IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case no: 12400/17

12401/17

REPORTABLE:**NO**

OF INTEREST TO OTHER JUDGES:**NO**

REVISED: **YES**

DATE: 10 May 2021

In the matter between:

BONGANI INNOCENT LAWU First Plaintiff

TSHEPO MAKOBI Second Plaintiff

and

THE MINISTER OF POLICE Defendant

NEUKIRCHER J:

1] This is an action for damages against the defendant stemming from the allegedly a) unlawful arrest and detention and b) assault of the plaintiffs[1] by members of defendant without a warrant and under s40(b) of the Criminal Procedure Act 51 of 1977 (the CPA).

2] The plaintiffs each issued out separate action against defendant which were then consolidated for purposes of trial.

3] The matter proceeded on merits only.

4] The defendant has admitted that the arrests were without a warrant and its case is that the offence was a Schedule 1 offence of theft and that as it was based on a reasonable suspicion that plaintiffs had committed the offence, the arrest was lawful. The defendant denied the assault allegations.

5] At the pre-trial conference held on 16 February 2021 the parties agreed that, although defendant bore the onus in respect of the arrest, as plaintiffs bore the onus as regards the assault and therefore the plaintiffs would bear the duty to begin.

The witness

6] There were five in total:

6.1 Lawu;

6.2 Makobi;

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[1] In this judgment 1st plaintiff is referred to as Lawu and 2nd plaintiff as Makobi – or they are referred to as "the plaintiffs"

6.3 Mrs Lawu (Lawu's mother and Makobi's aunt);

6.4 Sergeant Rasenyalo; and

6.5 Constable Molaudzi.

The evidence

7] Lawu's evidence was that at approximately 23h00 on 28 July 2015 he was sleeping at this aunt's flat, where Makobi resides, when there was a loud knocking at the door. When he opened the door 6 to 8 policemen barged in with the complainant[2]. The police demanded "*who is Bongani?*" and complainant pointed him out. The complainant then pointed to a jacket which was lying on the bed and a computer[3] which was next to the bed, and told the police that Lawu stole them and also stole R10,000 from him.

8] The police then demanded the money from Lawu and began to search the flat. Although he asked whether they had a warrant, they ignored him.

9] They found R320 in the pocket of the jacket which one officer then pocketed.

10] Lawu and Makobi were then handcuffed.

11] Not long after, Mrs Lawu arrived. She witnessed complainant storming towards Lawu and hitting him with an open hand on the left side of his face so hard that the right side of his face hit the wall and he started bleeding.

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2 One Mr. Ntshabeleng

3 Plugged in and open next to the bed

12] When Lawu wanted to press charges against complainant for assault, he was told to "*shut up*".

13] He and Makobi were put into the police van and taken to the Sunnyside Police Station's charge office where they were read their rights. Lawu again stated he wanted to press charges and was told "*shut up little boy*".

14] He and Makobi were then put in a cell. His head was still bleeding and he wiped the blood with his clothes. After a while the bleeding stopped.

15] According to Lawu, he was charged on 29 July 2015 and his fingerprints taken. It is also important to note that there is "Statement regarding interview with Suspect" which is dated 29 July 2015 which specifically notes the swelling and bruising on Lawu's face.

16] He and Makobi were taken to court for the first time on 30 July 2015 and their cases were remanded for seven days to confirm their addresses. The reason for this apparently was that the arrest sheets gave different addresses for Lawu and Makobi respectively. According to Lawu, the prosecutor specifically asked why this was and he explained that no […], Pretoria was Makobi's parental home and no […], Pretoria was his home. It was the prosecutor who insisted on confirmation of address and the matter was then postponed.

17] From there they were taken to Kgosi Mampuru Prison[4] where he says the prison warder assaulted him with a mug on his head. He was taken to the

[4] Also known as New Lock

clinic and needed stitches. The warder then gave him two packets of cigarettes and told him that if he did not say anything about the assault, he would give Lawu cigarettes every day. Because he was scared, he didn't press any charges.

18] He and Makobi were eventually, after several appearances, released on bail on 6 August 2015 and the case against them was withdrawn on 11 November 2015.

