

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 29067/2013

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

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DATE

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SIGNATURE

In the matter between:

THEMBA LEPOTA

Plaintiff

And

MINISTER OF POLICE

Defendant

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

- [1] The plaintiff in this matter, Themba Lepota (“Mr Lepota”) sues the defendant, the Minister of Police (“the Minister”), for Mr Lepota’s alleged wrongful arrest and detention. He claims damages in the amount of R200 000. 00 for the wrongful arrest, and a further R200 000.00 for the detention.
- [2] It is common cause that Mr Lepota was arrested on charges of housebreaking and theft by Detective Warrant Officer Moeketsi (“Mr Moeketsi”) on 10 September 2010. His first appearance in court was on 13 September 2013. Mr Lepota was not released on his first appearance, and remained in custody until 1 November 2010 after he was granted bail by the court.
- [3] Mr Lepota was ultimately acquitted on the charges against him on 22 January 2013.
- [4] As Mr Lepota’s arrest was without a warrant, the Minister relies on section 40(1)(b) of the Criminal Procedure Act 51 of 1977 to establish the lawfulness of the arrest. This provision provides that:

“a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1”

- [5] The jurisdictional requirements for a lawful arrest under section 40(1)(b) are very well established in our law, and do not require extensive discussion:
- [5.1] the arresting officer must be a peace officer;
- [5.2] he or she must entertain a suspicion;

[5.3] the suspicion must be that the arrestee has committed a schedule one offence; and

[5.4] the suspicion must rest on reasonable grounds.¹

[6] “Suspicion” implies an absence of certainty or adequate proof. A reasonable suspicion does not require that there is sufficient evidence to establish a *prima facie* case against the arrestee.²

[7] Whether a reasonable suspicion exists or not is determined on an objective basis.³ The pertinent question is whether the circumstances giving rise to the suspicion are such that they would ordinarily cause a reasonable person to form the suspicion that the arrestee has committed the offence in question.⁴ The lawfulness of the arrest is not affected by the withdrawal of charges, or acquittal of the arrestee on the relevant charges, as this decision lies with the court or prosecutor, and not the arresting officer.⁵

[8] If the jurisdictional facts are present, a discretion arises on the part of the arresting officer as to whether to effect an arrest or whether to use an alternative method of ensuring the suspect’s attendance at court. The discretion must be exercised in good faith, rationally and not arbitrarily. This

¹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H and *Minister of Safety and Security v Sekhoto & Another* 2011 (1) SACR 315 (SCA) at [6] & [28]

² *Duncan*, above, 465-6

³ *Minister of Safety and Security v Swart* 2012 (2) SACR 226 (SCA) at [20]

⁴ *R v Van Heerden* 1958 (3) SA 150 (T) 152

⁵ *Victor v Minister of Police* [2014] ZAGPPHC 920, at [150]

requires that it must be exercised with the objective of bringing the suspect before court.⁶

- [9] Arresting officers are entitled to exercise their discretion as they see fit, provided they stay within these bounds. Whether or not the discretion was properly exercised should not be judged on the standard of what was best in hindsight. As the SCA noted in *Sekhoto*:

*“The standard is not perfection or even the optimum, judged from the vantage of hindsight – so long as the discretion is exercised within this range, the standard is not breached.”*⁷

- [10] The arresting officer bears the *onus* of establishing the jurisdictional facts. If this is established, the arrest will be lawful, unless the plaintiff is able to establish that the arresting officer exercised the discretion to arrest in a manner that was unlawful.

- [11] In the present case there is no dispute that Mr Moeketsi was a peace officer, or that he harboured a suspicion that Mr Lepota was guilty of the offences in question, or that those offences were Schedule 1 offences. The only jurisdictional fact that is placed in dispute is whether or not Mr Moeketsi’s suspicion was reasonable.

- [12] If I find for the Minister in this regard, Mr Lepota pleads, in addition, that the arrest and detention nonetheless are unlawful in that Mr Moeketsi exercised his discretion improperly.

