

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2283/2017

In the matter between:

CORNELIUS JOHANNES SCHOOMBEE

Plaintiff

and

MINISTER OF POLICE

Defendant

DATE OF HEARING : 01 DECEMBER 2022

DATE OF JUDGMENT : 06 FEBRUARY 2023

FOR THE PLAINTIFF : ADV. ZWIEGELAAR

FOR THE DEFENDANT : ADV. MMOLAWA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 06 February 2023.

ORDER

Consequently, the following order is made:

- (i) The plaintiff's claim is dismissed.**
- (ii) The plaintiff is ordered to pay the costs of suit on the scale as between part-and-party on the High Court tariff, to be taxed.**

JUDGMENT

HENDRICKS JP

[1] The plaintiff instituted an action for damages as a result of unlawful search and seizure at his property (farm) [claim 1] and unlawful arrest and detention [claim 2]. At the inception of the trial, claim 1 was withdrawn and the plaintiff only forged ahead with claim 2. It was ordered that liability (merits) be separated from quantum in terms of Rule 33 (4) of the Uniform Rules of Court

and the trial only proceeded on the merits. The defendant denied liability and based its defence on section 40 (1) (g) of the Criminal Procedure Act 51 of 1977(CPA), as amended read with the provisions of section 2 and 6 of the Stock Theft Act 57 of 1959, as amended, contending that the arrest and subsequent detention of the plaintiff was lawful.

- [2] The defendant who alleged that the arrest was lawful, bare not only the onus to prove that the arrest was lawful seeing that any invasion of the right to liberty, which is entrenched in the Bill of Rights and Constitution of the Republic of South Africa Act 105 of 1996 is prima facie unlawful, but also the duty to begin. As such the defendant led the evidence of three (3) witnesses namely Warrant Officer (W/O) Cocks, Warrant Officer (W/O) Monyadi and Lieutenant Colonel (Lt. Col) Mokgatle. To avoid prolixity, a concise and succinct summary of their evidence is that W/O Cocks testified that on 22 October 2014, he was on duty around Zeerust and Lehurutshe when at between 11h30 am and 12h00, he received a message that cattle were going to be delivered at Kareespruit abattoir. He immediately proceeded there together with W/O Monyadi. Upon their arrival, they found that the cattle had not yet arrived. They then went back to the police station.
- [3] Between 15h00 and 16h00, he received a message that the cattle had arrived. They went to the abattoir again where, upon their arrival, he and W/O Monyadi found that ten (10) herd of cattle had already been dropped off. He

checked the brandmarks of those cattle and found that three (3) out of the ten (10) cattle had K11 brand marks, which according to him, was a brandmark used only in the Republic of Botswana, a neighbouring country.

[4] He then enquired from Mr Coetzee, who had brought those cattle to Kareespruit abattoir, to ascertain who the owner of the cattle was. Mr. Coetzee told him that the cattle belonged to Mr Schoombee, the plaintiff in this matter. He said he then took down a statement from Mr Coetzee, who also gave him the documents that he used for transporting the cattle to Kareespruit abattoir. He then made a call to the plaintiff who arrived at Kareespruit abattoir shortly thereafter.

[5] Upon enquiring from him about the cattle, the plaintiff said the cattle belonged to him. He also took down the plaintiff's statement and requested him to provide him with the documents that indicate who the person in Botswana is from whom he bought the three (3) cattle with K11 brand marks. W/O Cocks further explained to the plaintiff that the documents only served as transportation documents and are not proof from whom he brought the cattle. The plaintiff then informed him that he would bring the documents to his office. However, the plaintiff never brought the requested documents to him.

- [6] W/O Cocks requested the people at Kareespruit abattoir to keep those three (3) cattle, as he had already contacted the Botswana police who had promised to come the following day, 23 October 2014. However, the Botswana police were unable to come on that day but only managed to come on 29 October 2014. The three (3) cattle were impounded and taken to Lichtenburg pound on 23 October 2014, for safekeeping.
- [7] On 29 October 2014, W/O Cocks proceeded to Lichtenburg pound together with the police from Botswana. The Botswana police were in the company of some of Botswana citizens, who might have lost their cattle, to see if they would be able to identify any of the three (3) cattle as their stolen cattle. Mr. Jacob Itumeleng Mokenke from Botswana was able to identify one (1) cow amongst the three (3), as belonging to his mother. After that, the policeman from Botswana, Constable Innocent Modongo Mothoka, started scanning the three (3) cattle. The scan revealed two (2) bolus numbers in two (2) of those three (3) cattle. Constable Mothoka then took those bolus numbers to their Veterinary Department in Botswana to establish to whom the bolus numbers belonged.
- [8] W/O Cocks then took down the statement of Mr. Jacob Itumeleng Mokenke, who identified one (1) cow as belonging to his mother by the brand mark

JTM. The certificate of registration shows that the brand mark JTM was registered in his mother's name, Mrs. Motlatsi J. Mokenke.

- [9] According to W/O Cocks, the three (3) cattle were not taken to Botswana on 29 October 2014, but were taken there at a later stage. He could not say when were the three (3) cattle transported from Lichtenburg to Botswana by the Botswana police, as by then the docket had already been taken from him, two (2) days after 29 October 2014. By then the plaintiff had not yet given him documents of proof of purchase showing where he bought the cattle from.
- [10] He was then cross examined by counsel for the plaintiff. Under cross examination he confirmed that Mr. Jacob Itumeleng Mokenke identified one (1) of the three (3) cattle with a brand mark JTM as belonging to his mother. Asked why the brand mark JTM was not appearing on proof of receipt, W/O Cocks said he only wrote K11 as it was the one he was able to see. Asked what were the documents that plaintiff was supposed to furnish him with, he said the document he wanted from the plaintiff was the document of identification as required in terms of section 6 of the Stock Theft Act 57 of 1959, which is a document showing the person from whom he bought the cattle as well as removal certificates in terms of section 8 of Act 57 of 1959, and not the documents provided. W/O Cocks further stated that the K11

brand mark is used for a particular area or village in Botswana and that JTM is the brandmark of the owner of the cattle.

