



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 730/2015

**Date heard: 28-08-2018
Date delivered: 29-03-2019**

In the matter between:

Faniki William Mothibi

Plaintiff

And

Minister of Police

Defendant

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiff, Mr Faniki William Mothibi, instituted an action for damages against the Minister of Police (the Minister), arising from his arrest by Sergeant K D Zulu on 1 February 2015 without a warrant and his subsequent detention at the Galeshewe Police cells until 2 February 2015 and thereafter at the Old Kimberley Prison until his release on bail on 6 February 2015. The Director of Public Prosecutions declined to

prosecute and on 8 March 2015 the prosecutor withdrew the case against the plaintiff.

2. When the trial commenced the parties agreed that the merits and quantum be separated and that the issue of quantum be deferred for later determination. The plaintiff, who appeared in person withdrew his amended particulars of claim and chose to rely instead on his original particulars of claim with certain amendments.
3. The background to this matter which is mainly common cause or at least not seriously disputed, is as follows. During 2014 Mr Kgopodithate, a police officer, took his Toyota Corolla motor vehicle to the plaintiff's auto repair shop for certain mechanical repairs to be effected. Once the vehicle was repaired Mr Kgopodithate failed to settle the account for the repairs in full. The plaintiff refused to release the vehicle to Mr Kgopodithate until he was paid in full for his services. Mr Kgopodithate thereafter approached the Kimberley Magistrates Court for an attachment order. An interim attachment order was granted on 22 October 2014, authorising the Sheriff to attach the motor vehicle wherever it may be found and to hand it to Mr Kgopodithate or his attorneys for safe-keeping, pending an action to be instituted against the plaintiff for the delivery of the motor vehicle.
4. The Sheriff served a copy of the above court order on the plaintiff on 28 October 2014 and was informed by the plaintiff that he had sold the vehicle to defray costs. Mr Kgopodithate thereafter, on 27 November 2014, laid a complaint of motor vehicle theft against the plaintiff. Sgt Zulu who was attached to

the motor vehicle theft unit at the time, was the investigating officer. Mr Kgopodithate has initially been cited as the 2nd defendant but the plaintiff has withdrawn the action against him on 12 August 2016 due to his passing away.

5. The issues between the parties, as it unfolded during the trial, appear to be firstly whether or not the arrest was lawful and if not, whether the Minister would be liable for damages as a result of the plaintiff's further detention after his first appearance on 2 February 2015.
6. The onus of proving the lawfulness of the arrest and subsequent detention resting upon the Minister, the first witness called was Sgt Zulu.
7. Sgt Zulu testified that he received a telephone call from the Galeshewe police station on 1 February 2015 and was informed that the motor vehicle in one of the cases he was investigating had been found and that the suspect was arrested and at the Barkly West police station. When he and a colleague arrived at the police station they found the plaintiff who was detained in one of the offices. This was the first time that he had met the plaintiff. He enquired from the plaintiff whether he knew why he was arrested. The plaintiff responded by saying that he knew it was because of the specific motor vehicle and that the motor vehicle was at his mother's place outside of Barkly West.
8. The plaintiff informed him that he took the vehicle to his mother's place since the complainant (Mr Kgopodithate) was a police officer who had influence over other police officers and he feared that they could take the vehicle from his workshop,

while Mr Kgopodithate still owed some money for repairs done on the vehicle.

9. Sgt Zulu then requested the plaintiff to accompany him and his colleague to the plaintiff's mother's place. There they found the Toyota Corolla motor vehicle parked next to the house. The wheels of the vehicle had been removed and it had two different number plates on it. The back number plate belonged to a Volkswagen Citi Golf and the front number plate belonged to the Toyota Corolla. Sgt Zulu determined that the Volkswagen number plate did not belong to a stolen car. He enquired from the plaintiff why the vehicle had two different number plates but could not get a clear answer from the plaintiff. He then informed the plaintiff that he was detaining him and that he will appear in court the following day.
10. The plaintiff was then taken to the Galeshewe police station where his rights were explained to him, his fingerprints taken, a warning statement taken and all of the required processes followed. The plaintiff stated that he did not want legal representation.
11. The plaintiff was detained at the Galeshewe police station overnight and on the Monday, 2 February 2015, Sgt Zulu attended court for the plaintiff's bail application.
12. Sgt Zulu testified that he did not oppose bail since he had verified the plaintiff's address and also due to the nature of the case. He stated that it was a civil case and that he was not supposed to arrest the plaintiff, but that the plaintiff was already arrested when he met him. As a result he did not oppose bail.

