THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 759/2020

In the matter between:

CHRISTIAAN BRITS **APPELLANT**

and

MINISTER OF POLICE **FIRST RESPONDENT**

COLONEL JAMES ESPACH **SECOND RESPONDENT**

Neutral citation: *Brits v Minister of Police & Another* (759/2020) [2021] ZASCA 161 (23 November 2021)

Coram: PETSE AP and MATHOPO, MOCUMIE, MOLEMELA and MOTHLE JJA

Heard: 25 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 23 November 2021.

Summary: Delict – unlawful arrest and detention – vicarious liability of the Minister of Police – appropriate amount of compensation.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP and Mudau J sitting as court of appeal):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'1 The appeal is upheld with costs.

2 The order of the Magistrates' Court, Tzaneen, is set aside and replaced with the following:

"(a) The first defendant is ordered to pay R70 000 as general damages to the plaintiff.

(b) The first defendant is ordered to pay R7 239.

(c) The amounts in paragraphs (a) and (b) above shall bear interest at the prescribed rate from date of the judgment of the Magistrates' Court, Tzaneen, being 11 January 2018 to date of payment.

(d) The first defendant is ordered to pay the plaintiff's costs of suit."'

JUDGMENT

Molemela JA (Petse AP and Mathopo, Mocumie and Mothle JJA concurring)

Introduction

[1] This appeal arises from a delictual claim for damages instituted by the appellant, Mr Christiaan Brits as the plaintiff, against the respondents as the defendants in the Magistrates Court, Tzaneen (the trial court). The basis of the claim was that the second respondent, Col Espach, (cited as the second defendant in the trial court) had acted wrongfully and unlawfully when he arrested the appellant without a warrant at the latter's business premises, a dealership in second hand goods and scrap metal, on suspicion of being complicit in the offence of possession

of property suspected to be stolen. The claim against the first respondent, the Minister of Police (cited as the first defendant in the trial court), was on the basis of vicarious liability. The trial court found that the arrest was justified and thus dismissed the appellant's claim with costs. The appellant appealed to the Limpopo Division of the High Court (the high court). That court, per Mudau J with Makgoba JP concurring, dismissed the appeal with costs. Aggrieved by that decision, the appellant sought and was granted special leave by this Court.

Background facts

[2] The circumstances leading to the appellant's arrest are largely undisputed. The appellant stated in his evidence-in-chief that metal scrap dealers were regulated by law in relation to the sale and purchase of second-hand goods. He testified about the procedure normally followed at his shop whenever a seller offered to sell scrap metal. This procedure was in apparent reference to the Second-Hand Goods Act 6 of 2009 (Second-Hand Goods Act), which 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. He stated that the scrap metal offered for sale is usually a mixture of different metals, like aluminium, iron, pieces of stone and pieces of plastic. According to the appellant, once the metal is brought to his shop, the process followed by the shop-assistants entailed separating and sorting different metals out. After the sorting process, 'the metal is then weighed, written up in the register, the price calculated, the ID document [of the seller] would be photocopied, and then the person leaves with his money'. His explanation of the procedure followed at his shop was not disputed by the respondents.

[3] On the morning of 4 July 2014 the appellant received a text message from his former employee, Mr Dube, asking the appellant to phone him. He ignored the text message. About 30 minutes later, Mr Dube sent a message to his phone via the short message service (SMS) informing him that he had copper for sale. He told Mr Dube to take it to the shop. He explained that the reason he directed him to the shop was because all business transactions were done at his business premises. He subsequently received a call from the manager of his business, Mr Michael Mashapu (Mr Mashapu), who told him that the police were at the business premises and

required his presence. Upon arrival at the shop, Col Espach told him that Mr Mashapu had purchased stolen copper and the appellant would therefore be arrested. He informed Col Espach that Mr Dube had sent him an SMS offering to sell him copper. He professed his innocence and even offered to assist Col Espach to locate Dube. After reading the SMS exchange, Col Espach confiscated his phone and then arrested him. He was detained from about 12h00 and subsequently released on bail the following day, 5 July 2014, at about 13h00. As a result of the arrest, he engaged the services of a legal representative. He incurred legal expenses in the amount of R7239 in respect of the bail proceedings. The appellant's version of events was not controverted.

