

SOUTH AFRICA / JUDGMENT

Kunene v Minister of Police (18028/2019)

[2024] ZAGPJHC 456 (9 May 2024)

[2024] ZAGPJHC 456**COURT**

South Gauteng High Court, Johannesburg

BEFORE

A E Ayayee

CASE / FILE NUMBER

18028/2019

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****REPORTABLE: YES/NO****OF****INTEREST TO OTHER JUDGES: YES/NO****REVISED: NO****Date: 9 May 2024****CASE****NO:** 18028/2019
In**the matter between:** ZANELE
KUNENE
Plaintiff
And
MINISTER
OF
POLICE
Defendant**Summary:** Claim for damages arising out of unlawful arrest and detention.
Discussion
of jurisdictional factors for lawful arrest for possession
of suspected stolen property under section 40(1)(e) of the Criminal
Procedure Act 51 of 1997, as compared with section 36 of the General
Laws Amendment Act 62 of 1955

Heard on: 5 and 6 March 2024

Delivered: 9 May 2024

JUDGMENT

AYAYEE AJ:

- [1] The plaintiff claims damages in the sum of R400 000,00, from the Minister of Police (“the defendant”). Her claim arises out of what she contends to be her unlawful arrest and detention. The plaintiff was detained from 16 August 2018 until 20 August 2018.
- [2] There is no dispute that the plaintiff was arrested and detained on the grounds of being in possession of goods reasonably suspected to be stolen. It is also common cause that on 20 August 2018, the prosecution determined to withdraw charges against the plaintiff. Consequent upon this decision she was released from detention.
- [3] The legal representatives of the parties agreed at a pre-trial meeting held on 6 February 2020, that the defendant bore the onus of establishing that the plaintiff’s arrest and detention was lawful, as well as the duty to begin.
- [4] In the course of the trial, the defendant led evidence of four witnesses, respectively Jabulani Godfrey Duma, Sergeant Dumelo Kotane, Sergeant Mbatha and Sergeant Zanele Vilakazi. The plaintiff gave evidence in support of her case but called no other witnesses in corroboration of her version. The judgment briefly restates the material evidence provided by the witnesses. As will become evident, this case turns on the facts.
- [5] Jabulani Godfrey Duma (“Duma”) was first to testify. He gave evidence that he resided in the same yard in the Jabulani township with the plaintiff. The plaintiff is his cousin. Duma testified that in August 2018 his room was burgled, with the thieves making off with all his possessions save for a bed and a fridge. According to Duma less than a week after this incident, which he had reported to the police, he was advised by certain community members on his way back home from work that they had observed persons carrying certain household items walking down the street. These community members urged Duma to try to catch up with such persons, and confirm if the items being transported were possibly the same items stolen from his residence.
- [6] Duma acting upon their advice hurried along a parallel street to intercept these persons. He observed in his words two people, a man and a woman enter into a yard about three streets from his residence and specifically to a room located close to the gate of this yard. Duma alleges that the man was carrying a television set along with a school bag in the company of a woman, holding a Shoprite bag.

- [7] Duma testified that he immediately called the South African Police Services (“SAPS”), and requested assistance to verify if the items carried into the yard were his. According to Duma, he waited for approximately two hours and left frustrated by a lack of prompt response by the SAPS. He recalls having observed these persons entering the yard at approximately 3 pm in the afternoon and he left his position as a lookout at approximately 5 pm.
- [8] At about 8 pm, Sergeant Kotane and Mbatha arrived at Duma’s residence following up on a call they had received on the community policing sector mobile phone. Duma informed these police officers of the housebreaking and his observations earlier in the afternoon. He told the officers that he had opened a case of house breaking and needed their assistance to verify whether the items he saw being carried were his. He described the items he had seen being carried, and specifically that the woman was holding a Shoprite plastic bag.
- [9] Duma now accompanied by these police officers returned to the yard he had earlier observed the “yet unidentified persons” entering. Flagged by the police officers, they entered the room close to the gate. Upon entry they observed the presence of three people namely a Bongani, whom Duma identified as a cripple and was later confirmed as residing at the premises, as well as the plaintiff in the company of her then boyfriend Lefa.
- [10] These persons were said to have been sitting either on bricks or crates in this mostly empty room right next to items which Duma immediately identified as his. Specifically next to these persons, was Duma’s television set and in the Shoprite bag he observed earlier in the day, were two decoders which had also been taken from his room. The school bag he had observed the male person carrying earlier in the day contained clothes which the parties accept belonged to Lefa.
- [11] Duma’s recollection of the events, was that upon questioning by the police officers, Bongani stated that the goods were not his but had been brought by the plaintiff and her boyfriend named Lefa. Duma then recounts an argument between the plaintiff and Lefa, at which point the police officers after calling upon him to formally identify these items as his, effected an arrest of all three occupants of the room for being in possession of stolen property.
- [12] Under cross-examination there were certain inconsistencies in Duma’s version, as ably pointed out by the plaintiff’s legal representative, Mr Naidoo. These inconsistencies include Duma’s inability to explain why he had been unable to recognise the persons he observed carrying the goods that afternoon, as the plaintiff and Lefa, being persons, he admittedly knew. On Duma’s version he was across the street when he observed them enter Bongani’s yard. More perplexingly, in placing the call to the SAPS and during his earlier exchanges with Sergeants Kotane and Mbatha, prior to arriving at the yard, Duma did not disclose the identity of the persons in possession of the items to these police officers.

