



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No. 40947/2019

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

REVISED: YES

Date: 29 June 2023

In the matter between:

MAXWELL BUTHELEZI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MAHOMED, AJ

INTRODUCTION

1. The plaintiff claims damages for unlawful arrest and detention. On 15 January 2019, at approximately 15h15, police officers of the Naledi Police station, visited the plaintiff's property after they received information from an informant, that

there were counterfeit bank notes and a money printing machine on the property. They were informed that the money was going to be moved to another premises within three hours. The police had to act quickly and could not obtain a warrant in the circumstances.

2. It is not disputed that a money printing machine, the size of an industrial photocopier and “stacks” of counterfeit money were found on the premises.

3. It is not disputed that as a result the plaintiff was arrested on 15 January 2019 and released on 17 January 2019, after the prosecutor issued a *nolli prosequi*, on the basis that the items found were in a rondavel on the plaintiff’s property, there being insufficient evidence to link the evidence to the plaintiff.

POINT IN LIMINE

4. Advocate Mashele appeared for the defendant and argued that the plaintiff failed to serve the statutory notice in terms of s 4 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, as amended, on the provincial offices of the defendant.

5. He submitted that the Act as amended requires service on both the national and provincial offices of the defendant.

6. He argued that the purpose of such service is to enable the defendant to investigate the claim at its provincial office in proximity to the station involved and its personnel who acted in the course and scope of their duties.

7. Advocate Luvuno appeared for the plaintiff and submitted that his attorney noted in the national office’s letter acknowledging receipt of the notice that *“it was to forward the notice to the provincial office.”*

8. The plaintiff’s attorney noted further that the defendant had filed its plea and suffered no prejudice. Counsel submitted there is not merit in the point raised. It

was argued that, by filing its plea, the defendant had investigated the matter and filed its defence.

9. Furthermore, at the pretrials held in July and August 2022, the defendant did not minute any prejudice it suffered.

10. I agree with the plaintiff's counsel, when the defendant filed its plea, it had already formulated its defence and suffers no prejudice. It must have concluded its investigations to file its defense.

11. The point in limine is dismissed.

The Pleadings

12. The plaintiff in its amended particulars of claim¹, sets out the damages he suffered for:

12.1. unlawful arrest and detention	R 150 000
12.2. damages to property	R 550
12.3. defamation	R150 000
12.4. past and future loss of earnings	<u>R100 000</u>
R400 550	

The Defendant's Evidence

13. The defendant commenced, the onus is on the defendant to prove that the arrest and detention were lawful.

Warrant Officer Ngobeni

14. The defendant led the evidence of four witnesses, whose recollection of the events were similar.

¹ Caselines 002-7 at para 7

15. Warrant officer Ngobeni was in charge on the day and he testified that whilst on patrol on 15 January 2019 at approximately 15h30 he received a call from a known informant who told him that at an address at Ngwenya Street, Emdeni, he would find counterfeit money and a printing machine.

15.1. He was informed further, that the money was going to be moved within three hours and that the “old man” knows of the items and the money.

16. Officer Ngobeni testified that he had to act quickly and there was no time to obtain a warrant.

17. He understood that the money would be moved but did not know where to. He rounded up three other officers, to assist him in the operation and together they went to the plaintiff's premises in Ngwenya Street in Soweto.

18. They identified themselves and informed the occupant at the premises Ms, Rikhotso of the purpose of their visit and asked for the plaintiff.

19. He testified that they searched the home on the property. They found nothing, and then enquired about the structure on the property, “the rondavel”. He asked to be allowed to access it.

20. Ms Rikhotso informed him she could not assist and that the old man knew all about the rondavel.

21. She informed him that the old man had gone off to the Dobsonville mall nearby to collect his laundry.

22. He asked Ms Rikhotso to call him and ask him to return home.

23. There was a dispute as to who contacted the old man, however nothing turns on this fact. When the plaintiff was contacted, he was told the police were on

the property and he was asked to return home, to which he replied he would return after collecting his laundry.

