

SOUTH AFRICA / JUDGMENT

D.V.M.T v Minister of Police (2021/51114) [2024] ZAGPJHC 921 (30 August 2024)

[2024] ZAGPJHC 921**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Raubenheimer

CASE / FILE NUMBER

2021/51114

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Policy**FLYNOTES:**

CRIMINAL – Domestic violence – Violation
of protection order –
Arrest
in terms of warrant – Discretion of arresting officer –
Arrest only where real danger that complainant
could be at risk of
harm – Police National Instruction 7 of 1999 –
Specific factors for cognizance of arresting
officer –
Factors not considered by arresting officer in this case –
None of factors in Act considered –
Arrest and detention of
plaintiff was unlawful – Domestic Violence Act 116 of
1998, s 8.
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
CASE
NO: 2021/51114
(1)
REPORTABLE: YES / NO
(2)

OF INTEREST TO OTHER JUDGES: YES / NO
(3)
REVISED: YES / NO

DATE: 30 August 2024
SIGNATURE
In

the matter between: D[...]
V[...] M[...]
T[...]
Plaintiff
and
THE
MINISTER OF
POLICE
Defendant

Summary: Domestic violence – arrest in terms of a warrant –
Domestic Violence Act 116 of 1998 – South African Police
National Instruction 7 of 1999 – discretion of arresting
official.
ORDER
1.
The arrest and detention of the Plaintiff by the employees of the
Respondent
was unlawful and the Respondent is liable for any damages
proved by the Plaintiff.
2.
The Respondent is liable for the costs of the action on the scale as
between
party and party.

JUDGMENT

RAUBENHEIMER, AJ

Introduction

- [1] The Plaintiff, a 62-year-old teacher, claims that her arrest by the police officers was unlawful on the basis that it was contrary to the provisions of the Domestic Violence Act, 1998 (Act 116 of 1998).
- [2] The Plaintiff was arrested on 13 September 2019 for contravening a protection order confirmed as a final order on 29 February 2016. The Warrant of Arrest was issued together with the Interim Protection

Order on 25 November 2015.

- [3] The protection order was obtained by her brother S[...], a 65-year-old retired former soldier and government employee, with whom she resided on the same property.
- [4] The protection order prohibited the Plaintiff from:
- (i) Committing domestic violence by submitting the complainant to any physical, economic, sexual, emotional, verbal or psychological abuse, harassment or stalking;
 - (ii) enlisting the help of another person to commit the acts of domestic violence mentioned in (i).
- [5] The Plaintiff's brother laid a complaint at the Randfontein Police Station on 10 September 2019 that she had contravened the protection order.
- [6] On her appearance in court on 16 September 2019 she was released on bail. The charges against her were later withdrawn for want of evidence.

Factual matrix

Evidence by the Plaintiff

- [7] The Plaintiff testified that she is the registered owner of the residential property (premises) where both she and her brother reside and that she pays for the bond as well as all the utility accounts.
- [8] She is a teacher at the nearby school for many years.
- [9] She has a daughter and a grandchild who sometimes resides with her whilst her daughter is elsewhere engaged.
- [10] On the morning of the arrest she was on the premises with her grandchild.
- [11] It was early in the morning when she was approached by the arresting officer, Constable Ntsoelengoe (Ntsoelengoe) together with two other police officers.
- [12] Ntsoelengoe informed her that her brother had laid a complaint against her that she had sworn at him and threatened to kill him. He informed her that on account of the complaint by her brother she is under arrest for a contravention of the protection order.
- [13] Despite her denial of contravening the protection order, Ntsoelengoe arrested her and transported her to the Randfontein Police Station where she was detained until Monday 16 September 2019 when she was taken to court.
- [14] Shortly after her arrival at the police station her attorney arrived to apply for bail but was informed that the police are not authorised to grant her bail and that she would have to apply for bail at court

on the Monday when she will be taken to court. She was consequently not allowed to consult with her attorney.

