



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG**

CASE NO: 745/2020

Not reportable

In the matter between:

THABISO TLHONE

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

Coram: Reddy J

Heard: 2 October 2025

Delivered: Judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for handing down of the judgment are deemed the 12 February 2026 at 16:00.

Summary: Unlawful arrest and detention—the application of section 40(1)(b) and (e) of the Criminal Procedure Act 51 of 1977—whether the jurisdictional requirements have been met. The distinction between the provisions of section

40(1)(b) and (e) of the Criminal Procedure Act 51 of 1977. The standard of reasonable suspicion.

ORDER

1. The arrest and subsequent detention from 2 May 2017 to 4 May 2017 were unlawful.
 2. The defendant is held liable for the plaintiff's agreed or proven damages.
 3. The quantum proceedings are postponed *sine die* to a date to be allocated by the Registrar to be served before Reddy J.
 4. The defendant is to pay the costs in terms of rule 67A on a party and party Scale B.
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JUDGMENT

Reddy J

Introduction

[1] This is an action for delictual damages arising from the unlawful arrest, detention, and search of the plaintiff, Mr Thabiso Tlhone (Tlhone). The relevant timeframe that constitutes the basis of this action runs from 2 May 2017 to 4 May 2017. The defendant, the Minister of Police (the Minister), contended that the arrest and detention were justified within the tenets of s 40(1)(b) and (e) of the Criminal Procedure Act 51 of 1977 (the CPA). The Minister denied that Tlhone had been searched.

[2] As agreed between the parties, the issues of liability and quantum were separated in terms of rule 33(4) of the Uniform Rules of Court (URC). It follows that this Court is confined to the determination of the lawfulness of the arrest, detention, and search of Tlhone. During the trial, Tlhone jettisoned the latter claim.

Background

[3] The Minister's case in broad strokes is as follows. On 26 April 2017, police officers acting on information, including Sergeant Konzani (Konzani), arrived at a premises colloquially described as "hostel-like" rooms where several individuals were found engaged in the buying and selling of goods. Subsequently, from these goods, windows were identified by Mr Salima as his stolen property. Significantly, Tlhone was not present when these goods were seized. Notably, the Minister relied on several strands of hearsay evidence to establish a *nexus* between the blue shop, the seized goods, and Tlhone.

[4] On 2 May 2017, Tlhone presented himself at the Mmabatho police station. Konzani claims that Tlhone admitted to ownership of the goods seized. Konzani surmised that there was sufficient evidence against Tlhone and arrested him without a warrant on a charge of "possession of suspected stolen property." Tlhone was not afforded the opportunity to proffer an explanation for the possession of the goods seized.

[5] Tlhone closed his case without leading any evidence, predicated such election on the Minister's failure to discharge its statutory onus.

Tlhone's Submissions

[6] Tlhone contends that his arrest and subsequent detention were unlawful because the Minister failed to discharge its burden of proof. Tlhone's submissions pivot on three pillars. First, Tlhone maintains that there existed a lack of a reasonable suspicion at the time of his arrest. This, Tlhone advances, resulted from his arrest for a "non-existent offence" ("Possession of suspected stolen property") rather than the correct statutory charge under s 36 of the General Law Amendment Act 62 of 1955. Tlhone submits that, notably, Konzani conceded he did not ask him for an explanation before the arrest, which Tlhone suggests is fatal to the Minister's defence. Tlhone underscores that he was not found in actual physical possession of the goods at the time of seizure.

[7] Second, Tlhone posits that Konzani exercised his discretion improperly in that the police officer failed the *Mabona*¹ test by not assessing information critically and failing to verify facts. Moreover, Tlhone maintains that Konzani did not consider less drastic measures to secure his attendance at court, such as a summons, despite there being no urgency and the fact that Tlhone, having a fixed address, had cooperated.

[8] Third, Tlhone claims that his further detention became unlawful because he was not informed of his right to police bail as evinced in s 59A of the CPA as soon as reasonably possible, which is a peremptory constitutional injunction. Tlhone proposes that there was also contradictory evidence regarding whether he was taken to court on the release date, suggesting the arrest may not have been for the sole purpose of securing his attendance at court.

¹ *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE)

The Minister's Submissions

[9] The Minister maintains that the arrest of Tlhone was lawful in terms of s 40(1)(b) or 40(1)(e) of the CPA, underscoring that the jurisdictional threshold of these requirements was met.

[10] Significantly, the Minister avers that the police acted on information from a reliable source and found property at Tlhone's premises. The property was identified by complainants using unique marks, keys, and invoices. The Minister argues that the standard for "reasonable suspicion" is low and only requires specific and articulable facts, which threshold was met.