[4] Mr Mashapu testified that on the day of the incident, three men entered the shop and offered to sell scrap metal that was contained in a bag. While he and a female shop assistant were in the process of examining the items that were brought to the shop by these men, Col Espach entered the shop. He was dressed in civilian clothing. He grabbed one of the three men, identified himself as a police officer and produced his appointment card. The three persons all managed to flee. He maintained that Col Espach entered the shop before he and his female colleague had had an opportunity of inspecting the contents of the bag. At that moment, the contents of the bag had not yet been weighed and no transaction to purchase its contents had been entered into. He also pointed out that at that stage, he bore no knowledge of the SMS exchanges between the appellant and Dube. According to Mr Mashapu, the appellant had, at no stage, instructed him to buy or take possession of the items brought to the shop by the three men. He further testified that after Col Espach had introduced himself to him, he called the appellant to apprise him of the situation. While he was talking to the appellant, Col Espach took the phone from him and instructed the appellant to come to his shop, indicating that he intended arresting him.

[5] Although Mr Mashapu's evidence was that he was not allowed to purchase second-hand copper, it was common cause that the appellant, in the normal course of his business as a second-hand scrap metal dealership, was permitted to deal in all types of metals within the precepts of the law. Mr Mashapu's evidence regarding the procedure followed when a seller was offering to sell second hand goods accorded

with that of the appellant. He confirmed the procedures as set out by the appellant, commencing with the assessment of the nature of the goods brought by the seller and culminating with the recordal of the information in the register and the filing of a copy of the seller's ID document. He explained that the metals usually brought to the shop for sale consisted mostly of aluminium, radiators and stainless steel metal sheets. He explained that sorting the material offered for sale was important as different metals had varying prices. Whenever someone was selling various metals, the metal would first be sorted before being weighed. I interpose to mention that to the extent that Mr Mashapu's account of events was not challenged, it must be accepted as correct.[1]

[6] Colonel Espach testified that on 4 July 2014 he was on duty and had stopped his unmarked vehicle at a petrol station when he saw two men walking in the street carrying what seemed to be a very heavy bag. The two men were coming from the direction of some smallholdings in the area, which was an area that was beset with ~~the~~ theft of copper cables, borehole shafts and transformers. The men were struggling to carry the bag. This fortified his suspicion that the contents of the bag could be copper cables stolen from the industrial area. He decided to watch the movements of these persons in the hope that they would lead him to the kingpin who had created a market for the theft of copper cables.

[7] He observed a third man (who was later identified to him as Mr Dube) approaching the duo with a shopping trolley and noted that the heavy bag was loaded on the trolley, whereafter the trio walked together in the direction of a second-hand metal dealership. He phoned his colleagues, reported on his observations and asked for a back-up team to be dispatched. He followed the trio and saw them entering a second-hand metal dealership with the shopping trolley. Watching from the street while awaiting the arrival of the back-up team, he noticed that the bag was taken out of the trolley and put on a counter, whereafter it was attended to by two shop attendants, who later turned out to be Mr Mashapu and an elderly lady. He realised that a transaction was in progress but did not ascertain whether the

[1] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [199] ZACC 11; 1999 (10) BCLR 1059; 2000 (1) SA 1 (CC) para 62.

transaction was concluded because he was moving up and down in the street so that the back-up team could see him. He decided to enter the shop to confront all the persons who were involved in the transaction, as he feared that the men in question would soon leave the premises.

[8] Upon entering the shop, he produced his appointment card, introduced himself and ordered everyone to stand still. At that point, one of the two men who had initially carried the bag pushed him out of the way and the two of them headed for the door. He grabbed one of them, but Mr Dube loosened his grip to help the man escape. He tried chasing the two men in the street, but they outran him. In the intervening period, Mr Dube also fled the scene.

[9] He stated that once he was back at the appellant's shop, he ordered everyone to remain inside until the backup team arrived. He learnt that the person behind the counter, Mr Mashapu, was the manager of the business. He noticed that the bag previously carried by the suspects who had fled was placed on the counter and that the contents thereof had been put in a sack belonging to the shop. Upon the arrival of his back-up colleagues, it was discovered that the contents of the bag were copper cables that had been cut into pieces. The pieces of copper were weighed and found to weigh 29.8 kg. He asked Mr Mashapu to phone the owner of the business. The appellant subsequently arrived at the premises and introduced himself as the owner of the dealership.