19] According to Lawu in cross-examination:

19.1 Constable Mulaudsi was not at the flat when plaintiffs were arrested – he saw him for the first time at the charge office and only knew his name because he was wearing a name badge;

19.2 six to eight police officers, only two of which were uniformed, came to the flat to arrest him and Makobi;

19.3 other than that the arrest was effected without a warrant, he denied defendant's version.

20] When it came to how he and Makobi knew complainant, his version was that he met complainant at the company where he worked as a security officer and complainant and he became friends and the former would give him advice.

21] When Lawu's contract ended after three months, they would visit each other's home. Lawu said the complainant loved the way he sang and gave him a computer so Lawu could make his own music – complainant even installed

and set up the computer at the flat.

22] As to the money: complainant sent Lawu to the ATM to draw money for him. He gave Lawu his ATM pin and instructed him to draw R300 to R350 each time. He was in possession of complainant's jacket as it had been lent to him the same day he was arrested as it was a cold day and complainant had sent him to draw money again. He testified that he had given the complainant the money each time he had withdrawn it at complainant's behest.

23] He saw complainant at approximately 11h00 that morning and said complainant looked "*clumsy*" and "*tired*" as if he wanted to sleep[5].

24] Lawu denied that he had stolen the computer, the jacket or the R10,000. In fact, the complainant's bank statement[6], which formed part of the docket and was referred to in evidence, also shows no evidence of either a single withdrawal of R10,000 or several withdrawals which total R10,000. What it does show are the following withdrawals:

24.1	on 25 July 2015	R 350.00
24.2	on 26 July 2015	R 350.00
24.3	on 26 July 2015	R 300.00
24.4	on 26 July 2015	R 150.00
24.5	on 27 July 2015	R 300.00
24.6	on 27 July 2015	R 400.00

[5] During the evidence it was suggested that the complainant had taken drugs or alcohol but there was absolutely no foundation laid for this and was pure speculation. The evidence carries no probative value at all

[6] For the period 25 July 2015 to 31 July 2015

R1750.00

25] On Lawu's version he drew money for complainant on approximately three occasions in amounts not exceeding R350.00 and, apart from the last withdrawal on 27 July 2015, the bank statement confirms this version.

26] Lawu's head injury also finds support in the "Statement regarding interview with suspect" which is dated 29 July 2015 at 09h15 which records in par 7:

*" *… I asked the suspect to show me the injuries and noticed the following: -*

Swollen head

** I asked the suspect how and when he/she* has sustained the injuries and he or she replied as follows:-*

assaulted by the complainant"

27] That same statement records that Lawu refused to make any statement and stated:

"I do not agree with the allegations and I would like to give my statement in court."

28] It remained Lawu's position throughout his evidence that he had attempted to give his version on more than one occasion during his arrest, that he was told each time to "*shut up*", that he was assaulted by complainant in view of the police officers who stood by and did nothing to prevent this assault, that he was again assaulted by a Correctional Services Officer at New Lock Prison and that he was prevented from laying a charge of assault against

complainant and later against the Correctional Services Officer[7].

Tshepo Makobi

29] His evidence was that on 28 July 2015 he and Lawu were their flat when there was a hard knock on the door. When he opened it there were six to eight people outside with the complainant and Mrs. Lawu. They pushed past him and asked "*who is Bongani?*" The complainant pointed out Lawu and then Lawu and he were handcuffed.

30] He stated that Lawu was injured when complainant slapped him with an open hand and as a result, Lawu's head bumped against the wall and he was bleeding. Complainant assaulted Lawu in full view of the police stating *"this is what I wanted to do to you in front of the police*."

31] None of the police officers told him why he was being arrested. All he knew is that the allegation was that Lawu had stolen two computers, a jacket, R10,000 and some cellphones.

32] He confirmed that complainant had given Lawu a computer and had lent him his jacket. He also confirmed that complainant would send Lawu to draw money for him on occasion and that the money found in the jacket pocket by the police belonged to Lawu and not the complainant.

