

REPUBLIC OF SOUTH AFRICA

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

CASE NO: HCAA23/2022

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE <u>26/04/24</u> SIGN 	

In the matter between:

THOKA ISAAC

APPELLANT

And

THE MINISTER OF POLICE

1st RESPONDENT

LIMPOPO PROVINCIAL COMMISSIONER OF POLICE

2nd RESPONDENT

JUDGMENT

LEDWABA AJ

- [1] Between 21hrs of the 21st December 2017 and 2h20 am of the 22nd December 2017, the appellant was arrested and detained without a warrant by Lieutenant Colonel Mohlala (Mohlala), the member of the South Africa Police Service, acting within the course and scope of his employment with the first respondent. The first respondent avers that Mohlala had reasonable suspicion that the appellant had committed an offence of contravening the domestic violence protection order as envisaged in section 8(4) of the Domestic Violence Act 116 of 1998 and that this is an offence covered in schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA) . It is common cause that the appellant was detained without court appearance for about five days until the 27th December 2017 when the public prosecutor decided not to proceed with any charge against him.
- [2] The existence of the protection order prohibiting the appellant from assaulting, threatening to assault, insulting or swearing the complaint, his former wife is common cause.
- [3] The first respondent's version is that when he saw two men walked out of the place where his former wife stayed carrying his fridge, the appellant threatened his ex-wife that if she did not return the fridge, she would know him. This is denied by the appellant. His version is that when that happened, he ordered the men to return the fridge back to his former wife's homestead.
- [4] The appellant contends that the arrest and detention are unlawful. The first respondent's version is that the arrest was justified in terms of section 40(1)(b) of the CPA read with Chapter 4(2) (a) of the South African Police Services Standing Order G 341, in that the appellant was arrested on reasonable suspicion of having committed schedule 1 offence of violating the protection order.¹ The Domestic Violence Court issued the protection order and the arrest warrant. The first respondent does not rely

¹ Par 3.3 and 4 of the amended plea- page 34- par 3 of bundle 1 of 4.

on this warrant.

- [5] The court of first instance found that there was little doubt that the police officers acted on a reasonable suspicion that the appellant committed a schedule 1 offence in that he violated the protection order and further that the appellant was about to commit further offences under schedule 1. It found that the jurisdictional requirements were satisfied, that the police officers properly exercised their discretion and that the arrest was lawful. Referring to Mvu case², it concluded that the appellant's detention was lawful.
- [6] The court of first instance dismissed with costs the appellant's claim. This aggrieved the appellant who lodged an appeal. On the 16th September 2022 the court of first instance granted the appellant leave to appeal to the full bench of this division.
- [7] Section 35(1)(f) of the Constitution presupposes a deprivation of freedom- by arrest- that is constitutional. This deprivation is for limited purpose of ensuring that the arrestee is duly and fairly tried.³
- [8] The prism through which liability for unlawful arrest and detention should be considered is the section 12(1) constitutional right not to be arbitrarily deprived of freedom and security. The unlawful deprivation of liberty, with its accompanying infringement of the right to human dignity has always been regarded as a grave wrong and a serious inroad into the freedom and rights of a person. The unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. The principles of delictual liability following unlawful arrest is that in order to succeed a plaintiff must show that the defendant either personally or vicariously deprive her or him of her liberty. Since the arrest and detention involve the deprivation of liberty, it is fair and just that the person who caused the arrest should

² Mvu v Minister of Safety and Security 2009(6) SA 82(GSJ)

³ S v Dlamini, S v Dladla & Others ; S v Joubert ; S v Schietekat (1999) ZASCA 8; 1999(4) 623(CC); 1999(1) BCLR 771(CC) - par

bear the onus of proving that the action is justified. Once the arrest and imprisonment are out of dispute, the defendant must allege and prove the existence of grounds of justification.⁴

- [9] Since arrest and detention without warrant is common cause in this matter, the first respondent bears the onus of justifying the arrest and detention. The first respondent relies on the provision of section 40(1)(b) of the CPA read with Chapter 4(2) (a) of the South African Police Services Standing Order G 341, to aver that the appellant was arrested on reasonable suspicion of having committed schedule 1 offence of violating the protection order
- [10] The reading of scheduled I of the CPA reveals that the contravention of the section of the Domestic Violence Act is not covered under the schedule, whether expressly or by implications. This defeats the first respondent's justification. On more than the balance of probabilities, the first respondent has failed to justify the appellant's arrest and detention.
- [11] The court of first instance misdirected itself when it found that the police officers acted on a reasonable suspicion that the appellant committed a schedule 1 offence. It further misdirected itself when it found that the jurisdictional requirements were satisfied, that the police officers properly exercised their discretion and that the arrest was lawful. This calls for intervention.

There is a misdirection in law which justifies interference with the order of the court of first instance.⁵ The appeal succeeds. There is no reason why the costs should not follow the judgment.

⁴ Mahlangu & Another v Minister of Police (2021) ZACC 10; 2012(7) BCLR 698(CC); 2021 (2) SACR 595(CC)- paras 25,27 30, 31 and 32

⁵ Liesching & Others v S (2018) ZACC 25; 2018(11) BCLR 1349(CC); 2019(1)SACR 178 (CC); 2019(4) SA 219(CC)Par 104

Order

12.1 The appeal succeeds with costs, including the costs in the court of first instance.

12.2 The court order of the court *a quo* is set aside and substituted with the following:

12.2.1. The plaintiff succeeds in his claim for unlawful arrest and detention against the 1st defendant with costs.



LGP LEDWABA AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION : POLOKWANE

I agree



F KGANYAGO J
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION : POLOKWANE

I agree



DIAMOND AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCES