

SOUTH AFRICA / JUDGMENT

Kruger v Minister of Police (525/2014)

[2017] ZANWHC 109 (6 April 2017)

[2017] ZANWHC 109**COURT**

North West High Court, Mafikeng

BEFORE

Gutta

CASE / FILE NUMBER

525/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

“IN THE HIGH COURT OF SOUTH AFRICA”

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 525/2014

In the matter between:-

HARLAN KRUGER PLAINTIFF

And

MINISTER OF POLICE DEFENDANT

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] Plaintiff instituted an action for damages arising from his alleged unlawful arrest and detention on the 6 November 2013.

[2] Defendant in its plea and amended plea raised the following defence inter alia that:

2.1 The police received credible information that implicated plaintiff in the commission of a schedule 1 offence;

2.2 The investigating officer, Abram Thabo Nkgodi reasonably suspected plaintiff of having committed a schedule 1 offence, namely theft of cash in the amount of R160 000.00;

2.3 The police at the time of arrest were aware that they have a discretion to arrest or not to arrest plaintiff and properly exercised their discretion to arrest plaintiff and

2.4 The police are entitled to arrest on reasonable suspicion that a schedule 1 offence was committed in terms of section 40 (1)(b) of Act 51 of 1977 (the Act).

[3] At the commencement of the proceedings the court granted an order by agreement between the parties for a separation in terms of rule 33 (4). Accordingly the trial is on merits only.

B. COMMON CAUSE

[4] The following facts are common cause:

4.1 plaintiff was arrested and detained on the 6 November 2013 at about 13h00;

4.2 the police officer who arrested plaintiff was a peace officer acting within course and the scope of the South African Police (SAP);

4.3 plaintiff was detained until 11h20 on the 7 November 2013;

4.4 plaintiff was released on bail;

4.5 the arrest was without a warrant;

4.6 defendant bears the onus to prove that the arrest and detention was not unlawful and bore the duty to begin.

C. ISSUE IN DISPUTE

[5] The issue in dispute is whether the arrest and detention was lawful or unlawful.

D. DEFENDANT'S CASE

[6] The first witness for defendant was Thabo Abram Nkgodi (Nkgodi). He is a member of SAPS for 21 years and is currently a detective warrant officer, stationed at Mafikeng. He arrested plaintiff on the 6 November 2013.

[7] He said the Branch Manager of Absa Bank, Ms K R Motladiile (Motladiile), on the 23 October 2013 opened a case of fraud and theft

at the Mafikeng Police Station. A sealed bag containing money belonging to Pick n' Pay was stolen from their bulk department.

Nkgodi interviewed her and took her statement. In her statement Motladiile states inter alia that on the 3 August 2013 at about 14:45, the electricity went off in the bank and no monies could be deposited or cashed. An amount of R160 000.00 was supposed to be deposited from Pick n' Pay by Lebo Moeti (Moeti) and management discovered later that Moeti did not deposit the money when Pick n' Pay phoned the bank two weeks later and reported that the deposit was not reflected in their account. Management then engaged the forensic unit and they discovered footage of Moeti taking money and putting it in

his pocket. Moeti resigned within 24 hours. On the 23 October 2013, Moeti confessed in writing that he stole the money.

[8] Motladiile made a second statement to the police on the 24 October 2013, wherein she said inter alia that she was informed by Miss Sthembile Esther Nkomo (Nkomo) about the problem relating to the current matter on the 30 August 2013 while she should have been informed immediately on the 3 August 2013 by the plaintiff who was the specialist manager at the teller department. She said “he failed to act positively as required by our policy and procedures”. She stated further that the person who had to account for the bags from Pick n’ Pay was the receiver who signed for it and in this case it was Kgotso Tlhokwane (Tlhokwane). She concluded by stating that Tlhokwane and Moeti were both liable for the disappearance of the monies.

[9] Nkgodi said, Motladiile made an additional statement (third statement) on the 6 November 2013 wherein she stated inter alia the following:

9.1 On the 23 October 2013 I registered a case with SAPS and two suspects were directly linked to the crime.

9.2 I approached the internal forensic investigators who confirmed that Kruger and a customer, Serake had failed the polygraph test dismally. Kruger was also responsible for the two suspects at the time when the monies disappeared.

9.3 Kruger was aware of the Pick n’ Pay query on the 3 July 2013.

9.4 Kruger did not inform the bank management about the shortage or loss of monies until the Regional Service Centre of Absa reported it. Hence Kruger took 9 weeks to report the matter to Absa Management.

9.5 Kruger did not even report the matter to his immediate customer and specialist manager, as confirmed by Ms Nkomo.

9.6 These are some unconfirmed reports that one of the customers who was detained with Moeti heard him admitting that he had been stealing monies with Kruger who was his immediate manager.

9.7 There has been a trend continuously on the disappearance of these monies in the presence of Kruger, who at this stage I consider a main suspect in the case in question. I need prosecution in this matter.