33] He testified that the complainant was their friend; that they would visit each other and that complainant enjoyed listening to Lawu "rapping" and that he

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7 The latter because he was intimidated

had given Lawu a computer so he could make music. This was why, when the police arrested them a month later for theft, they were so shocked.

34] His evidence was further that he was assaulted by a police officer at the cell – he was slapped with an open hand and pushed. He did not have any injuries.

35] He found out in prison, from Iyanda, that the latter had been arrested for stealing two computers, five jackets, R10,000 and cellphones. It bears mentioning that Iyanda was the third person referred to in the complainant's statement as having committed the theft.

36] On their first appearance, plaintiffs were not granted bail: they plead not guilty and their case was postponed for further investigation.

37] He confirmed that he witnessed the assault on Lawu by the Correctional Services Officer at New Lock.

38] In cross-examination, Makobi confirmed that six to eight police officers arrived to arrest them; that two were in police uniform; that Lawu was assaulted in full view of the police and was injured and bleeding as a result, and remained adamant that the police did not tell him why he was being arrested.

39] Although he was not a particularly dynamic witness he confirmed Lawu's evidence in all material respects.

Mrs. Lawu

40] Her evidence was that the police and complainant arrived at her residence

between 22h00 – 23h00 on 28 July 2015 and knocked hard at the door. They identified themselves and when she opened the door the complainant rushed in asking "*where is the computer?*" and started looking for it and accusing Lawu of stealing it.

41] She stated that she specifically said that complainant had given Lawu the computer a month earlier and that Lawu was at her sister's house. They all then went there.

42] She said it was "chaos" at her sister's flat when they arrived. There were more than five police officers present of which only two were in uniform. As the police were arresting the plaintiffs for theft, complainant threatened to assault Lawu and then did so while the police looked on – Lawu hit his head on the wall as a result of the assault by complainant and was bleeding.

43] In her opinion, complainant was drunk at the time[8].

44] Complainant accused Lawu of stealing his computer and jacket and despite her again trying to explain to the police that these items had been lent to Lawu by the complainant, they refused to listen. She also testified that Lawu pointed the policeman out to her who had allegedly pocketed the R320 found in the jacket pocket.

45] Approximately two or three days later complainant telephoned her and asked

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[8] Again, this evidence is simply conjecture and has no probative value

forgiveness as he said it was, in fact, Iyanda who had stolen his possessions.[9] He asked Mrs Lawu to accompany him to the Sunnyside Police Station to secure plaintiffs' release. Unfortunately, by then they had been taken to New Lock prison. She found out when the court appearance was. On that date the matter was postponed and no bail granted because proof of address was required. According to her, she found this puzzling as *"they were arrested where they stayed".*

46] They were released after she paid Lawu's bail of R500 and her sister paid Makobi's bail – she did not specify the date.

47] When Lawu was released she saw he had a stitch on his head. He told her a prison warder had hit him on the head with a cup.

48] She denied defendant's version.

49] Plaintiff then closed their case and defendant applied for absolution in respect of the claims based on the alleged assaults of the plaintiffs. An *ex tempore* judgment was handed down in which I granted the following order:

49.1 the application for absolution in respect of the assault that took place at New Lock Prison was upheld;

49.2 the absolution application in respect of the remainder of the assault allegations was dismissed.

The defendant's case

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9 It appears that Iyanda was later arrested for theft of the complainant's property

Sergeant Rasenyalo

50] He is a sergeant employed by SAPS and stationed at Sunnyside Police Station. He has been a police officer for 15 years and has held his present rank for 3 years.

51] On 28 July 2015 he and Constable Mulaudzi were in a marked SAPS vehicle doing patrol in Arcadia, Pretoria when they received a complaint via radio control. They went to complainant's residence at approximately 21h30. According to complainant he was with three men[10] on 26 July 2015 – they drugged him and he regained consciousness in the hospital two days later and was discharged. When he went home he saw that the three men had stolen two computers, his jacket and taken his bank card and withdrawn R10,000. He stated that he knew where to find the suspects.

52] They then all went to the plaintiffs flat at […], Pretoria. They knocked and Lawu opened the door. They identified themselves as police officers (they were in uniform). They explained that the complainant had opened a case against them. Complainant pointed out Lawu as the one who had stolen his possessions and pointed out his jacket and computer. He then informed the plaintiffs that they were going to arrest them, which they did after reading them their rights, and they seized the stolen property.