⁶ *Sekhoto*, above, [30]

⁷ *Sekhoto*, above, [38]

THE FACTS

- [13] On the evening 4 September 2010, a Saturday, the home of the criminal complainant, Nomsa Ndlela (“Ms Ndlela”), in Orlando East, Soweto, was broken into and various items were stolen. These included a TV, four wristwatches, two cell phones, and four pairs of “designer” sports shoes, or takkies, as they were referred to in evidence. The room from which the items were stolen was ransacked, and the TV stand was broken.
- [14] Ms Ndlela was not home at the time. She was attending a funeral. Her daughter, Nomvulo, contacted her by phone earlier in the evening to report the incident to Ms Ndlela.
- [15] In the statement made by Nomvulo to the police at the Orlando police station the following day, she indicated that two men in balaclavas had come into the house after knocking on the front door. They forced her into the bedroom. Thereafter, they started ransacking the room and taking items. One of the men tried to undress her, and tore the buttons off her pyjamas. The other man remonstrated with him, and he stopped. Thereafter, the men locked her in the house, and left with the stolen items.
- [16] Although Nomvuzo did not give evidence at the trial, it is not in dispute that Mr Lepota’s arrest was sparked by a housebreaking incident at Ms Ndela’s home on the night in question. It is also not in dispute that the police action that followed stemmed from the criminal complaint laid by Ns Ndela, which was supported by Nomuvuso’s statement, and one by Ms Ndela herself.

- [17] In Ms Ndele's statement that she made to the police when she laid her criminal complaint on Sunday, 5 September 2010, she stated that a man who stays in the house next door to hers told her that he had seen the suspects. On the basis of this information, Ms Ndela said in her statement that she had proceeded to "Themba and Machudu", in the same street as hers. They had agreed that they had stolen the items in question, and they had given her back her cell phones.
- [18] It is common cause that the person called Themba is the plaintiff, Mr Lepota, and that "Machudu" is the person who was his co-accused in the criminal case. The correct spelling of his name is "Mashudu".
- [19] Ms Ndela knows both Mr Lepota and Mashudu. They come from the same neighbourhood.
- [20] After the complaint was laid, the arresting officer, Mr Moeketsi, was given the responsibility of investigating the matter. The exact date when this occurred is not know, but it was between the lodging of the complaint and the opening of the police docket on 5 September, and the arrest of Mr Lepota on 10 September 2010.
- [21] It is not in dispute that both of Ms Ndele's initial statement and Nomvulo's statement were in the docket when it was handed to Mr Moeketsi.
- [22] The fact that Mr Lepota was arrested on 10 September 2010 is not in dispute. However, the details of, and the background to the arrest form the core of the dispute between the parties. I will revert to this in due course.

[23] It is common cause that the initial charge identified in the police docket was one of housebreaking and theft, and that this was subsequently amended by the public prosecutor to charges of robbery and attempted rape.

[24] As I have already indicated, Mr Lepota appeared in court for the first time on 13 September 2010, and was remanded in custody. More than two years later, in January 2013, Mr Lepota was acquitted on the charges against him. Ms Ndela testified at the hearing before me that she had attended every one of the court dates, and that she was never called as a witness in the criminal trial. She said that when she asked the prosecutor why he had not called her, he told her that he had forgotten about her. This was not challenged under cross-examination.

[25] These are the non-contentious, bare bones facts of the case. I deal with the more detailed facts forming the heart of the dispute below.

WAS THERE A REASONABLE SUSPICION?

[26] As I have already indicated, the first issue in dispute is whether Mr Moeketsi's suspicion that Mr Lepota was involved in the crime was reasonable. The Minister bears the *onus* of establishing this.

[27] Over the approximately three days of the trial I heard the evidence of five witnesses. Mr Moeketsi and Ms Lepota for the Minister, followed by Mr Lepota, a Mr Myoli and Mr Lepota's grandmother, Sana Lepota, ("the grandmother"), for Mr Lepota.

