

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, PORT ELIZABETH)

CASE NO: 2001/10

IN THE MATTER BETWEEN:

WYCLIFF ZOLA QUNTA

PLAINTIFF

VERSUS

MINISTER OF POLICE

DEFENDENT

Coram:

Pillay J

Date Heard:

4 May 2011

Date Delivered:

10 January 2011

Summary:

**Claim for damages – Arrest and detention – Unlawful
arrest and detention – Arrest and detention admitted –
Defendant invoking Section 40 (1) (b) of criminal Procedure
Act 51 of 1977.**

**Once arrest is admitted - Onus to prove justification in
terms of Section 40 (1) (b) of Act is on defendant to prove
arrest was lawful - Defendant is required to establish that
the arrestor had formed suspicion based upon reasonable
grounds.**

Necessary opinion – Based on plaintiff's conduct prior to arrest and allegations of theft by complainant.

Allegations in statement of the complainant incorrect –

Circumstances leading to forming opinion should not be clouded by that – Prevailing circumstances must be examined to determine whether reasonable grounds existed for suspicion of not.

Arrestor holding reasonable suspicion – Reasonable grounds did exist to form opinion – Defendant established jurisdictional facts required to invoke Section 40 (1) (b) of the Act – Claim dismissed.

JUDGMENT

PILLAY, J:

[1] The plaintiff sued the defendant for damages arising out of an alleged unlawful and wrongful arrest and detention. In the alternative, plaintiff claimed that the arrest (and detention) was malicious and without probable cause. The aforesaid arrest and detention were effected by a member of the South African Police Services ('SAPS') and was in the employ of the Department of Safety and Security of which the defendant is the ministerial head.

[2] It will be seen that the defendant is cited as the 'Minster of Police'. This is the title which used to be accorded to the minister for that portfolio until the name of the department was changed to the Department of Law and Order and then to the Department of Safety and Security. The defendant ought to have been cited as the Minister of Safety and Security. No issue in regard thereto was however raised by the defendant and I will not regard it as one. It seems that all the formalities have nonetheless been complied with.

[3] The plaintiff was resident at 218 Connacher Street, New Brighton, Port Elizabeth. He stayed there for a relatively long period together with his mother and brother, Mziwakhe Winston Dlabantu. After his mother died, plaintiff and his brother hosted their cousin, Whitcliff Ndudela, who was later joined by his girlfriend, Lindelwa Yako. Plaintiff's girlfriend, Ethel Kutwana would stay there with him from time to time together with his son.

[4] Mziwakhe ('the deceased') passed on and had made arrangements for the disposal of his estate by way of a will which he completed at the offices of Santam Insurance, a copy of which he produced while testifying.

[5] It is common cause that the deceased bequeathed the whole of his estate to the plaintiff. This instruction was qualified with the following:

"Failing the last mentioned beneficiary his/her share must devolve upon his/her issue by representation per stirpes."

[6] The qualification is however of no moment since the plaintiff inherited the whole estate, including the house at 218 Connacher Street, New Brighton, Port Elizabeth. Similarly it is common cause that the contents of the house also belonged to the deceased and consequently also inherited by the plaintiff. The house was transferred to the plaintiff in terms of the said will and he also produced a copy of the title deed which confirmed that he was indeed the owner thereof.

[7] The use of the appliances and the associated electricity use gave rise to tension between the plaintiff on the one hand and Whitcliff and Lindelwa on the other. Plaintiff then removed certain appliances and furniture from the kitchen and stored it in his bed-roomed. This included the refrigerator and the microwave oven which he had inherited from his deceased brother. It is uncertain whether Whitcliff and/or Lindelwa were aware of what he had done with the items he removed from the kitchen.

[8] Shortly thereafter, on Sunday, 18 April 2010, a little after 7 pm, Inspector Mvula (he was a constable at the time) arrested the plaintiff at 218 Connacher Street, New Brighton.

[9] The plaintiff was then taken to the New Brighton Police Station. The cells there were full and he was consequently taken to Kwazakhele Police Station where he was detained till Tuesday morning of 20 April 2010. The plaintiff was charged with theft of, *inter alia*, the refrigerator and microwave oven, as well as what was described as domestic violence. He was released before appearing in court, on the 20 April 2010.

[10] The plaintiff testified that on the night of his arrest he was in bed when there was a knock at the kitchen door. Whiteliff opened it. Mvula and another person then entered the house. After being told that he was being arrested, the plaintiff was handcuffed by Mvula and taken out.