[10] Nkgodi also made a statement wherein he stated inter alia that:

10.1 I am the investigating and arresting officer in the case of theft;

10.2 all the statements obtained from witnesses link Kruger to the case;

10.3 Kruger admitted in his sworn declaration made at Absa Bank that he was mistaken;

10.4 he failed a polygraph test for the period 20 June to July 2013;

10.5 he investigated on his own without involving management;

10.6 Kruger did not report the missing money until he was approached in August 2013;

10.7 the time frame rendered him liable for the missing monies. He kept quiet for a long period between the 20 June 2013 and 30 August 2013 in order to hide the truth.

[11] The declaration made by plaintiff at his workplace was read into the record. Plaintiff on the 3 September 2013 said inter alia that:

11.1 Sometime in July 2013, I had a query from business banking regarding missing deposits for Pick n' Pay;

11.2 During my investigation I found that Moeti was the person who signed for the deposits;

11.3 Moeti was on leave and I contacted him telephonically to find out if he would remember anything about the deposits;

11.4 Moeti was in the Free State and I told him to come back early from his leave;

11.5 Two days later, Moeti returned and told me that he found the bags in the safe and he processed the deposits immediately.

[12] A statement made by Moeti at his workplace dated 20 September 2013 was read into the record. In the statement, Mr Moeti states inter alia that:

12.1 I was in a hurry to go on leave on the 20 June so I did not process the Pick n' Pay bag and left it next to the safe;

12.2 On my return the bag was gone and I lied to Kruger saying that I found the bag and was going to process it;

12.3 Kruger was not happy and I begged him to forgive me and promised that it will never happen again;

12.4 We agreed to process it and back date it;

12.5 I processed the bag with another client deposit and started rolling over the bags;

12.6 On the 3 August 2013, I used the R169 000 to deposit a previous days deposit and that is why it was not processed.

[13] The statement of Johannes Jacobus Kotze (Kotze) was obtained by Nkgodi on the 6 November 2013. Kotze is the area branch manager at Absa bank, Mafikeng. He said inter alia the following:

13.1 During the 30 August 2013, Motladiile informed me that a Pick n' Pay bag totalling approximately R169 000.00 had disappeared and that according to the records Kruger was informed by Nazeemah Isaacs of the Regional Service Centre about the disappearance of the monies during the 3 July 2013.

13.2 This was unexpected of Kruger as customer service and hosting manager. He was supposed to report such loss or disappearance immediately to the manager in charge.

13.3 He instructed Motladiile to investigate and the outcome of the investigation showed that Mr Moeti has taken the money.

13.4 A forensic investigation was conducted by one Albert who confirmed that there was more than one person involved and not only Mr Moeti.

13.5 He recommended to Albert to conduct a polygraph test. All the tellers at Mafikeng Absa branch underwent a polygraph test. All the staff consented to the polygraph tests.

[14] Nkgodi testified that he had a reasonable suspicion that plaintiff and his subordinates committed the offence which suspicion was based inter alia on the following:

14.1 He studied all the witnesses' statements, the complainant's statements and Motladiile's third statement, which implicated plaintiff as well as the polygraph tests.

14.2 Although Moeti in his statement acknowledged that he lied to plaintiff, plaintiff as the manager was in a position of trust and as supervisor he should have taken steps against Moeti but instead he misled management that the money was deposited at the right time while he knew that this was not true. For 9 weeks, plaintiff did nothing about the disappearance of the monies and hid the truth from management.

14.3 Moeti said he and plaintiff agreed to backdate the payment. This amounts to fraud which is a crime. Plaintiff was duty bound to advise his subordinates which he failed to do. He perpetrated a crime. Plaintiff and Moeti acted in common purpose.

[15] Nkgodi said he arrested Moeti and Tlhokwane on the 24 October 2013 and plaintiff was arrested later on the 6 November 2013. Plaintiff was only arrested after he obtained plaintiff's statement and the additional statement from Motladiile on 6 November

2013. Nkgodi said it was not his intention to detain plaintiff after he arrested him as he intended to charge him and take him to court but because the prosecution was not available as they was attending a memorial service and because there is no police bail because of the amount involved, he detained plaintiff and took him to court the following day.

[16] Nkgodi said the case against plaintiff was initially withdrawn as he was on leave and his colleagues failed to send the docket to court. He went to the Director of Public Prosecutions and they said he should continue with the investigation. He is still proceeding with the case against plaintiff.

