

SOUTH AFRICA / JUDGMENT

Moipolai v Minister of Police (1853/2020) [2025] ZANWHC 55 (12 March 2025)

[2025] ZANWHC 55**COURT**

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

1853/2020

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NUMBER: 1853/2020****Reportable: YES / NO****Circulate to Judges: YES****/ NO****Circulate to Magistrates:**

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between:-

PULE

WHITEY MOIPOLAI

Plaintiff

and

MINISTER

OF POLICE

Defendant

This

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judgment is

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MARCH 2025

JUDGMENT

FMM REID J

Introduction:

- [1] This is a claim for damages suffered as result of an alleged unlawful arrest and detention. The merits and quantum have been separated and the trial proceeded on merits only.
- [2] The plaintiff obtained condonation for the late delivery of the Section 3 Notice in accordance with the Institution of Proceedings against certain State Organs Act 40 of 2002.
- [3] The special pleas raised by the defendant have been abandoned.
- [4] The defendant bears the onus to prove that the arrest was lawful.

Factual material background:

- [5] On Sunday, 21 April 2019, the plaintiff was arrested by Sergeant Mokgara, a member of the South African Police Service (SAPS) on a charge of being in possession of suspected stolen property. The arrest was executed without a warrant of arrest.
- [6] Following the arrest, the plaintiff was detained at the Vryburg SAPS cells until Tuesday, 23 April 2019, when he was released without having appeared in court.

[7] The plaintiff spent a period of 2 days incarcerated.

[8] The parties agreed to the following undisputed facts:

- 8.1. The defendant is vicariously liable for the actions of the arresting officer Sergeant Mokgara.
- 8.2. The plaintiff was arrested on 21 April 2019.
- 8.3. The arrest was executed without a warrant of arrest.
- 8.4. The plaintiff was charged with being in possession of suspected stolen property.
- 8.5. The plaintiff was detained until 23 April 2019.
- 8.6. The plaintiff was released without appearing in court.

[9] The question before this Court is whether the plaintiffs arrest and subsequent detention was executed lawfully. To answer this question, the following must be determined:

- 9.1. Whether the arresting officer had a reasonable suspicion that the plaintiff was guilty of a Schedule 1 offence.
- 9.2. Whether such suspicion was founded on reasonable grounds.

The plaintiff's evidence

- [10] The plaintiff testified that he operates a vegetable stand in front of the Boxer Store in Church Street, Vryburg, where he sells mixed vegetables to the public. The Overland Store is located across the street from the plaintiff's vegetable stand. The taxi rank is situated approximately 200 to 300 meters away from the plaintiffs vegetable stand.
- [11] At the time of the arrest, it was common practice for the customers of the plaintiff to leave their belongings at the plaintiff's stand while they went shopping at Overland.
- [12] On 21 April 2019, an individual named Thabang approached the plaintiff's stand, walking at a normal pace and pushing a lawnmower (referred to in some instances as a 'grass-cutter'). Thabang asked the plaintiff whether he may leave the lawnmower at the plaintiff's grocery stand while Thabang attended to errands at Overland. The plaintiff inquired whether Thabang was the owner of the lawnmower, to which Thabang confirmed that he was. Trusting this assertion, the plaintiff agreed to store the lawnmower whilst Thabang did his shopping.
- [13] The plaintiff testified that Thabang's demeanor, characterised by his calmness and the fact that he was walking with the lawnmower in broad daylight, led him to believe that Thabang was telling the truth. The plaintiff testified that he had no reason to doubt that Thabang was the owner of the lawnmower.
- [14] The plaintiff's stand is relatively small and not entirely covered. It began to rain, and the plaintiff put the lawnmower on the back of his Toyota Hilux bakkie and transported it to the taxi rank. At the taxi rank the plaintiff left the lawnmower under a covered area under the care of a vendor named Thabo.
- [15] On returning to his stand, the plaintiff was informed by his assistant, Godiseng, that a security officer from HP Security was searching for the lawnmower. The plaintiff retrieved the lawnmower from the taxi rank. He then covered it with a sail that he borrowed from Thabo and transported the lawnmower back to his store.
- [16] Shortly thereafter, police officers, including Sergeant Mokgara, arrived at the plaintiff's stand. Sergeant Mokgara's partner informed the plaintiff that he was being arrested on the basis that the lawnmower which was on the plaintiff's Toyota bakkie, was reported stolen.
- [17] The plaintiff attempted to explain how he came into possession of the lawnmower. He testified that he informed the police officers that he kept the lawnmower for safe keeping on behalf of Tabang, a customer. He emphasised that he had no knowledge whether the lawnmower might have been stolen. However, the police officers refused to accept his explanation and proceeded with the arrest.
- [18] During cross-examination, the plaintiff maintained that he provided an explanation to the police on why the lawnmower was in his possession. The plaintiff testified that the police officials disregarded the explanation.

