

SOUTH AFRICA / JUDGMENT

Foli v Minister of Police (739/2018) [2023] ZANWHC 120 (20 July 2023)

[2023] ZANWHC 120**COURT**

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

739/2018

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****CASE****NO: 739/2018****In****the matter between:**ZWELINZIMA
MARTIN FOLI
PLAINTIFF
and
MINISTER
OF POLICE
DEFENDANT**Delivered:**

This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to 15h30PM on 20 July 2023.

ORDER

In the result, it is

ordered that:The
plaintiff's claim is dismissed with costs.

JUDGMENT

PETERSEN J

Introduction

- [1] The plaintiff instituted an action against the defendant for his alleged unlawful arrest and detention by a member of the South African Police Service (SAPS).
- [2] The action which is defended by the defendant proceeded on merits and quantum in respect of general damages in an amount of R2 500 000.00. The plaintiff seeks a postponement sine die in respect of the heads of damages under loss of earnings and medical expenses.
- [3] The defendant adduced evidence of two witnesses, Warrant Officer Samuel Kalagosi Mafojane ('Mafojane') and Warrant Officer Michael Mosamai ('Motsamai'). The plaintiff relied on the evidence of one Tshepo Boysa ('Boysa') and himself testified in support of his claim.

Issues

of common cause

- [4] It appears at first blush common cause that the plaintiff was arrested on 24 April 2015 without a warrant on a charge of contravening section 36 of the General Law Amendment Act 62 of 1955 ('possession of suspected stolen property') by Mafojane, a member of the SAPS, acting in the course and scope of his employment with the defendant. Later when the plaintiff was charged at the police station he was informed that the charge was house robbery (robbery simpliciter). The very basis for the plaintiff's arrest is a bone of contention which is extrapolated upon later. The defendant relies on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ('the CPA') as justification for the arrest. Following his arrest on 24 April 2015, the plaintiff was detained at Mafikeng Police Station and brought before court on 28 April 2015 where he was remanded in custody on numerous occasions until his release on bail on 3 July 2015. The charge against the plaintiff was subsequently withdrawn against him on 7 July 2017.

The onus of proof

- [5] In the circumstances, the onus of proof is on the defendant to prove or justify the lawfulness of the arrest. The position in this regard is trite having regard to *Minister of Law and Order v Hurley*[1]:

"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 should bear the onus of proving that his action was justified in law."

Background

- [6] On 24 April 2015 at approximately 04h30am a robbery occurred at the home of one Alexio Usewenya ('Usewenya') where he and his family were robbed at gunpoint of several items by two unknown men. Whilst Mafojane and Pheto and other members of the SAPS were attending to the complaint several hours later around 09h10am, Usewenya received a call from a friend, one Punish Masihingwatsa ('Masihingwatsa'), who informed him that he encountered two African males who were selling a cellphone in Golfview, Mafikeng.
- [7] Usewenya drove to Golfview, with Mafojane and Pheto in tow. Usewenya arrived before Mafojane and Pheto. Upon the arrival of Mafojane and Pheto, they found plus minus five (5) people. Usewenya pointed out Boysa as one of the suspects who was involved in the robbery. This led to Boysa's arrest.
- [8] The plaintiff was pointed out to Mafojane by Usewenya for allegedly having thrown a cellphone to the ground. Mafojane searched the plaintiff and found in his back trouser pocket a black SanDisk memory card ('the memory card'). When the plaintiff, on Mafojane's version could not furnish a satisfactory explanation for being in possession of the memory card he was arrested for being in possession of suspected stolen property. The plaintiff along with Boysa were ferried in a police van to Mafikeng Police Station where they were detained.
- [9] Against this background, I turn to the evidence adduced by the defendant and the plaintiff.