24. Officer Ngobeni, on a second thought decided to instead dispatch two officers to collect him from the mall whilst he and the third officer remained on the property.

25. It is disputed whether Ms Rikhotso accompanied the police to the mall as they needed someone to identify the plaintiff, however nothing turns on this fact.

26. Upon the plaintiff's return to his home, the plaintiff unlocked the door to the rondavel and gave them access.

27. When he entered the rondavel, he saw a large printing machine, almost the size of an industrial photocopier and a box nearby, which he could see from his vantage point, contained money.

28. He enquired from the plaintiff about the printing machine and the money. The plaintiff informed him that he knew nothing more than that the items belonged to a tenant, who rented a room on his property. He was Dlamini, who spent a night on his premises and left the next day for a holiday to KwaZulu Natal.

29. The plaintiff informed him that Dlamini had paid him R800 rental for the month of December 2018 and that when he failed to return by the end of the first week of the month to pay his rental for January 2019. Thereafter, the plaintiff with the help of Ms Rikhotso, his partner, moved Dlamini's belongings into the rondavel for safe keeping. He needed the room to rent out to another.

30. Officer Ngobeni testified that the plaintiff told him, he did not know what the machine was used for, he preferred to respect his tenant's privacy, he did not think it necessary to investigate further.

31. Officer Ngobeni tried contacting Dlamini on a number the plaintiff gave to him, however there was no reply. He thereafter informed the plaintiff that he was

going to arrest him, as the items were found in the rondavel which was on his property. He testified that the information he received was correct and there was no other on the premises which belonged to the plaintiff. He could not contact anyone that the plaintiff referred to at the time.

32. The witness denied that he and his team damaged the door to the rondavel. As he exited the rondavel he noticed people had gathered out in front of the property, and some were taking pictures.

33. Officer Ngobeni denied that he knew of the photographers or the persons on the street.

34. He testified that they took the plaintiff to the Naledi SAPS to be detained and to count the money.

35. Subsequently the plaintiff was detained at Jabulani Police station he did not know the outcome of the case against the plaintiff.

36. He testified that he patrolled the Naledi area since 1993 and retired in February 2023. It was the first time that he was on the plaintiff's premises. He noted that it was a four bedroom house, with 3 rooms as outhouses, and the rondavel. He noted that only Ms Rikhotso and the plaintiff occupied the premises.

Constable Tshikwane

37. He testified that he relied on the informant about the money printing machine and money and corroborated that they were informed the money was to be moved to another premises in three hours, therefor they did not have time to obtain a warrant.

38. All the officers travelled in one marked car with a canopy and on arrival at the address they found Ms Rikhotso in the house, after they informed her of the reasons for their visit, she gave them permission to search.

39. He testified that he searched the house and found money, which Ms Rikhotso said was not hers and that it belonged to the plaintiff.

40. The witness testified that as the plaintiff let them into the rondavel, he saw the machine and the money in the box. He was satisfied that the information they received was correct.

41. Warrant Officer Tshikwane confirmed that they arrested the plaintiff and took him to the Naledi Police station where he was in custody for further investigation.

Constable Sono

42. He testified that he was called to join the team at approximately 15h00 on the date of arrest.

43. He testified that he searched the house and found some money and noted that the owner was not home.

44. He told Ms Rikhotso to call the owner. She informed a person on phone that the police were on the property. He pointed out the plaintiff in court as the owner.

45. Constable Sono, saw the money and the machine in the rondavel. He testified that it took four persons to move the machine off the premises.

46. His evidence is that he saw a box with money on the premises.

47. The witness noted that the plaintiff was angry and refused to cooperate with any further details of the tenant whom he said owned the machine and the money.

48. He confirmed that the matter was handed over to the investigating office and he did not know the outcome of the case.