- [17] Under cross examination he said plaintiff was arrested for theft of R169 000.00 stolen on the 3 August 2013 at Absa Bank. He said that Nkomo told him that plaintiff was on duty on the 3 August 2013 and plaintiff also admitted that he was on duty in the statement he signed, he also looked at the bank's register. He was unable to produce any documents to show that plaintiff was on duty on 3 August
2013. He later said his assumption that plaintiff was on duty was based on the fact that plaintiff was responsible for monies on that day and for Moeti. Nkgodi also said he saw the camera footage of the 3 August 2013 and saw plaintiff, Moeti and Lebogang. It was put to him that Motladiile in her statement said she saw Moeti in the camera footage and did not mention plaintiff. He replied that Motladiile told him that plaintiff was present and furthermore at that stage plaintiff was not a suspect. He said that the camera footage had not been handed over to the SAP.
- [18] Nkgodi said when he arrested Moeti and Tlhokwane, he was not satisfied that plaintiff was implicated and it was only when he received the statements, he was satisfied and arrested the plaintiff using his discretion that plaintiff acted with the common purpose to steal the bank's money. Plaintiff was present and had knowledge that money was taken by Moeti and they conspired to change the date. Nkgodi said he appreciated that he had a discretion to arrest or not to arrest and he exercised his discretion to arrest as he had reasonable grounds to suspect that plaintiff committed the offence. He acknowledged that plaintiff had the right to freedom and said that is why plaintiff was granted bail.
- [19] Nkgodi was referred to a statement made by Moeti in which plaintiff was not implicated which relates to an incident prior to the theft. Nkgodi replied that it was the same amount that was stolen from Pick n' Pay and that is why he arrested plaintiff. He said Moeti explained that he was rolling the money over. They were exchanging bags so that Pick n' Pay would not be aware. Plaintiff agreed with Moeti to keep quiet and to lie to management and is therefore an accomplice to theft. Plaintiff didn't report to the bank or to the police for a period of 9 weeks.
- [20] He was cross-examined about Motladiile's third statement wherein she states that one of their customers who had been detained together with Moeti, heard Moeti admit that he had stolen money with plaintiff. He said he interviewed the customer who was afraid because he invested his money at Absa Bank, his money will be taken away and he was not prepared to make a statement.
- [21] The next witness was Kegomoditswe Rosalia Motladiile (Motladiile). She is presently stationed at Absa Bank in Mega City as branch manager. During 2013 to 2014 she was branch manager at the Absa Bank in Mafikeng. Plaintiff was the specialist manager team leader. She said plaintiff was dismissed as a result of a case concerning Moeti where there was a loss of money by Pick n' Pay for approximately R160 000.00. She said one Nazeemah, the relationship manager called her a month later telling her about a bag of money containing R160 000.00 that had disappeared and told her that she was talking to plaintiff about it.

Motladiile contacted plaintiff and Nkomo, the other specialist manager and plaintiff told her that he is investigating the case. She contacted Kotze and the forensic team and polygraph tests were conducted on their staff. Moeti failed the polygraph test and confessed that he stole the money and was arrested. Tlhokwane received the bags and Moeti signed that he is going to process the bag. Tlhokwane was also arrested. A week later, plaintiff was arrested at the workplace. An internal investigation was conducted and plaintiff was dismissed because he failed to act in his role as the manager. He went to the CCMA and they settled on one month's salary.

- [22] She was questions about plaintiff's statement which she requested him to write. In the statement, plaintiff stated that Moeti found the bags in his safe. She said the banks procedure is that the safe should be cleared when you go on leave. She was not on duty on the 3 August 2013 when the Pick 'n Pay bag was stolen. She said even though plaintiff was not on duty on that day, as the specialist manager he was supposed to inform her in accordance with their policy and procedure. She said one of plaintiff's main accountabilities as a specialist manager, was to "create awareness amongst customer service and costing staff of control

measures to prevent theft and fraud and ensure that control measures are implemented on a continuous basis". Plaintiff was supposed to report the matter to her after he had done his investigation which in terms of service level agreement was after 3 days, at most 5 days.

- [23] Under cross examination she said after Moeti confessed to theft she went to the police station and opened a case for money that was stolen on the 3 August 2013. It was put to her that plaintiff will tell the court that the charges brought against him at the disciplinary hearing did not relate to money that was stolen on the 3 August 2013. She replied that the incidents are related. It was further put to her that plaintiff was dismissed because an amount of money from Pick n' Pay was not deposited by Moeti during June and July for which plaintiff received a query in July 2013 from business banking. The information given to her from Pick n' Pay was that the money was stolen on the 3 August 2013 but through her investigation she discovered that the money was rolled over from the 3 July 2013. Moeti was banking the money for July in August. The money did not disappear on the 3 August but on the 3 July. She admitted that on the 3 August, plaintiff was not on duty but Nkomo was on duty as the specialist manager and it was her duty to report if there was money missing. She told Legodi that plaintiff should have reported to her immediately after he investigated the case of the 3 August.

