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

Case Number: A2023-114372

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

20 November 2024 _____	
DATE	SIGNATURE

In the matter between:

S[...]	T[...]	T[...]	First Appellant
S[...]	T[...]	T[...] on behalf of her minor child	Second Appellant
TSHEGO MOLEFE			Third Appellant
XOLANI MAKROTI			Fourth Appellant
T[...]	T[...]		Fifth Appellant
and			
THE MINISTER OF POLICE			Respondent

JUDGMENT

MITCHELL AJ (with whom WINDELL J and WILSON J agree)

Introduction

[1] This is an appeal against the whole of the judgment and cost order of His Lordship Mudau J handed down on 19 May 2023. It comes before this court as a result of leave to appeal having been granted by the Supreme Court of Appeal.

[2] The Appellants (Plaintiffs in the court of first instance) allege that they were unlawfully arrested by police officers acting in the course and scope of their employment with the Respondent (Defendant in the court of first instance).

[3] By agreement between the Parties (as recorded in the Pre-Trial Minutes¹) the only disputed issues were the lawfulness of the arrest, the lawfulness of the detention and the quantum of damages.

The facts

[4] The following is a summary (in my words) of the material facts leading up to the arrest of the Appellants upon which the learned judge based his judgment –

- a. On Saturday 19 December 2020, Sgt Moagiemang (“Moagiemang”) and his colleague, Constable Koie (“Koie”) were on crime prevention duties at Kagiso doing stop and search duties pursuant to a special operation.
- b. They drove towards the Father Gerald section in Kagiso and at about 20h40 heard gunshots coming from the direction of Mpumelelo Street.

¹ Appeal record page 003-73

- c. They then drove to that area where they found a minibus Kombi parked on the street directly opposite house number 8966 with a group people dancing to music coming from the Kombi.
- d. When the two officers approached the group of people, some members of the group ran inside the yard of house number 8966, Mpumelelo Street, Kagiso.
- e. Moagiemang and Koie gave chase (with firearms in hand) into the yard through the open gate and did not lose sight of the members of the group who had fled inside.
- f. Once inside the yard, the police officers ordered the group (12 in number (the "Group of 12")), to remain on the ground between the main house and an outside toilet (the 5 Appellants were part of the Group of 12). The police called for additional help which arrived.
- g. The Group of 12 were all searched as Moagiemang and Koie suspected that they were the ones who had fired the shots which they had heard. Nothing was found in the physical possession of any of the Group of 12.
- h. However, next to the toilet a firearm with two magazines was found. They were found about a metre away from where the Group of 12 were being searched. It was Koie who pointed out these items to Moagiemang.
- i. The firearm smelt of gunpowder and confirmed Moagiemang's suspicion that it had just been used. The two magazines contained 21 rounds of live ammunition.
- j. None of the Group of 12 would take responsibility for the firearm or the 21 live rounds of ammunition.
- k. About 5 to 6 minutes later, Moagiemang and Koie asked to search the Kombi. Koie conducted this search. Two further firearms and 26 and 19 rounds of live ammunition were found. In addition, 16 spent cartridges were found 'on the scene'.
- l. Moagiemang explained that the Group of 12 (which included the 5 Appellants) were arrested and detained on the grounds of common purpose for possession of the firearms and ammunition. The Group of 12 were arrested in his presence.

[5] The Appellants have criticised these findings of fact on a number of grounds. These criticisms are, in many instances, compelling, but I am mindful that an appeal court will only overturn a judgment of a court of first instance if the Appellant shows that the judge was wrong, and that the decision should have been different. In particular when there has been conflicting evidence, it is important that the trial judge had the advantage of seeing and hearing the witnesses in person².

[6] While there are inconsistencies in the evidence, for the reasons that I have set out below, it is my view that this appeal can be decided on the facts outlined above.,

Joint possession of firearms

[7] The Appellants were arrested under section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) for possession of unlicensed firearms and ammunition. This section provides that a peace officer may arrest any person without a warrant of arrest 'whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'.