- [15] Before being removed from the premises she contacted her daughter who came and collected her child.
- [16] The conflict between her and her brother originated when their mother passed away whereafter her brother started to demand that the house should be transferred to him. He insisted that he is entitled to the house in accordance with the will of his mother.
- [17] The Plaintiff indicated to him that the Master of the High Court confirmed that no will in respect of the mother had been filed with the Master.
- [18] Her brother is addicted to drugs, does not work and does not contribute financially to the expenditure of the household.
- [19] At no stage during the arrest or detention was she afforded the opportunity to make a statement. Her warning statement was only taken from her on the morning that she was taken to court when she was informed that she could either make a statement or tell her story in court. She elected to tell her story in court.
- [20] She denied that she signed any document evidencing that she was informed of her rights in terms of the Constitution and denied that the document contained in the docket evidencing that she was so informed was signed by her on the 13th but persists that she was informed of her rights on the 16th.
- [21] She never threatened to kill her brother or swore at him. Her testimony is that he had no reason to be afraid of her as he is a man of large stature and a former soldier in the liberation struggle and a very brave man.
- [22] After the alleged incident her brother returned to the shared residence and stayed there until her arrest.

The evidence of the arresting officer

- [23] The arresting officer is employed in the crime office at the Randfontein Police Station. He joined the South African Police Service in 2006 and underwent basic training in the same year. At the time of the incident he was a constable.
- [24] He received the docket on Friday morning 13 September 2019. The docket contained the Interim Protection Order, the Final Protection Order, the Warrant of Arrest and the statement of the complainant.
- [25] He proceeded to the residence of the Plaintiff and arrived there at 08:45.
- [26] He found the Plaintiff to the back of the premises holding a baby and informed her of the charges against her and that he is arresting her for a contravention of the protection order.

- [27] He arrested her and transported her to the police station in his vehicle. At the police station he decided to detain her after which he processed her and handed her over to the official in charge of the cells
- [28] He only received basic training on domestic violence and has since he completed basic training never received any further training on domestic violence.
- [29] One of his functions is the executing of domestic violence arrest warrants of which he executes between 5 and 10 per month.
- [30] He does not know the contents of the Domestic Violence Act and specifically Section 8 where the discretion dealing with arrest is contained.
- [31] Ntsoelengoe does not know about the existence of National Instruction 7 of 1999 dealing with the conduct of police officers in dealing with complaints of domestic violence.
- [32] He performed no further investigations on the matter before effecting the arrest and did not give consideration to any factors mentioned in the National Instruction or the provisions of the Domestic Violence Act.
- [34] It was him who made the decision to arrest her and detain her until Monday morning and not to take it to court on the Friday so that she could apply for bail.
- [35] Ntsoelengoe had no interaction with a prosecutor at any stage between Friday and Monday to provide such prosecutor with information on which to decide whether to release the Plaintiff on bail, neither did
- he obtain any information from the Plaintiff which could be provided to the prosecutor to decide whether to release the Plaintiff on bail.
- [36] He denied that he had at any stage been requested by her attorney that she be released on bail.
- [37] According to him, domestic violence is a serious matter and has to be dealt with accordingly.
- [38] The factors that he took into consideration in his decision to arrest and detain the Plaintiff was the threats of violence and that the parties resided on the same premises.
- [39] According to him there were no alternative options than to arrest the Plaintiff and detain her until she could be brought to court on Monday 16 September 2019.
- [40] He did not give consideration to any other means of securing the Plaintiff's presence in court, neither did he conduct any investigation or obtained any information regarding her attendance in court without arresting her.
- [41] He has never considered any other options to arrest in a domestic violence matter where an arrest warrant was issued for the arrest of the perpetrator.

[42] The imminent harm that the complainant stood to suffer stemmed solely from the threat uttered by the Plaintiff on 10 September 2019.

The evidence of warrant officer Mbekwe (Mbekwe)

[43] Mbekwe testified that he works in the community centre of the Randfontein Police Station, and he charged the Plaintiff on Sunday night 15 September 2019. He was also responsible for taking the warning statement of the Plaintiff on the morning of the 16th of September 2019 before she went to court.

[44] Mbekwe is not aware of the content of National Instruction 7 of 1999 neither is he aware of the content of the Domestic Violence Act.

The statutory position

[47] Arrest with a warrant in terms of the Domestic Violence Act are dealt with in sect 8(4) of which the relevant portions read as follows:

“(b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in Section 17(a). (Emphasis added.)

