



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

CASE No: 14060/2010

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED: <u>✓</u>
DATE	<u>4/12/2011</u>
	<u>[Signature]</u> SIGNATURE

13/01/2012
DATE: 4 December 2011

In the matter between:

GOERGE TSHEGOFATSO MODIBEDI
KENNETH TSWANE

FIRST PLAINTIFF
SECOND PLAINTIFF

AND

THE MINISTER OF SAFETY & SECURITY
CAPTAIN HEYDENRYK
INSPECTOR MASIELA

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT

JUDGMENT

RANCHOD J

[1] The Plaintiffs seek to have the defendants held jointly liable for an alleged unlawful arrest of the plaintiffs at "Pick n Pay Store, Mall @ Reeds, Weirda Park, Pretoria" on 16 April 2009.. The first defendant is sought to be held vicariously liable as employer of the second and third defendants, who made the arrests. It should be noted at this early stage that the plaintiffs sue for an alleged unlawful arrest only - not for their detention as well. It was agreed between the parties at the pre-trial meeting on 20 April 2011 that the sole issue to be determined was whether the arrest of the plaintiffs by the second and third defendants was lawful or not.

[2] It was determined at the commencement of the trial that the defendants had the duty to begin and accordingly the second and third defendants testified for the defence.

[3] The defendants do not dispute – indeed it is common cause that the plaintiffs were arrested without a warrant. Section 40 (1) of the Criminal Procedure Act 51 of 1977 provides as follows:

"(1) a peace officer may without a warrant arrest any person –

(a) ...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the Act."

The defendants contend that the arrest was in accordance with the relevant section of the Act.

[4] On 10 April 2009, being Good Friday – a public holiday - the burglar alarm at the Pick n Pay branch at the "Mall @ Reeds" was triggered. On inspection thereafter it was found that R152, 000.00 in cash was stolen from within a safe on the

premises. However, there was no forced entry or a break-in but it was found that an emergency exit door at the back of the premises was open. This door could be opened only from the inside. The plaintiffs were in possession of a set of keys to gain access to the premises. This was in accordance with Pick n Pay's arrangement that two of the managers were, on a weekly rotational basis, to open and close the doors for business and to allow entrance to and exit from the premises after business hours by cleaners and by employees for the purpose of re-stocking shelves. The key holders were called first and second key-holders respectively. The entrance door has two locks. The one manager would have the key to the one lock and the other manager the key for the second lock. This ensured that both managers had to be there together to open the door. Between them they also had three keys for internal doors leading to the room where there is a large safe for which they also had keys. Within the large safe was a smaller so-called "drop" safe. The alarm was activated or deactivated by the senior of the two of them – in this instance by the first plaintiff.

[5] The alarm system was linked to Chubb Alarms (Chubb) which monitored it and would contact the two individuals and certain other managers according to a pre-determined arrangement which it is not necessary to elaborate upon further for purposes of this judgment. When the alarm was triggered on 10 April, Chubb informed the store manager, Mr David Denyschen, who in turn informed Mr Modibedi, the first plaintiff.

[6] Mr Denyschen testified that Mr Modibedi went to investigate together with the second plaintiff and thereafter called him to inform him that there was a break-in at the store. He went to the premises and found both plaintiffs there together with a guard from Chubb. There was no forced entry but the back door, which could only be

opened from the inside, was open. It was the emergency exit. None of the several doors leading to the offices and the safe (which were all open) were broken, nor their locks. The large safe was open as well. The drop safe was still closed but an approximately ten centimetre grinding mark was visible on it. Several cashiers' money-bags had been left inside the large safe with the cash takings that were in them at the close of business the previous day. That money, about one hundred and thirty- eight thousand rands, was missing as were the hard drives (including external hard drives) of computers which contained recordings from approximately forty (40) security cameras. (It is common cause between the parties that the amount involved is R152 000.00 but nothing hinges on this for the purposes of this judgment.) He further testified that as the first and second key holders respectively that week it was the plaintiffs' duty to ensure that all doors were locked and the alarm activated when the store was closed.

[7] Denyschen then testified about the circumstances leading to the arrest of the plaintiffs. He said almost a week after the burglary, on 16 April 2009, a police captain (later confirmed to be Captain. Heydenryk, the second defendant) and the investigating officer in the case, Inspector Masiela, the third defendant, came to the scene and had a consultation with him. They asked for the plaintiffs. He called plaintiffs to the office. The police arrested the plaintiffs, and informed them of the reason for their arrest. He testified further that the police told the plaintiffs to inform their families of the arrest. Plaintiffs were handcuffed and the police led them on the way out of the store when staff members of Pick n Pay prevented the police from taking away the plaintiffs. The police returned to the office with the plaintiffs and took off the handcuffs. An argument ensued for about an hour between the shop stewards

and the police officers. The shop stewards questioned why he, Denyschen, was not arrested as well and also about why the plaintiffs' cell phones were confiscated. Ultimately the officers left but they did not take plaintiffs with them. When plaintiffs were first led with their hands cuffed behind their backs, they had to walk past a number of the tills where customers were standing as well as cashiers manning the tills.