- [28] For purposes of reaching a decision in this matter it is not necessary for me to summarise the evidence of each witness. Indeed, a substantial amount of evidence was on tangential issues, and was not really of much assistance to me. Mr Myoli's evidence by and large fell into this category, and I will make very little reference to it.
- [29] As will become apparent later, most of the evidence that I will refer to in detail concerns the circumstances in which Mr Lepota's arrest took place.
- [30] At the time of the incident, Mr Lepota lived with his grandmother. It is common cause that the police tried to trace both suspects during the week after 5 September 2010. They looked for Mr Lepota at his grandmother's house on at least one occasion, this being the night of Thursday 9th September 2010, in connection with Ms Ndela's complaint. He was not at home. The police told the grandmother that they were looking for Mr Lepota, and that he should report to Mr Moeketsi at the police station when he returned home.
- [31] It is common cause that the arrest occurred the following day, when Mr Lepota, accompanied by his grandmother, arrived at the police station, and met Mr Moeketsi. The crux of the case turns on what occurred between Mr Moeketsi and Mr Lepota at the time of his arrest. Not surprisingly, Mr Moeketsi and Mr Lepota give conflicting versions of what transpired.
- [32] On Mr Moeketsi's version, he had read the statements by Ms Ndala and Nomvuzo when the docket was given to him. He had also interviewed both of these witnesses and checked their versions against the statements. Ms

Ndela had identified Mr Lepota as one of the suspects, together with Mashudu. Ms Ndela had repeatedly said that she had tried to arrange with Mr Lepota and Mashudu for the return of her missing items. They had promised to do so or to pay her back, and had asked her not to open a criminal case.

[33] According to Mr Moeketsi's testimony, on 10 September 2010, when he met Mr Lepota and his grandmother at the police station, Mr Lepota said that he had come to hand himself in. He (Mr Lepota) told Mr Moeketsi that he was prepared to hand himself over, in order to get the matter settled. Mr Moeketsi understood this to mean that Mr Lepota wanted to settle the matter with the complainant.

[34] In his view, it was not the police's job to try to settle matters between suspects and complainants. The duty of the police was to arrest a person reasonably suspected of a crime, and to take the matter to court.

[35] Mr Moeketsi testified that he was satisfied that there was a "solid" case against Mr Lepota, and that his suspicion of Mr Lepota's involvement in the crime was reasonable. He accordingly proceeded to arrest Mr Lepota. He informed him of his rights and he asked him to remove his shoelaces, and belt and to give these to his grandmother. Thereafter, Mr Lepota was detained at the police station.

[36] On the following day, Mr Moeketsi proceeded to complete what is commonly known as the "warning statement" form with Mr Lepota. In the section indicating that the suspect has been informed, among other things, of the

reason for his arrest and his right to remain silent, the word “Yes” has been inserted in Mr Moeketsi’s handwriting, and Mr Lepota’s signature appears thereunder. It is also recorded in the document that the suspect has elected “to remain silent”. Again Mr Lepota’s signature appears thereunder. Mr Moeketsi confirmed in his testimony that the form accorded with the facts, i.e. Mr Lepota did not wish to make a statement to the police when he was arrested, and had exercised his right to silence.

[37] He testified further that the following day, the 12 September 2010, the same process was followed with the other suspect, Mashudu, who had since also been arrested. However, unlike Mr Lepota, Mr Mashudu elected to make a written statement. Mr Moeketsi testified that the normal procedure in those circumstances is that the investigating officer does not complete the warning statement. Instead, the investigating officer refers the suspect to a senior officer, who takes the statement down. This is because the suspect may make self-incriminating statements. These must be properly recorded by an officer with a high enough rank. In Mashudu’s case, a captain completed the warning statement form and took Mashudu’s statement. In Mashudu’s statement, he says that it was Mr Lepota who gave the stolen cell phones to him.

[38] Mr Lepota’s version paints a very different picture altogether of what occurred when he was arrested.

