



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

CASE NUMBER: 45690/2017

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

29/11/2024

DATE

SIGNATURE

In the matter between:

TEBOGO JACKY MPHURU

FIRST PLAINTIFF

SELLO MARVIN WALAZA

SECOND PLAINTIFF

and

THE MINISTER OF POLICE

FIRST DEFENDANT

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION SECOND DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

- [1] Mr Mphuru and Mr Walaza, the Plaintiffs, issued summons against the Minister of Police and the National Director of Public Prosecutions, the Defendants, based on their alleged unlawful arrest and detention as well as malicious prosecution. The First Defendant filed a plea in terms of which the defendant relied on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA"), claiming that the arresting officer, Sergeant Simali ("Simali") held a reasonable belief/suspicion that the Plaintiffs had committed a Schedule 1 offence, theft, in order to justify their arrest and detention.

- [2] I pause here to note that, at the commencement of the trial before me on 30 October 2024, Counsel for both parties indicated their agreement that it would be convenient to continue with both the issues of merits/liability and that of the quantum of the plaintiff's claim, therefore the matter proceeded on merits and quantum.

- [3] Additionally, the claim concerning the First Plaintiff, Mr. Mphuru ("Mphuru"), was withdrawn on the day of the trial as he could not be located.

- [4] The Second Plaintiff initially pursued a claim against the Second Defendant, the National Director of Public Prosecutions, for malicious prosecution in relation to a theft charge. However, this claim was withdrawn on the day of the trial. Consequently, the sole issue before me is whether Mr. Walaza, the Second Plaintiff ("Walaza") was lawfully arrested and detained on suspicion of theft. After hearing evidence in the matter, written submissions were provided by Counsel, and additional oral arguments were presented to me on 21 November 2024.

- [5] The parties agreed that the First Defendant bore the duty to begin and to justify both the arrest and the detention.

- [6] The following facts are common cause between the parties;

1. On Friday, 22 April 2017, the Plaintiffs were arrested on a charge of theft by Sergeant Simali who at the time, was on official duties.
 2. The Plaintiffs were arrested without a warrant.
 3. At the time of the arrest, Sergeant Simali acted within the course and scope of his employment with the South African Police Services ("SAPS").
 4. The Plaintiffs appeared in Magaliesburg Reception District Court on Monday, 24 April 2017 when bail was fixed in the amount of R1000.00 each. Walaza only paid the bail on 30 May 2017.
 5. The Walaza was detained from 22 April 2017 until 30 May 2017 when he was released after paying bail.
 6. Mphuru and Walaza attended to the Magaliesburg Court on 13 June 2017, when the charge of theft was withdrawn against them.
- [7] The main issue for determination in the present matter is whether the arresting officer entertained a reasonable suspicion based on reasonable grounds in order to arrest the second plaintiff.

The Defendant's Case

- [8] The Defendant called three witness, Sergeant Simali, the arresting officer, Mr Nemagwthune, District Court Prosecutor at Magaliesburg Reception Court and Mr Sibanda, the complainant.
- [9] Sergeant Simali that at the time of the warrantless arrest of the Second Plaintiff, Mr. Walaza, he was employed by the SAPS in Magaliesburg. On the morning of Saturday, 22 April 2017, he received the case docket from the Community Service Centre. Included in the docket was a sworn statement by the complainant, Mr. Sibanda, a security officer at Magaliesburg Water Works, regarding the theft of reinforced steel that occurred on 18 April 2017.