[11] He explained that at the locked gate his one arm was released from the handcuff in order to allow him to unlock the gate. Outside in the street, he noticed, *inter alia*, Lindelwa Yako and one Andiswa Ntsaluba in the vicinity of the police motor vehicle.

[12] He testified that prior to 18 April 2010, he had been brought before the magistrate's court to deal with a claim against the estate of his late brother. He proceeded to explain that Andiswa had claimed that she was entitled to inherit the whole of the estate, including the house, on the basis that she was the deceased's daughter. It is not clear how this was resolved, if at all, but there is no evidence that Andiswa was declared either the deceased's daughter or a beneficiary. On the contrary, it seems that the will of the deceased was executed and plaintiff was declared the sole beneficiary and indeed, inherited the property of his late brother.

[13] It is also common cause, that Andiswa laid a charge against the plaintiff at the New Brighton Police Station on 16 April 2010. The basis for the charges was that he had removed certain appliances from the house which he had no right to do because she was the owner thereof by virtue of having inherited this from her father, the deceased. A charge of theft was proffered against the plaintiff in relation to these

appliances and other things also listed as stolen property. A second charge relating to domestic violence was also included on the charge sheet.

[14] As it turns out, Andiswa's claim that she was a beneficiary in the deceased's estate was, at best for her, an incorrect belief. The plaintiff was in fact the sole beneficiary of the whole of the deceased's estate.

[15] The plaintiff testified that at the time of his arrest, he was told by the arresting officer to get dressed as he was being arrested. He stated that when he asked why he was being arrested, he was told that he would be informed at the police station. He also testified that he was unlawfully taken to the New Brighton Police Station, but as there was no place for him there, he was taken to the Kwazakhele Police Station. There he was held in a cell together with twelve other people. The cell had a pungent odour which affected him. The cell was full and he had to squeeze in between others when he had to find a place to lie down. He was provided with a sponge mattress.

[16] During the following day, he and others who were not taken to court on that day were moved to another cell. This one was less uncomfortable but the blankets and the sponge mattress issued to him smelt of stale urine.

[17] On Tuesday the 20 April he met Mvula while his property which had been handed in when he was detained was being returned to him. He testified that Mvula asked him if he knew about the stolen property and showed him a list of the alleged stolen items. The list reflected items such as a refrigerator, a microwave oven and so forth. He said that he told Mvula that he did not know about the theft and that he had

put those items in his bedroom. Mvula did not say anything. He testified that this was the first time he had heard about the alleged theft and the possible reasons for his arrest and detention.

[18] He explained that throughout his period of custody, he was scared - having heard of incidents between inmates which resulted in serious injury and even death.

[19] Shortly thereafter, he was taken to the New Brighton Police Station where he was told by another policeman that he was being released as the charges against him had been withdrawn. He went home feeling relieved and happy.

[20] He also testified that on the afternoon of Saturday, 17 April 2010 he was washing clothes in the yard outside his home when a policeman approached him enquiring about Andiswa. He told the policeman that there was no person by that name staying there. The policeman did not say anything more and left. As it turns out, the policeman was Mvula. He denied that Mvula had enquired after him or anyone else.

[21] He denied that he had prevented the police from looking into his bedroom or that Andiswa had showed the police where the microwave oven and the refrigerator had been placed in the kitchen. He also denied that he did not answer Mvula about where the items were as he was never asked about them while in the house.

[22] He contended that his arrest and subsequent detention was wrongful and unlawful.

[23] Ethel Kutwana testified on behalf of the plaintiff. She confirmed that she was his girlfriend and on the evening of 18 April 2010, she was with him at 218 Connacher Street, New Brighton, Port Elizabeth. At about 8 pm there was a knock on the kitchen door and one Kumbuzo, plaintiff's relative, allowed the police in. She testified that plaintiff was then told by one of them that he was being arrested and the reasons for the arrest would be explained to him at court. It is not clear who Khumbuzo is and nothing more was said about a person by that name.

[24] The group went outside and she then saw Andiswa, amongst others outside. She took some clothing and cigarettes to the plaintiff when he was already in the police vehicle. At that time, she noticed Andiswa signing a document(s). The plaintiff was then taken away.

[25] The plaintiff then closed his case.

[26] The defendant called Inspector Mvula to testify.