[39] According to his testimony, he did not know why the police were looking for him. He was at his mother’s house on the Thursday night. His grandmother

phoned him on Friday to say that the police had come to the house looking for him. The police had left a message that he was to go to the police station when he came home.

[40] On Friday, 10 September 2010, he and his grandmother went to the police station and asked to see Mr Moeketsi. They waited for him for about 45 minutes. When Mr Moeketsi arrived, the grandmother said: "Here is the person you are looking for." When he went into Mr Moeketsi's office, Mr Lepota repeated that he was the Themba that they were looking for.

[41] At this point, according to Mr Lepota's evidence, Mr Moeketsi instructed him to remove his shoelaces and belt and all items from his pocket and to give these to his grandmother. Mr Lepota asked Mr Moeketsi why he must do so, and Mr Moeketsi responded by telling him that he was under arrest.

[42] Mr Lepota's version is that when he asked Mr Moeketsi why he was being arrested, Mr Moeketsi told him that he was not to say anything; he was not to talk to Mr Moeketsi. Despite Mr Lepota trying to tell Mr Moeketsi that he did not understand why he was being arrested, Mr Moeketsi would not let him speak.

[43] He says that he also tried to explain to Mr Moeketsi what had transpired at Mashudu's house at the meeting on Sunday 5 March. He said he had tried to tell Mr Moeketsi that he had told Ms Ndela that he knew nothing about stolen watches. However, according to Mr Lepota, Mr Moeketsi would not allow him to tell him anything. Instead, he said to Mr Lepota: "I already know everything about you. I am well informed."

- [44] It was Mr Lepota's further evidence that Mr Moeketsi did not tell him the reason for his arrest, nor did he advise him of his rights. He said he did not elect to exercise his right to remain silent. Mr Moeketsi did not ask him if he wanted to make a statement or not. If he had been asked, Mr Lepota said that he would have elected to make a statement.
- [45] Mr Lepota explained his signature on the warning statement form by telling the court that he had simply signed his name where Mr Moeketsi indicated he should, where the paper was marked with an "X". He said that the answers above his signature had not been filled in when he was told to sign the document.
- [46] When Mr Lepota's version was put to Mr Moeketsi under cross-examination, he denied it. Similarly, when Mr Lepota's version was put to Mr Moeketsi under cross-examination, he also denied it.
- [47] Accordingly, on Mr Moeketsi's version, he formed a suspicion of Mr Lepota's involvement in the crime, this was a reasonable suspicion, based on what he knew about the case from the police docket, and from interviewing Ms Ndela and Nomvuzo. When Mr Lepota presented himself at the police station, with a view to handing himself in so that the matter could be settled between Mr Lepota and the complainant, Mr Moeketsi acted in accordance with his duties and obligations as a police officer and arrested him.
- [48] The contrary version of Mr Lepota is that Mr Moeketsi was determined to arrest him and to keep him in the dark about why he was being arrested and what his rights were. He actively prevented Mr Lepota from trying to tell Mr

Moeketsi anything that was exculpatory. In addition, on Mr Lepota's account, Mr Moeketsi essentially falsified the warning statement document by obtaining Mr Lepota's signature on it by devious means.

[49] Which of these versions is the more probable? Clearly, if Mr Lepota's version prevails, it would be difficult to conclude that Ms Moeketsi's suspicion was a reasonable one. This is because on Mr Lepota's evidence, Mr Moeketsi actively went out of his way to close his mind to any information pointing away from Mr Lepota's involvement in the crime. An arrest in such circumstances would not be lawful.

[50] However, when considered as a whole, the evidence weighs in favour of Mr Moeketsi's version of what happened when he arrested Mr Lepota. There are a number of indicators that support this.

[51] It is common cause that on the Sunday following the break-in a meeting took place at Mashudu's house to discuss what had occurred. Mr Lepota and Mashudu were at the meeting, as were Ms Ndela, her father, Mashudu's uncle, and Mr Lepota's grandmother.

