



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 32477/2009

DATE: 17/3/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	✓
213/11	
DATE	SIGNATURE

IN THE MATTER BETWEEN

LUFUNO JUSTICE SWALIVHA

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

PRINSLOO, J

Introduction and background

[1] At all relevant times, and particularly during September 2008, the plaintiff was employed as a security officer by Hlanganani Protection Services (Pty) Ltd ("Hlanganani") a security business which was also duly registered in terms of the

Private Security Industry Regulation Act 56 of 2001. The principal place of business of Hlanganani was in Langlaagte, Johannesburg.

- [2] From 21 September 2008 the plaintiff and a number of his colleagues were deployed at the Mafikeng Campus of the University of North West ("the university") situated some three kilometres from the Mmabatho police station in Mmabatho, North West ("the police station"). There was a period of student unrest and rioting and the security officers were deployed to assist the police to protect the assets and interests of the university. During their period of deployment the security officers were accommodated at Lerona Lodge, Mafikeng ("the lodge").
- [3] On Wednesday 24 September 2008 (a public holiday, namely Heritage Day) the plaintiff and nineteen of his colleagues were arrested by the police at the police station. The charges were said to include theft alternatively failure to give account of goods suspected of being stolen in contravention of section 36 of the General Law Amendment Act 62 of 1955. In essence, the stolen goods were said to be some eight cell phones and one calculator allegedly belonging to some of the students and allegedly stolen by the security officers while they were assisting the police to maintain law and order at the university during the rioting.
- [4] The plaintiff and his colleagues appeared in court on Friday 26 September 2008 when they applied for bail. The bail application was postponed to 3 October 2008.

On that day bail was granted to the officers in the amount of R500,00 each. The matter was postponed to Friday 28 November 2008 for further investigation and there were further appearances on 16 February 2009 and 7 April 2009. On the last mentioned date all the charges were withdrawn.

[5] In about May 2009, the plaintiff and his nineteen colleagues instituted action against the defendant Minister for damages arising from alleged unlawful arrest and detention. Each action was instituted under a separate case number.

[6] When the trial came before me, I was told that only this one matter under this case number, 32477/2009, would be heard, and the other nineteen matters would be held in abeyance, pending the outcome of this case.

[7] Before me, Ms Swiegelaar appeared for the plaintiff and Mr Mathibedi, assisted by Mr Manyaga, appeared for the defendant.

[8] At the commencement of the proceedings, counsel jointly applied, in terms of Uniform Rule 33(4), for a separation of issues. The *quantum* of the claim would be separated for later adjudication. Only the merits would come before me for decision. I duly made an appropriate order.

[9] Counsel for the plaintiff informed me that the following was common cause between the parties:

1. the arrest on 24 September 2008;
2. the detention for the periods mentioned;
3. the fact that the arrest was effected without a warrant of arrest;
4. the fact that the police officers who arrested the plaintiff and his colleagues acted within the course and scope of their employment with the defendant Minister;
5. the plaintiff had complied with the formalities prescribed in terms of the Institution of Legal Proceedings against Certain Organs of State Act, 50 of 2002;
6. the fact that the defendant bore the *onus* to prove that the arrest and detention were lawful.

[10] It was agreed that the defendant would start leading evidence.

The pleadings

[11] The relevant paragraphs in the particulars of claim read as follows:

"

3.

On 24th September 2008 and at Mmabatho the plaintiff was arrested without a warrant by various members of the South African Police Services, acting within the course and scope of their employment with the defendant.

4.

5

At the time of the arrest the member/s of the South African Police Services had no reasonable and/or probable cause for doing so nor did he/they have any reasonable belief in the proof of the information given.

5.

Thereafter the plaintiff was after having been arrested detained from 24th September 2008 to 3rd October 2008 on which day bail was granted to the plaintiff. On 7 April 2009 all charges were withdrawn against the plaintiff in the magistrate's court Mmabatho. ...

7.

As a result of the aforesaid the plaintiff suffered damages ..."

[12] With regard to the allegations made in paragraphs 3, 4 and 5 of the particulars of claim, the only response offered in the plea is the following:

"Ad paragraphs 3 to 5

Save to admit arrest, the defendant denies the remaining allegations contained in these paragraphs."

[13] Bearing in mind the *onus* which rests on the defendant, this plea is totally inadequate and excipiable. No exception was noted.

[14] At the pre-trial conference in September 2010, the plaintiff asked and minuted the following question:

"The plaintiff requests the defendant to set out clearly and precisely their version of how the incident occurred, out of which this claim arose?"

[15] The following answer was furnished and minuted:

"3.2 Arising from the incident: (note: this is the unrest at the university)

3.2.1 a number of students were arrested by the plaintiffs who were rendering services as referred to above, were taken to the police station, charges were laid against the students who were arrested and detained;

3.2.2 a number of students laid criminal charges against the personnel who were on duty on the day in question ranging from assault GBH, theft, *inter alia* of cell phones, calculators, CD's, wallets containing money and various cards etc.

3.3 On the 24th September 2008, eight cell phones were found in the bus that was transporting the plaintiffs, a calculator and CD's were found in the luggage of one of the plaintiffs. The articles referred to above were positively identified by the complainants as referred to in 1.3 as their belongings which were stolen the previous night in the various rooms of the students at the university. Based on the fact that the plaintiffs were on duty at the university where the

identified articles were stolen, members of the South African Police Services had reasonable grounds to arrest, detain and charge the plaintiffs for allegedly being in possession of stolen goods."

- [16] With reference to the relevant authorities, the learned author, Harms, in *Amler's Precedents of Pleadings* 7th edition p46 and 47 says the following:

"An arrest or detention is *prima facie* wrongful. It is not necessary, therefore, to allege or prove wrongfulness. It is for the defendant to allege and prove the lawfulness of the arrest or detention."

And:

"Thus, when police have arrested and detained a person, once the arrest and detention are admitted the *onus* of proving lawfulness rests on the State."

- [17] In cases like the present, where the plaintiff was arrested without a warrant, the provisions of section 40 of the Criminal Procedure Act, 51 of 1977, ("section 40") come into play. For present purposes, it is only necessary to quote the provisions of section 40(1) and the relevant subsections:

"40(1) A peace-officer may without warrant arrest any person-

- (b) whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody;
- ...
- (e) who is found in possession of anything which the peace-officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace-officer reasonably suspects of having committed an offence with respect to such thing."

