

SOUTH AFRICA / JUDGMENT

Zenzile v Minster of Police (1631/2018)

[2023] ZAECMHC 52; [2024] 1 All SA 593 (ECM) (19 October 2023)

[2023] ZAECMHC 52

COURT

Eastern Cape High Court, Mthatha

BEFORE

B M Pakati

CASE / FILE NUMBER

1631/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MTHATHA

Case No: 1631/2018

In the matter between NOZUKILE ZENZILE Plaintiff And MINISTER OF POLICE Defendant

JUDGMENT

PAKATI J

Introduction

- [1] The plaintiff instituted action against the defendant for damages in the amount of R300 000-00 for alleged unlawful arrest and detention on 15 May 2017. The defendant admitted the arrest and detention but alleged that it was lawful.
- [2] On 09 May 2019, the defendant filed a notice of intention to defend the action, a plea and an amended plea dated 15 September 2020. The parties agreed to proceed with the trial without separating the issues of liability and quantum. The defendant admitted the plaintiff's arrest at about 05h00am and detention on 15 May 2017. The defendant admitted further that the plaintiff was released on bail at approximately 11h30am, on 17 May 2017.

The Pleadings

- [3] In paragraph 8 of her particulars of claim, the plaintiff alleged that the arrest and detention were wrongful and unlawful in that: (a) The police officers did not have a warrant of arrest; (b) The plaintiff had not committed any offence in the presence of the police; (c) The police had no reasonable suspicion that she had committed an offence listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) as amended; and (d) They failed to apply their minds to the circumstances of the plaintiff and/or properly exercise their discretion and/or acted mala fide when they detained the plaintiff.
- [4] In response to paragraph 8 of the particulars of claim, the defendant encapsulated his defence in paragraphs 3 and 7 of his amended plea thus:

“3. AD PARAGRAPH 4

Save to admit that the Plaintiff was arrested by the members of the Defendant, the Defendant denies that the arrest was wrongful and unlawful and in amplification of such denial the defendant pleads that the plaintiff was the one causing havoc and insinuated an unwarranted attack on the members of the Defendant.

7. AD PARAGRAPH 8

The defendant denies this averment and pleads that the members of the Defendant had reasonable and probable cause to arrest the Plaintiff.

8.1 The defendant denies such and the plaintiff is put to proof thereof.

8.2 The defendant denies such.

8.3 The defendant denies such and the plaintiff is put to proof thereof.

8.4 The defendant denies such allegations as all proper protocol was observed before effecting such arrest by the members of the Defendant.”

- [5] Mr Msindo, for the applicant, submitted that the defendant pleaded material facts upon which he relied in justifying the arrest and detention as can be gleaned from paragraph 3 of the amended plea supra. However, during the trial a different case was pleaded, that the plaintiff was arrested and detained for being in possession of stock suspected to be stolen. He submitted further that the court could not have recourse to the evidence relied upon by the defendant to the extent that such evidence and the issue therein falls outside the defendant’s plea. The plaintiff prepared her case based on the amended plea, that she had caused havoc and insinuated an unwarranted attack on the members of the defendant. Mr Msindo submitted further that the plaintiff was taken by surprise when the defendant’s evidence was led. He said that the plaintiff was prejudiced by the conduct of the defendant. He urged the court to reject the defence of the defendant and find that the defendant had failed to justify the plaintiff’s arrest and detention which would render the arrest and detention unlawful. For this assertion, he relied on *Minister of Safety and Security v Slabbert*[1] where Harms DP, as he then was, (Mthiyane, Lewis, Mhlantla JJA, et Hurt AJA concurring) held:

“[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.”

[6] In reply, Mr Bembe, on behalf of the defendant, submitted that the original plea was amended entirely and there was no issue between the parties. He submitted further that the plaintiff did not place it in dispute that she was not arrested for being in possession of stock suspected to be stolen. He contended that it was unnecessary to plead that the plaintiff was arrested for unlawful possession of stock suspected to be stolen considering that the defendant admitted the arrest and detention but deny that they were unlawful. According to him, the evidence led by the defendant did not constitute a new defence and the plaintiff alleged no prejudice suffered. He argued that nothing hinged on the fact that the plaintiff caused havoc, as it did not affect the defence raised and the plaintiff easily ascertained it. He argued further that no new defence has been raised.

[7] A perusal of the plea clearly shows that the defence raised by the defendant during the trial was not pleaded. However, in *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*[2] Holmes JA (Wessels JA, Trollip JA, Corbett JA, and Galgut AJA, concurring) stated:

“However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue.”

[8] When the defendant's evidence was led, the defence witnesses testified that what was contained in the amended plea, was incorrect. That is because the plaintiff was not the one who caused havoc and insinuated an unwarranted attack on the members of the defendant. They contended that they arrested the plaintiff without a warrant for having been in possession of stock suspected to have been stolen, an offence created by the Stock Theft Act 57 of 1959. This Act provides that a person who is found in possession of stock or produce, and there is reasonable suspicion that such stock has been stolen and no satisfactory account of such possession is given, is guilty of an offence.

[9] It is common cause that when the police officers approached the plaintiff at her homestead, they asked her to take them to the stock kraal, although according to her, she remained at the gate. Clearly, when she was arrested after the sheep had been identified by the complainant and handed over to Mr Jezile, she knew or must have known that it was for the sheep that were alleged to have been stolen and seized from her stock kraal. When the summons was issued, this fact was known to her as shown in paragraph 4 of the summons which state that she was arrested by the members of the Stock Theft Unit. I am therefore satisfied that although the averment is lacking in the pleadings, this issue was fully canvassed by both parties during the trial and the court will pronounce upon it as an issue.

[10] The defendant's defence is therefore contained in s 40(1) (g) of the CPA. For purposes of paragraph

(g) the suspicion must be that the arrestee was or is in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.[3]

Issues for

determination

[11] It is trite that the defendant bears an onus to justify an arrest. It became clear during the trial that the issues for determination were whether the arresting officer had reasonable grounds for the arrest in terms of s 40(1) (g) of the CPA and whether her detention was lawful. The issue further was whether the plaintiff was entitled to compensation and quantum thereof. Since the defendant admitted the arrest and detention, the onus rested on him to prove that same were lawful.

[12] In discharging the onus resting on him, the defendant led evidence of two witnesses. The plaintiff testified and called Mr Xolani Michael Toni to testify on her behalf.

Undisputed facts

[13] From the evidence led by the parties, the following facts were undisputed: Sgt Mdutshane, the investigating officer, received information from an informer about sheep alleged to have been stolen in Tabankulu and were allegedly kept at the plaintiff's homestead at Mjikelweni Locality in Qumbu. In the early hours of 15 May 2017, Lt Col Jungqwana, the operational commander and arresting officer, Sgt Mdutshane, Sgt Masango, Constable Njiva and other police officers travelled from Bizana to the plaintiff's homestead in Qumbu to conduct an investigation pertaining to the alleged stolen sheep. They arrived approximately after 04h00 to 05h00 that morning. On their arrival, the plaintiff opened for them. Lt Col Jungqwana introduced himself and Sgt Mdutshane as police officers from the Bizana Stock Theft Unit. Lt Col Jungqwana asked the plaintiff the whereabouts of her husband, Mr Nkosifikile Zenzile ("Nkosifikile"). The plaintiff informed them that he had gone to Mthatha the previous day. They then proceeded to the stock kraal in the company of the plaintiff. In the stock kraal, Sgt Mdutshane identified sheep that fitted the description of the alleged stolen sheep belonging to the complainant. The sheep were thereafter handed over to him after he confirmed that they were his. The plaintiff was then arrested and taken to Mt Frere Police Station. On 16 May 2017, she was transferred to Bizana Police Station, and she appeared in Tabankulu Magistrate's

Court for the first time, on 17 May 2017. She was granted bail in the amount of R1000-00.

The trial

The evidence of Lt Col Jungqwana

- [14] Lt Col Jungqwana added that Sgt Mdutshane identified 54 sheep with marks described to him by Mr Jezile namely, a “J” mark made with black paint at the back and long tails amongst sheep that were in the stock kraal. When Lt Col Jungqwana enquired from the plaintiff as to who the sheep belonged, the plaintiff said that ‘they belonged to her homestead’. He arrested her for being in possession of sheep suspected to be stolen. Sgt Mdutshane contacted Mr Jezile telephonically who, upon arrival at the plaintiff’s homestead, confirmed that he owned the said sheep. He indicated that 8 sheep were still outstanding. The plaintiff was then taken to Mt Frere Police Station the same day where she was detained.
- [15] Lt Col Jungqwana disputed that the plaintiff refused to enter the stock kraal thereby claiming a cultural prohibition. He disputed further that Sgt Pretorius was present at the plaintiff’s homestead. He stated that Sgt Pretorius arrived after the plaintiff was arrested and said nothing to her. He denied that Sgt Pretorius and Mdutshane told the plaintiff that they would arrest her if Nkosifikile handed himself over to the police. During cross-examination he mentioned that the plaintiff and Nkosifikile were suspects. He added that when the plaintiff told them that Nkosifikile had gone to Mthatha, they believed her and did not search for him in the house. They also did not tell her that she was hiding him. He asserted that the plaintiff did not cause havoc at her homestead. Her neighbours did.
- [16] Lt Col Jungqwana contended that after the arrest and detention of the plaintiff, she appeared before the magistrate in Tabankulu. He asserted that he detained her because there were many sheep found in her stock kraal and some were still outstanding. He said that he had ‘a feeling that she would not attend court if I had warned her.’ When it was put to him that he exercised his discretion improperly, he said that it was necessary for him to arrest and detain the plaintiff. He did not warn her because the outstanding sheep would not be recovered. He did not know that the outstanding sheep were ever recovered.
- [17] Lt Col Jungqwana denied that Sgt Mdutshane told the plaintiff that they were looking for Nkosifikile and not her because he was the arresting officer and not Sgt Mdutshane. He also disputed that the person they were looking for was Nkosifikile only, but both the plaintiff and Nkosifikile. He explained that the reason why he asked for the whereabouts of Nkosifikile was because Sgt Mdutshane had informed him that the plaintiff stayed with her husband. Lt Col Jungqwana confirmed that the arrest took place in full view of the members of the community. However, this contradicted what is said in paragraph 5 of the amended plea that it was still dark when the arrest took place, and no people were watching.

The evidence of Sgt Mdutshane

- [18] He added that on their arrival at the plaintiff’s homestead, a male person came out of the plaintiff’s house running but they ignored him. After the plaintiff opened for them, Lt Col Jungqwana introduced himself as a police officer and asked the plaintiff who she was. She told him her name and said that she was the woman of the house. When the plaintiff was asked about the identified sheep, she did not respond, which was disputed by the plaintiff.

- [19] On 17 May 2017, Sgt Mdutshane arrested Nkosifikile at the entrance of the court building. The plaintiff and Nkosifikile were granted bail of R1000-00 cash each. The docket was then transferred to Mt Frere Regional Court for trial. However, the matter was never set down for trial. Nkosifikile died before he and the plaintiff appeared in the Regional Court. Sgt Mdutshane stated that when he went to court requesting the docket, he was informed that the case could not proceed because Nkosifikile was deceased. The matter was then forwarded to the Director of Public Prosecutions (“DPP”) for decision. Sgt Mdutshane was later informed that the DPP had decided not to proceed against the plaintiff after the death of her husband. He was shown an inscription on the docket stating that the case should not proceed against the plaintiff. He disputed that the criminal case against the plaintiff was withdrawn due to insufficiency of evidence. When it was put to him that there were no chances of a conviction in the absence of Nkosifikile, he did not respond and could not dispute same.
- .
- [20] Sgt Mdutshane denied that the reason for the plaintiff’s arrest was to get hold of her husband. He confirmed the evidence of Lt Col Jungqwana that the plaintiff did not refuse to enter the stock kraal alleging that it was against her culture to do so. He confirmed further that Sgt Pretorius was not present when the plaintiff was arrested. He testified that he did not hear when Sgt Pretorius and Lt Col Jungqwana advised the plaintiff that she would remain in custody until her husband was available.
- [21] Sgt Mdutshane denied that he was approached by Mr Xolani Michael Toni (Mr Toni), the plaintiff’s legal representative, at Tabankulu Magistrate’s Court, regarding her release on bail. He denied further that he advised Mr Toni that if Nkosifikile would hand himself over to the police, the plaintiff would be released on bail because Nkosifikile was the one they were looking for and not her. Sgt Mdutshane did not think of warning the plaintiff as the arresting officer, Lt Col Jungqwana, insisted on her detention. He also thought she should be detained because the investigation was ongoing.
- [22] When it was put to Sgt Mdutshane that Lt Col Jungqwana did not arrest the plaintiff for stock suspected to be stolen but for Nkosifikile to submit himself, he disputed that. He was surprised that the reason for the plaintiff’s arrest was not contained in the plea and amended plea namely, that she was found in possession of stock suspected to be stolen.
- [23] Sgt Mdutshane was asked why he and Lt Col Jungqwana did not chase the male person he alleged ran out of the plaintiff’s homestead. In response, he gave various answers: (a) that they wanted to concentrate on the investigation of the sheep; (b) that it was going to be difficult to give chase because it was in the morning and still dark; (c) that there were only two police officers present and therefore they could not chase the man; and (d) that Lt Col Jungqwana said that they should not chase the man, and he agreed. Sgt Mdutshane mentioned seeing this man for the first-time during re-examination by Mr Bembe. When asked why he did not raise it in his evidence-in-chief, he explained that he would have

mentioned it if he had been asked.

That concluded the defendant's case.

The evidence of Mr Xolani Michael Toni

[24] Mr Toni, an attorney practising at Vivi Msindo & Associates situated at No. 48 Wesley Street Mthatha, testified that in May 2017, he was a candidate attorney. The plaintiff's case was assigned to him to apply for her release on bail in Tabankulu Magistrate's Court when she appeared in court. Prior to leaving his office, Mr Toni contacted Nkosifikile telephonically and arranged with him to travel to Tabankulu because he was informed that Sgt Mdutshane wanted to arrest him instead of the plaintiff, which they did. On arrival at Tabankulu Magistrate's Court, Mr Toni approached the public prosecutor and informed him that he was representing the plaintiff. He then enquired from the prosecutor about his attitude regarding the release of the plaintiff on bail. The prosecutor advised him to approach the investigating officer first, since the plaintiff was appearing in court for the first time. The prosecutor directed him to Sgt Mdutshane who was in the company of another male person, at the

time. They were both in civilian clothes. Mr Toni approached Sgt Mdutshane and his companion and introduced himself as the plaintiff's

legal representative. They informed him that they were police officers from the Stock Theft Unit, Bizana. Mr Toni enquired from

them about their attitude towards the release of the plaintiff on bail. Sgt Mdutshane informed him that he would oppose bail unless

Nkosifikile would hand himself over as he was the person he wanted. That was because if the plaintiff were released on bail, he would never locate Nkosifikile. Mr Toni then advised Sgt Mdutshane that he had brought Nkosifikile and that he was waiting outside the court building, whereupon they proceeded to Mr Toni's motor vehicle which was parked outside the court building with him. Mr Toni asked Nkosifikile to alight from the motor vehicle, which he did. He then advised him that Sgt Mdutshane was looking for him. Nkosifikile alighted from the motor vehicle and Sgt Mdutshane walked with him to the police station, situated opposite the court building. He charged him and returned to the court building. He placed Nkosifikile in the court holding cells. Mr Toni observed that Sgt Mdutshane was talking to the plaintiff, but he was not within hearing distance.

[25] When the matter was called, Nkosifikile appeared alongside the plaintiff. Mr Toni indicated to the magistrate that he was representing both the plaintiff and Nkosifikile. Thereafter, bail in the amount of R1000-00 cash was granted to the plaintiff but the amount of bail in respect of Nkosifikile was much higher than that fixed for the plaintiff. Mr Toni could not remember the exact amount. The plaintiff was then released after paying the said amount. From then on, Mr Toni was no longer involved in the plaintiff's matter.

- [26] The plaintiff testified that in the early hours of the morning of 15 May 2017 at approximately 03h00 to 04h00, police officers arrived at her homestead. They proceeded to a bedroom referred to as the rondavel where the children were sleeping. They enquired from the children about the whereabouts of elderly people whereafter they were informed that only the plaintiff was at home. The plaintiff's elder son came to the building where the plaintiff was sleeping and knocked at the door telling her that the police were looking for her. At that time, her son was in the company of the police. She opened the door and three police officers namely, Sgt Mdutshane, Lt Col Jungqwana and Sgt Pretorius, entered her bedroom. They introduced themselves as police officers and enquired as to who was present in the house. She responded that she was the only one, whereupon Sgt Pretorius enquired as to the whereabouts of her husband, calling him by his name. She told him that he had gone to Mthatha the previous day. Lt Col Jungqwana asked her to take them to the stock kraal, which she did, but did not enter the kraal. She remained at the gate claiming that according to Xhosa tradition, as a woman she was not allowed to enter the stock kraal while her husband was still alive. Nevertheless, they demanded that she enter the kraal, which she refused to do. Inside the stock kraal, Lt Col Jungqwana told her that in the stock kraal, there were sheep that they suspected to be stolen. At that stage, Mr Jezile, who claimed to be the owner of some of the sheep, was in the company of the police. He identified eight sheep as his. Before the said sheep were loaded into the police van, Lt Col Jungqwana and Sgt Pretorius told the plaintiff that in the absence of her husband she would be arrested until Nkosifikile availed himself. That was because they believed that her husband was hiding somewhere. Sgt Pretorius asked the plaintiff if she would rather be arrested instead of calling Nkosifikile. Before she answered, she was arrested and loaded into the police van, and they proceeded to the pound where the sheep were off-loaded. She was then taken to Mt Frere Police Station where she was detained.
- [27] The following day Sgt Mdutshane fetched the plaintiff from Mt Frere Police Station and transferred her to Bizana Police Station where she was charged and further detained. Sgt Mdutshane and other members unknown to the plaintiff, interviewed her. Sgt Mdutshane asked her if Nkosifikile was going to attend court on Monday, 17 May 2017, when she was to appear in court for the first time. He informed her that if Nkosifikile handed himself over she would be released on bail as her release depended on his availability. That is because they were looking for Nkosifikile and not her. However, she spent the night in Bizana Police cells.
- [28] On Monday 17 May 2017, Sgt Mdutshane drove the plaintiff to Tabankulu Magistrate's Court where she appeared in court. She was kept in the holding cells and at approximately 10h00, Sgt Mdutshane brought Nkosifikile. At around 11h00 they appeared in court before the Magistrate. The plaintiff was legally represented by an attorney from Msindo Attorneys. According to the plaintiff, she was granted bail of an amount of R1000-00 cash but Nkosifikile, was not. The matter was postponed several times before it was withdrawn due to insufficiency of evidence. At the time, Nkosifikile was still alive.

- [29] The plaintiff disputed that only Lt Col Jungqwana and Sgt Mdutshane visited her home that morning. She insisted that Sgt Pretorius was in their company and did not arrive later. She testified that there were other police officers at her homestead. She insisted that she did not sign the disposal form on 15 May 2017, but was made to sign a form on 16 May 2017, in Bizana. The police did not even tell her why she had to sign that form; she just signed it.
- [30] The plaintiff testified that when the police arrested her, it was approximately 07h00 in the morning, thereby leaving her children alone. The six-year-old child cried when she was placed at the back of the police van. This, and the fact that she was arrested in the presence of her in-laws, affected her.
- [31] Regarding the condition of the cell wherein the plaintiff was locked up in Mt Frere, she described it as bad. There were two of them inside the cell. There was something that looked like a bench made of cement and on top of it there was a thin sponge on which she used to sleep or sit. There were no blankets but something that looked like two mats which she used for sleeping. The toilet was situated in the same room wherein she slept. Its condition was also bad. Its cover could not close, and the toilet could not flush. When one of them used it, one would do so in the presence of the other and there was no door to close the toilet. Some dirty water came out from the base of the toilet. There was neither water to shower nor flush the toilet. There was also no drinking water. She had to ask for water to drink from police officers who brought same in a bottle. Before she
- was arrested, she had not taken a shower because it was still in the early hours of the morning. She had been in the police cell from 10h00 without having taken a shower and remained there for the whole day and night.
- [32] When the plaintiff left home in the morning, she had nothing to eat. At about 18h00 the day she was arrested, she ate four slices of bread and had something to drink. Before she was taken to Bizana Police Station the next day, she also ate four slices of bread.
- [33] The condition of the cell in Bizana Police Station was as bad as the one in Mt Frere. The toilet was also placed inside the cell. The only difference was that there was food and water. However, the cell was cold.
- [34] The plaintiff insisted that the police found her and her children at home although they were in different rooms. She did not know the name of Nozukile Khondlo, which appears in the disposal form of seized stolen property or property suspected to be stolen, attached as SAPS 299 which she was made to sign on 16 May 2017. She disputed that she was in possession of stock suspected to be stolen because she did not collect the sheep from the veld and did not count it. She contended that her eldest son collected it and counted it. However, in the absence of Nkosifikile, she was responsible for the household duties and had nothing to do with stock.

That concluded the evidence of the plaintiff.

[35] It is worth mentioning that I was faced with two conflicting versions. It is inescapable that only one version can be correct. Nienaber JA in *Stellenbosch Farmers' Winery Group LTD And Another v Martell Et Cie and Another*[4] referred to a technique used by courts to resolve factual disputes thus:

"[5] 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' 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' 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."

[36] The defendant's plea was based on s 40(1) (g) of the CPA, as alluded. The jurisdictional requirements for a lawful arrest under s 40(1) (g) of the CPA were set out in *Selebogo v Minister of Police* (unreported, NWM case no 1047/14, 10 February 2017)[5], thus:

- (i) The arrest must be by a peace officer.
- (ii) The arrestor must entertain a suspicion.
- (iii) In terms of s 40(1) (g) the suspicion must be that the subject was or has been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.
- (iv) The suspicion must rest on reasonable grounds."

[37] In *Duncan v Minister of Law and Order*[6] the Court remarked:

“For purposes of para (g), the suspicion must be that the arrestee was or is in possession of stock or produce as defined in any law relating to the theft of stock or produce. The jurisdictional facts for the other paragraphs of s 40(1) differ in some respects, but these are not germane for the present purposes.”

- [38] The remaining issues related to whether the suspicion rested on reasonable grounds and whether the arresting officer exercised the discretion to arrest the plaintiff properly. That is because the plaintiff claimed that the arresting officers informed her that they were arresting her to get her husband to hand himself over to the police as he was the one, they wanted.

The lawfulness of the arrest

- [39] It is undisputed that Lt Col Jungqwana is a peace officer. When he and Sgt Mdutshane visited the plaintiff's homestead, they alleged that they entertained a suspicion that some of the alleged stock kept in the plaintiff's kraal was stolen. It is uncontroverted that the complainant identified sheep in the stock kraal that matched his identifying marks, and the plaintiff allowed Mr Jezile to take possession of the sheep he positively identified.

- [40] The arrest will be lawful if the arresting officer successfully establishes the jurisdictional factors and he/she may invoke the power conferred by s 40(1) (b) to arrest the suspect unless the plaintiff demonstrates that the discretion to arrest her was exercised unlawfully. [7] If one or more or all the jurisdictional factors are not met, the arrest would be unlawful. The relevant enquiry is whether the suspicion was reasonable thereby successfully establishing the jurisdictional factors.[8]

- [41] In *Mabona and Another v Minister of Law and Order and Others*, [9] Jones J held:

“The test of whether a suspicion is reasonably entertained within the meaning of s 40(1) (b) is objective (S v Nel and Another 1980 (4) SA 28 E at 33H). 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 plaintiff was 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, ie 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.”

- [42] In *Shaaban Bin Hussein and Others v Chang Fook Kam and Another* (1969) 3 All ER 1627 (PC) the court held:

“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.”

