



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

**CASE NO: 434/2020**

In the matter between:

**MANDISA NGXUKUME**

**PLAINTIFF**

and

**MINISTER OF POLICE**

**DEFENDANT**

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**JUDGMENT**

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**Cengani-Mbakaza AJ**

**Introduction**

[1] On 05 February 2020, the plaintiff issued a combined summons in this court claiming damages for unlawful arrest and detention against the Minister of Police

(the defendant). In law, the defendant is vicariously liable for delicts committed by the members of his department.

[2] In the particulars of claim, the plaintiff alleged that the members of the South African Police Services (SAPS) arrested the plaintiff at her home without producing a warrant of arrest. It was alleged that she committed a crime of theft of stock or was in possession of stock suspected to have been stolen. She was taken in the police van together with the said stock. The plaintiff averred that during arrest she was humiliated in front of the public and questioned as if she was a criminal.

[3] She was transported to Central police station where she was detained for four days. The plaintiff further alleged that as a result of humiliation, and impairment of her dignity and self-esteem, she suffered the following damages:

(a) R150 000 (One hundred and fifty thousand rand) for unlawful arrest and detention;

(b) R200 000 (Two hundred thousand rand) for unlawful detention; and

(c) R250 000 (Two hundred and fifty thousand rand) for *contumelia*, plus interests and costs of suit.

[4] The defendant filed a plea and made a bold denial of events. As I understood the trial proceedings, the defendant admitted that the plaintiff was arrested without a warrant of arrest on an allegation that she was found in possession of stolen stock, an offence which falls under Schedule 1 in terms of the Criminal Procedure Act 51 of 1977(CPA). On that basis, the parties agreed that the defendant bore the onus to justify the arrest and therefore would begin to lead evidence. The parties did not seek to separate issues in the matter; the case proceeded on both the merits and quantum.

### **The undisputed facts**

[5] On Friday 21 October 2019, the plaintiff was arrested by SAPS. On the day preceding her arrest, Mr Lunga Godongwana (Godongwana) from the Nyathi family, lost seven sheep in his homestead. He went to report the matter to the police. On the following day, he went to the plaintiff's home and found members of the SAPS already at the scene. On his arrival, the shack which is situated inside the stock kraal was already opened. He identified six of his sheep with certain identified marks and same were later transported to his home.

[6] Warrant officer Mbuyekezi Nogoduka (W/O Nogoduka) was amongst the police officers who were hinted about the whereabouts of the stolen sheep. On his arrival at the plaintiff's home, he found members of the Crime Prevention and Stock Theft Units. They entered the stock kraal and found six sheep which were later identified by Godongwana as his. They asked the plaintiff for an explanation about

the stolen sheep and she repeatedly told them that she knew nothing about the activities in the stock kraal. She further explained that her husband would be in a better position to explain about the stolen sheep. The plaintiff was then arrested on a charge of possession of sheep that had been stolen or suspected to have been stolen.

[7] At the time of her arrest, the plaintiff was a married woman. The marital home belonged to both her and her husband. When she was questioned about stolen sheep, she summoned her brother-in-law to attend to the questions posed by the police because her husband was not at home. According to the plaintiff's culture, which she explained to the court, her role as a married woman prohibited her from entering the kraal or participating in any activities involving the livestock. Due to this, she insisted that she had no business in the stock kraal and knew nothing about the activities incidental thereto.

[8] All the witnesses gave a clear description of how the stock kraal was structured. The stock kraal was made up of tall shrubs and a bush making it impossible for an outsider to see what was stocked inside. There was also a shack that was located inside the stock kraal and this was where the stock was kept. The shack was made up of corrugated iron sheets which were completely covered. It had a door which was locked and in order to gain access a key to the padlock had to be used.

[9] It is common cause that W/O Nogoduka was not an arresting officer, W/O Didiza was. W/O Nogoduka testified that he was standing next to the doorway of the stock kraal to prevent people from entering. He could hear some of the questions asked and the plaintiff's responses, however, he would occasionally answer phone calls not paying too much attention to the activities that led to the plaintiff's arrest. Amongst others, W/O Nogoduka was trying to locate the plaintiff's husband over the phone to come and explain about the stolen sheep. The plaintiff's husband could not be located. Under cross-examination, it was put to him that immediately after he reported to W/O Didiza that the plaintiff's husband could not be located, W/O Didiza informed him that he would not wait for that he because was rushing for a meeting. W/O Nogoduka responded that there were times when W/O Didiza would talk to the plaintiff in his absence.