- [10] According to Sibanda's statement, on 19 April 2017, he visited the Magaliesburg scrapyard, where he discovered that the stolen property had been sold by two individuals identified as Mphuru Tebogo Jackey and Walaza Sello Mervin. The scrapyard manager provided Sibanda with copies of the identity documents used during the transaction, which were included in the docket.
- [11] After reviewing the docket and the statements it contained, Sergeant Somali proceeded to interview the complainant and subsequently visited the scrapyard to speak with the manager, Mr. Gracia. Following these interviews, on 22 April 2017, Simali arrested Walaza at approximately 07:05 and Mphuru at around 08:00. He informed both suspects of the charge against them—namely, theft—and explained their Constitutional rights. The suspects were detained at the Magaliesburg SAPS and formally charged. Later that same day, they were transferred to the Krugersdorp SAPS holding cells.
- [12] On Monday, 25 April 2017, Walaza and Mphuru appeared for the first time in the Krugersdorp District Court, where they were each granted bail in the amount of R1,000. Simali testified that he arrested Walaza and Mphuru based on a reasonable suspicion that they had committed theft. He further stated that Walaza did not mention assisting another person to sell the stolen items by providing his identity document during the scrapyard transaction. Simali also confirmed that he took their warning statements on the day of their arrest and provided them with Notices of Rights in terms of the Constitution (SAPS 14).
- [13] During cross-examination by Counsel on behalf of the Second Plaintiff, Simali denied having reviewed any video footage from the scrapyard, stating that such footage was not available during his visit. He also clarified that he was on standby over the weekend and handed over all dockets from cases he dealt with while on standby to the respective investigating officers on Monday morning, including this case, which was assigned to Msibi. Additionally, Simali denied that Walaza informed him about assisting someone named Bongani in selling the stolen items by providing his identity document for the transaction.
- [14] Simali was unable to provide the Court with information regarding the date when the second plaintiff was released on bail as he was not the investigating officer

in the matter. He was aware that the charges against the Plaintiffs were withdrawn on 23 June 2017.

[15] Mr. Sibanda essentially corroborated Simali's testimony.

[16] Mr. Nemagwathune, the State Prosecutor assigned to the Magaliesburg District Reception Court on Monday, 24 April 2017, testified that he received the docket for the present matter from the Control Prosecutor to handle the court appearance of the plaintiffs. During their appearance, the Plaintiffs were represented by Legal Aid South Africa ("LASA"). He noted that they did not disclose any previous convictions. Consequently, he informed the Presiding Officer that the State had no objection to the Plaintiffs being released on bail.

[17] The matter was initially postponed to 23 May 2017 and subsequently to 30 May 2017. On the latter date, the case was transferred to the Magaliesburg Court. According to information in the charge sheet, including reference to the bail receipt, Mr. Walaza paid bail on 30 May 2017 and was released from custody thereafter.

[18] Mr. Nemagwathune further testified that on 27 June 2017, the case against the plaintiffs was withdrawn.

The Second Plaintiff's Case

[19] The Second Plaintiff, Walaza, testified that he was arrested by Simali on 22 April 2017 at his residence. He stated on 18 April 2017, around 8:00, he had sold scrap metal at the scrapyard. At the scrapyard, he encountered an individual named Goodman, who requested his assistance in selling Goodman's scrap metal. Goodman asked him to provide a copy of his identity document to facilitate the transaction. Walaza explained that he knew Goodman from attending the same school and agreed to help by providing his identity document to the scrapyard in order to conclude the transaction.

[20] On the morning of his arrest, a police officer, Smiley, arrived at his residence and requested him to accompany him to his vehicle to speak with someone named

Thato, also known as Tebogo. After complying, he and Thato were transported to the police station. Walaza stated that he informed Smiley about Goodman's involvement both at his residence during the arrest and later at the police station. At the police station, he was informed that he was arrested for possession of stolen property, but no further details were provided to him.

[21] Walaza testified that the arresting officer was aware of video footage from the scrapyard, as the officer mentioned seeing them on camera selling scrap metal. He did not, however, ask the officer to review the footage, as the officer already had his identity document in possession. He and Thato were detained in police cells and later transferred to Krugersdorp SAPS. On the following Monday, they appeared in Court, and the matter was remanded for further investigation.

[22] Walaza explained that he was unable to pay the bail amount because his family members were unemployed at the time and he therefore remained in custody until 30 May 2017, when he was released after paying the bail.

[23] During cross-examination, he testified that he was unaware of the contents of the warning statement he made at the police station. He also stated that during his first court appearance, he informed the Presiding Officer that he could not afford the bail amount and raised his hand to indicate that he could manage to pay an amount of R500 instead. He further confirmed that in his subsequent court appearances, he did not report the poor conditions in which he was detained.

The Applicable Law

[24] It is trite that an arrest or detention is *prima facie* wrongful. It is for the Defendant to allege and prove the lawfulness of the arrest or detention.¹

[25] The CPA, provides for the arrest of any person without a warrant in a number of clearly circumscribed circumstances.