- [43] In the instant case, Sgt Mdutshane had asked his informer to look for sheep that had allegedly been stolen from Mr Jezile in Tabankulu. On 14 May 2017, between 21h00 and 22h00, the informer informed Sgt Mdutshane that the sheep were kept at the plaintiff's homestead at Mjikelweni Locality in Qumbu. He was also informed that the plaintiff stayed with Nkosifikile and the children. This information subjectively caused him to suspect that an offence involving theft or possession of stock knowing it to be stolen had been committed.
- [44] Be that as it may, the relevant question is, would a reasonable man in the position of Lt Col Jungqwana and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of possession of stolen property knowing it to be stolen? In my view, the answer is no. This will be canvassed hereunder.
- [45] Once the jurisdictional facts for an arrest are established, a discretion whether to arrest or not, arises. An exercise of discretion will be unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature. No doubt, the discretion must be exercised properly. The general rule is that a party who attacks the exercise of discretion, where the jurisdictional facts are present, bears the onus of proof. This is the position whether the right to freedom is compromised.[10]
- [46] The plaintiff alleged that the police officers failed to exercise their discretion to arrest her properly and acted mala fide in detaining her. Her evidence was that after the police officers introduced themselves, they asked who else was in the house and she responded that she was alone. They then asked the whereabouts of her husband. Her evidence, in this regard, was confirmed by the police officers. When Sgt Pretorius asked her the whereabouts of Nkosifikile, he mentioned him by name. When she told them that Nkosifikile had gone to Mthatha the previous day, the police officers told her that in the absence of Nkosifikile, she should take them to the stock kraal, which she did but remained at the gate. After Mr Jezile pointed out sheep that he identified as his, Lt Col Jungqwana informed the plaintiff that in the absence of Nkosifikile, he was arresting her. She would be released only when Nkosifikile handed himself over to them. Sgt Pretorius supported this. She contended that she did not commit an offence in the presence of the police officers and was not found in possession of stock knowing it to be stolen.
- [47] The plaintiff testified that on 16 May 2017, when she was in Bizana Police Station, Sgt Mdutshane and other police officers unknown to her, interviewed her. During the interview, Sgt Mdutshane enquired from her if her husband was going to attend court on Monday, 17 May 2017, as he would not oppose bail if he presented himself to him. Sgt Mdutshane

further told her why her release on bail depended on the availability of Nkosifikile. He informed her that when they went to her homestead, they were looking for Nkosifikile. Thereafter, he charged her and returned her to the cell.

- [48] The plaintiff testified further that she did not cause havoc at her homestead but by her father-in-law and brother-in-law who arrived when the police officers were arresting her and taking her to the police van. This was confirmed by the defendant's witnesses, as alluded. Her father-in-law asked the police officers what was happening. Sgt Pretorius responded that they were arresting the plaintiff because Nkosifikile was not present. Her father-in-law told the police officers that they should not arrest the plaintiff, but should wait for Nkosifikile, the head of the homestead, as the plaintiff knew nothing about what was in the stock kraal. Sgt Mdutshane confirmed that, that was the reason why they first asked the plaintiff the whereabouts of Nkosifikile.
- [49] The defence witnesses denied that they arrested the plaintiff to secure the presence of Nkosifikile. This denial is inconsistent with Sgt Mdutshane's evidence that on their arrival at the plaintiff's homestead, they observed a person running out of the plaintiff's homestead. His evidence regarding this person was contradictory. He first stated that Lt Col Jungqwana drew his attention to the person as a male person. He later said that he saw the person who was running out and he observed that it was a male person. When it was put to him that it must have been interesting that they came to investigate the alleged stolen sheep and someone came out running from the same homestead, he answered in the affirmative. When he was asked what their reaction was regarding this man, he said that they did nothing. He was again asked: "Does it mean you never thought of giving chase?" He answered in the negative. When further asked why they did not chase the man, he said: "The reason we did not do anything was that our purpose was to investigate sheep we were informed were there." He again said that they ignored the man and proceeded to the house because they were concerned that if they chased him, they would not find the sheep on their return. When asked if he warned the man to stop, he asserted that he did not. However, Lt Col Jungqwana did, but the man did not stop. They also did not summon other police officers to give chase. It is inconceivable that they would do nothing after seeing a man running out of a homestead which was the subject of their investigation.
- [50] Surprisingly, Sgt Mdutshane did not mention seeing this man in his evidence-in-chief. It only came to light for the first-time during cross-examination. He added that it did not cross his mind that the man could have been a suspect, which is improbable. He changed and said that he could have been a suspect, but they ignored him. This was after he had indicated that when he went there, he had no suspect in mind. He later changed and said: "I had a suspect in mind, it was the Zenzile people, the husband and wife." When he was asked to reconcile the contradiction, he said that he did not answer correctly to the question when he said that he had no suspect in mind because that was the reason why on their arrival Lt Col Jungqwana asked the whereabouts of Nkosifikile.

