REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***9th November 2022*** Signature:

CASE NO: 30278/2018

DATE: 9TH NOVEMBER 2022

In the matter between:

NDLOVU, TRUST	First Plaintiff
BHEBHE, THANDAZANI	Second Plaintiff
and	
THE MINISTER OF POLICE	First Defendant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Defendant
NDZUKE, VINCENT	Third Defendant
NTJANA, ANDRIES	Fourth Defendant

Coram: Adams J

Heard: 1, 2, 3 and 8 November 2022

Delivered: 9 November 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII.

The date and time for hand-down is deemed to be 11:30 on 09 November 2022.

Summary: Criminal law and procedure – Criminal Procedure Act 51 of 1977 – sections 40(1)(b) and (e) – unlawful arrest and detention – whether the plaintiffs' arrest and detention was lawful in terms of ss 40(1)(b) and (e) of the Criminal Procedure Act 51 of 1977 – arrest and detention justified – plaintiffs' claims dismissed

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ORDER

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(1) The first plaintiff's claim is dismissed with costs.

(2) The second plaintiff's claim is dismissed with costs.

JUDGMENT

Adams J:

[1]. At about 05:00, in the wee hours of the morning, on Friday, 21 April 2017, an unidentified person called in, to the South African Police 'Dispatch Centre', a housebreaking in progress in Yeoville. A shop was being broken into, so the 'informer' advised the Dispatch Centre, which immediately dispatched Constable Ngaka and his partner, stationed at the Yeoville Police Station, to the scene of the crime. Shortly after their arrival at the scene, they encountered the informer, who indicated to them that he wished to remain anonymous, but he nevertheless agreed to accompany them on their pursuit of the suspects, who, the informer indicated, were making their get-away in a Southerly direction. Very shortly thereafter, the first plaintiff ('Ndlovu') and the second plaintiff ('Bhebhe') were tracked down by Constable Ngaka and his partner, and, as luck would have it, they were found in possession of one of the items – a steel cabinet – which had been stolen from the business premises, which had been burgled minutes before then. Their explanation for being in possession of the

stolen goods was to the effect that they had bought it from so called ‘street boys’.

[2]. Despite this explanation, Ndlovu and Bhebhe were arrested by Constable Ngaka and his partner on a charge of being in possession of suspected stolen property – the steel cupboard, which they were busy pushing on a trolley. Their explanation was seemingly not acceptable to Constable Ngaka and his colleague. And, in any event, the informer had identified them as the persons who had broken into the said premises. Constable Ngaka and his partner therefore arrested Ndlovu and Bhebhe, who were subsequently detained, first in the Yeoville Police Cells and thereafter at the Johannesburg Prison, until 13 September 2017, when after a trial in the Johannesburg Regional Court, they were discharged and acquitted in terms of s 174 of the Criminal Procedure Act, Act 51 of 1977 (‘the CPA’).

[3]. In this action, the plaintiffs claim delictual damages for unlawful arrest and detention, as well as for malicious prosecution, from the first defendant, the National Minister of Police (‘the Minister’), and the second defendant, the National Director of Public Prosecutions (‘the NDPP’), as well as from the Johannesburg Public Prosecutors – Mr Ndzuke (the third defendant) and Mr Ntjana (the fourth defendant) – who were responsible for the prosecution of the plaintiffs in the Johannesburg Regional Court. Needless to say, the plaintiffs attach considerable weight to the fact that the Johannesburg Regional Court had discharged them in terms of s 174 of the CPA, which confirms, so the plaintiffs aver, that the State had no case against them and should never have arrested and prosecuted them.

[4]. The defendants deny liability for the claims of the plaintiffs. Their case is that the arrests and the detention were lawful in that the plaintiffs were suspected – reasonably so – of having committed the crimes of possession of suspected stolen property and housebreaking in respect of business premises.

[5]. The issues to be considered in this action are therefore whether, all things considered, the arrest of the plaintiffs and their subsequent detention were lawful, and whether their prosecution by the National Prosecuting

Authority was malicious. Put another way, the issues to be decided in this matter is whether the arresting officers had reasonable grounds to arrest the plaintiffs and whether they had reasonable grounds thereafter to detain him. Additionally, I am required to decide whether the prosecution of the plaintiffs was, in the circumstances of this matter, malicious.

[6]. These issues can and should be decided, in my view, against the backdrop of those facts, which are common cause and which are set out in the paragraphs which follow. In my view, there is no need to decide any factual disputes either way, in order to arrive at a resolution of the legal disputes between the parties. I reiterate that the disputes can be resolved and adjudicated upon simply by having regard to those facts which are common cause between the parties and which are not seriously challenged by the plaintiffs.

[7]. Before dealing with the facts in the matter, it may be apposite to traverse and consider firstly the applicable legislative framework and the applicable legal principles.

[8]. An arrest or detention is *prima facie* wrongful. Once the arrest and detention are admitted, as is the case *in casu*, the onus shifts onto the State to prove the lawfulness thereof and it is for the defendants to allege and prove the lawfulness of the arrest and detention. So, for example, it was held by the Supreme Court of Appeal as follows in *Zealand v Minister of Justice & Constitutional Development & Another*[1]:

'This is not something new in our law. It has long been firmly 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.'