Constable Radamba

49. He testified that on 15 January 2019 Ngobeni called him to the boardroom at the Naledi station when he pointed out the plaintiff to him and the money in the boxes.

50. He counted the notes in the plaintiff's presence which totalled a sum of R1 051 200.

51. He did all that was necessary to preserve the evidence and then took the plaintiff to the Jabulani SAPS where he explained his rights to him and was satisfied that the plaintiff understood his rights.

52. The witness confirmed that the printing machine was a colour Konika Minolta.

53. He noticed persons taking photos in the boardroom however, he did not know who they were.

The Plaintiff's Evidence

54. The plaintiff testified that on 15 January 2019 around mid-morning he was on his way to collect his laundry from the nearby launderette, when he received a called from someone who identified himself as the police. He advised him that they were at his property. He was asked to return.

55. He received a second call from the same person, who instructed him to wait at the launderette, he will be picked up.

56. Immediately thereafter, he noticed the police vehicle drive up to the launderette and he approached the police to inquire if they were looking for him.

57. He requested to be allowed to collect his laundry, which was allowed, he was then directed to the back of the vehicle, where he found his partner. She informed him that the police were concerned that he would run off. They did not know him and they brought her along to identify him.

58. He testified that when he returned to his house, he found the whole community of Emdeni outside his property and noticed uniformed police officers on his property.

59. He walked to his home and was followed by the police when he changed into more casual clothing. The police said nothing to him, they simply arrested him and took him off to the station.

60. Mr Luvuno inquired about a rondavel, when the witness recalled that the police asked him to open the rondavel. He informed them, it was not locked, and he led them to it.

61. The witness testified that they found a machine 1m x 1m in dimensions.

62. He testified that it was Dlamini's machine, he moved it out of his room when he failed to pay rental for the next month.

63. He leases rooms on his property and if a tenant fails to pay by the 5th of the month, he removes the tenant from the rooms and rents it out to others.

64. He found a locker that contained his pots and blankets to sleep, a sponge mattress, and this machine in the room.

65. His wife assisted him, and they pushed the machine to the rondavel where he stored it for safekeeping, for the tenant.

66. The plaintiff testified that the police found the machine in the rondavel and pushed the machine out when through the entrance, it hooked on the side and the machine opened. He saw "stacks of money", in the machine.

67. He was surprised and shocked, and frightened by what he observed, that this person who rented his room owned such large sums of money.

68. He knew nothing about the money, it was the first time that he had seen the money, it belonged to Dlamini, the tenant.

69. At that point the police told him that they were arresting him. The machine and money were found in a rondavel which was on his property.

70. He testified that he was taken to the Naledi police station, where at a long table, the police took the money out of the machine and proceeded to count the money.

71. The witness testified that he was very disturbed that the police even allowed the public into the station and allowed them to take photographs of him, particularly in that he had done nothing wrong.

72. He testified that the police asked him to hold the bags in which he had placed the money, but he refused.

73. Thereafter he was detained at the Jabulani police cells.

74. He testified that he was ill, and the cells were very cold and dirty. The blankets were dirty, and he was forced to sleep next to the toilets.

75. He suffered with arthritis and is on medication for his condition. He was ill on the day he was arrested.

76. He was very upset to have to spend time in the cell, he was not familiar with that scenario and furthermore he had to share the cell with a few young men.

77. Three days later he was collected by the Hawks and taken to the Commercial Crimes Court. He spent a weekend in the cells, and he was taken to court only on a Thursday. He made a statement to the officer from the Hawks.

78. He was taken to court but never put into the dock and was told to leave because there was insufficient evidence to prosecute him. He was advised by the

officer who showed him out, to sue the police. When he returned home, he instructed his attorney to institute this action against the police.

79. In cross examination, it was put to the plaintiff that he was arrested late in the afternoon, as it appears in the pleadings and this corresponds with the evidence of the police officers. The plaintiff replied that his attorney was mistaken, and he stood by his evidence that he was arrested and detained on the morning of 15 January 2019.