[10] Under cross-examination, it was put to W/O Nogoduka that W/O Didiza informed the plaintiff that he would arrest her just to secure her husband. On this aspect, W/O Nogoduka refused to comment. When he was informed that no reasonable explanation was formulated to arrest the plaintiff, he responded, *'I am unable to answer on behalf of the arresting officer'*. When this issue was clarified under re-examination, he added that he would not argue that there was no reasonable suspicion to arrest the plaintiff.

[11] On Monday 28 October 2019, the plaintiff appeared in court. The plaintiff's case was not on the court's roll of cases. She sat in court until the court roll came to an end. The Magistrate enquired about the status of her case. The public prosecutor

advised that due to insufficiency of evidence, her matter was never enrolled. She was therefore asked to leave and she proceeded home.

### **The facts in dispute**

[12] The evidence of the plaintiff and W/O Nogoduka parted ways in respect of the following: W/O Nogoduka testified that when they asked the plaintiff to explain what was locked inside the shack, the plaintiff produced a padlock key from the clothes she was wearing. W/O Didiza together with another member entered the stock kraal and opened the shack using the key he got from the plaintiff.

[13] The plaintiff denied that she produced a key to the padlock and testified that the police did not want to listen to her explanation. The keys to gain access to the kraal would either be with her husband or father-in-law because her father-in-law also kept his stock in the same yard. Since her husband could not be located, the police informed her that it would be better for her to be arrested so that her husband would come and release her. Her brother-in-law, Sivuyile Ntulo whom she summoned together with her father-in-law, pleaded with the arresting officer not to arrest her. The police did not accede to the request. She left her four-year-old child in the care of a neighbour until she was released. Her child suffered enormous trauma as a result of her being incarcerated. She testified that she was never in possession of any stolen livestock. According to her testimony, she was carried in a police van with the livestock until she reached the police station.

[14] In cross-examination, the plaintiff admitted that she was the co-owner of the premises and would ask the boys to look after the livestock in her husband's absence. When asked whether she was not in charge of the livestock by virtue of her marriage, she denied this. Under cross-examination, she conceded that she informed the police that the stock was already in the veld for grazing because she believed so.

### **Issues**

[15] The crisp issue for determination is whether the plaintiff's arrest and her subsequent detention were justified.

### **The law**

[16] The law is settled that absent justification of the arrest is *prima facie* unlawful. When the arrest is admitted as in the present case, the onus of proving the lawfulness of the arrest is on the arrestor.<sup>1</sup>The approach towards discharging of onus to prove wrongful detention is like the approach adopted towards proving wrongful arrest. The test is on a balance of probabilities. In *Botha v Minister of Safety and*

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<sup>1</sup> Minister of Law and Order v Hurley 1986 (3) SA 568 (A) at 818 E-F, Rabie CJ held: "An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be 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."

*Security and Others, January v Minister of Safety and Security and Others*<sup>2</sup>, the court held per Tshiki J at para 29,

“It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of section 12(1) of the Constitution.....These provision, therefore, places an obligation on the police officials who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish before detaining the person, the justification and lawfulness of such arrest and detention”

[17] In *Zeeland v Minister of Justice and Constitutional Development and Another*<sup>3</sup>, per Langa CJ at para 25 held,

“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 interference has occurred, the burden falls upon the person causing interference to establish a ground for justification.”

[18] Our courts have accepted that if an arrest or detention is by or at the instance of any public officer or authority, the responsible official must justify the arrest or detention by pointing to the statute or statutory regulation from which he claims to derive his power to arrest or detain the detainee and he must demonstrate that he

<sup>2</sup> (2012(1) SACR 305 (ECP) [2011] ZAECPHC 63;[2011]ZAECPHC 12(2 April 2011)

<sup>3</sup> (CCT54/07)[2008] ZACC 3; 2008(6) BCLR 601(CC);2008 (2) SACR 1 (CC);2008(4)SA 458 (CC) (11 March 2008); In *Zeeland's* case, the court also referred to *Ingram v Minister of Justice* 1962(3) SA 225 (WLD) at 227.



acted within the scope of the power conferred, and further that he has observed the provisions of the statute or regulation that empowered him to do so.<sup>4</sup>

[19] In the pleadings, the statute or statutory regulation from which the arresting officer derived his powers to arrest was not specifically pointed out. This notwithstanding, the case of the defendant as I understood it during the trial proceedings was that the plaintiff was found in possession of suspected stolen livestock (sheep). Furthermore, the plaintiff was arrested without a warrant of arrest. Section 40(1) (b) of the CPA prescribes arrest without a warrant of arrest. The section provides,

'A peace officer may, without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody'.