[18] Section 36 of the General Law Amendment Act, 62 of 1955, provides as follows:

"Failure to give a satisfactory account of possession of goods – Any person who is found in possession of any goods, other than stock or produce as defined in section 13 of the Stock Theft Act, 1923 (Act no 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

The evidence

[19] A number of witnesses testified on behalf of both parties. The trial, without closing argument, lasted for approximately five days. Closing argument was presented in the form of written heads of argument. I intend limiting the summary

of the evidence to those aspects which appear to me to be relevant for purposes of adjudication of this case.

[20] George Setlhadi is a bus driver in the employ of Atamilang Transport. On 24 September 2008 he was instructed to transport officers of the Hlanganani security services. He left the depot and went to the lodge. There the police said that he must take the officers to the police station. At the depot he also checked if the bus was clean and the security department also checked the bus before he left. There was nothing inside.

[21] The police escorted them to the police station. On arrival the police ordered the security officers to get out, each with his luggage. After they got out the police got into the bus and found cell phones in the bus and brought them out. There were two police officers doing the searching. He was instructed by his employers at the depot to go back to work with the bus.

[22] In cross-examination he said he did not see the police finding the cell phones. They told him that they had found the phones between the seats. He did see the phones. He does not know how many phones there were neither did the police tell him. There were no police in the bus when he was escorting the officers to the police station.

He does not know how many passengers he carried on that occasion but the bus takes about sixty five and the bus was full. It may have been sixty passengers but he is not sure.

[13] The officers had bags and blankets with them as their luggage. He did not see them carrying anything else apart from bags and blankets.

[24] He was not in the bus when the police did the searching. He was standing outside.

[25] Katlego Thomas Maleho was a final year law student at the university in September 2008. On 23 September 2008 at about midnight he was in his room in the James Moroka Mixed Residence with his girl friend Rejoice Molema.

There was banging and kicking against the door. He opened and about five security officers entered. He identified them as security officers and they were dressed in black trousers with maroon tops carrying shields and batons. They started assaulting him with open hands. He was dragged out of his room. Later he was taken into custody by the police. He stayed there until Friday the 25th when he was taken to court. He was released on warning and went back to his room to find that it was damaged. His cell phone was missing. On the night when the security officers came his cell phone was lying on the window-sill. It was later recovered from the police. He felt that the security officers had taken his cell

phone. Exhibit "A" is a bundle of documents. "A54" to "A56" are photos of cell phones and the calculator lying on a grass lawn next to and inside three disposable holders which could be food containers. His cell phone was identified as one to be seen on "A55". He did not lay any charges. In cross-examination he said that he could not identify the security officers who allegedly assaulted him. He did not lay any assault charges either. He was not injured. When he got back from detention the door of his room was not locked neither was it guarded. His girl friend was not there either. It was put to him that the security officers would deny assaulting any of the students or taking their property. It was put to him that at the time there were sixty security officers assisting the police to arrest the students. It was put to him that according to the plaintiffs, it was the police who effected the arrests of the students.

[26] Ipeleng Rejoice Molema was also a student at the university at the time and the girl friend of the previous witness.

[27] She, broadly, corroborated the evidence of her boy friend about the security officers coming in and assaulting him and searching the room. At one stage they took her out of the room but later allowed her to return to the room. At that stage the cell phones were missing. She then went to sleep with one of her girl friends. Nothing apart from their cell phones was missing. She got her cell phone back as well. It can be seen on "A56". She first said that she only saw the phones at the police on Monday 29 September. Later she said it may have been earlier.

[28] Siyabulela Ricardo Thembani was also a student at the university. His door was also banged open and he saw officers in uniforms consisting of dark trousers and maroon tops. He was grabbed and pepper-sprayed. He managed to escape and later went back to his room to find it in disarray. Some of his property was missing, including his cell phone. His Casio calculator with a white sticker at the back was also missing. He recovered only the calculator from the police. It can be seen on "A55". He cannot identify the people who allegedly assaulted him. He does not know who stole his goods. It was put to him that the plaintiffs would deny assaulting the students or taking their goods. It was put to him that other local security officers were also on the scene. This he could not deny.

[29] Like the two student witnesses before him, he did not offer any evidence about the riotous conduct of the students, including stone throwing and burning down of parts of the university. When he was asked whether there was a fire in the library that night, he said he was not sure. It was put to him that the plaintiffs would deny having assaulted anybody or stolen their articles.

[30] Pheko Jacob Lekena works at the Criminal Record Centre of the Mmabatho police. "A53" is an affidavit by Inspector Selefo stating that the latter had taken the photos to be seen on "A54" to "A56" and that the "points" had been indicated to him by Captain Leshoe. This witness, Lekena, was only the Commissioner of Oaths. He did not take the photos neither did he know where they were taken.

[51] Thapelo Ronald Leshoe is a captain in the police. He is stationed at the Mmabatho Management Information Centre.

He was not at the university on the night of 23 September. On 24 September he was requested by Colonel Dince to accompany him to the lodge. There they found the security officers. Some had eaten and others were busy eating. The driver of the bus took them to the police station and the witness followed in a motor car behind the bus. He does not remember how many policemen there were. He was with Colonel Dince. At the police station Colonel Dince asked him to search the bus. He would do so with Warrant Officer Oliphant ("Oliphant"). Oliphant did not testify. He asked the bus driver to vacate all the passengers from the bus each with his luggage. The passengers left the bus and went into a shelter in the police station. He and Oliphant went into the bus to do a search. The bus driver was watching what they were doing. They found some food parcels. In some food parcels they found cell phones. Some cell phones were on top of food parcels and others were underneath the seats. The food parcels were mainly used for porridge. They were disposable containers. Afterwards they searched each bag of each security officer which had been in the bus. Nothing was found except in one bag a calculator and CD's were found. In the bus eight cell phones were found.

[12] "A106" is a "drop sheet" given to the police by Mr Ndou who was in charge of the security officers at the university. "A106", the drop sheet, contains the names of twenty two members of Hlanganani who were allegedly on duty at the university on the night of 23 September. He testified about the photos "A54" to "A56". Oliphant was the person responsible for pointing out the articles to the photographer.