53] His evidence also was that the plaintiffs failed to explain why they were in possession of stolen property despite their questioning them.

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10 Identified as Bongani, T.S and Iyanda

54] After the arrest, they took plaintiffs to Sunnyside Police Station where they were informed of their Constitutional Rights. After the plaintiffs were taken to the cells, they had no further knowledge of what occurred as his job ended at the arrest.

55] He was adamant that plaintiffs were justifiably arrested for being in possession of suspected stolen property.

56] In cross-examination, Rasenyalo confirmed that:

56.1 when he laid the charges, complainant stated that two computers, a leather jacket, cellhpones and cash had been stolen – they only found one computer and a jacket in plaintiffs' possession;

56.2 they did not get a warrant first because complainant stated he knew who and where the suspects were and when they got there he pointed out his property;

56.3 they did not listen to the plaintiffs' explanation that complainant had lent them the computer and jacket because *"people will say anything to get out of trouble*";

56.4 that although he is aware that an arrest is not the only means to secure an accused's attendance at court he *"will arrest if [he] needs to arrest to secure the attendance at court*" where plaintiffs can state their case;

56.5 the plaintiffs' explanation of why they were in possession of complainant's property was not sufficient.[11]

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11 But see par 53 *supra*

57] The question regarding whether an arrest shouldn't be a last resort yielded the following response: an arrest is necessary to secure a court attendance and to prevent a situation where the accused doesn't attend court and can't be traced.

58] He denied that either of the plaintiffs were assaulted but could not explain the recordal of Lawu's injury as set out in para 26 *supra*.

59] He denied that there were six to eight police officers at plaintiffs' residence and maintained it was only he and Mulaudzi who effected the arrest. He also denied that R320 was taken and denied speaking to Mrs Lawu.

60] He was adamant that as complainant pointed out the plaintiffs and as they were in possession of his property and their story was "mixed" they formed the opinion that there was a reasonable suspicion upon which they could effect an arrest in terms of s40(b) of the CPA.

Constable Mulaudzi

61] He has been in the employ of SAPS since 2012 and is stationed at the Sunnyside Police Station.

62] His evidence confirmed that of Rasenyalo in respect of the events leading up to plaintiffs arrest: they were on duty when they received a 10111 call. When they arrived at complainant's house he informed them that he suspected he

had been drugged on 26 July 2015 by three men who were at his place. He said certain items were stolen[12].

63] He said he knew where the suspects lived and took them to the flat. They knocked and entered. Complainant pointed out the plaintiffs and the complainant pointed out his property. According to Mulaudzi the plaintiffs were then arrested.

64] On his version the plaintiffs were arrested for being in possession of stolen property and he did not recall any discussions taking place with the plaintiffs.

65] He denied Lawu was assaulted, he denied six to eight police officers were present and also denied going to Mrs Lawu's residence first.

66] In cross-examination he conceded that he had not tried to ascertain the truth of the allegations before effecting the arrest – his version was that, as police officers, they must listen to what the complainant states and that it is not for them to judge. He also testified that an arrest is the most secure way *"of ensuring a suspect's attendance at court*" and that "*it is too much of a risk* "to take a suspect in first for questioning and then release them.

67] He has no knowledge of what happened to the case after the plaintiffs were detained in the Sunnyside Police Station cells.

68] It was also demonstrated in cross-examination that:

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12 According to his recollection – a desktop screen and boxes and clothes

68.1 on 22 September 2015 the Magistrate *"refused further remand. Matter struck off the roll. Please complete investigations and return docket for decision*."

68.2 on 24 November 2015 a *nolle prosequi* was issued in respect of both plaintiffs.

69] It was put to Constable Mulaudzi that the *nolle prosequi* was proof that the arrest was unlawful, which he denied.

70] That then concluded the evidence.

