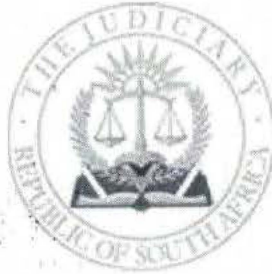


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A59/2024

- | | |
|----|---|
| 1. | REPORTABLE: YES / NO |
| 2. | OF INTEREST TO OTHER JUDGES: YES /NO |
| 3. | REVISED: YES /NO |

11 November 2024

DATE


SIGNATURE

In the matter between:

NATANIEL FOUCHE

Appellant

and

MINISTER OF POLICE

Respondent

Summary: *Unlawful arrest and detention – the Court of first instance dismissed the appellant's general damages claim of unlawful arrest and ordered that he be compensated for the pre-trial accommodation in the police cells. The appellant claimed his girlfriend bought him a motor vehicle. He collected same from the dealership. She complained to the SAPS that he collected her car without her consent. The SAPS contacted the appellant and made him aware of the complaint. He refused to bring the motor vehicle. After a week, the SAPS circulated it as stolen. He was arrested and detained.*

The Court of First Instance dismissed his claim as he did not produce proof of ownership at the time of his arrest. It held that the vehicle was in the name of the girlfriend, and SAPS had sufficient information to prove that he was neither the owner nor the lawful user of the motor vehicle. The provisions of section 40(1)(b) and (e) are applicable and met. The law requires the arresting officer to have a reasonable suspicion not certainty. The appeal is, therefore, dismissed with costs.

The matter was heard in open Court. The judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on Caselines. The date of the judgment and order is deemed to be 11 November 2024.

ORDER

1. The appeal is dismissed with costs.
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JUDGMENT

Mazibuko AJ (Davis J and Mbongwe J concurring)

INTRODUCTION

- [1] The litigation culminating in this appeal was launched in the Court a quo by the appellant, Mr Nataniel Fouche (Mr Fouche), who claimed general damages in the amount of R450 000 for unlawful arrest and detention between 27 July and 29 July 2016 by members of the South African Police Services (SAPS),

performing their duty within the scope of their work, under the employment of the respondent, the Minister of Police. Mr Fouche successfully claimed damages as a result of the pre-trial accommodation conditions in which he was held and the impairment of his dignity thereby. He was awarded R50 000. His claim for unlawful arrest and detention was dismissed. Aggrieved by the Court a quo's decision, Mr Fouche appealed the order and judgment.

FACTUAL BACKGROUND

- [2] According to the appellant, Miss Natasha Rawlins (Ms Rawlins) was his girlfriend. She bought him an Audi A1 motor vehicle (Audi A1) from Audi Centre, Johannesburg (Audi), to thank him for his support and for being there for her when she went through the difficult times of losing her family members.
- [3] On 18 July 2016, Mr Fouche and Ms Rawlins went to Standard Bank to pay for the vehicle. They also went to South African Revenue Services (SARS) for her tax clearance. He left her at SARS and went to do paperwork at Audi. After completing paperwork with the Audi salesperson, Mr Max Padia (Mr Padia), and a demonstration of the operation of the motor vehicle, he took possession thereof from Audi. He did not take it to Ms Rawlins.
- [4] On 27 July 2016, he was found in possession of the Audi A1 by SAPS. He was arrested without a warrant on a theft charge of the motor vehicle following its circulation as stolen. During his arrest, SAPS confiscated the motor vehicle from him and kept it at the Vehicle Identification System (VIS) unit in Pretoria West. He was charged with theft. However, the Director of Public Prosecutions declined to prosecute. He was released on 29 July 2021 without appearing in Court.

THE DECISION OF THE COURT A QUO

- [5] What was before the Court a quo was whether the arrest and detention of Mr Fouche was lawful.
- [6] The Court a quo dismissed Mr Fouche's claim for unlawful arrest and detention as it found that at the time of his arrest, Mr Fouche failed to prove that he was the lawful and rightful owner of the Audi A1.

ASSERTIONS

Appellant

- [7] In summation, it was argued, among others, by Adv Van Tonder, on behalf of Mr Fouche before the Court a quo that the arrest and detention was unlawful as:
- a) the offence reported by Ms Rawlins was mischaracterised as theft instead of possessing or using a motor vehicle without authorisation.
 - b) the reasonable suspicion test and reasonable discretion were incorrectly applied,
 - c) communication exchanged between Mr Fouche and Ms Rawlins was disregarded,
 - d) it was not the case of the defendant that the vehicle could be moved or destroyed,
 - e) the Offer to purchase, quotation and other documentation relating to insurance in the name of Mr Fouche were disregarded and
 - f) the process of transferring ownership was not considered.