[11] W/O Monyadi confirmed the events of 22 and 23 October 2014 when he was with W/O Cocks at Kareespruit abattoir. He confirmed further that three (3) out of ten (10) cattle had K11 brand marks, which is only used in Botswana. According to him, apart from the K11 brand mark, there were other brand marks on the three (3) cattle that were not completely visible, except for plaintiff's brandmark that was clearly visible.

[12] He testified that on 24 October 2014, he was on duty when he received a phone call from his informant at Kareespruit abattoir, that an employee of Mr Schoombee, (the plaintiff), namely, Mr Coetzee had brought seven (7) cattle. He drove from where he was and proceeded to Kareespruit abattoir where upon his arrival, he was informed by an employee at Kareespruit abattoir, that the cattle had been slaughtered.

[13] While talking to this employee, Mr. Thapelo another employee at Kareespruit abattoir, approached him whilst having two metals in his possession, which he was able to recognise as boluses (microchips) from Botswana. When he asked him where he got the boluses from, Mr. Thapelo told him he found

them in the intestines of cows numbered six (6) and seven (7) on the list provided, which formed part of the said seven (7) cattle brought by Mr. Coetzee. W/O Monyadi then called Mr Steyn, the owner of Kareespruit abattoir and showed him the two boluses. It was then that Mr Steyn went to look for the documents which were used to bring the cattle to his Kareespruit abattoir. Mr Steyn gave W/O Monyadi the documents that showed that the cattle were brought there by Mr Coetzee, an employee of the plaintiff.

[14] He then took out his phone and called the plaintiff and requested the requisite documents, who told him that as he was at Lobatla village, Mr Coetzee will be the one to bring the documents. Indeed Mr Coetzee arrived there with documents that he said were given to him by the plaintiff for purposes of bringing the cattle to Kareespruit abattoir. Shortly thereafter, the plaintiff also arrived at the abattoir. After W/O Monyadi had shown him the boluses, the plaintiff asked him about the boluses. He told the plaintiff that boluses are only used in Botswana and not in South Africa.

[15] Thereafter, he stood aside with plaintiff in order to take down his statement. After taking down his statement, he then called W/O Cocks to come and load the carcasses, as the vehicle he was driving was too small. W/O Cocks came but as they did not have a fridge which was big enough to put all the meat in

it, they then asked Mr Steyn to keep the meat for them. Mr Steyn agreed. Thereafter they left with the boluses.

[16] W/O Monyadi then contacted Constable Mothoka of the Botswana police to come with a bolus reader to determine who the boluses belong to, in order to determine who the owners of the carcasses were. Constable Mothoka then told him he would come on 27 October 2014. Indeed, Constable Mothoka came to see W/O Monyadi at his office on that day, having a bolus reader with him. He scanned the two boluses separately for a code number. After obtaining the code numbers, being H982000147137401 and H971000002069254, he noted them and said he would take those code numbers to their Veterinary Department in Botswana.

[17] After some time, Constable Mothoka contacted W/O Monyadi and told him that the owners of the two (2) carcasses have been identified. W/O Monyadi added that, they were also given a report indicating that the slaughtered cattle belonged to Mokgatle and Rachere. The report he is referring to is contained in the affidavit of a Botswana veterinary officer, Mr. Obuile Raboloko.

[18] Suffice to state that the bolus numbers noted and taken by Constable Mothoka correspond with those in Mr Raboloko's report, which shows the date of insertion of the bolus, brandmarks, the brand shape, the colour and the respective owners of the said cattle. The registered brandmark F5L belonged to Rachere Lekone while the registered brandmark F16S belonged to Buisanyang Mogatle.

[19] W/O Monyai testified further that sometime after 27 October 2014, the Botswana police came with the owners of the slaughtered cattle being Lekone and Mogatle. As they could not take the meat across the border, they both came to an agreement with Mr Steyn, the owner of the abattoir, to sell the carcasses to him. After telling Mr Steyn, who the owners of the slaughtered cattle were, he then gave W/O Monyadi a document called a "Slag Sertifikaat".

[20] With reference to the document of identification, W/O Monyadi testified that he was given this document by Mr Coetzee, after the plaintiff had told him that Mr Coetzee will be the first to arrive at Kareespruit abattoir. He went on to say that Mr Coetzee gave him this document after telling him that he wanted proof of where they bought these two cattle from. As the document did not show who the seller and the buyer were, he then told Mr Coetzee that he will speak to the person who sent him, meaning the plaintiff.

- [21] When the plaintiff arrived later that afternoon of 24 October 2014, he enquired from him about the proper document of identification. The plaintiff told him that he would give him the documentation later but he never gave him proper documentation. He testified that by proper documentation he meant the document in terms of section 6 of Act 57 of 1959, and not the two documents who were used only to transport the cattle from Jagersfontein, the farm of the plaintiff, to Kareespruit abattoir.
- [22] His version that he requested the plaintiff on several occasions to furnish him with proper documentation but to no avail can be gleaned from entries in the Investigation Diary of the dockets dated 14 November 2014, 02 December 2014, and 05 December 2014, respectively.
- [23] Under cross examination, W/O Monyadi testified that though all ten (10) cattle brought to Kareespruit abattoir on 22 October 2014 had plaintiff's brand mark, only three (3) of them had K11 brand marks, He further stated that although the cattle had other brand marks, these brand marks were however not clearly visible. With reference to the slaughtered cattle, he said he could not see their brand marks as the hides have been cut and damaged.