¹ *Lombo v African National Congress* 2002 (5) SA 668 (SCA).

[26] Subsection 40(1)(b) of the CPA reads as follows: -

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

[27] The jurisdictional facts for successful reliance on section 40(1)(b) as clearly set out in *Duncan v Minister of Law and Order*² 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 has committed an offence referred to in Schedule 1; and
- (iv) the suspicion must rest on reasonable grounds.

[28] It was stated in *Minister of Safety and Security and Another v Swart*,³ that:

“It is furthermore trite that a reasonableness of suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether any reasonable person, confronted with the same facts, would form a suspicion that a person has committed a schedule 1 offence.”

[29] In *Mabona and Another v Minister of Law and Order and Others*,⁴ Jones J stated:

“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 plaintiffs were guilty of conspiracy to commit robbery or possession

² 1986 (2) SA 805 (A) at 81BG-H.

³ 2012 (2) SACR 266 (SCA).

⁴ 1988 (2) SA 654 (SE) at 658E-H.

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, 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 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.”

[30] It is important to note that the arrestor’s grounds for effecting a warrantless arrest, must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests. Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order*.⁵ It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.⁶

[31] Musi AJA further stated in *Biyela*:⁷

“[33] The question whether a peace officer reasonably suspects a person of having committed an offence within the ambit of s 40(1)(b) is objectively justiciable. It must, at the outset, be emphasised that the suspicion need not be based on information that would subsequently be admissible in a court of law.

[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be

⁵ 1993 (1) SACR 434 (TPD).

⁶ *Biyela v Minister of Police* (1017/2020) [2022] ZASCA 36; 2023 (1) SACR 235 (SCA) (1 April 2022) para [33].

⁷ Ibid footnote 6.

based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.”

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether that information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.

[36] The arresting officer is not obliged to arrest based on a reasonable suspicion because he or she has a discretion. The discretion to arrest must be exercised properly.⁸ Our legal system sets great store by the liberty of an individual and, therefore, the discretion must be exercised after taking all the prevailing circumstances into consideration.

[37] ...

[38] *I, therefore, agree with the majority’s characterisation of the issues and its conclusion that a reasonable suspicion can, depending on the circumstances, be formed based on hearsay evidence, regardless of whether that evidence is later found to be admissible or not. **Furthermore, I agree with the conclusion that the court of first instance erred in its conclusion that the police officers could not form a reasonable suspicion because such suspicion was based on inadmissible hearsay evidence.***”

[my emphasis]

[32] It is clear, that despite holding that the standard of a reasonable suspicion is “very low” the Supreme Court of Appeal (“SCA”) in *Biyela* qualifies this by what is stated thereafter. In particular, that the suspicion must be based on “specific and articulable facts or information.” Of course, the ultimate *caveat* is that whether the suspicion was reasonable is determined objectively “under the prevailing circumstances.”⁹

⁸ *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G

⁹ *Lifa v Minister of Police and Others* (2020/17691) [2022] ZAGPJHC 795; [2023] 1 All SA 132 (GJ) (17 October 2022) para [61].

[33] In *Lefa v Minister of Police and Others*¹⁰, Wanless AJ said the following;

“In this manner, any danger whatsoever of lowering or potentially creating the incorrect perception of our courts lowering, the standard of reasonable suspicion, can and should be avoided. Furthermore, the fundamental principles of individual liberty as entrenched in our Constitution, together with the important responsibility that the police have in protecting that liberty, particularly having regard to the unfortunate history of our country, can continue to receive protection from our courts. At the same time, it is imperative that the police be able to effectively carry out their duties and, in this regard, the proper interpretation of the standard to be applied when considering a lawful arrest in terms of subsection 40(1)(b) of the Act, particularly in that each case should be decided on its own facts, provides a proper balance between the competing interests of individual liberty and the need for the police to effect often speedy arrests in relation to serious crimes.”

[34] Consideration must also be given to the doctrine of recent possession is a legal principle that allows a Court to infer guilt from the unexplained possession of recently stolen property. This doctrine plays a critical role in cases involving crimes like theft and possession of stolen goods, where direct evidence linking the perpetrator to the crime may be absent.