13. The prosecutor however informed Sgt Zulu that the plaintiff had previous convictions and that the matter would have to be postponed for a formal bail application on 6 February 2015. On that day Sgt Zulu was present in court when the plaintiff was released on bail and the matter was postponed for further investigation. Thereafter the case against the plaintiff was withdrawn and according to Sgt Zulu, referred back to the civil court by the Magistrate.
14. Sgt Zulu testified that the plaintiff was not arrested unlawfully and that there were reasonable grounds to arrest. That the plaintiff had moved the vehicle from point A to B and changed the number plates and in doing so had fraudulently and intentionally misled the people and the police. According to Sgt Zulu there was no need for a warrant of arrest because everything pointed to the plaintiff as a suspect – the vehicle was left with him for repairs and Mr Kgopodithate had identified him. However, he stated, had he found the plaintiff first, he would have seized the vehicle and have the court decide where the vehicle should go.
15. During cross-examination, the plaintiff put it to Sgt Zulu that he would have known the plaintiff's particulars e.g. where he worked and resided and his contact numbers ever since he received the docket during November 2014, but that Sgt Zulu had never made the effort to contact him. That it was only when the vehicle was found that Sgt Zulu showed an interest in the case. Sgt Zulu denied this and stated that he had on at least three occasions visited the workplace of the plaintiff but

had always found the premises locked and that he had not noticed the plaintiff's contact numbers in the docket.

16. These particulars of the plaintiff were provided by Mr Kgopodithate, when he laid the complaint and were included in the docket. The shoddy investigation into the matter by Sgt Zulu confirms the plaintiff's version that he had not known until 1 February 2015, that Mr Kgopodithate had laid a charge of motor vehicle theft against him.
17. When the plaintiff put it to Sgt Zulu that he had arrested him for no good reason, Sgt Zulu responded by saying that the police do not lock people up for nothing. That they realised that this was a civil matter and that there were no grounds upon which to arrest the plaintiff. He, Sgt Zulu, was instructed by his supervisor to get a warning statement from the plaintiff and to present it to the prosecutor for a decision. However since the crime prevention officers had already arrested the plaintiff, all Sgt Zulu could do was to process the plaintiff for court.
18. Sgt Zulu continued to deny having arrested the plaintiff during cross-examination until I asked him who exactly had arrested the plaintiff. He then admitted that he had arrested the plaintiff. When the plaintiff asked why he had arrested him contrary to his supervisor's instructions, Sgt Zulu answered that by the time he found the plaintiff, it was the right thing to do.
19. This version of Sgt Zulu also changed during cross-examination. He later stated that he had acted on the instructions of his supervisor who had instructed him to go ahead and arrest the plaintiff. He testified that the instruction from his supervisor was reasonable since he had given the

instruction after he was informed of the circumstances. Sgt Zulu identified his supervisor as Lt Col Rooza, now retired.

20. During re-examination Sgt Zulu stated that he had arrested the plaintiff because the motor vehicle was found at the plaintiff's mother's place and the number plates had been changed. He was of the opinion that the plaintiff had committed an offence because he had removed the vehicle and had placed a wrong number plate on the vehicle and that no one had the right to have stolen goods in their possession.
21. Two further witnesses were called in the Minister's case, Constable RW Blom and Captain C Roman. Const Blom was doing patrol duty on 1 February 2015. He was the police officer who noticed the Toyota Corolla parked at the plaintiff's mother's house in Phelindaba, outside of Barkly West. He had become suspicious because three wheels of the vehicle were missing. He checked the back number plate with their control room and discovered that it belonged to a Volkswagen vehicle. He then went into the premises where he met Mrs Mary Mocho, the plaintiff's mother. She informed him that her son had brought the vehicle there. He checked the front number plate and found out that it belonged to a stolen Toyota Corolla.
22. He then called Capt Roman to the scene. He states that he was on the scene when the plaintiff arrived there in the company of a man and a woman but that he was not involved in the arrest or processing of the plaintiff.
23. Capt Roman confirmed that he was called to the scene by Const Blom. He had asked the plaintiff's mother to call him to come to her house. When the plaintiff arrived he was

accompanied by a man and a woman. According to Capt Roman the plaintiff had not given him a reason for the vehicle being at his mothers' place and in that condition. He had asked the plaintiff to go to the Barkly West police station since a crowd had gathered at the mother's home and he wanted to avoid conflict. The plaintiff then went to the police station with Capt Roman and was asked to wait in the victim friendly room while Capt Roman contacted Sgt Zulu.