80. After some argument, in cross examination, the plaintiff conceded that he had made a statement ², but only to Mr Khubeka at the Hawks, he denied making any statement to the police. He agreed that he spoke to the Hawks in Zulu and testified that the statement is incorrect if it reads that the items were “found in Dlamini’s room”. He took the police to the rondavel as they instructed, where he had stored Dlamini’s belongings. They found the items in the rondavel.

81. He testified that he does not do any crime. He stated that he was too old and did not appreciate such behaviour and stress.

82. In cross examination the plaintiff conceded that the police could not locate Dlamini on the day of his arrest. However, he denied that he gave the police Dlamini’s contact number. He conceded he was the only person on his property at the time that the police found the counterfeit money and machine.

83. It was put to the plaintiff in cross examination that the reason he was arrested was that none of the information he gave to the police regarding Dlamini had assisted them at the time and plaintiff was the only person on property where the money and the machine were found. The plaintiff denied giving the police any information.

84. The plaintiff proffered that his attorney was again mistaken when he failed to plead that he was ill.

² Exhibit A, 032- 33 to 39

85. However, his main complaint against the police is that they caused him embarrassment when they visited his property and arrested him. He got calls from Durban, about an offense he had never been involved in.

86. Photographs were taken of him which associated him with fake money, and people no longer trust him. He should not have been arrested for something he did not know of.

87. The plaintiff denied that he presented two versions regarding where the items were found. He wanted the court to accept his testimony in court. He insisted that the machine and money were in the rondavel, and they belonged to Dlamini, a tenant. He asked the court to ignore the statement he made to the Hawks just two days after his arrest, in regard to the location of the items found.

88. The defendant's counsel referred to his attorney's letter of demand ³ wherein was stated that on his return with the police he noticed other police on the premises and the "door had been broken." The plaintiff denied he was lying and wanted the court to accept his testimony that the police broke the door to the rondavel when they moved the machine.

89. The plaintiff insisted the items belonged to Dlamini who is in the location, he testified that he saw him in his car the day before. He testified that Dlamini was renting a place in another street in the area.

90. Mr Mashele put it to the plaintiff that Dlamini does not exist and that he used Dlamini, as an alibi to claim damages from the defendant. This was denied, he insisted Dlamini was in the area and the Hawks or police must look for him, it is not his duty to point him out.

91. It was further put to him that he had a criminal record, the plaintiff replied that he did not see the relevance of the proposition. On further probing he admitted that

³ Caselines 001-16 para 3

he had previous convictions. When asked how many, he replied he did not know and stated he was not going to engage with counsel any further regarding his previous convictions. He proffered that counsel was simply trying to exaggerate his situation.

92. Advocate Luvuno informed the court that he had no questions in reply.

Ms Rikhotso

93. She is the plaintiff's partner, they lived together for 30 years.

94. She greeted the police on their arrival and understood they visited the premises to carry out a search.

95. She was asked where the old man was and replied that he had gone to the Dobsonville mall to collect his laundry.

96. On inquiry from the police, she replied that she knew nothing about the rondavel, the old man knew of it.

97. She testified that the police contacted the plaintiff, they told him to return to his home. They called him a second time, and instructed him to wait at the mall, they were going to pick him up.

98. She testified that she accompanied the police because they needed her to identify him, whilst others remained on the premises.

99. On their return she noticed people from the neighbourhood gathered around at their property. Some people took photographs.

100. She was unsure as to the time of the day when the police arrived.

101. She saw the plaintiff led the police to the rondavel and they pushed open the door where they found the machine and money in the rondavel.

102. She testified that the machine belonged to Dlamini, however she does not know who the money belonged to. She saw the money for first time when the police moved the machine and a drawer opened and she realised money was stored in it. She was shocked to see money stored in the machine.