The defendant's evidence

Warrant Officer Mafojane

- [9] The gist of the evidence of Mafojane is captured supra. The specifics of his evidence leading to the arrest of the plaintiff may be succinctly captured as follows. Once the memory card was found in possession of the plaintiff, Usewenya intimated that if the memory card was to be inserted in a phone, the pictures of his family would appear. A white cellphone which was laying on the ground was used to insert the memory card and the pictures of Usewenya and his family were depicted.
- [10] At the police station, the plaintiff was handed a notice of rights indicating that he was charged with house robbery. According to Mafojane what informed the charge was that a house robbery had taken place, a tip-off was received about two men selling a cellphone and the memory card was found on the plaintiff. Mafojane was at pains to explain how the arrest predicated on the alleged possession of suspected stolen property escalated to the plaintiff being charged with house robbery. The high watermark of his explanation initially was that if the plaintiff was found with property which he could not explain, he would still have charged him with house robbery. This evidence later changed under cross examination when he testified that it was in fact Motsamai who decided to charge the plaintiff with house robbery and not himself.

- [11] At the police station he conducted a second search of the plaintiff and Boysa where he found mandrax and money in possession Boysa but nothing in possession of the Plaintiff. According to Mafojane once the plaintiff was detained in a holding cell he had no further contact with him. He later learnt from Motsamai that the charge against the plaintiff was withdrawn.
- [12] Under cross examination, Mafojane confirmed that he has 33 years experience as police officer with 18 years as a Warrant Officer. Mafojane confirmed knowing that there is a difference between possession of suspected stolen property and robbery. He was at pains to explain the arrest of the plaintiff for possession of suspected stolen property and later being charged with robbery. When the pinch of the shoe became too much, Mafojane both under cross examination and re-examination changed the reason for his arrest from being possession of suspected stolen property to house robbery.
- [13] The aforesaid change in evidence by Mafojane is demonstrated through the cross examination as follows. When asked if he had sufficient information to arrest the plaintiff, he testified that the memory card which he found and the failure by the plaintiff to give an explanation as to whom it belongs to was sufficient. He remained adamant that the plaintiff did not furnish any explanation. On whether he enquired from the plaintiff where he was on the morning of the robbery, he relegated that duty to Motsamai, who was the detective assigned to investigate the robbery. Similarly, he maintained that there was no need to consult, or question Punish Mashingwatsa, as that was the duty of Motsamai.
- [14] Mafojane did not have the police case docket with him and had not read it prior to the arrest of the plaintiff as it was with the detectives. He maintained that there was no need for him to either have the docket or read it. When the statement of Usewenya, "A1" in the docket was pointed out to him and that he did not point out the plaintiff as one of the robbers he conceded that the plaintiff did not point out the plaintiff as one of the robbers to him. He further conceded that he did not see the cellphone being thrown on the ground.
- [15] Mafojane disputed the plaintiff's version that no memory card was found in his possession and disputes that a police reservist at the time one Abraham Fanie Mokgalo ("Mokgalo") searched the plaintiff and not himself. Mafojane further disputed seeing any injuries on Boysa initially and later conceded that he did in fact see his injuries.
- [16] Mafojane, a police officer of 33 years standing conceded that he does not know under which Schedule of the CPA house robbery (robbery simpliciter) falls, which similarly applies to section 36 of the General Law Amendment Act 62 of 1955. In fact, his evidence is that he has never heard of section 36 of the General Law Amendment Act 62 of 1955. Unsurprisingly therefore he conceded that he does not know where in the law it requires the plaintiff to have given a satisfactory explanation. He ultimately conceded that he does not know the law.