[8] Under cross examination he testified that at the time of the arrest, which was at about 16:00pm there were many customers in the store although he could not say how many. The store had about one hundred and forty Pick n Pay employees, including casual workers, of which about one hundred were on duty that day.

[9] Denyschen gave a written statement to the police on 16 April shortly before the plaintiffs' arrests.

[10] Captain Heydenryk testified that he had had a meeting with various officials of Pick n Pay and its security managers as well as Denyschen on the morning of 16 April 2009. Denyschen related to him what had happened on 10 April. That afternoon he took a written statement from him and thereafter decided to arrest the plaintiffs.

[11] He gave a number of reasons why he decided to arrest the plaintiffs. He determined that the plaintiffs were experienced managers and of importance to him was that they were the only key holders at the relevant time and he had been told that the duplicate keys were at Pick n Pay's head office. His investigations revealed that the key holders had to abide by a code of conduct in terms of which they were not permitted to allow anyone else to be in possession of the keys. He was also informed that only the plaintiffs could allow access to the shop on the relevant

weekend .He established that there was no forced entry but the fire-escape door was open. The door could be opened only from the inside. He further established that a lock to the door had been tampered with in such a manner that although the door could be closed it was possible to simply push it open. The safe door had also not been forced open. He was informed that according to Chubb the alarm activation showed that the burglary took place within a period of about eight minutes, that is, from 21:54 pm to 22:04 that night.

[12] One of the reasons he decided to arrest the plaintiffs was the fact that they were the only ones who had the keys to the premises. Another was the fact that the plaintiffs knew that on two days of the year, Good Friday and Christmas Day, Pick n Pay did not open for business. The staff, including cleaners left the premises in the morning of these two days after completing night shift. It was the plaintiffs who had attended to letting staff out last on Good Friday morning. He was also suspicious of the fact that the fire escape door was open in circumstances where the seal of the door had been broken from the inside of the premises for it to be left open.

[13] As part of its security measures Pick n Pay had a secret camera monitoring the roof. Heydenryk's information was that only managers of Pick n Pay knew of this camera. During the burglary an attempt was made to remove that particular camera. The attempt failed but the camera had stopped working. Another camera outside the shop which monitored the fire exit door was also not in working order on the relevant night.

[14] Heydenryk said he determined that it was a so-called "inside job" .All these facts and that the plaintiffs had the keys to both the main entrance and the safe, made it necessary, urgent, and reasonable to arrest the plaintiffs in terms of s40 of

the Criminal Procedure Act. He said the purpose of the arrest was to question the plaintiffs and thereafter decide whether to charge them. After questioning them if he was of the opinion that there was enough evidence he would have the suspects taken to court.

[15] Heydenryk and the third defendant then arrested the plaintiffs. Heydenryk says the plaintiffs were detained from 16:14 pm to 16:24 pm that is for ten minutes when they were released as a result of the protest by the employees of Pick n Pay. He explained that the arrest of the plaintiffs took place only six days after the burglary, that is on 16 April 2009 because that is when the meeting with Pick n Pay and its own security staff took place and he was informed of the results of the lie detector tests by Pick n Pay. He was told that the plaintiffs had failed the lie detector tests whilst a number of other staff members had passed it.

[16] It was put to Heydenryk in cross examination that the plaintiffs will say that investigating officer Masiela, was opposed to arresting the plaintiffs. Heydenryk denied it. Under cross examination, Masiela also denied that he was opposed to arresting the plaintiffs.

[17] Under cross examination Heydenryk substantially repeated what he said in his evidence-in-chief as to the reasons for the arrest and the suspicions on which it was based.

[18] Constable Masiela substantially confirmed what Heydenryk had said as to their suspicions which led to the arrest and detention of the plaintiffs. I need not

repeat it here. However, he testified that when the handcuffs were removed from the plaintiffs' hands they were told that they were released.

[19] Both defence witnesses made a good impression on the court. I am of the view that they were reliable and truthful witnesses. There were no material contradictions in their evidence more especially with regard to the events leading to the arrest of the plaintiffs.

[20] Mr Modebedi testified that when he was arrested and handcuffed he was told of the reason for his arrest. He was of the view that he should not have been arrested without the police having conducted further investigations. He testified that at the branch of Pick n Pay where he was employed there were a number of people who had been key- carriers or key-holders over the years. More pertinently in any one week there would be three different teams of key holders. This does not avail the plaintiffs as the burglary took place during the night when they were the key-holders.

