IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 71757/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

27/11/2014
DATE

SIGNATURE

28/11/2014

In the matter between:

JOHANNES RUDOLF VAN DER WESTHUIZEN Plaintiff

and

THE MINISTER OF POLICE Defendant

JUDGEMENT

DE VOS J:

[1] This is an action for damages arising out of the arrest and detention of the Plaintiff by members of the South African Police Services who were acting in the course and scope of employment with the Defendant. The Plaintiff's case is that his arrest occurred on Monday 22nd August 2011 at Olifantsfontein, and was followed by his detention at the Olifantsfontein Police Station until the next day when he appeared before Court. The arrest was effected by Constable Majatjabothata. It is common cause that two charges were laid against the Plaintiff by his former employer, Mr Vieira. The first charge was that the Plaintiff committed a crime of theft of money in an amount of R1250,00. This offence was allegedly committed on Sunday the 25th July 2011. Mr Vieira laid this charge according to his witness statement on the 26th

August 2011. A copy of the crime docket was handed in as an exhibit and shows that the investigating officer was Detective-Sergeant Lelaka. A CAS no. 131/08/2011 was allocated to this docket. The second charge laid against the Plaintiff, under CAS no. 157/08/2011, was one of malicious injury to property. According to the crime docket, this offence was allegedly committed on the 9th of July 2011 and a different investigating officer was appointed. The two dockets were eventually dealt with in one charge sheet. The theft case proceeded to trial and the Plaintiff was eventually discharged in terms of the provisions of Section 174 of the Criminal Procedure Act, Act no. 51 of 1977 (hereinafter referred to as "the CPA"). He was acquitted on the 2nd November 2011. The Malicious Injury to Property complaint was not proceeded with and was eventually *nolle prosequi* by the prosecutor on the 2nd November 2011.

[2] It is common cause that the Plaintiff was arrested without a warrant of arrest and that the main issue to be determined is whether the arresting officer lawfully arrested the Plaintiff on the 22nd August 2011. It is further common cause that the charge of Malicious Injury to Property played no role at the time of the Plaintiff's arrest although this charge was added later on the day of his arrest whilst being in detention. It is further common cause that the Plaintiff appeared in Court the following day, i.e. the 23nd August 2011. Bail was refused by the Magistrate's Court. The Plaintiff was held in custody for an additional period of time before he was released on bail. In his summons the Plaintiff also claims damages for the period held in detention after the refusal of the bail application. Such claim was not proceeded with as the Department of Justice was not joined as a party to the proceedings before this Court. The Plaintiff also abandoned a claim for the recovery of legal expenses in the amount of R3762,00.

[3] The Plaintiff's arrest and detention until his first Court appearance was admitted. It was pleaded on behalf of the Defendant that both the arrest and the detention were lawful in terms of Section 40(1)(b) of the CPA in that the arresting officer had formed a reasonable suspicion that the Plaintiff had committed the theft offence – a Schedule 1 offence in terms of the CPA – prior to effecting the arrest. The damages allegedly suffered by the Plaintiff are also disputed and denied.

[4] It is not in dispute that the arresting officer, Cst. Majatjabothata, was at all relevant times acting in the course and scope of his employment with the Defendant and that the Plaintiff had complied with the provisions of the Institution of Legal Proceedings Act, Act no. 40 of 2002.

[5] Section 40(1) of the CPA provides that:

> *"(1) a peace officer may without a warrant, arrest any person –*
>
> *a) ....*
>
> *b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody".*

[6] In order to rely on the protection of Section 40(1)(b) it was held in ***Duncan v Minister of Law and Order,* 1986(2) SA 805 (A)** at **818 g – h**:

> *"It must be established that:*
>
> *a) the person who effected the arrest was a peace officer;*
>
> *b) he must have entertained a suspicion;*
>
> *c) it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the CPA;*

d) the suspicion must rest on reasonable grounds".

[7] Such reasonable grounds have been defined in the matter of ***Mabona & Another v Minister of Law and Order & Others,* 1988(2) SA 654 (SE)** at **658 e – f** by JONES J as follows:

> *"Would the reasonable man in the Second Defendant's position and possessed of the same information have considered that there are 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?".*

[8] In ***Ralekwa v Minster of Safety and Security,* 2004(2) SA 342 (T)**, DE VOS J alluded to a suspicion which was "*objectively sustainable*". In essence, the term "*reasonable suspicion"* entails that such a suspicion must not be speculative, based on conjecture or be flighty, but must indeed be an investigation of the essentials of the offence to cover its basic elements in order to constitute *prima facie* proof.

[9] It is common cause that the onus rests on the Defendant to prove that the arrest was indeed lawful. In evaluating the evidence before this Court I will take into consideration the jurisdictional facts which have to be proved by the arrestor as set out in the case of ***Minister of Safety and Security v Sekhoto,* ZASCA 2010** at **141** where the following was said:

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

In this regard also see ***Minister of Law and Order v Hurley,* 1986(3) SA 568 (A)** at **589 e – f.**

BERTELSMANN J held in ***Louw v Minister of Safety and Security,* 2006(2) SACR 178 (T)** at **186a – 187e** that:

> *"I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officer's belief on reasonable grounds that such a crime has indeed be committed, this in itself does not justify an arrest forthwith".*

The learned judge then laid down the rule that even if a suspect might be arrested the police officer involved must consider whether other options, that are less invasive than immediate detention, are available to bring a suspect before Court. It was further accepted and concurred by the SCA that:

> *"If there is no reasonable apprehension that the subject will abscond, or fail to appear in Court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in Court is obtained, then it is constitutionally untenable to exercise the power to arrest".*

[10] This principle emphasises that a police officer is not obliged to effect an arrest; see ***Groenewald v Minster of Justice,* 1973(3) SA 877 (A)** at **833g – 884*b***. As the arrest of a suspect requires the exercise of a discretion it must be objectively rational. See in this regard ***Pharmaceutical Manufacturers Association of SA: In re: Ex-Parte Application of President of the RSA,* 2000(2) SA 674 (CC).** It is implied that the arrestor appreciated that he had a discretion whether to arrest without a warrant or not; that he considered and applied that discretion; that he considered other means of bringing the suspect before Court; that he investigated

explanations offered by the suspect. That will entail the weighing up of facts which may include that there are grounds for infringing upon the constitutional rights of a person, for example the suspect presents a danger to society, might abscond, can harm himself or others, or is not able or keen to disprove the allegations.