Warrant Officer Motsamai

- [17] Motsamai was the investigating officer on what he described as a charge of house robbery with aggravating circumstances. Upon receipt of the case docket which had three (3) statements, that of Usewenya, a witness and Mafojane, he did preliminary investigations. A cellphone and simcard were positively identified by Usewenya and his wife. This he testified convinced him that the two suspects who were arrested and in particular the plaintiff who was found in possession of the memory card was involved in the robbery. As a result, he charged them the following day with house robbery.
- [18] According to Motsamai, he and a colleague Sgt Thalerwa conducted interviews with the suspects on 25 April 2015. He was at pains to explain the inconsistencies in the warning statement of the plaintiff where he elected to remain silent, yet later stated that he knew nothing about the allegations against him. After clarification from court, he maintained that the plaintiff elected to remain silent.
- [19] Motsamai investigated the personal circumstances of the plaintiff and after establishing that he had a fixed address and family ties he recommended a bail amount of R1000.00 to the prosecutor. The final decision of the amount of bail would however be that of the prosecutor on his evidence. He explained that the reference to the word “No” in a bail form which he completed implied that he was not opposed to bail. When the plaintiff appeared in court, however, the disclosure of a previous conviction resulted in a postponement of the matter for a formal bail application. When he eventually received form SAP69 which reflects previous convictions, he decided to oppose bail. The plaintiff’s application for bail which was ultimately heard on 27 May 2015 was refused by the Magistrate.
- [20] Under cross examination it was pointed out to Motsamai that Usewenya in his statement indicated that he could identify both suspects if he found them around the streets but that he only pointed out Boysa. He went on to testify that if it were not for the memory card and the cellphone which was dropped that Mafojane would not have arrested the plaintiff for house robbery. Further, he contended that the plaintiff was arrested within 6 hours of the robbery and there was therefore no need for an identification parade.
- [21] He contradicted the evidence of Mafojane on who decided on the charges the plaintiff should be charged with, maintaining that it was him and not Mafojane. According to Motsamai, the plaintiff appeared in court on more than 20 occasions and chose to remain silent regarding the memory card. No fingerprints were taken from the cellphone which was said to be thrown to the ground nor from the memory card or tested for touch DNA. On Motsamai’s version, he was convinced as to the involvement of the plaintiff because of the evidence of Usewenya and his wife. Save for the statement obtained between 24 and 28 April 2015 no further investigation was conducted during the 71 days that the plaintiff was incarcerated until his release on bail in May

2015. According to Motsamai no other evidence linked the plaintiff to the commission of the robbery.

[22] That concluded the case for the defendant.

Evidence for the plaintiff

Tshepo Boysa

[23] The first witness for the plaintiff Boysa testified that he was on his way to the area of Fruit and Veg City where he sells drugs with his cousin Ben. When he saw the plaintiff whom he knew from the same Village he crossed the road to greet him. As they were talking and exchanging pleasantries a vehicle with a Botswana registration number arrived from which two men known to him as Alex and Peter, also drug dealers, emerged. An argument ensued between himself and the two men leading to an assault on him, whilst the plaintiff stood by watching. The assault proceeded with Boysa and the two men ending up opposite

the offices of the Department of Education. At this point, Mafojane and Pheto who were known to him as police officers arrived. A further three police vehicles arrived with some 13 police officers being present.

[24] Mafojane approached him, searched him and found a Samsung cellphone, drugs (CAT) and money (R300 in R20 notes) in his possession. Boysa disputes the version of Mafojane that nothing was found in his possession and that the drugs were only later found in his buttocks during a second search at the police station. Boysa further claims that nothing was found in possession of the plaintiff when he was searched.

[25] The police officers alleged that he and the plaintiff robbed Usawenye but he maintained that the plaintiff was not involved and repeated same when interviewed by Motsamai. He was charged with house robbery and possession of drugs at the police station.

[26] Under cross examination Boysa contradicted his evidence in chief that the plaintiff was searched and nothing found in his possession. He in fact did not see the plaintiff being searched. He proudly proclaimed himself as drug dealer and hustler who dealt in stolen goods. As to the presence of Mokgalo on the scene it was his evidence that he was merely there as back up and that he could not say if Mokgalo searched the plaintiff as he did not see the plaintiff being searched.

[27] Ultimately Boysa claimed that Usawenye fabricated the house robbery charge and Mafojane's too fabricated his evidence as nothing was found in possession of the plaintiff. Boysa then claimed that he was found in possession of the memory card and not the plaintiff. Boysa claims that during the plaintiff's evidence Motsamai called Mafojane to establish whether the plaintiff should be charged with robbery or being in possession of suspected stolen property as Thalerwa was not sure of what to charge the plaintiff with. He denied that his evidence was directed at protecting the plaintiff.