[8] Schedule 1 includes 'any offence.... The punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine'.

[9] Section 3(1) of the Firearms Control Act 60 of 2000 (the Firearms Control Act) provides –

No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm.

[10] Section 90 of the Firearms Control Act provides –

No person may possess any ammunition unless he or she-

(a) holds a licence in respect of a firearm capable of discharging that ammunition;

(b) holds a permit to possess ammunition;

² Bitcon Appellant v Rosenberg Respondent 1936 AD 380 at page 396

[11] Section 121 read with Schedule 4 to the Firearms Control Act provides that the maximum penalty for a person convicted of contravening section 3 or section 90 of the Firearms Control Act is fifteen years without the option of a fine.

[12] The offence is thus an offence as provided for in Schedule 1 of the CPA.

[13] The learned judge found, and indeed it is common cause, that none of the Appellants or other members of the Group of 12 were physically in possession of any firearms or ammunition. One firearm with ammunition was found near the toilet in the yard where the Group of 12 had been searched and 2 firearms and ammunition were found in the Kombi.

[14] Even though no-one was in physical possession, the basis for the finding that the Appellants were in possession of the firearms and ammunition is that they were in joint possession of the firearms and ammunition, with the person who was or had actually been in physical possession of the firearms and ammunition.

[15] The learned judge in his judgment stated that³ -

*Sgt Moagiemang explained the plaintiffs and their companions were arrested and detained on the grounds of common purpose for possession of the firearms and ammunition.*⁴

[16] There is an important difference between common purpose and joint possession. Nugent JA explained the position in *S v Mbuli*⁵ thus –

What is prohibited by both those sections is the existence of a state of affairs (i.e. having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not

³ para [6] at page 003-791

⁴ emphasis added

⁵ 2003 (1) SACR 97 (SCA)

arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case.

Nugent JA went on to say -

Marais J set out the correct legal position (apart from a misplaced reference to common purpose) when he said the following in S v Nkosi 1998 (1) SACR 284 (W) at 286 h-i:

“The issues which arise in deciding whether the group (and hence the Appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

(a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and

(b) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.”

[17] Furthermore in *In S v Nkosi*⁶ the Court held that the inference that the accused possessed the firearms jointly with other accused -

is only justifiable if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detentor and (b) the actual detentor had the intention to hold the guns on behalf of the group ...

[18] The starting point for an enquiry concerning an arrest under section 40(1)(b) is set out in *Duncan v Minister of Law and Order*⁷ where it was held that the jurisdictional facts which must exist before the power conferred by that section may be invoked, are: (1) The arrestor must be a peace officer; (2) He must entertain a

⁶ 1998 (1) SACR 284 (W)

⁷ [1986] 2 All SA 241 (A)

suspicion; (3) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence); (4) that his suspicion must rest on reasonable grounds. If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, that is, he may arrest the suspect.

[19] It is common cause that the policeman who arrested the Appellants was Koie. It was also not disputed by the Appellants that Koie was a peace officer⁸. In issue was whether Koie entertained a suspicion, and if so, whether that suspicion was that the arrestee committed an offence referred to in Schedule 1 to the Act (other than one particular offence) and if both of these facts existed, whether that suspicion rested on reasonable grounds.

[20] Koie was not called as a witness and Moagiemang was the only witness to give evidence about whether the arrestor entertained a suspicion and if so, whether the suspicion was that the person to be arrested committed an offence referred to in Schedule 1.

[21] In this regard the Appellants submit that -

- a. the jurisdictional requirements outlined in *Duncan v Minister of Law and Order* were not met in that there was no evidence that the arrestor, Koie, entertained a suspicion and that his suspicion was that the arrestees committed an offence referred to in Schedule 1 to the Act.
- b. referring to *Duncan v Minister of Law & Order* and *Minister of Safety & Security & Another v Swart* and quoting from *Minister of Law and Order & Others v Hurley & Another*⁹, “[t]hese decisions make it plain that the arresting officer must testify in order to justify the arrest otherwise the enquiry will not be objective.”