Respondent

- [8] In order to prove that the arrest and detention were lawful, before the court of first instance, the respondent led evidence of the events leading to Mr Fouche's arrest. The evidence was that Mr Fouche collected the Audi A1 from Audi on 18 July 2016 without Ms Rawlins' consent. He refused to return it to her, alleging it belonged to him as she had gifted him.
- [9] On 20 July 2016, Ms Rawlins went to Hillbrow police station and laid a complaint that Mr Fouche had taken her Audi A1 from Audi without her consent, and it was in his possession without her authorisation. In fact, she stated that she had been surprised, when she had gone to Audi to collect "her" vehicle, to find that Mr Fouche had taken it.
- [10] Between 21 July and 26 July 2016, Mr Fouche was contacted by Detective Constable Dlamini of Hillbrow police station, who told him that he was the investigating officer in the case that had been opened against him by Ms Rawlins for collecting her Audi A1 from Audi without her permission and keeping it without her consent. He informed Constable Dlamini that Ms Rawlins bought the vehicle for him.
- [11] Upon Mr Fouche's failure to return the Audi A1 to Ms Rawlins or the SAPS, Constable Dlamini circulated the Audi A1 as stolen on 26 July 2016. The SAPS members, namely Constable Zachaviah Mudau (Mudau), Constable Nthulane (Nthulane) and Maleleni, thereafter tracked and located the Audi A1 at the Pretoria Zoo. The tracker personnel arrived. The vehicle was identified by the VIN engraved above the dashboard. It had no number plates as it was still new.

[12] Mudau's evidence was that Mr Fouche approached them while verifying the Audi A1 information. He informed Mr Fouche that the vehicle had been circulated as stolen. He informed them it belonged to him. On inquiring about proof of ownership, Mr Fouche produced a quotation and an Offer to purchase, signed by him and witnessed by Mr Padia. No signature appeared on behalf of Audi. Mudau was not satisfied with the explanation and documentation provided by Mr Fouche.

[13] Mudau testified that, confronted with Mr Fouche's explanation, he called for the details of the motor vehicle on the SAPS radio system to confirm its ownership. The SAPS radio reported that the vehicle was registered to Ms Rawlins, and the vehicle was still reported stolen on the system. He was provided with the contact details of the investigating officer, Constable Dlamini and informed that the complaint had been filed at Hillbrow police station. He contacted Constable Dlamini, who confirmed he was investigating the matter and informed him he had documents revealing Ms Rawlins to be the valid owner of the Audi A1. Further, the vehicle and Mr Fouche were wanted.

[14] He asked Mr Fouche what more he relied on to prove the Audi A1 was his. Mr Fouche had nothing else to furnish to him.

[15] Considering the information at his disposal, Mudau testified that he believed an Offer to purchase could not be a title deed or proof of ownership. He did not accept Mr Fouche's explanation. As a result of his dissatisfaction, he suspected Mr Fouche had committed an offence relating to the vehicle and arrested him.

[16] The respondent, through Adv Ngoepe, argued that at the time of arrest, Mr Fouche was found in possession of the Audi A1, which was reasonably suspected of being stolen as it was circulated as stolen. His explanation to

SAPS members that it belonged to him was not substantiated with cogent documentation. The SAPS rejected the quotation and Offer to purchase as proof of ownership correctly, as these documents did not prove ownership. Therefore, his arrest and detention were lawful.

ISSUE

[17] The issue before this Court is whether the Court a quo was correct to dismiss Mr Fouche's general damages claim for unlawful arrest and detention.

LEGAL PRINCIPLES

[18] Section 40 (1) of the Criminal Procedure Act¹ (the CPA) reads:

"(1) A peace officer may, without warrant of arrest, 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;
- (c) ...
- (d) ...
- (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.

¹ Act 51 of 1977.

[19] Proper discretion is always to be exercised as to whether detention is indeed appropriate.²

[20] An arrest and detention is prima facie wrongful. It is for the defendant in a claim for damages to prove the lawfulness of such an arrest and detention.³

DISCUSSION

[21] In summation, the basis of the appeal is that the Court a quo misdirected itself when it found:

21.1. The arrest and detention were lawful and

21.2. It was an undisputed fact that Mr Fouche was alleged to have committed theft of the vehicle, which was central to the ultimate finding by the Court that the arrest was lawful. It was argued the charge was that he was using the Audi A1 without Ms Rawlins' consent.

[22] The Court a quo had to determine whether the arrest and detention of Mr Fouche was lawful, when at the time of arrest, Mr Fouche had claimed that the Audi A1 was his.

[23] In order to satisfy the requirements of Section 40(1) of the CPA, an arresting officer must reasonably suspect that an offence has been committed. In this case, at the time of the arrest of Mr Fouche, there was circulation of car theft of an Audi A1 with a VIN. Led by a tracking system installed in it, the SAPS located the Audi A1 at the Pretoria Zoo. Seeing the SAPS surrounding the Audi A1, Mr Fouche approached them and claimed ownership. In order to substantiate this

² *Mvu v Minister of Safety and Security & Another*, para 17.