[28] Boysa ultimately pleaded guilty to possession of drugs. He disavowed the contents of the guilty plea statement in terms of section 112(2) of the CPA which contradicts his evidence materially as to the circumstances of his arrest and that of the plaintiff and sought to apportion blame for it on his legal representative.

The plaintiff

- [29] The plaintiff testified that was in Mahikeng town to buy food at a Fruit and Veg store when he met Boysa. They exchanged pleasantries and as he was informing Boysa that he was busy with an Initiation school, three to five men or possible seven to eight men arrived. An argument between Boysa and these men. Boysa ran from the men who pursued him until the offices of the Department of Education. He followed and stood across the road.
- [30] Police officers Mafojane and Pheto arrived at the scene first. Mafojane crossed the road and proceeded to search Boysa. At no stage did Mafojane search him or find a memory card in his possession or effect his arrest. According to the plaintiff Mokgalo searched him and found nothing in his possession. Boysa was placed in the back of the van and he was placed in the front with Mafojane and Pheto.
- [31] At the police station he was instructed to sit in the holding cells for four to five hours with no police officers coming to check on him. After banging on the doors of the holding cell, a Captain Mokgapi arrived who attended to him. Mokgapi checked a certain book and informed him that he was to be detained for house robbery and to this end showed a paper, white in colour which was said to be his notice of rights. Mokgapi completed the date and time and where he had to sign. The plaintiff disputes ever being shown the notice of rights by Mafojane. He never saw Mafojane after he detained him at the police station.
- [32] The following day, 25 April 2015, a female police officer, Thalerwa informed him that statement was to be taken from him as with any suspect. This statement was obtained from him in the same room where Motsamai was with Boysa. He was not informed of any of his rights including the right to legal representation. The document produced by Thalerwa was blank and he was just made to sign it.
- [33] When he appeared in court on 28 April 2015, he was informed of further investigations and the postponement of the matter for 14 days. When he next appeared in court on 12 May 2015, the matter was once again postponed for a formal bail application, for the investigating officer to be present.
- [34] On 20 May 2015, the investigating officer was not present and the bail application proceeded in his absence. On 23 May 2015, Motsamai booked him out and apologised to him for his arrest.
- [35] The plaintiff testified as follows as to the conditions of his detention. He was detained in 15m2 cell and slept on sponges which had to be shared. There were no beds and only thin blankets which were infested with parasites and were filthy.

- [36] On the date of his arrest, 24 April 2015, the holding cell housed 14 detainees which increased to 19, with an average of 15 detainees over the period of 71 days that he was detained. The toilet and shower had no doors and had to be used in full view of other detainees. There was no soap and he had to request same from his family along with clothing. The toilet was cleaned occasionally and blocked up occasionally. The detainees had to clean the toilet and shower themselves.
- [37] According to the plaintiff he did not feel safe whilst bathing or sleeping for fear of being raped by other inmates. His fear was heightened when he tried to intervene in preventing a fellow detainee from being raped which resulted in a physical fight and when the said detainee was left in the holding cell. They were served 4 slices of bread with one spoon of butter twice a day for breakfast and supper with a small portion of porridge or soup for lunch. The bottom of a 2 litre cold drink bottle was used to consume coffee or tea. On a Sunday the meal comprised a small portion of meat.
- [38] Prior to his detention the plaintiff suffered from food allergies and used allergy medication. During his incarceration he suffered an allergic reaction but received no medical treatment. Allergex tablets which his family brought for him did not assist. Following his release in July 2015, he consulted a general practitioner who diagnosed him with asthma as he had difficulty breathing, a condition he did not have prior to his detention.
- [39] According to the plaintiff he was the principal of an initiation school at the time of his arrest. The initiation school was conducted during May to July and November to January and same did not carry on in his absence. When his family could not find him they looked for him in hospitals until eventually making enquiries at the police station.
- [40] At the time of his arrest, his daughter was 10 years old and he had no contact with her during his detention. On the day of his arrest he had R200 for the food he had to purchase and his cellphone. Whilst his cellphone was returned to him, the money was not. He is hurt by his ordeal and no longer trusts the police officers involved. He wants justice through compensation for the time he was incarcerated.
- [41] Cross examination of the plaintiff constituted a denial of possession of the memory card or throwing a cellphone to the ground or any dealings with either Usewenya or Boysa.
- [42] That is the evidence for the plaintiff.