103. She testified that Dlamini was a tenant on their property who spent one night on their property and went off on a holiday to Natal. In January 2019, he had not returned to pay the rent for the month. She testified that the plaintiff called him on several occasions to inquire as to when he would pay the rental, but Dlamini failed to return.

103.1. Thereafter, she and the plaintiff cleared the room off his belongings and moved them to the rondavel for safekeeping.

103.2. She testified that she saw the money for the first time when the police were moving the machine, she was shocked to see such a large sum of money.

103.3. She could not tell who the money belonged to but was sure that machine belonged to Dlamini.

104. The evidence is that upon finding the money, the police told the plaintiff that they were going to arrest him.

105. The plaintiff cooperated and went into the house to collect his toothbrush and a face cloth whereupon he left with the police.

106. Mr Luvuno had no questions in reply and closed the plaintiff's case.

ARGUMENT

107. Mr Luvuno proffered that his client's claim for damages is the main argument in casu. He submitted that his client was deprived of his liberty. The object of arrest

is to bring a witness to court, he submitted the police should have and indeed could have used less invasive methods to secure his client's attendance in court. Counsel, furthermore, argued that his client's detention was unlawful, there is no evidence before this court that any of the officers followed up on the case or tried to find Dlamini.

108. Counsel submitted that the police were only interested in securing an arrest, they had no regard for the constitutional rights of his client when they arrested him.

109. Mr Luvuno submitted that the court is only to address the issue of whether the arrest was lawful and whether his detention was lawful and necessary. He submitted that the court must bear in mind that we find ourselves in an era of gross negligence of human rights and freedoms.

110. It was argued that an arrest is *prima facie* deemed to be unlawful unless the defendant proves it is lawful.

111. An arresting officer must on an objective basis hold a reasonable belief that a person committed an offence before he arrests him/her.

112. Mr Luvuno conceded that our law provides for an arrest without a warrant and accepts the police evidence as to why they could not obtain a warrant. However, they ought to have approached this matter with caution in that:

112.1. The plaintiff is an elderly person.

112.2. He cooperated with police all along.

112.3. The plaintiff could have escaped when he was instructed to wait at the mall.

112.4. The police knew where he lived.

112.5. He was also ill, as he suffered with arthritis.

113. Counsel referred to **OLIVIER v MINISTER OF SAFETY AND SECURITY**,⁴ Horn J stated that *“the arresting officer must have exercised his discretion as to whether the suspect must be arrested or not and in this regard his suspicion must be realistic and well founded, having regard to the circumstances of the case.”* The court emphasized that “when deciding if an arrestor’s decision was reasonable, each case must be decided on its own facts”.

114. Counsel submitted that there were several ways besides an arrest that the police could have secured his attendance in court. In the light of plaintiff’s constitutional rights, arrest ought to have been the last resort. There is no evidence that any of the police officers continued to look for Dlamini.

115. The evidence confirms that they were satisfied that they “had their man” as they were informed. The police failed to exercise their discretion in casu. They acted with total disregard for the plaintiff’s rights.

116. Counsel argued that the police did not have a water tight case on arrest. At the first appearance in court the prosecutor was able to issue a noli prosequi. He could easily assess there was no case to prosecute the plaintiff.

117. Mr Luvuno suggested that R275 000 was a fair compensation, in the circumstances, his client has suffered a grave injustice and was in the public eye. In fact, the embarrassment he suffered is his main complaint. I noted the pleadings claim R150 000.

118. The plaintiff in his senior years has had to endure living in filthy conditions in prison and was forced to share a small space with other younger persons.

119. Counsel referred the court to **NHLAPO v MINISTER OF POLICE**⁵, the court awarded the plaintiff R275 000 for his unlawful arrest and detention.

⁴ 2009 (3) SA 434 W

⁵ (26738/2020) [2022] ZAGPJHC 99

120. Counsel reminded the court that the plaintiff was detained for two days and was arrested in the presence of his wife and neighbours.