[31] In cross-examination it was pointed out to him that in "A53", *supra*, Selefo says that he, Leshoe, pointed out the articles and not Oliphant. The witness said that Selefo may have thought that because the witness was present he did the pointing out. Later he said he may also have done the pointing out. His evidence in this regard was unconvincing. His involvement was limited to the search and the pointing out. He does not know if all the security guards in the bus were from the same firm. At the lodge some of the security officers were inside the bus and others were eating inside the lodge. He does not know how many securities there were. He said there may have been less than sixty. When it was put to him that there were sixty, he could not dispute it. Colonel Dince decided that the security officers must be taken to the police. He did not receive any complaints from students about alleged theft. He did not take statements. He saw some of the officers getting into the bus carrying food containers. It was put to him that the driver said he only saw bags and blankets. It was put to him that the plaintiffs would say that they were not in possession of food containers. This he disputed. It was put to him that the bus driver said that they showed him the cell phones

allegedly found in the bus but he said nothing about food containers. He does not know whether the driver saw the food containers. It was put to him that if they showed the driver the cell phones he must have seen the food containers.

[34] Significantly, the witness was confronted with an affidavit he made on 24 September. The last two paragraphs read as follows:

"We escorted the bus to Mmabatho police station. Upon arrival at the station we decided to search all security members as there was an allegation that the students' properties were missing. We requested all members in the bus to take their luggage on their way out and searched them individually.

I was with Inspector Oliphant when he searched one of the security members and he found a calculator in his bag. We asked him where he got the calculator and he said that he got it during patrol around the campus lying on the ground."

No mention whatsoever is made about the cell phones allegedly found in the bus, let alone the food containers.

When he was cross-examined as to why he did not say anything about the cell phones allegedly found in the bus he said "I omitted to mention it in the first statement therefore I made it clear in the second statement." He conceded that it

was a very important issue. When asked why it was necessary to make two statements about the same incident he said "because I realised after the first statement that I had omitted important issues then I made the second statement".

The "second statement" is "A412" and "A414". This is a much more elaborate affair mentioning the eight cell phones allegedly found underneath the seats and inside "their food parcels". There is also mention of the individual search and the calculator that was found but here it is added that apart from the calculator certain CD's were also found on this particular person. When this person testified later, he admitted that the calculator was found on him but denied the CD's.

Another astonishing feature of this evidence is that the "second statement" which the witness said he made when he realised the omission in the "first statement" has the time 15:00 on 24 September endorsed on it whilst the "first statement" has a much later time, 18:55, endorsed on it.

I consider this evidence to be questionable and unsatisfactory.

[35] The witness was also asked whether the bus driver was in the bus when he and Oliphant searched the bus. He said the bus driver was in the bus and had specifically been requested by them to be present when they conducted the search. It was put to him that the bus driver said he was outside the bus when they

conducted the search, and that he did not see them actually finding the cell phones.

[35] He was asked whether they showed the security officers the cell phones and the food containers after the search. He said yes and their answer was that they had no knowledge about those articles. This is at odds with the evidence of Dince who said that they were not prepared to give any explanation whatsoever. In any event, the version of the plaintiffs is that the alleged phones and food containers allegedly found in the search were not shown to them at any stage.

[37] He also confirmed that the security officer in whose possession the calculator was found, one Difference Mogorosi, who testified later, explained that he found the calculator lying on the premises of the university.

[38] It was put to him that about sixty security officers were inside the bus at the relevant time and he conceded that this could be correct.

[39] He was also confronted with the fact that on the photos, "A56" for example, three articles are photographed in one food parcel. It appears to be two cell phones and a calculator. He was asked whether it was his evidence that more than one article was found in one food container. He said that he could not remember.

[40] The following cross-examination then took place (I paraphrase from my notes):

"So you say if I am one of sixty passengers in the bus where food containers were found and three phones that could have been sneaked on the bus by any of the passengers then I must give an explanation? --- I did not say it is so and so who took them. They were asked if they had any knowledge of the cell phones and they could not answer.

They could not answer? --- They said they did not know anything about the cell phones.

They were then arrested? --- Yes, it appears so.

Were you involved in the arrest of the plaintiffs? --- Not so.

You were not involved in the arrest? --- That is so.

Who arrested them? --- All this operation was under the control of Colonel Dince and his members.

Not all the security officers that were on the bus were arrested? --- I have said I don't know about the arrest."

[~] It was put to the witness that all the security officers who were on the bus (some sixty odd) had been involved in the operation at the university the previous night when the police were assisted also in the arrest of the students with the exception of two female security officers and not only the twenty two (including the two females) listed on the "drop sheet" whilst only twenty of the twenty two on the drop sheet (barring the females) were arrested. The witness could not give any satisfactory answer to this statement. He said "it could be so I was not involved in the arrest".

[42] It was put to him that according to the pre-trial minute, and in answer to a question by the plaintiffs, the defendant stated that this witness was also involved in the arrest. He emphatically denied it.

[43] It was put to him that it would have been prudent to test the alleged stolen cell phones for finger-prints. He said he could not remember whether that had been done.

[44] I was not impressed with this witness.

[45] Baleseng Thapelo is a constable employed by the SAPS at Mafikeng. This witness gave evidence of a formal nature. He allegedly witnessed one of the found cell phones being handed over to one of the complainants, Rejoice Molema.

[46] Modisaotsile Simon Dince is a colonel in the police and attached to the Mafikeng Organised Crime unit. He was on duty on 24 September 2008.

[47] At about 10:00 he went to the university. There were areas which had been set alight and doors were damaged and windows were shattered. He summoned the local Criminal Record Centre to take photos of the damaged property. It had been reported to him that forty nine students were being detained at the police station. He understood that the security officers had effected the arrests and felt that he

needed arresting statements from these arresting officers. He summoned Captain Leshoe and Oliphant to accompany him to the lodge. On arrival he found the bus with occupants and others outside eating. The food was in white food containers as depicted on the photographs. They also had bags and blankets. He explained to the security officers that they had to come to the police station to make arresting statements. They agreed. He also got the drop sheet from Mr Ndou, as described. He spotted some security officers entering the bus with food containers. Remarkably, he said that no food containers were left outside the bus. It is difficult to understand why he would, at that stage, have made such a careful observation.

