



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 1301/2021

In the matter between:

MOBU ADOLF MOLOI

APPLICANT

and

THE MINISTER OF POLICE

FIRST DEFENDANT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

SECOND DEFENDANT

Neutral citation: *Moloi v The Minister of Police and Another* (1301/2021) [2026]
ZAFSHC 229 (2 April 2026)

Coram: NEMAVHIDI AJ

Heard: 23 February 2026

Delivered: 2 April 2026

Summary: Unlawful arrest and detention – s 40(1)(b) of the Criminal Procedure Act 51 of 1977 – warrantless arrest – reasonable suspicion – theft – discretion to arrest – post appearance detention – judicial remand – onus of proof.

ORDER

- 1 The plaintiff's claim against the first and second defendant is dismissed.
- 2 The plaintiff is ordered to pay both defendants' costs of suit on scale A.

JUDGMENT

Nemavhidi AJ

Introduction

[1] The plaintiff instituted action against the defendants for damages arising from his arrest on 3 May 2019 and subsequent detention until his release on bail on 20 May 2019. The plaintiff was arrested at his workplace, Bibi Cash and Carry in Phuthaditjhaba, on suspicion of theft of stock. He was detained for approximately seventeen days before being released on bail following a formal bail application. The plaintiff's claims were originally for unlawful arrest and detention, and malicious prosecution. During the trial, after the plaintiff closed his case, the second defendant, the National Director of Public Prosecutions, applied for and was granted absolution from the instance in respect of the malicious prosecution claim. The matter proceeded only on the claims for unlawful arrest and unlawful detention against the first defendant, the Minister of Police.

[2] The first defendant admits that the plaintiff was arrested and detained, but contends that both the arrest and detention were lawful. The onus accordingly rests on the first defendant to justify the lawfulness of the deprivation of liberty. Having considered the evidence presented, the applicable law, and the submissions of counsel, I find that the first defendant has discharged this onus. The plaintiff's claim falls to be dismissed. My reasons follow.

The evidence

[3] The plaintiff testified that on 2 May 2019, he removed expired stock to the receiving room, showed it to his manager, and was instructed to place it next to the door. He later borrowed a pallet jack from the damaged stock department. On 3 May 2019, he was called to the security room where CCTV footage was viewed. He explained that he had only been moving stock in the ordinary course of his duties.

According to the plaintiff, management indicated that he should not be arrested and could accompany the police to the station merely to make a statement. Nevertheless, he was taken to the police station, detained, and only released on bail on 20 May 2019 after a formal bail application.

[4] The first defendant called Sergeant Motloun, the arresting officer, and Sergeant Mkhwanazi, the investigating officer. Sergeant Motloun testified that she and other members attended at Bibi Cash and Carry following a complaint of theft. Upon arrival, they met the complainant, Mr Fabian (the receiving manager), who showed them CCTV footage in the presence of the plaintiff and another employee. The footage depicted the plaintiff moving stock using a pallet jack. Sergeant Motloun understood the complaint to be that good stock was being disguised as damaged stock. She testified that the plaintiff pointed himself out on the footage and explained that there was a promise of money after the work was done. A case of theft was then opened and the plaintiff was arrested.

The law

Arrest without warrant

[5] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977, provides that a peace officer may without a warrant arrest any person whom he or she reasonably suspects of having committed an offence referred to in Schedule 1. Theft is a Schedule 1 offence. In *Duncan v Minister of Law and Order*,¹ the Appellate Division identified four jurisdictional facts that must be present for a lawful arrest under this section:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect committed a Schedule 1 offence; and
- (iv) the suspicion must rest on reasonable grounds.

[6] The test for reasonable suspicion is objective. In *Mabona and Another v*

¹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H. See also *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA) para 6 (*Sekhoto*).

Minister of Law and Order and Others,² Jones J held that:

‘The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and 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 a sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion and not certainty. However, the suspicion must be based upon solid grounds.’