[22] This, in my opinion, is not a correct statement of the law. None of these cases nor, as far as I am aware, any other cases are authority for the proposition that “the

⁸ Notice of Application for Leave to Appeal: Appeal record page 03-809

⁹ *Minister of Law and Order and Others v Hurley And Another* [1986] 2 All SA 428 (A)

arresting officer must testify in order to justify the arrest otherwise the enquiry will not be objective”.

[23] I am of the view that the law does not require a pedantic approach as to who actually made the arrest. Where two or more policemen are on duty working as a team and jointly have a suspicion that a person has committed a schedule 1 offence, then I do not think it matters who actually physically makes the arrest.

[24] The learned judge in the court of first instance dealt with this aspect briefly by pointing out that Moagiemang was asked whether he arrested any of the Appellants and Moagiemang explained that he did not, but that the arrest was effected in his presence¹⁰. The learned judge found¹¹ –

As for the suggestion that, Moagiemang could not have been able to arrive at a reasonable opinion leading to the arrest of the plaintiffs, this is without merit as the conduct complained of by the plaintiffs upon which the state relies was in his presence. In essence the firearm and ammunition found from the yard was found in his presence and so were the other firearms and ammunition. It was clear from his evidence that he was party to the reasonable suspicion harboured leading to the arrest of the plaintiffs although he did not physically comply with the requirements of the arrest on any of the plaintiffs from the group.

[25] It also appears from the evidence of Moagiemang, that he and Koie did act jointly. Moagiemang and Koie were both involved in the stop and search operation. They worked together to approach individuals and they both asked questions of the suspects regarding the ownership of a firearm and ammunition found at the scene.

[26] In my opinion, these facts are, on a balance of probabilities, sufficient from which to draw the inference that Moagiemang and Koie jointly entertained a suspicion and that their suspicion was that the arrestees committed an offence referred to in Schedule 1 to the Act. This is sufficient to establish the requirements

¹⁰ Appeal record 003-792 para [8]

¹¹ Appeal record 003-804 para [49]

that the arrestor entertained a suspicion and that the suspicion was that the arrestee committed an offence referred to in Schedule 1 to the Act.

[27] However, these facts do not establish the requirement that the suspicion must rest on reasonable grounds. The essence of this appeal is whether Moagiemang's and Koie's suspicion rested on reasonable grounds.

[28] The test as to whether a suspicion rested on reasonable grounds was dealt with in *Nkambule v Minister of Law and Order*¹² where the learned judge, Myburgh J, held -

In my view the approach to be adopted in considering whether Van Rensburg's suspicion was reasonable is the one followed by Jones J in Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658F-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 but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'¹³

[29] According to his evidence, Moagiemang did entertain the suspicion that the arrestees had committed the offence of being in possession of unlicensed firearms and ammunition, despite the fact that no one was in the actual physical possession of either the firearms or the ammunition. Moegiemang said that the arrest was

¹² [1993] 3 All SA 847 (T)

¹³ emphasis added

effected on the basis that the people that were being arrested had a common purpose¹⁴ of possessing the firearms and ammunition.

[30] Given that this is a question of joint possession of firearms and ammunition (and not common purpose), the suspicion of possession of firearms and ammunition could only have rested on reasonable grounds on the basis that there was evidence that the people in the group had the intention to possess the firearms and ammunition through the actual possessor and that the actual possessor had the intention to hold the firearms and ammunition on behalf of the people in the group.¹⁵

[31] In effect the question is “*was there a prior agreement in the group to possess the firearms and ammunition and, if not, was there an active association in common in the group with the intention of possessing the firearms and ammunition*”.¹⁶

[32] The evidence was that one firearm with ammunition was found on the ground near the toilet in the yard of house number 8966 Mpumelelo Street and two firearms with ammunition were found in the Kombi. The identity of the actual possessor of these firearms and ammunition was unknown. There is nothing to connect the 12 people in the group with the actual but unknown possessor and there is no evidence to connect that possessor with the 12 people in the group. The inference that the actual possessor acted alone could certainly not have been excluded. Indeed, on the facts as found by the learned judge, the idea that the 12 people had an association or prior agreement with the actual possessor that he or she would possess the firearms and ammunition on behalf of the 12 is wholly untenable and unreasonable and the suspicion was certainly not based on solid grounds.