- [51] Sgt Mdutshane testified that he asked the plaintiff who the person was who ran out of the house. The plaintiff said that she did not see anyone running. This evidence was mentioned for the first time, during cross-examination. When asked why he did not mention it in his evidence-in-chief, he explained that he forgot to mention it. In hindsight, he knew that there was a man in that homestead from the informer.
- [52] Sgt Mdutshane gave different answers as to the reasons why they did not give chase. He said that he and Lt Col Jungqwana discussed amongst themselves whether they should chase the man or not and decided against it. According to him, that was to ensure that they did not lose the sheep and the plaintiff. The other reason he gave was that it was going to be difficult to do so as it was still dark. With the same breadth, he said it was Lt Col Jungqwana who said that they should not chase the man and he agreed. This evidence came out for the first-time during cross-examination. His explanation for introducing it at that stage was that he would have mentioned it if he had been asked. He contradicted the evidence of Lt Col Jungqwana who testified that there were two suspects in that house, the plaintiff, and her husband. What is strange though is that Lt Col Jungqwana did not mention Nkosifikile in his evidence-in-chief. When he was asked why he mentioned Nkosifikile for the first-time during cross-examination, he said that nothing was asked about him. This is improbable when he had the information that the plaintiff stayed with her husband. They had to cover up for the failure to mention that a man ran out as they approached and their failure to give chase, yet they had gone there to investigate the alleged stolen sheep.
- [53] Sgt Mdutshane was not candid when he testified that when they went to the Zenzile's he did not have a suspect in mind. He contended that they believed the plaintiff when she told them that Nkosifikile had gone to Mthatha the previous day. However, it is inconceivable that they would, after he earlier observed a man running out of the plaintiff's house as they approached. Instead, this confirms the version of the plaintiff that they did not believe her when she said that Nkosifikile had gone to Mthatha. They said that she was hiding him.
- [54] It does not hold any water that it did not cross Lt Col Jungqwana's and Sgt Mdutshane's minds that the person who ran out of the plaintiff's house could have been Nkosifikile and a subject of their investigation, considering the information they received from the informer. Sgt Mdutshane could not explain why Lt Col Jungqwana did not testify about this man. He was also not candid about the reason why they failed to give chase of this man. It is unclear why Lt Col Jungqwana did not testify about this man. His failure to mention this important piece of evidence leaves much to be desired. This also goes for Sgt Mdutshane who failed to mention it in his evidence-in-chief. Lt Col Jungqwana and Sgt Mdutshane had gone to the plaintiff's homestead to investigate the sheep that were alleged to have been stolen and kept there. When they saw a man running out of that homestead as they approached, that was supposed to have triggered their suspicion even more especially knowing that there was a man in that house. Questions around this conduct cannot be said to be unfair. These police officers were not the only officials at the plaintiff's homestead. This was important information that they decided not to testify about. Their evidence was unreliable.

[55] The plaintiff's evidence pertaining to what the police officers mentioned as the reason they arrested the plaintiff, finds support in the evidence of Mr Toni, her legal representative, who appeared on her behalf when she appeared in court for the first time. Mr Toni testified that on his arrival in court on Monday 17 May 2017, he was directed to the investigating officer, who turned out to be Sgt Mdutshane. He approached him and enquired from him about his attitude towards the release of the plaintiff on bail. Sgt Mdutshane informed him that Nkosifikile would escape permanently if the plaintiff was granted bail. He further told Mr Toni that Nkosifikile was the person they were looking for regarding this matter. When he heard this, Mr Toni advised Sgt Mdutshane that Nkosifikile was seated in his motor vehicle outside the court building. He had come to court because he was told that he was looking for him. Mr Toni immediately took Sgt Mdutshane to where Nkosifikile was. Consequently, Sgt Mdutshane

arrested and charged Nkosifikile and joined him as accused 2 with the plaintiff. Indeed, after Nkosifikile's arrest, Sgt Mdutshane no longer opposed bail in respect of the plaintiff. Both the plaintiff and Nkosifikile were granted bail, but Nkosifikile's bail amount was higher than the amount of R1000-00 granted to the plaintiff. When Mr Toni left the court building, only the plaintiff

paid bail.

[56] Although Sgt Mdutshane denied that Mr Toni approached him regarding the bail of the plaintiff and led him to Nkosifikile, he proffered no evidence as to how he knew that Nkosifikile was outside the court building. Before he was taken to him, he did not even know what Nkosifikile looked like. When it was put to him that Nkosifikile went to court looking for Sgt Mdutshane because he had been told that he was in court, he could not deny that. He could not tell the court why Nkosifikile was at the entrance of the court building that day, if he had not been advised to come to court so that the plaintiff was released, as advised. When it was put to him that Nkosifikile had attended court on that day because he was advised to be at court so that the plaintiff could be released according to his advice, he denied this. Importantly, the evidence of Mr Toni was unchallenged regarding what Sgt Mdutshane advised him. Although Sgt Mdutshane denied that when they arrested the plaintiff, they wanted to secure

the availability of Nkosifikile, surprisingly, it was never put to her that Sgt Mdutshane did not advise her that she was arrested

because Nkosifikile was not present. It went unchallenged that Sgt Mdutshane was taken to Nkosifikile by Mr Toni hence this evidence was uncontroverted.

[57] Mr Toni's evidence lends credence to the plaintiff's evidence that she was arrested as security for the availability of her husband and not for the purpose of bringing her to justice. The police officers' denial is a bare denial. Sgt Mdutshane could not even remember whether the plaintiff was represented or not when she appeared in court for the first time. That is so although he was in court until the proceedings were finalised that day.

[58] It remains a general requirement that a peace officer is entitled to exercise his/her discretion as he/she sees fit if it is exercised in good faith, within the bounds of rationality and not arbitrarily.[11] In *Masetlha v President of the Republic of South Africa and Another*[12] the Court as per Langa CJ, Moseneke DCJ, Madala J, Nkabinde J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van Der Westhuizen J and Navsa AJ, held:

"[23] The High Court considered the crucial inquiry to be whether the dismissal of the applicant is an exercise of executive power,

particularly because the Constitution and applicable legislative provisions are silent on the dismissal of a head of an intelligence

service. The court found that the power to appoint includes the power to dismiss. The power to dismiss is implicit in s 209(2) of the Constitution and is an executive power in terms of s 85(2)(e) of the Constitution. The court reasoned that the authority to dismiss is therefore not susceptible to judicial review under the provisions of the Promotion of Administrative Justice Act (PAJA). However, it observed, this did not mean that the

President's decision is beyond the reach of judicial review on any basis. The decision of the President to dismiss must conform to the principle of legality. Therefore, the power to dismiss may not be exercised in bad faith, arbitrarily or irrationally.

[59] In *Shidiack v Union Government* 1912 AD 642 at 651 the court held that the court will not interfere where the discretion has been exercised bona fide or the judgment of the functionary concerned was bona fide expressed.

[60] The plaintiff stated that the case against the plaintiff was withdrawn due to insufficiency of evidence, and this was before Nkosifikile died, which was denied by Sgt Mdutshane. In this regard, it is strange that neither the written instructions from the DPP's office nor the final entry on the face of the docket was available to confirm his version that the case against the plaintiff was withdrawn because it was said that the plaintiff would say the sheep were stolen by Nkosifikile who was deceased at the time. Strangely, this portion of the docket was missing when the docket was discovered. That leaves the defendant's version inconclusive.