121. Mr Luvuno informed the court that the plaintiff abandons his claim for defamation and loss of earnings. He claims the compensation for damages for his unlawful arrest and his detention for two days.

122. Mr Mashele on behalf of the defendant argued that the police met the jurisdictional requirements as set out in s40 (1) (b) of the Criminal Procedure Act of 1997.

123. Counsel argued that the plaintiff is an unreliable witness there were many contradictions and versions of the events he put to the court and in his statement after the arrest. He submitted that the court approach his evidence with caution.

124. It was argued that in the pleadings as confirmed at a pretrial held on 20 July 2022, the plaintiff accepted the version as per the particulars of claim. The plaintiff testified that that he was arrested at 09h00 on 15 January 2019 and that he was a sick man, however none of this was pleaded.

125. Mr Mashele submitted that there were several material contradictions in the plaintiff's testimony to the statement he made two days after his arrest and against the proven facts.

125.1. The plaintiff testified that the police found the machine and money in the rondavel, however in his statement to the police just two days after his arrest, he stated that they were found in Dlamini's room.

125.2. Mr Mashele argued that the plaintiff changed his version at the trial, he "adapted" so that it is corroborated by the defendant's witnesses, after he perused the defendant's statements in discovery.

126. It was submitted further that the plaintiff stated the rondavel was unlocked, he argued, that if it were unlocked the police would not have had to await his return to search the rondavel.

127. Counsel for the defendant submitted that the court must approach the plaintiff's evidence with caution, he was evasive, and he exaggerated.

128. Mr Mashele submitted there is no Dlamini, he was made up to give the plaintiff an alibi and he misled the police when he provided them with an alleged contact number for Dlamini.

129. Counsel submitted that the items belonged to the plaintiff, and he was the only one on the property who knew about the items. He argued that the manufacture of counterfeit money is a serious offence punishable with a sentence of 15 years without the option of a fine⁶.

130. Counsel for the defendant submitted the police exercised the necessary discretion and held a reasonable suspicion as testified. He argued that it cannot be said that they acted arbitrarily.

131. He accepted that there were variances in the defendant's witnesses' evidence against the statements they made, however argued they were not material, and the court must bear in mind that much time has passed and the officers deal with a load of cases that they are likely to omit certain information.

132. He submitted the arrest and detention was lawful and the defendant had discharged its onus, the claim stands to be dismissed.

JUDGMENT

133. An infringement of a right to liberty cannot be taken lightly in any democratic society.

⁶ Section 2(1) of Prevention of Counterfeiting of Currency Act 16 of 1965.

134. Those who hold power must exercise that power with the utmost caution and responsibly. There is a purpose to that power, their actions must be rationally connected to that purpose only.

THE LAW

135. Subsection 40(1)(b) of the Criminal Procedure Act xx of 1977, provides:

“A peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody.”

136. The jurisdictional requirements for a s40(1)(b) defence are that:

136.1. the arrestor must be a peace officer

136.2. the arrestor must entertain a suspicion

136.3. the suspicion must be that the suspect committed an offence referred to in schedule 1 and

136.4. the suspicion must be on reasonable grounds.

137. In **NKAMBULE v MINISTER OF LAW AND ORDER**⁷, the reasonable grounds must be reasonable from an objective point of view. Where the officer has an initial suspicion, he must take steps to confirm it to make it a reasonable suspicion for the arrest to be lawful.

138. In **DUNCAN v MINISTER OF LAW AND ORDER**⁸, the court confirmed that the discretion to arrest must be properly exercised, it involves an objective test, and

⁷ 1993 1 SACR 434 TPD

⁸ 1986 2 SA 808 AD

the exercise of power should not be arbitrary. The court continued that decisions must be rationally connected to the purpose for which the power was given.

139. This court is to determine whether the arrest was lawful in the circumstances of this matter, and every matter is to be decided on its own facts.