- [24] In her statement dated 6 November 2013 she stated that she considered plaintiff to be the main suspect. Under cross examination she said she couldn't remember saying that. She said she did not consider plaintiff to be the main suspect. She was given instructions to lay charges concerning the theft of the Pick n' Pay money. She denied trying to falsely implicate plaintiff in the statements and said that her interest was based on whether the procedure was followed and what plaintiff did about the money. Plaintiff did not discipline his staff and did not follow procedure. She also said she received a tip off in her office and informed

Kotze and the police as it concerned the Pick n' Pay case. She denied that plaintiff after conducting an investigation as

instructed by Nazeemah reported to her that the money was missing. She received a call from Nazeemah stating that she is frustrated

because she is speaking to plaintiff and is not getting a response. She further denied that plaintiff reported to her towards the end of August and said she was in Bloemfontein and said he never called her.

E. PLAINTIFF'S CASE

[25] Plaintiff called Harlan Lance Kruger. He is 40 years old and residing in Mahikeng. He said on Wednesday the 6 November 2013, after 12pm, he was at his home when Legodi called him and said they are looking for him to take a statement. Legodi arrived at his home and arrested him without a warrant of arrest. Legodi informed him that there were statements implicating him and that he, Moeti and Tlhokwane shared the money that was stolen. He was taken to Mahikeng police station at approximately 1pm and was kept inside the holding cell. He signed the Notice of Rights in terms of the Constitution which he did not read. The police hand cuffed him and took him to an office where they took his photograph and he returned to the holding cell where he remained until 5pm when Legodi laid a charge at the charge office and his fingerprints were taken. He signed a warning statement. His rights were not explained when he signed the statement. He was told that he is not going to make a statement. He spent the night in the cell with 16 men and slept on a cement floor. They brought bread at approximately 6pm and the other men in the cell took the bread. He didn't eat anything or get much sleep because the cell was hot and the other men sang and smoked. He was brought food the next morning but he didn't eat. There was a filthy shower. He did not have soap or his toothbrush. He was not afforded an opportunity to contact his family or his legal representative. He was taken to the Magistrate Court and released on bail before 1pm on the 7 November 2013. The matter was postponed to the 7 February 2014 at the Regional Court. On the 7 February 2014 the case was struck from the roll as there was no docket available.

[26] Plaintiff explained that bulk tellers deal only with big clients such as Pick n' Pay and Shoprite and don't assist the face to face clients. He said the cash in Transit collects the money from the clients who bring it to the bank where it is received by a bank official (receiving teller) who records it on a control sheet which is signed by the bulk teller and is put into a big safe. The bulk teller as soon as he takes the bags signs on the control sheet because he takes full responsibility for the money.

[27] Plaintiff said during August 2013, he was a specialist manager at Absa Bank. On the 3 August 2013 he was not on duty. He said 2 weeks after the 3 August, Nazeemah contacted him and told him that a Pick 'n Pay deposit was not done on the 3 August 2013 and he was told to investigate. He checked the control sheet and saw that Tlhokwane signed for it. He approached Tlhokwane who said he couldn't remember and that on that day the electricity

went off. He said a week or two, after conducting his preliminary investigation he went to Motladiile and reported to her that the money was missing and that he checked everywhere. He then left it in her hands. He said a month after Nazeemah called him, he heard that Moeti was implicated and admitted to Steenkamp that he had taken the money. Moeti was a business teller and reported to him.

- [28] Plaintiff related an earlier incident on 3 July 2013 when he received a query from Nazeemah in respect of money not deposited. Moeti signed for the bag. He phoned Moeti who was on leave and Moeti promised to return early from leave. Moeti told him that the money was in the safe. He and another teller checked the safe and no money was found. When Moeti returned on the 16 July he said the bags were not in the safe but at the back of the safe. He showed him the deposit slips and he phoned Nazeemah to report that the money was deposited. He denied that he and Moeti agreed that he should backdate the deposit and said the deposit was done on the 16 July and not an earlier date. Further he said it is not possible to backdate as the computer system will not allow it.
- [29] He said he did not report the incident of the 3 July because the money was returned and there was no fraud or loss. He did not suspect Moeti and said he was a hard worker. His disciplinary hearing was for not following procedures and taking action against Moeti. He referred the matter to the CCMA and Absa Bank agreed to pay him his salary for 3 months. He said there was no agreement or conspiracy between him, Moeti and Tlhokwane to steal money from Absa Bank. He was referred to Kotze, the area branch manager who in his affidavit stated that plaintiff as the customer service and costing manager had a duty to report the loss or disappearance of money immediately to the manager in charge. He said he did his investigation and the money was found. In respect of the second incident, he reported it to his branch manager and also told Nazeemah to liaise with his branch manager as he handed it over to her.
- [30] Under cross examination it was put to him that the police had evidence under oath that he and Moeti had agreed to backdate and Moeti implicated him and the police's investigation pointed to collusion with Moeti. It was further put to him that the police had reasonable grounds on which to arrest him as the police interviewed the investigator who did the polygraph test, his colleagues and the bank manager and only thereafter was he arrested without a warrant. He replied that it was because of hearsay that he was arrested, that Moeti implicated him by saying that he was stealing money.
- [31] He admitted that the incident in June when Nazeemah called him and said a Pick n' Pay deposit was not made and the incident in August when Nazeemah called again and said the money was not deposited, are related. However when the court questioned him, he initially denied that he said that but later admitted that since June until August the money was rolled over.