[10] Upon the appellant's arrival, he (Col Espach) requested to see his cellular phone. Without asking for the appellant's permission, he looked at the messages on the appellant's cellular phone. He discovered that the appellant had had an SMS exchange with Mr Dube, in terms of which Mr Dube had offered to sell him copper. The SMS exchange revealed that in response to the appellant's enquiry about the weight of the copper, Mr Dube had informed him that it weighed 20kg. The appellant had then told Mr Dube to take it to his shop. The SMS exchange led him to suspect that the appellant was complicit in the theft of the copper cables that were brought to his shop. On the basis of that suspicion, he decided to arrest the appellant without a warrant and took him to the police station, where he was kept in detention until he

was released on bail on the afternoon of 5 July 2014. The appellant furnished Mr Dube's address to the police and he was later arrested.

[11] Under cross examination, Col Espach conceded that the appellant was, as a second-hand dealer, allowed to buy copper. He stated that his concern was that the appellant had been contacted directly by the seller 'as if it is a special copper that needs to be delivered that side'. He also conceded that even though he had confiscated the appellant's phone, a transcript of the SMS exchange was not available to be handed in as evidence. His evidence that Mr Dube had told the appellant that the copper weighed 20kg thus remained unsubstantiated.

[12] Colonel Usiba was called as the respondents' witness. He confirmed that he was part of the back-up police team summoned to the scene by Col Espach. He stated that upon his arrival at the shop, he and his colleagues were shown a mealie meal sack containing copper cables. The copper cables were on the counter, near the scale. Furthermore, he confirmed having seen the SMS exchange between the appellant and Mr Dube in relation to the copper that Mr Dube was asked to bring to the shop. Under cross-examination, he conceded that one could not easily tell that the copper brought to the shop was burnt. None of the companies approached during police investigations were able to identify the copper as their property. The investigating officer, Mr Rasebotsa, also testified as the respondents' witness. Nothing turns on his evidence. Suffice to mention that he stated that, from his point of view, the proceedings were still pending.

[13] It is common cause that the appellant, Mr Dube and a third co-accused appeared before the magistrate's court in Tzaneen on a charge of possession of property suspected to be stolen in contravention of s 36[2] of Act 62 of 1955. It appears that the charges were then provisionally withdrawn on 17 November 2014, apparently to allow for the re-arrest of Mr Dube, who had absconded whilst out on

[2] Section 36 of Act 62 of 1955 provides:
'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.'

bail. The trial commenced on 5 September 2016 and was concluded on 24 March 2017.

Legal principles applicable to an arrest without a warrant

[14] In their plea, the respondents admitted the appellant's arrest without a warrant and his subsequent detention. Their justification of the arrest was simply set out as follows: '… the arrest was lawful as the Plaintiff was arrested for possession of suspected stolen property.' It is trite that the arrest and detention of any person are *prima facie* wrongful, as they amount to a deprivation of a person's liberty. Section 12 of the Constitution guarantees every person the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. In *Minister of Safety and Security v Van Niekerk*,[3] the Constitutional Court stated as follows:

'17. . . . [T]he constitutionality of an arrest will almost invariably be heavily dependent on its factual circumstances.

…

20. [I]t would not be desirable for this Court to attempt in an abstract way divorced from the facts of this case, to articulate a blanket, all-purpose test for constitutionally acceptable arrests.'

[15] As regards the onus to prove the lawfulness of an arrest, the Constitutional Court in *Mahlangu and Another v Minister of Police*,[4] said:

'It follows that in a claim based on the interference with the constitutional right not to be deprived of one's physical liberty, all that the plaintiff has to establish is that the interference has occurred. Once this has been established, the deprivation is prima facie unlawful and the defendant bears an onus to prove that there was a justification for the interference.'

In this matter, the arrest was not in dispute; it was therefore common cause that the respondent bore the onus to prove the lawfulness thereof.

[16] Section 40 of the CPA provides, in relevant parts, as follows:

'**40 Arrest by peace officer without a warrant**

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

…

[3] *Minister of Safety and Security v Van Niekerk* 2008(1) SACR 56 (CC); 2007 (10) BCLR 1102 (CC) paras 17 and 20.

[4] *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC) para 32.

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

. . .

(e) 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.'

[17] The respondents did not, in their plea, specify the subsection of s 40 on which they relied for their justification of the appellant's arrest. The trial court proceeded on the premise that reliance was placed on s 40(1)*(b)* of the Criminal Procedure Act. The high court, traversed both s 40(1)*(b)*, on the basis of the charge preferred against the appellant being listed in Schedule 1 of the CPA, and s 40(1)*(e)*, which provides that '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'.

