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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

Case Number: 15465/2009

In the matter between:

THOBEKA MAWU

First Plaintiff

SISEKA ALI

Second Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT DELIVERED ON 14 MAY 2014

ZONDI, J:

[1] The plaintiffs claim damages from the defendant on the ground that they were unlawfully arrested and detained by the police officers acting within the scope of their employment with the defendant. Their claim arises out of their respective arrests, both of which were without warrant, on Thursday, 26 February 2009 in Khayelitsha and their subsequent detention at Bellville South police station cells until Monday, 2 March

2009 when the charges against them were withdrawn. The plaintiffs contend that their arrests and detention were unlawful. The defendant defended the action and invoked the provisions of s 40 (1) (b) of the Criminal Procedure Act 51 of 1977 (“the Act”) to justify the lawfulness of the plaintiffs’ arrests and their subsequent detention.

[2] At the start of the trial,, the parties requested the Court to direct that the issues of merits and quantum be separated in terms of rule 33 (4) of the Rules of Court; and that the only question to be decided by this Court be that of the merits. It was so ordered.

[3] The first plaintiff (“Ms Mawu”) is a 34 year old female. She resides at Old C.... Roads, N....., Cape Town. She was arrested on 26 February 2009 at about 23h00 by reason of the fact that she is the registered owner of a black Toyota Yaris sedan (“the vehicle”) with registration letters CA 16..... which the police suspected to have been used in the commission of a crime of a house robbery in Welgemoed, Bellville, earlier on that day at about 21h00. It is common cause that at the time of her arrest she had parked the vehicle at her friend’s house (Nomfazwe). She took the police to Nomfazwe’s house. It is further common cause that after the arrest the police searched Mawu’s vehicle and her house and seized certain items. But none of those items could be linked to the crime for which she was a suspect.

[4] As regards the second plaintiff (“Ms Ali”), it is common cause that she is Mawu’s friend and she is also 34 years of age. Her house is about six houses away from Ms Mawu’s place. On the day in question, she has been at Mawu’s house at about 14h30 until late in the afternoon when she and her friend drove to town. When she returned home at about 23h00 after having spent some time with her friend in

town, she saw the police vehicle standing in front of Mawu's house. Concerned about Mawu's safety, she took a turn at her house with a view to ascertaining if she was not in trouble. When she was arrested she had just arrived at Mawu's house. They were both arrested on 26 February 2009 and detained in Bellville South police station. They were so detained until they were released on Monday, 2 March 2009 when the charges against them were withdrawn.

[5] It is clear from this brief factual background that the arrests and detention of the plaintiffs are not in dispute. What is disputed is the lawfulness or otherwise of these arrests and detention. The *onus* of justifying the arrests and detention of the plaintiffs therefore lies on the defendant. (*Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) paras 24 and 25; *Rudolph and Others v Minister of Safety and Another* 2009 (5) SA 94 (SCA) para 14).

[6] The plaintiffs testified regarding their arrests and the defendant presented the evidence of the arresting officer, Inspector Van Zyl ("Van Zyl") and Mr Tanswell Louw ("Louw") to justify the lawfulness of the arrests and detention of the plaintiffs.

[7] Ms Mawu is the registered owner of the relevant vehicle. She uses the concerned vehicle for the purposes of transporting for reward school children to and from school and this is what she did in the morning of the day in question. According to Ms Mawu besides her friend, Xoliswa she is the only person who drove her vehicle on 26 February 2009. After doing her morning rounds she parked the vehicle in her yard until at about 13h00 when she went to fetch children from school. Having done so, she parked the car in her yard until at about 16h00 when she took it to a car wash place which is located within the walking distance from her house. She left the vehicle at the

car wash and walked back home. Some two hours later at about 18h00 she collected it from the car wash.