F. THE LAW

[32] Section 12(1)(a) of the Constitution of the Republic of South Africa, Number 108 of 1996 (“the Constitution”), provides that “everyone has the right to freedom which includes the right not to be deprived of freedom arbitrarily or without just cause. Section 13(3)(a) of the South African Police Service Act provides that “a member of the Police Service who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances”.

[33] In terms of section 40(1)(b) of the Act, a peace officer may without a warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from lawful custody. 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 committed an offence referred to in schedule 1.
- iv) The suspicion must rest on reasonable grounds[1].

[34] Once the jurisdictional facts for an arrest are present, a discretion arises and the officer is not obliged to effect an arrest. The discretion must be exercised in good faith, rationally and not arbitrarily with the objective of bringing the suspect before court.

[35] An arrest without a warrant is a drastic means of initiating a prosecution or securing the accused attendance in court. Police

officers who purport to act in terms of section 40(1)(b) of the Act should investigate exculpatory explanations offered by a suspect

before they can form a reasonable suspicion for the purpose of a lawful arrest[2].

[36] An arrest or detention is prima facie wrongful. Thus, when police have arrested and detained a person and the arrest and detention are admitted or established, the onus of proving lawfulness rests on the state. As explained in *Minister of Law and Order v Hurley and Another*[3].

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just that the person who arrested or caused the arrest of the persons should bear the onus of proving that his action was justified in law”.

[37] In *Zealand v Minister of Justice and Constitutional Development*[4] the Constitutional Court in affirming the aforesaid principle said in paragraph [25] at 11 D to 12 C:

“It has long been established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that

interference to establish a ground of justification. There can be no doubt that this reasoning applies with equal, if not greater, force under the constitution”.

[38] In casu, it is common cause that as the defendant admitted the arrest and relied on the defences created by section 40(1) of the Act, the

defendant bore the onus to prove the jurisdictional facts for such a defence on a balance of probabilities. If all the jurisdictional facts for the defences

created in section 40(1) of the Act have been proved on a balance of probabilities then the deprivation of plaintiff’s freedom by his arrest without a warrant of arrest and ensuing detention would be with “just cause” as contemplated in section 12(1)(b) of the Constitution.

[39] Plaintiff’s challenge to his arrest is based on two legs, namely that it was without just cause as contemplated in section

12(1)(a) of the Constitution as Nkgodi was not empowered to arrest him as he did not have reasonable grounds for suspecting him of having committed an offence referred to in Schedule 1 to the Criminal Procedure Act and that even if Nkgodi was empowered by section 40(1) of the Act to arrest him that he acted arbitrarily in that he did not exercise the discretion conferred upon him by the aforesaid section at all, alternatively rationally and proper and that as such his arrest was arbitrarily as contemplated in section 12(1)(a) of the Constitution.

[40] In casu, it is common cause that NKgodi is a peace officer NKgodi testified that he suspected that plaintiff, Moeti and Tlhokwane conspired to commit theft of R160 000.00 at Absa bank. Theft, whether under common law or a statutory provision is listed offence under schedule 1 of the Act. Thus the first two jurisdictional facts are met. The next questions for consideration is whether Nkgodi suspicion rests on reasonable grounds and whether Nkgodi exercised a discretion when arresting plaintiff which exercise was in good faith, rational and not arbitrary.

[41] The test in considering whether Nkgodi’s suspicion was reasonable requires an objective standard of a reasonable person. The suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the person arrested committed a schedule 1 offence. It has been stated in *Mabona and Another v Minister of Law and Order and Others*[5].

“The test of whether a suspicion is reasonably entertained within the meaning of section 40(1)(b) is objective. S v Nel and Another 1980 (1) SA 28 (E) at 33 H. Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of ____ (the offence). It seems to me that that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. A reasonable man will therefore analyse and assess the quality of the information at his disposal critically and he will not accept it lightly or without checking it where it can be checked. It

is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engage in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based on reasonable grounds. Otherwise, it will be flightily or arbitrary, and not a reasonable suspicion”.

[42] The reasonable suspicion that the suspect has committed a Schedule 1 offence should be tested with reference to the essentialia of the particular offence[6]. However it is not necessary for a police officer to be certain that all the elements of the crime prescribed by schedule 1 have been established.

[43] At this juncture I will consider the credibility of the witnesses’ evidence.