[33] In this regard it is instructive to note that the Constitutional Court has observed that there will be few factual scenarios which meet the requirements of joint possession where there has been no actual physical possession¹⁷. The Constitutional Court went on to point out that -

¹⁴ emphasis added

¹⁵ S v Mbuli above

¹⁶ S v Thebus 2003 (2) SACR 319 (CC) para 19

¹⁷ Makhubela v The State; Matjeke v The State [2017] ZACC 36 at para 55

(t)his is because of the difficulty inherent in proving that the possessor had the intention of possessing a firearm on behalf of a group. It is clear that, according to established precedent, awareness alone is not sufficient to establish intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another in our law.

[34] In my judgment, therefore, the suspicion required to effect an arrest under section 40(1)(b) did not rest on reasonable grounds and the arrest of the group of 12 and thus the first, third, fourth and fifth Appellants was therefore unlawful.

Claim on behalf of the second Appellant

[35] There is a dispute as to whether the second Appellant (an infant) was arrested at all.

[36] During evidence in chief the Respondent's counsel asked Moagiemang¹⁸ -

ADV MASHILE: Did you arrest the child?

MR MOAGIEMANG: Well the child in essence was not arrested; but the mother of the child was arrested. And the mother insisted that if she gets arrested, she will take her child with her to wherever she will be taken to, and the child went with the mother after the mother got arrested.

[37] Later in cross-examination Appellants' counsel asked¹⁹ -

ADV NAIDOO: What does SAPS14 tell you? What is it?

MR MOAGIMANG: It is a detention register

...

ADV NAIDOO: So it says in paragraph 5 that all the people in the list below were arrested, not so?

MR MOAGIMANG: That is correct.

ADV NAIDOO: And one of the persons mentioned in the list, is the infant, T[...] T[...] and the SAPS14 number tells you that that child was detained as well.

¹⁸ Appeal record page 03-311

¹⁹ Appeal record page 03-546

MR MOAGIMANG: Indeed, correct.

[38] The SAPS14 referred to is at page 003-149 of the Appeal Record. Column 5.3 of that document is headed "Offence". For all the other Appellants this column has written in it "*Poss of firearm and live ammun*". In this column for the second Appellant the word "*Infant*" is written.

[39] In the court of first instance, the learned judge found that the second Appellant was not arrested. The infant's mother, the first Appellant, insisted on taking the infant along to the police station as the infant was still breastfeeding. Reading the evidence of the first Appellant it does not appear that the second Appellant was in fact arrested.

[40] The judgment notes that the infant was taken to the police station for the primary well-being of the infant, as there was no one at the property who could take responsibility for the child's best interests. The infant was released into the care of a relative the next day as soon as circumstances permitted.

[41] Therefore, on balance, in my opinion it was not proved that the second Appellant was arrested.

The Respondent's submissions

[42] I will now turn to deal with the submissions made by Respondent's counsel which may be summarised as follows -

- a. the onus of proving common purpose and joint possession is based on a reasonable suspicion on the probabilities which are to be further investigated after the arrest. It is not necessary to prove the actual commission of the offence;
- b. in all the circumstances, the only inference is that the firearms that fired shots were the ones found in the yard and in the VW Kombi and they were fired by one or more of the Appellants in the presence of the rest of the suspects arrested. All the suspects including the Appellants were 'covering' the identity of the physical possessor because they were in

common and joint intention of firing shots in the street where the cartridges were found;

- c. Section 3(1) of the Firearms Control Act provides that no person may possess a firearm without holding a license for it. It is submitted that the term "possess" for the purposes of section 3(1) of the Act can include the joint possession of a weapon by one of the perpetrators of a crime on behalf of another.