[52] Mr Lepota testified in his evidence in chief about this meeting and confirmed that his grandmother was present. He said that his grandmother, together with Mashudu's uncle, had come to fetch him to attend the meeting. He also said that the stolen watches, and his and Mashudu's involvement in their theft, was discussed. Ms Ndela told him that he should give the watches back, or pay for them, or she would go to the police.

[53] This is consistent with Ms Ndela's evidence about what occurred at the meeting, and it is consistent with Ms Ndela identifying Mr Lepota and Mashudu as the suspects in her first statement to the police. It is also consistent with Ms Nedela's evidence at the trial when she testified that when the suspects did not return the watches after 2 hours, she went to the police station and laid a complaint.

[54] In my view, what may be inferred from this common evidence is that on the day following the incident there was an attempt by Ms Ndela and her family (her father), together with the two suspects and their families (Mashudu's uncle and Mr Lepoto's grandmother) to deal with the situation without going to the police. Ms Ndele wanted the remainder of her property (the watches) returned by the suspects or to be reimbursed by them. Everyone involved was from the same neighbourhood. The course they adopted seems to me to have been a perfectly reasonable in the circumstances. It was only when Mr Lepota and Mashudu failed to return the watches to her, she followed through with her threat to go to the police.

[55] Against this background, Mr Moeketsi's evidence about what Mr Lepota said when he met with Mr Moekesti at the police station on 10 September has a considerable ring of truth. Mr Moeketsi testified that Mr Lepota said that he come to the police station to hand himself in so that the matter could be settled with the complainant. This is consistent with the families previously having met to try to settle the matter. The difference now was that the police were involved. It is not unreasonable to infer that what Mr Lepota and his

grandmother hoped they could do was to persuade the police that the matter was still capable of settling without criminal steps being taken.

[56] Mr Lepota's version, on the other hand was that when he reported to the police station on 10 September in response to the message the police had left with his grandmother on the night before, he did not know that he was a suspect in the theft case. He had in mind that the police may have wanted to see him in connection with the theft. However, he said that because he had nothing to do with the theft, he thought that the police were simply going to ask him for his help in trying to identify the suspect. Mr Lepota also testified that when Mr Moeketsi placed him under arrest he was unaware of the reason.

[57] In Mr Lepota's grandmother's testimony she also pleaded ignorance of what was behind the arrest. She testified that when her grandson was arrested she did not know it had anything to do with items stolen from Ms Ndela. In her evidence she said that first time that she heard about Mr Lepota's involvement in a theft was when he appeared in court on 13 September and she heard them saying there that Mr Lepoto had stolen some watches. She testified in her evidence in chief that before this, she did not even know that Ms Ndela's watches had been stolen.

[58] Both Mr Lepota's and his grandmother's versions in this regard do not stand up to scrutiny. On his own evidence, Mr Lepota knew that Ms Ndela had accused him of stealing items from her home, and she had demanded that he return the watches. Although he testified that he had denied his

involvement in the theft at the Sunday meeting, the fact is that he knew that Ms Ndela had identified him as a suspect and that she intended reporting the matter to the police if her watches were not returned. In these circumstances, his version of why he thought he was wanted at the police station, and that he did not know he was a suspect, is improbable.

[59] As far as the grandmother is concerned, on the common cause evidence, she was at the Sunday meeting. She must have known, at the very least, that her grandson was suspected of stealing the watches and that Ms Ndela was threatening police action.

[60] In these circumstances, I cannot accept that Mr Lepota and his grandmother were being truthful when they testified that they did not know that Mr Moeketsi wanted to see Mr Lepota as a suspect in the housebreaking and theft incident.

[61] I conclude that the more probable version of what transpired at the police station on 10 September when Mr Lepota was arrested is the version given by Mr Moeketsi. I find on the probabilities that Mr Lepota and his grandmother knew that Mr Lepota was a suspect in the crime. They came to the police station to speak to the investigating officer in the hopes of trying to broker a settlement with the complainant, Ms Ndela, and to avoid formal action being taken against Mr Lepota by the police. They knew very well why Mr Lepota was there, and they were not taken by surprise when Mr Moeketsi proceeded to arrest Mr Lepota.