24. Capt Roman denied having arrested the plaintiff and stated that he was not at all involved in the bail application or the criminal case.
25. The plaintiff testified in his own case. He explained that he was a business man trading under the name of Faniki's Auto Electrical and that a dispute had arisen between him and Mr Kgopodithate when he demanded his motor vehicle back without having made full payment for the repairs effected by the plaintiff. The plaintiff explained that Mr Kgopodithate had arrived at his business premises, where he also resided, on several occasions in the company of a number of his police colleagues and demanded the return of his vehicle. To avoid further harassment by Mr Kgopodithate and his police colleagues he towed the vehicle to his mother's place near Barkly West. He put a different number plate on the back of the vehicle so that Mr Kgopodithate and his friends would not identify the vehicle while he was towing it. At his mother's place he removed the wheels so that the vehicle could not be removed from there. He explained that he had merely

exercised his right of retention over the vehicle until payment for the repairs.

26. The plaintiff testified that he did not know that Mr Kgopodithate had laid a criminal case against him until he received a telephone call from his mother on the morning of 1 February 2015. His mother informed him that there were police officers at her home who wanted to see him about the vehicle which had been reported stolen.
27. He then went to his mother's place with his lady friend Ms Lerato Maduo and a male friend Mr Kgosikai Maduo. He took the documents relating to the civil case between him and Mr Kgopodithate with him.
28. When the plaintiff arrived at his mother's place he found Capt Roman in charge and explained to him the background of the vehicle and why it had different number plates etc. He states that he showed Capt Roman the civil case papers, but Capt Roman told him that all he knew was that the vehicle had been reported stolen and that he had better wait for the investigating officer at the Barkly West police station.
29. The plaintiff testified that when Sgt Zulu approached him at the police station he explained to him also why the vehicle was at his mother's place, why the wheels had been removed and why the number plates had been changed. He also showed Sgt Zulu the documents in the civil case.
30. Sgt Zulu however informed him that he was going to arrest him and explained his rights. He made a warning statement and Sgt Zulu then took him to Kimberley. On the way they stopped

at his mother's place, where the Toyota motor vehicle was removed in his presence.

31. Upon arrival in Kimberley he was detained in the police cells until his court appearance the next day. There the prosecutor informed him that since motor vehicle theft was a Schedule 1 offence and he had previous convictions, he would have to oppose any bail application and the matter was thus postponed for a formal bail application on 6 February 2015.
32. On 6 February 2015 he explained to the magistrate about the civil dispute and denied stealing the motor vehicle. According to the plaintiff Sgt Zulu appeared for the state to oppose bail on the basis of his previous convictions. The magistrate however granted him bail. I pause at this stage to mention that the magistrate in his judgment in the bail application mentions that Sgt Zulu opposed bail also on the basis of the risk of the plaintiff interfering with the state witnesses.
33. The plaintiff stated that he understood that the prosecutor only followed the prescribed procedure and cannot be faulted for his detention. He laid the responsibility for his detention until 6 February 2015 squarely upon Sgt Zulu who did not exercise his discretion properly whether or not to arrest in the light of all the circumstances. He also questioned the evidence of Sgt Zulu that he had formed a reasonable suspicion.
34. The cross examination of the plaintiff elicited no concessions. Ms Stanton's statement to the plaintiff that the civil matter between him and Mr Kgopodithate was no longer pending at the time of his arrest due to Mr Kgopodithate having obtained default judgment in his favour, was shown by the plaintiff not to

be correct. From the bundle of documents placed before me by both parties, the magistrates' notes show that Mr Kgopodithate withdrew the application for attachment of the motor vehicle on 20 March 2015. The default judgment which Mr Kgopodithate obtained in his favour on 24 April 2015 was rescinded on 2 November 2015. So, at the time of the arrest on 1 February 2015, the civil matter was still very much alive, a fact which was also recognised by the magistrate presiding over the bail application on 6 February 2015.