[35] The doctrine operates on the premise that possession of stolen property shortly after it is taken, without a reasonable and satisfactory explanation, allows a Court to infer that the possessor was involved in the theft or related crime.¹¹

[36] The Second Plaintiff was arrested on a charge of theft, and it is important to note that the possession of suspected stolen property constitutes a competent verdict

¹⁰ Ibid 9 para [62].

¹¹ *Nkosi v S* [2016] ZAGPPHC 768 at par [10]:

“the doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, the readiness with which the property can or is likely to pass to another person.”

for such a charge. This raises the further question: does possession of suspected stolen property, legally defined as a contravention of Section 36 of the General Law Amendment Act 62 of 1955 (“Section 36”), qualify as an offense contemplated under Schedule 1 of the CPA?

[37] Schedule 1 of the CPA outlines the offenses for which a person may be arrested without a warrant. While Section 36 is not explicitly listed in Schedule 1, the Schedule includes a provision for:

“Any offense, except the offense of escaping from lawful custody in circumstances other than those referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.”

[38] Schedule 1 includes any offense punishable by imprisonment exceeding six months without the option of a fine. Section 36 allows for penalties equivalent to those for theft, which typically exceed this threshold. Thus, offenses under Section 36 meet the criteria for inclusion in Schedule 1.

[39] Although Section 36 is not explicitly named in Schedule 1 of the CPA, it qualifies as a Schedule 1 offense on two distinct grounds:

[39.1] It meets the punishment threshold stipulated in Schedule 1.

[39.2] It aligns with theft, which is explicitly included in Schedule 1.

[40] This dual qualification ensures that Section 36 offenses are treated with the same seriousness as theft, justifying warrantless arrests and emphasizing their importance in upholding public order and deterring property-related crimes.

Issue for Determination

[41] As previously mentioned, the issue to be determined is whether Simali’s arrest of Walaza was lawful and whether he had a reasonable suspicion that Walaza had committed a crime listed in Schedule 1 of the Criminal Procedure Act, namely theft and or possession of stolen property

Evaluation and Analysis

[42] In this action, the Second Plaintiff seeks delictual damages from the First Defendant (the Minister of Police). The claim arises from an alleged unlawful arrest and detention by a member of the SAPS, who, at the time, was acting in his official capacity and within the scope of his employment with the SAPS. The defendants' vicarious liability is not in dispute.

[43] In my view, the central issue in this case is a factual determination of whether the plaintiff's version of events on the day in question should be accepted over the defendants' version. If I find the defendants' witnesses' account of the incident and surrounding events to be credible and accurate, the arrest and subsequent detention of the second plaintiff would be deemed justified and therefore not wrongful. However, if the second plaintiff's version is to be preferred, the SAPS would be liable for the resulting damages.

[44] Once the requirements for warrantless arrest are met, the arresting officer retains a residual discretion, which must be exercised rationally and in good faith. The burden of proving that the arrest was wrongful due to a failure to exercise this discretion, or because it was exercised irrationally or in bad faith, rests with Simali (see *Minister of Safety and Security v Sekhoto*¹²). In cases involving serious offenses, such as those listed in Schedule 1 of the CPA, it is seldom, if ever, irrational or indicative of bad faith to arrest a suspect solely for the purpose of bringing them before a court¹³.

[45] In order to decide whether Simali had a reasonable suspicion that Walaza had committed the alleged offence, theft, I find it imperative to refer to the witness statements referred to by Simali, as well as his interview with the complainant, Mr Sibanda and furthermore, his attendance to the scrapyard where the stolen items were sold, which seemed to form the basis for the arrest of Walaza.

¹² *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA), paragraph [47].

¹³ *Ibid* 12 at paragraph [44].