His failure in doing so, whilst a cause for concern which was explored at length under cross examination, does not upset three

critical aspects of his evidence.

- [13] Firstly, it must be accepted that Duma's room had been burgled. Secondly, it must be accepted that the items found during the arrest belonged to Duma. This in turn means that Duma's explanation of how he came to observe the persons carrying these items into Bongani's room cannot be seriously countermanded, for how else was he been able to lead the police officers to the scene, where these items were recovered.
- [14] The evidence of Kotane, one of the two arresting officers, was that he was in the presence of Sergeant Mbatha when they responded to a call placed by Duma. There was uncertainty as to the amount of times Duma must have called, as Kotane confirmed that he was on the evening shift when he received the call. This was however in circumstances where Duma's evidence stated that the call had been made during the course of the afternoon.
- [15] Kotane confirmed the evidence of Duma. He stated that Duma had taken them to Bongani's residence at which the items had been found, next to the plaintiff and Lefa. He confirmed that upon questioning Bongani, the police were told that the items had been brought by both the plaintiff and Lefa. He stated that this was why they arrested the plaintiff for being in possession of stolen property, alongside the other occupants of the room. Bongani, he alleges specifically stated that he had been approached to assist in selling the items.
- [16] Pressed during cross-examination as to why he persisted in arresting the plaintiff, after her explanation that she was not involved in the burglary, Kotane's response was that "I was not arresting her for theft, I was arresting her for possession". Pressed further as to why he did not believe the plaintiff's version that she had nothing to do with the burglary, Kotane testified that he suspected that she was implicated because the plaintiff resided in the same yard where the break-in had occurred. This to his mind suggested her involvement.
- [17] The evidence of Sergeant Mbatha, largely corroborated that of Kotane. He testified that upon entering the room and announcing their identity as police officers, Duma was able to see and identify his TV. He testified that the items were right there in front of the occupants of the room and that no search in any real sense was required. In this regard there was some debate as to whether the room was separated into a lounge and a sleeping area, and whether the items were concealed under a sheet.
- [18] Mbatha confirmed that Bongani had stated that the plaintiff and Lefa had brought the items. He testified that upon entering the room, he saw the Shoprite bag which Duma had observed being carried into the room. He testified that the plaintiff had been arrested because the existence of the Shoprite bag in which the two decoders were contained, accorded with the initial statements made by Duma that he had seen a woman in possession of the Shoprite bag accompanying a man

carrying a TV, enter the room.

- [19] Under cross-examination it was put to Mbatha that the explanation provided by the plaintiff that Lefa was responsible for the theft was a reasonable explanation and that he should have accepted that the plaintiff was not party to the burglary. To this, Mbatha responded that “I arrested Zanele based on what both Bongani and Duma had said”.
- [20] The third witness called by the defendant was Sergeant Zanele Vilakazi (“Vilakazi”). Her evidence related largely to the plaintiff’s further detention. She took a statement from the plaintiff on the day of the arrest which stated that Lefa had confessed to having broken into Duma’s room with two other men and further that the plaintiff knew where some of the property had been sold.
- [21] Her evidence was that she determined to detain the plaintiff so as to allow herself the opportunity to conduct further investigations. She stated that due to the fact that the plaintiff resided at the same yard as Duma, she was of the view that it was plausible that the plaintiff could be actively implicated in the burglary of the stolen

items found in her possession during the arrest.

