



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

Date: 13 November 2023

Signature: [REDACTED]

CASE NO: 2016/18398

In the matter between:

GIVEN MAKUNYANE

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

- [1] This is a delictual action for damages against the defendant instituted by the plaintiff arising from the alleged unlawful arrest and detention of the

plaintiff by members of the defendant, which arrest was effected without a warrant. The onus is on the defendant to prove on a balance of probabilities that the plaintiff's arrest and detention was lawful.

- [2] On the 26th of February 2016 at or near the corner of Grant Avenue and William Road in Norwood, the plaintiff was arrested and detained by members of the South African Police Services who were acting within the course and scope of their employment.
- [3] The plaintiff was arrested without a warrant of arrest for possession of suspected stolen property.
- [4] The plaintiff was taken to the holding cells at the Norwood Police Station and was detained there until his first appearance at Court on the 29th of February 2016.
- [5] He was detained for approximately three days.
- [6] The plaintiff was released on the 29th of February 2016 at the Hillbrow Magistrate's Court where the Prosecutor issued a *nolle prosequi*.
- [7] At the hearing I requested the legal representatives to hold a further pre-trial conference to curtail the issues before trial¹ and ultimately the issues were curtailed as follows:

COMMON CAUSE ISSUES

- [8] The parties agreed that the following issues are common cause issues between the parties:

¹ Signed Pre-Trial Minutes dated 25 July 2023, CaseLines, 022-20 to 022-23

- [8.1] The plaintiff was arrested without a warrant of arrest.
- [8.2] The date of arrest: 26 February 2016.
- [8.3] Duration of detention: 3 days.
- [8.4] Date of release: 29 February 2016.
- [8.5] The Prosecutor issued a *nolle prosequi*.
- [8.6] The alleged suspected stolen property is a white Defy washing machine.

ISSUES IN DISPUTE

- [9] The issues in dispute are the following:
 - [9.1] The lawfulness of the arrest.
 - [9.2] The lawfulness of the detention.

QUANTUM

- [10] The parties are of the view that, if the plaintiff succeeds 100% on the merits, that the reasonable quantum in such event is R150 000,00.
- [11] Costs to be awarded to the successful party on a party and party Magistrate's Court scale.

STATUS OF DOCUMENTS

- [12] The parties agreed that the documents as uploaded on the CaseLines system may be used.

DUTY TO BEGIN

- [13] The defendant has the duty to begin.
- [14] The defendant opened the proceedings and called the following witnesses:
- [14.1] Captain Van der Byl – the arresting officer;
- [14.2] Seargeant Mathebula – the charging officer.
- [15] The plaintiff called the following witnesses:
- [15.1] Given Makunyane, the plaintiff;
- [15.2] Nthakoana Kutoane (the plaintiff's wife).

ISSUES TO BE DETERMINED

- [16] The issues I am called upon to determine are the following:
- [16.1] Whether the arrest of the plaintiff was lawful;
- [16.2] Whether the detention of the plaintiff was lawful.
- [17] The plaintiff pronounced that the arrest of the plaintiff and detention was

unlawful whilst, the defendant pronounced that the arrest and detention of the plaintiff was lawful.

[18] Before dealing with the facts of the matter, it may be apposite to traverse and consider firstly the applicable legislative framework and the applicable legal principles.

[19] An arrest or detention is *prima facie* wrongful. Once the arrest and detention are admitted, as is the case *in casu*, the onus shifts on to the State to prove the lawfulness thereof and it is for the defendant to allege and prove the lawfulness of the arrest and detention on a balance of probabilities. *Inter alia*, it was held in the Supreme Court of Appeal as follows in ***Zealand v Minister of Justice and Constitutional Development and Another***:²

“[25] *This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.*”

[20] The defendant denies that the arrest was unlawful and pleads specifically that the arrest was lawful in terms of section 40(1)(a), (b) and (e) of the Criminal Procedure Act No. 51 of 1977 as amended³ (hereinafter referred to as “*the Criminal Procedure Act*”) Section 40 of the Criminal Procedure Act reads as follows:

² ***Zealand v Minister of Justice and Constitutional Development and Another*** 2008 (4) SA 458 (SCA) at paragraph 25. Also see ***Zealand v Minister of Justice and Constitutional Development and Another*** 2008 (6) BCLR 601 (CC) and ***Minister of Law and Order and Others v Hurley and Another*** 1986 (3) SA 568 (A)

³ Paragraph 3.2, Plea, CaseLines 006-2

“40(1) A peace officer may without warrant arrest any person –

(a) who commits or attempts to commit any offence in his presence;

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

...

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;”

[21] The jurisdictional facts for a section 40(1)(b) defence are that:

[21.1] the arrestor must be a peace officer;

[21.2] the arrestor must entertain a suspicion;

[21.3] the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1;

[21.4] the suspicion must rest on reasonable grounds.

[22] Once these jurisdictional facts are present the discretion whether or not

to arrest arises.⁴

[23] A person found in possession of property reasonably suspected to have been stolen or acquired by dishonest means, can be arrested without a warrant provided that the peace officer reasonably suspects the person to have committed an offence in connection with the property. The jurisdictional facts that have to be proven by the defendant who relies on section 40(1)(e) as a defence are the following:⁵

[23.1] The arrestor must be a peace officer;

[23.2] The suspect must be found in possession of the property;

[23.3] The arrestor must entertain a suspicion that the property has been stolen or illegally obtained;

[23.4] The arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property;

[23.5] The arrestor's suspicion must rest on reasonable grounds.

[24] It appears from the heads of argument of the defendant's counsel Mr Amojee and from the defendant's evidence (witness evidence of Captain van der Byl), that the defendant is in actual fact relying on a defence as

⁴ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at 6 and 28; *Moses v Minister of Safety and Security* (Unreported GJ Case No. 6983/2013, 20 February 2015 at 16.2); *Madiseng v Minister of Safety and Security* (Unreported GP Case No. A515/10, 31 March 2016 at 18); *Baloy v Minister of Police and Another* (Unreported GP Case No. A77844/2014, 23 September 2016 at 15-16) and *Mlilwana v Minister of Police* (Unreported Case No. 2212/2012, 20 May 2017 at 11)

⁵ *Sethapelo v Minister of Police* 2015 JDR 0952 GP at 25

set out in section 40(1)(e) of the Criminal Procedure Act.

WHETHER OR NOT THE ARREST AND DETENTION WAS UNLAWFUL

[25] In order to determine whether or not the defendant has discharged the onus raised by its defence under section 40(1) of the Criminal Procedure Act, the case of ***Mabona and Another v Minister of Law and Order and Another***⁶ bears relevance. This case sets out the test to determine whether or not a suspicion is reasonably entertained within the meaning of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 when conducting an arrest without a warrant. The following was said in relation to how a reasonable suspicion is formed.

“Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires

⁶ 1988 (2) SA 654 (SE) at 658E-G

suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”⁷ (Emphasis added)

- [26] The same considerations apply in respect of section 40(1)(e).⁸
- [27] In ***Minister of Police and Another v Du Plessis***⁹ it is stated that “*Police bear the onus to justify an arrest and detention.*”
- [28] In ***Minister of Law and Order and others v Hurley and Another***¹⁰ the Court stated the following:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.”

- [29] Furthermore, in the case of ***Mjali v Minister of Police***,¹¹ it was held that our new Constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur. The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution of the Republic of South Africa proclaims as founding values, human dignity, the

⁷ Also see ***Nkanbule v Minister of Law and Order*** 1993 (1) SA 848 (T); ***Mjali v Minister of Police*** (Case No. 2223, 2226 and 2227/2016 [2020] ZAECHMHC 49 (29 September 2020)

⁸ ***Minister of Police and Another v Miller*** (1037/18 2019 ZASCA 165, 29 November 2019)

⁹ 2014 (1) SACR 2017 SCA at paragraphs 14-17

¹⁰ 1986 (3) SA 568 (A) at 589E-F

¹¹ ***Mjali v Minister of Police*** (Case No. 2223, 2226 and 2227/2016 [2020] ZAECHMHC 49 (29 September 2020) at paragraph 24

achievement of equality, the advancement of human rights and freedoms.