[44] Nkgodi presented himself as a confident and satisfactory witness. He however contradicted his evidence that plaintiff was on duty on the 3 August 2013, which was an untruth as it is common cause that plaintiff was not on duty on the said date. That being said, Nkgodi testified that plaintiff was not initially a suspect and it is only after Motladiile made her third statement and he studied all the witnesses’ statements that he formed a reasonable suspicion that plaintiff conspired to commit theft. The aforesaid contradiction does not on its own discredit Nkgodi’s testimony.

[45] Motladiile was in my view a credible witness who gave her answers frankly and honestly. The only contradiction was in her third

statement wherein she said that she considered plaintiff to be the main suspect, while under cross examination she said she couldn’t recall saying that and she did not consider him to be the main suspect. I have not attached much weight to this contradiction as it is common cause that plaintiff was aware of Moeti’s wrongdoing in July 2013 and failed to report it timeously. I further accept Motladiile’s evidence that plaintiff failed to report to her that the money was missing after he conducted the investigation in August and that it was Nazeemah who informed her of the missing money.

[46] Plaintiff was generally a satisfactory witness who was able to answer all the questions put to him in examination and in cross examination confidentially. The only area where I am of the view that he was not entirely honest was when he testified that he had reported to Motladiile about the missing money after conducting the investigation. As stated supra, I believed Motladiile who testified that she was informed by Nazeemah and not plaintiff about the missing money. It is also common cause that plaintiff did not report the missing money in July and did not follow procedure and for this reason he was ultimately dismissed.

[47] The evidence on record is inter alia the following:

47.1 Fidelity delivered to Absa Bank on the 3 August 2013 a sealed bag containing R154 837.15 collected from Pick 'n Pay Mahikeng. Tlhokwane signed the teller list for bulk cash on the 3 August 2013. The amount was not deposited into the Pick 'n Pay banking account. Video footage of 3 August 2013 revealed that Moeti removed money from the bag on the said date.

47.2 Moeti after being confronted by the officials of Absa Bank who conducted the internal investigation with the video footage of 3 August 2013 made a statement on 23 October 2013 in which he admitted to stealing the money in the bag.

47.3 Motladiile laid a complaint of theft on behalf of the aforesaid bank in respect of the money which was in the bag with the South African Police Service at Mahikeng on 23 October 2013.

47.4 Plaintiff in July 2013 received a query regarding missing deposits for Pick 'n Pay. During his investigation he discovered that Moeti was responsible for the missing money. He contacted Moeti who returned the money. Plaintiff in his capacity as specialist manager failed to report Moeti to management, when in fact he knew or ought to have known that Moeti's conduct was not warranted and therefore was in breach of the bank's code of conduct.

47.5 Moeti made a statement on the 20 September 2013 wherein he said that he and plaintiff had telephonically discussed the missing money and they agreed to back date the processing of the missing money.

47.6 Moeti also said in his statement that he was rolling the money over. That he used to deposit the previous days deposit and that is why it was not processed on the 3 August 2013. Plaintiff in his testimony agreed that the money was rolled over.

47.7 According to both Kotze and Motladiile, plaintiff was the specialist manager and accordingly had a duty to report the missing money to Motladiile in July 2013, Motladiile also said plaintiff had a duty to report the missing money after he conducted his investigation in August which he failed to do timeously. Plaintiff took 9 weeks to report the matter to his immediate customer and specialist manager.

47.8 Plaintiff as branch manager mislead management that the money was deposited at the right time when he knew that that was not true. Plaintiff was remiss of his fiduciary duty to act with utmost care in execution of his mandate. Plaintiff did not report this incident up until he was asked by the branch manager and even at that late stage, he failed to disclose all the material facts concerning the disappearance of the bank deposits, whose duty it was to safeguard.

47.9 As part of Absa Banks internal investigation, staff underwent polygraph examination on the 23 October, the results of the test have not been disclosed to the court as it was found to be inadmissible and unreliable. Kotze in his statement said all the staff consented to polygraph tests. Both Motladiile and Kotze in their statements which were admitted into evidence referred to the polygraph test conducted by all the tellers at Absa bank and according to Motladiile both Moeti and Plaintiff failed the test.

47.10 Motladiile in her third statement said the following:

- a) Plaintiff was considered to be the main suspect insofar as the theft of the money in the bag of 3 August 2013.
- b) “There was an unconfirmed report that one of our customers who had been detained together with accused no. 1 heard him admitting that he had been stealing monies with Kruger who was his immediate manager”

47.11 Motladiile made the aforesaid third statement on the 6 November which is the same day on which plaintiff was arrested.

[48] From the foregoing, I am of the view that Nkgodi had reasonable grounds for suspecting plaintiff of committing theft. The fact that plaintiff was not on duty on the 3 August does not detract from the reasonableness as it is clear from the evidence that money was initially stolen on or about June/July 2013 which money was continually rolled over by Moeti.