[4] When they got to the police station he saw some students entering the area of the Community Service Centre and asked them what they wanted and they said they were students at the university and some of them wanted to open cases for "stolen property, damaged property, and assault". He asked them against whom did they want to open the cases and they said they did not know against whom but against those on duty the previous night. He then testified "because I was concentrating on the issue of getting statements I asked the students to get into the CSC to be assisted by the police". Immediately after giving this evidence, he said that he asked Leshoe and Oliphant to tell the security officers to leave the bus and to search the bus because the students had alleged that their properties had been lost. At this stage Dince would not have seen any documentation, complaints or statements. According to him, he ordered the search immediately upon hearing

vague allegations about stolen property and at a time when he was disinterested in that side of things and more interested in obtaining the arresting statements.

When the bus was searched the security officers were outside the bus. According to Dince, the bus was searched before the security officers were individually searched. All the witnesses on behalf of the plaintiff testified that the individual personal searches took place before the bus was searched.

[49] Dince said that Leshoe and Oliphant came out of the bus carrying "food parcels". They are the containers which the officers had taken into the bus. Some of the food containers had cell phones inside. He does not remember how many.

[50] He asked the security officers where the cell phones came from and what do they know about them and "no one gave me an answer". Of course, this is directly at odds with the evidence of Leshoe who said that the security officers said they knew nothing about the cell phones.

[51] Dince said when there was no response he instructed Leshoe and Oliphant to search the bags of the security officers and a calculator was found on one of them. CD's were also found on the same person. It was a man called Difference.

[52] When Dince was asked if anything else was found in the search on the security officers at the shelter he said he thinks cell phones but he cannot remember how

many. Thereafter he rectified this evidence by saying that no cell phones were found on them during the search in the shelter. This is in line with all the other evidence.

[53] The following evidence was then led in chief (paraphrasing from my notes):

"What happened then? --- I talked to the security officers and said since I originally wanted arrest statements and now found cell phones without an explanation, I said they were now under arrest."

In response to the following leading question: "In terms of the Constitution the security officers had a right, what was the situation?" he said that he then warned them of their rights and explained same to them in terms of section 35 of the Constitution. This is also denied by the witnesses who testified on behalf of the plaintiff.

[54] He was asked in chief

"Who was responsible for the arrest and detention of the security officers?
--- Leshoe and Oliphant whom I had instructed to arrest and detain them
though I was also involved to explain the rights."

Of course Leshoe denied any involvement and Oliphant did not give evidence.

[55] In chief, Dince was asked whether he made any statement about the incident. He says he thinks he made a first statement and then a further statement. In chief he

was asked only to identify a statement to be found at "A411" and "A413". It purports to be an affidavit, although I do not see a signature by the Commissioner of Oaths. The relevant portion reads as follows:

"At Lerona Lodge we requested them to come to police station to obtain their arrest statements of their students.

Upon arrival on the station Captain Leshoe and Inspector Oliphant came with cell phones from the bus of Atamilang company. They alleges that they recovered it from the bus where the security officers alighten? the bus.

According to Captain Leshoe and Inspector Oliphant those cell phones are belongs to the securities who are from the bus.

That is all I can say."

[56] When asked whether any of the security officers were set free without being charged, Dince said no. Of course, this is not correct. Of the sixty odd security officers, only twenty were arrested and charged.

[57] Dince confirmed that when he got to the police station with the security officers ("securities" from now on) he heard for the first time, when speaking to the students, about allegations of theft and assault on the part of the securities.

[58] Dince insisted that the bus driver remained in his seat behind the wheel while Leshoe and Oliphant were searching the bus. Of course, the driver denied this and said he was outside.

[59] Dince insisted that the securities remained silent when he asked them about the cell phones found in the bus. Of course, Leshoe said that they denied any knowledge of the cell phones.

[60] He does not remember whether the man Difference gave an explanation when the calculator was found in his luggage.

[61] He confirmed that after the search he decided that the securities must be arrested and that there was no warrant for the arrest. When he was asked why he decided to arrest the securities he said it was because of the items found in the bus and in the bag of one of the securities, Difference. It was put to him that according to the docket further investigation was done after the arrest. He said at that time he was not the investigating officer.

[62] The reason for his decision to have the securities arrested was restated as follows in cross-examination: (paraphrasing from my notes)

"You did not go to the charge-office or the CSC to establish if formal complaints had been laid? --- I did not want to be involved because they failed to give an explanation of the items found in their possession.

Then you decided to arrest, you told Leshoe and Oliphant and they were arrested? --- Yes because I could not get a clear explanation from them they were quiet."

[65] He was asked on what charge he caused the arrest and detention to be effected and said that it was section 36 of the General Law Amendment Act 62 of 1955. He was also asked about the provisions of section 40(1) of the Criminal Procedure Act, *supra*. He was asked whether he was aware of the fact that section 40 provides the arresting officer with a discretion to decide whether or not to arrest and said that he was aware of the discretion. He then added that because the securities were on their way to Johannesburg and he first had to get their addresses confirmed he thought it would be wise and expedient to detain them. The fact that they were all employed by Hlanganani was not good enough. It was still for the police to get the residential addresses of the people arrested. It was put to him that he could have asked for the residential addresses and he replied that in his experience he could not necessarily rely on information so obtained. He was asked whether, in exercising his discretion to arrest, it was of the utmost importance to know the residential addresses and he answered in the affirmative. He insisted that the police had to conduct their own investigation first into the residential addresses. It was put to him that he could have called Difference and

asked for his address. He said it was not important at that time to ask because when he asked them for an explanation he got nothing.

164 The following was then said in cross-examination (paraphrasing from my notes):

"So you decided that is enough, lock them up without asking where they live or without phoning the human resources department of the company to see if the address corresponds with that which they gave to you? --- I deemed it not necessary to contact the company regarding the address. I deemed it fit to detain them and then give addresses to the officers and then to confirm the addresses."

He carried on to say that in his experience difficulties are encountered when false addresses are furnished.

63 It was put to him that he had to exercise his discretion on the facts and not on his experience for example in this case they were all employed by a registered company and security provider. He answered that he had no difficulty with the company.

It was put to him that according to Leshoe, Difference gave an explanation namely that he had picked up the calculator on campus. The answer was that he could not remember that.

[66] The following cross-examination then ensued (paraphrasing from my notes):

"I then assume you do not know if that explanation was investigated? ---

My only last thing to do was to give instructions that they be detained.