(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which—

(i) specifies the name, the residential address and the occupation or status of the respondent;

(ii) calls upon the respondent to appear before a court, and on the date and at the time, specified in the notice, on a charge of committing the offence referred to in Section 17(a); and

(iii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent. (Emphasis added).”

[48] The mere breach of a protection order is insufficient to justify an arrest. An additional requirement namely the possibility that the complainant could suffer imminent harm should the arrest not be effected has to be present.

[49] The existence of imminent harm to the complainant has to be based on reasonable grounds. The arresting officer consequently must have had evidence to the effect that not effecting the arrest would place the complainant in imminent harm.

[50] National instructions for the South African Police are issued by the National Commissioner in terms of Section 25(1) of the South African Police Service Act, Act 68 of 1995 and are according to Section 25(2)

applicable to all members of the South African Police Service.

[51] The National Commissioner issued National Instruction 7/1999 – Domestic Violence by Consolidation Notice 5/2006. The Instruction is a comprehensive instrument dealing with a broad range of aspects in

respect of Domestic violence.

[52] The purpose of the Instruction is stated in paragraph 1 as:

“intended to provide clear direction to a member on how to respond to a complaint of domestic violence in order to comply with the

obligations imposed upon him or her in terms of the Domestic Violence Act.”

[54] Paragraph 5(1) requires a member of the South African Police Service (SAPS) attending a domestic violence scene to:

“first of all determine whether the complainant is in any danger and take all reasonable steps to secure the scene as set out in paragraph 6 (below) and to protect the complainant from any danger.”

[55] Paragraph 6 deals with the securing of a domestic violence scene and prescribes that the police officer attending the scene has to establish whether the complainant is in any danger and must interview the complainant to ascertain whether the complainant is in imminent danger.

[56] Subparagraph 11(2) provides as follows:

“(a) Where a respondent has contravened any prohibition, condition, obligation or order contained in a protection order, a complainant may hand the Warrant of Arrest together with an affidavit, wherein it is stated that the respondent contravened such protection order, to any member.

(b) If, upon receipt of the Warrant of Arrest together with the affidavit, referred to in subparagraph (a) (above), it appears to the member that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order, the member must arrest the respondent for contravening the protection order on the strength of the warrant.

(c) In considering whether or not the complainant may suffer imminent harm, a member must take the following into account:

(i) the risk to the safety, health or well-being of the complainant;

(ii) the seriousness of the conduct comprising the alleged breach of the protection order; and

(iii) the length of time since the alleged breach has occurred:

- (d) If the member is of the opinion that there are insufficient grounds to arrest the respondent, he or she must immediately hand a Notice to the respondent as provided for in Form 11 to the Regulations. The member must insert the first court day thereafter as date of appearance on the form and complete the certificate, provided for in the Notice. The member must put the duplicate original of this Notice in the docket which is opened for the contravention. This docket must be taken to court on the first court day thereafter.
- (e) ...” (Emphasis added.)
- [57] The Warrant of Arrest contains a proviso mirroring the provisions of the Act as well as the Instruction reading as follows:

“Therefore, you are hereby authorised and ordered to forthwith arrest the respondent in terms of the Domestic Violence Act, 1998, if there are reasonable grounds to suspect that the claimant may suffer imminent harm as a result of the alleged breach of the protection order by the Respondent.”

Application

- [58] It was stated in *MR v Minister of Safety and Security*[1] that as police officers have a discretion whether to arrest or not it requires an arresting officer to weigh and consider the facts and circumstances applicable to each specific case and to decide whether an arrest is necessary.
- [59] The Domestic Violence Act creates an arrest regime quite different from that found in the Criminal Procedure Act, Act 51 of 1977 or for that matter any other Act dealing with arrest in terms of a Warrant of Arrest.
- [60] In terms of the Domestic Violence Act a Warrant of Arrest is issued together with the interim order[2], which is issued in the absence of the perpetrator.[3] On issuing the Interim Protection Order the court determines a return date on which the perpetrator has to show cause why the order should not become a final order.[4]
- [61] The interim nature of the order has no influence on the validity of the Warrant of Arrest as a contravention of the Interim Order could activate the Warrant of Arrest.[5]
- [62] Due to the variety of conduct that could constitute domestic violence the Act provides for arrest with a warrant only in those instances where there is a real danger that the complainant could be at risk of harm.[6]
- [63] The Domestic Violence Act recognises that the remedies available to victims of domestic violence as at the time of its enactment was ineffective to protect the victims.[7]
- [64] The Act provides for the protection not only of the victims of domestic violence through the issuing of an Interim Protection Order and a Warrant of Arrest but also the protection of the procedural rights of the perpetrator by authorising an arrest only in very specific circumstances.[8]

