



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

Not reportable

CASE NUMBER:2678/2019

BUTIKI MACK MOLAO

Plaintiff

And

THE MINISTER OF POLICE

Defendant

Coram: Koraan AJ

Heard on: 12 March 2025 & 15 August 2025

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be on 27 March 2026 at 11h00.

Summary: Delict — Action for damages — Unlawful arrest, detention, and search and seizure — Search without a warrant — Consent — Police acting on crime intelligence regarding a suspect in military uniform terrorizing the community. Plaintiff opened the door and directed the police to a firearm under his bedding. Court finding that plaintiff provided informed consent, rendering the search lawful under Section 22(a) of the Criminal Procedure Act 51 of 1977.

Arrest — Without a warrant — Lawfulness — Reasonable suspicion — Schedule 1 offence — Discovery of a firearm and ammunition marked with "SAPS" or "P". Plaintiff was unable to produce a license or account for state-issued ammunition at the time of arrest. Section 40(1)(b) of the Criminal Procedure Act — Possession of such ammunition, providing reasonable suspicion of a Schedule 1 offence.

Detention — Lawfulness — Plaintiff detained for three days before being released after a court appearance, where the state declined to prosecute. Court finding the entire period of detention justified as the initial arrest was lawful and based on reasonable grounds. Claims for damages dismissed with costs.

JUDGMENT

Koraan AJ

Introduction

[1] The plaintiff instituted an action against the Minister of Police for damages in the amount of R800,000.00. The claim comprises R700,000.00 for alleged

unlawful arrest and detention, and R100,000.00 for alleged unlawful search and seizure. While the defendant admits to the arrest and the length of the detention, they contend that the actions of the South African Police Service (SAPS) members were lawful and justified.

[2] There was no separation of liability and quantum in terms of Rule 33(4) of the Uniform Rules of Court; accordingly, both liability and quantum were determined conjointly.

Background facts

[3] On 16 January 2019, at approximately 05h40, SAPS members acting on crime intelligence arrived at the plaintiff's residence. The intelligence indicated that a short, humble individual in military uniform was terrorizing the community with a firearm. The plaintiff, a former member of the SANDF, was found at the premises.

[4] A key dispute concerns the search of the plaintiff's bedroom. The defendant's version is that they identified themselves and requested permission to search for a firearm. They contend that the plaintiff provided consent by being cooperative and personally pointing out a 9mm pistol hidden under his pillow. Conversely, the plaintiff denies that he gave consent, alleging that the police entered and searched his private residence without his permission while pointing firearms at him.

[5] Following the search, the firearm was found to be loaded with 14 rounds of ammunition. Additionally, a military uniform was found on the premises. A further point of contention is the nature of this ammunition. The arresting officers testified that upon inspection, the ammunition bore "SAPS" or "P" markings, indicating it was state issued property. The plaintiff denied the unlawful

possession of state ammunition, asserting that the ammunition in his possession was legally acquired.

[6] Following his arrest, the plaintiff was transported in a police van in view of the public and school children, eventually being placed in a crowded, unhygienic holding cell where he slept on the floor with limited privacy and inadequate food. His detention continued until 18 January 2019, at which point he was released after appearing in court because the state declined to prosecute.

Submissions by the parties

[7] The plaintiff relies on s107 of the Firearms Control Act 60 of 2000 (hereafter the Firearms Control Act), arguing that if he failed to produce a license, the police were duty bound to use the less intrusive method of seizing the firearm rather than resorting to arrest.

[8] The defendant argues that the search was lawful because the plaintiff cooperated voluntarily. Concerning the arrest, the defendant relies on s40(1)(b) of the Criminal Procedure Act 51 of 1977 (hereafter the CPA), asserting that finding ammunition marked "SAPS" established an independent and reasonable suspicion of an offence for which the plaintiff lacked lawful authority.

Findings on the search

[9] The constitutional right to privacy must be carefully and rigorously protected. Section 14 of the Constitution¹ provides the following safeguards against unlawful search and seizure:

‘Everyone has the right to privacy, which includes the right not to have

¹ Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

[10] A search without a warrant is conducted in terms of the provisions of s 22 of the CPA, which provides:

‘22. Circumstances in which article may be seized without search warrant. A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search.’

[11] The laws of general application that govern search and seizure must be applied within the peculiar facts. Factual findings are therefore mandatory. Undoubtedly, there is a dispute of fact in this matter.

[12] *In Bonnet v Minister of Police*² the court postulated the following approach when faced with conflicting versions:

‘Our law is replete with precedent on how such a dispute is to be resolved. In *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell and Others supra* at para 5 referred to by Adv Mafoko, the following tools were provided for unravelling a dispute of fact:

‘To come to a conclusion on the disputed issues a court must make findings on:

² (504/2021) [2025] ZANWHC 109 (23 June 2025) at paragraphs 53-55.

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probability or improbability of each party's version on each of the disputed issues.

In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail.

In *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD) at 440D-441A, the following was posited:

‘It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case. If the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth

and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.”