[20] For arrest to be lawful, it must be proved that:

- (i) the arresting officer was a peace officer;
- (ii) the arresting officer entertained a suspicion;
- (iii) the suspect to be arrested committed an offence referred to in Schedule 1; and that the
- (iv) the suspicion rested on reasonable grounds.<sup>5</sup>

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<sup>4</sup> Madyibi v Minister of Police (4132/17)[2020] ZAECMHC 11;2020(2) SACR 243 (ECM)(17 March 2020); see also: Tsose v Minister of Justice and Others 1951(3) SA 10 (A)

<sup>5</sup> Duncan v Minister of Law and Order 1986 (2) SA 805A at 818 G-H

[21] Section 40 (1) (g) of the CPA provides:

“ (1) A peace officer may without a warrant arrest any person-

(g) who is reasonable suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.”

[22] The jurisdictional facts for a section 40(1)(g) defence are that:

(a) the arresting officer must be a peace officer;

(b) the arresting officer must entertain a suspicion;

(c) the suspicion must be that the suspect (the arrestee) committed an offence referred to in section 2 of the Stock Theft Act 57 of 1959 (the Act);  
and

(d) 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.

[23] In terms of section 2 of the Act, any person who is found in possession of stock or produce in regard to which there is a reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence. The concept of possession is the exercise of a required degree of control over an object together with the intent to do so. In *S v Adams*<sup>6</sup>, Corbett JA

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<sup>6</sup> 1986(4) SA 882 (A).

(with Viljoen JA, Botha JA, Galgut AJA and Nicholas AJA concurring) defines the concept of possession as follows: at paragraphs 890G-891B:

“In general, the concept of ‘possession’ (*besit*), when found in a penal statute, comprises two elements: a physical element (*corpus*) and a mental element (*animus*). *Corpus* consists either in direct physical control over the article in question or mediate control through another. The element of *animus* may be broadly described as the intention to have *corpus*, i.e. to control, but the intrinsic quality of such *animus* may vary, depending upon the type of possession intended by the statute. At common law a distinction is drawn between civil possession (*possessio civilis*) and natural possession (*possessio naturalis*). Under the former, the *animus possidendi* consists of the intention on the part of the possessor for keeping the article for himself as if he were the owner. Under the latter, the *animus* need merely consist of intention of the possessor to control the article for his own purpose or benefit, and not as the owner.....”

[24] Our courts have pronounced on how a reasonable suspicion is formed. In *Mabona and Another v Minister of Law and Order and Others*<sup>7</sup>, Jones J remarked:

“.....It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorizes drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear a warrant, i.e., something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of 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 on solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion.”

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<sup>7</sup> 1988 (2) SA 654 (SE) 658 G-J; see also *S v Net and Another* 1980(1) SA 28 E at 33 H.

[25] The *Sekhoto's*<sup>8</sup> matter ruled that once jurisdictional facts are present the discretion whether or not to arrest arises. Harms DP set some limits of the reasonable suspicion discretion.

“At paragraph 42: 1. Peace officers are entitled to exercise this discretion as they see fit, provided they stayed within the bounds of rationality.....”

[26] The exercise of discretion will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator.<sup>9</sup>

### **The parties 'contentions**

[27] The parties submitted written heads of arguments and argued as follows: the defendant's first challenge as demonstrated by Mr Halam on behalf of the plaintiff is that W/O Didiza, the arresting officer, was not called to justify the arrest. It is contended that W/O Nogoduka was merely in the company of the arresting officer and could not hear the whole conversation between the plaintiff and W/O Didiza. Mr Halam argued that the plaintiff's husband was not at home and so the plaintiff was arrested so that the husband could surrender himself to the police. The plaintiff submitted a reasonable explanation that she knew nothing about the livestock and her husband could be in a better position to account, so the argument continued.

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<sup>8</sup> 2011(1) SACR 315 (SCA).