The law

Unlawful arrest and detention

- [43] The defendant relies on section 40(1)(b) of the CPA to justify the arrest of the plaintiff. Whilst counsel for the defendant alludes to section 40(1)(g) of the CPA as further justification for the arrest of the plaintiff, same was never pleaded and therefore cannot be relied on. Section 40(1)(b) of the CPA provides as follows:

“40(1)(b) A peace officer may without a warrant arrest any person –

whom he reasonably suspects to have committed a schedule 1 offence other than the offence of escaping from custody.”

[44] Section 40(1)(b) of the Criminal Procedure Act implicates four (4) jurisdictional facts or requirements which must be present before an arrest without a warrant can be effected. These jurisdictional

facts

or requirements were explained as follows in *Duncan v Minister of Law and Order*[2]:

“The so-called jurisdictional facts which must exist before the power conferred by s 40(1)(b) of the present Act may be invoked, are as follows:

- 1) The arrestor must be a peace officer.
- 2) He must entertain a suspicion.
- 3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act.
- 4) The suspicion must rest on reasonable grounds.

If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect.”

[45] The defendant’s case rests in the main on an assertion that Constable Tlhapane, the arresting officer, reasonably suspected the plaintiff of having committed the offence of attempted robbery premised on admissions elicited from Johnny, the plaintiff’s cousin, at a stage where Johnny was already an arrested person. The first three jurisdictional requirements, on the evidence, accordingly need not detain this Court.

[46] The test for a suspicion resting on reasonable grounds has engaged our Courts and many other jurisdictions on a regular basis. In *R v Van Heerden*[3], Galgut AJ (as he then was) was engaged on the provisions of section 24(1)(c) and 37 of the Criminal Procedure Act 56 of 1955, which had a similar provision to section 40 of the present Criminal Procedure Act. After referencing section 24(1)(c) of Act 56 of 1955 which read that: ‘Any private person may, without warrant, arrest any person whom he has reasonable grounds to suspect of having committed an offence

mentioned in the First Schedule’, he held as follows in respect of the words “reasonable grounds to suspect”:

“An arrest is clearly an assault, and the appellant can only justify that assault if he shows, as stated in sec. 24 (1) (c) that he had ‘reasonable grounds to suspect.’ It is not sufficient for him to show that he did in fact have a suspicion. ‘Suspect’ and ‘suspicion’ are words which are vague and difficult to define.

Dictionary meanings and decided cases were quoted to the Court as to the meaning of these words. Save for saying that these suggest that suspicion is apprehension without clear proof I do not intend to deal with the meaning of ‘suspect’, because it seems to me that the words ‘reasonable grounds’ qualify the suspicion required by the section. These words must be interpreted objectively, and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion.”

(my emphasis)

[47] The ratio in *Mabona v Minister of Law and Order and Others*[4] resonates with the facts of the present matter. There the Court said:

“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 goods 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. 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.”

[48] In *Minister of Law and Order v Kader*[5], the Court said the following in respect of the question of suspicion, that it ‘is a state of conjecture or surmise where proof is lacking. . . . Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end’.

[49] The principles in the aforesaid authorities are succinctly enunciated in *Minister of Safety and Security v Magagula* (991/2016)

[2017] ZASCA 103 (6 September 2017), where Lamont AJA said:

“[8] ... The issue to be decided is whether or not Inspector Nel had a reasonable suspicion that the respondent had committed the offence of murder. If he had held such a suspicion then the arrest would have been lawful by reason of the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

[9] In *Shabaan Bin Hussein and Others v Chong Fook Kam & another*

[1969] 3 All ER 1627 it was held that a suspicion ‘in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end’. (Powell NO & others v Van der Merwe NO & others 2005 (5) SA 62 (SCA) para 36: Woji v Minister of Police [2014] ZASCA 108; 2015 (1) SACR 409 (SCA).)

