

SOUTH AFRICA / JUDGMENT

Boshoff v Minister of Safety and Security (1762/13) [2017]

ZANWHC 10 (17 February 2017)

[2017] ZANWHC 10

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1762/13

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IN

THE NORTH WEST HIGH COURT

MAHIKENG

CASE

NO.: 1762/13

In

the matter between:

SHARON
BOSHOFF Plaintiff
AND
MINISTER
OF SAFETY AND
SECURITY Defendant
CIVIL
MATTER
DATE
OF HEARING
: 23
NOVEMBER 2016
DATE

OF JUDGMENT :

17 FEBRUARY 2017
FOR

THE PLAINTIFF :

Adv. Zwiegelaar
FOR THE

DEFENDANT :

Adv. Moagi

JUDGMENT

KGOELE J:

- [1] The plaintiff claims damages from the defendant arising from the fact that Captain G M Mothowagae (“Mothowagae”) of the South African Police Service in Mahikeng North West (SAPS), arrested her without a warrant for contravening section 25(4) of the Second-Hand Goods Act, Number 6 of 2009 (“the Second-Hand Goods Act”), on 31 May 2012 and caused her to be detained in the police cells at Mahikeng Police Station until 1 June 2012 when she was released on bail by the Magistrates’ Court for the district of Molopo.
- [2] The arrest of the plaintiff and her ensuing detention emanated from the fact that “approximately 41 kg burnt copper and/or burnt copper cable” (the seized copper”) was found in a container on the business premises of Scrapcor at 42 First Street, Mahikeng. The incident occurred during a special operation carried out by the SAPS in conjunction with officials of Eskom on the instructions of their Cluster Commander to investigate the compliance with the provisions of section 25(4) of the Second-Hand Goods Act by scrap metal dealers in Mahikeng and Mmabatho.
- [3] The arrest and detention of the plaintiff as well as the fact that her arrest was effected without a warrant were admitted by the defendant. This also included the averment that the members of the SAPS concerned acted at the time within the course and scope of their employment.
- [4] When the trial commenced the parties agreed that the issue of liability be separated from the quantum. I then issued a ruling that the aforesaid issues be separated and that the question of the quantum be deferred for later determination. The defendant accepted the fact that it bears the onus to prove the lawfulness of the arrest and detention of the plaintiff and consequently commenced with the leading of evidence.
- [5] The evidence that was led by the defendant is that on the 31st May 2012 the police officers, amongst others Mothowagae, went to the business of the plaintiff’s father to conduct a search.

They were accompanied by members of Eskom. The Transnet personnel did not come although they were expected to be present.

According to Mothowagae the police normally ask these officials from these institutions to accompany them during this kind of operations

so that they can be able to identify the copper cables belonging to them. During the search, copper cables which were identified by Eskom official as theirs were found in the store room at the premises. This copper cable according to Mothowagae looked as if it was burnt as its cover was not there and it had some black marks on it. She then formed a suspicion that it was stolen and then requested the clerks who were found working there to call the owner. The plaintiff was

the one that came and she introduced herself as the manager because her father was ill. The clerks that called her also confirmed that he is a manager in control of the premises. After explaining to her that they found burnt copper cables at their premises she was asked how she acquired it. She explained that it was brought by the other people that came there. She then gave Mothowagae the identity copies of those people that she claimed they bought it from. She indicated that when a person comes to them to sell she just buy and obtain a copy of the identity document from that particular person. She did not show them the register where these transactions had to be recorded. Mothowagae indicated that what was important was for the plaintiff to have proof from where they got the burnt copper from. She further explained that in terms of the law, only Eskom or Transnet company can sell burnt copper but when they do that they issue a letter or a certificate that they are the ones that sold it to that particular buyer. She indicated that she was shown the identity documents instead when she requested for a Certificate or a letter from where they bought these burnt copper. The fact that the owner of that place did not follow the law and also that plaintiff

did not furnish a reasonable explanation strengthens her suspicion that the burnt copper was stolen. Mothowagae then informed

plaintiff that she was arresting her. Plaintiff requested to see her lawyer first, and was allowed to do that. She later came to the police station as she agreed with Mothowagae and she was then detained.