[9]. Section 40(1)(b) of the CPA confers the power on a police officer, without warrant, to arrest a person reasonably suspected of having committed a schedule 1 offence, which includes the offence of ‘Breaking or entering any premises, whether under the common law or a statutory provision, with intent to

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1 *Zealand v Minister of Justice & Constitutional Development & Another* 2008 (4) SA 458 (SCA) at para 25;

commit an offence', as well as the offence of 'Receiving stolen property knowing it to have been stolen'. And, in terms of subsection (1)(e), a police officer is empowered to arrest, without a warrant of arrest, any person 'who is found in possession of anything which [he] 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'. Section 50(1)(a) requires that such arrested person be brought, as soon as possible, to a police station, and be there detained; and section 50(1)(b) provides that he or she, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.

[10]. It is not required for a successful invocation by a peace officer of Section 40(1)(b) of the CPA, that the offence was actually committed, the question is whether the arresting police officer had reasonable grounds for suspecting that such a crime had been committed. This requires only that the arresting officer should have formed a suspicion that must rest on reasonable grounds. It is not necessary to establish as a fact that the crime had been committed[2]. 'Suspicion' implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee[3].

[11]. In cases such as *Duncan v Minister of Law and Order*[4], *Minister of Law and Order v Kader*[5], *Powell NO and Others v Van der Merwe NO and Others*[6], the Supreme Court of Appeal has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion':

'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.'

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2 *R v Jones* 1952 (1) SA 327 (E) at 332;

3 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I – 820B;

4 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) ([1996] ZASCA 24) at 819I;

5 *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) ([1990] ZASCA 111) at 50H – I;

6 *Powell NO and Others v Van der Merwe NO and Others* 2005 (1) SACR 317 (SCA) (2005 (5) SA 62; 2005 (7) BCLR 675; [2005] 1 All SA 149) para 36;

[12]. The question, whether the suspicion by the police officer effecting the arrest is reasonable, as envisaged by s 40(1)(b), must be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first-schedule offence. The information before the arresting officers must be such as to demonstrate an actual suspicion, founded upon reasonable grounds, that a schedule 1 offence had been committed by the person or persons to be arrested.

[13]. That then brings me back to the facts in the matter, as elicited from the evidence led during the trial. In that regard, the two plaintiffs gave evidence in support of their cases, as did one Mr Masimula, who was a Johannesburg Regional Court Control Prosecutor at the relevant time. He gave evidence to the effect that – by the time of their third appearance in Court – he had instructed the prosecutors to withdraw the charges against the plaintiffs. He did so, so he testified, because he did not believe that the State had a winnable case against the plaintiffs. For the defendants, the arresting officer (Warrant Officer Ngaka), the investigating officer (Sergeant Dlamini) and the third and fourth defendants, gave evidence.

[14]. As indicated above, the case on behalf of the defendants is that the arresting officer, Constable Ngaka (who had been promoted to Warrant Officer by the time he gave evidence), and his partner reasonably suspected that the two plaintiffs had committed the crime of being in possession of suspected stolen property and the crime of housebreaking. Their reasonable suspicion was informed mainly by the fact that, within minutes of the actual housebreaking being reported as being ‘in progress’, the two plaintiffs were found in possession of one of the stolen items. That, in my view, is the end of the plaintiffs’ case.

[15]. Moreover, the plaintiffs were fingered as the ones who committed the housebreaking by an ‘informer’, who, by all accounts had personally witnessed the plaintiffs breaking into the shop. It is of no moment, in my view, that the ‘informer’ preferred to remain anonymous and did not give a statement to the

police. At worst for the state, his pointing out of the plaintiffs, can be regarded as hearsay evidence, which could and should have been admitted in terms of the provision of s 3(1)(c) of the Law of Evidence Amendment Act[7]. The point is simply that the police officers cannot be faulted for their actions in arresting the plaintiffs. Everything pointed to them having committed the aforegoing offences – with or without the explanation that they had supposedly bought the stolen item from the supposed burglars within minutes of it having been stolen.

[16]. There can be no doubt that the arresting officers manifestly harboured a suspicion that the plaintiffs had committed at least the offence of being in possession of suspected stolen property. They would also have been justified in suspecting that the plaintiffs had committed the offence of housebreaking. They may not have had sufficient evidence to support their suspicion, but that is of no moment – the simple fact of the matter is that their suspicion was reasonable for the reasons mentioned above, notably the proximity in time and space between the commission of the crime and the plaintiffs being caught in the act of carting off the stolen item. It is inconceivable that, in these circumstances, the arresting officers should have simply accepted the explanation of the plaintiffs that they had bought the stolen cupboard from ‘street boys’.

[17]. The question, whether the suspicion by the arresting officer effecting the arrest is reasonable, must, as I have said, be approached objectively. Therefore, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first-schedule offence. In my view, the defendants had established that there were reasonable grounds to suspect that the plaintiffs had committed the schedule 1 offences. The arrests and subsequent detention were therefore lawful.