There is a duty on you as police officer in the exercise of your discretion to first investigate the explanation before the arrest therefore you should first have investigated before arresting? --- There was no one who gave me an explanation.

Can't you remember if Difference gave an explanation? --- I said I do not remember.

Do you say that all the securities on that bus were arrested? --- Yes I had a duty list."

[67] He confirmed that he did not conduct a roll-call with reference to the drop sheet to single out those whose names appeared thereon. It was put to him that the names of two females appeared on the drop sheet but they were not arrested. He said he did not go through the list. "That is why I explain I focused more on the recovered items and not worry much about the list." It was put to him that of the sixty on the bus only twenty were arrested. His answer was "That is what you say, what I know is that all who came from the bus were arrested and detained." It was put to him that the twenty arrested were all males and he answered "That is what you say. I do not remember male or female. All I know they were securities." He insisted that those who emerged from the bus are the ones who were arrested.

It was put to him that the rest of the sixty (at least thirty eight) were also on duty at the university on the night of 23 September. He answered "That is what you say. I only know of securities who came from the bus and from whom stolen property was recovered and they were detained." It was put to him that all the securities who were on the campus on 23 September were assisting the police in the arrest of the students. He answered that he was concentrating on the securities whom they had gone to get arrest statements from and he did not know anything about who assisted the police. It was put to him that the total of the securities in the bus, namely those whom he went to get arrest statements from were at least sixty. He answered "You give me the figures, I was not concentrating on that. I only concentrated on recovery of suspected stolen property." He agreed that he was the one who gave the instruction to arrest and not Leshoe.

[68] It was put to him that at least ten policemen were in the bus on the way from the lodge to the police station. This he denied.

[69] The version of the plaintiffs was put to him namely that they ate lunch at the lodge by using proper crockery and porcelain plates and cutlery and not disposable food containers. He insisted that they had food containers. It was put to him that the driver only saw bags and bedding and said nothing about food containers.

[70] He did not know why there was no decision to test the alleged stolen cell phones for finger-prints.

[71] Some facts relating to the period of detention after the arrest were put to Dince towards the end of his cross-examination. He said he could not comment because his involvement had ceased by then. I realise that these facts are probably irrelevant with regard to the arrest, but they may have some relevance with regard to the alleged unlawful detention: at the first appearance after the arrest, on 25 September, the investigating officer (female officer Leselo) wanted a postponement for further verification of addresses and for an identification parade to be held. It was put to her on behalf of the plaintiffs that the employer was, if bail were to be granted, prepared to monitor them and to take the responsibility for their duty to report to the police. It was put to the investigating officer that the employer would give the police a bus to visit the addresses for verification. This offer was made because the investigating officer claimed that she could not verify the addresses because of a lack of transport. There was another offer by the employer to convey the plaintiffs to Mmabatho for the identification parade and to secure their attendance at court. The investigating officer declined all these offers and said that the police would conduct their own investigation. The addresses of all the plaintiffs as appearing on the docket and as furnished to the police were correct with the exception of two where the securities had recently moved. The matter was then remanded to 3 October. By 3 October no ID parade had been held and no verification had been done. By 7 April 2009 when the charges were

withdrawn no ID parade had been held and no verification of addresses had been done.

[72] I was not impressed with this witness. He came across as arrogant and as someone who thought that he could very much do as he pleases. He was also evasive at times. His conduct was akin to that of the proverbial bull in a China store.

[73] This concludes the summary of the evidence presented on behalf of the defendant.

[74] I turn to the evidence presented on behalf of the plaintiff.

[75] Paul Mbatha is the area manager for the Vaal region of Hlanganani. He has been employed there since September 2004. He testified about the deployment of the securities at the university. He confirmed that they were accommodated at the lodge. He testified about the riots and the fact that two classes were set alight. Stones and bottles were thrown at them by the students. The police entered the residences and took out the students. Securities assisted them.

[76] During the morning of 24 September he was also at the university from about 06:00 to 10:00. Students and community members were aggressive towards them. He tried to talk to their leaders. One Khumalo who was a community leader, insisted they must go because they take their children's jobs and were not

welcome in the area. When they started moving out bricks and stones were again thrown at them. He was hit on the jaw with a stone. His jaw-bone was broken. He went to the hospital where they only stopped the bleeding. He was not admitted. The police would not accept a charge which he wanted to lay. While he was at the police station the securities arrived in a bus as described earlier. It was the full contingent of the guards from "both groups". He was aware that they were taken off the bus and searched, although he did not witness the search himself.

[77] Tshilidzi Chrisent Luvha has been working for Hlanganani as a guard since 2007. He was also deployed with his colleagues at the university on 23 September 2008. They already arrived on 21 September. They were told that they would be working with the police and a local security company. On the 23rd, there was a fire started on the campus. When the firemen wanted to extinguish the fire the students attacked their vehicle.

[78] As to the operation to clean up the residences, the police started knocking on doors and some opened. The students were handed to the securities who took them outside to the police. Those who refused to open were pepper-sprayed and pulled out by force.

[79] When they were transported by bus from the lodge to the police station the next day there were about ten policemen on board. At the police station they were

instructed to get off. The driver also got off. They went to a shelter in the station and there they were standing in a queue and searched. His person was also searched. Only his own cell phone was found on him. All the guards were searched. There were about sixty. After the search the police went to search the bus. Only the police went and they did not take the securities with. When they came back from the bus they accused the securities of being thieves and said they had found cell phones in the bus. The witness asked them to produce the cell phones. This did not happen. The witness asked them why they did not take finger-prints. They said they had already touched the cell phones and that he, as a mere security officer cannot tell them what to do. He did not see the cell phones allegedly stolen. Photographs "A54" to "A56" meant nothing to him.

80 They did not have lunch in food containers such as those appearing on the photographs. They ate from porcelain plates at the lodge. He did not see any food containers being taken on the bus.

81 When they were accused of the alleged theft he asked the police to treat them professionally and take them each for interrogation. The guards whose names appeared on the drop sheet were separated from the others. Before they were arrested they were also accused of raping school children and of taking the work of the local children because they come from Gauteng. He did not rape anybody neither did he steal anything. The address he gave was still valid at the time when he testified. He confirmed that he was then arrested.

[83] Humbhlani Robert Sadiki is a security officer working for Hlanganani. He was also on duty on night-shift on 23 September 2008. He was not involved in the arrest of students and did not enter the rooms in the residence. He did not steal anything.