- [6] The second and last witnesses that testified on behalf of the defendant were Mr Vincent Mosaka who was the investigating officer in this case. His evidence relates to events that occurred after plaintiff was arrested. He said that he and Captain Niemand were the ones that were interviewing the plaintiff and charged her after she was arrested. Further that plaintiff was asked by Niemand for an explanation but she did not make any. Lastly that he saw the cables in question which were burnt copper when it was at the police station. He concluded that it was burnt copper because he touched it and his fingers were full of soot (black ash he puts it).
- [7] After the close of the defendant's case the plaintiff testified on her behalf and told the Court that at the time of arrest and detention, her father who was not well at that moment and subsequently passed away on the 19th September 2013 was the owner of the scrap metal and a holder of a valid certificate to carry on business under the name and style of Scrapcor. Due to the fact that he was dependant on oxygen, he was no longer able to attend to the day to day control, direction and supervision of the scrap metal business and he had to rely on his employees for doing so. Her late father had at the time employed amongst others two female persons referred to by the plaintiff as Tshepiso and Gladys to attend to the buying of the scrap metals. According to her the two were also responsible for the making of the entries in respect of the scrap metal purchased by them in the register kept by her late father for that purpose. The seized copper was purchased by Tshepiso. She was not present at the premises of the scrap metal business at the time of the purchasing of the seized copper by Tshepiso. She did not have any knowledge of the purchase of the seized copper by Tshepiso and of the

circumstances under which the seized copper was purchased. She did not have any knowledge of the presence of the seized copper in the container at the premises of the scrap metal business. She reiterated that she did not possess the seized copper; and did not have the intention to possess the seized copper or either to keep and use it for herself or on behalf of or in the interest of her late father or the scrap metal business.

- [8] It is common cause that the plaintiff was not present at the time when the seized copper was found in the container at the business

premises of her father. Further that she on the day in question only went to the premises of the scrap metal business after having received a call from Tshepiso who advised her that there were members of the SAPS at the business premises. It is also common cause that, the police had after having searched the premises thereof found burnt copper in the container and that they insisted to see the owner or person in control of the scrap metal business. The seized copper had already been removed from the container where it was found when she arrived. It is also common cause that the plaintiff had upon her arrival at the business premises introduced herself to Mothowagae as the manager of the scrap metal business.

- [9] Her evidence regarding her arrest is different from that of Mothowagae. She testified that the police did not arrest her at the business premises. He was told to go back to work and they will contact her later. When she arrived at work a lady who also owns a scrapyard next to them informed her that the police were also searching at their place and Mr Van der Berg who was employed by the owner of that Scrapyard could not go. This lady also asked her to go and check at the police station what is happening. She then proceeded to the police station as a result. She found Mr Van der Berg at the police station standing outside. She asked Mothowagae whether they are arresting them and she indicated that they are still waiting for instructions from their Captain. Later they were taken to Mafikeng police station and were eventually charged there and she signed the explanation of rights document. They detained Mr Van der Berg there. They took her firstly to Ottoshoop with the aim of detaining her there but could not get a female cell. She was eventually taken back to Mafikeng police station where she was detained. She indicated that nobody ever asked for her explanation of the copper cable. The following

morning they took them to Court where they were represented by Mr Coetzer who applied for their release on bail, which was granted.

- [10] In evaluating the evidence as a whole, the credibility of the defendant's witnesses was not criticised at all, their evidence is accepted and it is found to be reliable. The evidence of the plaintiff on the contrary leaves much to be desired. There were many important things that she could not remember when asked during cross examination. At some stage one could not even discern what her version is. She initially gave the impression that she only assisted with giving the employees at his father's business cash when they needed some. She later conceded that she was in charge of the business. When it was shown to her that her evidence in chief down played her role, she then said that she said to the police that she was

the manager only to protect her father and did not want him to take responsibility as he was sick.

