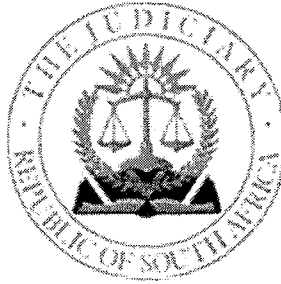
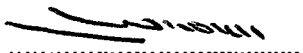


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 38653/2015

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
SIGNATURE	26.11.18 DATE

In the matter between:

DAVID PHIRI

PLAINTIFF

And

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an action for damages based on the alleged unlawful arrest and detention of the plaintiff.

[2] Merits and quantum have been separated.

[3] It is common cause that the plaintiff was arrested on Thursday 10 September 2015 at approximately 8 pm, on a charge of possession of suspected stolen property, without a warrant of arrest. He was detained for a period of 3 ½ days before he was released on Monday 14 September 2015.

[4] The relevant circumstances leading to his arrest are the following: On 10 September 2015 Constable Mogoboya ("Mogoboya") received a complaint about a hijacked vehicle, a white Nissan bakkie with registration number BD 88DB GP. He was informed that the vehicle was parked at 815 Clog Street Braamfischer Soweto. On his arrival he found a white Nissan bakkie, bearing the same registration number. On closer investigation he noticed that the chassis number had been grinded off and another number had been stamped on. He checked the engine number which appeared to be the original and contacted radio control to confirm ownership of the vehicle and whether it had been reported as stolen. He was informed that the vehicle had been reported as hijacked under Kagiso CAS number 393/01/2014. He also enquired about the registration number and licence disk (BD 88DB GP) and was informed that it belonged to a person with a Nigerian surname and identification

number. There was a person present at the address who informed him that the vehicle belongs to David Phiri ("the plaintiff"). The plaintiff was called and he arrived a while later. On his arrival the plaintiff was asked to hand over the keys of the vehicle and he was arrested on a charge of possession of stolen property. Mogoboya asked the plaintiff about the vehicle and he was provided with a small piece of paper with the particulars of a person who allegedly sold the vehicle to the plaintiff. It was a person by the name of Bongani Mudaka ("Mudaka") who stays at 2824/4 Meadowlands Zone 8, with ID number: 8204145746. The plaintiff was also in possession of Mudaka's telephone number and he was asked to phone him. Mudaka did not answer. Mogoboya then asked the plaintiff to take them to Mudaka's house. The plaintiff informed him that he will not be able to find the house and as the address was incomplete (there was no street name) no further attempts were made by Mogoboya to trace Mudaka. It is clear from the evidence produced by the defendant that the vehicle found in the possession of the plaintiff was a stolen vehicle and that it was hijacked during January 2014.

[5] Mogoboya testified that he had a reasonable suspicion to arrest the plaintiff based on the following grounds: (1) the chassis number of the vehicle had been tampered with; (2) the vehicle was reported as stolen under Kagiso CAS number 393/01/2014 and; (3) the registration number BD 88DB GP belonged to another Nissan vehicle belonging to a Nigerian national. He also testified that he never suspected the plaintiff of being involved in the hijacking or theft of the vehicle but only suspected him of being in possession of stolen property.

[6] The plaintiff testified that on 10 September 2015 he was phoned by his employee and informed that the police was looking for him in regards to his motor vehicle. He was requested to come to 815 Clog Street where the vehicle was parked, and he immediately obliged. On his arrival he found Mogoboya who arrested him on a charge of possession of stolen property. He told Mogoboya that he had documents for the vehicle and he phoned his wife to bring it to the premises. She brought a file and handed over a certificate of registration and an affidavit from Mudaka confirming that the vehicle was sold to him. He also asked Mogoboya to take him to Mudaka's house as they had the address but Mogoboya refused. He was taken to the police station where he was detained until the Monday when he appeared in court. At court the docket was *nolle prosequi* and he was released.

SECTION 40(1)

[7] Section 40(1) of the Criminal Procedure Act 51 of 1977 ("CPA") governs arrests without a warrant. The defendant pleaded that the arrest was effected in terms of section 40(1)(b) of the CPA, which reads as follows:

" A peace officer may without a warrant

arrest any person-

(a).....