[10] The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds

for his suspicion. Once the required suspicion exists an arresting officer will be vested with a discretion to arrest, which he must exercise rationally. (Minister of Safety and Security v Sekhoto and another [2010] ZASCA 141 para 39; 2011 (5) SA 367 (SCA).)

(my emphasis – case citations added)

[50] In the recent judgment of *Biyela v Minister of Police*[6], Musi AJA elaborated on the question of a reasonable suspicion, in the context of hearsay evidence as follows:

“[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[34] 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.

[35] 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 a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] 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.

[38] I, therefore, agree with the majority’s characterisation of the issues and its conclusion that a reasonable suspicion can, depending on the circumstances, be formed based on hearsay evidence, regardless of whether that evidence is later found to be admissible or not. Furthermore, I agree with the conclusion that the court of first instance erred in its conclusion that the police officers could not form a reasonable suspicion because such suspicion was based on inadmissible hearsay evidence.”

[51] A clear distinction must be drawn in the present matter on the basis of the arrest of the plaintiff and what he was consequently charged with. The plaintiff was arrested for possession of suspected stolen property by Mafojane, notwithstanding his attempt at changing his evidence that he arrested the plaintiff for house robbery. The question then is, is possession of suspected stolen property or as it is known by its legal description, a contravention of section 36 of the General Law Amendment Act 62 of 1955, an offence envisaged in Schedule 1 of the CPA.

[52] Section 36 of the General Law Amendment Act 62 of 1955 provides that:

“Failure to give a satisfactory account of possession of goods.

Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.”

[53] Schedule 1 of the CPA sets out the offences for which an arrest without warrant may be effected. Whilst section 36 is not specifically referred to, provision is made for “Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately

hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.” Section 36 specifically provides that upon conviction, the person so convicted may be liable to the penalties which may be imposed on a conviction of theft. Theft is an offence specifically provided for in Schedule 1. Thus on two scores a contravention of section 36 of the General Law Amendment Act 62 of 1955 is an offence envisaged in Schedule 1 of the CPA.

[54] A factual dispute exists on the searching and arrest of the plaintiff. The locus classicus on resolving factual disputes is Stellenbosch Farmers’ Winery Group Ltd and Another v Martell & Cie and Others 2003 (1) SA 11 (SCA) where the Court held that:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

(b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses

testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its 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 the 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."

Discussion

- [55] The factual dispute between the plaintiff and Mafojane implicates the main issue in dispute – the circumstances attendant upon the arrest of the plaintiff. On the version of Mafojane the very basis of searching the plaintiff was predicated on the plaintiff being pointed out as a suspect who threw a cellphone to the ground. On the evidence, the information which led Mafojane and the complainant in the house robbery Usewenya to the scene where the plaintiff was, was from one Mashingwatsa who informed Usewenya that he observed two males attempting to sell a cellphone in Golfview. Absent this information from Mashingwatsa, Mafojane would not have been at the scene in Golfview.
- [56] Whilst the plaintiff claims that he was not searched by Mafojane but by one Mokgalo, Mokgalo was not called to testify. No weight can be attached to any aspect of the evidence related to Mokgalo. Boyisa testifying for the plaintiff initially claimed that the plaintiff was not searched by Mafojane but later under cross examination contradicted this evidence, testifying that he did not see whether or not the plaintiff was searched.
- [57] The factual dispute is therefore a question of the plaintiff's word against that of Mafojane. Whilst the evidence of Mafojane is not an example of crystal clarity, he remained steadfast that he in fact searched the plaintiff. On a logical approach to the evidence, if it were not for the plaintiff to being pointed out as a suspect who allegedly threw a cellphone to the ground, no basis would have existed for Mafojane to search the plaintiff. Mafojane did not know the plaintiff prior to the day of his arrest. No bias latent, patent or blatant was demonstrated in his evidence. On the approach adumbrated in *Stellenbosch Farmers' Winery Group Ltd and Another* supra the evidence of Mafojane that he in fact searched the plaintiff is to be preferred to the denial of the plaintiff that Mofajane did not search him. It is therefore accepted that Mafojane in fact searched the plaintiff.
- [58] Having found that Mafojane searched the plaintiff, the question inextricably linked thereto is whether or not Mafojane found anything in possession of the plaintiff. The plaintiff disputes that anything was found in his possession, whether on his version that he was searched by Makola or on the version of Mafojane for that matter. Mafojane's evidence is