[61] Sgt Mdutshane and Lt Col Jungqwana testified that the plaintiff signed a form titled 'Disposal of Seized Stolen Property or Property Suspected to Be Stolen' (SAP299) when Mr Jezile took possession of the sheep seized from the stock kraal. What is awkward about this document is that the name that appears on it is not that of the plaintiff, but that of a certain Nozukile Khondlo who was unknown to the plaintiff. No explanation was proffered by the defendant as to why was the plaintiff made to sign a form bearing a name that was not hers. There is

uncertainty as to why the defendant relied on this document. This information is unreliable.

[62] Considering the evidence in its totality, the plaintiff and her witness, Mr Toni, created a good impression. Their evidence did not show material inconsistencies and improbabilities. It is consistent with the ultimate outcome of how the police officers were alleged to have dealt with her arrest and detention. The defence witnesses' evidence differed on simple issues like the time they left Bizana travelling to Qumbu and the reason why the plaintiff was detained. Their evidence was unreliable in most instances as shown above. The demerits of the police officers are beyond merit. It cannot be said that it is common cause that the plaintiff was found in possession of stock knowing it to be stolen because firstly, this was not pleaded and secondly, the defendant did not prove that she knew that the stock was stolen and exercised physical control of it. It was her version that she did not collect the stock from the veld, but his son did.

[63] Although the defence witnesses denied that they arrested the plaintiff to secure the availability of Nkosifikile, the plaintiff was suddenly released on bail when Nkosifikile showed up in court, as alluded. It is not surprising that after the death of Nkosifikile, the charges were withdrawn due to lack of evidence. Moreover, arresting the plaintiff to get to her husband, was mala fide. The court will interfere where the discretion has been exercised mala fide. In the circumstances, I am not satisfied that the police officers acted reasonably and justifiably in the exercise of their discretion

when they arrested the plaintiff. The arresting officer's suspicion did not rest on reasonable grounds. The defendant

therefore failed to justify the arrest of the plaintiff. That is because the suspicion entertained by Lt Col Jungqwana was not based on solid grounds. The plaintiff succeeded in discharging the onus of proving that Lt Col Jungqwana and Sgt Mdutshane exercised their discretion irrationally and arbitrarily and the arrest was therefore unlawful. Where an arrest is unlawful, the ensuing detention of the arrested person will also be unlawful.[13]

Detention

[64] The plaintiff alleged that Sgt Mdutshane failed to properly exercise his discretion and acted mala fide when he detained her.

[65] Detention is, in and by itself, unlawful. Therefore, the onus rests on the detaining officer to justify it.[14] In *Zealand v Minister of Justice and Constitutional Development and Another* 2008

(2) SACR 1 (CC) (2008 (4) SA 458; 2008 (6) BCLR 601)[15] the Court held:

“[24] The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause, as well as the founding value of freedom. Accordingly, it was sufficient in this case for the applicant simply to plead that he was unlawfully detained. This he did. The respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.”

[66] In *Mvu v Minister of Safety and Security and Another*[16] Willis J cited with approval *Hofmeyr v Minister of Justice and Another* [1992

(3) SA 108 (C)] and held:

“[10] In Hofmeyr v Minister of Justice and Another [1992

(3) SA 108 (C)] King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto, and that the failure by a police officer properly to do so is unlawful. The minister's appeal was unanimously dismissed by what was then known as the Appellate Division of the Supreme Court. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all. This, it seems to me, and in my very respectful opinion, enables one to get a better grip on an issue which has been debated in the law reports in recent cases such as *Minister of Correctional Services v Tobani*; *Ralekwa v Minister of Safety and Security*; *Louw v Minister of Safety and Security and Others*; *Charles v Minister of Safety and Security*; *Olivier v Minister of Safety and Security*; and *Van Rensburg v City of Johannesburg*. On the question of unlawful detention per se, as a concept to be considered separately from the question of arrest, it is, in my respectful view, instructive to read the *Tobani* case in which Jones and Leach JJ, together with Govender AJ, upheld, in an appeal to the full court, the judgment of Froneman J. I also agree with the general approach of Horwitz AJ in the *Van Rensburg* case even though, in that case, the facts are distinguishable from the present one at least inasmuch as a warrant for arrest had been issued.”

[67] In *Zealand v Minister of Justice & Constitutional Development* 2008 (2) SACR 1 (CC)[17] the Constitutional Court as per Langa CJ, Moseneke DCJ, Madala J, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J, Van Der Westhuizen J, Yacoob J and Mpati AJ remarked that the question whether the applicant's detention was consistent with the principle of legality and his right to freedom and security of the person in s 12(1) of the Constitution is a constitutional matter.

[68] Mr Msindo submitted that the court should reject the defendant's evidence and find that the defendant has failed to justify the plaintiff's detention. He submitted further that once the defendant fails to justify the arrest, the detention is automatically unlawful.

- [69] In his heads of argument and at the hearing, Mr Bembe submitted that the circumstances of this case indicated that the police acted within the scope and the ambit of the law in all the steps leading to the arrest of the plaintiff. He submitted further that the police had to detain the plaintiff to avoid her possible interference with the investigation.
- [70] A failure to lead evidence in this regard will inevitably result in the defendant being liable. [18] The defendant led no evidence to show a possible interference with the investigation by the plaintiff.
- [71] When Sgt Mdutshane was asked why the plaintiff was detained, he gave three versions, namely, (i) that Lt Col Jungqwana instructed him to detain her; (ii) that all the police officers present during her arrest agreed that she should be detained; and (iii) that he detained her so that he continued with the investigations regarding the outstanding sheep.
- [72] Sgt Mdutshane proffered no evidence suggesting that the plaintiff would not attend court if she were warned. He stated that when he charged the plaintiff, he did not think of warning her. According to him, the correct approach was to detain and investigate as she was detained for the sheep that had been recovered and those that were not yet recovered. He added that it was also his intentions to detain the plaintiff. Sgt Mdutshane led no evidence to justify detention of the plaintiff. There is therefore no merit in his submission as there was no evidence led to show a possible interference with the investigation. In *Minister of Safety and Security v Kevin Jaftha* (unreported ECD case no. CA310/2014 1 March 2016) Pickering J referred to *Burford v the Minister of Police*, unreported ECD case no CA128.2015[19] and said:

“The respondent tendered no evidence at all in this regard. Where the onus rested on the respondent it is impermissible, in my view, to speculate in favour of the respondent to the effect that it was not

reasonably possible to have brought the appellant before a court. Having regard to the onus it was incumbent on the respondent to have adduced the evidence of at least the investigating officer in this regard. Depending on the nature of the evidence the respondent may well have been able to discharge the onus. In the present circumstances, however, respondent has not discharged the onus of showing that the appellant’s continued detention from Friday morning was justified.”