[24] As alleged proof that plaintiff furnished him with the required transaction documents insofar as the two (2) carcasses and the other three (3) cattle were concerned, W/O Monyadi was referred to some documents. When a comment was sought from him about these documents, W/O Monyadi was steadfast that plaintiff had never provided them (the police) with proper transaction documents with regard to the two (2) carcasses and the other three (3) cattle.

[25] Lieutenant Colonel (Lt Col.) Mokgatlhe testified that before the arrest of the plaintiff on 18 December 2014, he had been posted to Lehurutshe Stock Theft Unit on intervention duties, which entailed, *iter alia*, inspection of the dockets of the Stock Theft Unit. In the course of his duties, he came across three (3) dockets which had one thing in common, to wit the name of Mr Schoombee, the plaintiff in this matter.

[26] According to him, upon inspecting these three (3) dockets, in two (2) of the three (3) (being Zeerust CAS No. 73/12/2014 and Zeerust CAS No. 74/12/2014), no documents in terms of section 6 of Act 57 of 1959 were given or provided by the plaintiff. In those two (2) dockets, the owners of the cattle from Botswana had reported them missing. Inspection of CAS 73 revealed that three (3) cattle out of ten (10) had been impounded as they had Botswana brand marks, which was K11. He said in respect of CAS 74, he

found that two (2) cattle had been slaughtered and boluses had been found inside the intestines.

[27] As he went through those two (2) dockets, he discovered that the plaintiff had repeatedly been requested to provide section 6 documents of identification, i.e., proof of where he got the cattle from before he became the owner thereof. He said those documents were not in any of the two dockets. He became aware upon reading the docket of W/O Cocks (CAS 73) that he requested the plaintiff to furnish him with proper section 6 documentation, but he failed to do so. Similarly, on reading W/O Monyadi's docket (CAS 74), he realized that he requested the plaintiff to furnish him with proper documentation, but he also failed to do so.

[28] He stated that the only documents he found in CAS 73 were those which indicated that the cattle were brought from plaintiff's Jagersfontein farm to Kareespruit abattoir by Mr Coetzee on 22 October 2014. According to him, those documents did not comply with section 6 of Act 57 of 1959 as they did not indicate who the seller and the buyer were. He testified that upon perusal of ZEERUST CAS No. 79/12/2014, being documents relating to the six (6) cattle that were stolen from Botswana and were found at plaintiff's farm, he realized that the plaintiff had provided proper section 6 documentation that indicated who sold the cattle to him.

[29] After having fully acquainted himself with the contents of the dockets, he then telephoned the plaintiff on 18 December 2014 and requested him to come and see him at Lehurutshe Stock Theft Unit offices, and to bring along with him documents relating to CAS 73 and CAS 74. Upon his arrival, he approached the plaintiff and introduced himself to him. He then told the plaintiff that he needed documents of identification regarding the two (2) carcasses and the three (3) cattle.

[30] When the plaintiff told him that he did not have them with him, he said it was then that he informed him that he was arresting him for being in possession of livestock that was suspected to have been stolen. He explained to him that he was arresting him only in respect of CAS 73 and CAS 74 and not in respect of CAS 79. He then explained his rights to him, including the right to apply for bail. After doing that, the plaintiff requested him to make a call to his attorney. The plaintiff called his attorney, after which he then handed him over to the investigating officer to detain him.

[31] Before parting ways with the plaintiff, he completed both Notices of Rights in terms of section 35 of the Constitution of the Republic of South Africa Act 108 of 1996. With regard to CAS 73, he said although he wrote ten (10) cattle on the section 35 notice, he actually charged him with being in possession

of three (3) out of the ten (10), and in relation to CAS 74 he charged him with being in possession of two (2) suspected stolen carcasses.

[32] He said he did not serve him with written summons to appear in court nor did he apply for a warrant for his arrest as the offences were of a serious nature. He stated further that notwithstanding numerous requests to furnish documents of identification in terms of section 6, the plaintiff failed to do so. According to him, and in view of the plaintiff's failure to comply with the repeated requests, he exercised his discretion to arrest the plaintiff. Under cross examination he confirmed that despite numerous requests to provide documentation as proof of purchase, the plaintiff failed to do so. He said the plaintiff did not bring along documentation as he requested him to do when he called him to come to the Stock Theft Unit on 18 December 2014.

[33] When it was put to him that the plaintiff did not provide fraudulent documents as appear in the defendant's plea, his response was that the documents provided by the plaintiff were transportation documents that have not been lawfully filled in as required by section 6 of the Stock Theft Act. He said he told the plaintiff to bring along documents of identification so that on his arrival at the Stock Theft Unit, he should not go back to fetch it and then come back again. When it was put to him that the plaintiff caused the documents to be furnished to the members of the Lehurutshe Stock Theft

Unit prior to his arrest on 18 December 2014, his reply was that the plaintiff never provided the required documents as the entries in the docket showed that he failed to do so.