[49] Nkgosi was in the circumstances empowered to arrest plaintiff under section 40(1)(b) which arrest was with just cause as contemplated in section 12(1)(a) of the Constitution and lawful. Accordingly defendant in my view discharged the onus of proving all 4 jurisdictional facts under section 40(1)(b).

[50] The next question for consideration is whether Nkgodi appreciated that he had a discretion to arrest or not to arrest and whether he exercised his discretion properly and rationally.

[51] In *MR v Minister of Safety and Security*[7] (supra) the constitutional court held:

“[43] As section 40(1) grants police officers a discretion whether to arrest, the two courts should have gone further in their evaluation of the evidence to determine whether the facts justified an arrest. This is so because an arrest is a drastic invasion of a person’s

liberty and an impairment of their rights to dignity, both of which are enshrined in the Bill of Rights.

[44] In other words, the courts should enquire whether, in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in *Duncan* or as per *Sekhoto* where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one’s own dignity in our constitutional democracy, held that the discretion conferred in section 40(1) must be exercised “in light of the Bill of Rights”.

[52] Even if all the jurisdictional facts are present the peace officer is not obliged to effect an arrest[8]. The arrestor should consider using a less drastic measure than arrest to bring the suspect (the arrestee) before court[9]. As the court in *Louw v Minister of Safety and Security*[10] held:

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

The court in Louw stated that in each case falling within the ambit of section 40, the police are obliged to consider whether less invasive options to bring the suspects to court are available.

- [53] The discretionary power to arrest conferred upon peace officers by section 40(1) of the Act may be exercised only for the purpose of bringing the suspect before court, for the court to determine whether the suspect ought to be detained further, for example, pending further investigations or trial and that the exercise of the discretion will be irrational and accordingly unlawful if the arrestor knowingly invokes the power to arrest for any other reason[11].
- [54] It has been held that to punish the plaintiff by means of arrest is unlawful[12]. It thus follows that if the arrest was made for any other purpose than to bring the suspect before court that the arrest would for that reason alone be unlawful[13]. It is also clearly established that the discretion must be exercised properly[14].
- [55] The Supreme Court of Appeal has referred in the Sekhoto matter (supra) to the general rule that a discretion must be exercised in good faith, rationally and not arbitrarily and that peace officers are entitled to exercise the discretion conferred upon them by section 40(1) of the Act as they see fit, provided that they stay within the bounds of rationality[15] and at paragraph [14] held that:
- “[14] While the purpose of arrest is to bring the suspect to trial, the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court or in some cases a senior officer. The purpose of arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed”.*
- [56] It further appears from paragraph [44] and [52] of the judgment in the Sekhoto matter (supra) [16] that the question whether the arrestor’s decision on the aforesaid question is rational would depend upon the facts and circumstances of the particular matter and that the defendant has to plead and prove the facts and circumstances which were taken into account in the decision to arrest the suspect. Accordingly the facts and circumstances relied upon by the arrestor for his decision to arrest the suspect must be such that it justified the arrest for the purpose of enabling either the senior officer to exercise the discretion conferred upon him, or a court to determine whether or not the interests of justice permit the release of the suspect on bail as contemplated in section 60(1) of the Criminal Procedure Act.

[57] It appears from paragraph [53] of the judgment in the Sekhoto-matter (supra)[17] at 334 B to D that if all four jurisdictional facts laid down in section 40(1)(b) of the Act have been satisfied by the arrestor the onus to establish that the discretion conferred upon the peace officer by that section was not rationally exercised by the arrestor is on the suspect.

[58] Thus Nkgodi had to establish that he appreciated that he has a discretion and that he considered and applied that discretion and after establishing same, it is then for plaintiff to establish that the arrestor did not exercise the discretion rationally.

[59] In casu, the following questions arises:

59.1 Did Nkgodi appreciate that he has a discretion whether to arrest without a warrant or not.

59.2 Did he consider and apply his discretion.

59.3 Did he consider other means of bringing plaintiff before court.

59.4 Did he investigate the explanations offered by plaintiff.

59.5 Were there any grounds for infringing upon plaintiff's constitutional right, such as, was plaintiff a danger to society, would he abscond, could he harm himself or others or was he not able or keen to disprove the allegations.

[60] When Nkgodi was asked during cross-examination, whether he appreciated that he had a discretion to arrest or not to arrest

Nkgodi replied, "I had a discretion to arrest at the time, not to arrest him". When asked in re-examination on behalf of the defendant to explain what he meant with the aforesaid Nkgodi said; "The discretion that I used, it was to arrest his person because I already came to the conclusion that indeed the crime has been committed. I has reasonable grounds that the crime has been committed, so the only thing was to arrest him".