[83] Before the arrest on 24 September allegations were made that they stole cell phones. The cell phones were never shown to them.

[84] In the bus on the way to the police station from the lodge there were about sixty of the guards and about ten policemen. They were searched after they got off the bus. They were body searched and their bags were also searched. Nothing was found on him.

[85] After this search the police went to the bus. They came back accusing them of the cell phone theft but he never saw the cell phones. He confirms that the guards requested them to take finger-prints and that the reaction was that they were only securities and could not tell the police how to do their work.

[86] He confirmed that not all the securities who were on the bus were arrested.

[87] In cross-examination he confirmed that they were accused of being thieves and rapists and also that they were taking work away from the local children.

[88] Lufuno Justice Swalivha is the plaintiff in this case. He works for Hlanganani and was also deployed at the university on 23 September 2008. He was on night-shift. He started working at 18:00.

[89] He testified about the fire that had been started and about the students throwing bottles and stones at them. He confirmed the attack by the students with stones on the fire-brigade.

[90] At the lodge the next day they had lunch on porcelain plates. They sat at the table. They were told that they had to go to the police station to make statements. In the bus were about ten policemen. The bus was full of securities. At the police station they were told to get off the bus with their own luggage and they were body-searched. The luggage was also searched. Nothing was found on him. After the search they went to search the bus. They did not show them what they had allegedly found in the bus. He did not see the objects depicted on the photos "A54" to "A56". He gave the police his address when he was arrested. They never came to verify the address. No identification parade was held.

[91] Kabelo Difference Mogorosi also works for Hlanganani. He was also deployed in September 2008. Before he testified, two certificates were handed in by agreement between the parties and became "A438" and "A439". "A438" is the certificate of incorporation of Hlanganani and "A439" is a certificate to the effect

that Hlanganani is a duly registered security service provider as contemplated in terms of section 21 of the Private Security Industry Regulation Act 56 of 2001. It was issued on 20 March 2002.

[92] Difference testified about what happened at the university. He confirmed the fire and the fact that the fire-brigade was stoned. He never entered the building. The students were taken away by the police. He did not steal anything on the campus. He worked until 06:00 and then went to sleep at the lodge. On the bus from the lodge to the police station there were fifty to sixty securities. There were also police inside the bus. At the police station they were told to vacate the bus with their luggage. They were searched. A calculator was found in his bag. He said he found it on the second day when they got to Mafikeng. They arrived on the night of 21 September. While he was on patrol he found the calculator lying in the grass and kept it for himself. When the calculator was found during the search he explained that he had picked it up in the yard. The police took his name and the calculator. The object on "A55" looks like the calculator that he had picked up.

[93] The police searched the bus after the securities had been searched. He was arrested and detained until 3 October when he was released on bail.

[94] In cross-examination he denied that the calculator could have been with the witness Tembani on 23 September because he had picked it up the previous day. He also denies that CD's were found on him in addition to the calculator.

[95] He confirmed that ultimately all the charges were withdrawn against him and his colleagues.

[96] Reverting to the calculator, it is noteworthy that his evidence that he explained during the search that he had picked up the calculator is corroborated by Leshoe in his affidavit "A22" where he says "we asked him where he got the calculator and he said that he got it during patrol around the campus lying on the ground".

[97] This concluded the evidence presented on behalf of the plaintiff. Generally, I was impressed with all the witnesses who testified on behalf of the plaintiff. Their testimonies struck me as being straight-forward and honest. They were not discredited in cross-examination.

Brief remarks about the legal position

[98] It is incumbent upon me to pay careful attention to the very recent decision (not yet reported) of the Supreme Court of Appeal in *Minister of Safety & Security v Sekhoto and Another* (131/10) [2010] ZASCA 141 (19 November 2010).

[99] In this judgment, the law was comprehensively restated in as far as it concerns claims for damages flowing from alleged unlawful arrest without a warrant. The learned Deputy President, HARMS DP, meticulously revisited the provisions of section 40(1) of the Criminal Procedure Act 51 of 1977, the jurisdictional requirements for valid arrest, the discretion vested in the arresting officer and the question of *onus*.

I will attempt to identify the crucial aspects which must be considered for purposes of the present case. I will do so by simply referring to the numbered paragraphs in the typed judgment, which I will refer to as "*Sekhoto*". I will avoid, as far as possible, repetitive references to all the authorities considered by the learned Deputy President.

[100] The jurisdictional facts for a section 40(1)(b) defence are that-

- (i) the arrestor must be a peace-officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in schedule 1 (in this case, the provisions of section 40(1)(e), *supra*, namely where the arrestee is found in possession of anything which the peace-officer reasonably suspects to be stolen property or property dishonestly obtained and whom the peace-officer reasonably suspects of having committed an offence with respect to such thing, will also come into play); and

(iv) the suspicion must rest on reasonable grounds – *Sekhoto* paragraph [6].

[101] It is trite that the *onus* rests on a defendant to justify an arrest – *Sekhoto* paragraph [7].

[102] A defendant who wishes to rely on the section 40(1)(b) defence (or, as in this case the section 40(1)(e) defence) traditionally had to plead the four jurisdictional facts in order to present a plea that is not excipiable – *Sekhoto* paragraph [52]. I already pointed out that in the present plea nothing but a bare denial is to be found, except for what was stated in the pre-trial minute. In her heads of argument, counsel for the plaintiff pointed out that no amended plea was delivered on behalf of the defendant. She submitted, correctly in my view, that the defendant's defence has not been pleaded.

[103] In a number of recent judgments the courts have sought to introduce the further ("fifth") jurisdictional fact which the arrestor has to prove in order to successfully defend the action. This amounts to a finding that even if the arrestor believed on reasonable grounds that the particular crime has indeed been committed, the arrest must still be justifiable according to the demands of the Bill of Rights. The police must consider, in each case, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the arrestee. Explanations offered by the arrestee before the arrest must also first be investigated. See for example *Louw v Minister of Safety and Security* 2006(2) SACR 178 (T) at

186a-187e and *Minister of Safety and Security v Sekhoto* 2010(1) SACR 388 (FB), which is the full bench decision of the Free State court from which the appeal originated which came before the Supreme Court of Appeal in *Sekhoto* – *Sekhoto* paragraph [10] to [12].