[34] He denied the suggestion under cross examination that he did not read the Notices of Rights to the plaintiff. On the contrary, he stated that after reading them to him, it was then that the plaintiff requested to call his attorney, which request was granted to him. He confirmed that he charged the plaintiff with three (3) out of ten (10) cattle as these three (3) were identified to be stolen cows from Botswana. When he was referred to the affidavit of Lieutenant (Lt.) Solomon Kgotlaetsile Modisane of the Forensic Science Laboratory, that it referred to the brand mark J11 and not K11, he said it meant that both W/O's Cocks and Monyadi mistook the letter J for K. According to him, J11 was revealed by the person who came and used an instrument to shave the cows.

[35] After the cross examination of Lt. Col. Mokgathe, the defendant closed his case, whereafter an application was brought on behalf of the plaintiff for judgment in his favour without leading evidence and without plaintiff closing his case. This application was dismissed. The reason for refusal of the application for absolution from the instance at the close of the case for the defendant, was simply because a case has been made out for the plaintiff to

answer and that this Court could not at that stage find in favour of the plaintiff.

[36] The plaintiff testified in rebuttal of the evidence tendered for and on behalf of the defendant. His evidence in summary is to the effect that he is the owner of Extreme Beef butchery, which business he started in October 2014. His employees, especially Mr Coetzee and Mr Swart, used to buy cattle on his behalf after having given them money for that purpose. He also used to buy cattle himself. He said he gave specific instructions to Mr Coetzee and Mr Swart regarding proper procedure to be followed when buying cattle by completing paper work as required by sections 6 and 8 of the Stock Theft Act 57 of 1959. For purpose of slaughtering cattle for his butchery, he would make use of Kareespruit or Joff abattoirs.

[37] On 22 October 2014, he instructed Mr Coetzee to take ten (10) cattle for slaughtering at Kareespruit abattoir. He was then called to come to Kareespruit abattoir as there was a problem with those cattle. Upon his arrival at Kareespruit abattoir, he was told that two (2) or three (3) cattle had K11 brand marks, which was found to be Botswana brand marks. They also had South African brand marks. He said the documents were used for transporting the cattle to the abattoir. He said only seven (7) cattle were slaughtered as the other three (3) were impounded by the police.

[38] With reference to the events of 24 October 2014, he said he had once more requested Mr Coetzee on 23 October 2014 to transport seven (7) cattle to Kareespruit abattoir for slaughtering. On 24 October 2014, and while he was at Lobatla Village, he received a call from W/O Monyadi, who informed him to come to Kareespruit abattoir as there was something wrong with the cattle. Upon his arrival at Kareespruit abattoir, Mr Steyn the owner of the abattoir, told him that the police had found two (2) boluses in two (2) of the slaughtered cattle. He told Mr Steyn that he did not know what the boluses were. The meat of the two (2) carcasses was impounded by the police and the carcasses of the other five (5) cattle were taken to his butchery.

[39] He testified that he provided the required documentation pertaining to the purchase of twenty-three (23) herd of cattle prior to his arrest on 18 December 2014, which included the purchase of the three (3) and two (2) slaughtered cattle respectively. As purported proof thereof he referred to some documents. He confirmed that he was arrested on 18 December 2014 at Lehurutshe Stock Theft Unit after he was called to come there by a certain Captain Mokgathe from Phokeng Stock Theft Unit. Although he signed both Notices of Rights whilst he was there, these were never explained to him by Captain Mokgathe. He confirmed that Captain Mokgathe informed him that he was detaining him overnight and could apply for bail the following day, 19 December 2014, on which day he was released on bail. It is common cause that by saying Captain Mokgathe, he was referring to Lt. Col. Mokgathe.

[40] Under cross examination, when he was asked where he bought the three (3) cattle with K11 or J11 brand marks from, he said he couldn't say with certainty where he brought them from. He said that the documents referred to above were furnished to the police prior to his arrest. He admitted under cross examination that the three (3) cattle that were taken to Lichtenburg pound were never given back to him because they did not lawfully belong to him. He said upon inspecting the cattle while he was at Kareespruit abattoir, he could see that the three (3) had either J11 or K11 brand marks, his own brand mark and the one of the person he bought the cattle from. When he was asked to indicate in the documentation in relation to the fact that the three (3) and two (2) slaughtered cattle belonged to him, he was unable to point out in any of those documents to serve as proof of purchase of the said three (3) and two (2) slaughtered cattle.

[41] When a comment was sought from him that, contrary to his version that he provided, all documentation to the police prior to his arrest, Modise and Sebogodi's documents were submitted to the police **after** his arrest on 12 January 2015, he was unable to answer that question. When asked what happened to the two (2) carcasses, he said Mr Steyn bought them and he was not paid anything. This is despite his assertion that he was the lawful owner of the two (2) carcasses.

[42] It is trite law that the onus rests on a defendant to justify an arrest. In **Minister of Law and Order v Hurley and Another** 1986 (3) SA 568 (A) at 589 E to F the following is stated:

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just that the person who arrested or caused the arrest of that persons .should bear the onus of proving that his action was justified in law":

- See also:
- **Mhaga v Minister of Safety and Security** [2001] 2 ALL SA 534 (TK);
 - **Manalaza v MEC for Safety and Security Eastern Cape** [2001] 3 ALL SA 255 (TK);
 - **Ralekwa v Minister of Safety and Security** 2004 (1) SACR 131(TPD) paragraph [9] at 124 H;
 - **C F Cele v Minister of Safety and Security** [2007] 3 ALL SA 365(0);
 - **Zealand v Minister of Justice and Constitutional Development** 2008 (2) SACR 1 (CC) paragraph [24] at 11;
 - **De Koker v Minister of Safety and Security** 2010 (2) SACR 595 (KZD) paragraph [24] at 600 H;
 - **Minister of Safety and Security v Sekhato** 2011 (1) SACR 315 (SCA) paragraph [7] at 321 C;

