



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE

Case No: 328/12

In the matter between:

THE MINISTER OF SAFETY AND SECURITY

APPELLANT

and

BONISILE JOHN KATISE

RESPONDENT

Neutral citation: *Minister of Safety and Security v Katise*(328/12) [2013] ZASCA 111
(16 September 2013)

Coram: **Nugent, Lewis, Maya, Tshiqi and Pillay JJA**

Heard: **9 September 2013**

Delivered: **16 September 2013**

Summary: Where a peace officer without warrant arrests a person on the reasonable suspicion that he is committing acts of domestic violence the arrest will not be unlawful only because there is no domestic protection order against that person in place.

ORDER

On appeal from Eastern Cape High Court, Grahamstown (Rorke AJ sitting as court of first instance):

The appeal is upheld. The order of the high court is replaced with:

‘The plaintiff’s claim is dismissed with costs.’

JUDGMENT

Lewis JA(Nugent, Maya, Tshiqi and Pillay JJAconcurring):

[1] The respondent, Mr B J Katise, was arrested by members of the South African Police Service at Bedford, Eastern Cape, on 18 April 2009. They did not have a warrant for his arrest. Katise was subsequently detained at the instance of a magistrate for ten days before he was released on bail. The charge against him – contravening a protection order issued in terms of the Domestic Violence Act 116 of 1998 – was withdrawn. He instituted action in the High Court, Eastern Cape, Grahamstown, against the Minister of Safety and Security for damages for wrongful arrest and detention. That court (Rorke AJ) upheld the claim and awarded damages in the sum of R200 000 to be paid to Katise. The Minister appeals against that order with the leave of the high court.

[2] Before considering whether the arrest of Katise was wrongful I shall briefly set out the events that gave rise to the arrest. Katise, who lived in Bedford, had a history of behaving in an abusive fashion when drunk. The victim of his abuse was his wife. He had assaulted her on various occasions, and used abusive language. The police in

Bedford had frequently been called to intervene and had witnessed Katise treating his wife with violence. Katise admitted that he had been arrested on various occasions, either at home or on the street, for 'drunken noise'.

[3] MrsKatise was advised by the police to 'open up a domestic violence' case. She had gone to the magistrate's court and, on 2 June 2008, obtained a provisional protection order under the Domestic Violence Act 116 of 1998, restraining Katise from assaulting or threatening to assault her. That order gave Katise the right to appear in court on 23 June 2008 to give reasons why the provisional order should not be confirmed.

[4] Although the magistrate filled in a form relating to an enquiry under the Act it is not clear whether there was in fact any enquiry made and whether the protection order was made final. It appears that neither Mr nor MrsKatise appeared in court on the return date and the magistrate made no order. In my view nothing turns on this. The existence or otherwise of a protection order was not necessary for the determination of whether the arrest was wrongful. I shall explain why in due course.

[5] The arrest was made on 18 April 2009. Katise had arrived at his home drunk. MrsKatise was there with her 11 year old child and a friend, MsSizani (who happened to be a relative of Katise). MrsKatise told Katise that she was going with Sizani to an aunt's home. Katise had called her vulgar names and suggested she was a whore. On her version, as well as that of Sizani, he had attempted to pour water from a pot on the stove over her head and had spilled water on the floor. A scuffle broke out between them. He chased her and stabbed her with a sharp object, called a 'sword' by the various witnesses. She threw a stone at his head which bled. Her hand was cut. The friend went to a public phone and called the police. When Constable Booi, together with a police reservist, arrived on the scene he saw Katise chasing his wife, shouting and carrying a spade. The sword could not be found. Both of them were injured at that stage. Katise had a gash on his forehead which was bleeding and MrsKatise's hand was cut. Both required stitches to their wounds.

[6] Booi took bothKatises to a nearby hospital, asking the staff to attend to their injuries, and to keep watch on them. He would return to collect them, he said. He then

went to the Bedford police station where he reported the incident to Sergeant Marangule. It was Marangule who had sent Booï to the Katise's home on receiving the telephone call from Sizani. Booï advised Marangule that when he got to the house he saw that Katise had stabbed Mrs Katise and heard him threatening to assault her with the spade.

[7] Marangule instructed Booï to fetch the Katises from the hospital and to bring Katise to the police station: 'he was still drunk and still not co-operative'. He was also still 'violent'. Booï brought both Katises to the police station where Mrs Katise made a statement about the incidents of the afternoon. Marangule considered that Katise 'intended to injure' his wife. When filling in the necessary forms (which Katise refused to sign) Marangule heard Mrs Katise state that there was a 'domestic violence order' against her husband. He checked Katise's file and found that an interim protection order had been issued. He arrested Katise.

[8] When asked at the trial why he did so, Marangule responded: 'Booï informed me that Mr Katise had a sword and he hid it and he threatened her with a spade. And then I thought to myself if they can go back both of them he can use it again and Mr Katise was also drunk. . . That is why I took that decision even the wife said he can kill her.' When cross examined, and advised that Booï had said that the reason Katise had been arrested was because he had contravened a domestic violence protection order, Marangule said 'Yes it is right and more because he assaulted the wife and injured her.'