[27] He explained that he was stationed at the New Brighton Police Station at the time. During the morning of 17 April 2010, he was instructed to investigate a complaint of theft. He was handed the police docket by the commander of the police station. After examining the contents of the docket he later proceeded to 218 Connacher Street, New Brighton. There he found a man washing clothes in the yard and enquired after the plaintiff, as referred to in the complainant's statement which was in the docket – Zola Quta. He was told that no one by that name was there. He left the house and was finally able to contact Andiswa, the complainant, the next day.

[28] Andiswa then accompanied Mvula to 218 Connacher Street, New Brighton, with her uncle, Booi, who she suggested should accompany them to calm the plaintiff, if need be.

[29] Upon reaching the house they found the front gate locked. Mvula said that Booi then jumped over the locked gate and knocked on the front door. The plaintiff opened and appeared angered. He questioned the right of anyone to jump over the gate and enter the property. Andiswa pointed him out as the person who allegedly stole the items in question.

[30] Mvula testified that he reminded the plaintiff that he had confronted him the previous day. There was no response from the plaintiff.

[31] The gate was then opened and all of them went into the house. Inside the house, Andiswa pointed out where the refrigerator and the microwave oven used to be in the kitchen. Mvula stated that he then asked the plaintiff about the items on the list he had, explaining that the allegation was that he had stolen them. The plaintiff did not respond. Mvula testified further that he asked to look around the house but was prevented by the plaintiff and Ethel from entering and looking into a room of which the door was closed. The same two prevented him from looking into their bedroom. (As it turns out, most of the items allegedly stolen were in fact inside his bedroom).

[32] Mvula then arrested the plaintiff. Mvula confirmed that the plaintiff was detained at KwaZakhele Police Station till the morning of 20 April 2010 when the charges were withdrawn and the plaintiff was released.

[33] Mvula further testified that the plaintiff's conduct on 17 April when denying his identity and his further conduct during the period immediately prior to his arrest on 18 April, after being pointed out, his conduct in preventing or obstructing a house inspection which was brought about by the allegations contained in the complainant's statement and his failure to respond to material questions, all strengthened the allegations in the complainant's statement. He consequently formed a view that an offence listed in schedule 1 of the Criminal Procedure Act 51 of 1977 ('the Act') had been committed by the plaintiff and he therefore arrested and detained him.

[34] The charge relating to domestic violence was added to the charge sheet at the charge office after the plaintiff's arrest. Mvula furthermore did not have domestic violence in mind when he made the decision to arrest the plaintiff. It follows therefore that the plaintiff's arrest and subsequent detention was not as a result of any charge related to domestic violence. As it was correctly argued, depriving the owners or household members of the use of their items could conceivably constitute a form of domestic violence as defined. In the context of this claim, the charge concerning domestic violence is of no moment since it had nothing to do with the decision to arrest and detain the plaintiff.

[35] I was informed by Mr Dyer, on behalf of the plaintiff, that the only issue with regards to the arrest is whether Mvula had formed a reasonable suspicion that the plaintiff had committed an offence listed in schedule 1 of the Act.

[36] The defendant relies on the powers accorded by section 40 (1) (b) of the Act to justify the arrest and subsequent detention.

Section 40 (1) (b) of the Act provides that:

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

(a)

(b) whom he reasonably, suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody.”

[37] Mr Dyer argued that the defendant had failed to discharge the onus of proving justification because the only information or ‘evidence’ Mvula had at the time was contained in the statement which was insufficient to justify the arrest. He argued that the allegation in the statement that theft (and/or domestic violence) had been committed was not based on direct evidence and was indeed based on hearsay, which called for further investigation before the arrest. The relevant portions of the statement of complaint by Andiswa reads as follows:

“I am the biological daughter of MXIWAKHE WINSTON DLABANTU who passed away on 29-10-26. And my father MZIWAKHE WINSTONDLABANTU that was owner of the house in 218 Connacher Street, New Brighton, PE. My father had a trust at Sanlam Insurers which shows beneficiary of the entire estate and that states that he was unmarried and had only one child.

But now my father's brother ZOLA QUTA is staying in the house he is not supposed to be in the house and he removed some of the property from the house. He took all the appliances from the house and only left the built-in-cabinets.

My father's brother ZOLA QUTA has no right to remove anything from the property until the assets of the estate is finalised.

I have a witness LINDELWA YAKO who stays at 218 Connacher Street who saw ZOLA QUTA take the stuff 'appliances'.

I gave no-one permission to take the property of my father since I am the only child he has. The stuff that was in the house before my uncle took some of it was written down by Santam Insurers.