<sup>9</sup> *Holgate-Mohammed v Duke* 1984(1) All ER 1054 (HL) 1057.

[28] Mr Halam also put the question of the defendant's discretion to arrest to the test. He argued that the arrest and subsequent detention of the plaintiff were not *bona fide*. The arrest and detention were only made to force the plaintiff's husband to surrender himself to the police.

[29] Mr Ngumle, on behalf of the defendant, argued that the plaintiff was in charge of the premises with a key to the shack where the livestock was hidden. The police correctly charged her for being in possession of livestock suspected to be stolen. Mr Ngumle submitted that the plaintiff's contention that she was arrested so that her husband could present himself to the police was a fabrication because it would have been pleaded in her particulars of claim.

[30] Mr Ngumle contended that the witnesses that were called by the defendant were credible, they gave a coherent version and did not demonstrate any biasness towards the plaintiff. Regarding the plaintiff, she contradicted what she pleaded in her particulars of claim, so the argument continued. Mr Ngumle further contended that I must find improbabilities in the evidence of the plaintiff. He further argued that the question of the defendant's discretion to arrest the plaintiff was not pleaded.

### **Evaluation of evidence**

[31] I will first deal with the defendant's point of criticism on how the plaintiff's pleadings were couched. Counsel for the defendant argued that the plaintiff failed to plead that by virtue of being a woman, she was prohibited from accessing the stock kraal due to her cultural and traditional values. Furthermore, the question of whether the police properly exercised their discretion to arrest the plaintiff was never pleaded. It is inappropriate to plead a cause of action that fails to disclose a real dispute of fact. In traversing this point, counsel correctly relied in the case of *Minister of Safety and Security v Slabbert*<sup>10</sup>, where Harms DP, as he then was, (Mthiyane, Lewis, Mhlantla JJA, et Hurt AJA concurring) held at paragraph 11:

"The purpose of the pleadings is to define the issues for the other party. 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."

[32] On perusal of the court's index bundle, the material facts pleaded were that the plaintiff never committed a first Schedule offence and her arrest and detention were unlawful. The plaintiff augmented this point through oral evidence. According to her testimony, she was prohibited from accessing the stock kraal due to her cultural rules and standards as alluded to above. She testified that she was not in control of the livestock which included the ones that were stolen. Her testimony with regard to the possession of the stolen livestock was extensively challenged.

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<sup>10</sup> (2010) 2 ALL SA 474 (SCA)

[33] The plaintiff's argument where she alleged that the purpose of the arrest was only to secure her husband, who could not be located, can be interpreted to mean that the arrest was instigated by malice. In my view, this is the gist of the plaintiff's case which was correctly challenged in the trial proceedings.

[34] Considering the fact that all these issues were properly canvassed during the trial, the defendant suffered no prejudice, in my view. Therefore, it is expected of this court to pronounce on these aspects. This proposition is supported in *South British Insurance Co Pty Ltd*<sup>11</sup>, where Holmes JA (Wessels JA, Trollip JA, Cobert JA and Galgut AJA concurring) held:

"If the plaintiff had wished to rely on the point that, if the cargo reached Matadi, and was delivered to Otraco, it was, when taken out of the ship, so mixed with other goods that *in law* there was no delivery to Otraco, the plaintiff should have replicated to this effect. It is a matter of confession and avoidance. 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." (my underlining)

[35] To some extent, there are two mutually destructive versions, in this matter. The most crucial issue in the testimony of W/O Nogoduka is that the plaintiff produced a key and permitted them to search the stock kraal. The plaintiff's version, on the other hand, was to the effect that she never produced any key and was never

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<sup>11</sup> *South British Insurance Co (Ltd) Pty Ltd* 1976(1) SA 708 at 714G; see also *Minister of Police v Slabbert* fn. 10(*supra*), where the court referred to *South British Insurance Co (Ltd) Pty* matter and held at para 12, 'There are however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial'.

in possession of the stolen livestock. In *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others*,<sup>12</sup> a case that I was referred to by Mr Ngumle on behalf of the defendant, the court held:

“The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the 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 of the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors 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 extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and 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 more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[36] Before I traverse on the credibility of opposing witnesses, it is apposite to deal with the first issue that was raised by the plaintiff's counsel. W/O Didiza (the

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<sup>12</sup> *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.



arresting officer) was not called to present evidence. The importance of this aspect lies with the fact that his evidence is crucial to prove the jurisdictional elements as envisaged in sections 40(1) (b) and 40(1) (g) of the CPA.

