the instance of Turnbull.

[5] Sgt Letsoalo conceded that, although he could easily have done so, no further investigation was conducted at the house where the appellant was arrested with the view of establishing the truth of the allegations Turnbull had made in the police statement. He testified that Turnbull was shaking, that she seemed to be in shock when he interviewed her at the police station and that she had raised concerns about the safety of the children who were at home with the appellant. She observed that she was limping and she explained that it was a result of falling down the stairs. He admitted that the arrest was discretionary and that he did consider *not* arresting the appellant but decided to arrest him as 'the complainant was not feeling safe if he [the appellant] was still around because she was even afraid to go home'.

[6] This brings me to the version of the appellant. On the morning of the arrest he was in the bedroom to change clothes after having finished breakfast with the children and planning to play football with them outside, when his wife entered and informed him that the police wanted to talk to him. Although she had returned home from a business trip to Cape Town the previous day, her whereabouts that morning was of no concern to him as they were involved in acrimonious divorce litigation. Sgt Letsoalo and another police officer carrying a gun, were just behind her. Sgt Letsoalo informed him that his wife had opened a case against him, 'that you hit her' and in

response he started questioning him what this was all about. He in vain attempted to bring to their attention a letter he had received the previous day from his wife's attorneys in the divorce action as well as his file containing documents relevant to those proceedings. Their simple response was that he could talk at the police station. He was handcuffed, escorted out of the house with a gun in his back, in front of his two children, then put in the police van and taken to the police station. The handcuffs were removed and he was eventually placed in a cell. He appeared in the court on the Monday but was refused bail as he did not have an alternative residential address. He was released on the Thursday after his arrest on the previous Saturday. His wife in the meanwhile had obtained a domestic violence protection order against him *inter alia* forbidding him to enter the matrimonial home. He in turn opened a case against his wife. Both the criminal case and the domestic violence proceedings were eventually withdrawn at the behest of his wife. The allegations against him concerning the incident the day before his arrest, he maintained, were 'totally unfounded' and 'totally untrue'.

[7] The learned judge *a quo* held that Sgt Letsoalo's has reasonable grounds to arrest the appellant, which could not be impugned, although 'it would not have been difficult for him to make a few enquiries' to verify the allegations made in Turnbull's police statement.

[8] It is trite that a deprivation of a person's liberty, such as arrest and detention at the hands of the police, is *prima facie* unlawful. In *Minister of Justice v Hofmeyr* [1993] ZASCA 40; 1993(3) SA 131(A) 153D-E, the then Appellate Division (per Hoexter JA) stated as follows:

'The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal.'

[9] In an action for wrongful arrest and detention a plaintiff only bears the onus of proving the arrest and detention. Recently, in *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 ALL SA 375 (SCA) the Supreme Court of Appeal (per Malan AJA) reiterated this position as follows (par 6):

‘To succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty.’

[10] In *Minister of Justice v Hofmeyr* (supra) the court further held ‘Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.’ This pronouncement was in approval of the AD’s decision in *Minister of Law and Order and others v Hurley and another* 1986 (3) SA 568 (A) where the Court (per Rabie CJ) stated as follows (589D-E):

‘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.’

[11] In *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H, Van Heerden JA explained that once the jurisdictional requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA), are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace officer.

[12] It is now settled that the purpose of the arrest is to bring the arrestee before the court, for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial (see *Minister of Safety and Security v Sekhotho & another* [2010] ZASCA 141; 2011 (5) SA 367 paras 30-31). An arrest will accordingly be irrational and consequently unlawful if the arrestor exercised his discretion to arrest for a purpose not contemplated by law.

[13] In the present matter the jurisdictional facts of the arrest and detention of the appellant are common cause. The respondent accordingly, bears the onus of proving the lawfulness of the arrest and detention. In my view the learned judge a quo correctly found that reasonable grounds for the arrest of the appellant had been proved. The arresting officer was in possession of a statement made by a complainant to a colleague under oath revealing serious allegations concerning domestic violence. He had the opportunity of interviewing the complainant who

confirmed the allegations of domestic violence. She was limping and her explanation therefore indeed corroborated the version in her statement. He proceeded to the house where the parties were living. The appellant was present. Having been informed of the reason for their visit, the appellant offered no explanation but simply willingly subjected himself to the arrest.

[14] I interpose to consider the credibility of the appellant's version. In my view the appellant was an unsatisfactory witness, who was plainly dishonest. The learned judge a quo did not make any specific credibility findings in regard to the appellant's version, but correctly referred to the unexpected, surprising evidence of the appellant that belatedly emerged in cross-examination, that he indeed had searched his wife's cell phone in order to obtain information relating to her suspected relationship with another man. His evidence, moreover, that nothing out of the ordinary had happened on the Friday evening is illogical and improbable, considered in the context of the totality of the facts of this matter. His evidence moreover, was given in an unsatisfactory manner. He resorted to unduly long, non-sensical answers and disingenuously evaded the real issues. It is abundantly clear from the evidence that an incident of domestic violence had occurred which gave rise to the appellant's eventual arrest.