[19] Sergeant Mokgara testified that he was informed by a security officer that Thabang had alleged the plaintiff promised him R100 to steal the lawnmower. Based on this allegation, the plaintiff was arrested without further investigation. In his evidence, the arresting officer sergeant Mokgora confirmed that neither Thabo nor Godiseng, who are individuals involved in the events, were interviewed prior to the arrest. It is worth noting that the security officer was

not called to testify, and the evidence of what he said to sergeant Mokgora is therefore hearsay evidence to be disregarded.

[20] During cross-examination, the plaintiff maintained that he had provided a full explanation to the members of the SAPS, but they disregarded it. This is corroborated by Sergeant Mokgara (the arresting officer) who confirmed that neither Thabo nor Godiseng had been interviewed prior to the plaintiff's arrest. Mokgara also admitted that no alternative measures were considered before the arrest.

Arrest and Detention

[21] Following his arrest, the plaintiff was placed in the canopy section at the back of a police vehicle. The plaintiff's vehicle was driven to the police station by Sergeant Mokgara's partner.

[22] The plaintiff testified that, after arriving at Vryburg Police Station, the plaintiff was left in the canopy section for approximately an hour. A police officer presented him with a notice of rights document while he was still inside the canopy, but its contents were not explained to him.

[23] During cross-examination, it was put to the plaintiff that he had paid Thabang R100 to steal the lawnmower. The plaintiff denied this accusation, maintaining his version that he never suspected that the lawnmower could be stolen and had no reason to believe that it was stolen.

[24] It is submitted on behalf of the plaintiff that the plaintiff consistently testified that he did not instruct Thabang to steal the lawnmower and that he had no need for such an item, as he did not have grass at his residence.

[25] The plaintiff testified that he was presented with an interview statement, which he signed under duress after being told that if he refused, he would not be taken to court and would remain in detention indefinitely. He testified that this was not a voluntary statement, but one obtained through coercion.

[26] It is submitted by Adv Smit that the plaintiff provided consistent, direct, and uncontradicted testimony regarding the sequence of events. She submits that his explanation for the possession of the lawnmower remains plausible and reasonable.

- [27] Adv Smit further submits that the arresting officer failed to conduct any substantive investigation into the plaintiff's explanation before proceeding with the arrest. Furthermore, he did not exercise any discretion in making the arrest.
- [28] Given the above circumstances, it is submitted on behalf of the plaintiff that the arresting officer did not have a reasonable suspicion that the plaintiff had committed the offence of possession of suspected stolen property.
- [29] The police officials had a duty to investigate the plaintiffs' explanation prior to his arrest. At the time of his statement, he was already arrested. It is submitted on behalf of the plaintiff that the plaintiff provided a reasonable explanation before the arrest, however the police officers did not investigate this explanation at all.
- [30] In summation, it is further submitted on behalf of the plaintiff that (a) the arresting officer did not have a reasonable suspicion that the plaintiff committed this alleged offence, and (b) he did not conduct any kind of investigation, nor did he exercise his discretion to arrest, at all.
- [31] Accordingly, it is submitted on behalf of the plaintiff that the lawfulness of the plaintiff's arrest and detention was not proven and the plaintiff should be successful in his claim.