- [22] It is the view of this Court, that the versions of the three police officers that testified on behalf of the defendant must be accepted, as consistent and probable. Whilst there was an attempt to impugn these versions under cross-examination, by making reference to the fact that certain aspects of their evidence were not recorded in the contemporaneous statements discovered by the parties, it was rightly pointed out by Vilakazi that the statement made reference to was an “identifying statement” and not the “arresting statement”. In any event as stated by Mbatha, in the preparation of statements during the time of arrest, summaries are generally provided in police statements as opposed to full and detailed accounts. I see no reason to reject the evidence of the police officers especially noting that they have no personal interest in the litigation.
- [23] The plaintiff gave evidence on her own behalf. There were several aspects of the plaintiff’s evidence which were improbable. The plaintiff alleged that until the time of her arrest on 16 August 2018, she was unaware that Duma room had been burgled. That version is not probable because the plaintiff concedes that Lefa’s residence, where she stayed, was a mere three-minute walk from her family residence, at which Duma resided. Duma moreover testified that on having discovered that there had been a house-breaking, he had reported this to the police and had questioned members of the family, including the plaintiff as to whether they knew anything about the theft of his possessions.

[24] If this Court was to accept the version of the plaintiff that she was unaware of the burglary until the time of her arrest, it must per force reject the evidence of Duma that he had not only informed other family members resident at the yard of the fact of the burglary, but he had also informed members of the community at large including neighbours. Duma's version is consistent with typical human behaviour. It is of course to be remembered that it was due to

the very fact that the burglary which had taken place was broadcast to members of the community, that they had cause to alert Duma on 16 August 2018 as to the movement of items which may possibly be his. Ultimately under cross-examination, the plaintiff conceded that Duma had made the family aware of the burglary.

[25] Secondly, whilst the plaintiff denied that Duma had observed her and Lefa entering Bongani's residence, she could provide no alternative explanation as to how Duma would otherwise have come to know of the presence of the stolen items in Bongani's room, and thus lead the police to the location on the evening of 16 August 2018.

[26] If the plaintiff's version is to be accepted, it would mean that Duma evidence that he had observed persons possibly carrying the stolen items, enter Bongani's room, must be rejected. Yet it cannot be gainsaid that the stolen items were in fact found in Bongani's room. Further Duma and the arresting officers, both gave evidence that Bongani indicated in their presence that the plaintiff and Lefa had brought the items over. The plaintiff chose not to call any witnesses in corroboration of her version. Whilst she did not bear the onus of proof, having heard the evidence of the defence, she should have appreciated that her mere denial of the factual matters advanced by the two arresting officers and Duma would be insufficient. This Court is of the view that the defendant's version of how the stolen items were discovered is probable.

[27] What remains is an assessment of whether the defendant has been able to discharge the onus of establishing that the arrest of the plaintiff was lawful.

[28] In *Setlhapelo v Minister of Police and One Other*[1] the Court per Rossouw AJ set out the jurisdictional factors which will render an arrest lawful in terms of section 40(1)(e) of the Criminal Procedure Act 51 of 1997 ("the CPA"). Under section 40(1)(e), a peace officer may without a warrant, arrest any person who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing.

[29] Rossouw AJ equates the provisions of section 40(1)(e) of the CPA with those offences created by sections 36 and 37 of the General Law Amendment Act 62 of 1955. Section 36 of the General Law Amendment Act 62 of 1955 provides that a person who is found in possession of any goods, other than stock or produce as defined in section 1 of the Stock Theft Act 57 of 1959, and of which there is a 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. I respectfully disagree with the judgment of Setlhapelo only insofar as it is this Court's view that Rossouw AJ was incorrect in pronouncing the jurisdictional factors of section 40(1)(e) of the CPA, to being the same as that of section 36 of the General Law Amendment Act.