[37] If a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, an adverse inference may be drawn, as this failure may lead naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witness has a public duty to testify.<sup>13</sup>

[38] In general, the person making the arrest is also the person who must harbour reasonable suspicion. Snyman J in *Bhika v Minister of Justice and Another*<sup>14</sup> qualified this statement and stated that where a police official carries out the physical part of an arrest on the command of another police official under which he or she serves, it is the superior who carries out the arrest and who must harbour a reasonable suspicion. In the present instance, the W/O Didiza was in command of the operation.

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<sup>13</sup> Sishonga v Minister of Justice and Constitutional Development and Another 2007 (4) SA 135 LC at para 112; see also Principles of Evidence, Second Edition, PJ Schwikkard et al (2002) At page 513, where it is stated, A party's failure to call available witness may in exceptional circumstances lead to an adverse inference being drawn from such failure against the party concerned. The extent, to which such inference can be drawn, will depend on the circumstances of the case'.

<sup>14</sup> 1965(4) SA P399, at page 400G Snyman J referred to Minister of Justice v Ndala 1956 (2) SA 777(T), Birch v Johannesburg City Council, 1949 (1) SA 231 (T) and held, 'an arrest in circumstances such as in the present case is the act of the officer ordering the arrest, although the physical act of arrest may have been carried out by his subordinate. In my view therefore, the act of arrest here was that of the second defendant'.

[39] What was stated in *Ralekwa v Minister of Safety and Security*<sup>15</sup> also finds relevance in the present matter. With the Constitution as a guide, the court examined whether an arrest was lawful. At para [13 ] De Vos J held,

“To decide what a reasonable suspicion is, there must be evidence that the arresting officer formed a suspicion which is objectively sustainable’. At para [14], ‘In view of the evidence of Sergeant Herbs that he actually did not form his own suspicion but he relied on the opinion of Ms Kilian. I am of the view that no reliance can be placed on s 40 of the Act to make the arrest lawful.’ (my underlining).

[40] Upon evaluation of the evidence tendered, I accept the proposition made by the defendant’s counsel, that section 40(1) (g) only required the defendant to present evidence to demonstrate that peace officers had reasonably suspected the plaintiff to be in possession of stock or produce suspected to be stolen as defined in any law relating to theft of stock or produce.

[41] Considering the absence of W/O Didiza’s testimony, the question to be asked is whether W/O Nogoduka harboured a reasonable suspicion that the plaintiff was in possession of the stolen livestock and whether such suspicion (if any) was based on solid grounds. It has already been proved that the stolen livestock was found in the plaintiff’s premises.

[42] Although W/O Nogoduka was not an arresting officer, he was adamant that he formulated a suspicion that the plaintiff exercised control over the livestock that was

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<sup>15</sup> 2004(1) SACR 131 (T).

found on her premises. If this fact is found to be probable, the reasonableness of his suspicion needs to be tested. The question is whether the suspect who possessed the stock unlawfully was satisfactorily identified.

[43] The law is settled, in that, the reasonableness of a suspicion is assessed objectively.<sup>16</sup> In this regard, the crucial part of W/O Nogoduka's evidence is that the plaintiff informed the police that the livestock was already conveyed to the veld for grazing. According to his testimony, the plaintiff later produced a key which they used to open the shack and retrieve the six stolen sheep, amongst others, that were kept inside the shack. Because of this conduct, there was a suspicion that the plaintiff had knowledge of the stolen stock in question.

[44] The plaintiff denied that she produced a key to the shack where the livestock was kept. She, however, conceded that because it was in the morning, she thought that the livestock was already conveyed to the veld for grazing. Considering this concession, if the plaintiff had believed that the livestock was no longer on the premises, there would never have been a situation in which she could have produced a key to the shack where the livestock was kept. In his version, when W/O Nogoduka arrived, the members of the Stock Theft Unit had already gathered at the scene. Upon the objective assessment of his evidence, the process of investigation had already commenced at that stage. Under cross-examination, W/O Nogoduka appeared to be confused about who opened the shack, using a padlock key, between himself and the plaintiff. In the same breath, he testified that he was

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<sup>16</sup> Minister of safety and Security v Swaart 2012 (2) SACR 266 SCA [20].

standing in the doorway preventing other people from coming in and was busy over the phone. One finds that W/O Nogoduka presented a mishmash of improbabilities in this regard. I accept the plaintiff's version that she presented no padlock key to the members of the SAPS.