- **Botha v Minister of Safety and Security and others and January v Minister of Safety and Security and Others** 2012 (1) SACR 305 (ECP) paragraph [29] at 316 C to D;
- **Minister of Safety and Security v Swart** 2012 (2) SACR 226 (SCA) paragraph [19] at 232 B to C;
- **Minister of Safety and Security v Ndlovu** 2013 (1) SACR 339 (SCA) paragraph [9] and [10] at 342 H to 343 B;
- **Minister of Police v Du Plessis** 2014 (1) SACR 217 (SCA) paragraphs [13] and [16] at 342 H to J;
- **Botha v Minister of Police** 2014 (2) SACR 601 (GP) paragraph [30] at 608 D;
- **Van Heerden v Minister van Veiligheid en Sekuriteit** 2014 (2) SASV 346 (NCK) paragraph [124] at 374 F;
- **Mawu v Minister of Police** 2015 (2) SACR 14 (WCC) paragraph [24] at 21 B to F; and
- **Scheepers v Minister of Safety and Security** 2015 (1) SACR 284 (ECG) paragraph [2] at 287 C.

[43] In the **Zealand-matter** (*supra*) the Constitutional Court (CC) said in paragraph [25] at 11 D to 12 C:

"It has long been established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.

...

There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."

[44] The Supreme Court of Appeal (SCA) has held in paragraph [15] of its judgment in the matter of **Minister of Police v Du Plessis** (*supra*) at page 223 at paragraph 8:

"Our new constitutional order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which have always in even the dark days of apartheid been judicially valued, and to ensure that the excesses of the past would not recur. The right of liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values human dignity, the advancement of human rights and freedom. Put simply we as a society place a premium on the right of liberty."

[45] Section 40 (1) (g) of the Criminal Procedure Act provides:

“40 Arrest by peace officer without warrant

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

(a)

(b)

(c)

(d)

(e)

(f)

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

(my own underlining).

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

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

(b) the arresting officer must entertain a suspicion;

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

(d) the suspicion must be that the arrestee was or is in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.

[47] Section 2 of the Stock Theft Act creates the offence of failure to give satisfactory account of possession of stock or produce in that any person who is found in possession of stock or produce in regard to which there is a reasonable suspicion that it has been stolen, and is unable to give a satisfactory account of such possession, shall be guilty of an offence. In terms of section 6 of the Stock Theft Act, failure to furnish documents of identification by a person who disposes of stock to another shall be guilty of an offence.

[48] Section 9 of the said Stock Theft Act 57 of 1959 (“the Stock Theft Act”) provides that :-

“ 9. Arrest and search without warrant

(1) Any person may, without warrant, arrest any other person upon reasonable suspicion that such other person has committed the offence mentioned in section two or four.

(2) Whenever any justice of the peace, policeman, or owner, lessee or occupier of land reasonably suspects that any person has in or under

any receptacle or covering or in or upon any vehicle any stock or produce in regard to which an offence has been committed, such justice of the peace, policeman, owner, lessee or occupier may without warrant search such receptacle or vehicle and remove such covering, and if he thereupon finds any stock or produce in regard to which he reasonably suspects an offence to have been committed, he may without warrant arrest such person and seize such vehicle or receptacle and shall as soon as possible convey such person and the stock or produce so found and the vehicle or receptacle so seized to a police station or charge office."

On a proper meaning and construction of section 9, this simply means that a reasonable suspicion of contravening the Stock Theft Act justifies the arrest without a warrant.

[49] The defence to the wrongful arrest which was pleaded on behalf of the defendant in his plea was that the plaintiff was arrested in terms of section 40(1)(g) of the Criminal Procedure Act, Number 51 of 1977 ("the Criminal Procedure Act") on a reasonable suspicion of being or having been in unlawful possession of stock or produce in contravention of section 2 read with section 6 of the Stock Theft Act.

[50] Section 40(1) of the Criminal Procedure Act deals with the arrest by a peace officer without warrant and paragraph (g) thereof provides that a

peace officer may without a warrant, arrest any person who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce.

[51] It is trite that a defendant who relies on one of the defences created by section 40(1) of the Criminal Procedure Act has to prove the jurisdictional facts for such a defence on a balance of probabilities. It is clear from the wording of section 40(1) of the Criminal Procedure Act that it is only when all the jurisdictional facts for the defences created therein are satisfied that the peace officer may invoke the power conferred by it and it is only then that the peace officer would be empowered to, in his discretion, arrest without a warrant. It is also clear that it is the peace officer who makes the arrest that must entertain the reasonable suspicion.

See:

- **Minister of Justice v Ndala** 1956 (2) SA 777 (TPD) at 779H to 780 A; and
- **Ralekwa v Minister of Safety and Security** 2004 (1) SACR 131(TPD) paragraph [14] on 1.36 G.

[52] It is clear from the wording of section 40 (1) of the Criminal Procedure Act that the suspicion must rest on reasonable grounds. Like in the instance of paragraph (a), (f), (h), (k), (l), (m), (n), (o) and (q) of that sub-

section, the objective standard of a reasonable man, to wit whether a reasonable man would in the circumstances have harboured the suspicion that the suspect (arrestee) is or has been in unlawful possession of stock or produce as contemplated therein.

