

SOUTH AFRICA / JUDGMENT

Fokisi v Minister of Police (4258/2023)

[2025] ZAFSHC 125 (6 May 2025)

[2025] ZAFSHC 125**COURT**

Free State High Court, Bloemfontein

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

4258/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREESTATE****DIVISION, BLOEMFONTEIN****Not****reportable****CASE****NO: 4258/2023****In****the matter between:**

LEBOHANG CHARLES

FOKISI

PLAINTIFF

and

THE MINISTER OF

POLICE

DEFENDANT

Neutral citation:Lebohang Charles Fokisi v the Minister of Police (4258/2023) [2015]
ZAFSHC (6 May 2025)**Coram:**

Greyling-Coetzer AJ

Heard: 15 and 16

October 2024, 6 December 2024 and 7 February 2025

Delivered: 6 May

2025

Judgment by:

Greyling-Coetzer AJ

Summary: Unlawful arrest and detention – Criminal Procedure Act, 51 of 1977 – section 40(1)(h) – Drugs and Drug Trafficking Act, 140 of 1992 – section 5 – undesirable dependence-producing substance – Criminal Procedure Act, 51 of 1977 – section 59 – Schedule 2, Part II
ORDER
1.
The plaintiff’s claim is dismissed, with costs.

JUDGMENT

GREYLING-COETZER AJ:

- [1] The plaintiff claims damages in amount of R 450 000,00 arising from a unlawful arrest and detention by members of the South African Police Service acting in the course and scope of their employment with the service.[1]
- [2] The parties were ad idem that the issues for determination were i) the lawfulness of the arrest and detention and ii) the quantum of the plaintiff’s claim.
- [3] The defendant specifically placed reliance on Section 40(1)(h) of the Criminal Procedure Act 51 of 1977 (‘CPA’) in justification of the arrest and detention.
- [4] It was common cause the plaintiff had complied with section 3 of the Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002; the plaintiff was arrested without a warrant by members of the South African Police Service acting within the course and scope of their duties; the plaintiff was arrested on Friday the 18th of November 2022 on suspicion of committing an offence in terms of the Drugs And Drugs Trafficking Act, 140 of 1992, as amended being the ‘dealing in dagga’; the plaintiff was detained from date of arrest until Monday the 21st of November 2022 when he was taken to court; and the plaintiff was released from the court holding cells on Monday the 21st of November 2022, without appearing in court.
- [5] The plaintiff contends that he was selling boxer tobacco divided into small packages referred to as ‘bankies’, which packages he had in his possession at the time of arrest.
- [6] The defendant called two police officers to testify. They were Constable Sigcawu, the arresting officer and the investigating officer, Sergeant Molefe.
- [7] Constable Sigcawu testified that in 2022 he was deployed at Phutahadihaba. On the day in question he and his team were conducting crime prevention duties. They were in full uniform and driving slowly along the road near the Tsitseng Taxi Rank. They were travelling in a white marked Volkswagen Transporter police vehicle. He was unable to recall who was driving but per his recollection they were 3 police officer in the vehicle, which included Constable Phofi. He was sitting at the sliding passenger door which was slightly open.

[8] He observed an individual, later identified as the plaintiff, approximately 25 metres ahead of the police vehicle. As the vehicle

approached, the plaintiff repeatedly looked back in its direction. Upon noticing this behaviour, the officer continued to observe the plaintiff for a minute or two and formed the opinion that his conduct was suspicious. He explained that, unlike other individuals on the street who appeared to be engaged in their ordinary activities, the plaintiff was fixated on the police vehicle, watching it closely as it advanced slowly. When the vehicle came to a stop approximately three metres from the plaintiff and Constable Sigcawu was about to alight, the plaintiff suddenly fled the scene on foot.