[43] In dealing with the Respondent's submissions in paragraph [42] b it is useful to restate what was said by Watermeyer AJ in a *R v Blom*²⁰ -

In reasoning by inference there are two cardinal rules of logic which cannot be ignored -

- (1) *The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
- (2) *The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*

[44] The facts relied on by the Respondent are that –

- a. all the Appellants know each other. Third, fourth and fifth Appellants know each other very well. The first and fifth Appellants are siblings;
- b. prior to the arrival of police, third, fourth and fifth Appellants were together in the street and they were "chilling";
- c. the firearm, ammunition and cartridges were found a metre away from the Appellants and there was no one in the house yard except for the suspects and Appellants in particular;

[45] Based on those facts the Respondent's counsel concludes that the only inference is that -

- a. the firearms that fired the shots were the ones found in the yard and in the VW Kombi and

²⁰ 1939 AD 188

- b. they were fired by one or more of the Appellants in the presence of the rest of the suspects arrested and
- c. all the suspects including the Appellants were “covering” the identity of the physical possessor because they were in common and joint intention of firing shots in the street where the cartridges were found;

[46] These submissions are not sustainable.

[47] First the Appellants were not arrested on suspicion of discharging the firearms (in a built up area²¹). They were arrested for being in possession of unlicensed firearms and ammunition²². Furthermore there was no evidence that the firearms found in the Kombi had fired shots.

[48] Second, the submission that *“the Appellants were covering the identity of the physical possessor they were in common and joint intention of firing shots in the street where the cartridges were found”* is not sustainable. As I have pointed out there is no evidence that the suspects knew who had fired the shots and there is no evidence from which an inference can be drawn that they knew who had fired the shots.

[49] In any event, the allegation that Appellants did know who fired the shots, is irrelevant. As I have pointed out above the Appellants were not arrested on suspicion of discharging the firearms. They were arrested for being in possession of unlicensed firearms and ammunition. Being aware of, and even acquiescing in the possession of the firearm by one member of the group, does not translate into reasonable grounds for suspecting the remainder of the group of the joint possession of that firearm.

Section 117 of the Firearms Control Act

²¹ section 120(7) of the Firearms Control Act

²² section 3(1) of the Firearm Control Act

[50] The Respondent relies, very belatedly, on section 117 of the Firearms Control Act. This defence was raised for the first time in the Respondent's Heads of Argument in this appeal.

[51] The relevant part of Section 117 (2) provides that –

(2) Whenever a person is charged in terms of this Act with an offence of which the possession of a firearm or ammunition is an element, and the State can show that despite the taking of reasonable steps it was not able with reasonable certainty to link the possession of the firearm or ammunition to any other person, the following circumstances will, in the absence of evidence to the contrary which raises reasonable doubt, be sufficient evidence of possession by that person of the firearm or ammunition where it is proved that the firearm or ammunition was found-

(a) on residential premises and the person was, at the time-

(i) in control of such premises; or

(ii) over the age of 16 years and ordinarily resident at such premises; ...

[52] I have considerable doubt that this section is intended to apply to an arrest under section 40(1)(b) of the CPA. Wording like “*Whenever a person is charged in terms of this Act*” and “*which raises reasonable doubt*” indicates that this section is intended to apply to criminal proceedings rather than arrest under section 40(1)(b) of the CPA. Nevertheless, I shall assume for the purposes of this judgment that section 117 can be relied on by a peace officer when making an arrest under section 40(1)(b).