140. The police officials in casu obtained information through an informant and critical to them at the time, was that they were informed that the money was to be moved in three hours.

141. It is not disputed that they were entitled to act without a warrant in the circumstances.

142. They were informed that the “old man” knew of the printing of counterfeit money.

143. It is noteworthy that upon arrival at the premises, they asked to see the “old man” and Ms Rikhotso replied that he was on his way to the mall.

144. They asked Ms Rikhotso what was in the rondavel, she replied that she knew nothing about what was in it and that the old man knew about the rondavel.

145. Initially the police contacted the plaintiff and instructed him to return to his home, however officer Ngobeni changed his mind and called the plaintiff again, this time he instructed him to wait to be collected.

146. Officer Ngobeni dispatched two officers to pick him up and the others remained on the property, presumably to secure the premises.

147. The police awaited the plaintiff's return, to search the rondavel. I am not persuaded that the rondavel was unlocked or else the police would have continued to search there as well.

148. When the rondavel was unlocked and upon entry, the evidence is that the police saw a box with money, which was clearly visible to them and a money printing machine, amongst other items which appeared old and strewn about.

149. Officer Ngobeni heard the plaintiff's explanation, that the items belonged to his tenant, one Dlamini. Although the plaintiff denied having given a contact number for Dlamini to the police, it is more probable that he had a number and would have given it to them. If the items did not belong to him, if they were a source of his misfortune at the time, the natural thing to do is to hand over a contact number, to avoid blame or guilt.

149.1. I noted Ms Rikhotso's evidence, in examination in chief she testified that the plaintiff had on several occasions called Dlamini and inquired of him when he was going to return and pay the rental. If she is to be believed, it makes sense then if he had a number, he would give it to the police.

150. Office Ngobeni testified that he tried the number in the plaintiff's presence and got no response.

151. Only thereafter the plaintiff was informed that he was going to be arrested.

152. I am of the view the police did exercise their discretion. This was not simply an arbitrary arrest. They did not work on just a hunch.

152.1. Officer Ngobeni, searched premises, awaited access to the rondavel, questioned the plaintiff, heard of a Dlamini, could not contact him on a number and found items on the property that would constitute an offense in terms of Schedule 1 of the Criminal Procedure Act.

152.2. He arrested only after he formulated a view and understood the seriousness of the criminal activity that likely went on. On the probabilities, the owner of the property, who kept leases, and strict rules on payment of rentals and eviction in case of non-payment by a specified date, must have

had some inquiry as to the purpose and use of the machine. He did nothing about it.

152.3. It cannot be expected that the plaintiff would admit to knowledge of “stacks of money” as he described it, on his property and thereby incriminate himself. Such large sums are usually kept in a bank. In this regard, only the plaintiff’s say so is before the court and can never really be tested.

153. The police in each of the “steps” outlined at paragraph 152 above, demonstrated that they applied their discretion and formulated a reasonable suspicion, from an objective point of view. In **BIYELA v MINISTER OF POLICE**⁹, the court held that the suspicion must be based on “specific and articulable facts or information”. The court in this judgment also confirmed that there is no onus on the police to carry out a thorough investigation in every case before the arresting officer exercises his/her discretion to effect an arrest without a warrant in terms of s40(1) (b) of the Act.

154. Mr Mashele proffered that the offence was serious with a 15 year sentence, without the option of a fine and the evidence was overwhelming, the court must see that the arrest was necessary in the circumstances of this case.

THE RELIABILITY OF WITNESSES

155. The police officers were wholly reliant on the statements they made almost four years ago and although there were certain inaccuracies, in their evidence, I agree with Mr Mashele that they were not material. Mr Mashele proffered that they have dealt with many cases since the arrest of this plaintiff in January 2019 and cannot be expected to remember every detail with precision/accuracy.

156. The lawfulness of the arrest must be determined on a balance of probabilities and each matter is to be decided on its own facts.