- [46] The steps taken by Simali in his investigation prior to arresting Walaza suggest a methodical approach aimed at ensuring that the arrest was lawful and based on reasonable suspicion, as required by the law. These steps also reflect an effort to avoid making an unlawful arrest by thoroughly examining the available evidence before taking action.
- [47] One of the first steps taken by Simali was to review the contents of the docket, which contained all the relevant documents and statements related to the case. This includes witness statements, the complainant's version of events, and any other evidence collected prior to the arrest. Scrutinizing these statements assisted Simali to assess whether there is enough information to justify an arrest based on reasonable suspicion. By carefully reviewing the docket, Simali ensured that the arrest was based on more than just a vague hunch; instead, it was grounded in documented evidence that could support the charge of theft or possession of stolen property.
- [48] Simali took the additional step of interviewing the complainant, Bongani, which allowed him to gather firsthand information about the theft and clarify any doubts regarding the circumstances of the crime. This interview provided valuable insight into the details of the alleged theft and help confirm whether Walaza was involved in any way.
- [49] Another key step in Simali's investigation was his visit to the scrapyard where the stolen goods were sold. This visit allowed Simali to collect evidence at the scene of the crime and potentially find out where and how the stolen items were disposed of. By attending the scrapyard, Simali confirmed whether any of the stolen items had been sold there and whether Walaza had been involved in the transaction. This step not only corroborated the complainant's version of events but also allowed Simali to assess whether the sale of the stolen items was properly documented, such as by verifying the transaction against any records kept by the scrapyard.
- [50] Simali's interview with Mr. Garcia, the owner of the scrapyard, was another critical step. Mr. Garcia's account provided additional evidence linking Walaza to the transaction of selling the stolen goods. Garcia confirmed that Walaza had

indeed been present at the scrapyard and facilitated the sale of the reinforced steel, as he had allegedly done. Simali's interview with Garcia assisted to verify the timeline and establish the chain of events leading to the sale of the stolen items. This interview also served as an opportunity for Simali to assess the legitimacy of the transaction and determine whether any irregularities, such as Walaza's involvement in the sale of stolen property, were present.

[51] Taken together, these steps show that Simali was diligent in ensuring that the arrest of Walaza was based on more than just a vague suspicion. By reviewing the evidence in the docket, interviewing the complainant, visiting the scene of the crime (the scrapyard), and interviewing the scrapyard owner, Simali took all reasonable measures to confirm that there was sufficient evidence to justify an arrest. The information he gathered provided him with a reasonable suspicion that Walaza was involved in the crime, specifically the theft or the sale of stolen property.

[52] These actions also demonstrate that Simali was trying to avoid an unlawful arrest by thoroughly investigating the facts. In cases where police officers fail to properly investigate or gather sufficient evidence before making an arrest, the arrest can be deemed unlawful. However, Simali's actions suggest that he took the necessary steps to confirm that there was enough evidence to reasonably suspect that Walaza had committed a crime, in line with the requirements set out in section 40(1)(b) of the CPA.

[53] Furthermore, Somali was, in my judgement, not subjectively motivated by any irrelevant personal considerations of sympathy or vengeance. He had no reason to be so motivated. His suspicion that the second plaintiff had committed the said crime was based on reasonable grounds, notably information received from amongst others, Sibanda, the security officer stationed at the premisses where the theft occurred on 18 April 2027 and complainant in the matter. A further important fact in the present matter is that the second plaintiff sold the stolen items at a scrapyard on 18 April 2017, shortly after being stolen the morning.

- [54] Walaza's testimony is riddled with inconsistencies that raise serious concerns about its credibility. Initially, he testified that he did not request Simali to view the video footage referenced by the officer. However, he later contradicted himself by claiming that he had indeed asked Simali to show him the footage. This inconsistency undermines the reliability of his account.
- [55] Furthermore, Walaza stated that he informed Simali, both at the time of his arrest and at the police station, that Goodman had requested his assistance at the scrapyard by using his identity document to sell Goodman's scrap metal. However, this claim appears fabricated and was likely concocted after his arrest. Walaza's assertion that Goodman was the actual perpetrator is unsubstantiated, as he failed to provide any identifying details or evidence to support this claim beyond his word. Despite claiming to know Goodman from school, Walaza did not assist in tracing Goodman or provide any actionable information that could corroborate his version of events.
- [56] Simali's investigation prior to the arrest involved interviewing various individuals, demonstrating a thorough approach. It is implausible that Simali would have ignored credible information about Goodman had it been provided by Walaza. Given Simali's investigative diligence, as evidenced by his actions before arresting Walaza, it is unlikely he would have neglected to pursue leads about Goodman if Walaza had genuinely disclosed such information. Walaza's failure to cooperate or provide substantive details about Goodman further weakens his credibility.
- [57] Walaza also claimed that he was unaware of the contents of the warning statement he made at the police station. This raises doubts about whether he understood or challenged the charges against him adequately. His inability to clarify or address this aspect of his testimony casts further doubt on his credibility. A reasonable person in his position would have taken steps to ensure the accuracy and understanding of such a critical document. This failure adds to the inconsistencies in his testimony and further undermines its reliability.
- [58] Furthermore, Simali testified that he took Walaza's warning statement following the arrest, and at no point did Walaza mention Goodman's involvement in the

matter. During cross-examination, however, no questions were raised to challenge the accuracy of the warning statement or to suggest that Walaza had indeed mentioned Goodman's role in the incident but that it was omitted from the statement.