[11] The Defendant called three witnesses – the arresting officer, Constable Majatjabothata; the complainant, Mr Vieira; and Sergeant Sello Daniel Lelaka who was on duty in the charge office during and after the Plaintiff's arrest. Sergeant Lelaka did a profiling on the Plaintiff. The results of the profiling, i.e. the Plaintiff's previous convictions, were only received after the Plaintiff's appearance in Court on Tuesday 23rd August 2011. I can safely infer that the information contained in the profiling played no role at the time when the arrest was effected and can for practical purposes be ignored.

[12] Constable Majatjabothata testified that he arrested the Plaintiff. As part of his duties he received a docket from his Commissioner. He read the contents of the docket and subsequently interviewed the complainant, Mr Vieira. Mr Vieira explained to him that he opened a case against the Plaintiff for the theft of money as well as Malicious Injury to Property. Mr Vieira told him that at the time of the commission of the theft the Plaintiff was on duty with two other employees. When he interviewed Mr Vieira these employees were already off duty, but statements were subsequently obtained from both employees. Constable Majatjabothata was present when their statements were taken. After obtaining the two further statements, he was still not satisfied and went to the Plaintiff's home. After knocking a young lady opened the door and confirmed that the Plaintiff was present. He enquired from the Plaintiff whether he knows anything about Malicious

Injury to Property and theft of money charges levelled against him. The Plaintiff replied that he knows nothing about such charges. However, the Plaintiff did report to him that there is a dispute between himself and his employer, Mr Vieira. At that stage Cst. Majatjabothata was aware of the fact that the Plaintiff was staying on the complainant's property. They then went to the police station at Olifantsfontein. At the police station he again asked the Plaintiff whether he knows anything about the charges against him whereupon the Plaintiff once again denied any knowledge. He then requested the ID number of the Plaintiff. After the ID number was given to him he used it to do a profile search on the Plaintiff. Out of context with the flow of his evidence, Cst. Majatjabothat then informed the Court that the Plaintiff was living on the complainant's property and that he was discharged form the complainant's employment. He then arrested the Plaintiff on the theft charge. He further testified that he took the Plaintiff to Court the next day, i.e. the Tuesday, at 7h00.

[13] The Defendant's Counsel asked Cst. Majatjabothata after his reasons for arresting the Plaintiff and he responded as follows: Firstly, he said that he asked the Plaintiff questions and that he was not satisfied with the answers given to him. Secondly, the police had on a previous occasion been to the residence of the Plaintiff but were unable to find him. Thirdly, it was his impression that the Plaintiff could not be trusted. That concluded his evidence in chief. At that stage I was amazed at how little evidence was placed before me by the Defendant, having regard to the onus placed on the Defendant. I will revert to this aspect at a later stage.

[14] During cross-examination the witness confirmed that at the time he arrested the Plaintiff he had two years and six months experience in the South African Police Service, which included his basic training at the Police Training College. He was

asked whether he is aware that he is entitled to grant bail in terms of the provisions of Section 59 of the CPA for an offence where the amount involved is less than R2500,00. He confirmed that he is aware that he has the discretion whether or not to arrest a suspect. He then, and which I will regard as the fourth reason for the arrest, added that as he was aware of the fact that there was another charge laid against the Plaintiff, he decided to arrest him. Considering the fact that he was not the investigating officer and he was not even aware of the contents of the Malicious Injury to Property docket, no substance can be found in this statement. He conceded under cross-examination that he is aware of the contents of the SAPS Standing Orders and that the Standing Orders provide that arrest should only be used as a last resort. When confronted on why the Plaintiff was not released on bail, he again reiterated that the Plaintiff could not be trusted, that the police were looking for him, that he left a telephone message with somebody else to inform the Plaintiff to come to the police station and that the Plaintiff did not comply with his request. He was then asked whether he received a telephone call from the complainant to inform him that he, the complainant, was going to terminate the employment of the Plaintiff. The witness confirmed that he did receive such a telephone call. When asked about the merits of the case against the Plaintiff, he testified that he was aware of the fact that objectively speaking the vehicle from which the money was apparently stolen was not broken into, and that the Plaintiff was the only one in possession of the keys when the alleged theft took place. This is the fifth reason afforded by the witness for arresting the Plaintiff. He was asked how he came to such a conclusion and he testified that he read the statement of Khuseleka Nogemane which is to be found in Bundle B, Item 5, p8, as well as the statement of Frans Ralepelle which is contained in Bundle B, Item 6, p9. The

relevant portion of Khuseleka's statement is contained in paragraph 2 and reads as follows:

> *"2. On Sunday 2011/07/24 at 21h00 I arrived at my workplace to do baking. Rudolf was busy talking to [sic] much while working and busy drinking Black Label. He was shaking and vomiting blood and I took him home and I noticed that carpet was turned outside down and I asked him what happened and he told me that someone breaking into our kombi and stole the money which was left there. I suspect him because the doors and windows were properly locked".*

The relevant portions in Frans Ralepelle's statement are contained in paragraphs 2 and 3 thereof:

> *"2. On Sunday 2011/07/24 at 20h00 I went to collect Rudolf at 36 Maine Road so that he could report on duty. On Monday 2011/07/25 at 02h10 Rudolf asked me to open door shop so that he can go and lock the kombi (red one) he left for about ± 30 minutes.*
>
> *3. When he came back we proceeded working and after an hour he told me that a robbery occurred inside the kombi. I was so surprised because all the doors were locked. The carpet was removed and the plastic bag which was having money was lying on the ground. The money amount to R1250,00. I suspect him because he was saying many stories to me and asked me to give him R1250,00 so that he can go and buy gun".*

[15] It was put to the witness that nothing in the two statements directly implicates the Plaintiff whereupon the witness conceded that he also had doubt that the Plaintiff indeed committed the alleged theft offence. It was then put to the witness that there was no *prima facie* case against the Plaintiff on which he could have been arrested. At this stage the Court intervened and asked the witness if there was any

circumstantial evidence implicating the Plaintiff. The witness again repeated reason 5 referred to above, namely that there was not broken into the kombi, and that the Plaintiff was in possession of the keys to the kombi. It was then put to the witness that it was common cause that the back door of the kombi could not be properly locked. The witness replied that he was unaware of this fact and that the Plaintiff never brought it to his attention. When Mr Vieira was later called as a witness and it was put to him that the rear door of the kombi could not lock, he denied this allegation.

[16] Several questions were then put to the witness regarding the probabilities in the case. The main issue was that although certain crimes were allegedly committed by the Plaintiff during July, charges against him were only levelled in August and followed up by the Police approximately a month after the crimes were committed. It was put to the witness that Khuseleka does not incriminate the Plaintiff in his statement. The witness conceded that the two statements referred to did not directly implicate the Plaintiff. The witness again reiterated that his suspicion was based on the fact that the Plaintiff was in possession of the keys to the kombi and that the windows and doors were locked. He then added another reason for his suspicion and that is that the Plaintiff wanted to knock off from work earlier than expected. It was put to him that the reason the Plaintiff wanted to knock off early was a medical concern, as he was vomiting blood and feeling dizzy. Several questions were then put to the witness regarding the inferences that can be drawn from the circumstantial evidence. It was put to him that he is required to analyse the information critically and that he had to confirm the available facts before accepting such. The Plaintiff's version was then put to the witness according to which the witness arrived at the Plaintiff's residence and told the Plaintiff to go the police

station with him in order to make a statement. This version was denied by the witness. The witness testified that he first introduced himself and then gave the reason for his presence. The Plaintiff told him that he, the Plaintiff, knows nothing about the allegations against him, that there was a quarrel between him and his employer and he prefers that the Court should deal with the matter. This occurred at 7h00 in the morning. The witness was asked whether he enquired from the Plaintiff when the money placed in the kombi, and by whom. The witness replied that he did ask the Plaintiff these types of questions but that the Plaintiff was uncooperative and did not want to get involved. It was then put to the witness that on reading the statements of the co-employees earlier referred to as well as that of the complainant, the matter required further investigation. The witness again only replied that the Plaintiff was uncooperative.

[17] The witness was then referred to the warning statement deposed of by the Plaintiff as it appears in Bundle B, p21. From this document it is clear that the Plaintiff preferred not to say anything and stated that he *"will speak in Court"*. It was put to the witness that there was not enough circumstantial evidence against the Plaintiff. The witness replied that at that time *"I suspected that he might have been the one who had taken the money"*. The witness again repeated the reasons given for the existence of his suspicion. The Plaintiff's version was then put to the witness according to which it is alleged that he, Cst. Majatjabothata, informed the Plaintiff that if he does not go to Olifantsfontein police station to make a statement he will be arrested. The witness replied that this is the reason why the Plaintiff became uncooperative.

[18] The witness was referred to the Notice of Rights in terms of the Constitution as it appears in Bundle B on pp23 – 24 respectively. It is common cause that the Notice

on p23 refers to the theft of money charge and was deposed of on the 22nd August 2011 at 08h05 that morning. This was done at Olifantsfontein Police Station. The contents of these documents were not disputed.

[19] The list of previous convictions applicable to the Plaintiff as it appears in Bundle B, p4, p5 and p6 respectively, was extensively dealt with. The contents of the previous convictions were then debated with the witness and it was put to him that the domestic violence charge was in fact withdrawn against the Plaintiff; that none of the charges indicate that the Plaintiff ever escaped or attempted to do so; that the Plaintiff was residing in Olifantsfontein since 1986; that at the time of his arrest he was staying at the residence of the complainant;, and that there was bad blood between the Plaintiff and the complainant. The witness was asked whether he was aware of the fact that the Plaintiff's employment was terminated by the complainant on the date of his arrest. The witness was unaware of this fact. He was asked whether he was aware of the fact that the Plaintiff laid a charge in terms of the Labour Law against the complainant – the witness was similarly unaware of this fact. It was then put to the witness that he, the witness, never gave the Plaintiff an opportunity to explain his version of events and that he was summarily arrested. The witness denied this, but conceded that he himself did not mention anything in his own statement about having encountered problems with the Plaintiff. That concluded the cross-examination of this witness.

[20] Under re-examination the witness testified that the Plaintiff never told him that the back door of the kombi could not be locked. The Court enquired from the witness what his understanding of an accused's right to remain silent is, whereupon he answered that he "*did not understand that to mean that he can refuse to cooperate.*

The person should have told me his side of the story". The Court also enquired from the witness if he was aware of a second Notification of Rights given to the Plaintiff appearing on p24 of Bundle B, and which refers to the Malicious Injury to Property charge and was completed on the 22nd August 2011 at 15h20 at Olifantsfontein Police Station. The witness replied that no one told him about the second Notice.