⁹ (1017/2020) [2022] ZASCA 36 at par 36

157. The plaintiff was not a reliable witness, he tended to exaggerate his situation and was evasive in his testimony. He tried to gain sympathy for his seniority and his arthritis condition. The age of the person is but one of the factors to be taken into consideration.

158. Apart from the contradictions which were highlighted by counsel for the defence, I noted with interest that when the plaintiff commenced testifying, the plaintiff sought to give the court the impression that he was taken home from the mall and immediately upon return to his home he was arrested.

159. He tried to avoid any reference to the rondavel, which was material in the evidence in casu. He was reminded by his counsel that the facts relating to the rondavel were already before the court and only after this prompting did, he address the events related to the rondavel and the items found in them.

159.1. It is arguable that he may have forgotten, however this witness sat through all the testimony of all defendant witnesses, wherein the rondavel and their discovery featured prominently.

160. Counsel for the plaintiff submitted that his client was detained for two days, however, the plaintiff was adamant, that he was arrested and spent the weekend and the days following in the cells. He was only taken to court on the Thursday.

161. I noted with interest that on his return from the mall with the police, the plaintiff first went off into his home and changed into his casual, daily clothes. If he were at all disturbed by the presence of the police on his property and the neighbours watching, he would have immediately attended to the police investigation. The impression created was that he knew he was in trouble. He knew he would be arrested and therefore he had best change into casual clothing. He appeared in no hurry to attend to the police even though his evidence was that he was highly embarrassed by the presence of the police and his subsequent arrest.

161.1. He displayed the same calm attitude, when the police picked him up at the mall, he asked to be allowed to collect his laundry first and thereafter jumped into the van.

162. Furthermore, it is noteworthy that the plaintiff is no stranger to the criminal justice system. When counsel for the defendant referred to his previous convictions, he became argumentative and replied, "*I do not know how many there are, and I will not respond to your questions on that...*". Counsel did not probe this point any further.

162.1. A list of previous convictions is amongst the discovered documents.

¹⁰ It records seven convictions. The plaintiff is a repeat offender, and this court finds it difficult to accept that his detention was a shock or that he was in an unfamiliar environment, when he was detained.

162.2. Ms Rikhotso testified that after he was told he was going to be arrested, he went into his house, and collected his toothbrush and a facecloth to take along. He was familiar with prison conditions.

163. The plaintiff's evidence cannot be relied upon.

164. Ms Rikhotso knew what was in the rondavel but failed to tell the police. On her version, she assisted the plaintiff to move the machine to the rondavel, if she were honest and had nothing to hide, she could have informed the police of what was in the rondavel.

165. The detention of the plaintiff on the facts of this case, cannot be seen separately from the reasons for arrest. The police must be permitted to do their job, they are enjoined to work in the public interest and the crime likely to have been committed on the plaintiff's premises is serious. Against the factual matrix, the detention, may have been necessary, given that Dlamini could not be located, and counterfeit money can easily be concealed if it were out on the street.

¹⁰ Caselines 032-87 to 90

166. According to the learned author Hiemstra¹¹, there is no requirement that the police should consider a less drastic measure than arrest to bring a suspect to a court.

167. In my view, the defendant has discharged its onus on the probabilities, the arrest and detention of the plaintiff was lawful, Ngobeni and his team acted on a reasonable suspicion.

168. Accordingly, the claim fails.

I make the following order:

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

MAHOMED AJ
Acting Judge of the High Court

Date of Hearing: 16, 17 and 18 May 2023

Date of Judgment: 29 June 2023

Appearances:

For plaintiff: Advocate Luvuno

Instructed by: Mdlalose Inc

Tel: 011 331 5110

For Defendant: Adv Mashele

Instructed by: State attorney

Email: KRamsurjoo@justice.gov

¹¹ Hiemstra's Criminal Procedure p 2-8