

SOUTH AFRICA / JUDGMENT

Foli v Minister of Police (CIV APP FB 14/2024) [2025] ZANWHC 25 (3 February 2025) [2025] ZANWHC 25

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Djaje, Morei

CASE / FILE NUMBER

CIV APP FB 14/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NO: CIV APP FB

14/2024

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In

the matter between:

ZWELINZIMA

FOLI

APPELLANT

AND

MINISTER

OF POLICE

RESPONDENT

CIVIL

FULL COURT APPEAL

QUORUM:

HENDRICKS JP; DJAJE DJP & MOREI AJ

Heard:

22 NOVEMBER 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 3 FEBRUARY 2025.

ORDER

The following order is

made: 1. The
appeal is dismissed.
2. The
appellant is ordered to pay the costs of appeal, which shall include
the costs of the leave to appeal, on Scale B.

JUDGMENT

DJAJE DJP

[1] The appellant had instituted an action for damages in the court a quo, resulting from unlawful arrest and detention at the Mahikeng Police Station, by the members of the South African Police Services.

The claim was dismissed with costs. This appeal is against the whole judgment of the court a quo dismissing the appellant's claim.

[2] In the early hours around 04h30 on 24 April 2015 Mr Alex Usuwenya ("the complainant") was asleep together with his family in the house in Golf View, Mahikeng, when they were robbed at gun point and shots were fired. A white Samsung cell phone was alleged to have been amongst several items that were removed from the complainant's house during the robbery. The police attended the scene of the robbery after being contacted around 09h10. Whilst at the scene of the robbery with the police, the complainant got information about a cell phone that was being sold in Golf View. He, together with the police, went to the place of the alleged sale of a cell phone. Upon their arrival, the appellant was pointed out by the complainant as one of the robbers. He was arrested and subsequently detained.

[3] The police officers who were present when the appellant was pointed out are Warrant Officer Mafojane and Warrant Officer Pheto. Mafojane testified that after the appellant was pointed out to him by the complainant, he searched him and found a black scan disk memory card in the back trouser pocket of the appellant. The complainant said that if the memory card is inserted in a phone, it will reveal photos of his family. Indeed, when that was done, photos of the complainant's family were depicted. According to Mafojane, the appellant failed to give a satisfactory explanation for possession of the said memory card. He was then arrested.

[4] When the appellant was charged at the police station, a charge of robbery was preferred against him. However, during Mafojane's testimony he explained that the appellant was arrested for being in possession of suspected stolen property and failing to give a satisfactory explanation. During examination in chief and cross examination there was a

back and forth on the reason for the appellant's arrest. The court a quo observed that Mafojane 'was at pains to explain the arrest of the plaintiff for possession of suspected stolen property and later being charged with robbery'. In addition, that Mafojane could not explain under which schedule of the Criminal Procedure Act 51 of 1977 ("CPA"), robbery and section 36 of the General Law Amendment Act 62 of 1955, falls.

- [5] The investigating officer, Warrant Officer Motsamai, testified that he was the one who decided to prefer the charge of robbery with aggravating circumstances against the appellant after his preliminary investigations. Motsamai's evidence was to the effect that the reason he preferred the charge of robbery was because of the complainant's statement, identifying the memory card found on the appellant and the cell phone he dropped when approached by the police. A further reason advanced by Motsamai was that the appellant was arrested only a few hours after the robbery. He was therefore in recent possession of the suspected stolen property.
- [6] The appellant and Tshepo Boya who was with him on the date of arrest testified. Boya's testimony was to the effect that Mafojane and Pheto arrived whilst he was being assaulted by two men who were drug dealers. At that time, the appellant was standing watching him being assaulted. Boya was searched by Mafojane and the items found on him were a Samsung cell phone, drugs and three-hundred-rand cash. According to Boya, nothing was found in the appellant's possession when searched by the police.
- [7] The appellant confirmed that he was in the presence of Boya when the police arrived. He was searched by another police officer and not Mafojane, and nothing was found in his possession. He was arrested and only informed at the police station by Captain Mokgapi, that he was arrested for robbery. The appellant testified that he was detained until 23 May 2015.
- [8] The court a quo in dismissing the appellant's claim of unlawful arrest and detention, found that the basis for the appellant to be searched was as a result of being pointed out by the complainant as a suspect. Further, that no weight could be attached to the evidence of Boya as he contradicted himself during cross examination that he did not see whether the appellant was searched or not. In accepting the version of Mafojane as the one who searched the appellant the court a quo, held that:

"[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 Mafojane did not search him. It is therefore accepted that Mafojane in fact searched the plaintiff."

- [9] The reason for the arrest which seem to have been an issue was also dealt with by the Court a quo as follows:

“[58] Having found that Mafojane searched the plaintiff, the question inextricably linked thereto is whether 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 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 harbored 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.”

- [10] In the main, the issues raised by the appellant in this appeal are whether the arrest effected fell within the ambit of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 as found by the Court a quo. In addition, whether the reliance by the Court a quo on the provisions of section 36 of the General Law Amendment Act 62 of 1995 as the reason for arrest, when it was not pleaded, was incorrect.

- [11] It was submitted that the offence in terms of section 36 of the General Law Amendment Act is not an offence that is specifically provided for in Schedule 1 of the CPA. According to the appellant, the basis for this submission is that for the offence of being in possession of suspected stolen property to qualify under Schedule 1 of the CPA, the value of the property should be such that the punishment will be a period of imprisonment exceeding six months without the option of a fine.
- [12] Another argument presented relating to the applicability of section 36 was that, if indeed the appellant was found in possession of the memory card, the value thereof could not result in the punishment envisaged for offences under Schedule 1. The submission was that the Court a quo should have taken judicial notice of the fact that currently the value of a 32-gigabyte memory card at Makro is an amount of R119.00 which should have indicated that the 4 or 8 gigabyte found on the appellant was far much less. The appellant contended that being in possession of that value of property could not have been an offence as envisaged in Schedule 1.
- [13] The Court a quo in par 53 found that:

“[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.”
- [14] In terms of section 36 of the General Law Amendment Act, a person convicted of being in possession of suspected stolen property and failing to give a satisfactory explanation of such possession, may be sentenced to the penalties which may be imposed on a conviction of theft. The section provides that:

“36 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 that 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.”

- [15] It is trite that theft is included in the offences envisaged in Schedule 1 of the CPA, and as such any penalty that can be imposed on a conviction of theft may be imposed on conviction of being in possession of suspected stolen property. In dealing with the penalty that may be imposed on conviction of section 36, the Act makes no reference to the value of the property

that was found in possession of the suspect. At the time of arrest, the arresting officer's focus is the possession of suspected stolen property and the failure to provide a satisfactory account of the possession. That on its own

should suffice for an offence as envisaged in Schedule 1 of the CPA.

- [16] It was argued that at the time of arrest, Mafojane did not know about the existence of section 36 of the General Law Amendment Act, nor under which schedule the charge of house robbery falls. Therefore, it should be concluded that the arrest by Mafojane was not in accordance with section 40(1)(b) of the CPA. What is required for an arrest to be affected without a warrant, is that an arresting officer must satisfy the following jurisdictional facts, namely that (a) the arrestor is a peace officer, (b) the arrestor must entertain a suspicion, (c) the suspicion must be that the suspect committed an offence referred to in Schedule 1, and (d) the suspicion must rest on reasonable grounds.