- [30] In ***Zealand v Minister of Justice and Constitutional Development***¹² the Court held the following:

“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

- [31] Section 50(1)(a) of the Criminal Procedure Act reads as follows:

“50 **Procedure after arrest**

(1)(a) *Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.”*

- [32] Section 50(1)(c) and (d)(i) reads as follows:

“(c) *Subject to paragraph (d), if such an arrested person is not released by reason that –*

¹² 2008 (4) SA 458 (CC)

(i) ...

(ii) *bail is not granted to him or her in terms of section 59 or 59A,*

he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest."

(d) *If the period of 48 hours expires –*

(i) *outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;"*

[33] Sergeant Mathebula testified that the plaintiff told him that he was not in a position to pay bail and therefore bail was not offered to him. On the evidence it is common cause that the plaintiff was brought before the Hillbrow Magistrate's Court the next Court day being Monday the 29th of February 2016.¹³

THE EVIDENCE

[34] In view of my judgment, I will not be repeating all the evidence led in Court. The evidence of Captain van der Byl, the arresting officer however bears scrutiny.

¹³ This however is inconsistent with the plaintiff's particulars of claim where it is alleged that the plaintiff had never appeared before any Court of law and was released from the Parkview Police Station, paragraph 7.3, CaseLines 003-6

The evidence of Captain van der Byl – the arresting officer

- [35] Captain van der Byl testified that he is currently employed as a Captain in the MIC (Management Information Centre). In February 2016 he was a Warrant Officer in the Crime Prevention Unit at Norwood Police Station. During October 2016 he was promoted to Captain. He commenced his services at the SAPS in January 1991. In February 2016 he had been employed in the SAPS for 25 years. He held the rank as Warrant Officer for almost 17 years in February 2016. He was stationed at Norwood Police Station throughout his time as a Warrant Officer and patrolled in Norwood and specifically in the precinct where the plaintiff was arrested.
- [36] He testified that he arrested the plaintiff on the 26th of February 2016 at 19h10 on the corner of William Road and Grant Avenue, Norwood. A cluster group of the Crime Prevention Unit were busy with operations on Grant Avenue and William Road. The General sought the parade for a crime prevention operation task. On that day he proceeded to the corner of William Road and Grant Avenue, Norwood at approximately 19h00, a place where *“they sell dagga and where there was also gambling”*. That area is a crime hotspot. He found the plaintiff standing on the pavement a little down on William Avenue not on the exact street. He found him with a washing machine and a group of men next to him. He approached him to find out what he was doing there. He was not alone - there was a couple of other *“guys”* around him (the plaintiff). Captain van der Byl testified that it looked suspicious – the plaintiff standing there with a washing machine. The Captain testified that he (Captain van der Byl) was not alone. Constable Mashaba, General Ndaba was there herself and Colonel Kuboni and other members of the SAPS were with him. All of the members were in uniform and they were driving in vehicles which were marked. He was driving in a marked bakkie. It had the SAPS markings and a blue light on the roof.
- [37] The plaintiff told Captain van der Byl that he was selling the washing

machine. Captain van der Byl asked him why at this time of the night? The plaintiff was very evasive according to Captain van der Byl. Captain van der Byl read the first two paragraphs from his statement:

“On 26 February 2016 at about 19h10 we were busy with an operation with Hillbrow Cluster. I was in William Road nearest corner Grant Avenue, Norwood. I found Given Makunyane in William Road, Norwood with a front loader washing machine.

I approached him and he told me that he is selling the machine. I asked him where the machine comes from. He could not show me a receipt for the machine.”

