

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 03/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Signature]</i>	
Date <i>12/12/2019</i>	

In the matter between:

NAKAMPE TRACY MADIBA

APPELLANT

and

MINISTER OF POLICE

RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the judgment and order of the Magistrate Court of the district of Letaba held at Ga – Kgapane. The Appellant had instituted action against the Respondent in the Magistrate Court for damages arising out of an alleged unlawful arrest and detention by members of the South African Police Service. The Appellant's claim against the Respondent was dismissed with costs; hence this appeal.
- [2] The Appellant's version is that his arrest and subsequent detention was unlawful. He was arrested and detained at about 00:45 and released at about 10:50. He spent approximately 10 hours in the police cells. The Respondent's version is that the Appellant was lawfully arrested by members of the Respondent who suspected him of having committed an offence of murder and that the Respondent's servants were acting in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [3] It is common cause that the Appellant was indeed arrested by members and servants of the Respondent and detained as stated herein above. It is further common cause that the Appellant was arrested and detained without a warrant.

The issue in this appeal is therefore whether the arrest was lawful or not, or whether the Court *a quo* was correct in finding that there was a reasonable suspicion that the Appellant has committed an offence and thereby dismissing the action with costs.

[4] It is trite that an arrest constitutes an interference with the liberty of the individual concerned. The arrest is therefore *prima facie* unlawful. The arrestor (the Respondent in this case) bears the onus of justifying the arrest¹. In the present case the Respondent bears the onus of proving that the arrest was based on reasonable grounds.

[5] The Respondent's only witness was Warrant Officer Mukhacani Elias Hlungwani whose testimony is as follows:

5.1. He is employed by the South African Police Service with the rank of Warrant Officer and stationed at Tzaneen Police Station. On the 2 August 2016 he was a detective and his duty was to investigate cases.

5.2. He was the investigating officer of a murder case at Relela Village. He had an informer who gave information that the Appellant was seen coming out of the deceased's place with one Nicholus Selowa. According to the informer the deceased was discovered dead after the

¹ Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 589 D

two were seen coming out of her homestead. They received this information late at night.

- 5.3. Following on the information of the informer, they went to Appellant's homestead to arrest him. The Appellant was found sleeping and it was around 00:30 when he was arrested. They arrived at Tzaneen Police Station at around 00:45 and detained the Appellant after he was given Notice of Rights. He acted on a reasonable suspicion that the Appellant committed a schedule one offence.
- 5.4. As it was already in the early hours of the morning and they were tired, they decided to detain the Appellant and come back to interrogate him in the morning. In the morning they came back to work to continue with the case. The Appellant was interrogated and as they could not get what they were looking for it was decided that the Appellant be released until they find something to link him. They could not get the clothes that the Appellant was allegedly wearing when committing the murder.
- 5.5. The Court heard that Nicholas Selowa was successfully prosecuted for murder and sentenced to 22 years imprisonment. According to Hlungwani the reason Appellant was not prosecuted is because they could not find clothes that he wore when the murder was committed.
- [6] The outcome of this matter turns largely on an application of the provisions of section 40(1)(b) of the CPA to the facts of this case.

Section 40 of the CPA grants the peace officer the power to arrest a suspect under certain circumstances. The section provides:

"40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person-

(a)

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

[7] The jurisdictional factors that must exist before the power conferred to a police officer by section 40 can be invoked are that:

- 7.1. The arrestor must be a peace officer;
- 7.2. The arrestor must entertain a suspicion;
- 7.3. It must be a suspicion that the arrestee committed an offence referred to in Schedule I to the Act.
- 7.4. Such suspicion must rest on reasonable grounds.

See **Duncan v Minister of Law and Order**².

[8] In **Tsose v Minister of Justice & Others**³ it was held that the arrest must be with the intention of bringing the arrestee before Court. An arrest can still take place lawfully, where the arrestor objectively speaking, has a reasonable

² 1986 (2) SA 805 (A) at 818G-H

³ 1951 (3) SA 10 (A)

suspicion against the suspect but has still to conduct further investigations after the arrest but before finally deciding to charge the arrestee.

In **Minister of Safety and Security v Sekhoto**⁴ it was held that once the jurisdictional facts for an arrest are present, a discretion whether or not to arrest arises. Where the exercise of a discretion is questioned, the onus to establish the improper object of the arrestor will rest on the arrestee.

- [9] The reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) of the CPA must be approached objectively. The question is whether any reasonable person, confronted with the same set of facts would form a suspicion that a person has committed a Schedule I offence or not⁵.

In **Minister of Safety and Security v Linda 2014 (2) SACR 464 (GP)** the Court said the following:

“The question whether the suspicion of the person effecting the arrest is reasonable must be approached objectively. A suspicion inherently involves an absence of certainty or adequate proof. A police officer is not expected to satisfy himself to the same extent as a Court. A suspicion can be reasonable despite there being insufficient evidence for a prima facie case.

⁴ 2011 (1) SA 367 (SCA)

⁵ Minister of Safety and Security v Swart 2012 (2) SACR 226 (SCA) at 232

In Shabaan Bin Hussein and Others v Chong Fook Kam and Another the Privy Council said:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end⁶".

[10] In **Duncan** *supra*, Van Heerden JA said the following at page 818B:

"Hence an arrest under s 40(1)(b) of the present Act is not unlawful where the arrestor entertains the required reasonable suspicion but intends to make further enquiries after the arrest before finally deciding whether to proceed with a prosecution, provided it is the intention throughout to comply with s 50 of the Act".

[11] In the present case it is common cause that Warrant Officer Hlungwani who arrested the Appellant is a peace officer. The arresting officer received information from the informer that the Appellant was involved in the commission of the offence as he was seen coming out of the deceased's homestead before she was discovered dead. With this information Warrant Officer Hlungwani entertained a suspicion that Appellant was involved in the murder.

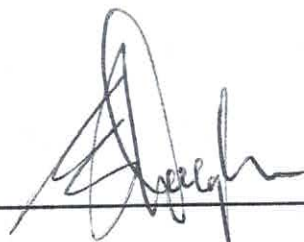
⁶ At page 470 para [21]

The suspicion entertained by the arresting officer was that the Appellant committed murder, a Schedule I offence. A reasonable person in the position of Warrant Officer Hlungwani would have suspected that the Appellant was involved in the commission of the murder of the deceased. In the circumstances the suspicion by the arresting officer was reasonable.

[12] In our view the Respondent succeeded to prove, on a balance of probabilities, that the arrest and detention of the Appellant was lawful. In particular, the Respondent managed to prove all the jurisdictional facts which need to be satisfied before a discretion to arrest the Appellant could be exercised.

The judgment and order of the Court *a quo* cannot be interfered with and this appeal should fail.

[13] The appeal is accordingly dismissed with costs.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

I agree



G SHAKOANE
ACTING JUDGE OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

Heard on	: 22 November 2019
Judgment delivered on	: 12 December 2019
For the Applicant	: K D Mphahlele
Instructed	: T J Machete Attorneys
For the Respondent	: D D Mtebule
Instructed by	: State Attorney