[7] Where an arrest is admitted, the defendant bears the onus of proving that it was lawful. In *Qunta v Minister of Police*,³ the court confirmed that once arrest and detention are admitted, the onus rests on the defendant to prove justification in terms of s 40(1)(b). The defendant must establish that the arrestor formed a suspicion based upon reasonable grounds.

Discretion to arrest

[8] Even where the jurisdictional facts are present, s 40(1) confers a discretion, not an obligation, to arrest. In *Minister of Safety and Security v Sekhoto and Another*,⁴ Harms DP held that a party who alleges that a constitutional right has been infringed bears the onus, and that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This includes the onus to show either that there was no urgency to use the arrest method or that other milder methods would have been equally effective.

[9] In *McEwan v Minister of Police*,⁵ Gqamana J confirmed this principle:

‘In the particulars of claim (at para 13.4) a bold allegation was made that the arresting officer failed to exercise any discretion at all, alternatively, failed to exercise his discretion in a rational manner. There was no evidence led by the appellant to show either that there was no urgency to use the arrest method to bring him before court or that other milder methods of

² *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658G-H (*Mabona*). See also *Le Roux v Minister of Safety and Security and Another* [2009] ZAKZPHC 8; 2009 (4) SA 491 (N); 2009 (2) SACR 252 (KZP) para 24.

³ *Qunta v Minister of Police* [2012] ZAECPHC 6 paras 72-73 (*Qunta*).

⁴ *Sekhoto* para 49.

⁵ *McEwan v Minister of Police* [2022] ZAECKHC 4; 2022 JDR 0996 (ECM) para 14 (*McEwan*).

bringing him to court would have been equally effective. Based on the evidence and pleadings herein, the exercise of discretion by the arresting officer to use the arrest method to bring the appellant to court cannot be faulted.'

Further detention

[10] In *Minister of Police and Another v Du Plessis*,⁶ the Supreme Court of Appeal examined the legal duties resting on police and prosecuting authorities after an arrest. The court emphasised that a prosecutor must pay attention to the contents of the docket and act with objectivity. However, the liability of the Minister of Police for post-appearance detention depends on whether police conduct materially influenced the remand decision. In *Mahlangu and Another v Minister of Police*,⁷ the Constitutional Court held that police officials bear a continuing duty after arrest to ensure that a detainee is not unlawfully deprived of liberty. This duty includes placing before the prosecutor any information known to the police which may justify release or militate against further detention. The Court further held that judicial detention does not automatically sanitize police misconduct, and an enquiry into the legality of further detention cannot be precluded merely because a magistrate's remand order exists.

Application to the facts

The Arrest

[11] The first three jurisdictional facts are not in dispute. Sergeant Motloun was a peace officer. She entertained a suspicion that the plaintiff had committed theft, a Schedule 1 offence. The critical enquiry is whether that suspicion rested on reasonable grounds. Sergeant Motloun's evidence was that she attended the scene following a complaint of theft. She was shown CCTV footage in the presence of the plaintiff. The footage depicted the plaintiff moving stock using a pallet jack. The plaintiff pointed himself out on the footage. The complainant, Mr Fabian, explained that good stock was being disguised as damaged stock. Sergeant Motloun formed the suspicion that theft had occurred.

⁶ *Minister of Police and Another v Du Plessis* [2013] ZASCA 119; 2014 (1) SACR 217 (SCA) para 34 (*Du Plessis*).

⁷ *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) paras 37 and 52 (*Mahlangu*).

[12] The plaintiff's evidence was that he explained his actions as being in the ordinary course of his duties and that management indicated he should not be arrested. However, even on the plaintiff's own version, the CCTV footage showed him moving stock. The explanation he gave was one of innocent intention, but the objective facts, the movement of stock in circumstances where the complainant alleged theft, were sufficient to ground a reasonable suspicion. In *Mabona*,⁸ the court held that the reasonable person analyses and assesses the quality of information critically and does not accept it lightly without checking it where it can be checked. Sergeant Motlounge did precisely that. She viewed the CCTV footage. She heard the plaintiff's explanation. She considered the complaint's version. On the basis of all this information, she formed a suspicion.