- [38] After that Captain van der Byl warned the plaintiff and told him that he was under arrest for suspected stolen property. Captain van der Byl testified that he had a reasonable suspicion because from the plaintiff's standing at that hotspot he had a suspicion that that machine was not his and that the machine comes from somewhere else. He read from his statement into the record again:

“I find it strange for him to stand on the street with a washing machine at that time and suspected it to be stolen property. He didn't have a car to transport it.”

- [39] He also had a reasonable suspicion that the machine was stolen, also having regard to the way the plaintiff spoke – the plaintiff was evasive and did not give straight answers. It did not make sense at that time of night – somebody standing with a washing machine on the corner. Also the plaintiff told Captain van der Byl that he was going to sell it. The Captain testified that nobody goes that time of night to buy a washing machine. There is no business at that time open to buy a washing machine. Captain van der Byl's suspicion was that the plaintiff stole the machine from somewhere else.

[40] He testified that he spoke only to the plaintiff as he wanted to find out about the washing machine. Other members of the SAPS that were with him questioned the people standing with the plaintiff. He testified that when they asked about the washing machine the others that were standing with the plaintiff pointed to the plaintiff and said the washing machine was his. The plaintiff himself kept quiet. After the questioning Captain van der Byl told the plaintiff that he was under arrest for possession of suspected stolen property. The plaintiff was angry at them. Captain van der Byl then placed him inside the police van. They also loaded the washing machine and then they transported the plaintiff to the Norwood police cells. This was at approximately 19h30. The Norwood Police Station is not very far from the corner of William Road and Grant Avenue, approximately 3 minutes away. Captain van der Byl read into the record again from his statement:

"I arrested Given Makunyane for the possession of suspected stolen property and transported him to the Norwood SAPS where I placed him in the cells. I handed the property in the SAP13/81/2/2016. SAP13 is for property and the SAP14 is a cell register."

[41] Captain van der Byl stated that the plaintiff did not have a clear explanation for what he was doing with the property at that time of night – the plaintiff's explanation that he was selling it did not make sense. Captain van der Byl stated that the plaintiff was speaking to the General as well but that he could not hear what they were saying. At that time of his career he was a Warrant Officer in that department for 17 years at the Police Station approximately three minutes away from the corner of Grant Avenue and William Road. He knew the area well. This was a crime hotspot. It was not reasonable selling a washing machine in that area at 19h10 at night. The plaintiff was the first person that Captain van der Byl ever found with a washing machine at that time of night. He arrested him because of the reasonable belief that the washing machine was stolen

and the plaintiff could not give him a reasonable explanation. He did not have a warrant to arrest the plaintiff. He arrested the plaintiff in terms of section 40(1)(e) – *“one can arrest someone in terms of that section if one has a reasonable suspicion that he has committed a crime”*.

[42] On a question posed by the defendant’s counsel to Captain van der Byl, whether with his experience of 17 years as a Warrant Officer he could assess situations reasonably, Captain van der Byl answered in the affirmative and stated in his view, he exercised his discretion reasonably. After this he did not have any dealings with the plaintiff. The cell guards filled out the cell register. He wrote his name and took him to the cells. He left and went to register the crime docket.

[43] At CaseLines 016-5 appears a notice of rights in terms of the Constitution. It explains to the person who is arrested about his constitutional rights. The signature that appears on the right hand side of the stamp is his signature. It was dated the 26th of February 2016 at 19h59. The Captain testified that this document must be explained or read to every person that is arrested. If they agree they then put their signature on the document. Captain van der Byl then explained the rights to the plaintiff. The plaintiff signed the document after his rights were explained.

[44] In cross-examination Captain van der Byl again testified that the plaintiff was arrested because he had a reasonable suspicion that the washing machine was not the plaintiff’s washing machine *“together with the explanation that the plaintiff gave”*.

[45] In cross-examination Captain van der Byl on a question posed by Ms Lekwape as to why the plaintiff looked suspicious to him, answered that *“when you look at them they look at you and then they try to hide their faces”*. The plaintiff turned around from the Captain and was not facing the Captain. Ms Lekwape questioned whether that was all that elicited the reasonable suspicion of the Captain.