[21] The second witness to testify on behalf of the Defendant was Mr Augustinho De-Jesus Vieira, the complainant in both criminal charges. It is common cause that the Plaintiff was employed by Mr Vieira when the alleged offences occurred. He testified that on a Sunday in July 2011 the Plaintiff was ordered to do bread deliveries and to collect monies from the various delivery points, as set out in his statement, which is contained in Bundle B, p14 – 15. He deposed of this statement on the 18th August 2011 when he laid the charge of theft against the Plaintiff. He laid a charge against the Plaintiff because certain monies disappeared. It is common cause that the content of his statement regarding the theft of the monies results to hearsay evidence as he was not personally present when the incident occurred. He also confirmed that he laid a charge of Malicious Injury to Property against the Plaintiff which is contained in his statement in Bundle B, p17 – 18. This statement is dated 15th August 2011. The alleged theft took place on the 25th July 2011, whilst the Malicious Injury to Property incident occurred on the 9th July 2011. This witness was present and in Court when the first defence witness testified. He confirmed that he heard the Plaintiff's version that the money was left in the kombi and as the door was broken somebody else must have taken the money. He testified that he knows nothing about such circumstance and that there was nothing wrong with the door or doors of the said kombi. He then explained to the Court how

the money that was allegedly stolen came into the possession of the Plaintiff. He testified that he runs a bakery. The baking process takes place during the course of the night and is done by the night shift that starts roundabout 11pm/12pm. Early in the mornings the delivery vehicles take the bread from about 5h00 and deliver it to various delivery points. As they go along they will collect money. The bakery usually closes at 18h30 in the evenings. The delivery vehicles usually return between 7am/8am in the morning but not in the afternoon. He also confirmed that apart from making his statement to the police he did not speak to anyone about the incident.

[22] Mr Vieira also confirmed what he said in his police statement on p14, as set out here under:

> *"2. On Sunday 2011/07/24 at approximately 20h00 Frans Rodepelle went to collect one of our employees Rudolf van der Westhuizen at Kleiwol number 36 Major road so that he could report on duty.*
>
> *3. On arrival they started baking bread with the rest of the staff. At 02h00 Johannes asked Frans to open the door shop for him so that he could go and lock the kombi. Frans was surprised because the kombi was locked. He left for about ± 30 minutes.*
>
> *4. When he got back we proceeded working. After an hour he told Frans that there was a robbery inside the kombi, Frans was surprised because the kombi was locked. Then he said he want to go home. Johannes told Frans that when he went to lock the kombi he discovered that the kombi was robbed and the money was stolen inside a kombi. It was R1250,00.*
>
> *5. Frans asked Khuseleko to take Johannes home because he was drunk and it was about 03h00 in the morning".*

As said before, everything said in this statement amounts to hearsay as Mr Vieira was not present when the events referred to in his statement occurred.

[23] It became evident from Mr Vieira's testimony that the person with the name of Rudolf and the person referred to as Johannes is the same person. The witness testified that the keys of the vehicle which was allegedly broken into was kept by the Plaintiff. The witness also testified that there was nothing wrong with the vehicle except that the carpet of the vehicle was cut with a knife. No windows were broken and everything else was intact. The witness further testified that the Malicious Injury to Property charge was laid before the theft charge.

[24] Mr Vieira was then cross-examined. He confirmed that he is Portuguese speaking. At the time the charges were laid the Plaintiff was employed as a driver doing deliveries, and collected money on behalf of Mr Vieira on a daily basis. Before the incidents no other problems were encountered between him and the Plaintiff and no other charges were laid against the Plaintiff.

[25] During cross-examination it was conceded that the so-called stolen money has nothing to do with the delivery of bread. Apparently the money received by the Plaintiff for bread deliveries on that specific morning was in fact returned to the complainant. However, apart from the bakery deliveries the complainant also sells liquor. Drivers then leave the premises in the early afternoon to deliver liquor and also to collect money. This fact was never disclosed by the witness in his evidence in chief. He was confronted with his statement to the Court that the Plaintiff never arrived for work and therefore had to be fetched from his home. He was also confronted with the fact that although the theft allegedly took place on the 25th July

2011, he only laid a charge about a month later during August 2011. The witness was unable to give a logic answer and merely said "*I've got nothing to say*". It was put to the witness that he dismissed the Plaintiff three days after his arrest. The Plaintiff accepted this dismissal on condition that he receives two weeks' remuneration. Mr Vieira refused to pay him and as a result thereof the Plaintiff went to the CCMA and laid a complaint against Mr Vieira. The witness denied this allegation. It was put to the witness that everything that he heard from the co-employees regarding the events of the Sunday evening of the incident was purely hearsay. The witness conceded that he reiterated what was said to him about the Plaintiff drinking Black Label beer and vomiting before he left for home. He also conceded that there is no direct evidence against the Plaintiff. The witness was referred to the arresting officer's statement and it was put to the witness that the reason why Constable Majatjabothata arrested the Plaintiff was simply because he was still on the complainant, Mr Vieira's, property and that Mr Vieira wanted to get rid of the Plaintiff. This was denied. Under re-examination the witness confirmed that after laying the complaint until the time the Plaintiff was arrested, no police official came to see him, although on the date of Plaintiff's arrest, one policeman did go to his house. That concludes the evidence of Mr Vieira. In my view Mr Vieira's evidence does not assist the defence. It is purely hearsay and does not take the matter any further.

[26] As said before, Sergeant Lelaka's evidence also does not enhance the Defendant's case. For sake of completeness I will briefly deal with his evidence. Sergeant Lelaka confirmed that two separate dockets were opened against the Plaintiff. The first docket was a Malicious Injury to Property docket, and then the theft charge was laid. The Plaintiff was arrested on 22 August 2011. He confirmed that after the

arrest of the Plaintiff he did the profile check on the Plaintiff regarding his previous convictions. As reference he used the identity number of the Plaintiff as well as his names. According to his version the Plaintiff has several previous convictions. He however conceded that at the time of the arrest his colleague, who arrested the Plaintiff, was unaware that he himself was doing a profile on the Plaintiff.