[9] Constable Sigcawu gave chase and, shortly before apprehending the plaintiff, observed the plaintiff discard an object resembling a bag onto the ground. Throughout the pursuit, he maintained uninterrupted visual contact with both the plaintiff and the discarded item. He apprehended the plaintiff by seizing him from behind at the waist. With the assistance of Constable Phofi, he retrieved the bag, which was located a few steps away and later described as a red side bag. Constable Sigcawu then requested the plaintiff's permission to conduct a search of his person. The plaintiff responded by nodding in agreement, whereupon Constable Sigcawu proceeded to search him.

[10] Constable Sigcawu conducted a search of the plaintiff and discovered, under the plaintiff's clothing and specifically beneath his right armpit, a plastic shopping bag containing three smaller plastic-wrapped balls, which he identified, based on their appearance and odour, as dagga. He thereafter proceeded to search the plaintiff's red side bag, where he found additional packages, similarly identified as dagga by their visual characteristics and smell. These packages were individually sealed in transparent plastic bags and were categorised into small, medium, and large units commonly referred to as 'bankies'. The transparency of the packaging enabled him to observe the contents without opening them. Although Constable Sigcawu did not count the individual

packages at the time of arrest, he noted that there were numerous units, which, coupled with the manner of packaging, led him to

reasonably suspect that the plaintiff was involved in the sale of dagga rather than mere possession. In addition, the plaintiff was found to be in possession of money in the form of both notes and coins.

[11] The plaintiff was thereafter transported to Phuthaditjhaba Police Station, where the packages were counted and weighed in his presence. The tally revealed 16 small bankies, 80 medium bankies, and 20 large bankies, with a total weight of 293.54 grams. The weight was established using a scale made available at the police station. However, due to load shedding at the time, the standard weight certificate form could not be printed and completed. Consequently, the weight measurement was recorded in the official statement made by Constable Sigcawu. The dagga was then sealed inside a forensic evidence bag, booked into the SAP13 register, and the matter was handed over to the detective branch for further

investigation.

- [12] Constable Sigcawu testified that he informed the plaintiff of his constitutional rights in Sesotho, first at the scene what he described as informally to take him 'in' and then at the Phutahadihaba Police Station the SAPS 14A Notice of Rights document was signed when he formally arrested the plaintiff. He explained that before the latter could take place he wanted to establish quantity and/or the weight of the dagga.
- [13] According to Constable Sigwacu he conversed with the plaintiff enquiring what he was doing with the dagga to which the plaintiff answered he was selling as he has no job and did so in order to make a living. Qualifying it that dagga was legal.
- [14] Constable Sigcawu denied that the plaintiff ever stated that the contents of the 'bankies' were tobacco. He further rejected the assertion that the contents of the separated packages were tobacco, reaffirming that he is familiar with the appearance and odour of dagga. He testified that dagga is distinguishable by its pungent smell, green leafy appearance, and the presence of small brown seeds.
- [15] Cross examination established that there were some discrepancies between the oral evidence of Constable Sigcawu and his written statement, essentially as to which packages were found were i.e. on the plaintiff's person and in the red side bag. He was also at length cross examined about the accuracy of the scale used to weigh the packages, scientific composition of dagga which makes it illegal and whether it's a dependence producing substance or undesirous dependence producing substance.
- [16] Constable Sigcawu readily made concession where his memory failed him or the answer solicited was beyond his knowledge, but he was adamant about the essential facts, namely that he arrested the plaintiff on suspicion of dealing in what he regarded and observed to be dagga, segregated into packages for the purpose of selling.
- [17] Sergeant Molefe was the second witness called by the defendant. He testified that he was the investigating officer in the matter. He received the docket concerning a charge of dealing in dagga the day after the arrest. He proceeded to interview the plaintiff who he claims verbally admitted to him that he was dealing in dagga. This was however not confirmed in a statement as the plaintiff refused to make a statement and elected that he will provide a statement to court in the warning statement.
- [18] Sergeant Molefe proceeded to review the docket which contained the affidavits of Constables Sigcawu and Phofi as well as the exhibits. He visually inspected the exhibits and the content, which was in two forensic bags stored in SAP13 storage and satisfied him that it was dagga. He did not open the bags but could see as its transparent and did not weigh it again as the weigh was confirmed in the affidavits in the docket.
- [19] Sergeant Molefe confirmed that police bail was not granted by him as the weight of the dagga was more than 100grams and that the plaintiff was thus eligible for the court to make a determination on bail. During cross examination he testified that the plaintiff was not