[53] It is common cause that the Respondent bore the onus of proving that the arresting police officer had a reasonable suspicion that the Appellants were in possession of unlicensed firearms and ammunition. Relying on this section 117 the Respondent's submission is that the police officer's suspicion was reasonable because it was based on the facts that -

- a. the State took reasonable steps to link the possession of the firearm or ammunition to any other person;

- b. the firearm or ammunition was found on residential premises and the person was, at the time in control of such premises or over the age of 16 years and ordinarily resident at such premises.
- c. there was no evidence to the contrary which raises reasonable doubt to the contrary.

[54] In my opinion, taking into account the Respondent's onus of proof, the allegations of fact supporting these conclusions should have been explicitly pleaded in the Respondent's plea. It cannot be expected of the Appellant to deal with a defence about which no averments are made²³. It is a fundamental rule of fair civil proceedings that parties should be made aware of the case which they are required to meet. For that reason alone, this defence must be dismissed.

[55] In dealing with section 117, the Respondent in its Heads of Arguments makes the submission that –

*It is without a doubt that first and fifth Appellants were at all material times in control of the premises as their residential premises and the other suspects were arrested for common purpose paying a last respect to their loved ones.*²⁴

[56] The Respondent gives no basis for making this submission. The Respondent also does not deal with the other requirements as required by section 117 nor does it deal with the requirements of section 117 in relation to the firearms and ammunition found in the Kombi.

[57] I add that there was no evidence about the steps taken to link the possession of the firearm or ammunition to any other person and there was more than a reasonable doubt that the Appellants were in fact in the joint possession of the firearms and ammunition.

Conclusion

²³ Minister of Safety and Security v Sekhoto and Another [2010] ZASCA 141 at para 50

²⁴ Appeal record page 25-27 para 8.8

[58] In my opinion therefore, the Respondent failed to prove that the arresting officer or officers had a reasonable suspicion to arrest the first, third, fourth and fifth Appellants. The Respondent thus failed to prove that the arrest of these Appellants was lawful. These Appellants are entitled to damages for unlawful arrest and detention.

Damages

[59] The Respondent made no submissions on quantum and did not cross-examine the Appellants on what transpired after they were arrested.

[60] The following is a summary of the uncontested evidence of the first, third, fourth and fifth Appellants regarding the conditions in the cells in which they were detained on 19 December 2020 -

- a. there was no running water in the toilet and the toilet could not flush. As a result, the smell in the cell was foul;
 - b. the available blankets had an awful smell. There were sponge mattresses available to sleep on but they were filthy;
- They were detained in the cell under these conditions until 22 December 2020 and then released.

[61] The additional conditions affecting the first Appellant were that -

- a. the arrest and detention took place during the Covid-19 pandemic and there was no social distancing in the cells;
- b. she was asthmatic and she was affected by other suspects smoking in the cells;
- c. the arrest and detention was embarrassing and degrading for her in the community especially because she was detained for a period of three days. The family was in mourning for her late brother who had committed suicide and was yet to be buried;
- d. she cried when she was lodged in the cells with her baby who was about one year old. The first Appellant did inform the police that she had a baby to take care of and that there would be no one to look after the child in her absence. Despite this, the police ordered her to accompany them to the

police station along with her one-year-old child. Furthermore the first Appellant's biological mother (the second Appellant's grandmother) later requested to take the child (the second Appellant) from the cordoned-off area, but the police officer in charge refused.

[62] The fourth Appellant stated that he too felt aggrieved by the arrest and detention for something he did not do, and which brought shame to his family in the community. He was 25 years old at the time of his arrest and employed as a 'Fruit and Veg' Controller at Checkers. As a result of the arrest and detention, he was unable to attend work for three days as a consequence of which he received a written warning .

[63] The fifth Appellant stated that the entire experience was unpleasant, and he was concerned that he would receive a criminal record. He was in his final year of university that year studying IT Business Systems and was looking forward to pursuing opportunities thereafter. About a year later, he applied for employment and after a background check was done, it was 'picked up' that he had previously been arrested. He had to explain the situation and that a *nolle prosequi* had been issued.

[64] The Appellant's attorney has usefully referred in his heads of argument to a number of cases dealing with damages awarded for unlawful arrest and detention which I have considered.

[65] I am, nevertheless, mindful of what was said in *Minister of Safety and Security v Tyulu*²⁵ by the learned judge Bosielo AJA (as he then was) -

In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the

²⁵ [2009] 4 All SA 38 (SCA)

seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts ...

[66] The trite principle is that the amount of compensation is in the court's discretion and has to be exercised judicially. The court has to have regard to the unique circumstances of each case to determine a just and fair amount of compensation.

[67] Taking into account the circumstances of the four Appellants in this case, I determine the compensation for unlawful arrest and detention that will be just and fair to be -

- a. first Appellant - R350 000
- b. third Appellant - R150 000
- c. fourth Appellant – R200 000
- d. fifth Appellant – R250 000

Interest

[68] The Appellants claim interest in terms of Section 2(A) of the Prescribed Rate of Interest Act 55 of 1975. This act provides for the recovery of default interest on unliquidated amounts awarded by a court. Once judgment is granted, interest runs from the date payment is demanded or summons is served, whichever is earlier. A "demand" is defined as a written notice that enables the debtor to reasonably assess the creditor's claim.

[69] A letter of demand was delivered to the Respondent by way of a notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act (Act 40 of 2002). The notice was delivered by post on 19 March 2021.

[70] The Appellants claim interest from 30 March 2021 at the then prevailing prescribed rate of interest which was 10.5% per annum.

[71] The Respondent makes no submissions concerning interest.

[72] I have no reason to disagree with Appellants' submissions on their claim for interest.

Costs

[73] The general rule is that successful parties should be awarded their costs. As regards the first, third, fourth and fifth Appellants, there is no difficulty with the application of this rule.

[74] I have found that the claim by the second Appellant should be dismissed because of my finding that, on a balance of probabilities, the second Appellant was not arrested.

[75] The question arises as to whether there are good grounds for deviating from the application of the general rule which would result in the second Appellant being ordered to pay the Respondent's costs.

[76] In my opinion there are good grounds for deviating from the general rule. Although the second Appellant was not arrested, the police officers' conduct in dealing with the second Appellant (an infant of about one year old) was deplorable. I have dealt with what transpired in detail above, but what stands out is the fact that, after the arrest of the first Appellant, when the second Appellant's grandmother asked to take the child from the area that was at that stage cordoned-off, the police officer in charge refused.

[77] In my judgment there should be no order of costs against the second Appellant.

Order

It is Ordered:

A. The appeal of the second Appellant is dismissed;

B. The appeals of the first Appellant, the third Appellant, the fourth Appellant and the fifth Appellant are upheld and the order of the court of first instance is set aside and replaced with the following;

a. The arrest of the first, third, fourth and fifth Appellants on 19 December 2020 and the subsequent detention is declared unlawful;

b. The Respondent is ordered to pay to:

i. the first Appellant, the sum of R350 000 plus interest at the rate of 10.5% per annum from 30 March 2021 to date of payment;

ii. the third Appellant, the sum of R150 000 plus interest at the rate of 10.5% per annum from 30 March 2021 to date of payment;

iii. the fourth Appellant, the sum of R200 000 plus interest at the rate of 10.5% per annum from 30 March 2021 to date of payment;

iv. the fifth Appellant, the sum of R250 000 plus interest at the rate of 10.5% per annum from 30 March 2021 to date of payment;

C. The Respondent is ordered to pay the costs of suit of the first, third, fourth and fifth Appellants including the costs of the application for leave to appeal, the petition to the Supreme Court of Appeal and the costs of this appeal.

A MITCHELL

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 20 November 2024.

HEARD ON: 30 October 2024

DECIDED ON: 20 November 2024

For the Appellant: Attorney Logan Naidoo
in terms of Section 25(3) of Act 28 of 2014

For the Respondent: Adv K Mashile
Instructed by the State Attorney, Johannesburg