The defendant's evidence

- [32] Sergeant Mokgara, the arresting officer, testified that he was approached at the SAPS station by a security officer from PH Security, who brought a suspect along with him. This suspect, who was later identified as Thabang, alleged that the plaintiff had promised him R100.00 to steal a lawnmower. Relying on this claim, Sergeant Mokgara proceeded to arrest the plaintiff.
- [33] Mokgara admitted that no alternative measures were considered before arresting the plaintiff. He stated that once an individual is found in possession of suspected stolen property, immediate arrest is the only option, and further investigative discretion lies with the investigating officers, and not the arresting officers. This contention is blatantly wrong, in law and in logic.
- [34] The plaintiff argues that the admission of sergeant Mokgara indicates a failure to exercise proper discretion or to evaluate the plaintiff's explanation before acting and arresting the plaintiff.
- [35] The arresting officer confirmed that if the lawnmower was found at the plaintiff's store, the plaintiff would be arrested, irrespective any explanation provided by the plaintiff. The plaintiff argues that this is indicative thereof that the decision to arrest the plaintiff, was predetermined. It is argued by the plaintiff that this approach demonstrates an absence of reasonable suspicion, as the officer failed to assess the plaintiff's account or verify Thabang's credibility prior to the arrest.

[36] Additionally, sergeant Mokgara conceded that the entire chain of events was triggered by a report from PH Security. However, he failed to mention whether he interviewed the security officer who initially received the information. Instead, he relied on hearsay evidence, as the PH Security had obtained their information from an unknown source. His testimony further revealed that he was aware Thabang had implicated himself in the alleged crime, yet he still proceeded with

the plaintiff's arrest.

[37] Under cross examination and when confronted with the fact that the plaintiff voluntarily retrieved the lawnmower upon learning that security personnel were searching for it, sergeant Mokgara was not able to provide a response. He merely reiterated that the lawnmower was found on the plaintiff's Toyota bakkie, failing to consider the plaintiff's explanation that it had been moved to protect it from the rain.

[38] Sergeant Mokgara further acknowledged that the plaintiff's store had no covering or netting, corroborating the plaintiff's version of events and making it plausible that he did not attempt to hide the lawnmower, but protect it from the rain when moving it to the taxi rank.

[39] Sergeant Mokgara admitted that the plaintiff had indeed provided an explanation regarding his possession of the lawnmower, contradicting claims made during cross-examination of the plaintiff, that the plaintiff had remained silent on the matter.

[40] Makgora's evidence was inconsistent when claimed that the plaintiff was taken directly to the SAPS station and interviewed the same day, but both documentary evidence and the plaintiff's testimony indicate that the interview occurred the following day.

Legal position

[41] It is trite law that the onus rests on a defendant to justify an arrest in that as explained in *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F:

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just that the person who arrested or caused the arrest of that persons should bear the onus of proving that his action was justified in law."

[42] In *Zeeland v Minister of Justice and constitutional Development* [2008] ZACC 3; 2008

(2) SACR 1 (CC) the Constitutional Court stated in paragraph [25] of its judgment at 11D-12C:

"It has long been established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."

[43] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) reads as follows:

“A peace officer may without warrant arrest any person - whom he reasonably suspects of having committed an offence referred to in

Schedule 1, other than the offence of escaping from lawful custody.”

[44] Section 40(1)(e) of the CPA states:

“A peace officer may without 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 reasonable suspects of having committed an offence with respect to such thing.”

[45] The jurisdictional facts for a defence against an unlawful arrest, are premised on section 40(1)(b) of the CPA were set out in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H, as follows:

'(i) the arrestor must be a peace officer;

(ii) the arrestor must entertain a suspicion;

(iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

(iv) the suspicion must rest on reasonable grounds.'

[46] In relation to an offence of being in possession of suspected stolen property, being section 40(1)(e), such section is to be considered together with sections 36 and 37 of the General Law Amendment Act, 62 of 1955.

[47] Section 36 of the General Law Amendment Act 62 of 1955 state:

“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.”

[48] For successful reliance on section 36, the state must prove that (a) the accused was found in possession of the goods;

(b) reasonable grounds existed for suspecting that the goods were stolen; and (c) the accused was unable to give a satisfactory account of his/her possession.

[49] For sufficient compliance with the first leg of section 36 (and therefore also sections 40(1)(b) and (e) of the CPA) the existence of a reasonable suspicion in the arrestor's mind needs to be present.