[11] The Minister states that while Tlhone was not physically present during the search, he was in control of the business premises where the goods were found and later confirmed ownership. This possession, the Minister alleges, is legally sufficient for the application of s 40(1)(e) of the CPA and s 36 of the General Law Amendment Act 62 of 1955.

[12] The Minister suggests that Tlhone's case suffered a procedural shortcoming. The Minister continues that this was caused by the failure of Tlhone to have properly and correctly exercised his right to cross-examination. This was laid bare by Tlhone's failure to have challenged material evidence in the Minister's case and crucially by an informed election not to put Tlhone's version to same. The Minister contends that failure to observe these canons of cross-examination should result in the undisturbed evidence in the Minister's case being accepted as true. As a side issue, the Minister was concerned that Tlhone had improperly raised new issues for the first time in his heads of argument. While this may be so, nothing really turns on it.

[13] The Minister claimed Tlhone was arrested to secure his court attendance and was informed of his rights. He was taken to court within forty-eight (48) hours, where the matter was not enrolled.

Legal Prescripts

[14] It is trite law that every interference with physical liberty is *prima facie* unlawful. Once a plaintiff establishes the fact of arrest, the onus shifts to the defendant to justify the lawfulness of that arrest. In this matter, the Minister placed exclusive store on s 40(1)(b) and (e) of the CPA to negate the unlawfulness of Tlhone's arrest.

[15] For a warrantless arrest under section 40(1)(b) of the CPA to be lawful, the following jurisdictional requirements must be present: the arrestor (i) must be a peace officer; (ii) must entertain a suspicion; (iii) the suspicion must be that the suspect committed an offence referred to in Schedule 1 of the CPA; and (iv) the suspicion must rest on reasonable grounds. In *Minister of Safety and Security v Sekhoto*², the Supreme Court of Appeal elucidated that once these jurisdictional factors are present, a discretion to arrest arises. A peace officer is not obliged to arrest if a less intrusive alternative is available that can secure the attendance, but the burden shifts to the plaintiff to prove that the arrest was exercised irrationally.

[16] Under section 40(1)(e) of the CPA, the suspect must be found in possession of property reasonably suspected to be stolen, and the arrestor must reasonably suspect the person of having committed an offence in respect of that

² (2011) 1 SACR 315 (SCA) paragraph 6.

property. In *Minister of Police v Ose*³, the court held that the mere possession of goods is insufficient; the peace officer must have objective grounds for the suspicion, such as an inability to provide a satisfactory explanation at the time.

The Fundamental Distinction Between s 40(1)(b) and (e)

[17] Section 40(1)(b) is tethered strictly to Schedule 1 offences; in contrast, s 40(1)(e) is a specific power related to possession. It does not require the underlying crime to be Schedule 1. It triggers when a person is found with property that is reasonably suspected to be stolen and the person is suspected of having committed an offence in connection with that property.

[18] A further differential in respect of these provisions is what can be referred to as the objective of the suspicion. In s 40(1)(b), the peace officer's suspicion must be directed to the suspect's conduct, referring with specificity to the offence which was committed. In contrast, in s 40(1)(e), the suspicion is anchored to the property itself, which axiomatically extends to the person in possession of same.

Principal Issues

[19] The dispute before this Court crystallises into a fundamental inquiry, that is, whether the warrantless arrest and subsequent detention of Tlhone were lawful within the purview of s 40(1)(b) or (e) of the CPA.

Discussion

[20] The evidence of Konzani is key to the determination of whether the Minister cleared the initial hurdle by proving the jurisdictional requirements that

³ (CA70/2023) [2024] ZAECMHC 78(11 June 2024) paragraph 19.

constitute s 40(1)(b) or (e) of the CPA. Central to this finding is whether Konzani acted on a suspicion based on reasonable grounds.

[21] The test to be applied to whether a suspicion is reasonable is an objective one—the suspicion, to qualify as a reasonable one, must be objectively sustainable.

[22] In *Mabona v Minister of Law and Order and others*⁴, Jones J described what this entails in the following way:

"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 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."

⁴ Ibid 658 G-H.

[23] In *Biyela v Minister of Police*,⁵ the standard of a reasonable suspicion was stated as follows:

"The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured reasonable suspicion that the arrested person committed a Schedule 1 offence.

The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly. Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration."