- [46] Captain van der Byl in cross-examination said that he could not remember whether there was a Woolworths in the vicinity where the arrest took place even though he worked in the area for the past 17 years and the Norwood Police Station was three minutes away from where the incident occurred at the corner of Grant Avenue and William Road at the time the incident occurred - even though he did his rounds around there. He stated that he could really not remember that far back. In cross-examination Captain van der Byl testified that he only questioned the plaintiff as there was a big group and the other members of the police questioned the other people (referring to the people around the plaintiff and in the area). They questioned the people that *“stood around him”*.
- [47] Under cross-examination a question was posed to the plaintiff whether he questioned the people around the plaintiff as to how the machine got there and how they know that the machine was the plaintiff's. Captain van der Byl said that he only asked one question and that is whose machine is it and the other people pointed at the plaintiff.
- [48] Captain van der Byl testified in cross-examination that when the cluster group approached the plaintiff, he did not run away. He was just standing there according to Captain van der Byl avoiding eye contact. On a question posed in cross-examination whether in his experience a person who is in possession of suspected stolen property when they see the police approaching individually or in a convoy would run away, Captain van der Byl answered that *“they are not scared of the police anymore”*. They do not run away anymore in his experience.
- [49] The Captain furthermore testified in cross-examination that the plaintiff told Captain van der Byl that he was selling the machine. **This was not all he was saying.** Captain van der Byl could not understand what else he was saying as the plaintiff also spoke in another language (Sepedi). When asked whether Captain van der Byl asked his colleagues **what the plaintiff said to them they told him that he was lying.** On a question

posed to Captain van der Byl as to whether Captain van der Byl asked the other members what exactly the plaintiff said, Captain van der Byl responded by saying that *“they told me that the plaintiff had changed his story”*. **Captain van der Byl did not ask his colleagues to tell him exactly what the plaintiff was saying.** On a question posed by the Court to Mr Amojee (the defendant’s counsel) whether the members of the SAPS referred to would be testifying he answered that only Captain van der Byl, the arresting officer, and Sergeant Mathebula, the charging officer, would be called and that no other members would be called *“to confirm Captain van der Byl’s evidence”*.

[50] The plaintiff’s version was put to Captain van der Byl that it was the plaintiff’s machine. It was put to Captain van der Byl that the reason why the plaintiff did not have transport was that he had asked a friend to drop him off there with the machine at the corner of Grant Avenue and William Road. Captain van der Byl answered in the negative and said that the plaintiff had never told him this. He recalled the plaintiff saying that he is waiting for a friend. He did not hear him to say that a friend dropped him off. Captain van der Byl was questioned by Ms Lekwape as to why for the first time we are hearing that the plaintiff told him that he was waiting for a friend was heard in cross-examination as this does not appear in his statement. Captain van der Byl responded that which he heard from the other translators he did not write in his statement, as he himself could not understand the language. The question was then asked as to why Captain van der Byl did not write in his statement that he only wrote certain things in his statement and not what was said by the plaintiff to other members of the police.

[51] On a question posed by Ms Lekwape in cross-examination that arresting the plaintiff was not the only way one could have brought him before Court, Captain van der Byl answered *“We never confirmed his home address so we had to wait for the detective on standby to confirm his home address”*. Captain van der Byl testified that the plaintiff just said he stayed

in Orange Grove.