[13] I align myself with the technique outlined in our law, which requires an inquiry into the credibility, reliability, and inherent probabilities of witnesses. Regarding the search, I find the defendant’s version to be more probable. The plaintiff’s status as a former SANDF member makes it more likely that he would cooperate with identified officers. Furthermore, the plaintiff’s own testimony revealed that he opened the door for the police and specifically directed them to the location of the firearm concealed under his bedding. These are not the actions of a person who objected to or resisted the search.

[14] The plaintiff alleged that the police entered while pointing firearms at him, which he contends vitiated any consent. I reject this version as improbable for the reasons stated above. Even accepting that the officers were armed, the mere presence of armed officers does not, without more, negate consent. What is required is that the consent be voluntary, in the sense that it was not the product of physical compulsion or an unlawful threat. On the facts, I have found that the plaintiff cooperated, opened the door, and personally indicated the location of the firearm there is no basis to conclude that his conduct was coerced rather than voluntary. I am accordingly satisfied that the plaintiff gave actual and voluntary consent within the meaning of s 22(a) of the CPA, rendering the search and seizure lawful. It is therefore unnecessary to consider whether the requirements of s 22(b) were also met.

[15] Regarding the ammunition, the court specifically finds that the recovered ammunition bore "SAPS" or "P" markings. It is highly unlikely that the police would fabricate the presence of state marked ammunition during a legitimate intelligence led operation. This finding is a significant fact that distinguishes this case from a mere failure to produce a firearm licence.

Finding on arrest

[16] It is trite that the Bill of Rights guarantees the right of security and freedom of the person, which includes the right ‘not to be deprived of freedom arbitrarily or without just cause’.³ As explained by Rabie CJ in the *Minister of Law and Order v Hurley*⁴:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems 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.”

[17] It has been established that an arrest is *prima facie* unlawful, and the burden of proving the lawfulness of the arrest rests with the defendant. As a result, the onus fell on the defendant to prove, on a balance of probabilities, the lawfulness of the arrest and the subsequent detention of the plaintiff. The authority to arrest without a warrant under s 40(1)(b) of the CPA applies only to offences outlined in Schedule 1, which generally involve more serious crimes in our law. The plaintiff was arrested on a charge of unlawful possession of a firearm and ammunition.

[18] To justify the arrest, the defendant must establish the jurisdictional facts as

³ See s12(1), s1(a) and 7(1) of the Constitution.

⁴ 1986 (3) SA 568 (A) at 589E-F.

outlined in *Duncan v Minister of Law and Order*⁵. In sum, for an arrest under s40(1)(b) to be lawful, the arresting officer must be a peace officer, must reasonably suspect the person of having committed a Schedule 1 offence, and these facts must exist at the time of the arrest.⁶ The officer's suspicion must be objectively reasonable and based on information available at the time of the arrest.

[19] What is central to these jurisdictional requirements is whether the suspicion was based on reasonable grounds. Our law is rich in judicial precedent that consistently affirms that reasonable suspicion must rest on objective facts, not on mere conjecture, intuition, or hunch. In *Mabona and Another v Minister of Law and Order and Others*⁷, the court explained that a reasonable suspicion exists if a reasonable person, with the same information possessed by the arrestor, would have suspected that the suspect had committed a Schedule 1 offence. Similarly, in *Duncan*, the court emphasized that the existence of reasonable suspicion is a factual question and must be present at the time of arrest. The suspicion must be formed on credible and reliable information, considering the circumstances as a whole. These authorities confirm that reasonable suspicion is an objective one, grounded in factual information available to the arresting officer at the time of the arrest.

[20] In *Biyela v Minister of Police*⁸ the test for a reasonable suspicion was stated as follows:

⁵ 1986 (2) SA 805 (A) at 818 G-H.

⁶ *Minister of Safety and Security v Sekhoto and Antohler* (131/10) [2010] ZASCA 141; 2011 (1) SACR 315 (SCA) ; [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) (19 November 2010) (hereafter *Sekhoto*) paragraphs 28-38.

⁷ 1988 (2) SA 654 (SE) at 658 E-H.

⁸ [2018] ZASCA 128 at paragraph 14.

“The test for the existence of a reasonable suspicion is objective. It is not sufficient for a police officer to allege that he entertained a suspicion; there must be facts from which a reasonable man could conclude that there was a suspicion. The information must not be vague or indefinite, nor should it amount to a mere rumour or gossip or be based on speculation or conjecture. The arrestor must act on a suspicion that would be shared by a reasonable man placed in the position of the arrestor.”

[21] The plaintiff argues that his arrest was unreasonable, given the circumstances, as he had a valid licence and was not given an opportunity to present it. He also contends that the alleged offence, unlawful possession of a firearm and ammunition, does not qualify as a Schedule 1 offence. According to the plaintiff, the police officer should have used discretion to seize the firearm and ammunition instead of making an arrest.

[22] In assessing the defendant’s evidence, it is clear that the police officers acted on the intelligence they received. When evaluating their combined evidence, I find no material contradictions that impact the likelihood of their individual accounts. This does not mean their evidence was perfect. According to the plaintiff’s own testimony, the police officers asked him twice if he had a licence. If he indeed had a licence, the question remains why he did not produce it. Therefore, it is reasonable to conclude that the suspicion the plaintiff did not have a licence was justified under the circumstances. The plaintiff was arrested for unlawfully possessing an unlicensed firearm and ammunition.

[23] The plaintiff’s submissions regarding the questions of law as it relates to the firearm and ammunition, and the corresponding Schedule of the CPA that makes a warrantless arrest permissible are misplaced. In the *S.T.T and Others v Minister of Police*⁹ the court addressed these questions as follows:

⁹ (A2023/114372) [2024] ZAGPJHC 1180 (20 November 2024) paragraphs 7-12.

“[7] The Appellants were arrested under section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) for possession of unlicensed firearms and ammunition. This section provides that a peace officer may arrest any person without a warrant of arrest ‘whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody’.

[8] Schedule 1 includes ‘any offence.... The punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine’.

[9] Section 3(1) of the Firearms Control Act 60 of 2000 (the Firearms Control Act) provides –

No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm.

[10] Section 90 of the Firearms Control Act provides –

No person may possess any ammunition unless he or she-

- (a) holds a licence in respect of a firearm capable of discharging that ammunition;

- (b) holds a permit to possess ammunition;

[11] Section 121 read with Schedule 4 to the Firearms Control Act provides that the maximum penalty for a person convicted of contravening section 3 or section 90 of the Firearms Control Act is fifteen years without the option of a fine.

[12] The offence is thus an offence as provided for in Schedule 1 of the CPA.”

(Footnotes omitted)

[24] The plaintiff contended that s 107 of the Firearm Controls Act was a remedy that could have been used to circumvent the intrusive nature of an arrest. It reads as follows:

“107. Duty to comply with the request of a police official or authorised person

- (1) Any person who carries with him or her a firearm must at the request of a police official or any person authorised by the Registrar produce the licence, permit or authorisation, as the case may be, in respect of such firearm for inspection.

- (2) A person referred to in subsection (1) must—

- (a) at the request and to the satisfaction of a police official or any person authorised by the Registrar, identify himself or herself forthwith; and

(b) at the request of a police official or any person authorised by the Registrar, produce such firearm for inspection.

(3) If a person fails to comply with subsection (1) or (2), the police official or authorised person may seize the firearm without a warrant and keep the firearm in custody until the licence, permit or authorisation is produced or the firearm is disposed of in terms of this Act.

(4) A police official or an authorised person, when exercising a power in terms of subsection (1) or (2) must—

- (a) identify himself or herself to the person referred to in subsection (1); and
- (b) produce his or her appointment certificate or authorisation.”

[25] In my view, the critical enquiry is whether the peace officer held a reasonable suspicion that the suspect had committed a Schedule 1 offence, and I find that this requirement was satisfied.

[26] It remains to consider whether, even where the jurisdictional facts under s 40(1)(b) are established, the arresting officers exercised their discretion to arrest lawfully. In *Sekhoto*, the Supreme Court of Appeal confirmed that once the jurisdictional facts are present, a peace officer has a discretion whether to arrest, and that discretion must be exercised in good faith and must not be arbitrary. The court must therefore be satisfied that the officers did not act with an improper motive or in bad faith. In the present matter, the officers acted pursuant to credible crime intelligence, arrived at the premises in the early hours of the morning, and upon discovering an unlicensed firearm loaded with state marked ammunition, formed an objectively reasonable suspicion of a serious offence. There is no suggestion in the evidence that the arrest was motivated by malice, personal animosity, or any improper purpose. I am satisfied that the discretion to arrest was exercised lawfully and in good faith, and that the arrest accordingly complies with the full requirements set out in *Sekhoto*.

Conclusion

[27] The defendant has met the burden of proving that the search, arrest, and detention were justified. The plaintiff's possession of state marked ammunition provided reasonable suspicion of a Schedule 1 offence, justifying the deprivation of his liberty.

[28] In addition to the lawfulness of the arrest, the court is satisfied that the duration of the plaintiff's detention did not independently violate his constitutional rights. Section 50(1) of the CPA requires that an arrested person be brought before a court as soon as reasonably possible and, where a court does not sit on the day of arrest or the following day, not later than the first court day thereafter. The plaintiff was arrested on 16 January 2019 and appeared in court on 18 January 2019, a period of approximately three days. The intervening day, 17 January 2019, fell within the period ordinarily attributable to court availability. No evidence was led to suggest that the plaintiff was held beyond the first available court sitting. The detention was accordingly lawful.

Costs

[29] The general rule is that the costs follow the event. I find no reason to deviate from this rule. The defendant requested that a punitive cost order be imposed at the attorney and client scale, including counsel's costs on scale C. I find no grounds to impose a punitive cost order.

Order

[30] Resultantly, the following order is made:

1. The plaintiff's claim is dismissed with costs.
2. The plaintiff is ordered to pay the defendant's costs of suit on a party and party Scale A.



R KORAAN

**ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

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