



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: *Yes*
(2) OF INTEREST TO OTHER JUDGES: *Yes*
(3) REVISED:

Date: *19.09.19*

Signature: *[Handwritten Signature]*

CASE NO: 3042/2017

APPEAL CASE NO: A 3094/18

In the matter between:

VINCENT TSOTSO

1st PLAINTIFF/APPELLANT

NONI TSOTSO

2nd PLAINTIFF/APPELLANT

and

THE MINISTER OF POLICE

DEFENDANT/RESPONDENT

JUDGMENT

BHOOLA AJ :

Introduction

[1] This is an appeal from a judgment of the Mogale Magistrate's court (Learned Magistrate De Beer) in which the court dismissed the claim instituted by the appellants against the respondent for damages arising from their unlawful arrest and detention with costs.

[2] The appellants also seek condonation of the delay in prosecuting their appeal and reinstatement of the lapsed appeal. Although in our view condonation should have been refused as there appeared to be no prospects of success on appeal, we nevertheless exercised our discretion to grant condonation and to deal with the appeal on the merits.

[3] The appellants are the brothers of the complainant, Florina Thozama Tsotso and reside with her and her children in their mother's home. On 25 November 2016, following an evening of drinking they returned home and perpetrated acts of domestic violence on their family members. The complainant contacted the South African Police Services ("SAPS") and two peace officers arrived at the family residence at about 23.30 that night. They arrived about two and half hours after the complainant's calls as they were busy attending to the scene of an accident.

[4] The appellants were arrested without a warrant in terms of section 40 Criminal Procedure Act, 51 of 1977 ("the CPA") on a charge of domestic violence at about midnight on Friday 25 November / early morning of 26 November 2016. They were detained in the holding cells at the Krugersdorp police station until their release on Monday 28 November 2016 when the complainant withdrew charges following their call to their mother expressing remorse.

The issue on appeal

[5] The appeal is primarily based on factual conclusions made by the court *a quo* as to the lawfulness of the arrest and detention, but also includes the legal question of whether the appellants should have been granted bail in circumstances

where they were not arrested for an offence referred to in Part II or III of Schedule 2 of the CPA.

[6] The appellants contend that on the factual issues the learned magistrate erred in concluding, *inter alia*, that

6.1 The first appellant committed an act of violence as contemplated in section 3 of the Domestic Violence Act 118 of 1998, as the complainant testified that he did not intentionally injure her on the lip. The learned magistrate failed to consider the testimony of the complainant as to the circumstances in which she sustained the lip injury;

6.2 The second appellant committed an act of violence as contemplated in section 3 of the Domestic Violence Act 118 of 1998, as no evidence implicated the second appellant in committing any act of violence;

6.3 The probabilities favour the respondent in that after the initial altercation there was no evidence that the appellants were a threat to the complainant or that there was imminent harm. The situation was calm for two and a half hours until the two appellants were arrested;

6.4 The investigating officer did not consider their release on bail when they were charged on the morning of 26 November as the bail form was only completed on 28 November before the appellants were taken to court. The respondent failed to adduce any evidence regarding the continued detention of the appellants.

6.5 The appellants had to be kept in custody until they sobered up;

6.6 The detention and continued detention of the appellants after being charged was lawful even though the complainant did not want them to be arrested; and

6.7 The appellants were not allowed to testify about the conditions of the cells.

Judgment of the court *a quo*

[7] The court found that there was a domestic relationship between the complainant and the appellants and there was indeed an altercation on the night of 25/26 November as a result of which the complainant called the police. On the probabilities the court rejected the denial by the appellants that they were aggressive and that they attacked or assaulted the complainant and/or her mother. The court found as a fact that the complainant had indeed sustained an injury on her lip but could not determine whether it was caused intentionally or by accident. This was corroborated by Constable Mushwana who said her lip was broken and she was in a state of fright, and that the complainant and the kids looked very scared. Constable Mushwana also confirmed that the complainant had called the police three times that evening. It was not disputed that the police did try to sort things out at the scene but Constable Mushwana further testified that the two appellants were drunk and they were swearing at their mother and the complainant. The court found that he was an honest witness in that he testified that the appellants were not aggressive towards the police but only towards their mother and the complainant and they co-operated when they were arrested. As further sign of his honesty the court cited his evidence that the complainant did not want the matter to go as far as an arrest, but he would have failed in his duties if he had not done so. He further stated during cross-examination that there was imminent danger of harm because the complainant kept calling and he could not leave aggressive people in the yard. The court accepted Constable Mushwana's version that it was not within his power to release the appellants on warning or bail as this was the investigating officer's duty.

