

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No. AR134/24

In the matter between:

M[...] G[...] Appellant

and

THE MINISTER OF POLICE Respondent

ORDER

On appeal from: The Magistrates Court for the District of eThekweni held at Durban (Ms BG Shabalala sitting as court of first instance):

1. The appeal is upheld to the extent that the respondent is found liable to compensate the appellant for damages arising from his unlawful arrest and detention.
 2. The matter is remitted to the court *a quo* for hearing and judgment in respect of the quantum of the appellant's damages arising from his unlawful arrest and detention.
 3. The respondent is directed to pay the costs of the appeal, such party and party costs are to be on Scale B.
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JUDGMENT

Singh J (Henriques J concurring)

Introduction

[1] This appeal arises from the dismissal of the appellant's claim for damages in respect of an alleged unlawful arrest and detention. Judgment in the court a *quo* was granted against the respondent, who after having delivered a plea failed to attend the pre-trial conference and the trial.

The allegations on the pleadings

[2] The material allegations in the appellant's particulars of claim are the following:

- (a) on 24 September 2015, at Durban, members of the South African Police Services ('SAPS'), acting within the course and scope of their employment with the respondent, arrested and detained the appellant on a charge of assault;
- (b) the arrest and detention were unlawful in that the said police officers were not in possession of a warrant of arrest, alternatively the arrest and detention was contrary to the provisions of s 40 of the Criminal Procedure Act 51 of 1977 (the CPA);
- (c) the offence of assault was neither a schedule 1 offence nor a statutory offence;
- (d) the appellant was detained from 24 September 2015 until 28 September 2015, when the charges against him were withdrawn;
- (e) during his arrest and detention, the appellant was subject to interrogation and intimidation by members of the SAPS and consequently, suffered damages in the form of deprivation of his liberty, pain, mental anguish, trauma, contumelia, and loss of dignity;
- (f) he claimed the sum of R200 000 as damages arising from his unlawful arrest and detention.

[3] In the plea, the respondent pleaded as follows:

- (a) the respondent denied any knowledge of the appellant's arrest and detention;
- (b) the respondent specifically denied that:
 - (i) the appellant's arrest and detention was effected without a warrant and contrary to the provisions of s 40 of the CPA;
 - (ii) the appellant was charged with an offence that was neither a schedule 1 offence nor a statutory offence;
 - (iii) the appellant was subject to interrogation and intimidation by members of the SAPS or that he suffered damages in the sum claimed or any damages at all.

The proceedings in the court a quo

[4] It is common cause that the respondent failed to attend the pre-trial conference held on 7 September 2021, nor was there any appearance on his behalf at the trial on 2 November 2023. The trial proceeded in the absence of the respondent on both the issues of liability and quantum.

[5] The appellant's evidence was as follows:

- (a) he was 36 years old and employed as an operations controller at Servest Marine;
- (b) he had two children and was separated from his wife (the complainant);
- (c) on the evening of 23 September 2015, he and the complainant had a minor altercation and he left the matrimonial home;
- (d) at approximately 7h00 on the morning of 24 September 2015, he returned to the matrimonial home and went to sleep when he was awoken by two police officers;
- (e) the police officers advised him that the complainant had telephoned them and reported an altercation between the appellant and her. The police officers told him that they had come to arrest him;

- (f) he was handcuffed and placed in the police vehicle;
- (g) at the police station, his details were taken but his constitutional rights were not explained to him;
- (h) he was detained in a cell at the Wentworth Police Station and was advised that he could only apply for bail when he appeared at court;
- (i) the cells at the police station were untidy and had no drinking water. He was not provided with food. While waiting to appear at court the following day, he was only given mouldy bread and juice;
- U) he appeared in court on 25 September 2015 and the matter was adjourned to 28 September 2015;
- (k) he was thereafter taken to Westville Prison which was overcrowded with other prisoners. The prison cells were dirty and the toilets were uncleaned. The mattresses and bedding had bed bugs. There were no bathing facilities;
- (l) within the prison cells, there were criminal gangs who demanded money from him. He was in fear for his life and had to get a relative to send money by way of e-wallet so that he was given a bed with clean sheets to sleep on;
- (m) in respect of the charge against him, he denied having assaulted the complainant and maintained that they only had an argument. There was therefore no basis for her to have called the police or have him arrested;
- (n) he lived in a closely knit community with the houses in the neighbourhood in close proximity to each other. Various community members and neighbours witnessed the police arresting him.