- [52] It was put to Captain van der Byl in cross-examination that the plaintiff denied having been told of any rights with reference to the notice of rights document at CaseLines 016-5. Captain van der Byl's response was that he agreed that he understood the rights. It is his signature on the document.
- [53] It was put to Captain van der Byl that the plaintiff will testify that he was waiting at the time for someone working at Woolworths that was open at the time. There is a lady that works at Woolworths that closes at 20h00. He was waiting there for the lady to "*knock off*". That lady was going to arrange transport for herself "*to take the machine*". The response by Captain van der Byl was he never told him that he was waiting for a lady from Woolworths. On a question that was posed to Captain van der Byl about what made him suspicious at the time – the response was that there was no businesses open at the time that was dealing in washing machines. Captain van der Byl further responded that Woolworths do not buy washing machines. A question was posed to Captain van der Byl whether the witness said to Captain van der Byl that he was going to sell the machine to a business that was "*operating*" in washing machines. The response was no.
- [54] Under cross-examination it was further put to Captain van der Byl that the plaintiff told Captain van der Byl that his wife was at home and that the SAPS could verify from his wife that the machine is his. The Captain answered by saying "*He didn't tell me to see his wife. He was evasive.*"
- [55] In re-examination Captain van der Byl said he had a reasonable suspicion as a result of not only the fact that the plaintiff did not have a car but also the time of night and that he was avoiding eye contact – that time of night who would actually buy a washing machine. It was strange if you sell a washing machine it would usually be during the day. "*You would usually*

sell it through Junk Mail or advertise if you want to sell it". Housebreaking and theft are common in the area and was also common in 2016. He has been in the area since 1996 and he saw many businesses change around in the area. Captain van der Byl further testified that it would not be reasonable to expect him to recall whether there was a Woolworths in the area. He responded by saying no. Captain van der Byl testified that just because one hears from the bystanders that it is his machine does not mean that it is his machine. Saying that it is his machine was not sufficient and that is why he requested a receipt, which the plaintiff was unable to produce.

- [56] In re-examination Captain van der Byl further testified that criminals look at your first move and then avoid eye contact. He thinks the machine is about 1.2 metres. He cannot speculate. The machine was about 1.2 metres tall and maybe half a metre wide. It might be that the plaintiff stole it somewhere to take it somewhere. It is normal to patrol there in the vicinity of where the plaintiff was arrested approximately ten times a day by members of his police station.
- [57] In re-examination Captain van der Byl further answered that he would have put it in his statement if he was informed by the plaintiff that he was selling the washing machine to a lady in Woolworths at 20h00 if it was told to him at the time.
- [58] The Court posed the question to Captain van der Byl as to whether he asked the plaintiff where he got the washing machine from. Captain van der Byl responded that the plaintiff did not want to answer and just said it was his. The plaintiff looked at him when he said that. *

EXAMINING THE EVIDENCE WITH REFERENCE TO THE APPLICABLE LAW

[59] The Court in ***Thusi S'Bonelo Vukani v Minister of Police***¹⁴ cited the case of ***Nkambule v Minister of Law and Order***¹⁵ which held that when a peace officer holds an initial suspicion, he must take steps to have it confirmed in order for the suspicion to be a reasonable one for him to arrest the plaintiff.

“[29] There was no evidence of any steps which were taken to verify the allegations made by the two security guards.

[30] The arresting officer lacked any reasonable suspicion to arrest the plaintiff nor to detain him. In my view the plaintiff’s arrest and detention was unlawful.

[31] There is no evidence as to why it was necessary to detain him for that period either.

[32] The deprivation of ones liberty is a serious matter. Such arbitrary acts by the police, only serves to build distrust and erodes confidence of the public in those entrusted to keep the peace and ensure public security and safety.”

[60] In ***Matebese v Minister of Police***¹⁶ it was held that it is trite that police officers purporting to act in terms of section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect before they can

¹⁴ 2023 ZAGPJHC 638 (5 June 2023)

¹⁵ 1993 (1) SACR 434 (TPD); ***Lifa v Minister of Police and Others*** (2020/17691) [2022 ZAGPJHC 795 [2023] 1 All SA 132 (GJ) (17 October 2022)

¹⁶ (2224/2017) [2019] ZAECPEHC 37 (18 June 2019)

form a reasonable suspicion for the purpose of lawful arrest.¹⁷

[61] It was held by our Courts that it is expected of a reasonable person to analyse and weigh the quantity of information available critically and only thereafter, and having checked what can be checked, will he form a mature suspicion that will justify an arrest.¹⁸

[62] Writing for the Constitutional Court in **Mahlangu and Another v Minister of Police**,¹⁹ Tshiqi J was compelled to include in the judgment a fairly lengthy excerpt from the decision of **Botha v Minister of Safety and Security, January v Minister of Safety Security**.²⁰

“It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of section 12(1) of the Constitution. ... These provisions, therefore, place an obligation on police officials who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention. ...”