35. The plaintiff called Ms Lerato Moduo and Mrs Mary Mocho to testify in his case. Ms Moduo is the ex-lady friend of the plaintiff who had been with him in Barkly West on 1 February 2015. She testified that she was in the presence of the plaintiff at Barkly West police station when he explained to Sgt Zulu why he had changed the number plates of the motor vehicle and that the plaintiff had also shown Sgt Zulu the documents relating to the civil case.
36. Mrs Mocho is the plaintiff's mother. Her evidence does not take the matter any further except that the plaintiff had asked her if he could leave the motor vehicle at her place and that she had not suspected anything untoward since he was in the business of fixing motor vehicles. She also testified that the plaintiff had arrived at her house after she had called him on 1 February 2015, with some documents in a bag.
37. That was the evidence led in the trial.
38. Sec 40(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act) provides that:

"40(1) a peace officer may without warrant arrest any person –

.....

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

39. Ms Stanton referred to *Minister of Safety and Security v Sekhoto and Another* [2011] 2 All SA 157 (SCA), where the Supreme Court of Appeal confirmed the four jurisdictional facts to be present for an arrest under section 40(1)(b) of the Act to be:
 - (i) the arrestor must be a peace officer;
 - (ii) the arrestor must entertain a suspicion;
 - (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
 - (iv) the suspicion must rest on reasonable grounds.

40. It is trite that the onus rest on a defendant to show the existence of the above four jurisdictional facts to justify an arrest under sec 40(1) (b) of the Act. The main dispute between the parties relating to the jurisdictional facts is whether the suspicion formed by Sgt Zulu was reasonable. The test whether a suspicion is reasonably entertained within the meaning of sec 40 (1) (b) is objective: i.e. would a reasonable man in the position of the arrestor and possessed of the same information, have considered that there were good and sufficient grounds for suspecting that the arrestee had committed the offence for which he sought to arrest him. See

Manase v Minister of Safety and Security and Another 2003(1) SA 567 (CKHC) at 574 H-J.

41. Ms Stanton argued that despite Sgt Zulu's reluctance to admit that he arrested the plaintiff, his evidence relating to the grounds for the arrest is clear and reasonable. She refers in this regard to the fact that the vehicle had been reported stolen, that the plaintiff admitted he had taken the vehicle to his mother's place and that the plaintiff had admitted changing the number plate. These facts she submits, are sufficient to render the suspicion entertained by Sgt Zulu reasonable. Ms Stanton argued further that the plaintiff's contention of a pending civil case cannot be used as a defence against the arrest and that in any event Sgt Zulu denied that the plaintiff had told him about the civil case or that he had shown him any documents to that effect.
42. The argument that Sgt Zulu had not been informed about the civil case cannot stand. Sgt Zulu himself admitted that the plaintiff had told him so. What Sgt Zulu denied was that the plaintiff had shown him the documents in this regard
43. This denial by Sgt Zulu is in my view highly questionable. Why would he at one stage during his evidence say that if he had seen the plaintiff first, he would have seized the vehicle and have left it to the court to decide where it should go, if he did not know of the interim attachment order. In any event, Ms Moduo's evidence, that the plaintiff had shown the documents to Sgt Zulu in her presence has not been attacked. Ms Moduo, at the time of the trial, was no longer in a relationship with the

plaintiff and had no reason to fabricate evidence to his advantage.

44. I do not think that an argument can be made realistically that Sgt Zulu was a credible witness. I counted at least five different reasons that he gave for arresting the plaintiff (leaving aside for the moment his denial of arresting the plaintiff until halfway through his cross-examination). Firstly, because the plaintiff was already detained by the crime prevention officers; secondly, because the vehicle was reported stolen; thirdly, because his supervisor instructed him to arrest the plaintiff; fourthly, because it is an offence to possess stolen property and fifthly, the plaintiff had committed an offence by removing the vehicle and changing the number plates.
45. Whether the fifth reason above even constitutes an offence is not clear. The fourth reason is not an offence under Schedule 1. The third reason above is a second version of what Sgt Zulu testified his supervisor had instructed him to do. It will be remembered that Sgt Zulu first said in this regard that his supervisor had told him to get a statement from the plaintiff and to leave it to the prosecutor to make a decision as to an arrest. It is in any event the arrestor who must have reasonable grounds and not his supervisor some 40 km away from the scene. The second reason above on its own does not constitute reasonable grounds and the first reason above borders on the absurd.
46. Even if one has regard to the reasons given by Sgt Zulu cumulatively, with the information he had in the docket and that given to him by the plaintiff, he could not have entertained a

reasonable suspicion that the plaintiff had committed the offence. He in fact admitted as much when he at first denied that he had arrested the plaintiff since it was a civil matter.

