

REPUBLIC OF SOUTH AFRICA

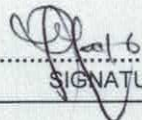


IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA11/2019

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

[5 JUNE 2020]


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SIGNATURE

In the matter between:

BRITS, CHRISTIAN

APPELLANT

And

MINISTER OF POLICE

1ST RESPONDENT

COL. ESPACH, JAMES

2ND RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This appeal is about a delictual damages claim resulting from an alleged unlawful arrest and detention. The appellant instituted a delictual claim against the respondents in the magistrate's court for the district of Letaba, Tzaneen. The appellant sued the first respondent based on being vicariously liable for the second respondent, Colonel Espach's alleged unlawful conduct. The magistrate subsequently dismissed the claim with costs. The appellant is aggrieved with this outcome, hence the appeal. After an agreement with

counsel, this appeal was disposed of on papers without further oral submissions in open court, pursuant to section 19 (a) of the Superior Courts Act¹.

- [2] The arrest without warrant and subsequent detention of the appellant is not in issue. What is in issue, is the alleged unlawfulness thereof as well as the question of quantum of damages. The respondents' pleaded case is that the arrest and detention was lawful, as the appellant was arrested for 'possession of suspected stolen property'. Furthermore, that the appellant's scale and cell phone were taken as exhibits. In addition, the criminal charges 'were provisionally withdrawn' to allow for the re-arrest of a co-accused who absconded whilst out on bail. It is common cause between the parties that the appellant and two others, appeared before the magistrate's court on a charge of possession of 29.9 KG of copper allegedly stolen in apparent contravention of section 36 of Act 62 of 1955. The state, on a subsequent occasion withdrew the charges provisionally.
- [3] The authority of a police officer in his or her capacity as a peace officer to arrest a person without a warrant is permissible as set out in section 40 of the Criminal Procedure Act² (the CPA). In our law, it is trite that an arrest and detention of any person is *prima facie* wrongful. The wrongfulness of an arrest and detention lies in the wrongful deprivation of a person's liberty. Once arrest and detention are admitted however, the onus is on the defendant, in this case the respondents, to prove that the arrest and the subsequent detention were lawful.³
- [4] The corollary is that if the arrest is unlawful, then the subsequent detention is also unlawful. The Bill of Rights in our Constitution guarantees every person the right, *inter alia*, not to be deprived of freedom arbitrarily or without just cause.⁴ Accordingly, the right to dignity, freedom and security of the person are primary values of the Constitution and any arrest and detention of a person amounts to a *prima facie* infringement of these rights.⁵ All that is required of a peace officer effecting an arrest without a warrant is a

¹ 10 of 2013

² 51 of 1977

³ *Brand v Minister of Justice & another* 1959 (4) SA 712 (A) at 714G-H

⁴ Section 12 (1) (a) of the Constitution of the Republic of South Africa, 1996

⁵ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA)

reasonable suspicion objectively considered, that a Schedule 1 offence has been committed.⁶ As De Vos J held in *Ralekwa v Minister of Safety and Security*⁷:

"[10] Arrest without a warrant is the most oppressive means of initiating a prosecution. Although it has been pointed out that personal freedom is a right which has always been jealously guarded by our Courts, in general, it can be said that the enquiry into the lawfulness of a warrantless arrest tends to end once the preconditions for the exercise of the power, namely the jurisdictional facts, have been found to exist."

- [5] The facts that gave rise to the appellant's claim, broadly stated, are as follows. The appellant testified that, as at the time of his arrest at about 12 midday on 4 July 2014, he was the owner of a scrapyard business. He received an SMS message from a former employee, Dube (accused 3 in the criminal charges) asking him [appellant] to call him [Dube] back, which he ignored. He later received another SMS message from Dube saying that he has copper that he wanted to sell. He directed Dube to go to his scrapyard where these kinds of transactions were conducted.
- [6] Later he received a phone call from his scrapyard manager, Michael (accused 2 in the criminal charges) saying that the police were there and that he must come to the scrapyard. Upon his arrival he learned from the second respondent, Colonel Espach, that Michael, who at that stage was behind the counter, was buying stolen copper. He knew who had brought the copper because of the earlier conversation he had with his manager. He volunteered to show the police where Dube could be found at a certain address. He also showed the police the SMS messages exchanged with Dube on his cell phone that was subsequently confiscated. He and Michael were arrested, put into the back of the van and taken to the police station, which experience he found to be traumatic and frightening. He remained in detention until about 1 PM the next day (5 July 2014) when he was released on police bail fixed at R100-00.
- [7] The appellant confirmed in his evidence in chief that metal scrap dealers were regulated by law in relation to the sale and purchase of second-hand goods, in