[45] Even if I am wrong in my approach, this issue cannot be assessed in isolation to demonstrate that the plaintiff was the unlawful possessor of the stock in question. A proper analysis of the evidence as a whole is required.<sup>17</sup> W/O Nogoduka played no role for purposes of determining the jurisdictional requirements which are essential to justify the plaintiff's arrest and detention. Under cross-examination, he made it clear that he would not answer questions on behalf of the arresting officer. Considering his evidence and that of the plaintiff, there is no way he would have formulated a suspicion, let alone a reasonable one. In the circumstances of this case, W/O Didiza was the most crucial witness for the defendant. It would be inadequate to evaluate and rely on the suspicion of a witness who never testified in the proceedings.

[46] Regarding W/O Didiza's failure to testify, there was no valid explanation advanced in this regard. I am alive to the fact that litigants have a right to present their case the way they deem fit. It is not up to the court to decide on this aspect. The importance of W/O Didiza's evidence lies with the fact that the statutory jurisdictional requirements are the key points to be proved by the onus bearer, in this instance, the defendant.

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<sup>17</sup> Santam bpk v Biddulph [2004] 2 All SA 23 (SCA) at para 6.

[47] Concerning to what occurred between the plaintiff and W/O Didiza, the only material evidence before me is that of the plaintiff. Section 2 of the Act requires that:

- (a) the stock or produce must be found in possession of the suspect;
- (b) there must be a reasonable suspicion that the stock or produce have been stolen; and
- (c) the suspect must be unable to give a satisfactory account.

(Accentuation added)

[48] In *casu*, it was commanding for W/O Didiza to ask some questions to the plaintiff, to establish whether she was indeed found in possession of the stolen livestock or not, and whether she was unable to give a satisfactory account of the stolen stock. Gleaning from the plaintiff's testimony, W/O Didiza correctly analysed the information he received, in that he delegated W/O Nogoduka to phone the plaintiff's husband. The cultural prohibition that the plaintiff claimed to W/O Didiza was never placed in dispute under cross-examination. It is common cause that the plaintiff informed the police officers that her husband was in control of the livestock.

[49] With respect to Mr Ngumle, the fact that the plaintiff was married to a husband who possessed stolen sheep is not enough to formulate a reasonable suspicion that there was a joint possession of the stolen livestock. In this instance, joint possession would require a reasonable suspicion of *animus possidendi* on the part of each of the parties (the plaintiff and her husband). The element of reasonable suspicion of *animus possidendi* is not supported by the facts of this case. The plaintiff was not even in control of the stock kraal where the animals were kept.

[50] With regards to who the possessor of the stolen livestock was, the plaintiff's evidence was consistent from the time of arrest, to the time she made her warning statement, and up to the stage she gave evidence before this court. Furthermore, the fact that the plaintiff summoned her brother and father-in-law to respond to the questions asked by the police intensifies her case that she was prohibited from going to the stock kraal and was not in control and therefore not in possession of the stolen livestock. Even though she was aware that the livestock was kept in that hidden kraal, she could not have been aware that there were hidden stolen sheep, under the circumstances.

[51] The second requirement to be established is whether there was a reasonable suspicion that the stock was stolen. This issue has been resolved, in that, Godongwana confirmed that his seven sheep were stolen, he further identified the six sheep that were found in the stock kraal as his.

[52] I now turn to the last requirement, the inability to give a satisfactory account of the possession. W/O Nogoduka was tasked to trace the actual suspect (the plaintiff's husband. This happened after the plaintiff gave an account of the stolen stock that was found on her premises. On probabilities, W/O Didiza would not have delegated W/O Nogoduka to locate the plaintiff's husband, if the plaintiff's account of stolen livestock was not satisfactory. The evidence demonstrates that W/O Nogoduka phoned the plaintiff's husband many times. The fact that the plaintiff's husband took time to come home and ignored the police phone calls until the police gave up on

him, ought to have increased a reasonable suspicion that he was indeed the correct suspect and not the plaintiff.

[53] In *Minister of Police and Another v Muller*<sup>18</sup>, the court dealt with the issue of arrest and detention where the arrestee was suspected to have contravened section 36 of the General Laws Amendment Act 62 of 1955<sup>19</sup>. This section poses identical elements to those that can be found in Section 2 of the Act. The court held:

“An explanation is ‘satisfactory’ if (a) It is reasonable possible; and (b) shows that the suspect bona fide believed that his possession was innocent with reference to the purpose of this Act, namely the prevention of theft. It is therefore required of the possessor to state where he obtained the goods and it must be clear from his statement that his possession was innocent in the sense that either the goods had not been stolen or that he reasonably believed that it was not stolen or that he was entitled to possess it.”<sup>20</sup>

[54] I note that on the concept of the possession of the goods found, *Muller’s* case exhibits dissimilarity to the matter at hand. This notwithstanding, I share the sentiments raised by the court in that matter, in that, the plaintiff’s explanation with regard to the stolen sheep that were found in the stock kraal, was not only

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<sup>18</sup> The Minister of Police & another v Muller (1037/18) [2019] ZASCA 165 (29 November 2019)

<sup>19</sup> This section states, ‘Any person who is found in possession of goods, other than stock or produce as defined in section one of the Stock Theft Act (Act 57 of 1959), in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and be liable on conviction to the penalties which may be imposed on a conviction of theft.’

<sup>20</sup> Supra note 18 at para 19

reasonably possible true but probably true. No offence is committed unless the possessor is unable to give a satisfactory account of his possession.<sup>21</sup>

[55] Considering the explanation by W/O Nogoduka, Godongwana and the plaintiff, it is clear that the place where the livestock was kept was highly secured and the stolen livestock was hidden. On the salient facts presented, the plaintiff's husband was the subject of investigation because he was in physical control and therefore in possession, of the livestock that was hidden in the stock kraal.

[56] Given the circumstances leading to the plaintiff's arrest, it is probable that W/O Didiza started to panic when he realised that the plaintiff's husband was untraceable because he was rushing for a meeting. In that desperate state, he arrested the plaintiff to secure her husband.

[57] In my view, a reasonable person confronted with the same set of facts ought to have traced the plaintiff's husband, the actual suspect in the matter and brought him to justice. I find that the plaintiff was a credible and reliable witness. Her evidence was to a large extent consistent with the proven facts.

[58] W/O Nogoduka's, testimony could not substantiate the defendant's case, especially on the material issues. His actions on this particular day fell far short of

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<sup>21</sup> Muller (supra) fn. 16 para21 at page 9.



the test as set out by Jones J in *Mabona's* matter (*supra*).<sup>22</sup> He failed to establish the jurisdictional facts as set out in terms of sections 40(1) (b) and 40(1) (g) of the CPA. W/O Nogoduka found himself in a position where he was expected to dwell on the issues that would have been relevant for the arresting officer to elaborate on.

[59] The question of the discretion to arrest arises once the jurisdictional facts are established<sup>23</sup>. In his written heads of arguments, counsel for the plaintiff appears to have conflated the jurisdictional requirements to arrest and improper exercise of discretion to arrest. That being the case, no jurisdictional facts were met in this matter and one finds it unnecessary to traverse on this issue.

[60] I now proceed to deal with detention. The constitutional right guaranteed in Section 12(1) of the Constitution to not be arbitrarily deprived of one's freedom and security of the person shall serve as the lens through which liability for unlawful arrest and detention should be viewed.<sup>24</sup> The right not to be deprived of freedom arbitrarily or without a just cause applies to all persons in the Republic.<sup>25</sup> In *Minister of Police v Du Plessis*<sup>26</sup> at paragraph 8, it was stated:

“Our new Constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which have always in even the dark days of apartheid been

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<sup>22</sup> See also *Ralekwa's* matter (*supra*) fn. 14.

<sup>23</sup> *Sekhoto* matter *supra*.

<sup>24</sup> Section 12(1)(a) of the Constitution states: ‘Everyone has the right to freedom and security of the person, which includes the right-(a) not to be deprived of freedom arbitrarily or without a just cause’. See also: *Grooves N.O v Minister of Police* [2023] ZACC 36 at para 49; *Botha v Minister of Safety and Security and Others* (*supra*) fn. 2.

<sup>25</sup> *Mahlangu and Another v Minister of Police* 2021(2) SACR 595 (CC) at para 25.

<sup>26</sup> 2014(1) SACR 217 SCA page 223.

judicially valued, and to ensure that the excesses of the past would not recur. The right of liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values human dignity, the advancement of human rights and freedom. Put simply, we as a society place a premium on the right of the liberty.”

[61] As early as 1927 AD,<sup>27</sup> the courts emphasized that the object of the arrest is to ensure the attendance of the accused to court in answer to a charge, and not to punish him for an offence he has not been convicted of. I agree with this proposition.

[62] In the present matter, the plaintiff’s detention was unjustified and her rights as entrenched in the Bill of Rights were never given a thought. In the result, the plaintiff’s arrest and subsequent detention were unlawful. Therefore, the plaintiff’s claim on the merits must succeed.

### **Quantum of damages**

[63] In *Olgar’s*<sup>28</sup> case, Jones J stated that a fair award for an unlawful arrest and detention should acknowledge the significance of the victim’s constitutional right to personal freedom and appropriately consider the facts of the case, the victim’s personal circumstances, and the type, severity, and degree of the offence against victim’s sense of worth.

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<sup>27</sup> *Mc Donald v Kumalo* 1927 AD 293; *Williams and Another v Lategan*, 12 S.C 335

<sup>28</sup> *Olga v Minister of Safety and Security* (unreported ECD case n0 608/07, 18 December 2008 At para 16.

[64] An individual's liberty is one of the fundamental rights in a society and our courts have a duty to protect this right from infringement. Unlawful arrest and detention constitute a serious inroads into the freedom and the rights of an individual.<sup>29</sup>

[65] The parties referred to several authorities that were decided in previous cases and recommended the quantum of damages to be awarded in this case. In *Minister of Safety and Security v Seymour*,<sup>30</sup> Nugent J found it challenging to evaluate general damages with reference to awards made in previous cases. The court reasoned that the facts of a particular case need to be looked at as a whole. Furthermore, the awards made in previous cases serve as a useful guide to what other courts consider appropriate but their worth does not go beyond that.

[66] I have considered the facts of this matter, in particular that: the plaintiff was detained for a period of four days. She was humiliated in front of the public and portrayed as a criminal. She had a four-year-old baby that she had to leave in the care of the neighbours. The plaintiff's brother-in-law pleaded with the police to let go of the plaintiff so that she could take care of the child, the police never acceded to that plea. The paramountcy of the child's best interest was disregarded.<sup>31</sup> As a result of her incarceration, her baby was traumatised and even today he gets terrified

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<sup>29</sup> Thandani v Minister of Law and Order 1991 (1) SA 702 (E), per Van Rensburg J.

<sup>30</sup> [2007] 1 All SA 558 (SCA) at 17.

<sup>31</sup> Section 28 (2) of the Constitution Act 108 of 1996, provides: 'A child best interest is of paramount importance in every matter concerning the child; the Children's Act 38 of 2005 stipulates in section 9 that the child's best interests is of paramount importance in all matters concerning the care, protection and well- being of a child.'

whenever he sees police cars. The plaintiff was detained in a filthy police cell. She was repeatedly intimidated and harassed. She did not have toiletries but later got assistance from a certain policewoman whom she appreciates even today.

[67] Having considered the awards made in previous cases, with specific reference to the facts of this matter, I award the plaintiff a globular amount of R160 000 (One hundred and sixty thousand rand)

### **Order**

[68] I make the following order:

- 1. The plaintiff's claim in respect of unlawful arrest and detention succeeds.**
  
- 2. The defendant is ordered to compensate the plaintiff an amount of R160 000 (One hundred and sixty thousand rand) for damages suffered as a result of unlawful arrest and detention.**
  
- 3. The defendant is ordered to pay interest at the above amount, calculated at the legal rate, from the date of the judgment to the date of payment.**
  
- 4. The defendant is ordered to pay the costs of this action.**

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**N CENGANI-MBAKAZA**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

Counsel for the Plaintiff : Adv. L.L Ngumle

Instructed by : Mjulelwa Inc Attorneys  
Plaintiff's Attorney  
Unit 2 Glencombe  
45 Leeds Road  
MTHATHA

Counsel for the Defendant : Adv. L. Halam  
Instructed by: State Attorney  
Defendant's Attorney  
Broadcast House,  
94 Sisson Street,  
MTHATHA

**DATE HEARD** : 31 October 2023

**DATE DELIVERED** : 28 November 2023