The following items I noticed that is missing is the fridge ±R2000-00 (Two Thousand Rand) and microwave ±R1500-00 (One Thousand Five Hundred Rand) and dishes, spoons and pots ±R1 200-00 (One Thousand Two Hundred Rand) and ornaments ± R85-00 (Eighty Five Rand) and kitchen table ±R400-00 (Four Hundred Rand)."

[38] In amplifying his argument, Mr Dyer, contended that the allegations of theft in the statement is attributed to Lindelwa Yako only, and therefore falls outside the personal knowledge of the complainant and therefore constitutes hearsay. It called, at least, for further and proper investigation prior to the arrest.

[39] A close scrutiny of the statement in question clearly shows that the complainant claimed ownership of the property alleged to have been stolen. She also alleges that the items mentioned in the statement were taken by the plaintiff without her permission. Her reference to the documentation at Sanlam Insurers is merely to

serve as support for her assertion that the property indeed belonged to her by way of inheritance.

[40] Her reference to Lindelwa Yako as having seen the plaintiff take the items in question is a reference to someone who would support her allegation that the items were taken by the plaintiff. It is not an assertion that she (Lindelwa) is the only or exclusive source of such information or evidence.

[41] There is nothing in the statement to suggest that the allegations of the complainant should be doubted or that it should not be relied upon for the purpose of investigation.

[42] It is clear from these circumstances, that what happened prior to the arrest of the plaintiff informed on Mvula's ultimate suspicion which led to the arrest of the plaintiff.

[43] It is undisputed that Mvula was briefed to investigate the complaint laid by Andiswa. It is common cause that Mvula made two visits to 218 Connacher Street, New Brighton in the course of his investigations of this complaint. First on 17 April 2010 when he encountered the plaintiff who was washing clothes in the yard. Then on 18 April 2010 when the arrest in question occurred. There are however disputes of fact in regard to what occurred during the respective visits.

[44] The plaintiff alleges that Mvula met him on 17 April 2010 and asked him about the whereabouts of Andiswa and left when he said there was no such person.

staying there. Mvula disputed this and claimed to have asked after the plaintiff by name as appeared in the statement.

[45] The plaintiff alleges that Mvula entered the house on 18 April 2010 through the kitchen door with one other person despite the gate being locked. Mvula disputed this and claimed that he entered with Andiswa and her uncle Booi after the plaintiff opened the front door.

[46] It is undisputed that Andiswa pointed out plaintiff as the person who allegedly stole the property. She in fact signed a document to that effect.

[47] There are further disputes between the plaintiff and Mvula as to what occurred when they were inside the house. Both plaintiff and Ethel state that plaintiff was just told to get dressed because he was being arrested. He was not given reasons in regard thereto. They also denied having prevented Mvula from inspecting the house. On the other hand, Mvula contends that he did ask him about the missing property after Andiswa pointed out to him where some of them used to be in the kitchen viz: the refrigerator and microwave oven. He was also prevented by plaintiff and Ethel from inspecting two specific rooms in the house.

[48] I am not able to agree with the criticism levelled at Mvula by Mr Dyer. In my view the criticism, which I will refer to presently, do not reflect dishonesty on Mvula's part. He was criticised for giving different versions for effecting the said arrest and I was then urged to reject his evidence as untrue on that basis. There was no other criticism of Mvula's evidence.

[49] It is also undisputed that on 18 April 2010 there was no response when Mvula asked plaintiff why he did not tell him that he was the person he enquired about on the 17 April 2010.

[50] The plaintiff's evidence was not criticized in any significant way. His version was simple. He was probably comforted, it seems, by the fact that he was the owner of the items he allegedly stole. His evidence was supported by that of Ethel. He seemed a good witness who testified in a straight forward manner.

[51] Mvula was also a good witness and the only criticism levelled against him was that he gave different 'versions' for the arrest. This should not be confused with reasons for the arrest. It is clear that he tendered evidence of various factors or reasons for concluding that he should arrest the plaintiff. These reasons cannot be isolated from each other but should be seen as a composite number of factors which led him to form a suspicion.

[52] The versions in regard to the material issues as they occurred between the plaintiff and Mvula before the said arrest, are mutually destructive.

[53] In a situation where there are two mutually destructive versions (and there is little to choose between the two), the party upon whom the onus of proof rests can only succeed if the court, on a preponderance of probabilities, is satisfied that the version of that party is true and accurate and therefore acceptable, and that the other version tendered by the other party is false or mistaken and should be rejected as such.