[18]. On behalf of the plaintiffs, it was contended that the arresting officers acted unreasonably in that they failed to follow up on and investigate the explanation given by the plaintiffs to the police – either at the place where they were arrested or at the Yeoville Police Station when they were being processed. This explanation, it will be recalled, was to the effect that they (the plaintiffs) had

[7] The Law of Evidence Amendment Act, Act 45 of 1988;

bought the steel cupboard from so called ‘street boys’ for one hundred rand. The least the arresting officers should have done, so the contention on behalf of the plaintiffs went, was to go to the place where the item was supposedly bought to try and verify the story. These officers had a duty, so it was submitted, to consider and investigate any exculpatory explanation given by the plaintiffs, which they failed to do.

[19]. The response to this proposition by the arresting officer, WO Ngaka, was to the effect that, at the Police Station, the plaintiffs simply said that they had bought the steel cabinet on the streets, without given any further details, such as the place where the sale happened or particulars relating to the alleged sellers. All the same, my impression of the evidence of the arresting officer was basically that he did not accept the explanation. That, in my judgment, was reasonable. In the context of the matter and the surrounding circumstances, it can safely be said that the explanation given by the plaintiffs was highly improbable, far-fetched and bordered on the ridiculous. His uncontested evidence was that no more than five minutes passed from the time that they received the report of the break-in in progress at the shop to when they arrested the plaintiffs. In that context of time, WO Ngaka had every reason to reject out of hand the explanation by the plaintiffs that they had bought the stolen cabinet from phantom ‘street boys’.

[20]. Mr Sibisi, Counsel for the plaintiffs, also submitted that the police officers’ suspicion was not reasonable because: (1) There were other items stolen from the shop, such as a TV and a fridge, which were not found in the possession of the plaintiffs; and (2) They were also not found in possession of housebreaking implements, which they would have needed to break into the shop.

[21]. I cannot agree with these submissions. As rightly pointed out by the arresting officer during his evidence, at the time they arrested the plaintiffs they did not know what had been stolen from the shop. As for the housebreaking implements, it is so that there are reasonable explanations for the plaintiffs not being in possession of same, such as the fact that they could have and probably did discard them after use.

[22]. The same applies to the continued prosecution of the plaintiffs on the charges of housebreaking, alternatively, unlawful possession of suspected stolen property. With the evidence which they had in their possession, the prosecutors were fully justified in persisting with the charges against the plaintiffs. Moreover, the evidence of the investigating officer, Sgt Dlamini, was that, when he interviewed them as suspects on or about 24 April 2017 (on the Monday following their arrest), the plaintiffs were not prepared to give him their side of the story. They opted to give their version in court. This then left the prosecutors only with the version of the arresting officer, which incorporated the report and the pointing out of the informer, which, in my view, translated into the conclusion that there was a reasonable suspicion that the plaintiffs had committed the crimes of breaking and entering, alternatively, unlawful possession of suspected stolen property, which, in turn, justified the arrest and detention of the plaintiffs as well as their prosecution on the aforementioned charges.

[23]. As regards the unlawful detention, the plaintiffs confirmed that they never applied for bail or even attempted to apply for bail, how then, I ask rhetorically, can it be said that they were detained unlawfully.

[24]. On the basis of the facts in this matter, there is no evidence to support a conclusion, either directly or inferentially, that Constable Ngaka and his partner, when arresting the plaintiffs, acted unreasonably and without reasonably suspecting that they had committed the offences of housebreaking and being in possession of suspected stolen property. The arresting officers were, in my judgment, not subjectively motivated by any irrelevant personal considerations of sympathy or vengeance. They just had no reason to be so motivated. Their suspicion that the plaintiffs had committed the said crimes was based on reasonable grounds, notably information received from the informer, and importantly the fact that the plaintiffs were caught with the stolen goods literally within minutes of the shop reportedly being broken into.

[25]. The mere fact that in the end the plaintiffs were discharged in terms of s 174 of the CPA does not detract from the reasonableness of the suspicion

that crimes had in fact been committed by the plaintiffs. If anything, there are a myriad of reasons why the criminal case took a turn for the worse as it did. Objectively viewed, it is difficult to see on what basis the arresting officers can be said not have had a reasonable suspicion that the crimes had been committed. Furthermore, the plaintiffs were not unlawfully detained. They had every opportunity to apply for bail, but opted not to do so.

[26]. For all of these reasons, the plaintiffs' claims fall to be dismissed.

Costs

[27]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule.

[28]. The plaintiffs should therefore be ordered to pay the defendants' costs of the action.

Order

[29]. Accordingly, I make the following order: -

(1) The first plaintiff's claim is dismissed with costs.

(2) The second plaintiff's claim is dismissed with costs.

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L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	1st, 2nd, 3rd and 8th November 2022
JUDGMENT DATE:	9th November 2022 – judgment handed down electronically
FOR THE FIRST AND SECOND PLAINTIFFS:	Advocate S F Sibisi
INSTRUCTED BY:	Dike Attorneys, Johannesburg
FOR THE FIRST TO FOURTH DEFENDANTS:	Advocate James Magodi
INSTRUCTED BY:	The State Attorney, Johannesburg