⁶ *Duncan v Minister of Law and Order* 1986(2) SA 805 (A)

⁷ 2004 (1) SACR 131 (T)

apparent reference to the Second-Hand Goods Act.⁸ The law prescribes that all scrap metal dealers engaged in recycling of any controlled metals be registered and keep a register that contains the details of the seller, a description of the product sold, as well as the price involved in the object of sale. According to the appellant, once the metal is brought to the shop, the process entails separating and sorting it out. Once this is done, *"the metal is then weighed, written up in the register, the price calculated, the ID document would be photocopied, and then the person leaves with his money"*.

- [8] During cross-examination, the appellant was constrained to concede that he checked the trolley, and that there was copper that was probably stolen. As to the question whether he had no suspicion that he was dealing in stolen copper he responded thus: *"No, well you always have to suspect that is why you have to go to the shop so that it can be inspected and weighed and booked..."* He was also constrained to concede that the criminal charges against him and his co-accused were provisionally withdrawn.
- [9] The scrapyard shop manager, Michael Mashapu (Michael), testified in support of the appellant briefly as follows. Contrary to the testimony of the appellant, they did not deal with copper as instructed by the appellant at the scrapyard but with aluminium, radiators as well as stainless steel metal sheets. He confirmed that the process entailed first, the nature of the goods brought by the customer and then sorting out the kind of metals brought, after that, the metal is then measured on the scale and the weight is recorded. It was his evidence that the second respondent arrived in the shop at the point when Dube, who was in the company of two others, had opened his bag, before he and another shop assistant, an elderly woman whose responsibility it was to sort out the items, could look at the contents of the bag. The contents had not been weighed and possession not passed. Dube and his companions thereafter ran away from the scene.
- [10] Colonel Espach testified in defence of the claim briefly as follows. He was at the petrol station at about 9 AM on 4 July 2014 when he saw two men carrying a heavy bag. They were struggling to carry it. The two men were coming from the direction of some smallholdings in the area. The area was beset with the

⁸ 6 of 2009

theft of copper cables, borehole shafts and transformers. A third man, whom he later came to know as Dube approached the two men. Dube was pushing a shopping trolley. The two men put the bag inside the trolley. He held a suspicion that the men were all involved in the theft of infrastructure materials in that area and called for police backup. He followed them to the appellant's scrapyard shop. He noticed the two shop attendants, a man and a woman, exchanging greetings with the three men. He subsequently came to know the male shop attendant later as Michael, the appellant's support witness. From a clear view, he noticed the two shop attendants placing the heavy bag that was brought by the three men on top of a scale.

- [11] The police backup team, under Colonel Usiba, that he had requested was taking long. As the transaction was going on, he feared that they might leave the premises. He went inside the shop, produced his appointment card and ordered everyone to standstill after introducing himself. The two men whom he first saw carrying the heavy bag, pushed him out of the way. He grabbed one of them, but Dube loosened his grip to help the man escape. He tried chasing the two men, "the runners" but to no avail. He returned to the shop and ordered everyone to remain inside until backup arrived. In the meantime, he noticed that the bags contained cables that were cut in pieces, the same bags that he initially saw loaded on the trolley and later placed on the scale. Michael then phoned the appellant who arrived shortly thereafter.
- [12] Upon the appellant's arrival, he requested to see his cell phone. From the cell phone SMS exchanges that the appellant had with Dube, he discovered that the appellant was directly involved with the sale of the copper cables. In the SMS exchanges, the appellant had inquired how much the weight of the copper was. The response was, it was approximately 20 KG. The appellant asked the person with whom he was communicating (Dube) to take it to the shop. The copper was measured and found to be 29.8 kg in the appellant's shop. He also testified that it is illegal to buy unprocessed copper cables that were cut and burnt. The appellant and Michael were placed under arrest. The scale that was used to measure the quantity of the copper was confiscated as well as the appellant's cell phone.