[63] In the case of **Mahlangu and Another v Minister of Police**²¹ the Constitutional Court further held that the prism through which liability for

¹⁷ **Louw and Another v Minister of Safety and Security and Others** 2006 2 SACR 178 (T); **Liebenberg v Minister of Safety and Security** [2009] ZAGPPHC 88 (18 June 2004)

¹⁸ **Mabona** *supra*

¹⁹ [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021)

²⁰ 2012 (1) SACR 305 (ECP)

²¹ *Supra* at 24

unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic of South Africa.²² These rights, together with the right to human dignity, are fundamental rights entrenched in the Bill of Rights. The State is required to respect, protect, promote and fulfil these rights, as well as all other fundamental rights. These are also part of the founding values upon which the South African Constitutional state is built.

[64] The defendant *in casu* regarding the arrest sought to only proffer the evidence of a single witness in relation to the lawfulness of the arrest namely that of Captain van der Byl, although on the defendant's own version there were other SAPS members of Captain van der Byl's crew present who actually also questioned the plaintiff. The defendant chose not to call any of the other members of the SAPS who questioned the plaintiff so as to cast further light on the reasonableness of the arrest. The arresting officer only heard a certain portion of the explanation and did not hear the explanation, which was given in another language that the arresting officer could not understand. The arresting officer formed a suspicion based on an incomplete explanation.

[65] The defendant bore the onus to show that the arrest was lawful. The defendant on its own version as proffered by Captain van der Byl had insufficient grounds to objectively justify a reasonable suspicion, which could easily have been checked. Captain van der Byl could critically have analysed the information at his disposal to determine whether his suspicion was based upon solid grounds that could justify the arrest of the plaintiff. Captain van der Byl testified that he did not enquire from his colleagues who were with him what the plaintiff was explaining to them. The only response he received from them was that the plaintiff "*was lying*".

²² Also see ***Shabalala v Minister of Police and Another*** (323/2021) [2023] ZAMPMHC 6 (2 March 2023)

He did not enquire from his colleagues as to why they say that the plaintiff was lying. Captain van der Byl did not analyse and assess the quality of the information at his disposal critically and he failed to check the information and as such a suspicion cannot justify an arrest. To further form a suspicion as he testified based thereon that the plaintiff stood on the street with a washing machine at that time of night being 19h10 for which he could not show a receipt and that when questioned by Captain van der Byl the plaintiff could not look him in the eye and looked down and was evasive, does not constitute a reasonable suspicion. This was not enough to formulate a reasonable suspicion.

[66] The defendant had every opportunity to prove the lawfulness of the arrest. There were several SAPS witnesses the defendant could have called to give information in relation to what lies were told, the extent of the lying and it could have set out a basis for their suspicion, which they failed to do. It appears that there was further evidence to justify the suspicion, but the defendant simply failed to lead the evidence. The only evidence the defendant led was that the plaintiff had a washing machine next to him on the street at 19h10 at night and looked suspicious in that he did not make eye contact, looked down and that Captain van der Byl's colleagues told him that the plaintiff was lying.

[67] I therefore find that the defendant had insufficient grounds to objectively justify a reasonable suspicion, that its suspicion was not based upon solid grounds that could justify the arrest of the plaintiff and as such I find that the arrest of the plaintiff was unlawful and the onus was not discharged by the defendant.