The witnesses

71] Whilst neither the first nor the second plaintiffs were particularly dynamic witnesses, all the evidence presented on the material aspects of their case corroborated their version. Any discrepancies[13] do not disturb my view that their evidence was reliable. Unfortunately, the defendant's witnesses did not make a particularly good impression, especially given that they contradicted documentary evidence: they denied any assault on Lawu and denied he was showing any signs of injury. But in the Interview Statement[14] that injury is specifically mentioned. The fact that they did so, and the one attempted to corroborate the version of the other, indicates their unreliability as witnesses.

The legal position

72] The principles regarding an unlawful arrest are trite:

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13 For example whether Mrs Lawu arrived together with the police officers or after them

14 para 26 supra

72.1 an arrest or detention must be constitutionally and statutorily justified[15] and the reason for this is obvious: it deprives a person of their liberty and dignity[16];

72.2 where an arrest takes place without a warrant, once the arrest and detention are admitted the onus rests on the State to prove the lawfulness thereof[17];

72.3 to discharge this onus, the defendant must show that a) the arrestor was a peace office; b) that he or she entertained a suspicion; c) that the suspicion was that the arrestee had committed a Schedule 1 offence and d) that the suspicion rested on reasonable grounds[18];

72.4 an honest belief in the legality of the arrest or detention is no defence[19]

73] s40 of the CPA provides:

"(I) A peace officer may without warrant arrest any person –

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 other than the offence of escaping from lawful custody."

74] Schedule 1 of the CPA includes, for purposes of s40 and 42, *inter alia*:

"Theft, whether under the common law or a statutory privisio"

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15 Minister of Correctional Services v Kwakwa [2002] 3 All SA 242 (SCA); 2002 (4) SA 55 (SCA)

16 Minister of Justice v Hofmeyr [1993] 2 All SA 232 (A). 1993 (3) SA 131 (A)

17 Brand v Minister of Justice [1959] 4 All SA 420 (A) 1959 (4) SA 712 (A) at 714: the plaintiff need not allege or prove wrongfulness – it is for the defendant to allege and prove the lawfulness of the arrest and detention.
Also: Mhaga v Minister of Safety and Security [2001] 2 All S 534 (Tk); Cf Ceter Minister of Safety and Security [2007] 3 All SA 365 (D); Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) 589E-F

18 Duncan v Minister of Law and Order 1986(2)SA 805(A) at 818 G-H

19 Tsose v Minister of Justice 1951(3) SA 10(A) at 18 Smit v Meyerton Outfitters 1971 (1) SA 137 (T); Ramsay v Minisster of Police 1981 (4) SA 802 (A) at 818

and

"Receiving stolen property knowing it to have been stolen"

75] It is so that an arrest is not the only manner of securing an accused's attendance at court. In terms of the CPA, the others are via summons, written notice and indictment.

76] In **Louw v Minister of Safety and Security**[20], Bertlesmann J found that given the other methods of securing an accused's attendance at court, and given the severe inroads an arrest and detention makes on an individual's freedom and dignity, there was a fifth jurisdictional requirement before an arrest could be made: there must not have been a less invasive option available in order to bring the suspect before court.

77] However in 2011 the Supreme Court of Appeal (SCA) put an end to that debate in **Minister of Safety and Security v Sekhoto and Another**[21] when it found that to construe the provisions of s40(1)(b) of the CPA to include this fifth jurisdictional requirement would unfairly and incorrectly fetter an arresting officer's discretion and that no such requirement exists.

78] Of particular importance insofar as the exercise of that particular discretion is concerned, is the following:

"[28] <u>Once the jurisdictional facts for an arrest</u>, whether in terms of s40(1) or in terms of s43, <u>are present, a discretion arises</u>. The question whether

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20 2006 (2) SACR 178 (T)
21 2011(5) SA 367 (SCA)

there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised is not obliged to effect an arrest. This was made clear by this court in relation to s43 in Groenewald v Minister of Justice[22].

[29] As far as s40(1)(b) is concerned, van Heerden JA said the following in Duncan (at 818H-J)

"If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, i.e., he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] All ER 1054 (HL) at (1057). No doubt the discretion must be properly exercised. But the grounds on which the discretion can be questioned are narrowly circumscribed…"

Was there a reasonable suspicion that the plaintiffs had committed a Schedule 1 offence?