[13] The plaintiff places great emphasis on the fact that management purportedly requested that he not be arrested. However, Sergeant Motlounge's evidence on this aspect was not that management exonerated the plaintiff, but that a request was made, possibly to avoid a night in the cells because bail could be arranged. Even if management expressed a preference, this did not negate the existence of reasonable grounds for suspicion. The arresting officer was entitled to exercise her own independent judgment. The plaintiff also points to contradictions between Sergeant Motlounge's civil evidence and her criminal trial testimony. I have carefully considered these alleged contradictions. While there are some inconsistencies, they do not go to the heart of whether reasonable grounds existed for suspicion. The core facts, that the plaintiff was identified on CCTV footage moving stock, that a complaint of theft was made, and that the plaintiff was present at the scene, are consistent across both versions.

[14] In *Qunta*,⁹ the court held that where the arresting officer formed a reasonable suspicion based on the plaintiff's conduct prior to arrest and allegations of theft by the complainant, the arrest was lawful. The court further noted that the fact that allegations in the complainant's statement later proved to be incorrect does not retrospectively invalidate the suspicion; the prevailing circumstances at the time of arrest must be examined. Applying this principle, I find that at the time of arrest,

⁸ *Mabona* at 658G-H.

⁹ *Qunta* paras 75-79.

Sergeant Motlounq possessed sufficient information to ground a reasonable suspicion. The fact that the plaintiff may have had an innocent explanation, or that management may have preferred that he not be arrested, does not render the suspicion unreasonable. As the court in *Mabona* made clear, the section requires suspicion, not certainty.

[15] Turning to the exercise of discretion, the plaintiff bore the onus of showing that the discretion was not properly exercised. No evidence was led to establish that there was no urgency to arrest or that less invasive methods would have been equally effective. The plaintiff's bald assertion that he could have been asked to make a statement is insufficient. In the circumstances, a complaint of theft, the presence of CCTV footage depicting the plaintiff moving stock, and the need to secure the plaintiff's attendance at court, the decision to arrest falls within the range of rational choices available to the arresting officer.

Further detention

[16] The plaintiff was arrested on 3 May 2019, appeared in court on 6 May 2019, and was released on bail on 20 May 2019 following a formal bail application. The plaintiff contends that his detention beyond the first court appearance was unlawful and that the defendants are liable for the entire period. Sergeant Mkhwanazi, the investigating officer, testified that he received the docket on 6 May 2019 after the matter had already been to court. The matter was remanded to 20 May 2019. He confirmed that he relied on the complainant's statement, the arresting officer's statement, and the alleged existence of CCTV footage. He conceded that he did not personally view the CCTV footage prior to the bail postponement and that if relevant information had been conveyed to him, this could have impacted the duration of detention.

[17] However, Sergeant Mkhwanazi also testified that the value of the alleged stolen property exceeded R20 000, which constituted a Schedule 5 offence. In such circumstances, police bail is limited to R5 000, and the matter required the prosecutor and the court to determine whether release in the interests of justice was appropriate. The plaintiff relies heavily on *Mahlangu*, for the proposition that the Minister may be liable for post-appearance detention where police conduct materially

influenced the remand decision. In *Mahlangu*, the police had obtained a confession through torture and failed to disclose this to the prosecutor. The Constitutional Court held that the police bore a continuing duty to disclose all relevant facts.¹⁰

[18] The present matter is distinguishable. There is no evidence that the police suppressed exculpatory information or misled the prosecutor. The arresting officer's statement and the complainant's statement were placed before the prosecutor. The CCTV footage existed and was available. The investigating officer's failure to personally view the footage prior to the first appearance does not amount to the kind of deliberate misconduct or material omission that was present in *Mahlangu*.