[6] There being no appearance by the respondent, the appellant was not subject to cross-examination and his evidence was unchallenged.

The judgment of the court *a quo*

[7] On 22 January 2024, the court *a quo* dismissed the appellant's

claim with costs on the following basis:

- (a) The appellant had not adduced any evidence to support the allegations in his particulars of claim that his arrest and detention was unlawful;
- (b) the only issue which was addressed in the heads of argument furnished by the appellant's legal representative was that of quantum. No submissions were made in respect of liability;
- (c) that simply because there was an arrest and detention, it does not follow that an arrest was unlawful;
- (d) on the appellant's own version he had an altercation with his wife and when the members of the SAPS came to arrest him, he was advised that he had committed an act of domestic violence;
- (e) the appellant had failed to discharge the onus of proof which rested on him;
- (f) the arrest of the appellant was based on a reasonable suspicion by members of the SAPS that he had committed an act of domestic violence and therefore his arrest was lawful.

The issues before this court

[8] The following are issues for consideration in this appeal:

- (a) whether the court *a quo* erred in finding that the arresting officers acted rationally in arresting the appellant based purely on an allegation that the appellant committed an act of domestic violence against the complainant a day before the appellant's arrest;
- (b) whether the court *a quo* erred in determining that the appellant attracted the onus of proving that his arrest and detention was unlawful;
- (c) whether the appellant's arrest and detention was unlawful based on the evidence and the pleadings before the court *a quo*;
- (d) the costs of the appeal.

The appellant's submissions

[9] Mr *Sewpal* who appeared on behalf of the appellant submitted that

an arrest is *prima facie* wrongful and that the onus of proving the justification for the arrest rests on the respondent. Additionally, Mr *Sewpal* submitted that the respondent's plea was a bare denial and that the respondent had not placed any evidence to prove justification as a defence for the arrest. He submitted that any subsequent detention of the appellant was also unlawful.

[10] It was submitted that all that the appellant was required to prove was that he was arrested. Once he had proven that he had been arrested, the respondent bore the onus to prove the lawfulness of the arrest. The appellant relied on *Mojahi v Minister of Police and Another*¹ where Yacoob, J stated that 'it is trite that the deprivation of liberty is something that should only happen in exceptional circumstances. Once the plaintiff has established that he was deprived of freedom, the onus falls on the defendant to demonstrate that the deprivation, or arrest was lawful.'

[11] Mr *Sewpal* submitted that in effecting an arrest following a complaint of domestic violence, the police must act rationally. In *casu*, the appellant's unchallenged evidence was that the police had received a telephone call from the complainant on the evening of 23 September 2015. They then arrived at his home at 7h00 on 24 September 2015 which was more than seven hours after the complainant called them. Mr *Sewpal* submitted that there was no justification to have effected the arrest of the appellant without a warrant in circumstances where the complainant was not in any imminent danger. He submitted that the police ought to have investigated the complaint properly rather than arresting the appellant without a warrant. Mr *Sewpal* submitted that the appellant had discharged the onus to prove his unlawful arrest and detention. He asserted that the court *a quo* erred in finding that there was no evidence to support the appellant's claim of unlawful arrest.