granted police bail due to the seriousness of the offence. As the plaintiff was arrested on a Friday he proceeded to prepare the plaintiff for his court appearance on the Monday and completed the required form, wherein he indicated that the plaintiff could be released on bail by the court.

- [20] The plaintiff testified that he is 37 years old. He could not confirm his identity number but believes he was born in 1987.[2] He is unemployed but works informally as a hawker, selling tobacco. His business method involved buying bulk Boxer tobacco, repackaging it into small plastic packets for resale. The packets he used are transparent.
- [21] On the morning in question, he was at Sesing where he normally sells tobacco. He was standing with his black side-bag containing his tobacco products when he was approached by four police officers not in uniform. He denied running from the police. He testified that after being approached, one officer grabbed him by the waist and questioned the contents of the bag. He denied that his person was searched. On being questioned what the bag contained, he responded that it was tobacco, but his response was ignored. He was taken to a police vehicle described as a 'baby Quantum', and taken to Phuthaditjhaba Police Station.
- [22] He was detained upon arrival, placed in a 3.5m x 5m cell with 13 to 14 unknown people. The cell had a working toilet, but no bathing facilities. The cell was untidy and smelling bad. He slept on the floor with a blanket which was provided to him. He could not change clothes as he only had the clothes on him, and visitors were not allowed over the weekend. He was provided with meals which included bread (4 slices at a time), porridge and hot tea to drink. He emphasized that other people at Sesing were also carrying bags like his and selling similar items but were not stopped or arrested. He stated that the experience left him afraid of the police and that he was not treated fairly.
- [23] He confirmed signing the SAPS 14A Notice of rights and during the interaction he answered questions but stated that no explanation of the documents was provided. He was only told where to sign. He testified that this process was undertaken by the investigating officer. He denied that he was advised of his right to apply for bail.
- [24] He denied that he admitted to dealing in dagga. He claims what he said was not properly recorded without elaboration as that what exactly was said other than he was selling tobacco. He denied that the dagga was weighed in his presence, and maintained it was tobacco.
- [25] During cross examination he was confronted with his knowledge of dagga. He denied knowing what dagga looks or smells like, stating he had never seen it before, and could not distinguish it from tobacco. Confronted with the improbabilities of this considering the prevalence of dagga he responded that it's for the court to decide. He confirmed knowing selling dagga is illegal.

- [26] The provisions of section 40(1) of the CPA are relevant. They indicate that a peace officer may arrest a person without a warrant in several circumstances.
- [27] Before an officer can exercise such a power, the necessary jurisdictional facts must exist. In *Duncan v Minister of Law and Order*,^[3] the erstwhile Appellate Division held, per Van Heerden JA, that there are four such jurisdictional facts: (i) the arrestor must be a peace officer; (ii) he or she must entertain a suspicion; (iii) it must be a suspicion that the arrestee committed a Schedule 1 offence; and (iv) the suspicion must rest on reasonable grounds.
- [28] The meaning of 'reasonable grounds' was considered in *R v Van Heerden*,^[4] where Galgut AJ held that the term must be interpreted objectively, and the grounds must be those that would induce a reasonable person to have a suspicion. In *Mabona and another v Minister of Law and Order and Others*,^[5] where Jones J confirmed that the test for whether a suspicion is reasonably entertained is objective. He stated as follows:

'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 authorizes drastic police action. It authorizes 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.'