79] Thus the first question is whether the police officers reasonably suspected that plaintiffs had committed[23] a Schedule 1 offence. In my view the answer is "no": according to the evidence, the complainant's charge was that plaintiffs had stolen two computers, a jacket, taken complainant's bank card and

22 1973 (3) SA 877 (A) at 883 G-884B

23 The test is an objective one: S v Nel and Another 1980 (4) SA 28 (E) at 33H

withdrawn R10,000[24] and taken cellphones. According to Mulaudzi, the accusation was that they had stolen a desktop screen, boxes and clothes. It is common cause that a computer and a jacket were pointed out by complainant and Lawu admitted that they belonged to complainant. The plaintiffs' version was that these had been lent to Lawu – it is common cause that both police officers refused to entertain any explanation for the possession of the goods[25]. It is also the defendant's version that they had not found any money at the flat. The plaintiffs' explanation for being in possession of the complainant's property, as corroborated by Mrs Lawu prior to the plaintiffs' arrest, demonstrates that a proper investigation was required prior to an arrest being made.

Did the police officers exercise their discretion reasonably?

80] It remains trite that the purpose of an arrest is to bring a suspect before a court[26].

81] Even if it could be said that the police officers had entertained a reasonable suspicion that the plaintiffs had committed a Schedule 1 offence, the question in the present matter is: was it necessary to arrest the plaintiffs in order to secure their attendance at court?

82] In answering this question, the evidence presented by the defendant is

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24 According to Rasenyalo

25 In Ramakuluksha v Commander, Venda National Force 1989 (2) SA 813 (V) at 836G to 837B it was held that in order to ascertain whether a suspicion that a Schedule 1 offence had been committed is reasonable, there must be an investigation into the essentials relevant to the offence
Also Gellmon v Minister of Safety and Security 2008 (1) SACR 446 (W)

26 Kotze v Minister of Safety and Security 2012(1) SACR 396 (GSJ) at [28]

particularly instructive as:

82.1 Sgt Rasenyalo simply stated that although he was aware that an arrest is not the only means to secure an accused's attendance at court he *"will arrest if [he] needs to arrest to secure the attendance at court."*[27]

82.2 Constable Mulaudzi testified that an arrest is *"the most secure way"* of ensuring a suspect's attendance at court and that it is too much of a risk to first take the suspects in for questioning and then release them[28]

83] The only possible way that there was *"too much of a risk"* in this matter is if the addresses given by plaintiffs were false and indeed at their first appearance in court on 30 July 2015, the matter was remanded to confirm their addresses.

84] But, in my view and on the facts of this particular matter, the above is demonstrative of the fact that both Rasenyalo and Mulaudzi simply failed to exercise the discretion conferred on them by s40(1)(b) and as confirmed in a long line of authorities including **Duncan** and **Sekhoto**. I say this for the following reaons: on defendant's version –

84.1 when these police officers went to take complainant's statement on 28 July 2015 he told them he knew where to find the suspects[29]. Thus he knew where they lived;

84.2 on their own version, the police officers were taken straight to the flat where they actually found both plaintiffs and arrested them there.

85] Thus there could never have been any issue of a false physical address being

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27 par 56.4 *supra*
28 par 51 and 63 *supra*
29 par 52 and 63 *supra*

provided as the two police officers tried to intimate in their evidence.

86] On plaintiffs own version, and as corroborated by Mrs Lawu, the complainant and the two SAPS officers first went to her address and when they didn't find plaintiffs there they went to the flat. Thus, even on that version, SAPS was at all times fully aware of where they could find plaintiffs.

87] Thus, in my view, it was not necessary to arrest the plaintiffs in order to secure their attendance at court and in doing so the defendant failed to exercise their discretion correctly.

88] Given this, given that not all the allegedly stolen property was found in possession of the plaintiffs, given that they had both provided the police officers with an explanation for the possession of the goods, and given that both police officers knew where they could find both plaintiffs, I find that the police officers failed to exercise the discretion conferred on them by s40(1)(b) properly and thus the plaintiffs must succeed on the issue of the unlawful arrest[30]. This being so, their subsequent detention until they were brought before a court on 30 July 2015 is also unlawful.