[54] The issue of weighing up the credibility of a witness or whether a version is credible is therefore interwoven with a consideration of the probabilities and if the probabilities favours the version of the party bearing the onus, then that version will be accepted as probably true. See: National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (ECD) at 440 D-G; Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens 1974 (4) SA 420 (W) at 426 -7.

[55] It is important, to remember though, that the discharge of the onus on a balance of probabilities, is really satisfying the court that the version in question is the truth and therefore acceptable.

[56] The two versions on the material issues in this matter are so radically different that it follows that one of the versions must be untrue. As referred to already, Mr Dyer argued that Mvula was armed with a statement which did not include 'solid' evidence and therefore should not have arrested the plaintiff, but possibly further investigated the matter in the light of those doubts relating to ownership and actual *contractatio*, referred to by Mr Dyer.

[57] However on close scrutiny of the facts, the doubts are indeed created *ex post facto* in that the true situation as to ownership and where the items were at the material time, only came to light after the arrest. What was actually contained in the statement is a direct allegation that items were stolen and was the property of the deponent by virtue of her inheriting them.

[58] Secondly the impression that the allegation of the theft of these items is based on hearsay is not actually correct. As it stands in the statement, all it states is that Lindelwa Yako is a witness thereto. This does not mean that Lindelwa is the only witness. On the face of the statement, Andiswa asserts that plaintiff had stolen the items and not that she had been told thereof by Lindelwa.

[59] In any event Section 40 (1) (b) of the Act does not necessarily require direct evidence but rather that the arresting officer should hold a suspicion which should be formed on reasonable grounds.

[60] In adopting this approach, it is necessary to examine the probabilities in the context of what generally occurred and what is either common cause or undisputed.

[61] Mvula went to 218 Connacher Street, New Brighton on 17 April 2010. At the time he was in possession of a statement made by Andiswa. According to the statement it was the plaintiff who allegedly stole the items.

[62] However the truth, as it transpired, is that the said property did not belong to Andiswa and in fact, the items were not removed from the house at all. But this should not muddle the situation.

[63] It is clear from the statement that Andiswa did not stay at 218 Connacher Street. It is improbable then that Mvula had gone in search of Andiswa at that address on 17 April 2010. On the other hand, it is more likely that he enquired after the plaintiff who denied that such person stayed there or was present.

[64] There is the issue of a differently spelt name, as it appeared in Andiswa's statement, which could conceivably have led to a wrong pronunciation of the plaintiff's name when the enquiry about the plaintiff was made on 17 April 2010. This was not raised in argument and indeed, it was never the case or evidence of the plaintiff that Mvula enquired after a 'Mr Quta' and hence he denied that a Mr Quta resided there or was not there. His version is that Mvula enquired after Andiswa. Consequently this is not a decisive issue and nothing further need be said about it.

[65] It is further improbable that Andiswa did not enter the house immediately prior to plaintiff being arrested as was contended by plaintiff. This is so because Mvula's evidence is that Andiswa pointed out plaintiff and showed Mvula where the fridge and microwave oven used to be in the kitchen. If Andiswa did not enter the house, then she would not have been able to have done so. This is further corroborated by the fact that Mvula did not know the plaintiff. The only way he would have known who plaintiff was, would be by way of identification by someone else. This is what Andiswa did. Similarly, he would have known where in the kitchen the refrigerator and microwave oven used to be unless he was showed. This is what Andiswa also did. She had to be in the house to do this.

[66] It is also clear that Mvula was on an investigative visit. As he testified he would not necessarily have arrested the plaintiff had the whereabouts of the said property been explained to him by the plaintiff. He did not go to 218 Connacher Street specifically to arrest plaintiff.

[67] Being part of the investigation, it is probable that Mvula indeed attempted to search certain rooms in the house after being shown where certain items used to be in the kitchen. His failure to detect these items cannot be explained other than that he was prevented from doing so by plaintiff and Ethel. In his evidence, he also explained that at the time, plaintiff refused to answer questions as to the whereabouts of the items in question.

[68] In my view, factors such as denying his identity on 17 April 2010; the contents of the statement upon which his investigation was based; plaintiff's failure to respond to Mvula when asked why he denied his identity; preventing an inspection of the house and plaintiff's silence upon enquiry of where the items were, objectively raises a clear suspicion that plaintiff had something to answer for and that a crime of theft to which he was connected, had been committed.

[69] It is trite that an arrest and detention must be both constitutionally and statutorily justified. (See: Mistry v Interim Medical and Dental Council of South Africa and others 1998 (4) SA 1127 (CC). Minister of Correctional Services v Kwakwa [2002] 3 All SA 242 (SCA); Hash & Others v Minister of Safety & Security [2011] JOL 27576 (ECP) at para [57].