- [62] I accept the truth of Mr Moeketsi's evidence that he took the view that it was not the police's function to get involved in trying to settle matters between complainants and suspects. He pointed out to the court that the crimes in question were serious ones. A home had been invaded in the presence of a resident, and items of substantial value had been stolen. Mr Moeketsi cannot be faulted for adopting the approach that in those circumstances his duty was to arrest the person suspected to be involved in the crime.
- [63] What of Mr Lepota's version that Mr Moeketsi refused to permit him to say anything that may have provided exculpatory evidence, and that he did not give Mr Lepota the opportunity to make a warning statement? If this version is correct, it means that Mr Moeketsi falsified the warning statement document by making Mr Lepota sign a statement in blank, and filled in the answers afterwards.
- [64] Again, this version does not stand up to scrutiny. Mr Moeketsi is a police officer with more than 20 years experience. From his testimony it was clear to me that he is fully acquainted with the process of arresting suspects, and how they are dealt with until their first appearance at court. Mr Moeketsi had Ms Ndela's statement identifying Mr Lepota as a suspect, and he had interviewed Ms Ndela before Mr Lepota's arrest to verify her version. Mr Lepota and his grandmother had arrived at the police station in response to message that Mr Lepota should report to the police. There is no reason why, in these circumstances, Mr Moeketsi would have felt the need deliberately to flout police procedure, and his own constitutional obligations as a police officer by falsifying the warning statement as Mr Lepota claims.

[65] Most tellingly, the warning statement form of the other suspect, Mashudu, recorded that he wished to make a statement, and a statement was attached to it. As I have already noted, Mr Moeketsi explained that Mashudu's warning statement form and the statement itself were completed by a captain rather than by Mr Moeketsi. This is the normal procedure where a suspect elects to make a statement. There is no explicable reason why, as the investigating officer, Mr Moeketsi would have actively obstructed one of the suspects from making a warning statement, while not doing the same in respect of the other.

[66] Mr Lepota relied on Mr Miyeni to support his claim that Mr Moeketsi actively prevented the recording of any exculpatory statements. Mr Miyeni assisted in the recovery of the TV set on the night of the housebreaking. On Sunday 12 September 2010 he made a written "recovery statement" under oath to the police. Mr Moeketsi took the statement. The statement is brief. It explains how Mr Myoli came to know about the incident on the night in question, how he went to Ms Ndela's house, how the TV set was found behind the room of the next door neighbour, and how he and Ms Ndela's son took the TV set to Mr Myoli's house, presumably for safe keeping. The statement does not mention Mr Lepota. It is clearly aimed at establishing the facts regarding where the TV set was found, and how it came to be in Mr Myoli's house.

[67] Mr Myoli claimed in his evidence that at the time that he made the statement, he had tried to tell Mr Moeketsi why Mr Lepota could not have been involved in the housebreaking, but that Mr Moeketsi would not listen to him, and would

not include any of what he was trying to tell him in his statement. The statement was taken after Mr Lepota was arrested. Consequently, whatever Mr Myoli told Mr Moeketsi, it could not have affected the reasonableness of the latter's suspicion regarding Mr Lepota's involvement in the crime. The suspicion had already been formed and acted upon. For this reason, too, it is difficult to understand why Mr Moeketsi would have needed to deliberately suppress exculpatory evidence at this stage.

[68] Mr Moeketsi in any event denied in his testimony that he had prevented Mr Myoli from giving him exculpatory information. He testified that Mr Myoli had not mentioned Mr Lepota when he made his recovery statement. This is consistent with what is contained in the statement. As I have already indicated, the statement was made under oath, and Mr Myoli confirmed that he had read it through before he signed it.