Duncan v Minister of Law and Order for the Republic of South Africa [1986] ZASCA 24; [1986 2 All SA 241 (A)]

- [17] In this matter there is no doubt that the arresting officer, Mafojane, is a peace officer. At the time of arrest, the appellant was pointed out to him by the complainant of a robbery. After the appellant was searched a memory card was found in his possession. When the memory card was inserted into a cell phone, it contained photos of the complainant and his family. The appellant could not give a satisfactory explanation of his possession of the memory card. At that time the arresting officer entertained a suspicion of an offence being committed. The Court a quo correctly referred to the case of *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36 (01 April 2022) that:

"[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 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."
- [18] The arguments by the appellant that the arresting officer did not have any knowledge about the provisions of section 36 of the General Law Amendment Act, cannot affect the lawfulness of the appellant's arrest. At the time of arrest the arresting officer did not act on a hunch. He found the appellant in possession of a suspected stolen property with no explanation. The appellant's witness, Boysa, under cross-examination contradicted himself on whether he saw when the appellant was searched or not. On the conspectus of the evidence and the events that unfolded, only one version stands, namely that the appellant was searched, and a memory card was found in his possession.

- [19] It was argued that the Court a quo, in relying on the applicability of section 36 of the General Law Amendment Act as a justification for the arrest, introduced a defence which was not pleaded. The plea raised by the respondent was that the appellant's arrest was lawful and in compliance with the provisions of section 40(1)(b) of the CPA. The Constitutional Court in *Kapa v S* 2023(1) SACR 583 (CC) held that "It is a well-established principle that a trial court's decision must be based on the totality of evidence available to the court."
- [20] The respondent during argument correctly referred to the Supreme Court of Appeal case of *Minister of Safety and Security v Katise* (328/12) [2013] ZASCA 111(16 September 2013) at par 15 where the court held that: ".....if the evidence adduced at the trial covers the particular issue, then the court is not bound by the pleadings. (See *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) par 22)."
- [21] The Court a quo after assessing all the evidence found that the appellant was searched and found in possession of suspected stolen property and gave no satisfactory explanation. This was not a defence introduced by the Court, but a conclusion based on the evidence before the Court a quo as expounded in paragraphs 58 and 59 of the judgment quoted above. The issue of being in possession of the memory card by the appellant was properly ventilated during trial. The witnesses for the respondent were all examined and cross-examined on whether the appellant was searched, who searched him and what was found in his possession. The same applies to the appellant and his witness, Boysa.
- [22] I will finally deal with the submissions made by the appellant in relation to the contents of paragraph 45 of the Court a quo's judgment. The said paragraph reads as follows:
- "[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."*
- [23] This paragraph does not relate to any of the evidence before the court a quo, as none of the people mentioned therein testified. In addition, thereto, the conclusion by the Court a quo was in no way related to the contents of the said paragraph. These are totally unrelated remarks made by the court a quo and has no bearing on the reasoning and the conclusions reached. The submissions by the appellant on the relevance of this paragraph, cannot be sustained as a ground to uphold the appeal. It is trite that what is appealed against is the order and not the reasons for the judgment. It is also the only paragraph out of the [71] paragraphs where the names of Constable Tlhapane are mentioned as the arresting officer, which must be an error. Most probably it stems from another or different case.
- [24] Having considered the submissions on behalf of the parties herein I find no reason to interfere with the judgment of the Court a quo in dismissing the appellant's claim for unlawful arrest and detention with costs.

Order:

[25] Consequently, the following order is made:

2. The appellant is ordered to pay the costs of appeal which shall include the costs of the leave to appeal on Scale B.

J T DJAJE

DEPUTY JUDGE PRESIDENT

HIGH COURT, NORTH WEST DIVISION

I agree

R D HENDRICKS

JUDGE PRESIDENT

N MOREI

ACTING JUDGE ,

APPEARANCES

DATE OF HEARING

: 22 NOVEMBER 2024

DATE OF JUDGMENT

: 03 JANUARY 2025

COUNSEL FOR THE APPELLANT : ADV OPPERMAN

COUNSEL FOR THE RESPONDENT : ADV KALASHE

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