¹ *Mojahi v Minister of Police and Another* (2023] ZAGPJHC 835, para 31

[12] Mr *Sewpal* conceded that in the event that the appeal is upheld in relation to the appellant's arrest and detention, then the issue of quantum must be remitted to the court *a quo* for determination. He submitted that should the appeal be upheld, then the respondent ought to pay the costs of the appeal on a scale as between attorney and client, alternatively scale B because of the manner in which the respondent litigated in the court *a quo*, namely the plea was a bare denial and the non-appearance by the respondent at the trial in the court *a quo*.

The respondent's submissions

[13] Mr *Khuzwayo*, who appeared for the respondent submitted that the judgment of the court *a quo* was 'less than ideal' as the appellant had proven his arrest and detention in the court *a quo*. He effectively conceded the appeal in respect of the respondent's liability for the unlawful arrest and detention. Mr *Khuzwayo* submitted that the amount sought by the appellant as damages was excessive. He agreed that the matter ought to be remitted to the court *a quo* for determination of quantum in respect of the appellant's claim for damages.

The law in relation to unlawful arrest and detention

[14] It is trite that an arrest constitutes an interference with a person's liberty and it is therefore fair and just to require that the person who arrested or caused the arrest should bear the onus of proving that the arrest was justified in law.² The evidence by the appellant in the court *a quo* was that he was informed by the police officers that he was being arrested on a complaint of domestic violence. However, this was not pleaded by the respondent in its plea which essentially constituted a bare denial of both the arrest and detention.

[15] Section 40(1)(q) of the CPA provides:

- '(1) A peace officer may without warrant arrest any person - ...
 - (q) who is reasonably suspected of having committed an act of

² *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589 E - F

domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, and which constitutes an offence in terms of any law.'

Section 1 of the Domestic Violence Act 116 of 1998 (the OVA) identifies 'physical abuse' as an act of domestic violence, and defines it as 'an act or a threatened act of physical violence towards the complainant, where that conduct harms or may cause imminent harm to the complainant.'

[16] Section 3(2) of the OVA provides for a peace officer without a warrant of arrest to effect an arrest 'at the scene of an incident of domestic violence' where he or she reasonably suspects that the person has committed an offence, including violence against the complainant.

[17] It is clear that the acts of domestic violence, including 'physical abuse' referred to in the OVA are the offences referred to in s 40(1)(q) of the CPA.

[18] In order for there to be an arrest without a warrant, and in cases where it is alleged the arrest was unlawful, the following jurisdictional facts must be present³:

- (a) the arrestor must be a peace officer;
- (b) the arrestor must entertain a suspicion;
- (c) the suspicion must be that the arrestee committed an offence;
- (d) the suspicion must rest on reasonable grounds.

[19] In the case of *Duncan*⁴, the court discussed the provisions of s 40(1)(b) of the CPA but the principles apply equally to s 40(1)(q) of the CPA as both sections allow for arrest without a warrant. Once the jurisdictional facts referred to above are established, the discretion of whether or not to arrest the suspect arises.⁵ This discretion must be

³ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G - H

⁴ *Ibid*

⁵ *Ibid* at 819 - 820

exercised in good faith, rationally and not arbitrarily⁶. In *Louw and Another v Minister of Safety and Security and Others*⁷, Bertelsman, J held with reference to the right to personal liberty, that arresting officers are under a constitutional obligation to consider whether there are no less invasive options to bring the suspect to court than the drastic measure of arrest.

[20] Consequently, it follows that a police officer must carefully weigh the prevailing circumstances and a fair balance must be struck between the reasons to arrest and the reasons for the suspect to retain his liberty on the understanding that he will co-operate with the investigation. The arresting officer must therefore keep an open mind within the parameters of the Constitution.⁸ The arresting officer must analyse and assess the quality of the information critically and must not accept it lightly. It is only once this is done, that he may entertain a suspicion.⁹ Aside from assessing the quality of the information available, the arresting officer must consider whether there are other avenues open to securing an appellant's attendance at court. This must be done in a manner which is consistent with the Constitution and only where there are no other means to secure a suspect's attendance at court, must an arrest without a warrant be effected.¹⁰