[27] Under cross-examination he was referred to a diary kept by the police which forms part of the docket. It was put to him that he attended to the crime scene in the Malicious Injury to Property case. He confirmed that. It was put to him that it does not appear in the docket that he requested the young lady who he met at the scene of the Malicious Injury to Property crime to inform and/or to request the Plaintiff to come and see him at the police station. He conceded that it was not written in the diary. He testified that he verbally conveyed this request to a young woman. When asked whether the Plaintiff ever gave him an explanation regarding the broken window, he testified that the Plaintiff informed him that he will speak in Court. The witness further denied that he arrested the Plaintiff. After the Plaintiff's arrest and while being detained, the Plaintiff was given a Notice of Rights pertaining to the Malicious Injury to Property charge, which was signed by both himself and the Plaintiff on the 22nd August 2011 at about 18h20. The witness was also referred to a statement made by himself after completing the profile check where he stated that the Plaintiff is not a flight risk. He was asked why he did not disclose this fact. The witness denied that he did not disclose the said fact. He further testified that he read both case dockets. According to him there was direct evidence against the Plaintiff, namely that he failed to come and see the witness on the charge of Malicious Injury to Property as requested and also that after the Plaintiff's arrest he refused to say anything and said that he will speak in Court.

[28] Under re-examination he was referred to his statement deposed of after the profiling dated 30th August 2011. He confirmed that in the statement he proposed that bail should be granted to the Plaintiff. The Court then asked the witness to clarify certain notes in the police diary. The one relates to a note made by Captain Morudi instructing Constable Mabasa to interview the complainant, and a further note under reference no. 57 dated 22nd August 2011 written by Captain Morudi, reading: *"Who put money in the minibus and why? Who locked minibus and how was it opened?"*. Nothing further transpired from the Court's questions. The Defendant then closed his case.

[29] The Plaintiff then gave evidence. He testified that on the 22nd August at about 07h30 in the morning he was preparing to go to work. He was still in his pyjamas when there was a knock at his door. Two detectives asked him to accompany them to Olifantsfontein Police Station. Upon his asking why, they replied that it was for questioning. They then went to the complainant's shop where the complainant was informed by the policemen that they have found the Plaintiff and are taking him to the police station. At the police station his personal particulars were taken and he was then asked what happened. He told them that he will speak in Court. He was then taken to the charge office where he had to wait for a long time. He was then later told that he was going to be put in a cell. He was getting upset because his work did not know where he was. He also told the Police that they had nothing against him. He was then allowed to make a telephone call whereupon he phoned a Mrs Lizelle van Dyk and requested her to obtain the services of a lawyer. Thereafter he was placed in a cell where he was kept for the whole day. At about 18h00 that evening one of the policemen came to him and asked him to sign some

papers confirming that he is guilty of theft. He refused to sign the document. He was then told that they will just detain him for an even longer period if he does not cooperate, whereupon he signed the said document. About an hour later a lawyer, Mr Pillay, arrived to ensure that he was safe. The next day he was taken to Tembisa Magistrates Court. Bail was denied and the matter was postponed. He remained in the cells until the 1st September 2011 when he was released on bail. As a result of his detention he had to withdraw his CCMA charge against the complainant as he could not proceed with the matter. He says that on the day of his arrest Mr Vieira also informed him that his employment is being terminated. He also had to leave his residence as it belonged to the complainant, and he went to stay with a certain Mr van Wyk. He was asked what happened on the day of the 24th July 2011. He testified that the shop closed at around 13h00 that day and he was to do some further deliveries. Mr Vieira told him to collect the money and hide it in the kombi. That night they started their nightshift and at 23h00 he had a problem with his stomach. He told Frans and Khuseleko that he was going to lie down which he did. Around 00h00 he started shaking and vomiting. He then collected some water in a Black Label bottle and drank a bit of water. He denied that he was drunk or that he was drinking beer. At about 02h00 that morning Frans took him home. He says that they left the shop together and that he handed the keys to the kombi to Frans, so that Frans could drive the vehicle as he was not feeling well. He entered the vehicle on the passenger's side. When they opened the vehicle he saw that there was something wrong and that the plastic bag containing the money which was placed under the seat was lying on the floor. The battery box as well as the carpet of the vehicle were ripped open. He immediately told Frans that somebody was in the kombi and opened the box. He was then taken back home. The rest of the night he was at home due to his illness. His

service was subsequently terminated and he laid a complaint at the CCMA against Mr Vieira. The reason for laying the charge at the CCMA was that Mr Vieira failed to pay his outstanding salary.

[30] On or about the 15th August he received information that Mr Vieira laid a charge against him for breaking a window. He repaired the window but that did not stop the police from arresting him on the 22nd August. He testified that on the day of his arrest the police only informed him that they want to question him about the theft of the money. Subsequently he was taken to the police station where he was arrested. He denies that he refused to cooperate with the police and pointed out that he signed both his warning statement as well as a notice setting out his constitutional rights. He says the reason why he originally refused to sign was because he is not guilty. He then testified about the conditions under which he was held in custody. He said that the cells were smelly and dirty and that while being held in custody he was robbed of his cellphone and his 18ct gold earring. As a result of his arrest he suffers from severe stress and developed an ulcer. He then went on to explain how the back door of the kombi could be opened without the use of a key. As a result of these events he lost 8kg in weight. He is currently employed with another firm. He further explained that prior to his arrest, nobody conveyed a message to him to go to the police. He explained that he and his girlfriend had a fight and they did not talk to each other. He further testified that he was unaware of the fact that Mr Vieira laid a theft charge against him and this fact only became known to him on the day of his arrest. The only case that he was aware of that was opened against him was for the broken window.