[18] In *Duncan v Minister of Law and Order for the Republic of South Africa (Duncan)*[5] it was held that an arrest without a warrant would be justified as envisaged in s 40(1)*(b)* of the CPA if the following jurisdictional facts were present: (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. The learned Judge of Appeal stated further that 'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection; ie, he [or she] may arrest the suspect. In other words, he [or she] then has a discretion as to whether or not to exercise that power (cf *Holgate-Mohamed v Duke* [1948] 1 All SA ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed.'

[19] Applying the same reasoning as in *Duncan*, the jurisdictional factors that have to be proved by a defendant who relies on s 40(1)(e) as a defence are: (i) the

[5] *Duncan v Minister of Law and Order for the Republic of South Africa (Duncan)* [1986] 2 All SA 241 (A); 1986(2) SA 805 (A) at 818F-H.

arrestor must be a peace officer; (ii) the suspect must be found in possession of property; (iii) the arrestor must entertain a suspicion that the property has been stolen and illegally obtained; (iv) the arrestor must entertain a suspicion that a person found in possession of the property has committed an offence in respect of the property; and (v) the arrestor's suspicion must rest on reasonable grounds. It is trite that once the jurisdictional facts for an arrest in terms of any one of the paragraphs of s 40(1) are present, a discretion arises.[6]

[20] The following remarks made by the court in *Mabona and Another v Minister of Law and Order and Others (Mabona)*[7] in relation to the issue of a reasonable suspicion are apposite:

'The test of whether a suspicion is reasonably entertained within the meaning of s 40 (1)*(b)* is objective. . . . 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 but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

These remarks are, *mutatis mutandis*, equally apposite in relation to the provisions of s 40(1)*(e)*.

Application of the legal principles to the facts

[21] The fundamental question is whether Col Espach, prior to the arrest, reasonably suspected the appellant of having committed an offence in respect of the

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[6] Ibid.; also see *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 28.

[7] *Mabona and Another v Minister of Law and Order and Others* 1988(2) SA 654 (SCE) at 658E-G.

copper cables brought to his shop by the three men. The trial court and the high court found that he did. The ratio of the decision of the high court can be found in the following passage:

'On the probabilities, [Mr Mashapu] 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.

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.

Prima facie, the appellant exercised constructive control of the copper through his employee, [Mr Mashapu]. 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.'

[22] The difficulty for the respondents is that none of the findings in the passage above are borne out by any evidence at all. The appellant never conceded that the contents of the bag were stolen property. The high court therefore erred in finding that the appellant had made such a concession. It seems to me that the high court considered certain parts of the evidence in isolation instead of analysing the evidence in its entirety.[8] It failed to take into account that, by Col Espach's own admission, at the time when he was standing in the street, he was not focused solely on what was happening in the shop because he was also on the lookout for the expected arrival of the back-up team. A significant concession which does not seem to have been taken into account by the high court is that Col Espach admitted that he entered the shop before the transaction was finalised.

[23] There can be no debate that a buyer dealing with second-hand goods would first want to see the goods offered to him before deciding whether or not to purchase them. The appellant's and Mr Mashapu's testimony about the protocols followed at

[8] *S v Shilakwe* 2012 (1) SACR 16 (SCA) at 20, para 11.

the appellant's shop are plausible. Notably, Mr Mashapu's evidence that Col Espach entered while he was busy inspecting the contents of the bag was not disputed. Similarly, it was not put to him that by the time Col Espach entered the shop, he (Mr Mashapu) had already weighed the copper cables. Under such circumstances, the high court's findings that '[t]he measurement of the copper presupposed an important end-stage, receipt of the copper on behalf of the shop' and that 'Col Espach intervened at the stage when the copper was weighed' are clearly erroneous.

[24] It is clear from Col Espach's own version that he acted hastily and pounced prematurely, as the transaction had not yet been concluded. In terms of the Second-Hand Goods Act, a buyer must inspect the goods and satisfy himself or herself that the seller is in lawful possession of the goods in question before buying them. The second-hand dealer must also record the details of the transaction in a register. The Act further imposes a duty on the second-hand dealer to report any suspicious items to the police and obtain an acknowledgment that he or she made a report. Mr Mashapu's evidence was that Col Espach entered the shop before he had had an opportunity to follow the protocols set out in the Act. That being the case, his compliance with that Act was interrupted by Col Espach at the stage when he was determining the contents of the bag. He can therefore not be faulted for the absence of the relevant documentation.