that he found a SanDisk memory card in the back pocket of the plaintiff. It is the finding of this memory card that ultimately led to the arrest of the plaintiff, after photographs or “pictures” of the complainant Usewenya and his family was found on the memory card. Absent this evidence, clearly no arrest would have been effected by Mafojane. I accordingly find that the probabilities weigh in favour of the defendant that the memory card was in fact found in possession of the plaintiff.

[59] The factual findings giving rise to the arrest of the plaintiff is not the end of the enquiry. As indicated supra a bone of contention is the reason for the arrest of the plaintiff. Whilst it is most disconcerting that Mafojane, a police officer of 33 years lacks any knowledge of offences listed in Schedule 1 of the CPA or the offence of section 36 of the General Law Amendment Act, his evidence is that he arrested the plaintiff for possession of suspected stolen property. Whilst he later tried to disavow himself from the reason for the arrest of the plaintiff by changing the offence to one he referred to as house robbery, the evidence

overwhelmingly demonstrates that the arrest was for possession of suspected stolen property.

[60] It is further irrelevant for purposes of determining the reason for the arrest, that when the plaintiff was ultimately charged he was charged with the offence of robbery. The charge ultimately proffered when the plaintiff was charged bears relevance for what the prosecution would ultimately decide to charge the plaintiff with. In *Biyela supra* the following was said at paragraph [35]:

“[35] 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 a reasonable suspicion that the arrested person committed a Schedule 1 offence.”

[61] The defendant in its plea relied specifically on section 40(1)(b) of the CPA and is constrained thereto. The belated attempt by counsel for the defendant at raising section 40(1)(g) of the CPA does not avail the defendant. Section 36 of the General Law Amendment Act 62 of 1955, as shown supra is an offence for which Mafojane could effect an arrest.

[62] It is apposite to have regard to the Constitutional Court judgment of *Osman and Another v Attorney-General for the Transvaal* (CCT37/97)

[1998] ZACC 14; 1998 (4) SA 1224; 1998 (11) BCLR 1362 (23 September

1998) in respect of the argument on the right to silence and presumption of innocence in the context of section 36 of the General Law Amendment Act 62 of 1955:

“[8] ...The elements of the offence are that : (a) the accused person must actually be found in possession of goods; (b) a suspicion founded on reasonable grounds must exist in the mind of the finder (or possibly some other person) that the goods had been stolen; and (c) there must be an inability on the part of the person found in possession to give

a satisfactory account of such possession. It is the last requirement - the inability to give a satisfactory explanation - which raises the challenge to section 36 in the case before us.

...