(b) whom he reasonably suspects of having

committed an offence referred to in Schedule

1, other than the offence of escaping from

lawful custody;"

[8] The plaintiff was arrested by Mogoboya who testified that he arrested the plaintiff for possession of stolen property. Possession of stolen property is not a Schedule 1 offence. The arrest could therefore not have been made in terms of section 40(1)(b) of the CPA as the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a **Schedule 1 offence** (my emphasis).¹ Section 40(1)(e) which applies to the offences referred to in ss 36 and 37 of the General Law Amendment Act 62 of 1955, does however make provision for an arrest without a warrant if any person:

“.... 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.”

[9] It is trite that an arrest or detention is deemed to be *prima facie* unlawful. It is for the defendant to allege and prove the lawfulness of the arrest. In essence the defendant has to plead justification for its actions. (See *Minister of Law and Order and Another v Dempsey*² and *Zealand v Minister of Justice and Constitutional Development*³). As Rabie CJ explained in *Minister of Law and Order and Others v Hurley and Another*⁴:

¹ *R v Van Heerden* 1958 (3) SA 150 (T) at 152.

² 1988 (3) SA 19 (A) at 38B-C.

³ 2008 (2) SACR 1 (CC)

⁴ 1986(3) SA 568(A) at page 589 E-F.

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

[10] It was held in *Duncan v Minister of Law and Order*⁵, that the jurisdictional facts for a s 40(1)(b) defence are that (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.

[11] Applying the same principles, the jurisdictional requirements in regard to s 40(1)(e) are therefore that: (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the property had been stolen or acquired by dishonest means; (iv) that the arrestee had committed an offence in connection with the property and that; (v) the suspicion was based on reasonable grounds. The question whether the suspicion of the peace officer effecting the arrest is reasonable must be approached objectively. (See *Rex v Van Heerden*⁶). Accordingly, the circumstances giving rise to the suspicion in terms of s 40(1)(e) must be such as would ordinarily move a reasonable person to form a suspicion that the property has been stolen/ acquired by dishonest means and that the arrestee has committed an offence in connection with the property.

⁵ 1986 (2) SA 805(A)

⁶ 1958(3) SA 150 (T)

[12] In *Duncan supra*, Van Heerden JA found that defending a claim for unlawful arrest, the four jurisdictional facts set out in s 40(1)(b) of the Criminal Procedure Act 51 of 1977 must be pleaded. On page 818H – J the learned judge stated the following:

“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-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.”

[13] The defendant did not plead any jurisdictional requirements for the arrest in terms of section 40(1)(e) and specifically pleaded that the arrest was effected in terms of section 40 (1)(b) of the CPA to *“bring him before court and answer the charges”*. It was only during argument that counsel for the defendant submitted that the arrest was effected pursuant to section 40(1)(e). The jurisdictional facts contained in 40(1)(b) and 40(1)(e) differ. It is not clear from the pleadings or the arresting officer’s testimony whether the suspicion was reasonable and of such a nature that it would ordinarily move a reasonable person to form a suspicion that the arrestee committed an offence in connection with the property. In fact the arresting officer testified that he did not suspect the plaintiff of being involved in the theft or hijacking of the vehicle.

[14] It is only after the jurisdictional requirements have been satisfied that a peace officer may invoke the power conferred by the subsection to arrest the suspect. For the above reasons I find that the defendant has not satisfied the jurisdictional requirements set out in section 40(1)(e) to effect the arrest. The defendant has failed to prove the lawfulness of the arrest. The arrest and subsequent detention were unlawful.

[15] In the result the following order is made:

1. Judgment is granted in favour of the plaintiff on the merits with costs.

L WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Attorney for the plaintiffs: B.H Taula Attorneys.

Counsel for the plaintiffs: Advocate E. Nhutsve

Attorney for the defendant: Office of the State Attorney, Johannesburg.

Counsel for the defendant: Advocate L. Adams.

Date matter heard: 22 November 2018 & 23 November 2018.

Judgment date: 26 November 2018.