The detention from 30 July 2015 until 6 August 2015

89] The next leg of the enquiry is: was the subsequent detention of plaintiffs until their release on bail on 6 August 2015 unlawful? The reason for their further detention, according to Lawu's own evidence, was that the prosecutor was not

30 This case is somewhat trivial: see Sekhoto *supra*

satisfied with the explanation given by the plaintiffs as to why they had two addresses. He wanted confirmation of address and thus their case was postponed by the court for this purpose.

90] Both police officers testified that after plaintiffs were arrested they had no further knowledge of the case and their view was that any damages would fall within the purview of the Minister of Safety and Security. This too was the submission made by defendant's Counsel.

91] In **De Klerk v Minister of Police** Theron J[31] found that the investigating officer was aware that the applicant would not be released on bail at his first appearance in court, such appearance being a mere formality in a busy remand court and that the police officer subjectively foresaw the precise consequence of the unlawful arrest of the applicant but it appears that this was found as a result of direct evidence before the court[32], which is not the position here.

92] As was stated:

[76] A reasonable arresting officer in the circumstances may well have foreseen the possibility that pursuant to an unlawful arrest, the arrested person would routinely be remanded in custody after their first appearance. Here, however, the arresting officer had actual subjective foresight that the proceedings in the 'reception court' would occur as they did and that the applicant would not be considered for bail at all and

31 2020(1) SACR 1 (CC) - writing for the majority court

32 See par 81 of the judgment quoted in par 91 below

accordingly suffer the harm that he did.

[77] The High Court in Ebrahim, the Police Minister (Minister of Law and Order)

contended that his liability relating to the unlawful arrest of the plaintiff was

limited to the time of the plaintiff's detention until the date of his first appearance before a Magistrate. The High Court reasoned that in order to determine whether the Police Minister was liable, it had to be established whether the requisite causation was present to give rise to legal responsibility. Applying the test for causation as enunciated in Skosana and Bentley, the High Court concluded that the plaintiff's loss of liberty was caused by the abductors' wrongful acts, but for which he would have been a free man:

"I am of [the] opinion that a supervening act which is foreseen as the likely consequence of the wrong does not break the chain of causation and can be taken into account in assessing damages."

[78] The decision was confirmed on appeal. The Court held that the original arrest and re-arrest were linked sufficiently closely to the respondent's continued detention:

> *"The re-arrest flowed from the original arrest and the purpose of both was to eventually bring the respondent before the courts so that he might ultimately be convicted and sent to prison. This purpose was achieved and the responsible police officers must have foreseen that the respondent might be detained until so sentenced. Hence the roles of the Attorney-General and the*

courts in the whole process constituted no more than contributory links in the chain of causation."

[79] *Professor Burchell is of the view that an intervening event does not necessarily break the causal chain where it was subjectively foreseen, even though it is otherwise considered as abnormal. Burchell explains that "[a]n abnormal event which would otherwise rank as a novus actus does not so rank if it was actually foreseen (or was reasonably foreseeable in negligence cases) or planned by the accused".*

[80] *Professor Snyman puts it as follows:*

"All the . . . rules relating to a novus actus are subject to the qualification that if X planned the unusual turn of events or foresaw it, it cannot amount to a novus actus. This accords with the rule of the adequate causation test . . . that, in determining whether an act tends to lead to a certain result, one should take into account not only the circumstances ascertainable by the sensible person, but also the additional circumstances known to X."

[81] *As explained, subjective foresight of harm cannot itself necessarily imply that harm is not too remote from conduct. It is, however, a weighty consideration. In the present matter, Constable Ndala subjectively foresaw the precise consequence of her unlawful arrest of the applicant. She knew that the applicant's further detention after his*

court appearance would ensue. She reconciled herself to that consequence. What happened in the reception court was not, to Constable Ndala's knowledge, an unexpected, unconnected and extraneous causative factor – it was the consequence foreseen by her, and one which she reconciled herself to. In determining causation, we are entitled to take into account the circumstances known to Constable Ndala. These circumstances imply that it would be reasonable, fair, and just to hold the respondent liable for the harm suffered by the applicant that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the Magistrate do not amount to a fresh causative event breaking the causal chain."[33]

93] Thus, on the facts of this matter and given that it was the decision of the prosecutor to recommend that the matter be remanded despite the plaintiffs explanation, which the court then did, I find that the decision of the prosecutor and the court constitutes a *novus actus* as referred to in **De Klerk**[34], and defendant cannot be held liable for the plaintiffs continued detention after their appearance on 30 July 2015.