- [29] The jurisdictional facts in the context of section 40(1)(h) can be summarised as follows: (i) The arresting officer must be a peace officer; (ii) the arresting officer must entertain a reasonable suspicion; and (iii) that the arrestee is committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition.
- [30] In *Minister of Safety and Security v Sekhoto and Another*^[6], the Supreme Court of Appeal, per Harms DP, held that once the jurisdictional that the officer is entitled to exercise such a discretion as he or she deems fit, provided that he or she stays within the bounds of rationality. The court went on to remark as follows:

‘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... The purpose of the arrest is no more than to bring the suspect before the court... 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... 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...’

- [31] In *Biyela v Minister of Police*[7] noted that the standard of a reasonable suspicion for arrest 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. Whether that information would later, in a court of law, be found to be inadmissible is irrelevant for the determination of whether the arresting office at the time of arrest harboured a reasonable suspension.
- [32] What was thus required in the present instance is that the arresting officer must have formed a reasonable suspicion that plaintiff is or was committing an offence ‘under any law governing the making, supply, possession, or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition. . .’. In this instance, the relevant law was the Drugs Act, in particular section 5(b).
- [33] Section 5(b) of the Drugs Act, prohibits anyone from dealing in any dangerous dependence producing substance or any undesirable dependence-producing substance. Those include cannabis.[8] Cannabis (dagga) is per Part III of Schedule 2 of the Drugs Act listed as an undesirable dependence -producing substance.
- [34] ‘Deal in’ is defined ‘in relation to a drug, includes performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug’.[9]
- [35] The correct approach to be adopted when a court faces two mutually destructive versions is set out in *National Employers' General Insurance Co Ltd v Jagers*[10] where Eksteen AJP said: ‘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 and, 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.'

[36] It is trite and was also so agreed between the parties that the defendant bears the onus to prove the lawfulness of the arrest and detention. That said as per *Minister of Safety and Security v Sekhoto & Another*[11], while the overall onus to prove that the arrest was lawful remains to be on the Minister, once the Minister has established the

jurisdictional facts required for a defence based on section 40(1), the arrest is *prima facie* lawful. An arrestee (plaintiff in this case) who contends that the police officers did not exercise the discretion to arrest lawfully must plead and prove facts which show that the discretion was exercised unlawfully. If the appellant does not do so, the lawfulness of the arrest can be confirmed.

[37] Constable Sigcawu is a single witness in respect of the arrest and so is Sergeant Molefe in respect of the detention post arrest until release. The Plaintiff in turn is a single witness in respect of his version. Considering the totality of the evidence before me and weighing up both the defendant's evidence and that of the plaintiff and testing same against general probabilities, the probabilities favour the defendant.

[38] I accept the evidence of the Constable Sigcawu, who carried out the arrest and that: he noticed the plaintiff's reaction when he saw the police vehicle; that the plaintiff commenced running the moment the police vehicles was stopped; that he then apprehended the plaintiff. Further that he found the plaintiff in possession of various packages bankies of dagga. Based on experience and knowledge of dagga he was able to visually identify it as dagga by its appearance and by smell; and the manner of packaging that he formed a suspicion[12] that the plaintiff was committing or of having committed the offence of dealing in dagga and arrested the plaintiff lawfully;[13] that the plaintiff was taken to the police station soon as was possible and proper procedures were followed.[14]

[39] Constable Sigcawu's version is to some extent confirmed by the plaintiff in that he was grabbed by the waist. It is improbable that it would have been necessary to grab him by the waist if the plaintiff was merely approached by the police men as testified to by the plaintiff or that they would not have search his person.