- [11] Section 36 neither compels an arrested or detained person to do anything, nor does it constitute pressure being applied on such person to make a statement. It must be emphasised that such persons have a choice as to whether or not to provide an explanation for the possession of the goods. Arrested or detained persons suffer no prejudice at trial stage in the absence of an explanation, because they retain the express right to furnish an explanation at the trial if no explanation has previously been given. In the circumstances the attack on this ground must fail.”
- [63] Did Mafojane give full effect to the provisions of section 36 or otherwise stated did the circumstances at the time of the arrest fall within the ambit of section 36? In answering this question, the sequence of events leading to the arrest are instructive. Mafojane did not see when the cellphone was thrown to the ground. Ownership of the said cellphone was also not established by Mafojane at the scene. Premised therefore only on the hearsay information received from Mashingwatsa, Mafojane proceeded to search the plaintiff. The elements of section 36 must be considered. There is no evidence that Mafojane suspected the cellphone as having been stolen (robbed). Section 36 finds no applicability in regard to the cellphone. It is only once the plaintiff was searched that the memory card was found in his possession. Once Usewenya indicated that if the memory card were inserted in a cellphone it would show “pictures” of himself and his family and same was confirmed, did Mafojane suspect that the memory card was stolen. In my view, there is nothing amiss with Mafojane’s evidence in this regard. The discovery of photographs of Usewenya and his family on the memory card which was found I the plaintiff’ pocket would logically raised the suspicion of any reasonable person.
- [64] A dispute exists whether or not the plaintiff gave an explanation for his possession of the memory card. From the plaintiff’s evidence he maintains that the card was not found in his possession. Irrespective thereof and based on this Court’s finding supra that the memory card was found in his possession, the question is whether or not the plaintiff in fact gave an explanation. Mafojane’s

evidence is that the plaintiff gave no explanation. Later when a warning statement was obtained from the plaintiff, notwithstanding

the serious procedural irregularities in the taking of the warning statement, he denied any knowledge of the memory card. As Osman supra makes it plain, the plaintiff could at any stage, even at trial provide an explanation for his possession of any goods suspected to be stolen.

[65] In my view, Mafojane's actions in respect of the memory card fell squarely within the ambit of section 36 and on that basis he effected the arrest of the plaintiff for possession of suspected stolen property. Should he have arrested or considered the release of the plaintiff on bail or warning? As re-iterated in *Biyela supra*:

"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."

[66] The memory card found in possession of the plaintiff was from a robbery following a home invasion some 5 hours earlier. Against this background, Mafojane cannot be faulted for effecting an arrest of the plaintiff for possession of suspected stolen property – section

36. It is also accepted that further investigation at a later stage could have resulted in more serious charges being preferred against the plaintiff. It is a neutral factor that later charges were withdrawn against the plaintiff. The further detention of the plaintiff in circumstances where the prosecution persisted in its prosecution of the plaintiff, in the circumstances cannot be attributed to the defendant.

[67] In passing, the plaintiff sought to rely on *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC) on the basis that but for the actions of the servants of the defendant, the plaintiff would not have been detained for 71 days. The plaintiff to that end has not cited the Minister of Justice and Constitutional Development on the basis of the Magistrate/s who postponed the matter against the plaintiff from time to time or refused his admission to bail or the National Director of Public

Prosecutions in respect of the decision to prosecute the plaintiff. *De Klerk* in my view finds no applicability to the peculiar facts and circumstances of this matter.

[68] The arrest of the plaintiff was accordingly on the evidence, justified in terms of section 40(1)(b) of the CPA.

Conclusion

[69] The plaintiff's claim accordingly stands to be dismissed.

Costs

[70] Costs ordinarily follow suit. I can find no basis to order otherwise.

Order

[71] In the result, it is ordered that:

The plaintiff's claim be dismissed with costs.

AH PETERSEN

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE PLAINTIFF: ADV. F F Opperman and T W Snyders Instructed by: Gildenhuis Malatji Inc. c/o Labuschagne Attorneys 19 Constantia Drive Riviera Park MAHIKENG FOR THE DEFENDANT: ADV. L KALASHE Instructed by: THE STATE ATTORNEY 1ST Floor, East Gallery MEGA CITY Heads of Argument filed: 06 March 2023; 07 March 2023 Date of judgment: 20 July 2023

[1] 1986

(3) SA 568 (A) at 589 E-F.

[2]

[1986] ZASCA 24; [1986] 2 All SA 241 (A). See too: Minister of Safety and Security v Sekhoto and Another 2011

(1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011

(5) SA 367 (SCA).

[3] 1958

(3) SA 150 (T) at 152 C-E

[4] 1988

(2) SA 654 (E) at 685 E-H.

[5] 1991

(1) SA 41 (A) at 50H.

[6] (1017/2020) [2022] ZASCA 36 (01 April 2022) at paras [33]- [36] and [38].

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