When asked whether by doing the latter she was lying to the police, she could not even accept this simple concession.

[11] In her evidence in chief she testified that nobody read the document that contained the rights although she signed it, later in cross-examination she changed and said she cannot remember whether it was read to her or not. The version that was initially put by her Counsel to the defendant's witnesses was that she was not told that the copper seized were burnt, and she will also deny that the copper was burnt. During cross-examination she on the contrary without hesitation admitted that amongst the copper that was found there was a burnt copper cable. I may pause to indicate that the version of the plaintiff keeps on changing to adapt to the evidence given in Court. I am saying this because this was not the first time that an issue which was put by the plaintiff was admitted at a later stage. The first issue that the plaintiff changed its initial stance on was the one that related to whether she said to Mothowagae and the person that was taking her warning statement that she was a manager. She initially denied having said that. This issue was formally admitted later after cross-examination of the defendant's witnesses. Under the circumstances the questions that are left for considerations in this matter is whether the arresting officer formed a reasonable suspicion that an offence had been committed and whether she exercised her discretion rationally in arresting the plaintiff.

[12] Sections 25(4)(b) and 25(4)(c) of the Second Hand Goods Act criminalizes dealing and possession of non-ferrous metal (ie. Copper) which cover was burnt. The Section provides as follows:-

"25. (4) No person may-

- (a);
- (b) acquire or dispose of any cable consisting of controlled metal of which the cover has been burnt, unless the seller thereof is able to provide a reasonable explanation for the burnt cover, and only after the matter has been reported to a police official in the manner contemplated in section 22(1); or
- (c) be in possession of any cable consisting of controlled metal of which the cover has been burnt, unless such person is able to provide a reasonable explanation for the burnt cover".

[13] The jurisdictional facts which must exist before the discretional power conferred by section 40(1)(e) of the Criminal Procedure Act 51 of 1977 (CPA) may be invoked are:-

- the arrestor must be a peace officer;
- the goods have to be found in the possession of the suspect (the arrestee);
- the arrestor must entertain a suspicion that:

- the goods found in the possession of the suspect (the arrestee) were stolen property or property dishonestly obtained; and
- the suspect (the arrestee) has committed an offence in respect thereof; and
- the suspicion entertained by the arrestor must rest on reasonable grounds.

[14] It is now settled that there is no further jurisdictional requirement that the arrestor should consider using a less drastic measure than arrest to bring the suspect (the arrestee) before Court. See: *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA) paragraph 22 at 325 E to F; and *National Commissioner of Police v Coetzee* 2013 (1) SACR 358 (SCA) paragraph 13 at 365 F to G.

[15] It is clear from the wording of section 40(1) of the CPA that it is only when all the jurisdictional facts for the defences created therein are satisfied that the peace officer may invoke the discretionary power conferred by it and that, it is only then that the peace officer would be empowered to in his discretion arrest without a warrant. If all the jurisdictional facts for the defences created in section 40(1) of the CPA have been proven on a balance of probabilities, then the deprivation of the freedom of the arrestee (or suspect) by her arrest or without a warrant of arrest and ensuing detention would be with “just cause” as contemplated in section 12(1)(b) of the Constitution of the Republic of South Africa (the Constitution).

[16] It is also clearly established that the discretionary power to arrest conferred upon peace officers by section 40(1) of the CPA may be exercised only for the purpose to bring the suspect (the arrestee) before Court and that the exercise of the discretion will be unlawful if the arrestor knowingly invokes the power to arrest for any other reason. See: *Minister of Safety and Security v Sekhoto* (supra) paragraph [30] at 327 H and paragraph [42] at 331 C.

[17] It thus follows that if the arrest was made for any other purpose than to bring the arrestee before Court, the arrest would for that reason alone be unlawful. See: *Minister of Safety and Security v Sekhoto* 2010 (1) SACR 388 (FB) paragraph 28 at 398 F.