- [30] This judgment accepts that the jurisdictional facts for an arrest in terms of section 40(1)(e) of the CPA are as set out in the Setlhapelo decision:

"[21] The jurisdictional facts for an arrest in terms of s 40(1)(e) of the CPA are the following: 1) the arrestor must be a peace officer, 2) the suspect must be found in possession of the property, 3) the arrestor must entertain a suspicion that the property has been stolen or illegally obtained, 4) the arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property and 5) the arrestor's suspicion must rest on reasonable grounds."

- [31] In Setlhapelo, Rossouw AJ accepts with reference to the application of section 36 of the General Laws Amendment Act that a suspicion held by a peace officer, which may be based on insufficient grounds that the property has been stolen or illegally obtained can be transformed into a reasonable suspicion as a result of something which the suspect then says or does at the time he is found in possession of the goods, such as giving an unacceptable explanation for his possession of such property.[2]
- [32] While such ratio is undoubtedly good law in the application of section 36 of the General Law Amendment Act 62 of 1955, it fails to identify the further jurisdictional requirement of section 40(1)(e) of the CPA which requires an arrestor not only to entertain a suspicion that the property has been stolen or illegally obtained but further requires "the arrestor to entertain a suspicion that the suspect has committed an offence in respect of the property".
- [33] Accordingly, it would appear that to satisfy the test under section 40(1)(e) of the CPA, a further jurisdictional factor must be met, which is not provided for under section 36 of the General Law Amendment Act 62 of

1955. Indeed, it is difficult to understand why the legislature imposed this further requirement under section 40(1)(e), as it appears entirely superfluous, noting the nature of the offence.

- [34] In *Doma v S*[3] the Full Court set out the elements of an offence under section 36 as follows:

"[34] The elements of this offence are therefore:

- 34.1 To be found in possession of goods,
- 34.2 The existence of a reasonable suspicion that the goods are stolen,
- 34.3 The absence of a reasonable explanation, given at least at trial."

- [35] The Full Court in *Doma*[4] further states:

“[36] Section 36 is a quintessential example of what might be called a ‘policeman’s crime’. The purpose of the section is to afford an alert police officer the right to lawfully stop and interrogate a person who is honestly and reasonably suspected by the police officer of wrongdoing. It is not a device to circumvent evidential problems on a charge of theft. It is quite unlike, for example, the crime of Assault with intent to do grievous bodily harm, where, if it is unproven that the accused had the requisite specific intent, the scale of the wrongdoing can be ratcheted down to Common Assault. The offence created in terms of Section 36 is not a logical progression from theft. It is an artifice conceived by the legislature to address a different set of circumstances, and simply for policy reasons is it, in terms of Section 264 of the CPA, declared to be a competent verdict on a charge of theft.”

[36] Whether the offence under section 36 of the General Law Amendment Act can be equated to that under section 40(1)(e) of the CPA and more importantly whether the jurisdictional factors to be established would in each case remain the same, is however not an issue that this Court must resolve in the present matter.

[37] This is for reason that the particulars of claim in this matter reads thus:

“[8] Notwithstanding the explanation given by the plaintiff, the police proceeded to arrest her together with Lifa and Bongani. All three were taken to the Jabulani Police Station where they were charged for possession of stolen property and detained.”

[38] Self-evidently, the plaintiff does not plead that her arrest was in terms of section 40(1)(e) of the CPA, nor does the defendant concede this. Accordingly, one ought not to fault the defendant, if it only sought to discharge the onus of establishing the lawfulness of the plaintiff’s arrest under the provisions of section 36 of the General Law Amendment Act and not under section 40(1)(e) of the CPA.

[39] Turning to the application of section 36 of the General Law Amendment Act, it is trite that under section 40 of the CPA, reasonable suspicion for the purpose of effecting an arrest is to be adjudged by having regard to:

[39.1] the information possessed by the arresting officer when the arrest was effected; and

[39.2] whether by effecting the arrest the arresting officer exercised his discretion correctly.

[40] In *Mabona v Minister of Law and Order and Others*[5] the Court dealt with reasonable suspicion as follows:

“Would a reasonable man in the second defendant’s position 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 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. 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.”