[31] The Plaintiff was then cross-examined. Under cross-examination he conceded that he was in a position of trust in the sense that he was overseeing some of the other

employees, that he resided at the premises of the complainant and he was in control of collecting money and was also using the kombi belonging to the business. He confirmed that he had the kombi's keys in his possession and kept it with him on the night when the so-called theft occurred. He had the keys with him until he handed it to Khuseleko between 02h00 and 03h00 in the morning. He further confirmed that there were no broken windows and that from the outside the kombi appeared to be in a normal state. The witness further confirmed that he cannot dispute that the investigating officer, Cst. Majatjabothata read the contents of the docket. It was put to the witness that except for Mr Vieira's statement, there were also two other statements in the docket and that Cst. Majatjabothata testified that he also spoke to the two other witnesses. This was disputed by counsel for the Plaintiff. The Plaintiff did concede that there was an interview between the investigating officer and Mr Vieira and that he accepts that Mr Vieira told him about the theft of the money. It was put to him that two policemen came to his house to arrest him. The Plaintiff conceded to this but says he does not know the name of the other policeman. He only realised at the police station that there were two charges against him and that he was arrested for the theft charge. It was put to the witness that according to Mr Vieira's evidence there was nothing wrong with the vehicle and that there were no external signs of any break-in. The witness again reiterated that the back door could open without the assistance of a key. The Plaintiff further conceded that under normal circumstances and if there was a real break-in, it would have been visible and any person looking at the vehicle would have observed it. He was then cross-examined about the mechanism as to how the door could open by itself. The Plaintiff testified that he discovered it himself and that another person also told him about that. He discovered this fact very soon after he started using this kombi to do deliveries. He conceded that he never told the

police that there was an arrangement between him and Mr Vieira that he could keep the money in the car. It was put to the witness if this was not specifically told to the police, the police would obviously be unaware of that fact. The witness conceded this. It was put to the witness that the allegation made by the Plaintiff that there was a quarrel between him and his girlfriend and that they did not speak to each other was never put to any of the witnesses called by the Defendant. He conceded this. It was put to the witness that any reasonable person reading the docket without any other explanation and observing that there was no sign of a break-in, would normally suspect the driver in possession of the keys to be the guilty person who removed the money from the kombi. The Plaintiff conceded this and said *"I will also suspect him"*. He further conceded that it will then be up to the Court to make the final decision. The witness further confirmed that on the day of his arrest his girlfriend was still living with him and she in fact called him to tell him about the presence of the police. He was further questioned about the drinking of beer from a Black Label bottle or can. He was confronted by the fact that although he was seen drinking beer from a Black Label bottle, and that he was under the influence of alcohol, and that it was not put to any of the witnesses that he did not drink beer, but water. The Plaintiff's reply was that he did tell it to his Counsel. It was then put to the Plaintiff that he did not tell it to his counsel and that it is only a thought that came up later during the trial. The Plaintiff again replied that he did tell it to his counsel. It was also put to him that at no stage was the alleged CCMA case against Mr Vieira put to any of the witnesses. The Plaintiff was further confronted by the fact that there was no reason to keep the money in the kombi. It was put to him that on his own version he was only allowed by Mr Vieira to keep the money in the kombi when he had no place to stay. At that stage, however, he was staying with Mr Vieira on the same premises. Therefore there was no reason to keep the

money in the kombi. He replied that this arrangement applied when bread deliveries were made. The witness conceded that when the police came to see him on the 22nd August 2011 he was told by the police that they wanted to interview him regarding the so-called theft of the money but he refused to give an answer. He also admitted that on the 22nd August 2011 and at the police station he never requested that bail should be granted to him. He further conceded that he is not the real supervisor at the bakery but that a person with the name of George was the supervisor. His only function was to keep an eye over the people who were working there at the request of Mr Vieira. That concluded the evidence on behalf of the Plaintiff.

[32] The impression I gained during Constable Majatjabothata's evidence is that at the time of the arrest of the Plaintiff he was young and fairly inexperienced. He received a docket to investigate. It appears that the only defence witness interviewed by himself is Mr Vieira. Mr Vieira's evidence is based on hearsay evidence. His version of the events is based on what he heard from other employees. An experienced policeman would have realised that he cannot rely on Mr Vieira's version to determine the truth of the allegations. Furthermore he should have realised that the alleged Malicious Injury to Property docket and theft docket referred to two separate incidents. The Malicious Injury to Property was allegedly committed on the 9th July 2011, and the theft on the 25th July 2011.

[33] The theft charge was only laid on the 26th August 2011, almost a month after the commission of the crime. The warning lights should have sounded for him after obtaining Mr Vieira's statement. He then proceeded and obtained statements from Khuseleko Nogemane and Frans Ralepelle who were present at the bakery on the

night when the money was allegedly stolen. Constable Majatjabothata testified that after taking the statements from the latter two witnesses he was still not satisfied and as a result thereof went to the Plaintiff to obtain a statement or explanation from him. I am not surprised that he was not satisfied with the explanation received from Khuseleko and Frans respectively. I personally find it very difficult to reconcile the contents of these statements with each other. According to Khuseleko the theft was only discovered when he went with the Plaintiff to take him home and they opened the kombi. According to Frans Ralepelle's version, the theft must have taken place on the Monday morning during their night shift. At that stage the Plaintiff was on duty and roundabout 02h10 the Plaintiff, after obtaining his permission, left the premises to go and check if the kombi was indeed locked. The Plaintiff then returned and about an hour later the Plaintiff told him that a robbery occurred inside the kombi. These two versions need clarification. An experienced policeman would have realised that further investigation is necessary before any further steps can be taken. However, he decided to approach the Plaintiff and informed him about the theft charge. When the Plaintiff was asked about the theft allegations against him, the Plaintiff replied that he knows nothing about it. The Plaintiff further explained to him that there is a dispute between him and his employer. Without further ado the Plaintiff was taken to the police station where he was placed under arrest for theft. The reasons for arresting the Plaintiff given by this witness is further vague and do not make sense at all. Apparently, Constable Majatjabothata was not satisfied with the answers given by the Plaintiff and without any further investigation he decided that the Plaintiff cannot be trusted and must be placed under arrest. This was probably motivated by the fact that he left a message with the Plaintiff's girlfriend on an earlier occasion for the Plaintiff to contact him. I gained the impression from this witness's evidence that although he had the discretion not to arrest the Plaintiff and