[25] It is significant that on Col Espach's own evidence, money had not yet exchanged hands. This must be the reason why the three men were still in the shop when Col Espach arrived at the scene. The persons who brought the copper cables to the appellant's shop fled as soon as Col Espach had introduced himself. It could therefore not be established whether Mr Mashapu would have purchased the contents of the bag or not. Objectively considered, a reasonable police officer who was privy to the same information as Col Espach would not have reasonably suspected that the appellant was complicit in the three suspects' possession of the copper cables. There was simply no basis for such a suspicion.

[26] As regards the SMS exchange, both the trial court and the high court lost the context of the circumstances under which the SMS text messages between the

appellant and Mr Dube were exchanged. The explanation given by the appellant for the SMS exchange was reasonable. This is more so the case because the appellant is the one who volunteered the information pertaining to the SMS exchange between himself and Mr Dube, to Col Espach. The undisputed evidence was that Mr Dube had sent the appellant a text message requesting him to phone him and the appellant had ignored that message because he did not want to talk to him. The appellant's evidence that he did not want to speak to Mr Dube because he had dismissed him over theft is a plausible version that was confirmed by Mr Mashapu. Even on Col Espach's version, Mr Dube was merely told to take the copper to the shop. Nothing in Col Espach's evidence suggested that the SMS exchange was incriminatory. There was no basis for the trial court's conclusion that a transaction for the sale of copper was concluded via SMS.

[27] The respondents' pleaded case was that the appellant had been found in possession of property suspected to be stolen. According to Snyman, a person is 'found in possession' within the contemplation of s 36 of Act 62 of 1955 if he or she has personal and direct control over the goods suspected of having been stolen; it is not sufficient that he exercises control through an agent or a subordinate.[9] The high court found that the appellant had exercised constructive control of the copper cables through Mr Mashapu. Relying on an obiter statement in *S v Wilson (Wilson)*,[10] the high court reasoned that the appellant was in possession of the copper cables even though he was not physically present at the shop when they were found. In that case, possession of dagga was imputed to the appellant as the owner of the premises where dagga was found in a locked storage area in the appellant's absence.

[28] Reliance on the *Wilson* judgment is misplaced, in my view, as this case is distinguishable both on the facts and the law. First, the charge in that matter related to the possession of dagga and not the possession of good suspected to be stolen as set out in s 36 of Act 62 of 1955; second, the court expressly stated that it was not necessary for it to decide the precise meaning of the expression 'found in possession' as used in s 36 of Act 62 of 1955; third, the court accepted that the

[9] CR Snyman, Criminal Law, 5th ed at 525.
[10] *S v Wilson* 1962 (2) SA 619 (A).

owner of the property had exercised a measure of control over the illicit goods; fourth, in coming to its conclusion that the appellant in that matter was in possession of the dagga, the court *inter alia* took into account that the appellant had, at the time when the dagga was found, admitted that it was his property.

[29] In this matter, the appellant had never been shown to have exercised any control over the illicit goods. Contrary to the high court's finding, he never admitted to knowing that the copper cables were stolen. On Col Espach's own evidence, the bag containing the copper cables was still on the counter when he entered the shop and had not been locked away. Under those circumstances, I am not persuaded that Mr Mashapu ever assumed possession of the copper cables in question. Mr Mashapu categorically stated that the appellant had not, prior to the three men's arrival at the shop, instructed him to purchase or take possession of the contents of their bag. Therefore, there can be no question of Mr Mashapu having accepted the copper cables as an agent on behalf of the appellant or the appellant having exercised constructive control of the copper through Mr Mashapu. It would therefore be wrong to impute unlawful possession of the copper in question to the appellant. Insofar as the high court found this to have been the case, it erred.

[30] On a holistic consideration of all the evidence, the circumstances under which the goods suspected to be stolen ended up at the appellant's shop were in part within the knowledge of Col Espach as he had witnessed their conveyance to the appellant's shop. Furthermore, the appellant proffered a reasonable explanation regarding the circumstances surrounding his SMS exchange with Mr Dube. Armed with all of that information, any further suspicion on the part of Col Espach could only have fallen within the category of a 'flighty or arbitrary, and not a reasonable suspicion'.[11] To the extent that Col Espach continued to harbour a suspicion notwithstanding the plausible explanation given by the appellant, his suspicion did not pass the test laid down in *Mabona* and was therefore not reasonable.