³ *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 714 and *Lombo v African National Congress* 2002 (5) SA 668 (SCA) par 32.

he could only produce a quotation and an Offer to purchase. An Offer to purchase was correctly assessed by the arresting officer to not amount to proof of ownership. I agree with the court a quo that the arresting officer had determined that Mr Fouche had not provided sufficient documentation to the SAPS to prove that he owned the Audi A1. Mudau was, therefore, correct in not accepting Mr Fouche's documentation as proof of ownership of the Audi A1. Further, he was justified in entertaining a suspicion that Mr Fouche had committed an offence in respect of the Audi A1.

[24] It has also been held that: "The test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective ...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 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 suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be lightly or arbitrary, and not a reasonable suspicion."⁴

[25] In my view, Mudau did not simply arrest Mr Fouche just because he found him in possession of a suspected stolen motor vehicle that had been circulated as stolen. However, he gathered more information and verified same by:

- a) Checking via the NATIS records, which showed that the Audi A1 was registered under the name of Ms Rawlins.
- b) Calling the Hillbrow police station and Constable Dlamini. Constable Dlamini confirmed that he was investigating the matter, that the vehicle was still registered stolen, and that it was circulated. Also, he was looking

⁴ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 E-H.

for the suspect (Mr Fouche) and the Audi A1. Constable Dlamini further informed Mudau that he had valid documents reflecting the owner as Ms Rawlins and

- c) Inviting Mr Fouche to provide more information to prove the vehicle was his.

[26] At the scene of the arrest, Mudau had nothing from Mr Fouche or the SAPS, including Constable Dlamini, that made him believe Mr Fouche was the owner of the Audi A1 to the extent that he was not required to arrest him. Notwithstanding his knowledge that Constable Dlamini was investigating the matter and wanted him to return the vehicle on the allegation of using it without Ms Rawlins' consent since 21 July 2016. At the time of his arrest, some five days later, Mr Fouche still had nothing more to show Mudau or Constable Dlamini than the quotation and Offer to purchase that he was in lawful possession or a lawful and rightful owner of the Audi A1.

[27] Mudau analysed and assessed the quality of the information at his disposal and entertained a reasonable suspicion that Mr Fouche had committed an offence. He correctly exercised his discretion to arrest and detain Mr Fouche. Constable Dlamini wanted the vehicle and Mr Fouche as a suspect. When she laid the complaint at the police station, Ms Rawlins stated who had her car.

[28] During the trial, Constable Dlamini testified and confirmed Mudau's evidence. He stated that when he spoke with Mudau, he had the original documentation, namely, vehicle history, car registration, car insurance and tracker, Audi invoice, bank statements of Ms Rawlins, electronic interbank payment receipt and Ms Rawlins' Offer to purchase. I, thus, found no fault on the part of the Court a quo in dismissing the claim of unlawful arrest and detention.

- [29] Mr Fouche's reliance on the communication between himself and Ms Rawlins was misplaced and irrelevant. What was relevant was what occurred and was entertained by Mudau and what was available to Mudau at the time of the arrest. Mudau did not have the WhatsApp messages on which Mr Fouche relied at his disposal.
- [30] Mr Fouche, through Adv Van Tonder, argued that the offence was mischaracterised to the extent that the Audi A1 was reported stolen. In contrast, according to Ms Rawlins's complaint statement, it was the use of a motor vehicle without the owner's consent. To this assertion, Constable Dlamini indicated that on the SAPS system, such offence was not available for selection. He, therefore, selected the theft of a motor vehicle. This argument does not take Mr Fouche's case any further.
- [31] Mr Fouche had failed to provide Mudau with information or documentation to that effect. Mudau had sufficient information from the SAPS, including Constable Dlamini, that someone else, Ms Rawlins, was the owner. The suspicion he harboured was reasonable that Mr Fouche did not legally possess the Audi A1. The Court a quo was correct in finding that the arrest and detention were not unlawful. As a result, the appeal must fail.

CONCLUSION

- [32] In my view, the Court a quo was correct in finding that Mudau had harboured a reasonable suspicion and that he had exercised his discretion correctly, based on solid grounds, when he effected the arrest.
- [33] In the absence of facts or evidence supporting the incorrect exercise of a discretion regarding the ownership of the Audi A1 at the time of the arrest, the

Court a quo was justified in finding that the arrest was not unlawful. It follows then that the appeal ought to fail.

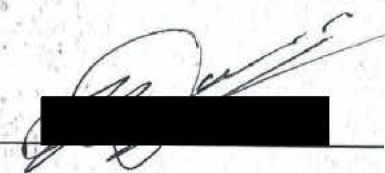
[34] Consequently, I propose the following order:
Order:

1. The appeal is dismissed with costs.



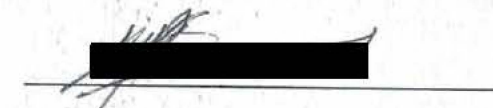
N G M MAZIBUKO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,



N DAVIS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,



M P N MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:

08 October 2024

Judgment delivered:

11 November 2024

Appearances:

For the appellant:

Adv B Van Tonder

Attorney for the appellant:

Thomson Wilks Attorneys

For the respondent:

Adv M T Ngoepe

Instructed by:

State Attorney