[70] When the jurisdictional facts as set out in section 40 (1) (b) of the Act have been established, a peace officer may invoke the powers bestowed upon him by the section and forthwith arrest the suspect. The exercise of such powers is of course discretionary (See: Duncan v the Minister of Law and Order 1986 (2) SA 805 A at 818 H - J).

[71] The plaintiff alleged, in no specific way, that the discretionary powers to arrest the plaintiff was not properly exercised. It was pleaded that Mvula did not exercise a discretion at all because he did not have knowledge of the discretion and alternatively, that if he did, he would not have concluded that arresting the plaintiff was necessary in the circumstances. In amplification, it was pleaded, that he failed to consider whether the plaintiff would abscond, intimidate witnesses, interfere with witnesses, or harm others.

[72] In Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A) at 38 G Hefer JA said 'Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and is thus justified. And if it is alleged that the opinion was improperly formed, it is for the party who makes the allegation to prove it. There are in such a case two separate and distinct issues, each having its own onus (Pillay v Krishna and Another 1946 AD 946 at 953). The first is whether the opinion was actually formed, the second which only arises if the onus on the first has been discharged or if it is admitted that the opinion was actually formed, is whether it was properly formed. If, eg, in a case like instant one the applicant were to admit that a member of a force had formed the opinion that the detention of the person concerned was necessary for the maintenance of the public order, there can, in my view, be no doubt that the approach will be dismissed unless evidence is produced which persuades the court on a preponderance of probabilities that the opinion was not properly formed.'

[73] It follows therefore that while the defendant bears the onus of proving justification for the arrest and detention when invoking section 40 (1) (b) of the Act, the plaintiff bears the onus of proving that the arresting officer did not properly form the opinion in deciding whether the effect the arrest or not.

[74] Arrest and detention is a mechanism used to secure the attendance of an accused at court - at least his or her first appearance. It is not always necessary to effect an arrest of a person to secure court attendance. If an alternative can be implemented, then that option should be adopted. It is the party making an allegation of an improperly formed opinion who must prove that once the opinion was actually formed, that it was not properly formed.

[75] The plaintiff did not provide evidence to substantiate any of these factors in an attempt to discharge this specific onus that the opinion was improperly formed. All that he can then rely on, in order to discharge that onus, is the defendant's evidence. In this matter, the factors pertaining to the decision to arrest and to detain would equally apply to the question of whether the opinion was improperly formed or not. Assuming that Mvula was unaware that there were alternatives to arrest and detention in order to secure his attendance at court does not help the plaintiff since the prevailing circumstances would, in my view, not have altered his opinion even if he had considered such alternatives. In my view the prevailing circumstances militated against arriving at the conclusion that any alternative would be appropriate. Consequently, it must follow that, absent substantiation by the plaintiff of indiscretion or improper instruction on the part of Mvula, there is clearly nothing else to suggest that the decision to exercise the power to arrest and detain the plaintiff should be faulted.

[76] The facts relied upon by Mvula and which led to the arrest of plaintiff has turned out to be untrue and incorrect but this should not cloud the material issue of whether the defendant has discharged the onus related thereto. The important

plaintiff was made. In other words what would the objective policeman in the position of Mvula have done in the circumstances as they presented themselves.

[77] The plaintiff had ample opportunity to explain his situation and refute the allegations against him. He lied about his identity, he refused or failed to explain the whereabouts of the items when Mvula asked him about them, he refused to allow Mvula to inspect the rooms in which these items were being stored at the material time. Had he co-operated with Mvula and explained the situation, it is unlikely that he would have been arrested in the first place.

[78] Combined with the complaint's statement, her pointing out the plaintiff as the person who had stolen the items and where some of these used to be, it is clear that Mvula had every reason to form a suspicion and honestly believe that plaintiff did take these items when he had no right to do so as alleged in the complainant's statement.

[79] In my view, having formed this opinion and in the light of plaintiff's reluctance or inability to explain the situation regarding the stolen property, Mvula was justified in deciding to arrest and detain the plaintiff in the circumstances.

[80] The plaintiffs claim must consequently fail. As far as costs are concerned, there is nothing special in this matter which would justify an unusual costs award. Costs should follow the result.

[81] In the result, the plaintiff's claims are dismissed with costs.



R. PILLAY
JUDGE OF THE HIGH COURT

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