It was held that the fifth jurisdictional fact is not part of section 40(1)(b). Absent a finding of unconstitutionality of this section, the courts, *supra*, were not entitled to read anything into a clear text – *Sekhoto* paragraphs [23] and [24].

In coming to this conclusion, the learned Deputy President also took into account the provisions of section 12(1)(a) of the Constitution in terms of which the Bill of Rights guarantees the right of security and freedom of the person which includes the right "not to be deprived of freedom arbitrarily or without just cause" – *Sekhoto* paragraph [60].

It was held that it could hardly be suggested that an arrest under the circumstances set out in section 40(1)(b) could amount to a deprivation of freedom which is arbitrary or without just cause in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary – *Sekhoto* paragraph [25].

[14] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of section 40(1) or in terms of section 40(3) (arrest with a warrant) are present, a discretion arises. It is the discretion whether or not to arrest. The officer is not

obliged to effect an arrest. The discretion must be properly exercised. The decision to arrest must be based on the intention to bring the arrested person to justice. It must not rest on some ulterior motive – *Sekhoto* paragraphs [28] to [31].

[105] If the discretion has been *bona fide* exercised a court will be slow to interfere with the result.

"There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable and wrong."

INNES ACJ in *Shidiack v Union Government* 1912 AD 642 at 651-652.

Sekhoto paragraph [34].

[106] Because the *dictum* of INNES ACJ, *supra*, pre-dates the Bill of Rights it required reconsideration and was qualified when CHASKALSON P held that the Bill of Rights required that the exercise of discretion must also be objectively rational. He said the following:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions

must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle."

- *Pharmaceutical Manufacturers Association of South Africa: in re Ex parte Application of President of the RSA* 2000 2 SA 674, 2000(3) BCLR 241 (CC) paragraphs [85] to [86].

Sekhoto paragraph [36].

[107] The learned Deputy President also, on the same subject, referred to English authority where the following was stated:

"The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of

responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

(Emphasis added.)

- *Sekhoto* paragraph [37].

[108] It remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily. This would mean that peace-officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. An official who has discretionary powers must naturally exercise them within the limits of the authorising statute read in the light of the Bill of Rights – *Sekhoto* paragraphs [38] to [40].

[109] Once the jurisdictional facts have been established by the defendant, it is for the plaintiff to prove that the discretion was exercised in an improper manner – *Sekhoto* paragraphs [46] to [49].

Did the defendant discharge the *onus* of proving the jurisdictional facts for a section 40(1)(b) or (e) defence?

[110] To start with, the defence was not pleaded, as it should have been.

- [111] The jurisdictional facts were listed with reference to *Sekhoto* paragraph [6], *supra*. In essence, the defendant had to prove that the arrestor entertained a suspicion, the suspicion had to be that the suspect (the arrestee) committed an offence referred to in schedule 1 or in section 40(1)(e), in this case, and the suspicion had to rest on reasonable grounds.
- [112] The opposing versions presented by the plaintiff and the defendant respectively, were, in most respects, mutually destructive: the plaintiff (and his colleagues) denied having stolen anything or having been in possession of stolen goods. Barring the calculator, in respect of which Difference offered an explanation, and it is common cause that he did so, nothing was found on the plaintiff or, for that matter, on his colleagues. No complaints were laid by any of the students directly implicating the plaintiff or his colleagues in the alleged theft. The defendant alleged that there were food containers with the securities and on the bus and this is denied by the plaintiff and his colleagues. The bus driver said nothing about food containers. He did not see the police finding the cell phones in the bus either. He did, however, say that they showed phones to him after the search. The bus driver did not see food containers. All he saw was bags and blankets. The evidence on behalf of the plaintiff that the securities ate at the table using proper cutlery and crockery is undisputed. In his "first statement" which turned out to be his "second statement" judging by the time endorsed thereon, Leshoe said nothing about having found cell phones, let alone food containers on the bus. The photographer said that Leshoe pointed out the purportedly stolen articles and

the food containers to him whereas Leshoe said that Oliphant did the pointing out. Oliphant did not testify.

Leshoe said that Dince effected the arrest and Dince said that Oliphant and Leshoe effected the arrest.

Dince said that the securities offered no explanation whatsoever when they were confronted with the allegation of cell phones having been found on the bus whereas Leshoe said that the securities indicated that they had no knowledge of such cell phones. This evidence is supported by the witnesses on behalf of the plaintiff. Their evidence that they insisted on finger-prints being taken is undisputed.

The securities testified that there were policemen on the bus escorting them to the police station. On behalf of the defendant this was denied.

[113] The securities said that the alleged search of the bus took place after they were personally and bodily searched. On behalf of the defendant it was testified that the bus was searched before the securities were searched.

Dince said that the securities were confronted with the cell phones that had allegedly been found on the bus and the securities said they were never shown the cell phones.

[114] As to the question of *onus*, counsel for the defendant themselves referred me to the case of *National Employers' General Insurance Co Ltd v Jagers* 1984 4 SA 437 (ECD) where the following is said at 440D-G:

"It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

In my view this correctly states the law on the issue. See also *Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie & Others* 2003 1 SA 11 (SCA) at 14H-15E.

[115] As to the question of credibility, I have already expressed reservations about the credibility and demeanour of the witnesses Leshoe and Dince. I have also expressed satisfaction with the quality of the evidence of the plaintiff and his witnesses.