[19] Moreover, the plaintiff's continued detention after 6 May 2019 was the result of judicial orders. The matter was remanded by the magistrate for a bail hearing. There is no evidence that these remand orders were procured through police misconduct or misrepresentation. In *Du Plessis*,¹¹ the court examined the liability of the Minister for post-appearance detention and held that the prosecutor's failure to pay attention to exculpatory matter in the docket could found liability. However, in that case, the prosecutor failed to act on statements that showed the plaintiff was an innocent bystander. Here, no such clearly exculpatory material existed.

[20] Section 50(6)(d) of the Criminal Procedure Act provides that bail proceedings may be postponed for a period not exceeding seven days at a time. The postponement from 6 May to 20 May 2019 exceeded seven days. However, the plaintiff's remedy, if any, lies against the magistrate and the Minister of Justice for any alleged wrong application of the law. The magistrate was not joined in these proceedings. More fundamentally, the plaintiff has not established that the postponement was unlawful or that it was caused by any conduct of the police. The first defendant cannot be held liable for judicial acts over which it had no control.

[21] I am fortified in this conclusion by the approach in *McEwan*,¹² where the court upheld the lawfulness of detention where the plaintiff was brought before court within

¹⁰ *Mahlangu* paras 37 and 52.

¹¹ *Du Plessis* para 34.

¹² *McEwan* paras 3 and 10-12.

the prescribed period and the subsequent postponements were occasioned by the normal processes of the court. The court held that the object of arrest is to bring the suspect before court, and once that is achieved, further detention is a matter for judicial determination.

Credibility findings

[22] The plaintiff's evidence was not without difficulty. He testified that he had a poor relationship with the receiving manager and two security officers. He conceded that on the CCTV footage, he could see that good stock had been mixed with damaged stock by two other employees. He pointed these employees out to management. Yet he maintained that he had no involvement in any wrongdoing. Sergeant Motloun's evidence was substantially consistent on the core facts: the complaint, the viewing of CCTV footage, the plaintiff's presence and identification, and the decision to arrest. While there were some inconsistencies under cross-examination regarding the timing of her call to the station commander and whether admissions were made, these did not, in my view, detract from the essential reasonableness of her suspicion.

[23] The approach in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*,¹³ requires the court to make findings on the credibility of witnesses, their reliability, and the probabilities. Applying this approach, I find that Sergeant Motloun was a credible witness whose evidence, viewed holistically, established that she entertained a reasonable suspicion based on solid grounds. The plaintiff's version, while consistent, does not displace the objective reasonableness of the suspicion formed at the time of arrest.

Conclusion

[24] The first defendant has discharged the onus of proving that the jurisdictional facts for a warrantless arrest under s 40(1)(b) were present. Sergeant Motloun entertained a reasonable suspicion, based on objective grounds, that the plaintiff had committed theft. She lawfully exercised her discretion to arrest the plaintiff. The arrest was accordingly lawful. The plaintiff's detention following the arrest was the

¹³ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie and Others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) paras 5-6.

result of judicial orders made in the ordinary course. There is no evidence that the police suppressed exculpatory information or otherwise misconducted themselves in a manner that materially influenced the remand decisions. The first defendant cannot be held liable for detention that was judicially authorised in the absence of proven police misconduct.

[25] In the premises, the plaintiff's claims for unlawful arrest and unlawful detention cannot succeed.

Order

[26] In the result, the following order is made:

- 1 The plaintiff's claim against the first and second defendant is dismissed.
- 2 The plaintiff is ordered to pay both defendants' costs of suit on scale A

M B NEMAVHIDI
ACTING JUDGE OF THE HIGH COURT

Appearances

For the plaintiff :	A C Gobetz
Instructed by:	Loubser Van Wyk Inc, Pretoria c/o Jacobs Fourie Bloemfontein.

For the first and second defendants :	S S Jonase
Instructed by:	The State Attorney, Bloemfontein.