[8] The court found that Sergeant Makhoana corroborated the evidence of Constable Mushwana and went further to testify that the sister of the complainant had locked herself in her room, which is also confirmation that there was indeed some form of altercation in the house. He also stated that once a crime had been committed the safety of the victim was the only priority for the police and that only a magistrate or prosecutor could set bail once they had been arrested.

[9] The court had regard to the legal framework within which the arrest occurred, citing the relevant provisions of the Domestic Violence Act, 116 of 1998, ("DVA") and reinforced the obligation on law enforcement bodies, such as SAPS, to protect victims as far as possible, and section 40 (1) (q) of the CPA which authorises a peace officer to "without warrant arrest any person who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the DVA, which constitutes an offence in respect of which violence is an element". Counsel for the appellants contended, relying on *Minister of Safety and Security v M* (CA350/2012) [2014] ZAECHGHC 58 (10 July 2014) at para [24], submitted that there must be physical violence inflicted or imminent before an arrest can be effected. In this regard the court correctly held it was clear from the evidence that the complainant was abused physically and emotionally by the appellants who are in a domestic relationship with her.

[10] The court found in applying the facts to the law (referring also to *Duncan v The Minister of Law and Order* [1986] (2) All SA 241 (A), [1986] ZASCA 24; [(24 March 1986) that the arresting officer entertained a reasonable suspicion that an offence had been committed. The evidence was that the complainant had an injury and called the police three times for assistance; the children were scared and the complainant's sister had locked herself in her bedroom; and the two appellants were very aggressive towards their family members. The court cited *Mabona v The Minister of Law and Order* 1988 (2) SA 654 (EC) in regard to the reasonableness test, found that the test had been met and that the arrests were therefore lawful.

[11] In considering the lawfulness and justification of the detention the court found that the appellants were detained to ensure the safety of the complainant and her family as well as for the appellants to sober up as they were intoxicated (which was justified by police standing orders). The court correctly found that under the DVA only a prosecutor or magistrate could set bail and that Constable Mushwana's evidence established that the appellants were very aggressive towards the complainant and her mother and they could not be left on the premises and simply warned to appear in court. The court further had regard to the fact that the appellants were released two days after their arrest as a result of the complainant's

withdrawal of the charges, but held that the fact of the matter was that the police officers were of the opinion that they had to keep the appellants in custody and based on all the evidence it was clear that objectively the police did indeed have the right and it was their duty to arrest the appellants and keep them in custody. In these circumstances the court cannot be faulted for finding that the detention of the appellants was also lawful and in dismissing their claim with costs.

[12] It is apparent from the judgment that in determining the lawfulness of the arrest and detention, the court correctly applied the following approach set out in *Stellenbosch Farmers' Winery Group and another v Mattel SA and another* [2002] ZASCA 98 :

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[13] Furthermore, the judgment of the court was justified on the basis of the credibility and factual findings it had made and it is a well established principle that

this court should not likely interfere with such findings : *S v Dlumayo and another* 1948 (2) SA 677 (A).

[14] The court's conclusion that the arrest of the appellants without warrant was lawful and justified in terms of section 40(1)(q) of the CPA and section 1 of the Domestic Violence Act cannot be interfered with. In circumstances where the complainant and other occupants were in danger of imminent harm, the arresting officers acted in compliance with their duty under the Domestic Violence Act to secure the scene and to separate the appellants from the complainant. In our view the court *a quo* did not err or commit any misdirection in finding that the arrest and detention of the appellants was lawful and in dismissing their claim for damages.

[15] Furthermore, the factual finding that the appellants' detention over the weekend was not unlawful as it gave them time to sober up is not a misdirection. None of the other factual findings likewise constitute an error or misdirection on the part of the magistrate.

Order

[16] In the result, we make the following order: -

The appeal is dismissed with costs.

A handwritten signature in black ink, appearing to read 'U. BHOOLA', is written over a horizontal line.

U. BHOOLA

Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree



F. DIPPENAAR

Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

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