[18] It has also been held that an arrest to:

18.1 frighten or harass the suspect, for example to appear before mobile traffic Courts with intention to expedite the payment of fines (*S v Van Heerden en Ander* 2002(1) SACR 409 (T) at 416 G to H);

18.2 to prove to colleagues that the arrestor is not a racist (*Le Roux v Minister of Safety and Security and Another* 2009 (2) SACR 252 (KZP) (2009(4) SA 491) paragraph 41);

18.3 to punish the plaintiff by means of arrest (*Louw and another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T) at 184); or

18.4 to force the arrestee to abandon the right to silence (*Ramphal v Minister of Safety and Security* 2009 (1) SACR 211 (E) paragraph 11)-

are all deemed to be unlawful.

[19] In the Minister of Safety and Security v Sekhoto (supra) by the Free State Division in subparagraph [28] of the judgment at 398 G to 400 A it was held:

“.....

“(c) *The lawfulness of an arrest is fact-specific. See: (Minister of Safety and Security v Van Niekerk supra paragraph 17).*

- (d) Did the arrestor appreciate that an arresting officer has a discretion whether to arrest without a warrant or not, and did the arrestor consider and apply that discretion. See: (Gellman v Minister of Safety and Security [2007] ZAGPHC 269; 2008 (1) SACR 446 (W) paragraph 94.
- [20] Advocate Zwiigelaar submitted that the defendant’s case entails that Captain Mothowage had because she suspected that the seized copper was stolen Eskom-copper and that the plaintiff has committed the offences of contravening section 25(1)(b) and
- (c) of the Second-Hand Goods Act in respect thereof decided to arrest the Plaintiff and cause her to be detained.
- [21] She argued that the mere fact that the plaintiff told Captain Mothowagae that she was the manager of the scrap metal business does not constitute sufficient evidence to show on a balance of probabilities that the seized copper was at the time when it was found in the container on the business premises of the scrap metal business under the personal and direct control of the plaintiff and that she was thus found in possession thereof.
- [22] She furthermore submitted that the defendant has also failed to show on a balance of probabilities that the plaintiff had the intention to possess the seized copper – especially in view of the plaintiff’s evidence that she had no knowledge of the presence of the seized copper in the container at the scrap metal business.
- [23] Unfortunately the submission by Advocate Zwiigelaar on behalf of the plaintiff loses the fact that in matters like this, the Court does not require sufficient evidence to show that the plaintiff was in personal and direct control of the goods in question and that she was found in possession thereof. What the police officer has to do is to form a reasonable suspicion in his/her mind that that was the case. A suspicion is a suspicion in its ordinary sense and meaning in the dictionary and is not “Certainty”. It must further be borne in mind that a suspicion can be reasonable even if there is insufficient evidence to establish a prima facie case against the defence. See: Duncan v Minister of Law and Order 1984(3)SA 460 (T) 465-6.
- [24] The submission by Advocate Zwiigelaar further loses sight of the fact that what is important for the consideration by this Court is what the plaintiff said at the time immediately before her arrest and not her explanation in Court during trial that she had no knowledge of the presence of the seized copper in the container. What is of significance in this matter is that Mothowagae indicated that when she was asked about the possession of burnt copper and

the required documentation she indicated that they normally buy it like that and only obtain copies of the identity document of the people that they bought it from. Further that, they were shown copies of the identity document as the required documentation. Mothowagae further testified that when asked why they did not report to the police, no explanation was forthcoming. This is what led to Mothowagae concluding that her explanation is not reasonable and decided to arrest her. To make matters worse, the plaintiff did not at the time the explanation was required tell the police that in fact she only assist in giving them cash when they need it, as she claimed in the oral testimony, but rather chose to tell the police that she is the manager.