- [13] He confirmed that Dube was later arrested with the help of the appellant, after disappearing from the scene. However, Dube later absconded whilst out on bail. A warrant for Dube's arrest was issued on 12 September 2014. During cross-examination, he testified that he followed the three men to establish who that person was, creating a market for the stolen goods to be sold which led him to the appellant's shop.
- [14] Colonel Usiba, a police veteran with 32 years of service, testified and confirmed that at the scrap metal dealership, a man allegedly involved in the illicit trade, Dube and a mealie bag that contained copper cables were pointed out to him. Shortly thereafter, the appellant arrived. He further confirmed in his testimony that the SMS message between the appellant and the sender was in relation to the copper cables that the appellant asked the sender to bring. During cross-examination however, Col Usiba could not confirm whether there was another black bag that contained cables inside the shop. He maintained that it was illegal for the shop to deal with stolen goods. The copper was evidently stolen as the cables were clearly burnt and their covers removed.
- [15] The investigating officer in the criminal case, Rasesebotsa, testified and confirmed that the matter was not yet finalized, but pending in the magistrate's court. Furthermore, that on the facts, the appellant and his co-accused were properly charged. The appellant, upon investigation could not show him that he was legally in possession of the stolen copper.
- [16] The appellant contended that his arrest under these circumstances was unreasonable. The appeal turns on whether the arresting officer harboured a reasonable suspicion that the appellant committed the alleged offence. In *Minister of Safety and Security v Sekhoto*⁹ the following is said:

"[6] As was held in Duncan v Minister of Law and Order [1986 2 SA 805 (A) at 818G H], the jurisdictional facts for a s 40(1)(b) defence are that
(i) the arrestor must be a peace-officer;
(ii) the arrestor must entertain a suspicion;
(iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and
(iv) the suspicion must rest on reasonable grounds."

⁹ 2011(1) SACR 315 (SCA)

[17] In order to combat theft, the legislature created the crimes in sections 36 and 37 of the General Law Amendment Act¹⁰ to address the question of stolen goods or goods suspected to be stolen. Section 36 provides that: *'Failure to give a satisfactory account of possession of goods – Any person who is found in possession of any goods...in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.'* In this case, the charges that the appellant and his co-accused faced included receiving stolen property, the copper, which is a Schedule 1 offence.

[18] In terms of section 40 (1) (e) of the CPA a peace officer may without warrant arrest any person "who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing." It follows accordingly that a person found in possession of property reasonably suspected to have been stolen or acquired by dishonest means, can be arrested without warrant if the peace officer reasonably suspects the person to have committed an offence in connection with the property. The jurisdictional requirements are the same as referred to in section 40 (1) (a) as held in *Duncan v Minister of Law and Order*.¹¹ The jurisdictional facts that have to be proved by a defendant who relies on s 40(1)(e) as a defence are also the following:¹²

- (a) The arrestor must be a peace officer.
- (b) The suspect must be found in possession of property.
- (c) The arrestor must entertain a suspicion that the property has been stolen or illegally obtained.
- (d) The arrestor must entertain a suspicion that the person found in possession of the property has committed an offence in respect of the property.
- (e) The arrestor's suspicion must rest on reasonable grounds.

¹⁰ 62 of 1955

¹¹ Fn 5 above

¹² *Setlhapelo v Minister of Police* 2015 JDR 0952 (GP); *Swalivha v Minister of Safety and Security* (32477/09) [2011] ZAGPPHC 32 (17 March 2011); *Mdlalose and Another v Minister of Police and Another* [2016] 4 ALL SA 950 (WCC)

- [19] In *Mabona and Another v Minister of Law and Order and Others*¹³ Jones J, on the issue of reasonable suspicion, held:

"The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1) (b) is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, 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 upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion."