to secure his presence at Court in some or other way, he never gave it any thought. He did not even consider the fact that the amount involved was not substantial. Furthermore he failed to consider the complainant's delay in bringing the charge of theft against the Plaintiff. The only ground that he could rely upon was Plaintiff's own version that he was in possession of the money; that the money was locked in the kombi; the kombi was opened without any signs of forced entry; and the money went missing. It is well-known that certain car models can be opened without the use of a key by simply using a tennis ball cut in half, placing it over the keyhole, and through pressing down hard on such tennis ball, the doors will automatically unlock. No effort was made to determine whether the vehicle was fitted with an alarm system, nor was any mechanical tests done on the vehicle. The mere fact that the Plaintiff was in possession of the key and that the windows were still in tact and that there was no sign of a forced break-in, could merely raise a suspicion against the Plaintiff. No wonder the witness had to concede that there is no direct evidence against the Plaintiff implicating him on the theft charge. The circumstantial evidence referred to is inconclusive. The witness testified that if the door could not lock the Plaintiff should have brought it to his attention. No such duty rests on a suspect. The arrest of a person is a drastic step and requires from an arresting officer that information must be reviwed thoroughly before it can be relied upon. Cst. Majatjabothata evaded the question and said if the suspect does not furnish you with an answer what do you expect? The witness was similarly vague as to the reason why it took the complainant such a long time to lay the charge of theft. It seems to me that the main reason for the arrest of the Plaintiff is simply that he was considered to be uncooperative when he elected not to make a statement to the Police.

[34] The Plaintiff's previous convictions did not play any role at all at the time of his arrest. The list of previous convictions was only obtained after the Plaintiff's appearance in Court. Similarly the charge of Malicious Injury to Property played no role at the time of the Plaintiff's arrest and he was not even warned that there exists such a charge against him.

[35] To summarise, I am not impressed by the quality of this witness's evidence. It is clear that he did not apply his mind properly to the facts of the case before he effected the arrest on the Plaintiff. In my view he could not have formed a reasonable suspicion against the Plaintiff that he in fact committed the offence of theft. Objectively and on the available facts no reasonable suspicion could be founded. The jurisdictional facts emanating from the Police docket are contradictory and required further investigation. The two employees, Khuseleko and Frans, were not called by the Defence to testify. The probative value of their evidence could therefore not be tested. No reason was given why they were not called to give evidence. There was no agreement between the parties at the pre-trial or thereafter that the contents of the affidavits as recorded in the police docket constitute admissible evidence. In the absence of such arrangement neither the credibility nor the probative value of what is alleged in such statements can be determined.

[36] The evidence of the Plaintiff cannot be faulted. He gave a straightforward explanation of what happened on the day of his arrest. The next day he went to Court. Bail was refused and the matter was postponed for a further seven days. As a result of his arrest and the termination of his employment he had to leave the premises of Mr Vieira and seek other accommodation. He denies any knowledge of

the theft charge against him. The reasons given by him for being sick on the evening of he night of the theft is not convincing. His version that he suffered from stomach pains and therefore vomited and that he was drinking water from a Black Label can or bottle does not hold water. However, that is not relevant for purposes of the decision of this case. The main fact is that when he returned to the kombi together with Khuseleko, he immediately said to Khuseleko that somebody broke into the vehicle and took the money. This happened directly after the discovery of the broken battery box and the missing money. He also confirmed that the battery box was ripped open and that the carpet was also ripped to pieces. I have considered the improbabilities put to this witness by the Defendant's counsel. I am satisfied that those improbabilities do not affect the credibility of this witness as far as his arrest is concerned. I accept his credibility and his testimony to the circumstances under which he was arrested and as to what extent there were conversations between him and the arresting officer.

[37] Counsel on behalf of the Plaintiff contends further that due to the low value of the stolen money, the theft charge does not *strictu sensu* make the offence part of the group of offences stipulated in Schedule 1. This argument is based on the premise that, in terms of Section 59 of the CPA, an accused who is in custody in respect of any offence other than an offence referred to in Part 2 or 3 of Schedule 2 may, before his or her first appearance in a Lower Court be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer. It was contended that as the amount involved is less than R2500,00 the police should have released the Plaintiff on bail after his arrest. I could not establish where the Plaintiff's Counsel found an amount of R2500,00 as a cut-off point for a policeman's discretion, as there appears no such reference in the CPA. If such

reference appears in the Standing Orders of the South African Police Service, such Standing Order should have been proved. This was not done. The Court has perused the Plaintiff's particulars of claim. It contains no allegation that the Plaintiff suffered damages as a result of bail being refused by the Police. A claim based on this ground is therefore not contained in the pleadings and cannot be relied upon. If any such claim existed it should have been formulated as a separate claim, as it is totally distinct from the arrest executed by the investigating officer. For purposes of this judgement this contention in my view, is without merit and can safely be ignored. Similarly, the fact that the charge of Malicious Injury to Property was added after the Plaintiff's original arrest on the theft charge plays no role whatsoever. At that stage the Plaintiff was already arrested and in police custody. Counsel for the Plaintiff criticised the police for not obtaining a warning statement from the Plaintiff in regard to the Malicious Injury to Property charge. While it may be so that no warning statement was obtained from the Plaintiff, it does not affect the arrest on the theft charge. Even if an innocent explanation was given by the Plaintiff on the charge of Malicious Injury to Property against him, it would have no impact on his arrest in respect of the charge of theft.