47. That being said, the Minister has failed to show the existence of the four jurisdictional facts justifying an arrest without a warrant and as such the arrest of the plaintiff on 1 February 2015 was unlawful. I do not intend to deal with the plaintiff's contention that Sgt Zulu did not exercise his discretion properly to arrest, since this discretion only arises once the jurisdictional facts have been shown. See *Sekhoto*, para 28.
48. Mrs Stanton has argued that should I find that the arrest was unlawful, nothing prevented the plaintiff from requesting police bail before his first appearance, in terms of sec 59 (1) of the Act. This argument cannot stand since a person charged with theft does not in terms of sec 59(1) qualify for police bail.
49. The alternative argument by Ms Stanton is that the Minister cannot be held liable for the detention of the plaintiff beyond his first appearance, and in any event, the plaintiff did not even oppose the postponement of the bail application on 2 February 2015.
50. I deal with the latter contention first. *In casu* the position was as follows. The plaintiff had previous convictions for other Schedule 1 offences. As a result the offence he was arrested on resorted under Schedule 5 of the Act. In terms of sec 60 (11) (b) of the Act, where an accused is charged with an offence referred to in Schedule 5, the court shall order that the accused be detained in custody, unless the accused, having been given a reasonable opportunity to do so, adduces

evidence which satisfies the court that the interests of justice permit his release. A more stringent measure is thus applicable to bail applications where the offence falls under Schedule 5 than less serious offences, where an accused person is entitled to be released on bail if the court is satisfied that the interest of justice so permit.

51. The plaintiff was made aware by the prosecutor that his release on bail was not a simple matter and that a postponement for a formal bail application was necessary. This much at least was also the gist of Sgt Zulu's evidence in this regard. The plaintiff cannot be blamed in these circumstances for not opposing the postponement.
52. The argument that the Minister cannot be held liable for the detention of the plaintiffs after his first appearance, is based on what the SCA held in the *Sekhoto* case at paragraphs 42 to 44 thereof where the following is stated:

"[42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.

[43] The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging — and in some cases stringent — statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes save to mention that the Act requires a judicial evaluation to determine whether it is in the interests of justice to

grant bail, that in some instances a special onus rests on a suspect before bail may be granted and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.

[44] While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest. This case does not call for consideration of what those various circumstances might be. It is sufficient to say that the mere nature of the offences of which the respondents were suspected in this case – which ordinarily attract sentences of imprisonment and are capable of attracting sentences of imprisonment for 15 years – clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released and if so on what conditions, pending their trial.”

(Own highlighting)

53. The discussion by the SCA on the relevant principles in the paragraphs quoted above, is based on the discretion which a peace officer has as to whether to arrest or not once the jurisdictional facts for an arrest in terms of sec 40 (1)(b) are present. It does not have any bearing on the situation where an arrest is unlawful because of the absence of the required jurisdictional facts as *in casu*. In such a case and in a matter very similar to the present, Nepgen J held in *Mthimkhulu and Another v Minister of Law and Order* 1993(3) SA 432 (ECD) at 438 C thereof, that:

“I do not see how the mere fact that the further detention of the plaintiffs occurred pursuant to an order made by the magistrate in terms of s 50(1) of Act 51 of 1977 can render such detention lawful where the arrest, which resulted in such detention being ordered, was unlawful.”

I agree with the approach followed by Nepgen J.

54. In conclusion and to sum up, I find that the arrest of the plaintiff was not justified in terms of sec 40(1) (b) and that it was unlawful. His subsequent detention until his release on bail is accordingly also unlawful.

The following orders are made:

- a) Judgment is granted in favour of the plaintiff on the merits.**

- b) The defendant is ordered to pay the plaintiff's proven or agreed damages as a result of his unlawful arrest and detention until his release on bail on 6 February 2015.**
- c) The defendant is ordered to pay the costs of the action.**

CC WILLIAMS
JUDGE

For Plaintiff: Adv A Stanton
 The State Attorney

For Defendant: Mr Faniki William Mothibi
 (In Person)