Application of the facts to the law

[21] The unchallenged evidence of the appellant in the court *a quo*, was that he was advised by the arresting officers that he was being arrested because of a telephonic complaint of domestic violence made by the complainant. From the said evidence and given the respondent's plea of a bare denial, I am left to infer that the arrest was made in terms of s

⁶ *Naidoo v Minister of Police and Others* 2016 (1) SACR 468 (SCA), para 40

⁷ *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) at 187 C - E

⁸ *The Constitution of the Republic of South Africa, 1996*

⁹ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 E - H

¹⁰ *Minister of Safety & Security v Sekhoto and Others* [2010] ZASCA141, paras 28 - 30; 2011 (5) SA 367 (SCA), paras 28 - 30

40(1)(q) of the CPA given the appellant's evidence that the arresting officers received a complaint of domestic violence and were acting on such complaint.

[22] It was the appellant's unchallenged evidence that he left the matrimonial home on the evening of 23 September 2015 after the argument with the complainant. He returned at 7h00 on 24 September 2015 and was asleep when members of the respondent arrived at his home and placed him under arrest. Regard being had to the said circumstances of his arrest, the appellant was not arrested at the scene at the time of the incident as envisaged in s 3(2) of the OVA. The scene of the alleged incident would have been the night before his arrest, namely on 23 September 2015. This would also mean that at the time of his arrest, the complainant was not in any actual or imminent danger given the lapse of over seven hours from the time the complaint would have been received to the time of the arrest. There was, in my view, therefore no rational basis for the arresting officer to have arrested and detained the appellant without a warrant. Applying the *Louw* and *Sekhoto* decisions, the circumstances called for the arresting officers to investigate the complaint and to satisfy themselves that there was no other means of securing the appellant's attendance at court before effecting the arrest.

[23] It was undisputed that the appellant was detained until 28 September 2015. This is borne out by the police docket which forms part of the record. The court *a quo* misdirected itself in holding that the appellant had not discharged the onus of proving his arrest and detention. There was also no basis for the court *a quo* to have found that the arrest of the appellant was based on a reasonable suspicion by members of the SAPS that he had committed an act of domestic violence, particularly in the absence of any witnesses testifying that the complainant was in any immediate or imminent danger. Furthermore, the appellant was not arrested at the scene of the alleged domestic violence immediately after the complaint was made as he

was arrested more than seven hours after the complaint was received. There was no evidence to the contrary and consequently the court a *quo* materially misdirected itself in concluding that the appellant had not discharged the onus of proving his arrest. The appeal must therefore succeed on the issue of liability.

[24] With regard to the issue of quantum, both parties were in agreement that the matter ought to be remitted to the court a *quo* for the determination of quantum. The court a *quo* would be in a better position to hear the appellant's evidence in support of his claim for the amount of damages he seeks and for the respondent to challenge such evidence.

[25] The remaining issue is that of costs which must rightly follow the result. Mr *Sewpal* submitted that the respondent ought to pay the costs of the appeal on a punitive scale due to the manner in which the respondent chose to litigate in the court a *quo*, alternatively on scale B. I am not persuaded that this is a matter which warrants costs on a punitive scale. The issues on appeal, in my view, were not of a complex nature to justify such an award. Costs on a party and party basis on scale B is an appropriate order.

Order

[26] In the circumstances, I make the following order:

1. The appeal is upheld to the extent that the respondent is found liable to compensate the appellant for damages arising from his unlawful arrest and detention.
2. The matter is remitted to the court a *quo* for hearing and judgment in respect of the quantum of the appellant's damages arising from his unlawful arrest and detention.
3. The respondent is directed to pay the costs of the appeal, such party and party costs are to be on scale B.

SINGH J

CASE INFORMATION

Date of Hearing	24 January 2025
Date of Judgment	14 March 2025
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