- [41] On the facts of this matter, the arresting officers were placed in no doubt that the items recovered in Bongani’s room were in fact stolen. This is so because they had the benefit of Duma being at the scene at the time of the arrest and the statements made by Bongani, that it was the plaintiff and Lefa, who had brought the items. The plaintiff has never sought to suggest that the property recovered were not stolen. Her attempts have only been to disavow her involvement in the actual theft of the items.
- [42] But as I have found above, it is not a requirement of section 36 of the General Law Amendment Act, for the arresting officer to entertain the further suspicion that the plaintiff had committed an offence in respect of the property, which is a requirement under section 40(1)(e) of the CPA. Even if this was the case, the evidence of Sergeant Mbatha was that from his viewpoint and taking into account that the plaintiff resided, alternatively had her family home at the yard at which the property found in her presence had been stolen, it appeared plausible that she was involved in the theft. That evidence is enough to satisfy the further requirement of reasonable suspicion of the commission of an offence in relation to the property, required of an arresting officer under section 40(1)(e) of the CPA.
- [43] The Court further does not lose sight of the fact that this was the very conclusion reached by Sergeant Vilakazi, who determined to detain the plaintiff so that she could carry out further investigations to see whether or not the plaintiff could be actively implicated in the housebreaking case.
- [44] Accordingly, I am of the view that the plaintiff’s arrest met the jurisdictional requirements of section 36 of the General Laws Amendment Act, and was thus lawful.
- [45] This leaves the question of the plaintiff’s detention. It is trite that a lawful arrest does not necessarily validate a subsequent

detention.[6] Rossouw AJ in Setlhapelo with reference to section 59(1)(a) of the CPA underscores the need for accused persons in police custody to be promptly informed of their right to apply for police bail where they so qualify.[7] I agree with Rossouw AJ’s finding, that the police have a constitutional duty to ascertain promptly whether the arrestee wishes police bail to be considered and that a failure to inform the arrestee of his constitutional right to apply for bail depending on the circumstances of the case renders the arrestee’s further detention unlawful.[8]

- [46] However, as was also observed in the Setlhapelo decision, where a plaintiff relies on the provisions of section 35(1)(f) of the Constitution read with section 59(1)(a) of the CPA to advance a claim pertaining to the unlawfulness of detention, the plaintiff’s particulars of claim must advance sufficient factual allegations substantiating such a cause of action. The plaintiff must allege and prove that she was arrested for an offence which entitled her to

apply for police bail in terms of section 59(1)(a) of the CPA and that the police failed to consider bail or advise her of the right to apply for police bail.

[47] In Setlhapelo, the Court determined that the plaintiff had not engaged section 59(1)(a) of the CPA in his claim for unlawful detention and accordingly that issue was not ventilated during the trial. The Court was thus hamstrung and could not determine such issue.

[48] The pleadings in casu do not advance a cause of action for the plaintiff's unlawful detention, based on section 59(1)(a) of the CPA. The responses by Sergeant Vilakazi under cross-examination that the plaintiff's further detention was warranted so as to afford her an opportunity to investigate whether or not the plaintiff could be actively implicated in the housebreaking case, was not a matter made the subject of serious challenge. On the facts the plaintiff's detention was warranted and cannot be categorised as either unreasonable or unlawful.

[49] I accordingly find that in the circumstances of this matter, the defendant has discharged the onus of establishing that the arrest and detention of the plaintiff pursuant to the provisions of section 36 of the General Law Amendment Act, was lawful.

[50] In the result I make the following order:

[50.1] The plaintiff's claim is dismissed with costs, including all reserved costs.

A E AYAYEE

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 9 May 2024.

HEARD ON:

5 and 6 March 2024

DATE OF

JUDGMENT:

9 May 2024

FOR PLAINTIFF:

Mr Naidoo

INSTRUCED BY:

Logan Naidoo Attorneys

FOR DEFENDANT:

Adv Ramoshaba

INSTRUCED BY:

State Attorneys

[1] Setlhapelo v Minister of Police and Another (45031/2012) [2015] ZAGPPHC 363 (20 May 2015)

[2] See paragraph 22 of the Setlhapelo

judgment

[3] Doma v S (2012/A447)

[2013] ZAGPJHC 116 (21 May 2013)

[4] See paragraph 36

[5] Mabona v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at page 658E

[6] Mvu v Minister of Safety and Security 2009

(6) SA 82 (SGHC), paragraphs 9 and 10A-B

[7] Setlhapelo, paragraphs 32 and 33

[8] Ibid

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