THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 3 May 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Minister of Police v Gqamane (226/2022) [2023] ZASCA 61 (3 May 2023)

Today the SCA upheld an appeal with costs, against the decision of the Eastern Cape Division of the High Court of South Africa, Makhanda (the high court).

The respondent (Mr Gqamane) was arrested without a warrant on 17 February 2017 for allegedly assaulting the complainant with whom he was romantically involved, days earlier when she tried to collect her furniture from his home. She was admitted at Dora Nginza Hospital (the hospital) for two days and treated for a broken arm. A charge of assault with intent to commit grievous bodily harm was laid against the respondent. Upon his arrest, he was detained in police cells over the weekend until the Monday and was subsequently released directly from the cells at about 14h00 without a court appearance.

In April 2017, the respondent instituted a claim for damages of R240 000 in the Regional Court, Port Elizabeth (the trial court), against the appellant arising from allegations of unlawful arrest and detention. The appellant's defence was that: (a) the victim was a complainant as defined in the Domestic Violence Act 116 of 1998 (the DVA). (b) The assault constituted an incident of domestic violence with an element of violence.(c) The arresting officer was entitled to arrest without a warrant in terms of s 40(1)*(q)* of the Criminal Procedure Act 51 of 1977 (the CPA) read with s 3 of the DVA. (d) The arresting officer reasonably suspected the respondent of having committed a schedule 1 offence and as such, he could lawfully arrest the respondent without a warrant in terms of section 40(1)*(b)* of the CPA. The trial court dismissed the action and found that the jurisdictional requirements to arrest were met.

On appeal, the high court reversed the decision of the trial court and ruled in favour of the respondent. It held that the trial court failed to address the issue of the discretion to arrest, and, this failure caused the trial court to reach a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

The appeal to the SCA turned on the narrow question whether the high court could *mero motu* determine the question of the lawful exercise of a discretion to arrest even though not pleaded by the respondent.

The respondent contended that a discretion to arrest was inherent to the question of the lawfulness of the arrest. A court on appeal can consider the issue if it was canvassed fully at the trial. The complaint by the appellant was that the issue was not pleaded. Its attention was directed to one case at the trial and thereafter, the respondent impermissibly attempted to canvass a different case on appeal to the high court.

The SCA held that it was trite that a party was bound by their pleadings and ordinarily, they would not be allowed to raise a different or fresh case without a due amendment. A court was equally bound by those pleadings and should not pronounce upon any claim or defence not made in the pleadings. A court may relax this rule where the issue involves a question of law which emerged fully from the evidence or was apparent from the papers. The SCA held that the submission that a discretion to arrest is inherent to the question of the lawfulness of the arrest is incorrect in law. In the case at hand, the high court erred by conflating the onus to prove the jurisdictional requirements to arrest (which rested on the appellant) and the overall onus to prove other elements of the claim, including improper exercise of discretion to arrest (which rested on the respondent). The SCA held that once the high court found that the jurisdictional requirements to arrest the respondent were met, the appellant discharged the onus, which rested on it to justify the arrest. That should have been the end of the matter. Despite confirming that the trial court was correct regarding the jurisdictional facts, the high court held that it ought to have considered whether the discretion was properly exercised. The implication of the decision by the high court was that the onus to prove the proper exercise of the discretion to arrest rested with the appellant rather than the respondent. Accordingly, the high court erred on this score.

The SCA went on to hold that the danger of a litigation by 'ambush' and the prejudice that could arise from reasoning pertinent questions backwards, was manifest in this case. Whether or not the discretion was properly exercised cannot be judged based on facts not known at the time, against the standard of what was best in hindsight, based on a standard of perfection. If it was intended to found the case upon an alleged improper exercise of a discretion to arrest, then that ought to have been pleaded unambiguously. The high court would have determined the issue on established facts.

Importantly, the SCA held that the conclusion by the high court missed an important connection between an arrest made pursuant to s 40(1)*(b)* and one effected under s 40(1)*(q)* of the CPA. An arrest made in terms of s 40(1)*(q)* explicitly refers to an offence in respect of which violence is an element, while an arrest made pursuant to s 40(1)*(b)* requires that there be allegations of a commission of a schedule 1 offence. Given that s 40 (1) *(q)* incorporates s 3 of the DVA, the nature of the violence envisaged in s 40(1)*(q)* is unbounded, justifiably so to afford the maximum protection envisaged under the DVA. The offence for which the respondent was arrested fell under both ss 40(1)*(b)* and 40 (1)*(q)*.

For the reasons above, the high court conflated the onus and pertinent questions about the lawful exercise of the discretion to arrest the respondent, which were neither pleaded nor fully canvassed at the trial. The high court therefore erred and the appeal must succeed with costs.

~~~~ends~~~~
~~~~