- [40] It is not disputed that, at the time of his apprehension, the plaintiff was found in possession of various packages comprising small, medium, and large ‘bankies’ and that these packages were arranged or prepared in a manner consistent with onward sale. The plaintiff, however, denied that the contents of the packages were dagga and asserted that it was tobacco. It is improbable that, being able to visually inspect the contents through the transparent packaging—as well as to detect its odour—Constable Sigcawu would nonetheless have mistakenly concluded that the substance was dagga rather than tobacco.
- [41] It is equally unlikely that Constable Sigcawu would have proceeded to arrest the plaintiff in such circumstances absent a reasonable belief that the substance was indeed dagga. There exists a clear and recognisable distinction between dagga and tobacco, even to the ordinary person. I find it highly implausible that the plaintiff, a 37-year-old hawker operating near a taxi rank, has never in his life encountered dagga, yet simultaneously claims to know that its sale is unlawful.
- [42] A reasonable person in the position of Constable Sigcawu, upon encountering an individual in possession of multiple packages presented in a manner indicative of preparation for onward sale, and being equipped with knowledge of the appearance and smell of dagga, as well as the legal distinction that possession may be permitted while the sale, supply, or dealing in dagga is prohibited, and having identified—both visually and olfactorily—the contents as *prima facie* dagga, would have had reasonable and probable grounds to suspect that the individual was engaged in the sale of those packages and, therefore, dealing in dagga.[15]
- [43] The argument on behalf of the plaintiff that the defendant has failed to prove that the content was in fact dagga is misplaced. It is not a prerequisite for an arrest to be lawful that the facts upon which the suspicion is based should be proven. As articulated in *Biyela v Minister of Police*[16] whether that information would later, in a court of law, be found to be inadmissible is irrelevant for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion. Applying aforesaid, whether Constable Sigcawu was in fact correct on his *prima facie* view that the content was dagga is irrelevant. His *prima facie* view that it was dagga founded on his observations and experience was sufficient at that point.
- [44] The argument on behalf of the plaintiff that the defendant did not prove the plaintiff committed the act of ‘transacting’, suffers a similar fate. It is not the case of the defendant that the offence of dealing in dagga was committed in his presence or that actual transacting took place upon which the reasonable suspicion was formed. This argument seems to suggest that each of the elements of a specific crime had to be proven before an arrest could take place.
- [45] In line with the prescripts of section 50 of the CPA the plaintiff was taken to the police station. There the packages were counted, weighed and found to be 293,54 grams.

[46] It was argued on behalf of the plaintiff that the arresting officer was clearly not aware that the presumption clause relating to dealing had been invalidated *S v Bhulwana, S v Gwadiso*[17] as far back as 1995. This argument was founded on the testimony of Constable Sigcawu that he regarded it as dealing oppose to possession

due to the quantity of packages found and later confirmed weigh of more than 100grams.

[47] Section 21(1)(a)(i) of the Drugs Act provides that: 'If in the prosecution of any person for an offence referred to – (a) in section 13(f) it is proved that the accused - (i) was found in possession of dagga exceeding 115 grams;...it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance;'

[48] In *S v Bhulwana, S v Gwadiso*[18] the court ordered that: 'The following provisions of the Drugs and Drug Trafficking Act, 140 of 1992 are declared to be inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and are, with effect from the date of this judgment, declared to be invalid and of no force and effect: (a) section 21(1)(a)(i); (b) the words 'dagga or' in section 21(1)(a).'

[49] Although it is correct that said presumption is invalid and no longer has any force and effect, I fail to see how it finds application in the present matter. The effect of the invalidity merely requires the prosecution in a criminal trial to prove dealing notwithstanding the weight of dagga. It further, a presumption that find application during criminal prosecutions and it does not decriminalise dealing in dagga. Dealing in dagga is still a criminal offence and to form the suspension that a person is dealing in dagga the quantity of the dagga is one factor to consider. It would require the arresting officer and later the prosecutor to exercise their discretion founded on all available information including the quantity to determine what

the person should be arrested for and/or charged with.

[50] The court in *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton*[19] held: '...In determining whether or not a person is in possession of cannabis for a purpose other than for personal consumption, an important factor to be taken into account will be the amount of cannabis found in his or her possession. The greater the amount of cannabis of which a person is in possession, the greater the possibility is that it is possessed for a purpose other than for personal consumption. Where a person is charged with possession of cannabis, the State will bear the onus to prove beyond a reasonable doubt that the purpose of the possession was not personal consumption.