The assault

94] The question is: is defendant liable in circumstances where the assault on Lawu was not perpetrated by a police officer?

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33 Footnotes removed

34 At par [79] of the judgment

95] Lawu wants to hold defendant liable for an assault committed by the complainant on him in the presence of the police officers: the basis is that the police stood by and allowed the assault to take place.

96] No authority for this proposition was proffered by counsel.

97] In **Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Interventing**)[35] the Constitutional Court found that there were circumstances in which the police and prosecution services *"were among the primary agencies of State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against violent crime, and that on the facts of the instant case, the applicant was entitled to damages in delict for their failure to do so*."[36].

98] But the facts in **Carmichele** was a far cry from those in this case. In that case the egregious behaviour of the authorities – in ignoring the repeated efforts by the applicant to persuade the State to oppose bail of an offender charged with rape and a previous conviction for indecent assault, where an interview with the prosecutor revealed serious sexual deviation and the referral documents reflected the seriousness of the rape and sexual deviation – led to the Constitutional Court finding that the State was liable for delictual damages following the release of the suspect on bail (without opposition) and the appellant being brutally attacked by him again a few days later.

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35 2002(1) SACR 79(CC)
36 Headnote

99] In this matter the accounts given by plaintiffs' witnesses differed slightly:

99.1 according to Mrs Lawu, the complainant threatened he would assault Lawu and then hit him which caused his head to hit the wall:

99.2 according to Lawu and Makobi the complainants words and actions were virtually simultaneous.

100] It is also common cause that Lawu was assaulted once.

101] Whilst the discrepancies in highlighted in par 99 *supra* do not detract from the overall impression of these witnesses, the evidence suggests that everything occurred virtually in one continuous action. There was no prolonged period of threats by complainant before he assaulted Lawu and the police would not have been able to intervene to stop the assault. In any event I find that in the circumstances of this particular case, the liability of the State as set out in **Carmichele** does not and cannot be visited in this matter. I also find that the following is appropriate in this matter:

"… fears about the chilling effect such delictual liability for a failure by the State to take positive action to prevent harm might have on the proper exercise of their duties by public servants were sufficiently met by the proportionality exercise referred to above and also by the requirements of foreseeability and proximity. Liability had to be determined on the basis of the law and its application to the facts of the case, and not, as was the case in some foreign jurisdictions, on the grounds of public interest immunity granted to public authorities against such claims."[37]

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37 Carmichele @ par 49

102] This being so, the assault claim against defendant by Lawu must fail.

103] As regards the alleged assault on Makobi – he stated in this evidence that he was assaulted by a member of SAPS during his arrest but his Interview Statement specifically records that he *"was not threatened / assaulted / influenced*". There being two conflicting versions put by him before this court, and given that he bears the onus to prove the assault, I find that he has failed to discharge his onus and his assault claim must fail.

Conclusion

104] The conclusion thus, based on all the evidence, is that both plaintiffs must succeed solely in their claims for unlawful arrest and detention.

Order

105] The order I thus make is the following:

105.1 the defendant is ordered to pay 100% of the first and second plaintiffs proven or agreed damages in respect of their claims for unlawful arrest and detention until their appearance in court on 30 July 2015;

105.2 the plaintiffs' claims in respect of assault are dismissed;

15.3 the issue of quantum is separated in terms of Rule 33(4) and postponed *sine die*;

105.4 the defendant is ordered to pay the costs of the first and second plaintiffs.

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NEUKIRCHER J
Date of hearing: 2 March to 4 March 2021
Date of judgment: 10 May 2021
Hearing conducted via videoconferencing

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 May 2021.

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