- [20] For the proper determination of section 40 (1) (e), property can be found in the possession of a suspect even though he or she is not present when it is found.¹⁴ For a proper interpretation of section 36 of the General Law Amendment Act, a person can be found 'in possession of property' without being present when the property is found. According to Snyman¹⁵, *"possession consists of two elements, namely a physical or corporeal element (corpus detentio) and a mental element (animus that is the intention of the possessor). The physical element consists in an appropriate degree of physical control over the thing. The precise degree of control required*

¹³ 1988 (2) SA 654 (SE) at 658 E-H

¹⁴ *S v Wilson* 1962 (2) 1962 SA 619 (A) at 624E-F

¹⁵ CR Snyman, Criminal Law, 5th ed at pgs 429-430

depends upon the nature of the article and the way in which control is ordinary exercise of such a type of article. The controller may be actual or constructive. Constructive control means control through somebody else, such as a representative or servant. The animus element of possession relates to the intention with which somebody exercises control over an article, and differs according to the type of possession."

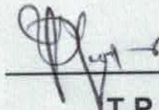
- [21] Counsel for the appellant, Mr Zietsman contended in his heads of argument that *"no transaction was concluded, as appellant would obviously at the shop view, consider decide whether to purchase items or not"*. This contention is without basis. The appellant from the SMS conversation with Dube had already established what the contents of the bag were. As indicated above, what remained was the measurement of the copper that had to be weighed followed by payment. On the probabilities, Michael would not have started the process of measurement, before the contents of the bag were ascertained. The measurement of the copper presupposed an important end-stage, receipt of the copper on behalf of the shop. Colonel Espach intervened at the stage when the copper was weighed, consistent with the laid down procedure in the shop. What remained was payment for the copper to the sellers and for the relevant details to be entered in the register.
- [22] Objectively considered, the arresting police officer in this matter had reasonable grounds for his suspicion and exercised his discretion accordingly. His suspicion that the appellant was involved in the sale of illicit copper was completely justified by the peculiar circumstances. In this case, the appellant, on his version, told a former employee to deliver copper to his shop. On his version, the appellant suspected that the copper was stolen.
- [23] *Prima facie*, the appellant exercised constructive control of the copper through his employee, Michael. That the copper was stolen is fortified by the fact that those who brought it, including the former employee, Dube, are at large, which gave rise to the authorization of a warrant of arrest and the temporary withdrawal of the charges. As to the withdrawal of the charges, the onus was on the appellant to show, on a balance of probabilities, that there are no

pending proceedings, or no likelihood of proceedings being reinstated.¹⁶ He failed on that score.

[24] I am of the view that these jurisdictional facts were present when the appellant was arrested. As pointed out in *Duncan*¹⁷, the grounds upon which an exercise of a discretion can be questioned are narrowly circumscribed. Members of the South African police are enjoined by law to combat and detect crimes, which include ensuring the security of property. The discretion by the second respondent in these circumstances was not only justifiable, but also properly exercised. It follows, accordingly, that the appeal stands to be dismissed as it is without merit. Costs should follow the result.

[25] Order:

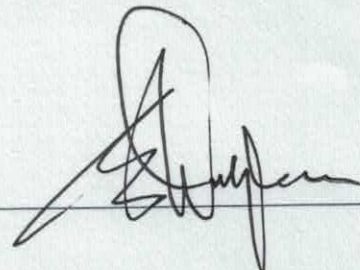
23.1 The appeal is dismissed with costs.



T P MUDAU

[Judge of the High Court,
Limpopo Division,
Polokwane]

I agree.



MAKGOBA JP

JUDGE PRESIDENT OF THE LIMPOPO
DIVISION OF THE HIGH COURT

¹⁶ *Van der Merwe & another v Taylor NO & Others* 2008 (1) SA 1 CC at para 51; see also *Minister of Police v Stanfield* 2020 (1) SACR 339 (SCA) para 12.

¹⁷ Fn 6 above at 818 I.

Date of Judgment: 5 June 2020

APPEARANCES

For the Appellant: Adv. C Zietman

Instructed by: Jan Ellis Attorneys

For the 1st Respondent:

And

The 2nd Respondent: Adv. M.E Ngoetjana

Instructed by: State Attorneys