[15] The real issue in this matter accordingly concerns the question whether Sgt Letsoalo exercised his discretion properly in deciding to arrest the appellant. That brings to the fore whether he should have conducted a further investigation to verify the truth of the allegations in the statement, after his arrival at the house. Put differently, was there a duty on Sgt Letsoalo to conduct such further investigation and verification, in order to enable him to properly exercise his discretion whether or not to arrest the appellant.

[16] The constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances (see *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) para 17). The factual circumstance pertinently relevant to the present matter is that a case domestic violence was reported to Sgt Letsoalo. In *S v Baloyi (Minister of Justice & another Intervening)* [1999] ZACC 195; 2000 (2) SA 425 (CC) para 13, the Constitutional Court held that the freedom from violence is fundamental to the equal enjoyment of human rights and freedom. It was further stated that the

sting of domestic violence lies in its 'hidden, repetitive character and its measurable ripple effect on society and in particular family life' and further that domestic violence reinforces patriarchal domination given its 'systemic, pervasive and overwhelmingly gender-specific' nature (para 12). Its harrowing effects the court held are made all the more devastating because of 'the ineffectiveness of the criminal justice system in addressing family violence' which in turn 'intensifies the subordination and helplessness of the victims' (para 12).

[17] Against this background it is necessary to briefly consider the nature of the duties imposed on members of the South African Police Service in regard to domestic violence and the manner in which victims of domestic violence must be treated and assisted. In *Naidoo v Minister of Police* (20431/2014) [2015] ZASCA 152 (2 October 2015), the Supreme Court of Appeal extensively dealt with those duties with reference to the provisions of the Domestic Violence Act 116 of 1998 (the Act), its Regulations and the police standing orders, as encapsulated in the National Instruction 7 of 1999 issued by the National Commissioner of Police pursuant to s 18(3) of the Act. In *Minister of Safety and Security v Venter & others* [2011] ZASCA 42; 2011 (2) SACR 67 (SCA) the wide-ranging nature of the rights and remedies accorded victims of domestic violence under the Act, was emphasised (para 19) and the manifest object of the Act spelt out in the preamble, which is to 'afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide.' Section 2 of the Act provides that:

'2 Duty to assist and inform complainant of rights

Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—

- (a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
- (b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
- (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.'

[18] The provisions of paragraph 7(1) of the National Instruction impose a duty on members of the SAPS to render assistance to victims of domestic violence by receiving and investigating the complaint.

[19] In my view Sgt Letsoalo fully complied with his duties under the provisions referred to above. I can find no support for the notion that he should have conducted a further investigation, which on the facts of this matter, in my view, would have been superfluous. As a general rule, and depending on the circumstances of each case, it cannot be expected of a reasonable police officer in these circumstances to conduct a further investigation. The arrest of the appellant was for the purpose of bringing him before court. Once arrested the appellant would have been entitled to exercise all the rights enjoyed by an arrested person. Support for these findings is to be found in *National Commissioner of Police and Another v Coetzee* 2013 (1) SACR 358 (SCA), where Mpati P, writing for the court, confirmed the jurisdictional facts necessary for an arrest under s 40(1), and added thereto (para 14):

‘The arresting officer is not required to conduct a hearing before effecting an arrest. Whether an arrested person should be released, and if so, subject to what conditions, arises for later decision by another person and that is the safeguard to the arrestee’s constitutional rights. Once the jurisdictional requirements are satisfied the peace officer has a discretion as to whether or not to exercise his or her powers of arrest. Obviously, the discretion must be exercised properly.’

[20] For all the above reasons I conclude that Sgt Letsoala exercised his discretion to arrest the appellant properly and not arbitrarily or without lawful cause. It follows that the trial court correctly dismissed the appellant’s claim and the appeal accordingly falls to be dismissed.

[21] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal.

I agree.

**MHE ISMAIL
JUDGE OF THE HIGH COURT**

I agree.

**RE MONAMA
JUDGE OF THE HIGH COURT**

***COUNSEL FOR APPELLANT
APPELLANT'S ATTORNEYS***

***ATT RM MOTSA
MOTSA (MUSA) ATT***

***COUNSEL FOR RESPONDENT
RESPONDENT'S ATTORNEYS***

***ADV M MAIMELA
THE STATE ATTORNEY***

***DATE OF HEARING
DATE OF JUDGMENT***

***1 JUNE 2016
1 JUNE 2016***