[24] Konzani is a police official who is included under the definition of a peace officer. Therefore, this jurisdictional fact has been met. It is common cause that Tlhone was not present when the goods were seized on 26 April 2017. Konzani grounded his suspicion that Tlhone was the owner of the goods entirely on hearsay evidence. *Biyela* endorses this approach; however, *Biyela* advocates that hearsay evidence can ground reasonable suspicion if it is corroborated by other evidence. Of course, it follows that the reliability and the source of the hearsay are critical features that must be given due consideration in the assessment of the hearsay.

⁵ (1017/2020) [2022] ZASCA 36; 2023(1) SACR 235 (SCA) (1 April 2022) paragraphs 34 – 36.

[25] Tlhone was never found in actual possession of the property. There is no objectively verifiable evidence to confirm Tlhone's possession in our law in any form.

[26] The Minister's contention that Tlhone admitted to the possession of the seized goods is not borne out by the facts. Strictly speaking, the timeline contradicts the existence of any admission by Tlhone as regards his possession. Konzani's statement of arrest deposed to on 2 May 2017 is legally deficient in this material respect. Put differently, Tlhone makes no admission regarding his possession.

[27] In a startling turn within the body of the investigation, is an undated statement deposed to by Tlhone where he states as follows:

"On 26/04/2017 my place of residence was searched, during that time I was not at home and my properties were confiscated by police, during that time there was no tenant at place, everything that was confiscated at my yard belongs to me that is all."

[28] The veracity and authenticity of this affidavit is brought into sharp focus on several levels. First, there is no date. Second, on 2 May 2017, Tlhone was arrested. He made no admissions. Third, in his interview with a police officer on 3 May 2017, Tlhone elected to make a statement before a magistrate or in the presence of his legal representative. Fourth, the existence of this statement is left hanging by a thread by an entry on 28 February 2018 made by the overseeing prosecutor which reads:

"It must be clarified who exactly rented the property and which rooms exactly. Was the whole yard rented or only parts? Obtain detailed statement from the owner."

[29] Moreover, Konzani harboured profound reservations regarding the merits of the case. Differently put, Konzani intended to refer the case to a detective to provide an independent review of the merits of the case to ensure objectivity. The ineluctable inference is that Konzani was doubtful regarding whether Tlhone was properly linked to the offence.

[30] In sum, Konzani's evidence is inadequate on the reasonableness of his suspicion. Our law uses the *Mabona* test to determine if a suspicion is reasonable. This test requires a reasonable person to "analyse and assess the quality of the information at his disposal critically" and not accept it "lightly or without checking it where it can be checked."

[31] In my view, a reasonable officer in possession of the same information as Konzani would have investigated the *nexus* between Tlhone and the seized goods more purposely, more especially given Tlhone's absence during the seizure and the nature of the "hostel-like" premises. Moreover, Konzani failed to meet the low standard in that he did not investigate whether the rooms where the goods were found were being rented out to third parties notwithstanding the "hostel-like" nature of the building. The lack of evidence of "possession" (either actual or constructive) at the time of the seizure renders the suspicion unreasonable.

[32] Accordingly, the Minister failed to establish the jurisdictional facts required for a lawful arrest either in terms of s 40(1)(b) or (e) as the suspicion of Konzani was not based on objective facts. It is self-evident that the arrest and subsequent detention were therefore unlawful.

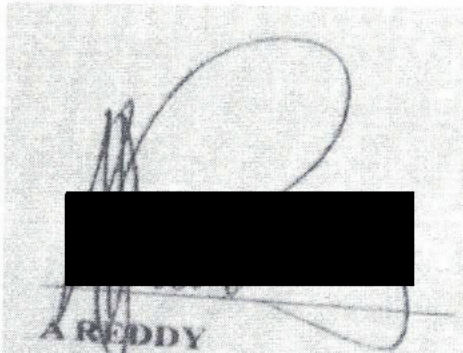
Costs

[33] While costs are at the discretion of the court, the general principle is that costs follow the result. I am unpersuaded that there exists any basis to deviate from this principle.

Order

[34] Resultantly, I make the following order:

1. The arrest and subsequent detention from 2 May 2017 to 4 May 2017 were unlawful.
2. The defendant is held liable for the plaintiff's agreed or proven damages.
3. The quantum proceedings are postponed *sine die* for a date to be allocated by the Registrar to be served before Reddy J.
4. The defendant is to pay the costs in terms of rule 67A on a party and party Scale B.



A REDDY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION MAHIKENG

Appearances:

For the plaintiff: Advocate H D Du Plessis

Instructed by: Labuschagne Attorneys
Mahikeng

For the defendant: Advocate M Moagi

Instructed by: The State Attorney,
Mahikeng