...

The above reading-in means that, if a police officer finds a person in possession of cannabis, he or she may only arrest the person if, having regard to all the relevant circumstances, including the quantity of cannabis found in that person's possession, it can be said that there is a reasonable suspicion that a person has committed an offence under section 40(1)(b) or (h) of the

Criminal Procedure Act. I think that the references to possession of cannabis, “for personal use,” or “for personal consumption” help to ensure that we do not have to specify the amount or quantity of cannabis that may be possessed. We only need to say that the amount that may be possessed is an amount for personal consumption.

At a practical level, a question that arises is: if a police officer finds someone in possession of cannabis, how will he or she know whether that person is in possession of that cannabis for personal consumption? Will he or she rely on that person’s word? Will he or she ask questions aimed at establishing that? Obviously, a police officer will ask the person questions but his or her answers will not be decisive. The police officer will need to have regard to all the relevant circumstances and take a view whether the cannabis possessed by a person is for personal consumption. If he or she takes the view, on reasonable

grounds, that that person’s possession of cannabis is not for personal consumption, he or she may arrest the person. If he or she takes the view that the cannabis in the person’s possession is for that person’s personal consumption, he or she will not arrest him or her.’

[51] Constable Sigcawu’s conduct aligns with aforesaid in that he found various packages, packages in a fashion that suggested onward sale to him. The suspicion of dealing in dagga was preliminary formed. He proceeded with the plaintiff to the police station. The packages were then counted, and the weight was established. This satisfied him and resulted him to classification of the offence as serious. The plaintiff was then formally arrested and detained.

[52] That is however not the end of the matter. The question remains whether Constable Sigcawu properly exercised his discretion to arrest.[20] The establishment of the jurisdictional facts and the exercise of the discretion to arrest can however not be seen in a vacuum. It remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily, which, in turn, meant that ‘peace-officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimally by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection or even the optimum, judged from the vantage of hind-sight – so long as the discretion is exercised within this range, the standard is not breached’.[21]

[53] The plaintiff pleaded an array of circumstances to challenge the exercise of the discretion, but placed little before court other than argument in substantiating same. It was inter alia argued on behalf of the plaintiff and as traversed above that it was not proved that the plaintiff committed the act of dealing or that it was dagga therefore the discretion was not exercised. The same reasoning applies as set out above, in that it was not a prerequisite for the discretion to be exercised properly that these fact at that stage had to be proven.

- [54] During cross-examination, it was put to Constable Sigcawu that he failed to exercise any discretion prior to effecting the arrest. In response, he testified that he had, in fact, exercised his discretion, having regard to the circumstances known to him at the time. These included the items found in the plaintiff's possession, the quantity and packaging of the substances, which he prima facie identified as dagga, and the manner in which they were segregated. He further stated that his discretion was influenced by the plaintiff's conduct in fleeing the scene immediately upon the police vehicle coming to a stop, and that the sole purpose of the arrest was to ensure the plaintiff was brought before a court of law to answer for the suspected offence of dealing in dagga, and for no ulterior or improper purpose.
- [55] The plaintiff did not identify any facts that were known to the arresting officer which ought to have persuaded him not to arrest and detain the plaintiff, let alone facts which show that the decision to arrest was made in bad faith, irrationally or arbitrarily.
- [56] For as far as the alleged explanation that the content of the packages was tobacco which was ignored, it was already found that improbable. Even assuming for the present purpose that that was probable Constable Sigcawu, was in a position to consider same and from his observation of the content as dealt with above prima facie establish the veracity of such explanation.
- [57] Once the plaintiff was under arrest, a bail application became necessary to ensure his freedom. Constable Sigcawu testified that his roll ended once he arrested the plaintiff and handed the plaintiff to the detectives. His is correct in that he was unable to give the plaintiff police bail as he was not a police officer of or above the rank of non-commissioned officer.
- [58] Section 59(1)(a) of the CPA provides that: 'An accused who is in custody in respect of any offence, other than an offence- (i) referred to in Part II or Part III of Schedule 2;....may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.'
- [59] It was argued on behalf of the plaintiff that section 59 of the CPA gave the investigating officer a discretion to release the plaintiff on police bail, which discretion was not exercised or improperly exercised in that the investigating officer regarded the offence as serious by incorrectly having regard to the weight and value of the dagga. I am unable to agree.
- [60] Section 59(1)(a) of the CPA only authorises police bail in certain circumstances. It expressly excludes police bail where the person is in custody in respect of an offence referred to in Part II or Part II of Schedule 2.
- [61] Part II of Schedule 2 lists: '...Any offence under any law relating to the illicit- (a) possession of- (i) dagga exceeding 115 grams; or (ii) any other dependence-producing drugs; or (b) conveyance or supply of dependence-producing drugs...'