[9] That was sufficient in my view to justify an arrest without a warrant under s 40(1)(g) of the Criminal Procedure Act. That section reads:

'Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person –

. . .

(g) who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.'

The definition of 'domestic violence' in that Act includes physical abuse and emotional, verbal and psychological abuse. What Boozi saw himself, and what Mrs Katise and Sizani reported, clearly amounted to domestic violence of which violence was an element.

[10] Unfortunately Katise's claim was confused by the introduction of the lapsed interim protection order as a reason why the police had not properly exercised the discretion to arrest without warrant. The particulars stated, amongst other things, that Marangule had 'failed to exercise his discretion properly in that the Plaintiff should never have been arrested at all had the Arresting Officer taken due account of all the relevant circumstances and in particular that the interim protection order had been discharged in June 2008 and that no protection order existed at the time of the arrest'.

[11] Rorke AJ regarded this factor as decisive of the question whether the arrest was unlawful. He said that had Marangule considered the content of the file that the police had, he would have realized that the protection order had not been confirmed, and thus did not meet the requirement for a lawful arrest without a warrant. Marangule, said the court, was 'overly zealous' in exercising powers he did not have. The arrest without warrant, and ensuing detention, were thus unlawful and Katise was entitled to claim damages.

[12] The high court was not persuaded by the Minister that the police had acted lawfully in terms of s 3 of the Domestic Violence Act. That section provides that a peace officer may, at the scene of an incident of domestic violence, without warrant 'arrest any respondent' (defined as a person who is in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant) 'whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant'.

[13] Although Katise's conduct falls squarely within the ambit of this section, the high court considered that the Minister had not pleaded reliance on it, and the defence was raised at a late stage during the course of the trial. Counsel for Katise argued that had he known that the Minister would rely on the section he would have cross-examined differently. Rorke AJ accepted this argument, and added that the section envisaged that the arrest without warrant 'may only occur at the scene of the incident and not sometime

thereafter.’ Further, he added, the ‘circumstances and exigencies’ ascertained after investigation and ‘critical analysis’ had to demand an immediate arrest. Booie had made no such investigation or analysis and thus reliance on s 3 was misplaced.

[14] I do not understand the section, on its plain meaning, to require an arrest at the scene of the domestic violence only after investigation and analysis. The stabbing of MrsKatise, and threats to injure her with a spade, are self-evidently acts of domestic violence. It is true, however, that Katise was arrested only after he had been treated in hospital and then brought to the police station. But in any event, the conduct of Katise falls within the ambit of s 40(1)(g) of the Criminal Procedure Act.

[15] As to the argument that no reliance was placed on that section, or on s 3 of the Domestic Violence Act, this court has repeatedly said that if the evidence adduced at the trial covers the particular issue then the court is not bound by the pleadings. (See *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 22.) In my view, the evidence clearly demonstrated that Katise was guilty of committing acts of domestic violence. That was enough to make the arrest without warrant lawful under s 40(1)(g) of the Criminal Procedure Act. (I see no reason why it would also not be lawful under s 40(1)(b) which gives a peace officer the power to arrest without warrant where he or she reasonably suspects that a person has committed an offence listed in Schedule 1 of the Act, which includes assault when a dangerous wound is inflicted.) In any event, the pleadings do refer to offences other than the breach of a protection order. While somewhat vague, the Minister’s plea, which also unfortunately refers to a breach of the order, also stated that MrsKatise’s life was clearly in danger and that the police had to take steps to protect her ‘life and limb’. That was sufficient to allow reliance on s 40(1)(g).

[16] In my view the Domestic Violence Act adds to the protection offered to a victim of an offence like assault by the common law and the Criminal Procedure Act. It does not detract from it, which would be the effect of not permitting an arrest without warrant where the complainant has once sought protection under that Act. The existence or otherwise of the interim protection order could not mean that in a clear case of violent abuse of a complainant the police could not arrest the perpetrator in order to protect her or him.

[17] As to the question whether Marangule exercised his discretion properly, all that is required is that he acted in good faith, rationally and not arbitrarily. In *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 39 Harms DP said peace officers are 'entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached.'

[18] I thus find that the arrest of Katise was based on a reasonable suspicion that he had committed acts of domestic violence against his wife and was accordingly lawful. And once his continued detention was authorized by a magistrate, as it was, that was also lawful. Katise's claim should have been dismissed.

[19] Katise did not oppose the appeal and was not represented in this court. However, his attorneys were notified of the appeal and its set down.

[20] 1 The appeal is upheld with costs.

2 The order of the high court is replaced with:

'The plaintiff's claim is dismissed with costs.'

C H Lewis
Judge of Appeal

APPEARANCE:

For the Appellant: N J Sandi

Instructed by:

Mili Attorneys, Grahamstown

Webbers Attorneys, Bloemfontein

For the Respondent: No Appearance