[31] Another significant consideration is that the respondents did not dispute the evidence that when Col Espach phoned the appellant, he told him that he must come to the shop so that he could arrest him. Bearing in mind his evidence that he wanted

[11] *Mabona and Another v Minister of Law and Order and Others*, footnote 7 above at 658H.

to arrest the ‘kingpin’ who ordered stolen goods and created a market therefor’, the ineluctable inference is that Col Espach had made up his mind to arrest the appellant long before he even arrived on the premises and did not apply his mind to the appellant’s explanation pertaining to the SMS exchange.

[32] For all the reasons mentioned above, I am of the view that a police officer possessed of all the information, including the SMS exchange and the explanation therefor, would not have reasonably suspected that the appellant was complicit in the unlawful possession of the copper cables. This finding is dispositive on the issue of liability, as one of the jurisdictional factors that render an arrest without a warrant lawful (a reasonable suspicion), is lacking. Put differently, the question whether the arrestor exercised a discretion to effect an arrest without a warrant only comes up for consideration once all the jurisdictional factors have been established. There is therefore no need for this Court to address itself to the enquiry as to whether or not Col Espach had exercised any discretion prior to effecting the arrest.[12] As it was common cause that he was acting within the course and scope of his employment with the first respondent at the time when the appellant was arrested, it follows that the first respondent was vicariously liable for Col Espach's wrongful acts.

The determination of quantum

[33] It is common cause that the unlawful arrest led to the appellant’s detention for a period of approximately one day. The trial court and the high court did not consider the issue of quantum as they found that the appellant’s arrest and detention were lawful. Although awards of damages made in previous decisions may serve as a guide in the consideration of an appropriate amount of damages for the injury resulting from unlawful arrest and detention, such awards are not to be followed slavishly, for every case must be determined on its facts.[13] It must be borne in mind that the primary purpose of an award of damages for unlawful arrest and detention is not to enrich the aggrieved party but to offer him or her some solatium for their injured feelings.

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[12] See *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) para 28.

[13] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 17; *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) para 26-29.

[34] In *Kammies v Minister of Police and Another*,[14] the plaintiff was detained for three days and awarded damages in the sums of R70 000. In *Rahim and Others v Minister of Home Affairs*,[15] this Court awarded damages ranging from R3 000 for four days unlawful detention and R20 000 for 30 days to R25 000 for 35 days' unlawful detention. In *De Klerk v Minister of Police*,[16] the Constitutional Court considered an amount of R300 000 for approximately seven days' detention to be fair and reasonable. In *Mahlangu and Another v Minister of Police*,[17] the Constitutional Court awarded damages in the amount of R500 000 for an unlawful detention that lasted eight months and ten days. Having considered all the facts of this case, including the age of the appellant, the circumstances of his arrest, the relatively short duration of the detention, I consider an amount of R70 000 to be an appropriate award of damages for his unlawful arrest and detention. I also consider the amount of R7239, which was paid as legal costs for the bail proceedings, to be fair and reasonable.

[35] As regards costs, there is no reason to depart from the ordinary rule that costs follow the result.

Order

[36] In the result, the following order is granted:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'1 The appeal is upheld with costs.

2 The order of the Magistrates' Court, Tzaneen, is set aside and replaced with the following:

"(a) The first defendant is ordered to pay R70 000 as general damages to the plaintiff.

(b) The first defendant is ordered to pay R7239.

(c) The amounts in paragraphs (a) and (b) above shall bear interest at the prescribed rate from date of the judgment of the Magistrates' Court, Tzaneen, being 11 January 2018 to date of payment.

(d) The first defendant is ordered to pay the plaintiff's costs of suit."'

[14] *Kammies v Minister of Police and Another* [2017] ZAECPEHC 25.
[15] *Rahim and Others v Minister of Home Affairs* [2015] 3 All SA (SCA) paras 27 and 28.
[16] *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425; 2021 (4) SA 585 (CC).
[17] *Mahlangu and Another v Minister of Police* [2021] ZACC 10.

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M B MOLEMELA

JUDGE OF APPEAL

Appearances

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