[61] Nkgodi was unable to give a satisfactory reply to the questions why he did not apply for a warrant of arrest and why he did not take the police docket to the prosecutor and apply for a summons. No evidence was presented to suggested that plaintiff's arrest was the only way to secure plaintiff's attendance in court. From the foregoing, it appears that Nkgodi did not appreciate the fact that although he had a reasonable suspicion to arrest plaintiff that he was not obliged to arrest the plaintiff. Hence he did not appreciate that he had a discretion and that he considered and applied his discretion.

[62] Further defendant failed to allege in its amended plea which circumstances according to him reasonably justified the drastic

procedure followed by Nkgodi arresting plaintiff. Nkgodi also did not deal in his evidence with the circumstances which according to him reasonably justified plaintiff's arrest.

[63] There was in my view no circumstances which reasonably justified the arrest of the plaintiff as:

63.1 plaintiff had a fixed abode and employment at the time of his arrest and Nkgodi was aware of this fact as well as other relevant personal circumstances of the plaintiff.

63.2 plaintiff was not a flight risk.

63.3 there was no fear that if left free, plaintiff might commit another offence.

63.4 Nkgodi had already completed the investigation at the time and as such there was no fear of interference with the witnesses or exhibits by plaintiff.

63.5 there was thus no need to detain plaintiff for the purpose of further investigation.

63.6 the other suspects had already been arrested and charged.

[64] The aforesaid is also borne out by the evidence of Nkgodi that he was from the start prepared to give plaintiff bail.

[65] Defendant's counsel in her closing argument correctly conceded that there is no evidence to conclude that Nkgodi exercised a discretion.

[66] Accordingly I am of the view that plaintiff discharged the onus to prove that Nkgodi did not exercise the discretion conferred upon him by section 40(1)(b) of the Act and that Nkgodi's decision to arrest plaintiff was taken arbitrarily. Consequently plaintiff's arrest and detention is unlawful and, defendant is liable to compensate plaintiff for damages he sustained by his unlawful arrest and detention.

G. ORDER

[67] In the result,

67.1 Plaintiff's claim for unlawful arrest and detention is granted with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 01 FEBRUARY 2017

DATE OF JUDGMENT

: 06 APRIL 2017

COUNSEL FOR APPLICANT

: ADV ZWIEGELAAR

COUNSEL FOR RESPONDENT : ADV SEBOKO

ATTORNEYS FOR APPLICANT : WJ COETZER ATTORNEYS

ATTORNEYS FOR RESPONDENT : STATE ATTORNEY

[1] Duncan v Minister of land and order 1986 (2) SA 855 (A) 159 C

[2] Louw and another v Minister of Safety and Security and others 2006 (2) SACR 178 (7) 183j – 184d.

[3] 1986 (3) SA 568 (A) at 589 E to F

[4]

[2008] ZACC 3; 2008 (2) SACR 1 (CC) para [24] at 11

[5] 1988 (2) SA 654 (SE) at 658 E to H

[6] R v Jones 1952 (1) SAA 327 (C) at 332 to 333; Ramakulukusha v Commandaer Venda National Force 1989 (2) SA 813 (VSC) at 836 J to 837 B; and Mhaga v Minister of Safety and Security [2001] s ALL SA 534 (TK) at 538 F

[7] 2010 (1) SACR 388 at paragraph 43 and 44, 553 E – 554 A

[8] Minister of Safety and Security v Sekhato (supra) paragraph [28] at 327 C; National Commissioner of Police v Coetzee (supra) paragraph [14] at 366 A; Mawu v Minister of Police (supra) paragraph

[23] at 20 J to 21 A; and MR v Minister Safety and Security (supra) paragraph [42] at 552 D to F

[9] Minister of Safety and Security v Sekhoto 2011 (1) SACR 315 (SCA) paragraph 22 R 325 E to F; and National Commissioner of Police v Coetzee 2013 (1) SACR 358 (SCA) paragraph 13 at F to G

[10] 2006 (2) SACR 178 at 186 b

[11] Minister of Police v Duncan (supra); Minister of Safety and Security v Sekhoto (supra) paragraph [30] at 327 H and paragraph [42] at 331 C; and Dlamini v Minister of Safety and Security (supra) paragraph [12] at 659 H to I.

[12] Louw and Another v Minister of Safety and Security and Others 2006

(2) SACR 178 (7) at 184

[13] Minister of Safety and Security v Sekhoto 2010 (1) SACR 388 (FB) paragraph 28 at 398 F

[14] National Commissioner of Police v Coetzee 2013 (1) SACR 358 (SCA) paragraph

[14] at 366 B

[15] Minister of Safety and Security v Katise (328/12) 2013 ZASCF 111 (16 September

2013) paragraph [17]; Minister of Safety and Security v Sekhoto supra, paragraph [38] at 330 D and paragraph 39 at 350 E and paragraph [14] at 3311G

[16] Minister of Safety and Security v Sekhoto supra at 331 to 332 and 33G to 334 A

[17] Minister of Safety and Security supra at 334 B to D

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2017/109.html>

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

Prepared on 23 October 2026 · Esheria