[68] *In casu* it must follow that the subsequent detention of the plaintiff was also unlawful. In **Mjali**²³ it was stated:

²³ *Supra* at paragraph 26

[26] *It is my view that the justification of detention after an arrest until first appearance in court continues to rest on the Police. ...”*

[69] The lawfulness (or not) of the detention is dependent on a finding with regard to the lawfulness (or not) of the arrest in those cases where the detention had been a result of the arrest and therefore interlinked with each other.²⁴ When an arrest is unlawful the ensuing detention of the arrested person will also be unlawful.²⁵

[70] Justification for the detention that follows an arrest until a detainee’s first appearance in Court continues to rest on the Police.²⁶

INCONSISTENCIES IN THE PLAINTIFF’S CASE

[71] Mr Amojee correctly argued that there were various discrepancies, inconsistencies and contradictions in the plaintiff’s evidence. It is so that the plaintiff did not star in his own evidence. His evidence was unreliable and there were many inconsistencies.

[72] The plaintiff was also the last witness to testify even after his wife had testified. There were a number of discrepancies between the evidence of his wife and the evidence of the plaintiff. There were also a number of new allegations that came to light when he testified, which was not put to the defendant’s witnesses. The Court accordingly does not accept the new evidence proffered by the plaintiff when he testified, which evidence

²⁴ *Sekhoto supra*; *Mahlongwana v Kwatinidubu Town Committee* 1991 (1) SACR 669 (E) at 18J

²⁵ *Mahlakoane v Minister of Safety and Security and Others* (Unreported GP Case No. A628/2012, 8 September 2016 at 30 and *Sheefeni v Council of the Municipality of Windhoek* 2015 (4) NR 1170 HC at 11-12

²⁶ *Zweni v Minister of Police and Another* (Unreported ECP Case No. 2629/2013, 4 October 2016 at 19)

was not put to the defendant's witnesses.

[73] Mr Amojee has highlighted the new evidence that was not put to the defendant's witnesses in his heads of argument.

[74] Mr Amojee has further highlighted the inconsistencies and discrepancies in the plaintiff's version in his heads of argument. I, however, find that whilst there were inconsistencies in the plaintiff's version, the inconsistencies in the plaintiff's case relates to secondary evidence and is not material to the questions, which I have to determine namely whether the arrest and subsequent detention was lawful or not.

[75] In light of the fact that the defendant had the onus and failed to prove its onus in relation to the lawfulness of the arrest and detention, based on the defendant's own version, I find that the arrest and subsequent detention of the plaintiff was unlawful.

QUANTUM

[76] In view of the fact that the parties have agreed as is evident from the supplementary pre-trial minutes dated the 25th of July 2023 that if the plaintiff succeeds 100% on the merits, that a reasonable quantum in such an event is R150 000,00. I do not intend to deviate from this amount as agreed upon between the parties in this regard. The amount is also in line with ruling case law in this regard.²⁷

COSTS

[77] Although the issue of costs is in my discretion and it is also in my discretion whether to grant costs on a High Court scale (even in circumstances

²⁷ ***Mjali v Minister of Police*** *supra* at paragraphs 54 and further; ***Madingana v Minister of Police*** (3411/2021) [2023] ZAECHC 29, 4 April 2023

where the quantum falls under the Magistrate's Court's jurisdiction),²⁸ I also do not intend to deviate from what the parties agreed upon in awarding costs to the successful party on a party and party Magistrate's Court scale.

ORDER

[78] In the result I make the following order in relation to general damages for the unlawful arrest and detention of the plaintiff:

[78.1] The defendant is liable to pay the plaintiff the sum of R150 000,00.

[78.2] Interest on the aforesaid amount at the prime lending rate from date of judgment to date of final payment.

[78.3] The defendant is liable to pay the plaintiff's costs on a party and party Magistrate's Court scale, including the costs of counsel.



M VAN NIEUWENHUIZEN

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Delivered: This judgment was prepared and authored by the 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 for hand-down is deemed to be on 13 November 2023.

²⁸ *Mjali v Minister of Police supra*

HEARD ON:	25, 26, 27 and 28 July and 24 August 2023
DATE OF JUDGMENT:	13 November 2023
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