[59] This absence of inquiry during cross-examination raises significant issues regarding the credibility of Walaza's testimony. If, as he claimed, Goodman was the true perpetrator and he had merely assisted him in selling the reinforced steel, it would be reasonable to expect Walaza to have explicitly stated this in the warning statement. The fact that Goodman's involvement was not mentioned in the warning statement at all is curious, especially given that Walaza later sought to introduce Goodman as the key figure in the alleged crime.

[60] The lack of challenge during cross-examination to this critical detail—namely, the omission of Goodman from the warning statement—suggests that Walaza may have fabricated this part of his story after the fact, possibly in an attempt to shift blame or exonerate himself. If Goodman had truly been a significant part of the events, it would have been in Walaza's best interest to clearly identify him at the earliest opportunity. The failure to do so undermines the veracity of his claims, and the fact that no questions were raised to clarify this omission weakens his credibility further.

[61] Additionally, the defence's failure to address this omission in cross-examination could be seen as a missed opportunity to cast doubt on Walaza's version of events. The warning statement is a key document in establishing the facts surrounding an arrest, and any discrepancies or omissions in it should have been thoroughly explored. The absence of such a challenge leaves the warning statement unexamined, and, as a result, the Court is left with the version of events provided by the police, which appears to be more consistent with the actual details of the case.

[62] Counsel representing Walaza raised an objection to questions posed by the First Defendant's Counsel concerning new evidence, specifically the claim that Walaza was unaware of the contents of the warning statement, despite Simali's

testimony that he had taken the statement from Walaza. This objection is significant, as it touches on the credibility of Walaza's version of events and the procedural integrity of the statement-taking process.

[63] On one hand, Walaza's Counsel objected to the line of questioning, likely to protect their client from being confronted with contradictions or inconsistencies that could undermine his testimony. By asserting that Walaza was unaware of what Simali had written in the warning statement, the defence sought to preserve the notion that Walaza's understanding of the events at the time of his arrest may have been flawed, or that he was not fully aware of the implications of his statement.

[64] Simali's testimony indicated that he took the statement from Walaza, meaning that, by all accounts, Walaza was present during the process and he understood what was recorded. Moreover, the First Defendant's Counsel's questioning was aimed at highlighting the potential discrepancy between Walaza's claim of ignorance regarding the warning statement and the process that took place when it was made. If Walaza was indeed unaware of the contents of the warning statement why was such questions not put to Simali during cross examination.

[65] The inconsistencies in Walaza's evidence, his failure to provide meaningful details about Goodman, and his contradictory statements about the video footage and warning statement significantly diminish the credibility of his version of events. These factors strongly suggest that his testimony cannot be accepted as truthful or reliable.

[66] By objecting to these questions, Walaza's Counsel may have sought to avoid a deeper examination of the warning statement and the circumstances surrounding it. If the Court finds that Walaza did not fully comprehend or was not properly informed about the contents of the warning statement, this could undermine his defence and reduce his credibility. Alternatively, the objection could be seen as an attempt to limit the scope of cross-examination in a way that favours Walaza's narrative, though this would be at the expense of a more transparent assessment of the evidence.