- [25] In as far as the issue of whether Mothowagae entertained a reasonable suspicion that the goods were stolen from Eskom or not and that she committed an offence in respect thereof Advocate Zwiigelaar submitted that Captain Mothowagae did not testify that she herself formed the opinion that the seized copper was stolen property. In addition, Captain Mothowagae testified during her evidence-in-chief that one of the officials of Eskom, who accompanied her and her colleagues to the scrap metal business, Mr K P Nyuliwe (“Nyuliwe”) indicated to them that the seized copper belonged to Eskom but that he did not explain to them why he said so. Captain Mothowagae further testified during cross-examination that she did not have any experience insofar as Eskom-copper is concerned and that she did not attend any workshop in respect thereof.
- [26] To substantiate the argument above Advocate Zwiigelaar submitted that it is clear from the aforesaid that Captain Mothowagae had like Sergeant Herbst in the matter of *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (TPD) not formed her own opinion but relied on the opinion of Nyuliwe that the seized copper belonged to Eskom. As such it can hardly be said that Captain Mothowagae as the arresting officer entertained a suspicion that the seized copper was stolen Eskom property.
- [27] She lastly submitted that it goes without saying that, if Captain Mothowagae did not entertain the suspicion that the seized copper was stolen Eskom property, that the fourth jurisdictional fact for a section 40(1)(e)-defence, viz that such suspicion must rest on reasonable grounds would also not have been satisfied by the defendant.
- [28] The argument of the plaintiff above does not have merit. Evidence by Mothowagae is to the effect that they normally took officials from Eskom and Transnet solely because they should assist the police in the identification of their respective cables if found as they cannot easily do that because they use their respective unique numbers in doing so. It is therefore clear that after Nyuliwe identified the seized copper as belonging to Eskom, as testified by Mothowagae, she formed an opinion that they were stolen or suspected to be stolen property from Eskom. With due respect, it is not correct to submit that she herself did not testify that she formed an opinion that it was stolen. She even went to state that because the copper looked burnt, this was another reason that made her to have the suspicion that it was stolen. In *S v Ganyu* 1977(4)SA 810 (RAD) the following was said:-

“In deciding whether a reasonable suspicion has been proved, it must of necessity be recognized that reasonable suspicion never involves certainly as to the truth. Where it does, it ceases to be suspicion and becomes fact. A reasonable suspicion that goods have been stolen is based on conjecture and therefore always admits to the possibility that the goods may have been acquired not by theft but by some other ... unlawful means or, of course, innocently. It follows that a reasonable suspicion that goods have been stolen does not cease to be either a suspicion or to be reasonable because the person entertaining it perceives the possibility that his suspicion may be unfounded and that the goods may have been acquired by... unlawful means or innocently”.

- [29] Advocate Zwiegelaar continued her submission by stating that due to the fact that the evidence of Nyuliwe has not been adduced on behalf of the defendant there is no evidence before this Court pertaining to the grounds on which Nyuliwe claimed that the seized copper belonged to Eskom. It has thus not been proved by the defendant that the seized copper belonged to Eskom.
- [30] These arguments are also misplaced simply because this Court is not seized with the criminal matter of this incident and thus there was no need that Nyuliwe be called to testify to prove that the copper cable belonged to them. The only thing that was needed at that time was a suspicion that it has been stolen. A reasonable suspicion that it belonged to them sufficed.
- [31] The next question for consideration is whether the defendant has shown on a balance of probabilities that Captain Mothowagae entertained a suspicion that the plaintiff has committed the offences of contravening section 25(4)(b) and (c) of the Second-Hand Goods Act in respect of the seized copper. Both the statutory offences created in section 25(4)(b) and (c) of the Second-Hand Goods Act relates to cable consisting of controlled metal of which the cover has been burnt. As such the defendant has to prove on a balance of probabilities that Captain Mothowagae has entertained a suspicion that the seized copper consisted out of copper cable of which the cover has been burnt.
- [32] On this issue Advocate Zwiegelaar submitted that it appears from the evidence of Captain Mothowagae as if she wanted to give out that she herself formed the suspicion that the seized copper was burnt as she could see it with her naked eyes. According to Advocate Zwiegelaar the aforesaid evidence of Mothowage is highly dubious and unsatisfactory as she has conceded that she was not an expert and has no experience in that regard. What is more worrying is that Captain Mothowagae made no mention in her witness statement that the seized copper consisted out of copper cable of which the cable has been burnt and that she considered it to be “burnt copper” as she could see that it has been burnt. It has also not been proved by the defendant that the seized copper consisted out of copper cable of which the cover has been burnt. In view of the aforesaid she submitted that the defendant has also failed to satisfy the fourth jurisdictional fact for a section 40(1)(e)-defence.