"The police official must have had a 'reasonable' suspicion that the goods were stolen at the time he/she found it. This requirement will not be satisfied if the police official merely says that he/she had a 'reasonable' suspicion that the goods were stolen. The grounds that gave rise to the police official's suspicion must be set out to enable the court to decide whether the police official's suspicion was reasonable. "

[50] The second leg that is to be satisfied is a satisfactory account of the possession. This brings the explanation of the possession of the goods in central stage to be considered in an arrest for suspicion of possession of stolen goods.

[51] These legal principles are set out succinctly in the publication of Applied Law for Police Officials, C Joubert, 4th Edition, Page 153, as follows:

"The accused must have been found in possession of the goods and the police official must have had a reasonable suspicion that the goods were stolen. Thereafter the police official can request an explanation from the person in possession of the goods in terms of s 36."

"In order to be a satisfactory account, the explanation must be reasonably possible and the accused must bona fide believe that his/her possession is innocent. The explanation must not be so far-fetched so as to be unreasonable. If the accused honestly believed that his/her possession was innocent then the reasonableness or unreasonableness of his/her explanation is irrelevant. The test is therefore subjective."

4.7 "To decide what is a reasonable suspicion there must be evidence that the arresting officer formed a suspicion which is objectively sustainable. It was described thus by Jones Jin Mabona and Another v Minister of Law and Order and Others 1988

(2) SA 654 (SE) at 658E-G:

'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this 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, ie something which otherwise would be an invasion of private rights and... (t)he 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.'

Analysis

[52] The evidence before this Court is that the arresting officer neither assessed the reliability of the information provided by Thabang, nor considered the plaintiff's explanation. This failure indicates an absence of a reasonable suspicion as required by law.

- [53] Based on the evidence, the arresting officer failed to establish a reasonable suspicion before arresting the plaintiff. The plaintiff provided an explanation that was not investigated, and key witnesses were not interviewed. On the arresting officer's own version, he has already decided that he is going to arrest the plaintiff should the lawnmower be in the plaintiff's possession. His evidence is that the investigating officer is to evaluate the explanation given by the possessor. This indicates that the arresting officer was not prepared to consider any explanation from the possessor. In the failure to accept an explanation, the investigating officer indicated that he did not apply any discretion to the reasonableness of the explanation.
- [54] In *Minister of Safety and Security v Sekhoto and Another* 2011
- (1) SACR 315 (SCA), the Supreme Court of Appeal held that reasonable grounds for an arrest must be objectively sustainable. The arresting officer's approach in this case, which lacked verification or further inquiry, falls woefully short of this standard.
- [55] The requirement of reasonable suspicion, as elaborated in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658E-G, requires an officer to critically assess and verify information before forming a suspicion.
- [56] The plaintiff's claim for unlawful detention is weakened by his failure to address the conditions of his detention in his pleadings or his evidence. In *Minister of Police v Thandekile Sabisa and Another* (725/2023) 2024 ZASCA 105 (28 June 2024) at para 36, the Supreme Court of Appeal held that an omission to plead the conditions of detention undermines a claim for unlawful detention.

Conclusion

- [57] The defendant has failed to discharge the onus of proving the lawfulness of the arrest. Consequently, the plaintiff's claim for unlawful arrest succeeds.
- [58] The plaintiff's claim for unlawful detention fails due to the omission of necessary evidence regarding the conditions of his detention.
- [59] The defendant is to be held liable for the unlawful arrest of the plaintiff.
- [60] The plaintiff's claim for unlawful detention falls to be dismissed.

Costs

- [61] The general principle is that the successful party is entitled to its costs.
- [62] I find no reason to deviate from the general principle and the defendant is held liable for the plaintiff's costs.
- [63] The general scale of cost is party – and – party scale, which is Scale B in Uniform Rule 69. I find no reason to deviate from the general scale of costs.

Order:

[64] In the premise I make the following order:

- i) The plaintiff's claim for unlawful arrest is upheld.
- ii) The plaintiff's claim for unlawful detention is dismissed.
- iii) The defendant is to pay the costs incurred by the plaintiff on a scale B in terms of Rule 69.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING:

3 OCTOBER 2024

DATE JUDGMENT RESERVED: 17 JANUARY 2025

DATE OF

JUDGMENT:

12 MARCH 2025

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