- [67] If Walaza's version of events differs significantly from what was recorded in the warning statement, it is a critical point that could challenge the accuracy and truthfulness of his account. By not cross-examining Simali on this matter, Walaza's Counsel missed an opportunity to directly address discrepancies, omissions, or inconsistencies between Walaza's testimony and the warning statement. This omission can be perceived as a failure to challenge the evidence that may undermine their client's credibility.
- [68] If Walaza's Counsel had cross-examined Simali, they could have focused on questions regarding the accuracy of the warning statement, whether Walaza had the opportunity to read or confirm the contents, and whether he was fully aware of what was recorded. This would have been an important opportunity to explore whether Walaza's claims—such as his assertion that he was unaware of the contents of the statement—were genuine, or whether they represented an after-the-fact attempt to distance himself from potentially damaging evidence.
- [69] By failing to cross-examine Simali, Walaza's Counsel also missed the chance to scrutinize the procedures surrounding the taking of the warning statement. There are certain protocols that must be followed to ensure that the statement is accurately recorded and that the person making the statement fully understands it. If Walaza truly did not understand what was recorded, this could point to a procedural flaw that would undermine the reliability of the statement.
- [70] Additionally, if Walaza's Counsel had cross-examined Simali on how the warning statement was taken—whether it was explained to Walaza, whether he had an opportunity to review or amend it, or whether he was coerced or pressured—this could have highlighted any potential violations of procedure or human rights that might support a claim of unlawful arrest or detention.
- [71] In sum, Counsel's decision not to cross-examine Simali regarding the warning statement and its contents raises significant questions about the strength of the defence's case. By not addressing this critical point, Counsel missed an opportunity to challenge the veracity of the warning statement, potentially revealing contradictions that could damage their client's credibility. Whether the decision was made for strategic reasons or out of concern for further exposing

weaknesses in the case, it certainly reduced the defence's ability to scrutinize the police's version of events and potentially weaken the prosecution's case.

[72] Furthermore, during his first court appearance on the Monday following his arrest, where he was represented by LASA, no mention was made of his alleged innocence or his claim that Goodman was the actual perpetrator of the theft. He also failed to raise the assertion that he had innocently assisted Goodman by providing his identity document to facilitate the sale of the stolen goods at the scrapyard.

[73] This omission is significant, as it would be expected that such critical information, if true, would have been immediately communicated to the Court, especially with legal representation present. Additionally, one would expect Walaza to exercise extreme caution in allowing another person to use a document as important as an identity document. His casual approach to handing over his identity document to assist in the sale of scrap metal significantly undermines his claim of innocence and casts doubt on his judgment and credibility. An identity document is a critical personal item, and its misuse can have severe legal and personal repercussions. A reasonable person would exercise great caution in allowing such a document to be used by another individual, particularly in a commercial transaction involving potentially valuable goods like scrap metal.

[74] By his own account, Walaza handed over his identity document to Goodman, a person he claims to know only from attending the same school, without ensuring the legitimacy of the transaction. He made no effort to verify whether the scrap metal Goodman was selling was legitimately owned or to inquire about the nature of the transaction. Given the potential for stolen goods to be sold at scrapyards, his failure to exercise basic diligence reflects poorly on his judgment. Even if Walaza's actions were not intentionally criminal, his willingness to provide his identity document for the transaction demonstrates a level of negligence. Such behaviour could easily be interpreted as complicity, especially in light of the subsequent allegations of theft, which Simali as a member of SAPS acted upon.

[75] If Walaza genuinely believed he was acting innocently, he had multiple opportunities to report Goodman or distance himself from the situation. For

instance, during his arrest, at the police station, or during his court appearances in Court, he could have insisted on Goodman's involvement and provided actionable details. His failure to do so diminishes the credibility of his claim that Goodman was the true perpetrator.

[76] From the perspective of the arresting officer, Walaza's actions—voluntarily handing over his identity document to assist in a transaction involving goods alleged to be stolen—would reasonably give rise to suspicion. This further justifies the arresting officer's decision to arrest Walaza under the circumstances.

[77] The enquiry here should be, objectively speaking, what information Simali had at his disposal when he made the arrest and did that information objectively speaking, empower him to arrest and further detain the second plaintiff as he did. In the final analysis the question ought to be, would a reasonable police officer, armed with the same information which was within the knowledge of Simali, at the time of arrest, have arrested the plaintiff?

[78] Claassen J held as follows in *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino*:¹⁴

“Deprivation of one's liberty is always a serious matter. The contention is reflected in fact that our Constitution has entrenched the freedom and security of the person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

“(1) 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 just cause;

(b) not to be detained without trial”.