[33] I do not understand why Counsel still persists on this argument because the plaintiff herself as indicated earlier conceded that it was burnt copper. At any rate, Mothowagae and Mosala testified that it was burnt copper. It suffice to highlight that the offence that Mothowagae suspected the plaintiff to have committed does not make a possession of copper cable an offence, only possession of a burnt one. Mothowagae demonstrated in Court that she was alive to the provision of the section involved and what it required.

[34] Advocate Zwiegelaar further submitted that it has been held in *S v Nader* 1963 (1) SA 843 (O) at 846 C to D and *S v Essack* 1963 (1) SA 922 (T) that to be “found in possession”

- one must at least have personal and direct control over the goods;
- a person cannot possess something which he is unaware that he possesses it (that means, if he is unaware that he is exercising control over it); and
- a person cannot possess something without knowing what it is that he possesses (or what he is exercising control over).

She also relied on the case of *S v Jacobs* 1989 (1) SA 652 (A) at 659 D to H for the above propositions.

[35] The fact that plaintiff conceded that she told the police that she is a manager gives a complete answer to the issue of possession. It is also important to note that such indication was also made in the presence of her attorney according to the version of the plaintiff. For purposes of Section 41(e) of the CPA, property can be found in possession of a suspect even though he or she is not present when it is found. The reason for this is that it is accepted that some degree of control over the property places him/her in possession thereof. See: *State v Motaung and Others* 1962

(3) SA 611; *S v Nader* 1963 (1) SA 843 (O); and du Toit et al, Commentary on the CPA Page 5-12H.

[36] In as far as to whether Mothowagae exercised his discretion properly Advocate Zwiegelaar submitted that it is clear from the aforesaid that the defendant has failed to plead that Mothowagae appreciated that she had a discretion whether to arrest without a warrant or not, that she considered and exercised that discretion, that she investigated the explanation offered by the plaintiff and that there were ground for the infringing upon the constitutional rights of the plaintiff as she presented a danger to society, might have absconded, could have harmed herself or others or was not able to disprove the allegations levelled against her.

[37] In addition, the submissions continued that Mothowagae had during her evidence not claimed that she appreciated that she has a discretion to arrest the plaintiff without a warrant of arrest or not and that she exercised it before having effected the arrest of the plaintiff. According to Captain Mothowagae she had after having informed the plaintiff that she was under arrest for contravening section 25(4) of the Second-Hand Goods Act instructed the plaintiff to come to the police station with her own vehicle and that when the plaintiff told her that she wanted to speak to her attorney told her that it was in order but

that she must make sure that “you bring yourself to the police station” and that the plaintiff had in fact later went to their office.

- [38] To bolster the above submission Advocate Zwiegelaar argued that the aforesaid as well as the fact that the plaintiff when informed by Tshepiso that the SAPS required her attendance at the scrap metal business immediately went there clearly showed that the plaintiff has rendered her co-operation to Captain Mothowagae and that there was no risk that she might have absconded. The plaintiff also did not present a danger to society. There was also no evidence indicating that the plaintiff could have harmed herself or others. As such there were no grounds for infringing upon the constitutional right of the plaintiff to freedom as enshrined in section 12(1) of the Constitution.
- [39] Lastly, she submitted that all of the above is an indication that Mothowagae’s decision to arrest the plaintiff was not rationally taken and that she did not exercise the discretion conferred upon her by section 40(1)(e) of the CPA properly. In view of the aforesaid she finally submitted that the plaintiff’s arrest has been effected arbitrarily.
- [40] As far as this issue is concerned, I can do no better than to quote what was decided in the Supreme Court of Appeal case of Minister of Safety and Security v Sekhoto and Another [2011] 2 All SA 157 (SCA) paragraphs 38-44.