- See:
- **R v Van Heerden** 1958 (3) SA 150 (T);
 - **Bentley and Another v McPherson** 1999 (3) SA 854 (ECO) at 860;
 - **Mvu v Minister of Safety and Security** 2009 (2) SACR 291 (GSJ); and
 - **Minister of Safety and Security v Swart** 2012 (2) SACR 226 (SCA) paragraph [20] at 232 D.

[53] It has been stated in **Mabona and Another v Minister of Law and Order and Others** 1988 (2) SA 654 (SE) at 658 E to H:

“The test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective. S v Net and Another 1980 (1) SA 28 (E) at 33 H. 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 ... (the offence). 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. A 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 engage in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on reasonable grounds. Otherwise, it will be flightily or arbitrary, and not a reasonable suspicion."

[54] To reiterate, it is trite that any deprivation of liberty, inherent in arrest and detention by the police is *prima facie* unlawful. See **Minister of Justice v Hofmeyr** 1993 (3) SA 131(A). The defendant bears the onus of proving the existence of grounds of justification for the arrest or otherwise stated that the arrest was lawful. In **Minister of Law and Order and others v Hurley and another** 1986 (3) SA 568 (A) Rabie CJ stated as follows:

"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law."

[55] The jurisdictional facts for a defence premised on s 40(1) (b) were set out in **Duncan v Minister of Law and Order** 1986 (2) SA 805 (A) at 818G-H as follows:

- (i) *the arrestor must be a peace officer;*
- (ii) *the arrestor must entertain a suspicion;*
- (iii) *the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and*
- (iv) *the suspicion must rest on reasonable grounds.'*

[56] Once the jurisdictional requirements of s 40(1) (b) of the Criminal Procedure Act are satisfied, the peace officer is vested with a discretion, to arrest as sanctioned by law. The discretion is to be exercised rationally and not arbitrarily. In this regard, the Court in **Mabona and Another v Minister of Law and Order and Others** 1988 (2) SA 654 (SE) remarked as follows:

"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."

(emphasis added)

[57] In **Minister of Safety and Security v Magagula** (991/2016) [2017] ZASCA 103 (6 September 2017) at paras 9-10, Lamont AJA further clarified the question of reasonable suspicion as follows:

“9. *In Shabaan Bin Hussein and Others v Chong Fook Kam & another* [1969] 3 All ER 1627 it was held that a suspicion 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking; I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end'. See *Powell NO & others v Van der Merwe NO & others* 2005 (5) SA 62 (SCA) para 36: *Woji v Minister of Police* [2014] ZASCA 108; 2015 (1) SACR 409 (SCA)

10. The suspicion of the arresting officer is reasonably held if, on an objective approach, the arresting officer has reasonable grounds for his suspicion. Once the required suspicion exists an arresting officer will be vested with a discretion to arrest, which he must exercise rationally.'

(emphasis added)

[58] It is apposite to have regard to what the purpose of effecting arrest entails. In **Naidoo v Minister of Police** 2016 (1) SACR 468 (SCA) at para [41], the purpose of effecting an arrest is explained as follows:

“[41] It is now settled that the purpose of the arrest is to bring the arrestee before the court for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial.

(See Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA) (2011 (5) SA 367; [2011] 2 All SA 157; [2010] ZASCA 141) paras 30 – 31.) Thus it goes without saying that an arrest will be irrational and consequently unlawful if the arrestor exercised his discretion to arrest for a purpose not contemplated by law.”

(emphasis added)

[59] In the recent unreported judgment of the Supreme Court of Appeal in **Minister of Police v Bosman and Others** (1163/2020) [2021] ZASCA 172 (9 December 2021) the Supreme Court of Appeal upheld an appeal by the Minister of Police and dismissed the respondents’ (the plaintiffs’) claim with costs. The judgment cites the authorities referred to *supra* and re-iterates what was said in **Minister of Safety and Security v Sekhoto and Another** regarding the purpose of an arrest:

“[13] It is instructive to consider pertinent case law in regard to this matter. In Minister of Safety and Security v Sekhoto and another [2010] ZASCA 141; [2011] 2 All SA 157 (SCA); [2011] 2 All SA 157 (SCA), this Court succinctly said, ...:

And at para 28:

‘Once the jurisdictional facts for an arrest, whether in terms of any paragraph of section 40(1) or in terms of section 43 are present, a discretion arises. The question whether 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. ...'

Paragraphs 30 and 31:

'He proceeded to say that an exercise of the discretion in question will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator. This brings me back to the fact that the decision to arrest must be based on the intention to bring the arrested person to justice. It is at this juncture that most of the problems in the past have arisen. Some instances were listed in the judgment of the court below, namely an arrest to frighten or harass the suspect, for example, to appear before mobile traffic courts with the intent to expedite the payment of fines (S v Van Heerden (supra) 416g-h); to prove to colleagues that the arrestor is not a racist (Le Roux (supra) paragraph 41); to punish the plaintiff by means of arrest (Louw (supra) at 184j); or to force the arrestee to abandon the right to silence (Ramphal (supra) paragraph 11). To this can be added the case where the arrestor knew that the state would not prosecute.

The law in this regard has always been clear. Such an arrest is not bona fide but in fraudem legis because the arrestor has used a power for an ulterior purpose. But a distinction must be drawn between the object of the arrest and the arrestor's motive. This distinction was drawn by Schreiner JA in Tsose and explained by G G Hoexter J in a passage quoted with approval by this court in Kraatz (supra) at 507C-508F. Object is relevant while motive is not. It explains why the validity of an arrest is not affected by the fact that the arrestor, in addition to bringing the suspect before court,

wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion. It would appear that at least some of the high court judgments under consideration have not kept this distinction in mind.'