[116] As to the general probabilities which, according to *Jagers, supra*, must be taken into account in order to determine whether the *onus* has been discharged, the picture appears to be equally bleak for the defendant: there is no evidence to the effect that the securities were told, when they were ordered to disembark with their luggage, that they were going to be searched. On the assumption, therefore, that they did not know that they would be searched (bearing in mind that they were told that they were going to the police station to furnish arresting statements) the following unlikely occurrence must have taken place when the order to disembark was given: some eight cell phone thieves amongst the sixty odd securities would have frantically removed the stolen cell phones from their luggage or their clothing where it had been hidden and co-incidentally adopted the same strategy to avoid detection by hiding the cell phones in their food containers and thereupon abandoning the food and the cell phones in the bus. They would have

adopted this strange strategy instinctively and without comparing notes with one another. Moreover, on the overwhelming probabilities, they would not at that stage even have known that there were complaints about missing cell phones. I consider this to be a strange and improbable state of affairs. On the other hand, there is the version of the plaintiff and his witnesses, which is uncontested, that they had lunch at the lodge in more civilised surroundings sitting at the table using cutlery and crockery. They testified that there were no food containers. This appears to be inherently probable in the circumstances. The bus driver also did not see food containers but only saw bags and blankets. Added to this there is the somewhat unlikely situation of three cell phones being photographed in one container, the photographer saying that Leshoe did the pointing out to him whereas Leshoe said that it was Oliphant but Oliphant did not testify. It is common cause that the suspects were not present at the photograph session. The plaintiff and his witnesses testified that the cell phones allegedly found in the bus were not shown to them. I see no reason why, on the general probabilities, this version should be rejected. Similarly, the plaintiff and his witnesses testified that the bus was searched (or purportedly searched) after the individual search was conducted on all the securities. I see no reason why this version should be rejected on the general probabilities. Moreover, there is the significant aspect of Leshoe having failed to mention the discovery of the cell phones, let alone the food containers in his "first statement" as already described.

- [117] Absent a finding that the defendant's version is true and the plaintiff's version is false as required in *Jagers* (which finding I am not prepared to make, for the reasons mentioned) it cannot be said that the defendant proved the jurisdictional facts on a balance of probabilities namely that the police had a suspicion that the suspect (in this case the particular plaintiff) had stolen a cell phone or had possessed a stolen cell phone without being able to adequately explain the possession thereof. In particular, it cannot be held that the defendant had proved that the suspicion, such as it was, rested on reasonable grounds.
- [118] To this should be added the fact that section 40(1)(e) requires the suspect to have been found in possession of the article suspected to have been stolen. The same applies to the provisions of section 36 of Act 62 of 1955 on which Dince said that he relied. For a conviction for contravening the last-mentioned provision, the suspect must be found in possession of the article. The provisions of that section must be interpreted restrictively. The suspect must have personal and direct control over the goods. He must also be in possession at the moment that the goods are found by the police – see the discussion by Snyman *Criminal Law* fourth edition on p514-515.
- [119] On the defendant's own version, this was not the case. This is another reason why it cannot be said that the defendant discharged the *onus* of proving that the suspicion, if it ever existed, rested on reasonable grounds.

[120] In the light of this finding that the defendant failed to discharge the *onus* of proving the existence of the jurisdictional facts, it follows that the defence cannot be upheld and that the plaintiff must succeed.

[121] If I am wrong in this conclusion, and if it can be said that the defendant managed to prove the existence of the jurisdictional facts, there must be an enquiry as to whether or not the exercise of the discretion by Dince or Leshoe and Oliphant to arrest was objectively rational as described in *Pharmaceutical*, *supra*, and in *Sekhoto*, paragraphs [34] to [37], *supra*.

[122] I now turn to that enquiry.

Was the exercise of the discretion to arrest objectively rational?

[123] To start with, it is not clear whether such a discretion was exercised at all, let alone rationally, because of the conflicting evidence. Leshoe said it was Dince and Dince said it was Leshoe and Oliphant who effected the arrest. I will accept, where Leshoe said he had nothing to do with it, that consideration must be given to the evidence of Dince.

[124] With regard to the discretion, it was only invited in cross-examination and Dince was rather vague about it. He also said that he was guided to a large extent by the fact that the securities gave no explanation when confronted with the alleged discovery of the cell phones. This, of course, is at odds with the evidence of

Leshoe who said that the securities explained that they had nothing to do with the alleged discovery and the plaintiff and his witnesses stating that they also denied any involvement and insisted on individual interrogation and the taking of fingerprints.

[125] Returning to the conduct of Dince, it can perhaps be summarised as follows, on his own version: he arrived at the police station and his vehicle was parked some distance away from the bus. He was then met by a number of students who made broad allegations about the securities having stolen their property, assaulted them and so on. At that stage he was concentrating on having the arrest statements taken and he sent the students to the CSC for assistance. Nevertheless, he ordered Leshoe and Oliphant to have the bus vacated and searched. When "food parcels" and cell phones were found, he confronted the securities who gave no explanation. The securities were individually and bodily searched. Nothing was found except the calculator on Difference. He cannot remember whether Difference gave an explanation. At that point he decided that they must all be arrested (qualified by his evidence that Leshoe and Oliphant also had a hand in the decision). He relies on section 36, namely a case that the plaintiff was in possession of a stolen cell phone. Of course, on his own version, this was not the case.

[126] Against this background, and even on Dince's own version which, of course, is seriously discredited by the other evidence, I fail to see how it can be said that his

decision to arrest all the securities can be said to be objectively rational. Nothing was found on the plaintiff or any of the other securities, barring the calculator. There were only vague suggestions of theft which he got verbally from a number of students. He had no insight in any documentary evidence such as statements or complaints. He did not even know whether the cell phones allegedly found were stolen and, if so, by whom and who the phones belong to. There was no evidence that all the securities arrested acted with a common purpose to steal the cell phones. I fail to see how Dince, in these circumstances, could seriously have contemplated that any of the multiple arrestees could successfully be prosecuted, let alone the plaintiff as an individual. I have serious reservations about whether Dince had a *bona fide* intention to bring all the securities to justice. His conduct was ill-considered and appears to have been a spur of the moment show of force rather than anything else.

[127] In my view, the conduct of Dince, and the exercise of his discretion, if it ever took place, to arrest, cannot be said to have been objectively rational as intended by the judgment in *Pharmaceutical*. In so far as the plaintiff had the *onus* to prove this, I find that he succeeded in doing so.

Conclusion

[128] In all the circumstances, and for the reasons mentioned, I have come to the conclusion that the section 40 defence has not been proved and cannot be upheld.

The order

[129] I make the following order:

1. It is declared that the defendant is liable to compensate the plaintiff for his proved or agreed damages flowing from having been unlawfully arrested and detained on 24 September 2008.
2. The defendant is ordered to pay the costs.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

32477-2009

HEARD ON: 17-23 SEPTEMBER 2010
FOR THE PLAINTIFF: Ms SWIEGELAAR
INSTRUCTED BY: VAN ZYL, LE ROUX & HURTER INC
FOR THE DEFENDANT: MR MATHIBEDI ASSISTED BY MR MANYAGE
INSTRUCTED BY: STATE ATTORNEY, PTA