“[38] Although this approach tends to suggest that the "executive discretion" of a peace officer is "administrative" and may therefore be regulated by section 33 of the Bill of Rights, which guarantees the right to just administrative action, I am somewhat loath to hold as much simply because it could mean that the provisions of the Promotion of Administrative Justice Act 3 of 2000 would apply and this could imply that if the discretion was "incorrectly" exercised the claimant would only in exceptional circumstances be entitled to "compensation" and not damages. But even if this Act does not apply it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily.

- [39] This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.
- [40] This does not tell one what factors a peace officer must weigh up in exercising the discretion. An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute read in the light of the Bill of Rights. Where the statute is silent on how they are to be exercised that must necessarily be deduced by inference in accordance with the ordinary rules of construction, consonant with the Constitution, in the manner described by Langa CJ in Hyundai.

- [41] In this case the Legislature has not expressed itself on the manner in which the discretion to arrest is to be exercised and that must be discovered by inference. And in construing the statute for that purpose the section cannot be viewed in isolation, as the court below appears to have done.
- [42] While it is clearly established that the power to arrest may be exercised only for the purpose of bringing the suspect to justice the arrest is only one step in that process. Once an arrest has been effected the peace officer must bring the arrestee before a court as soon as reasonably possible and at least within 48 hours (depending on court hours). Once that has been done the authority to detain that is inherent in the power to arrest has been exhausted. The authority to detain the suspect further is then within the discretion of the court.
- [43] The discretion of a court to order the release or further detention of the suspect is subject to wide-ranging -and in some cases stringent - statutory directions. Indeed, in some cases the suspect must be detained pending his trial, in the absence of special circumstances. I need not elaborate for present purposes save to mention that the Act requires a judicial evaluation to determine whether it is in the interests of justice to grant bail, that in some instances a special onus rests on a suspect before bail may be granted and the accused has in any event a duty to disclose certain facts, including prior convictions, to the court. It is sufficient to say that if a peace officer were to be permitted to arrest only once he is satisfied that the suspect might not otherwise attend the trial then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest is to be found in the statute by inference is untenable.
- [44] While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime - and those listed in Schedule 1 are serious, not only because the Legislature thought so - a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively” [My emphasis].
- [41] Accordingly the circumstances giving rise to the suspicion must be of such that as would ordinarily move a reasonable person to form the suspicion that the arrestee has committed the offence. See: *State v Reabow* 2007 (2) SA CR 292 E.

Objectively speaking, it is clear that Captain Mothowagae had a reasonable suspicion due to inter alia:-

41.1 The burned copper had been found on the premises

41.2 The plaintiff indicated that she is the manager of the business and is hence in control of same

41.3 She had an expert confirming the copper prior to her reaching the conclusion to arrest or not

41.4 She was not satisfied with the plaintiff's explanation

[42] In her supplementary heads of argument filed by Advocate Zwiegelaar, she referred this Court to the following recent decisions. Raduvha v Minister of Safety and Security 2016 (10) BCLR 1326 (CC) and Dlamini v Minister of Safety and Security 2016 (2) SACR 655 (GJ).

The Dlamini matter instead support the defendant's case Van Oosten J concluded in that matter that:-

"There was no obligation on the arresting officer to conduct any further investigations as on the facts of the matter such investigations

would have been superfluous"

This quotation is apposite in our matter because everything that transpired at the business premises occurred in front of the arresting officer Mothowagae. There was therefore no need for her to investigate anything further. The Constitutional case of

M R v the Minister is distinguishable from our matter as it deals with the discretion where a minor is involved.

[43] In the premises, I am satisfied that the defendant discharged the onus vested on it on a balance of probabilities. The plaintiff did not make a case for the relief sought.

[44] The plaintiff's claim is accordingly dismissed with costs.

A M KGOELE

JUDGE OF THE HIGH COURT

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/boshoff-v-minister-unknown-topic-anwhc-2017--6a3ea5213b1caa9129817781>

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