[79] It is necessary for the Police to have far reaching powers such as in certain circumstances to arrest a person without a warrant. However, the deprivation of

¹⁴ 2000 (4) SA 68 (WLD) at 86D.

liberty is a serious intervention in a person's life and the authority to arrest without a warrant must be exercised with the greatest care.

[80] There can be no doubt that the arresting officer, Simali, manifestly harboured a suspicion that the Second Plaintiff had committed at least the offence of being in possession of suspected stolen property. He would also have been justified in suspecting that the Second Plaintiff had committed the offence theft. He may not have had sufficient evidence to support his suspicion, but that is of no moment – the simple fact of the matter is that his suspicion was reasonable for the reasons mentioned above, notably the proximity in time and space between the theft and the Second Plaintiff selling the stolen items at the scrapyard the day after the theft.

[81] The question, whether the suspicion by the arresting officer effecting the arrest is reasonable, must, 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 Schedule 1 offence.

[82] Scrap metal transactions, particularly at scrapyards, often raise red flags regarding the origin of the materials being sold. Scrap metal is a common target for theft, as it can be easily sold for cash without much effort to trace its ownership. The Police, in this context, may reasonably suspect that the scrap metal being sold could be stolen, especially when there is no documentation verifying its lawful acquisition.

[83] Furthermore, when an individual provides their identity document in a situation involving scrap metal, the police might view this as an effort to legitimize the transaction, thereby providing reasonable grounds for suspecting that the person is knowingly involved in the sale of stolen property. This suspicion is compounded by the fact that Walaza's identity document could be linked to the transaction if the goods were found to be stolen.

[84] Simali had prior knowledge and had received information suggesting that the stolen goods were being sold at the scrapyard, Walaza's involvement—through

the provision of his identity document—inevitably provided reasonable grounds to believe he was assisting in the commission of a theft-related crime.

[85] In cases where reasonable suspicion is established under section 40(1)(b), Courts often look at the totality of circumstances, including the behaviour of the individual and the nature of the crime. The fact that Walaza provided his identity document to facilitate the sale of scrap metal in a potentially illegal transaction is a factor that would contribute to the officer's suspicion, particularly if other circumstances that the goods were stolen shortly before it was sold at the scrapyard.

[86] Courts have upheld arrests without warrants when police officers acted on reasonable suspicion, even if the suspicion was not supported by direct evidence at the time of the arrest. In this case, the suspicion of theft was based on the context of the transaction, the nature of scrap metal sales, and Walaza's involvement in the transaction through his identity document.

[87] In conclusion, the reasonable suspicion to arrest Walaza without a warrant for theft is based on the combination of factors: the suspicious nature of the scrap metal transaction, his involvement in the sale through the provision of his identity document, and the broader context of theft-related crimes commonly associated with scrap metal. Whether or not Walaza was aware that the scrap metal was stolen, his actions and the circumstances surrounding the transaction would likely provide sufficient grounds for the police officer to suspect that a crime had been committed, justifying his arrest under section 40(1)(b) of the CPA.

[88] In my view, the First Defendant had established that there were reasonable grounds to suspect that the Second Plaintiff had committed the Schedule 1 offence, theft.

[89] Based on the evidence presented, I am satisfied that, regarding the claim of unlawful arrest of the second plaintiff, Walaza, the arresting officer, Simali, acted on a reasonable suspicion as required by section 40(1)(b) of the CPA and had reasonable grounds to believe that the Second Plaintiff had committed a Schedule 1 offense. Furthermore, I find no basis to conclude that the discretion

to arrest was improperly exercised. Accordingly, I find that the arrest and detention of the Second Plaintiff were lawful. As a result, the claim for unlawful arrest and detention must fail.

Costs

[90] 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.

[91] The Second Plaintiff should therefore be ordered to pay the Defendants' costs of the action.

Order

[92] As a result, I make the following order:

1. The claim relating to the First Plaintiff is withdrawn.
2. The claim relating to the Second Defendant is abandoned
3. The Second Plaintiff's arrest and detention of 22 April 2017 until 23 June 2017 were lawful
4. The Second Plaintiff is to pay the First Defendant's costs on party and party scale, Scale "B".



**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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 16h00 on 29 November 2024.

DATE OF HEARING: 30 and 31 October 2024, 1 and 21 November 2024

DATE JUDGMENT DELIVERED: 29 November 2024

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