[8] Ms Mawu also testified about the get-together she had at her place on the day in question. She and her group of friends including Ms Ali had a braai at her place during the day. To entertain her guests she played music from her vehicle which she parked in her yard. This was the case until one of her guests brought his vehicle into Ms Mawu's yard. Thereafter, music was played from that vehicle. She then drove her vehicle out of her yard and parked it on the street as her yard is too small to accommodate more than one vehicle. At about 22h00 she decided to drive her vehicle and park it at her friend's garage as she was concerned about its safety. Her male friend, called Siya accompanied her to the friend's house. After parking the vehicle at her friend's house, which is about two blocks away from her house, Ms Mawu and her male companion walked back home.

[9] Shortly thereafter, the police including Inspector Van Zyl arrived at her house. They asked her if she was Thobeka, about the ownership of a vehicle which was in her yard and about the whereabouts of her vehicle. She confirmed that she was Thobeka and informed them her vehicle was at her friend's house. During this exchange Ms Mawu noticed that one of those police carried a piece of paper in his hand on which particulars of her vehicle were written. She was asked to take them to where her vehicle was parked which she did. Siya remained behind. As she walked out of her house, Ms Ali arrived. She asked Ms Ali to get the house keys from Siya and locked up the house. While at Nomfazwe's house, two other police officers arrived in a police van. Ali was at the back of the police van.

[10] According to Mawu, she did not know why she was arrested because her enquiries were simply ignored by her arrestors. From Nomfazwe's place, Mawu and Ali were conveyed to Nyanga police station and thereafter to Bellville South police station where they were charged and detained. It was only at that stage that she was informed of the reasons for her arrest.

[11] During cross-examination, her testimony was that she drove her vehicle to Nomfazwe at about 21h30 and the police arrived at her house at about 22h00. She conceded that her earlier testimony that she went to Nomfazwe at 22h00 must have been a mistake. She denied that her vehicle was used in the commission of armed robbery at Welgemoed at about 21h00 contending that it could not have been there because it was parked in front of her house at the relevant time. She could not deny that the police came to her house at about 23h00 because she did not check time. She denied that she refused to co-operate with the police when they asked her about the whereabouts of her vehicle.

[12] Ali confirmed that when she arrived at Mawu's house at about 23h00, Mawu was being escorted by the police out of the premises. At the same time, she saw two other police officers on the premises leaving Mawu's house with Siya. They took Siya to the police van which was parked in front of Mawu's house. It was the first time that she met Siya on the day of the incident. Mawu asked her to get the house keys from Siya and lock up the house. At that stage Siya was in the police van sitting between the driver and the passenger. Ali approached Siya and requested the keys from him. Siya got out of the vehicle and after giving Ali the keys he fled the scene. The police gave chase and fired a warning shot but they were unable to arrest Siya. When they later returned to the house they arrested Ali and conveyed her to Nomfazwe's house where Mawu was with Van Zyl, Smit and Wolmarans. Ali was not told why she was

arrested despite her enquiries. This was only disclosed when she was later charged at Bellville South police station. She was informed that she was charged with defeating the ends of justice and armed robbery.

[13] During cross-examination, she was referred to her police statement in which she had mentioned that she arrived at Mawu's house at 23h00. She said the time she gave was just an estimate. She denied that she orchestrated the escape of Siya from the police custody.

[14] The defendant presented the evidence of Van Zyl and Louw to justify the lawfulness of the plaintiffs' arrests and detention, in other words why Van Zyl exercised his discretion by arresting the plaintiffs. Van Zyl arrested the first plaintiff in connection with the armed robbery which was committed at 22 Q..... Street, W....., B..... On 26 February 2009 at about 21h10 he received a report through the control room of the armed robbery at 22 Q..... Street, W..... and according to the report a dark grey Toyota Yaris with registration letters CA 1..... was seen at, and sped away from, the scene of the crime. Further investigation revealed that the vehicle concerned was registered in the name of Mawu. Armed with this information Van Zyl accompanied by Captain Wolmarans and Smit proceeded to Mawu's house in Khayelitsha. On his way to Mawu's place he stopped at Nyanga police station and requested the police escort as he was not familiar with Khayelitsha area. Two policemen escorted him to Mawu's house. They arrived at Mawu's place at about 23h00. A vehicle was parked inside the premises but it did not match the description of the vehicle he was looking for. His further investigation in the area revealed that the suspected vehicle was parked at a certain address. He proceeded to that address. He looked over the wall and saw it. He climbed over the wall to have a proper look at it.

According to his observation, the vehicle appeared to have been recently driven. Having ascertained the whereabouts of the vehicle Van Zyl then drove back to Mawu's place.

[15] Mawu opened the door for Van Zyl and his two colleagues and let them in. According to Van Zyl he introduced himself to Mawu and explained the purpose of his visit. He asked Mawu about the whereabouts of her vehicle at 21h00. She failed to co-operate and on further probing Mawu offered to accompany them to where the vehicle was parked. Mawu was with a male person in the house. Van Zyl asked the two police from Nyanga police station, who had accompanied him to Mawu's place, to take the male person into the police van while Mawu was taking him to where her vehicle was parked. As Van Zyl and Mawu left the house, Ali arrived and he overheard Mawu asking Ali to lock up the house and keep the keys.

[16] After it was confirmed that the vehicle concerned belonged to Mawu, Van Zyl asked Smit to drive it back to Mawu's house which he did. Upon their arrival at Mawu's house it was reported to Van Zyl that the male suspect (Siya) had escaped and Ali was responsible for the escape. Van Zyl arrested Ali.

[17] Van Zyl's cross-examination by Ms Mziba on behalf of Ali revealed that according to Van Zyl's information, two male suspects were involved in the robbery. He suspected that a driver of the getaway vehicle could have been a female. He conceded that he failed to mention in his statement that Ali was arrested for the escape of Siya. The omission was a mistake on his part, he stated.

[18] The witness was referred to the police incident report relating to the house

robbery in connection with which the plaintiffs were arrested in which the colour of the vehicle concerned is indicated as blue. He was unable to explain as to why that description was given.

[19] Mr Louw is the witness who phoned the police and provided them with the details of the vehicle concerned. According to him, the vehicle he saw on the day in question when he arrived home shortly after 20h00 was a dark-grey Toyota Yaris. He was adamant that the vehicle he saw was greyish in colour, definitely not black. He testified that he had sufficient time to observe it. He stopped his vehicle behind it with his vehicle lights shone on it. He conceded that in his police statement he did not mention the registration letters of the relevant vehicle. This was because he could not independently recollect its registration letters. He assumed that the police were already aware of the identity of the registered owner of the vehicle concerned. He did not rule out the possibility that the police official who received his call might have taken down the registration numbers incorrectly.

[20] Section 40 (1) (b) of the Act, upon which the defendant relies for its defence, empowers a peace officer to arrest without a warrant any person. It provides as follows:

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

(a) ...

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

[21] In *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G-H Van Heerden JA held that that the jurisdictional facts which must exist before the power conferred by s 40 (1) (b) may be invoked are: first, the arrestor must be a peace officer; secondly, he must entertain a suspicion; thirdly, it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act and fourthly, the suspicion must rest on reasonable grounds.

[22] The test whether a peace officer “*reasonably suspects*” a person having committed an offence within the ambit of s 40 (1) (b) is an objective one. The test is not whether a police believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion. The test as set out in *Duncan* was endorsed by Rabie CJ in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579 H and later adopted by Harms DP in *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) para 6. See also *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) para 17.

[23] Once these jurisdictional requirements are met, a discretion whether or not to arrest arises. In other words, the officer is not obliged to effect an arrest (*Sekhoto* para 28). He has a discretion whether or not to effect the arrest and that discretion must be exercised judicially. In general the power to arrest must be exercised within the limits of s 40 (1) (b) read in the light of the Bill of Rights. It is necessary to emphasise that the decision to arrest must be based on the intention to bring the arrested person to justice, (*Duncan* at 820 D).

[24] The *onus* is on the defendant to justify the lawfulness of the arrest. This is so because an arrest constitutes as it does an interference with the liberty of the

individual concerned and the person who caused the arrest of another person should bear the *onus* of proving that his action was justified in law (*Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A) at 589 E-F). This was the law prior to the adoption of a Bill of Rights and the position has not changed since its adoption although that right is now expressly provided for in s 12¹ of the Constitution which guarantees everyone the right to freedom and security including *inter alia* a right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. It provides both substantive and procedural protection. See Woolman et al Constitutional Law of South Africa 2ed at 40-26. This dual protection afforded by s 12 (1) was articulated by O'Regan J in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 145:

“[145] In my view, freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.”

¹ “**12 Freedom and security of the person**

(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;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.”

[25] It is common cause in relation to Mawu that she was arrested without a warrant by Inspector Van Zyl, a peace officer on the suspicion that her vehicle was used in the commission of a crime of armed robbery. As regards Ali the facts relating to her arrest are in dispute. Her evidence, which is corroborated by Mawu, is that she was arrested at the scene by the two police from Nyanga police station who had been told by Van Zyl to guard Siya while he together with two other police was away with Mawu. This version is disputed by Van Zyl. According to him, he arrested Ali when he later returned to the scene with Mawu because she “*covered up for the owner of the vehicle and she assisted the suspect to escape*”. That factual dispute needs to be resolved as its resolution is necessary for the determination of the issues which arise in this matter, namely the lawfulness of the arrest and detention of Ali. The lawfulness of her arrest depends *inter alia* on the rank of her arrestor as well as the reason for her arrest. I will return later to this aspect when I deal fully with the evidence relating to the arrest and detention of Ali.

[26] The real dispute is about the reasonableness of the suspicion on which a decision to arrest was made.

[27] In *Duncan* (at 818H – 819B) the Court considered the nature of powers conferred by s 40 (1) (b) on a peace officer once the jurisdictional facts are established. It pointed out that the peace officer has a discretion as to whether or not to exercise the power to arrest. It held that once the jurisdictional facts are established, it is for the plaintiff to prove that the discretion was exercised in an improper manner. This approach was endorsed and adopted by the Court in *Sekhoto* (at para 46) as being the correct approach and it explained why the plaintiff bears the *onus* to show that the discretion to arrest was not properly exercised. This was explained as follows

(at para 50):

“...It cannot be expected of a defendant, ... to deal effectively, in a plea or in evidence, with unsubstantiated averments of mala fides and the like, without the specific facts on which they are based being stated. So much the more can it not be expected of a defendant to deal effectively with a claim — as in this case — in which no averment is made, save a general one that the arrest was 'unreasonable'. Were it otherwise, the defendant would in effect be compelled to cover the whole field of every conceivable ground for review, in the knowledge that, should he fail to do so, a finding, that the onus has not been discharged, may ensue. Such a state of affairs, said Hefer JA, is quite untenable.”

[28] It was submitted by Mr Godla on behalf of Mawu that the test whether a suspicion is reasonably entertained within the meaning of s 40 (1) (b) is objective. He argued that a reasonable man in the position of Van Zyl and possessed of the same information – colour of the vehicle and the gender of suspects – would not have considered that there were good and sufficient grounds for suspecting that Mawu had participated in a crime of armed robbery. He pointed out that Van Zyl should have first verified the information before arresting the plaintiffs by removing the vehicle for further investigation and by getting more information from Louw relating to the occurrence at the crime scene. He submitted that Van Zyl’s failure to verify information on which he acted, rendered the arrests of the plaintiffs unlawful. For this proposition he referred to an unreported judgment in the matter of *Lindile Mbotya v Minister of Police* (1122/10) [2012] ZAECPHC 43 para 25 (10 July 2012) in which a dictum in

Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658 E – H was quoted with approval.

[29] He pointed out that in the present matter the information at the disposal of Van Zyl was that two black male suspects fled the scene in a dark grey Toyota Yaris with registration number CA 169976. He accordingly submitted that it was unreasonable for Van Zyl to arrest the plaintiffs who were both females and did not have a grey Toyota Yaris.

[30] *Lindile Mbotya v Minister of Police* also concerned the lawfulness of the arrest effected in terms of s 40 (1) (b) and the issues for consideration in that case (at para 4 of the judgment) were *inter alia* whether on the facts the arrestor had formed a reasonable suspicion that the plaintiff had committed an offence falling under Schedule 1 of the Criminal Procedure Act and whether he applied his mind properly in exercising his discretion to arrest the plaintiff. In considering the issues which were before it the Court adopted the following approach (at para 25) quoting with approval the dictum in *Mabona* supra at 658 E – H:

“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, ie 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 not certainty. However the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion.”

[31] To the extent that it is suggested that this passage is authority for the proposition that for a reasonable suspicion to be formed the quality of the information upon which the arrestor acts must be analysed and assessed and that acting on the information the quality of which has not been subjected to scrutiny will render an arrest unlawful, I disagree. I am unable to find anything in the provision of s 40 (1) (b) which leads to the conclusion that this is the requirement. A lawful arrest in terms of s 40 (1) (b) can be made upon a reasonable suspicion. And in *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 465 H the word “*suspicion*” was defined as meaning an absence of certainty and of adequate proof. The Court went on to refer to the remarks of Lord Devlin in the Privy Council in *Shaaban Bin Hussien and Others v Chong Fook Kam and Another* [1969] 3 ALL ER 1626 at 1630 in which the word “*suspicion*” in its ordinary meaning “*was defined as a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove. Suspicion arises at or near the starting point of investigation of which the obtaining of prima facie proof is end*”.

[32] Van Dirckhorst J in *Duncan* held that the grounds for a suspicion are not limited to facts which can be proved in Court. He pointed out that a reasonable suspicion could also conceivably be formed where a person has been seen at the scene of a crime and upon being questioned gives a false alibi or refuses to answer questions.

[33] I do, however, recognise that there may be a tension between the need to combat crime and the right of the citizens not to be deprived of their liberty. As was correctly pointed out by Van Dijkhorst J in *Duncan* at 466D – F):

“The power of arrest without a warrant is a valuable means of protecting the community. It should not be rendered impotent by judicial encrustations not intended by the Legislature. On the other hand the law is jealous of the liberty of the subject and the police in exercising this power must be anxious to avoid mistaking the innocent for the guilty. They often have to act on the spur of the moment with scant time to reflect, but they should keep an open mind and take notice of every relevant circumstance pointing either to innocence or to guilt.”

[34] On the other hand, Mr Jacobs SC for the defendant submitted that the circumstances under which the plaintiffs were arrested justified a reasonable suspicion. This submission was founded upon the following facts:

- 34.1 A dark grey Toyota Yaris bearing registration letters CA 169976 was seen at the scene of the crime on 26 February 2009 at about 21h00.
- 34.2 Mawu was the registered owner of a black Toyota Yaris bearing similar registration letters;
- 34.3 There was no suggestion that Mawu’s vehicle had been reported stolen at the relevant time;
- 34.4 When Mawu was asked about the whereabouts of her vehicle at the relevant time she refused to co-operate and lied about time. In this regard it was submitted by Mr Jacobs that Mawu’s vehicle could not have been parked at her friend’s house at 21h30 because, he argued, when Van Zyl touched its bonnet at 23h00 it was still warm and the person at

whose house the vehicle was parked told Van Zyl that it was parked “*just now*”.

34.5 Mawu also gave conflicting versions as to where the car keys were when asked by Van Zyl to produce them;

34.6 After arresting Mawu, when Van Zyl searched her car he found two cellphone chargers and a small Sony Playstation. He found a Nokia cellphone and a wrist watch in the house. When Mawu was asked about ownership of these items she said they did not belong to her.

[35] Mr Jacobs accordingly submitted that on these facts Van Zyl had to arrest Mawu and there was no duty on him to have obtained collateral information before doing so. An analysis of Van Zyl’s evidence is necessary in order to assess the correctness of Mr Jacobs’ submissions. The question is whether these facts, to which Mr Jacobs referred, are sufficient to establish the jurisdictional requirements for a valid arrest in terms of s 40 (1) (b) of the Act, if so, whether Van Zyl properly exercised his discretion when he decided to arrest the plaintiffs.

[36] It is apparent from Van Zyl’s testimony that he could not have taken a decision to arrest Mawu when he confronted her about the whereabouts of her vehicle. He took a decision to arrest her when he later returned with Mawu to her house from her friend’s house. This is borne out by Van Zyl’s assertion that he arrested Mawu because she lied about the whereabouts of her vehicle at the relevant time and she had items in her car and in her house which she said did not belong to her.

[37] With regard to the first ground on which Van Zyl relied for his decision to effect the arrest, it is not correct that Mawu lied about the whereabouts of her vehicle at the

relevant time. Her evidence was that it had been parked in front of her house until she went to park it at her friend's house at about 21h30 – 22h00. As to the second ground, namely that certain items were found in her car and in her house which she said did not belong to her, it could not have served as a valid reason on which to found a reasonable suspicion. This is so because at the time of the arrest of Mawu, Van Zyl did not know what goods were stolen from the victim. He had not received a statement from the victim. One cannot draw a possible inference of untruthfulness from the fact that she disavowed ownership of the relevant items bearing in mind that on a day in question she had a party at her house and a reasonable possibility exists that those items belonged to some of her guests who might have forgotten to take them with when they left.

[38] Moreover, when Van Zyl proceeded to Mawu's house the information he had in his possession was that a dark grey Toyota Yaris with registration letters CA 169976 was used in the commission of an offence. He was therefore looking for a dark grey Toyota Yaris with registration letters CA169976. He did not find a dark grey Toyota Yaris but found a black Toyota Yaris albeit with similar registration letters. That discrepancy should have alerted him to the possibility that this was not the vehicle he was looking for and should not have for that reason arrested Mawu. It is correct that there are similarities in terms of make and registration letters between the vehicle he was looking for and Mawu's vehicle. But he should have investigated the discrepancy to verify his information because such discrepancy weakened the inference of a possible involvement of Mawu's vehicle in the commission of the relevant crime. A reasonable possibility existed that Mawu's vehicle's registration letters were duplicated by unknown persons for the purposes of committing the crime in question. In my view, a reasonable policeman would no longer have good grounds of suspicion, and he

would not have arrested Mawu. The information he thus far had could not serve as a basis on which to arrest Mawu; it was sufficient for the purposes of conducting further investigations.

[39] There are also serious contradictions in Van Zyl's evidence which in my view render his evidence less reliable. In his statement he made shortly after the arrest of the plaintiffs Van Zyl stated:

“Om 23:00 spreek ek die eienaar van Toyota Yaris Reg. CA 16..... by haar woning te 2.... Be..... H..... Nyanga. Sy wys my haar voertuig uit en kon nie aan my verduidelik wie vroeër haar voertuig gery het nie. Mev Mawu wou geen samewerk verskaf nie.”

[40] This version is inconsistent with his testimony. It was not his evidence that he had asked Mawu to tell him who drove the vehicle concerned at the relevant time. His evidence, which is consistent with Mawu's version, is that he asked her about the whereabouts of her vehicle at 21h00 on 26 February 2009.

[41] I accept Mawu's version that at a time of her arrest she was not informed why she was required to account for the whereabouts of her vehicle. Her version is consistent with her warning statement in which she said: *“I didn't know what was happening, no one explained to me or read my rights to me”*. Her version also finds corroboration in Ali's evidence. She testified that when she saw Mawu being escorted by the police out of the house she asked her what was happening and Mawu's response was that she did not know.

[42] Had Van Zyl explained to her why he was interested in knowing of the whereabouts of her vehicle Mawu would in all probability have told him where her vehicle was and why she had taken it to her friend's house. His failure to inform Mawu of the nature of the allegations against her deprived her of the opportunity to provide information which Van Zyl was bound to consider in deciding whether or not to arrest her. In the circumstances, I find that the defendant has failed to show that the arrest of Mawu was lawful. Her subsequent detention which followed upon her arrest was similarly unlawful.

[43] It is also not clear why Mawu's warning statement, on the basis of which she was later released on 2 March 2009, was only taken on 28 February 2009, some two days after her arrest. In light of the fact that her release was secured as a result of what she stated in her warning statement, it is reasonable to infer that had her warning statement been obtained before 28 February 2009, it would have been clear to Van Zyl and/or Inspector Uys (the investigating officer) that her detention was not necessary at all. In the circumstances, I find that the suspicion entertained by Van Zyl was not a reasonable suspicion. It therefore follows that her arrest is not justified by s 40 (1) (b), and hence that it was unlawful. Her subsequent detention is accordingly also unlawful.

[44] I turn now to consider the lawfulness of Ali's arrest. There is a dispute as to why, when and by whom she was arrested. Her version is that she was arrested by the two police officers from Nyanga police station for having been responsible for the escape of Siya from custody. She says after her arrest she was taken to where Mawu was. This version is denied by Van Zyl. According to his testimony, he arrested her at Mawu's house for armed robbery and for the escape of Siya. He was informed by the

two police officers, whom he had asked to keep guard of Siya, that Ali was responsible for Siya's escape. Ali's version that she was arrested for the escape of Siya by the two policemen who had remained behind at Mawu's house, is corroborated by Mawu's evidence. In her (Mawu) warning statement, she mentioned that while at her friend's place, the said two police officers joined them with Ali in the van. Mawu was also put in the same van. It is clear therefore that Van Zyl could not have physically arrested Ali at Mawu's place. I find that Ali's version that her arrest was effected by the two police officers from Nyanga police station at Mawu's place is probable. On Van Zyl and Mawu's versions, Ali was asked to lock up the house while Mawu took Van Zyl to where the vehicle was. Van Zyl's testimony makes it clear that Ali could not be considered a suspect at that stage. On Van Zyl's version after locking up the house, there would have been no reason for Ali to have remained at Mawu's place with the two policemen from Nyanga. She would have gone to her house which is not far from Mawu's house. Van Zyl would not have found her at Mawu's house when he later returned with Mawu. According to Mawu's warning statement when they returned at her house after having been at her friend's house Van Zyl wanted to search her house. Mawu obtained the house keys from the policeman who had taken their possession from Ali after her arrest and she opened the house for Van Zyl. It was not disputed that Mawu got the keys, with which she opened the house, from the policeman concerned. Ali's version that she was arrested by the two policemen from Nyanga police station is more logical and reasonable whereas Van Zyl's version is not.

[45] I therefore find that Ali was arrested by the two policemen from Nyanga police station. As they were not called to testify to justify the lawfulness of Ali's arrest, I conclude that Ali's arrest was unlawful. It is not suggested by the defendant that the two policemen were not available to give evidence regarding the arrest of Ali. The

defendant's failure to call them as witnesses in my view leads naturally to the inference that it feared that their evidence would expose facts unfavourable to it (*Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 750; *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A) at 715F). The defendant bears the *onus* to prove the lawfulness of the arrest. (*Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (A) at 840). I agree with Ms Mziba's submission that Van Zyl's evidence does assist the defendant in discharging the *onus* as he did not arrest Ali. It is not his evidence that he instructed the two policemen from Nyanga to arrest Ali in which case his evidence on why he gave such instruction would have been sufficient to justify the lawfulness of the arrest. But on the evidence he did not arrest Ali nor did he give instructions for her arrest. It follows therefore that Ali's arrest and detention were unlawful.

[46] In the result, the following order is made:

1. The defendant is liable to the plaintiffs for the damages they each suffered as a result of their unlawful arrest on 26 February 2009 and their subsequent detention.
2. The defendant is ordered to pay the plaintiffs' costs.

D H ZONDI
JUDGE OF THE HIGH COURT