- [62] Although the plaintiff was not suspected of possession per se, possession it is unavoidable linked or relates to dealing. The facts reveal that the plaintiff had in his possession dagga exceeding 115 grams. In addition 'deal in' includes performing any act in connection with inter alia supply of dependence producing drugs.[22]
- [63] Sergeant Molefe was thus not empowered to give the plaintiff police bail and aligns with the evidence that regard is had to the seriousness of the offence, which is understood to mean whether it falls under section 59 of the CPA.
- [64] For the reasons traversed above, I find on a preponderance of probabilities; the arrest and detention of the plaintiff was lawful, and the plaintiff failed to prove that the discretion was exercised improperly. The claims must fail.
- [65] There is no circumstances justifying a departure from the general rule that costs should not follow the event.[23]
- [66] Consequently the following order is made:
1. The plaintiff's claim is dismissed, with costs.

D GREYLING-COETZER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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- [1] During closing argument it was contended on behalf of the Plaintiff that a more appropriate award would be in the region of R120 000,00 to R150 000.00
- [2] This contradicted the identify number per the pleadings and documents in the trial bundle. It resulted in the matter being postponed to confirm the identity of the plaintiff. A report was handed in by agreement compiled by Warrant Officer Steyn in terms of which the fingerprints of the plaintiff was compared to that on arrest. The parties was ad idem that the plaintiff was the person arrested.
- [3]
- [1986] ZASCA 24; [1986] 2 All SA 241 (A); 1986 (2) SA 805 (A) at 818G-H
- [4] [1958] 3 All SA 125 (T)
- [5]
- [1988] 3 All SA 408 (SE)
- [6]

[2010] ZASCA 141; 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA)

[7] (1017/2020) [2022] (1 April 2022) ZASCA 36

[8] Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public

Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (18 September 2018) par [83]

[9] Section 1 of the Drugs and Drug Trafficking Act 140 of 1992

[10] National Employers' General Insurance Co Ltd v Jagers 1984

(4) SA 437 (E) 440E to 441B

[11] [2010] ZASCA 141; 2011 (5) SA 367 (SCA) par 7

[12] See Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) 658E in respect of a reasonable suspicion, albeit in terms of section 40(1)(b)

[13] The arrest was for possession of drugs in terms of section 40(1)(h) of the Criminal Procedure Act

[16] (1017/2020) [2022] (1 April 2022) ZASCA 36

[17] (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995

(12) BCLR 1579 (29 November 1995)

[18] (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) par [34]

[19] (CCT108/17)

[2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019

(1) SACR 14 (CC) (18 September 2018) par [110]

[20] Minister of Safety and Security v Sekhoto & Another,

[2010] ZASCA 141; 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA);

[2011] 2 All SA 157 (SCA)

[21] Minister of Safety and Security v Sekhoto & Another, [2010] ZASCA 141; 2011 (5) SA 367 (SCA); 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA)

[22] Section 1 of the Drugs and Drug trafficking Act 140 of 1992

[23] Myers v Abramson, 1951(3) SA 438 (C) at 455;

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