[69] On the probabilities, I accept Mr Moeketsi's version. It is common cause that Mr Lepota and Mr Myoli are good friends. It is easy to see how Mr Myoli might have been willing to embellish his version of what transpired when the recovery statement was taken to bolster his friend's claim against the Minister.

[70] For these reasons, I reject Mr Lepota's version that Mr Moeketsi closed his mind to any exculpatory evidence in the process of carrying out the arrest.

[71] Mr Lepota's counsel submitted that the suspicion formed by Mr Moeketsi was not reasonable. She submitted that Mr Moeketsi should have analysed Ms Ndela's statement more thoroughly, and should have interviewed more of the

people who had attended the Sunday meeting to determine whether Mr Lepota had indeed promised to return the stolen items to Ms Ndela.

[72] This submission is without merit on the facts of this case. At the time of the arrest Mr Moeketsi knew that Ms Ndela had identified Mr Lepota and Mashudu as suspects. He knew that on Ms Ndela's version, both suspects had accepted their involvement and, in the presence of their family members, had undertaken to return the stolen watches. Mr Moeketsi knew that they had not done so. He also knew that the police had not been able to trace the suspect over the past week, even though they resided in the area. This would certainly raise suspicion in the mind of the reasonable person that the two suspects were involved in the crime.

[73] Furthermore, when Mr Lepota reported to Mr Moeketsi, he (Mr Lepota) indicated that he was there to hand himself in in order to settle the matter with the complainant. For any reasonable person this would have confirmed the suspicion that Mr Lepota was involved in the theft.

[74] Therefore, I conclude that Mr Lepota's arrest was based on a reasonable suspicion on the part of Mr Moeketsi that Mr Lepota had committed the crime.

[75] It follows that the arrest was lawful.

WAS THE DISCRETION EXERCISED PROPERLY?

[76] The second question is whether Mr Moeketsi exercised the discretion to arrest Mr Lepota *bona fide*, rationally and not arbitrarily.

[77] In his evidence, Mr Moeketsi said that in terms of the applicable guidelines that apply to the police, the nature of the crime was such that an arrest was required, and that the suspect could only be released on bail set by a prosecutor or the court when the suspect appeared in court. He pointed out that the value of the stolen property involved was high. Furthermore, as women, the complainant and her daughter were vulnerable to possible danger if the suspects were summonsed or released on warning to appear in court, rather than being arrested.

[78] The *onus* of establishing that Mr Moeketse exercised his discretion unlawfully rests on Mr Lepota. Counsel for Mr Lepota submitted that Mr Moeketsi did not act *bona fide* by preventing Mr Lepota from providing an exculpatory statement to the police. I have already rejected Mr Lepota's evidence in this regard. It follows that there is no evidence of any *mala fides* conduct on the part of Mr Moeketsi.

[79] Furthermore, the purpose of Mr Lepota's arrest clearly was to bring him before court at the earliest opportunity. He was arrested on Friday, 10 September 2010. He made his first court appearance within the requisite 48 hours, on Monday 13 September 2010. The docket was handed to the prosecutor who then dealt with the matter in accordance with normal procedures. Mr Moeketsi's decision to arrest Mr Lepota was quite evidently rationally connected to the purpose of arrest, viz. to bring the suspect before court.

[80] From the reasons that Mr Moeketsi gave for his decision to arrest Mr Lepota and to detain him until his first court appearance I am satisfied that this decision was based on good grounds, and was not arbitrary in any way.

[81] I conclude that Mr Lepota has failed to establish that the exercise by Mr Moeketsi of his discretion to arrest him was improper and unlawful.

CONCLUSION

[82] It follows that I find in favour of the Minister on both issues before me.

[83] I make the following order:

1. The plaintiff's claim is dismissed with costs.

**R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard: 25-27 August 2015

Date of Judgment: 2 October 2015

Counsel for the Plaintiff: Adv L C Abrahams

Instructed by: Khumalo T Attorneys

Counsel for the Defendant: Adv FF Opperman

Instructed by: The State Attorney, Johannesburg