Further, at para 39:

'This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.'

(emphasis added)

[60] In **MR v Minister of Safety and Security** 2016 (2) SACR 540 (CC), the Constitutional Court summarises the position with reference to the discretion to effect an arrest as follows:

"[42] Section 40(1) of the CPA states that a police officer 'may', and not 'must' or 'shall', arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word 'may' suggest that police officers have a discretion whether to arrest or not. It is permissive, and not peremptory or mandatory. This requires police officer to weigh and consider the prevailing circumstances and decide

whether an arrest is necessary. No doubt this is a fact-specific enquiry. As the police officer are confronted with different facts each time they effect an arrest, a measure of flexibility is necessary in their approach to individual cases. Therefore, it is neither prudent nor practical to try to lay down a general rule and circumscribe the circumstances under which police officer may or may not exercise their discretion. Such an attempt might have the unintended consequences of interfering with their discretion and, in the process, stymie them in the exercise of their powers in pursuit of their constitutional duty to combat crime...

(emphasis added)

- [61] Upon evaluation of the evidence tendered, it is quite apparent that the three (3) cattle that were in possession of the plaintiff on 22 October 2014 were stolen in Botswana. According to W/O Cocks and W/O Monyadi, the three (3) cattle had K11 brand marks, which is used only in Botswana. It transpired during the cross examination of Lt. Col. Mokgatlhe that W/O's Cocks and Monyadi mistook the letter J for K as Lt. S. K. Modisane of the Forensic Science Laboratory in Botswana found that the brand mark was actually J11 and not K11. This must be an innocent mistake on their part which cannot be held against them or show that they were lying to this Court.
- [62] One of the three (3) cattle was positively identified by Mr. Jacob Itumeleng Mokenke at Lichtenburg pound on 29 October 2014 as belonging to his

mother, by the brand mark JTM, when he was in the company of Constable Innocent Modongo Mothoka of the Botswana police who scanned the three (3) cattle, which scan revealed two (2) bolus numbers in two (2) of the three (3) cattle. It cannot be disputed that boluses are only found in cattle from Botswana.

[63] According to W/O Cocks, the three (3) cattle were not taken back to Botswana on 29 October 2014, but were returned there at a later stage. The time they were taken to Botswana, the docket had already been taken from him. He said when the docket was taken two (2) days after 29 October 2014, the plaintiff had not yet given him the requisite transaction documents in relation to the three (3) cattle, despite his promise on 22 October 2014 that he would furnish him with same. In any case, and on plaintiffs own version, the three (3) cattle were never returned to him. Anyway, the plaintiff ultimately conceded under cross examination that the cattle were never given back to him as they did not lawfully belong to him.

[64] Again there is no denying that the two (2) carcasses in which two (2) boluses were found in their intestines on 24 October 2014 at Kareespruit abattoir, were also stolen from Botswana. Upon request of W/O Monyadi, Constable Mothoka of the Botswana police came to see him at his office at Lehurutshe Stock Theft Unit on 27 October 2014 and with the means of the bolus reader,

Constable Mothoka was able to determine the respective code numbers of those boluses. Upon his return to Botswana, he gave them to their Veterinary Department to determine who the owners of the slaughtered cattle were.

[65] According to the affidavit of the Botswana Veterinary officer, Obuile Raboloko, the code numbers revealed the registered owners of the slaughtered cattle as Rachere Lekone and Buisanyang Mogatle, who are both Botswana citizens. According to W/O Monyadi, sometime after 27 October 2014, the Botswana police came with the said two (2) owners of the slaughtered cattle, who decided to sell the carcasses to Mr Steyn as they could not take the meat across the border. Despite claiming ownership of the slaughtered cattle, the plaintiff said he was however never paid any money for the meat. The question that begs an answer is why was he not paid if these cattle lawfully belonged to him.

[66] There is overwhelming evidence on behalf of the defendant that plaintiff was requested on numerous occasions to furnish the police with the transaction documents relating to the three (3) and the two (2) slaughtered cattle, but failed to do so. When plaintiff was asked under cross examination to point out any transaction documents as proof that he purchased the three (3) cattle and the two (2) slaughtered cattle, he ultimately conceded that there was no transaction document that indicated where he bought these cattle from. The

meaning of this concession is simply that the plaintiff was at some stage, more particularly on 22 October 2014, 23 October 2014 and 24 October 2014, in possession of suspected stolen cattle for which he could not give a satisfactory account for such possession.

[67] The transaction documents furnished by the plaintiff to the police did not relate to the purchase by the plaintiff of the three (3) and two (2) slaughtered cattle. None of the transaction documents making a total of 23 cattle had J11 or K11; JTM, which is a brand mark belonging to Mokenke's mother; F5L, which is a brand mark belonging to Rachere Lekone or F16S, which is a brand mark belonging to Buisanyang Mogatle. For the plaintiff therefore to say that the three (3) and two (2) slaughtered cattle were included in the total of 23 cattle, was nothing else but a concerted ploy by him to deliberately mislead and deceive this Court, as correctly submitted by counsel for the defendant.

[68] Still on the issue of the twenty-three (23) cattle, the plaintiff's version throughout was that he provided the police with the transaction documents in relation to those number of cattle prior to his arrest on 18 December 2014. This cannot by any stretch of the imagination be true but once more an attempt to deceive and mislead this Court. On the contrary, and on the acceptable evidence on behalf of the defendant, some of the transaction

documents were submitted by him on 12 January 2015, several days after his arrest.

[69] This is borne out by the entry made in the Investigation Diary which indicates that he submitted the transaction documents of Modise and Sebogodi only on 12 January 2015. That being the case, it follows therefore that the total number of cattle prior to his arrest on 18 December 2014 could not have been twenty-three (23) as he wants this Court to believe. This is so when regard is had to the fact that Modise's transaction documents refer to three (3) cattle and one (1) cow respectively, making a total of four (4) cattle. That of Sebogodi refers to five (5) cattle. The total number of cattle in respect of which transaction documents were submitted on 12 January 2015 therefore comes to nine (9) cattle. Therefore, when nine (9) cattle are subtracted from twenty-three (23) cattle, the balance is fourteen (14) cattle.

[70] On the evidence tendered on behalf of the defendant, the police did not start by rushing to arrest the plaintiff, but wanted to satisfy themselves by affording him sufficient opportunity of providing them with proof of purchase, in particular documents of identification in terms of section 6 of the Stock Theft Act 57 of 1959 in relation to the three (3) and two (2) slaughtered cattle, but failed to do so. Only after he failed to provide the police with a reasonable and satisfactory account for being in possession of the suspected stolen

three (3) cattle and two (2) carcasses, coupled with the seriousness of the offences, did the discretion to arrest arise.

[71] When all the above mentioned factors are taken into account, the suspicion formed by the arresting officer, Lt. Col. Mokgathe was reasonable under the circumstances. A reasonable person in the position of any arresting officer confronted with the same set of facts would form a suspicion that the plaintiff had committed an offence of contravention of section 2 of the Stock Theft Act 57 of 1959, which provides that a person who is found in possession of stock or produce, in regard to which there is reasonable suspicion that it has been stolen, and is unable to give a satisfactory account of such possession, is guilty of an offence.

[72] Furthermore, and as already stated above, in terms of section 40 (1) (g) of the Criminal Procedure Act, a peace officer may without a warrant arrest a person who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce as described in the Stock Theft Act 57 of 1959. Section 1 of the Stock Theft Act defines “**stock**” as meaning:

“any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, poultry, domesticated, ostrich, domestic game or the carcass or portion of the carcass of any such stock”.

[73] On the information at his disposal, Lt. Col. Mokgathe, the arresting officer, therefore had good reason to suspect that the plaintiff had been in unlawful possession of three (3) cattle and two (2) carcasses, being stock, from 22 October 2014 until 24 October 2014, which suspicion was reasonable. Therefore, in terms of section 40 (1) (g) of the Criminal Procedure Act, Lt. Col. Mokgathe was entitled and justified to arrest the plaintiff without a warrant, given the very serious nature of the offences allegedly committed.

[74] The legislature casted the proverbial net of the provisions of section 40 (1) (g) with specific reference to the words:

*“... **or having been** in unlawful possession of stock or produce ...”*

very wide. This court, in the matter of **Mokabatlhobolo v Minister van Polisie** (1141/2015) [2016] ZANWHC 62 (1 December 2016), stated the following:

“[13] Taking all the abovementioned factors into account, I am of the view that the suspicion formed by the arresting officer, Sgt. Setatwe is reasonable. Any reasonable person confronted with the same set of facts would form a suspicion that the Plaintiff who had presented the permit and who had supplied the cattle, has committed the Schedule 1 offence of theft read with the provisions of Section 40 (1) (b) of the CPA. It does however not end there. As alluded to earlier on in this judgment, Section 40 (g) of the CPA also find application. In terms of this section, a peace officer (which

Sgt. Setatwe is) may without a warrant arrest a person who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce as described in the Stock Theft Act 57 of 1959. Section 1 of the Stock Theft Act defines "produce" as meaning:

"the whole or any part of any skins, hides or horns of stock, and any wool, no hair or ostrich feathers.

and "stock" means:

any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, poultry, domesticated ostrich, domestic game or the carcass or portion of the carcass of any such stock".

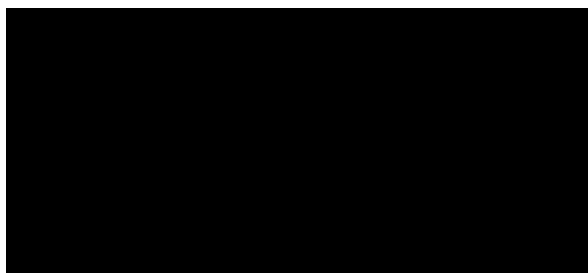
[75] It follows therefore that in terms of section 40 (1) (g), it is sufficient if it can be shown or proven by credible evidence, just like in the instant case, that at some stage an accused was in unlawful possession of stock or produce for which he failed to give satisfactory account of such possession. Therefore, I am convinced that the plaintiff's claim based on unlawful arrest and detention (claim 2) ought to be dismissed. The arrest was based on a reasonable suspicion formed that the cattle were indeed stolen. This was done after the police granted the plaintiff substantial and sufficient time to produce the requisite documentation as proof that the said cattle was lawfully bought, which he failed to do. The arrest was justified. What makes this matter different from others is the fact that the police first investigate before the

arrest was effected and not *visa versa*. The discretion to arrest was judiciously exercised. There is also no plausible reason why costs should not follow the result and be awarded in favour of the successful litigant, the defendant. The plaintiff's claim must therefore be dismissed with costs.

Order

[76] Consequently, the following order is made:

- (i) The plaintiff's claim is dismissed.
- (ii) The plaintiff is ordered to pay the costs of suit on the scale as between part-and-party on the High Court tariff, to be taxed.



**R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**