[21] Mr Modebedi stressed that the emergency exit door could only be opened from the inside of the shop with keys which were housed in a sealed container near the door. Neither of the keys the plaintiffs had could open that door. It was the receiving manager's duty, accompanied by the security guard, to check that the door was properly shut when the store was closed. The receiving manager on that day was one Derrick. He took issue with the fact that neither Derrick nor the security guard was arrested. In my view, this too does not avail the plaintiffs. The question is whether the arresting officers had formed a suspicion about the plaintiffs that was reasonable in the circumstances. Further investigations may have been necessary depending on the outcome of the questioning of the plaintiffs.

[22] Mr Modibedi testified that after the handcuffs were removed he was not told that he was free. It was only when he left the store more than an hour later that he realised he was no longer under arrest.

[23] Under cross examination Mr Modibedi agreed that the burglary was a so-called inside job. He also agreed that the perpetrators had to have inside knowledge of where the money was kept; how to get to where the safes were; that in fact there was money there on the night in question and the operation and location of the cameras. He also confirmed that all the locks of the doors and security gates leading to the large safe were functioning properly after the burglary and that it was he and the second plaintiff who had the keys to all the relevant doors and large safe.

[24] Mr Modibedi, crucially, conceded under cross examination, that when the second and third defendants concluded it was an inside job it was not unreasonable of them to suspect the persons who had the keys to all the relevant doors of being involved in the burglary. He testified further that he could not fault the police if they formed that suspicion.

[25] In *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) at [6] quoted with approval the dictum in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H that in order for a section 40(1)(b) defence to succeed, the following jurisdictional facts must be present:

- 25.1 the arrestor must be a peace officer;
- 25.2 the arrestor must entertain a suspicion;
- 25.3 the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

25.4 the suspicion must rest on reasonable grounds.

[26] Schedule 1 of the Act provides:

"Any offence, except the offence of escaping from lawful custody ... the punishment wherefore may be a period of imprisonment exceeding six months without the option of a fine."

It is common cause or not in dispute that the theft of the R152 000.00 falls within the ambit of Schedule 1. It is also not in dispute that the second and third plaintiffs were acting in the course and scope of their employment with the first defendant.

[27] What is in issue is whether at the time the plaintiffs were arrested, the second defendant entertained a reasonable suspicion that the plaintiffs had committed a Schedule 1 offence. Reasonableness is to be determined objectively. The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form a suspicion that the suspect has committed an offence referred to in Schedule 1. (See *R v Van Heerden* 1958 (3) SA 150 (T) at 152.) In *Duncan (supra)* at 465H-I it was held that a reasonable suspicion connotes an absence of certainty and adequate proof.

[28] I have set out the evidence of Captain Heydenryk in some detail as it was ultimately his decision to arrest the plaintiffs and Constable Masiela assisted in effecting the arrests. Given the fact that the Plaintiffs had the keys to the premises and the safe and other doors at the relevant time and that no forced entry had taken place, it was in my view not unreasonable for Heydenryk to suspect that the plaintiffs were involved in the commission of the offence. As I said earlier, even the first plaintiff conceded this under cross examination.

[29] It is so that even after he was satisfied that a reasonable suspicion existed that the plaintiffs had committed a Schedule 1 offence, Heydenryk had discretion whether or not to arrest the plaintiffs. He explained that the element of surprise is often important to gather evidence hence he took possession of the plaintiffs' cellular phones to investigate calls made to and from them. In my view, Captain Heydenryk acted on the facts before him and exercised his discretion reasonably and properly.

[30] In *Sekhota (supra)* it was held at [25] by the Supreme Court of Appeal that:

"It could hardly be suggested that an arrest under the circumstances set out in section 40 (1) (b) could amount to deprivation of freedom which is arbitrary or without just cause, in conflict with the Bill of Rights. A lawful arrest cannot be arbitrary. And an unlawful arrest will not necessarily give rise an arbitrary detention. The deprivation must, according to Canadian jurisprudence, at least be capricious, despotic or unjustified." (Reference to footnotes omitted.)

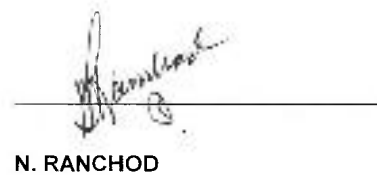
[31] In *Louw and Another v Minister of Safety and Security and Others 2006 (2) SACR 178 (T)* at 186a-b the learned Judge sought to introduce a fifth jurisdictional fact and said:

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

This view has now been rejected in *Sekhota* as been an unwarranted additional jurisdictional fact.

[32] In all the circumstances, I am of the view that the defendants have succeeded in discharging the onus upon them to prove on a balance of probabilities that the arrest without a warrant of the plaintiffs was lawful.

[33] The plaintiffs claim is dismissed with costs.



A handwritten signature in dark ink, appearing to read 'N. Ranchod', is written over a horizontal line.

N. RANCHOD

JUDGE OF THE NORTH GAUTENG HIGH COURT

For the Plaintiff :Mr KP Seabi (Attorney)

Instructed by :KP Seabi Attorneys,
PRETORIA

For the Defendants :Adv. SS Maakane

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