- [73] In my view, it can be said that the plaintiff was deprived of her freedom arbitrarily or without just cause. In the circumstances, I am satisfied that there was no justification for her detention of the plaintiff from 15 May 2017 to 17 May 2017, which is approximately two days.
- [74] In considering quantum van Rensburg J in *Thandani v Minister of Law and Order* 1991 (1) SA 702[20] had this to say regarding quantum:

“In considering quantum sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and the rights of an individual. In the words of Broome JP in May v Union Government 1954 (3) SA 120 (N) at 130 F:

‘Our law has always regarded the deprivation of personal liberty as a serious injury.’”

[75] In assessing damages for an unlawful arrest and detention, Jones J stated in *Olgar v Minister of Safety and Security* (unreported ECD case no. 608/07, 18 December 2008)[21]:

“In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the “horn of plenty”, at the expense of the defendant.”

[76] It is undisputed that the plaintiff was arrested in the morning on 15 May 2017, detained and released on bail on 17 May 2017. I consider that she suffered humiliation because of the arrest and detention for two days. The plaintiff described the unhygienic condition in the police cells under which she was detained. I also consider that she was removed from her children and family for that duration. Most importantly, she was deprived of her liberty for the abovementioned period. I have made a comparison of the previous awards in similar matters like this one, which serve as a useful guide. However, each case must be treated and decided on its own merits. I am of the view that damages in the amount of R100 000-00 is a fair, reasonable, and appropriate award considering that the plaintiff spent approximately two days in filthy and unhygienic cells.

Order

I issue the following order:

1. The defendant is ordered to compensate the plaintiff a sum of R100 000-00 (one hundred thousand) for the damages suffered because of the unlawful and wrongful arrest and detention from 15 May 2017 to 17 May 2017 (two days).
2. The defendant is ordered to pay interest on the above amount calculated at the legal rate from the date of judgment to date of payment, together with costs on a scale as between party and party.

B M PAKATI

JUDGE OF THE HIGH COURT, GQEBERHA

APPEARANCES: Representative for the Plaintiff Mr V Msindo From V V Msindo Attorneys
Counsel for the Respondent Advocate J J Bembe Instructed by C Mevana Dates Heard 11,12,13
May 2022. 20,21,22,23,24 February 2023 and 18 May 2023 Date of delivery 19 October 2023

[1] (668/2009

[2009] ZASCA 163 (30 November 2009) at para [11].

[2] South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976

(1) SA 708 at 714G.

[3] Selebogo v Minister of Police (unreported, NWM CASE NO 1047/14, 10 February
2017) at para [25].

[4] 2003

(1) SA 11 (SCA) at para [5]; see National Employers' General Insurance Co Ltd v Jagers 1984 (4)
SA 437 (E).

[5] At para [25].

[6] 1986 (2) SA 805 (A) at 818G-H.

[7] In Minister of Safety and Security v Sekhoto and Another 2011

(1) SACR 315 (SCA), Harms DP quoted with approval the dictum in Duncan v Minister of Law
and Order 1986 (2) SA 805 (A) at 818H-J and 819A-B where Van Heerden JA held: "If the
jurisdictional requirements are satisfied, the peace officer may invoke the power conferred
by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as
to whether or not to exercise that power (cf Holgate-Mahomed v Duke [1984] 1 All ER 1054
(HL) at 1057). No doubt his discretion must be properly exercised. But the grounds on which
the exercise of such a discretion can be questioned are narrowly circumscribed. Whether
every improper application of a discretion conferred by the subsection will render an arrest

unlawful, need not be considered because it does not arise in this case. All that need be said for
the purposes of the point under consideration is that an exercise of the discretion in question will
be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not
contemplated by the Legislator. But in such a case, as is generally the rule where the exercise of a
discretion is questioned, the onus to establish the improper object of the arrestor will rest on the
arrestee (cf Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA
Associated Newspapers Ltd and Another 1966 (2) SA 503 (A) at 512; Groenewald v Minister van
Justisie 1973 (3) SA 877 (A) at 884)."

[8] See Nkosinathi Justice Banda v Minister of Police N.O. (Case no CA 99/2020, delivered on 08
June 2021 (ECD) at para 40).

[9] 1988 (2) SA 654 (SE) at 659E-H.

- [10] Sekhoto supra at para [49].
- [11] See Sekhoto at para [39].
- [12] Masetlha v President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 (CC) at para [23].
- [13] See Patrick v Minister of Safety and Security & others (unreported, GP case no 628/2012, 8 September 2016) at para [30] and Sheefeni v Council of the Municipality of Windhoek 2015 (4) NR 1170 (HC) at
- [11] –[12].
- [14] Nkosingithi Banda v Minister of Police N.O. Case No. CA99/2020 delivered on 08 June 2021 (ECD) at para [32]. See also JE Mahlangu and Another v Minister of Police [2021] ZACC 10 at para [32].
- [15] At para 24.
- [16] 2009
- (2) SACR 291 (GSJ) at para [10].
- [17] At para 22.
- [18] See Minister of Safety and Security v Jaftha (unreported, ECG case no. CA310/2014, 1 March 2016) at [35] – [37] and Zweni v Minister of Police & another (unreported, ECP CASE NO. 2629/2013, 4 October 2016) at [19].
- [19] At para [35].
- [20] At 707B.
- [21] At para [16].

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