- [65] The Act does not create a blanket right to arrest in terms of a Warrant of Arrest. For a Warrant of Arrest to be executed an additional element has to be present namely reasonable grounds for the existence of imminent harm to the complainant.[9]
- [66] The determination of the existence of the additional element has been assigned to the arresting officer in terms of the provisions of the Act.[10]
- [67] Recognising the additional responsibility on an arresting officer the South African Police Service issued the guidelines in the National Instruction containing specific factors to be taken cognizance of by the arresting officer in exercising his or her discretion whether to arrest or not. These instructions are peremptory in nature and contain sanctions for contravention.[11]
- [68] For the threshold in terms of Section 8(4) to be met the suspicion of the arresting officer must firstly be objectively sustainable[12]. It must furthermore entail that not only has a protection order been contravened but, as a consequence of the contravention, the complainant is subject to imminent harm.[13]
- [69] Imminent harm has been defined as:
- “... the danger of harm of a certain degree of immediacy that activates the protection ... That is to say a harm which is impending threateningly, ready to overtake or coming on shortly.”*[14]
- [70] The arresting officer had a responsibility to conduct an investigation before executing the Warrant of Arrest. He is only authorised to effect the arrest after having obtained information indicating that there was a contravention of the protection order, and that the contravention entailed that the complainant was subject to imminent harm.[15]
- [71] The arresting officer testified that he was not aware of the provisions of the Domestic Violence Act dealing with arrest with a warrant neither did he conduct any investigations to determine the existence of imminent harm. He was not aware of what transpired between the complainant and the suspect in the time lapsed between the complaint and the time of the arrest, or that the complainant had returned to the residence after the alleged incident and remained there from the 10th to the 13th without any incidents. The arresting officer did not consider that the Final Protection Order was issued already in February 2016 and the complaint was laid on 10 September 2019 and that no incidents had occurred between those dates. None of the factors to be taken into consideration in terms of the National Instruction was consequently considered by the arresting officer, he was not even aware thereof. Neither was any of the factors mentioned in the Domestic Violence Act considered by him. He was likewise not aware of them.

Conclusion

- [72] The arrest and detention of the Plaintiff was consequently unlawful, and the Defendant is held liable for the unlawful arrest and detention of the Plaintiff.

RAUBENHEIMER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgement is deemed to be 30 August 2024.

Appearances

For the Plaintiff: L Schreuder instructed by Gildenhuis Malatjie Inc For the Defendant: O Mokoka instructed by State Attorney Date of hearing: 21 May 2024 Date of

Judgment:

30 August 2024

- [1] 2016 (2) SACR 540 (CC).
- [2] Section 8(1)(a) of the Domestic Violence Act ("DVA").
- [3] Section 5(2)(b) of the DVA.
- [4] Section 5(3) & (5) of the DVA.
- [5] Section 8(2) of the DVA.
- [6] Section 8(4)(b) of the DVA.
- [7] Preamble to the DVA.
- [8] *Seria v Minister of Safety and Security and others* 2005
- (5) SA 130 (C).
- [9] Section 8(4)(b) of the DVA.
- [10] Section 8(4)(a) of the DVA.
- [11] Section 18(3) and 18(4)(a) of the DVA, section 25(2) South African Police Service Act, 68 of 1995 and Par 13 of SAPS National Instruction 7/1999 Domestic Violence.
- [12] *Greenberg v Gouws and Another* 2011
- (2) SACR 389 (GSJ).
- [13] *Greenberg v Gouws supra Minister of Safety and Security v M* (CA 350/2012) ZAECGHC 58 (10 July 2014).
- [14] *Seria v Minister of Safety and Security and others supra*.
- [15] *Khanyile v Minister of Safety and Security* 2012

(2) SACR 238 (KZD).

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