[38] To summarise, the Defendant's counsel submits that although the two co-employees who were not called as witnesses, the contents of their statements must be accepted in terms of Section 3(1)(c) of the Law of Evidence Amendment Act, no. 45 of 1998 which governs the admissibility of hearsay evidence. In my view I should not admit any of the two statements. The contents thereof were not tested or proved. Furthermore there was no consent between the parties that the statements and their contents constitute admissible evidence. In my view the contents of these statements should be excluded in the interest of justice. This

leaves me with the evidence of Constable Majatjabothata with whom I dealt with previously. In my view the evidence relied upon by him could not objectively have led to a reasonable suspicion against the Plaintiff. I accept that suspicion arises at or near the starting point of an investigation. However, if there is doubt what the true facts are and especially where a mechanical failure of a locking system and/or the proper functioning of such a system is involved, suspicion can hardly arise until the proper functioning of the system has been verified. No investigation was done in this regard. No evidence was led as to how long before the incident the locking system of the vehicle was checked, having regard to the fact that the Plaintiff was the driver of the vehicle at the relevant time of the theft and that it was under his control. One would expect a reasonable investigating officer to do a proper inspection of the locking features and systems of the vehicle allegedly broken in to before forming a reasonable suspicion. This was not done. The mere fact that the Plaintiff had the keys to the kombi does not exclude other factual permutations. I therefore conclude that the Defendant objectively failed to prove that the arresting officer had a reasonable suspicion that the Plaintiff committed theft when he arrested him on the theft charge. In the absence of the existence of reasonable grounds to form such a suspicion it can not be fount that the Plaintiff was lawfully arrested and detained.

[39] That brings me to the question of quantum. It is common cause that after the Plaintiff's arrest he was held in custody until the next morning when he appeared in Court and the matter was postponed for another week. I am not going to deal with the period after the postponement in Court as the Department of Justice is not a party before me in these proceedings. I therefore will only deal with the question of his arrest and detention for a period of one day. The main reason for the arrest of

the Plaintiff according to the arresting officer's version is the failure of the Plaintiff to cooperate and in other words to give an explanation when he was arrested. In terms of Section 35 of the Constitution a person is entitled to remain silent and is not obliged to give any explanation to the police before an/or after his arrest. The Plaintiff was fully entitled and acted within his rights when he decided not to give any explanation when he was brought in for questioning. I take further into consideration the fact that the Plaintiff was held in custody for a full day under the conditions as set out in his testimony. The arrest further led to the dismissal of the Plaintiff from his work. He had to seek a new job and other accommodation, he had to institute a case before the CCMA, he developed an ulcer, certain personal items were stolen from him, including money, while being held in custody. I will further accept in his favour that it is degrading for any person to be held in police cells. I further accept that the arrest and the subsequent events led to a weight loss and that the Plaintiff became stressed. I further take into consideration the fact that although Constable Majatjabothata described the Plaintiff in paragraph 4 of Bundle B, index 13 as a cooperative person, he told the Court a different story, based on the fact that he experienced the Plaintiff to be uncooperative. Furthermore, on his own version he knew that the matter should be investigated further, which he did not do. When questioned why he arrested the Plaintiff apart from saying that he was uncooperative, he testified this it was because the Plaintiff was living on the property of the complainant. My impression is that he endeavoured to assist Mr Vieira after the Malicious Injury to Property charge was laid to get rid of the Plaintiff as quick as possible. Even the Plaintiff's innocent explanation that there was broken into the kombi was considered by himself to be a lie. Cst. Majatjabothata's intention was first to arrest and then to investigate. No tangible reasons were given by Constable Majatjabothata why he considered the Plaintiff to be a flight risk. It

seems to be an afterthought after the Plaintiff's profiling became available. If the matter was properly investigated, it would have disclosed that the money was in fact collected for the sale of liquor and that it had nothing to do with bread collections. It would further disclose what arrangement existed between Mr Vieira and the Plaintiff and as to where the Plaintiff was supposed to keep the money until he was able to hand it to Mr Vieira. It would also have disclosed that the Plaintiff could not hand over the money at closing time of the business at 13h00. The objective facts show that Mr Vieira was never asked if he enquired from the Plaintiff as to what happened to the money. The objective evidence further shows that the carpets of the kombi were cut and uplifted and the battery box was opened. The question then arises, if the Plaintiff wanted to steal the money, why cut the carpets or forcefully open the battery box. In conclusion, it is my finding that the arrest of the Plaintiff was executed for the wrong reasons. Having regard to the circumstances leading up to the arrest of the Plaintiff and his subsequent detention for one day, and having regard of the decisions and findings in ***Masisi v Minister of Safety and Security,*** **2011(2) SACR 262 (GNP)** and ***Theobald v Minister of Safety and Security,*** **2011(1) SACR 370 (GSJ)** damages in the amount of R60 000, 00 should be awarded to the Plaintiff.

[40] As far as cost is concerned, Plaintiff's counsel submits that this Court should award cost on the scale of attorney and own client, alternatively attorney-client cost. I do not agree with this submission. In the first place I take into consideration the fact that the Plaintiff failed to join the Department of Justice as a party to the proceedings. The Defendant should not be burdened with additional costs for which he is not responsible. I further take into account that the Plaintiff decided to bring this action in the High Court whereas it should have been brought in the

Magistrate's Court. There is no reason why the High Court should be burdened with this type of claim. I further take into consideration that due to the inexperience of a policeman acting upon the facts as set out before, he was persuaded to effect the arrest and to detain the Plaintiff. A more experienced policeman would probably have realised that the matter should be further investigated before an arrest be made. I further take into account the length of the trial and the difficulty of the case. Having considered these relevant facts, in my opinion, the Plaintiff is only entitled to Magistrates Court costs based on the scale applicable in the Magistrates Court and there is no reason for any punitive cost order.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. Damages is awarded to the Plaintiff in an amount of R60 000,00 (sixty thousand rand).
2. The Defendant is ordered to pay interest on this amount from the date of service of summons at a rate of *tempora morae.*
3. The Defendant is ordered to pay the costs of this action on the highest scale applicable in the Magistrates Court. The cost includes the cost of counsel.

DE VOS J
JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT