



**THE REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE DIVISION, CAPE TOWN)**

*Case No: 14666/2016*

*In the matter between:*

**JOY EWERE EMORDI**

*1<sup>st</sup> Plaintiff*

**FIDELIS IJEOMA AGHOLAR**

*2<sup>nd</sup> Plaintiff*

*and*

**FBS SECURITY SERVICES (PTY) LTD**

*1<sup>st</sup> Defendant*

**SHOPRITE CHECKERS (PTY) LTD**

*2<sup>nd</sup> Defendant*

**THE MINISTER OF POLICE**

*3<sup>rd</sup> Defendant*

**CORPORATE INVESTIGATING AND**

**VERACITY ASSESSMENTS (PTY) LTD**

*4<sup>th</sup> Defendant*

*and*

**CORPORATE INVESTIGATING AND**

**VERACITY ASSESSMENTS (PTY) LTD**

*First Third Party*

**FBS SECURITY SERVICES (PTY) LTD**

*Second Third Party*

**Coram:      Bozalek J**

**Heard:      19 - 22; 26 - 28 October 2020; 24 & 27 November 2020**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 15h30 on 27 July 2021.

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**JUDGMENT**

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**BOZALEK J**

[1] The plaintiffs, a married couple, sued the defendants for damages suffered as a result of their alleged unlawful detention following an alleged shoplifting incident at the Shoprite store in Parow on 19 October 2015. The first plaintiff, whom I shall also refer to as Mrs Emordi, was together with her 16-month old daughter when she was detained at Shoprite for several hours. At some point she was joined by her husband, the second plaintiff, who likewise claims that he was detained against his will. After some hours the police arrived, arrested Mrs Emordi and took her to the Parow police cells where she was charged and held overnight before being released on warning. Shortly after the police arrived at the store, the second plaintiff left with the couple's daughter. The following day Mrs Emordi appeared in the Bellville Magistrate's Court when the charge of theft was withdrawn against her.

[2] The first defendant, FBS Security Services (Pty) Ltd ('FBS'), was contracted by the second defendant, Shoprite Checkers (Pty) Ltd ('Shoprite') to provide security guards and deal with security issues in the store. Similarly, the fourth defendant, Corporate Investigating and Veracity Assessments (Pty) Ltd ('CIVA'), was contracted by Shoprite to provide it with the services of a floorwalker and video surveillance equipment in its Parow store. The third defendant, the Minister of Police ('the Minister') was cited as the employer of the police officers who arrested and detained Mrs Emordi.

[3] Prior to the commencement of the trial, the parties agreed that the following issues would be tried first:

- 'a. whether the first and second plaintiff and Jannell (the minor daughter) had been wrongfully and unlawfully detained at Shoprite's premises;*
- b. if the answer to (a) is in the affirmative, determination of the first, second, third and fourth defendants alleged respective liability for the wrongful and*

*unlawful detention of the first and second plaintiffs and Jannell;*

- c. whether Shoprite is entitled to an indemnity and/or a contribution from the first and/or second third parties on the bases alleged in the third party proceedings;*
- d. whether the first plaintiff and Janelle had been unlawfully arrested and detained by the Minister through his servants and if so, to determine whether the Minister is liable for such arrest and detention.'*

### **The pleadings**

[4] In their amended particulars of claim, the plaintiffs allege that Mrs Emordi (and Jannell, the plaintiff's 16-month old daughter) were wrongfully, unlawfully and without reasonable cause arrested and detained by unnamed security guards in the employ of FBS, by Mr Rorisang Lebeta ('Mr Lebeta'), an undercover floorwalker in the employ of CIVA, and by unnamed employees of Shoprite after she was falsely accused of stealing from the store; further that when the second plaintiff later entered the store to come to his wife and child's assistance, he too was wrongfully, unlawfully and without reasonable cause arrested and detained by the same parties. It was further pleaded that the police officers, acting in the course and scope of their employment with the Minister, who had been summoned to the scene, later released the second plaintiff and Janelle but wrongfully and unlawfully continued to detain Mrs Emordi and then arrested her and removed her to the Parow police station where she was detained overnight. It was alleged that the plaintiffs' constitutional rights had been infringed by the various defendants *inter alia* in that the plaintiffs had been detained and arrested without '*reasonable cause*'.

[5] General damages were claimed on behalf of the first and second plaintiffs as well as hospital and medical expenses. Constitutional damages were also sought but this claim was abandoned. Also pleaded was a claim on behalf of the plaintiffs for losses to their

business and a loss of earnings/earning capacity.

**The defendants' pleas**

[6] FBS admitted that Mrs Emordi was detained on 19 October 2015 at the Shoprite store at approximately 17h05 and pleaded that this was in consequence of her having stolen various items from Shoprite. It pleaded that neither Jannell nor second plaintiff was ever detained. FBS admitted that its security guard/s acted within the course and scope of his/their employment.

[7] Shoprite admitted that Mrs Emordi was detained by security guards in the employ of FBS and CIVA on the day in question acting within the scope of their employment with such defendants. It pleaded that such detention was '*with reasonable cause*' and in consequence of her having stolen items from the store. It denied that the plaintiffs and Jannell were unlawfully detained or, that its employees ever arrested and/or detained the first plaintiff and Jannell. It pleaded in the alternative that if a contrary finding was made, such arrest and detention was lawful inasmuch as there was evidence implicating the first plaintiff in the theft of several items from its store, which constituted reasonable cause for such arrest and detention.

[8] The Minister admitted that on the day in question at approximately 19h30, the first plaintiff was arrested without a warrant and taken into custody by Sergeant Khumbuza, a SAPS employee acting within the course and scope of his employment. The Minister pleaded that the arrest was lawful in terms of sec 40(1)(b) of the Criminal Procedure Act, 51 of 1977 *inter alia* inasmuch as the arresting officer had entertained a suspicion, resting on reasonable grounds, that the first plaintiff had committed the offence of theft.

[9] CIVA denied that its employee had arrested or detained the first plaintiff or Jannell and pleaded that such employee had, on reasonable grounds, suspected that the first plaintiff had committed a theft and had first reported this to FBS' employee/s.

[10] Shoprite also issued notices in terms of Rule 13 against CIVA and FBS as first and second third parties respectively. It pleaded that in the event that the plaintiffs' claims against Shoprite were upheld it sought to be indemnified in respect of any awards or orders made against it in terms of the provisions of written agreements concluded between it and those parties in terms of which they *'irrevocably indemnified (Shoprite) ... and agreed to hold them harmless against any claim which may be made against one or all of them'*. Shoprite pleaded further that CIVA's employee, Mr Lebeta, had reported to Shoprite that the first plaintiff had been detained by him, assisted by employees of FBS, as he entertained a suspicion, resting on reasonable grounds, that she had committed theft on Shoprite's premises. Shoprite had relied on the evidence presented by Mr Lebeta and FBS' employees as justifying the suspicion that the first plaintiff had committed the offence and that her detention was therefore lawful. Neither CIVA nor FBS pleaded or responded to such third party notices.

### **The evidence**

#### **Mrs Joy Emordi – the first plaintiff**

[11] Through a Nigerian/Igbo interpreter, the first plaintiff testified as follows. She and her husband had a stall behind Shoprite, Parow from which they sold clothes. That afternoon she left her husband at the stall and, with Jannell, went to a nearby shop, Parow Mark Fruit and Veg ('Parow Mark'), to purchase some groceries. Jannell was then one year and four months old and only just able to walk. She gave her child a *'Squish'* juice ('the juice') which she had brought from home and from which the child sucked

throughout. At Parow Mark she bought a tin of Gilda tomato paste as well as some potatoes and oranges. The fruit and vegetables were contained in transparent plastic bags generally used for that purpose in shops (hereafter referred to as '*roller bags*'). The fruit and vegetables were weighed at the cashier's counter in Parow Mark and paid for by her. She also purchased a Parow Mark plastic bag and left with all the items in that packet. She was given a receipt but left it on the cashier's till desk, seeing no need to keep it.

[12] The first plaintiff then walked to the Parow Shoprite store with Jannell to purchase further groceries, the walk taking some three to five minutes since Jannell could not walk at an adult's pace. When she entered the store a member of the security staff placed a Shoprite seal on her Parow Mark bag and gave it back to her. She took a small trolley with a shopping basket on top and below and went into the aisles. Jannell still had the juice in her hand. She selected some packets of noodles and a packet of mini yoghurts and placed them in the bottom basket whilst Jannell sat in the top basket. She then approached a cashier at a till, took the items she had selected and paid for them. Upon enquiry she told the cashier that she had brought the juice, which was still in her child's hands, into the store. She also told the cashier that she needed a plastic bag and her groceries were put into a Shoprite shopping bag and she was handed a receipt.

[13] Before she reached the exit of Shoprite, she was intercepted by a man wearing civilian clothes who had what appeared to be her daughter's juice container in his hand and which she assumed her daughter had dropped. She was asked to accompany the man but given no reason for doing so. In an internal office, she encountered three uniformed security guards, two of them women. One took her two plastic shopping bags, tore open the sealed bag from Parow Mark and emptied its contents onto the floor and asked her for a receipt. Mrs Emordi told them she had left the receipt for the items bought at Parow

Mark at that shop and asked if she could leave her items and her daughter and run to Parow Mark to get the receipt. They would not allow her to leave the premises and she then said that they could accompany her to Parow Mark. This request was also refused. Her Shoprite bag was then opened and she was asked for a receipt for those items. She told the guards that she had left this with the cashier and could she fetch it. She then ran to the cashier and got the receipt for the items bought at Shoprite and showed it to a security guard. The man who intercepted her, later identified as Mr Lebeta, said he would call the police and she told him he could do so.

[14] The security office in which Mrs Emordi found herself had a gate with a mesh grille opening onto the public passage-way behind the shop near where her stall was situated. She called out to a passer-by to call her husband. He arrived but was refused entry by security whereupon he forced himself into the office. She explained her situation to her husband who tried to intercede on her behalf. Her husband was then also detained because the office door was closed. Before he had arrived, she had been held for three hours together with her daughter. Her husband only spent about half an hour there since, when the police arrived, they told him to take the child home, which he did. The police officers who arrived conversed only with Mr Lebeta and spoke in Xhosa despite her request to them to speak English so that she could understand what was being said. They went upstairs with Mr Lebeta and returned after about 15 minutes. One of them handcuffed her and told her that they were taking her to the police station. The police officials gave her no explanation for their actions and asked her nothing about the items which she had purchased or which she had allegedly stolen. By the time she left with the police there was a crowd of Nigerian people outside the store shouting at the police and demanding to see the video footage of her allegedly stealing items from the store.

[15] Mrs Emordi testified at some length about the conditions in which she was held overnight at Parow police cells including an alleged diabetic coma into which she fell. These aspects of her detention are, however, not material to the issues which this Court must determine. She was released the next day after being issued with a notice to appear in court the following day on a charge of theft. When she appeared in court, the charges were withdrawn against her. Soon after her release, she went to Parow Mark to get the receipt which she had left there. She first spoke to a cashier who then spoke to her manager who in turn told her that they would first have to confirm on their CCTV footage that it was indeed her who bought the items on the day in question. Thereafter many till slips were printed until eventually hers was found. She presented a copy of that till slip to the Court, as Exhibit X. Mrs Emordi also presented, as Exhibit B, a shopping bag which she said she had purchased from Parow Mark and used on the day in question. It had been in a Shoprite shopping bag, together with the items which she had purchased, which her husband had brought home from Shoprite when he left the store on the evening in question.

[16] In cross examination on behalf of Shoprite, it was put to her that she could not have obtained a Shoprite bag since her till slip indicated that she had not paid for such an item. Mrs Emordi was also taxed with the contents of a forensic report which had been drawn up by a clinical psychologist, Ms Pam Tudin, whom she had consulted approximately three months after the incident. It was put to her that there were significant discrepancies between her present account of the incident and what she had told the psychologist. It was also put to her that Shoprite's manager, Mrs Fourie, would testify that she had seen video footage of her taking oranges and potatoes in separate roller bags and placing them in the bottom basket of her trolley.



[17] On behalf of CIVA it was put that Mr Lebeta had seen the first plaintiff enter Shoprite with a baby pram, which itself had made her suspect, and as a result he had followed her throughout her visit to the store. Mrs Emordi emphatically denied that she ever had a pram. It was put that Mr Lebeta would testify that he also saw her take a Squish juice from a shelf and give it to her daughter and discard the empty container in a fridge; further that Mr Lebeta had seen her take the oranges and potatoes and place them in roller bags, unmarked, unweighed and unpriced, into a white plastic bag which she had taken out from underneath her pram. All this was denied by Mrs Emordi. It was also put that she had proceeded to the tills but had not stopped at any till or paid for any items. This too was denied by Mrs Emordi. It was put that the floorwalker had shown the footage of Mrs Emordi stealing items to both the police and Mrs Fourie and that all of them had been satisfied that she had shoplifted.

[18] During cross examination on behalf of the third defendant, Mrs Emordi maintained her version that the SAPS members did not interact with her at any stage before arresting her nor did they give her any opportunity to see, or to ask to see, the video footage.

**Mr Fidelis Agholar - the second plaintiff**

[19] The second plaintiff also testified through an interpreter. On the day in question, he had been at his stall when someone came to tell him that his wife was being detained at Shoprite. He rushed to the shop. He was refused entry to the security office by a guard but forced his way in. He asked a security guard to show him the CCTV footage of his wife but was told that he must wait until the police arrived, which he did. When the police arrived, they went upstairs with other staff and later asked him to leave which he did, taking Jannell. Upon returning to his stall, he found that two bags of his merchandise

had been stolen in his absence. He testified that a security guard at Shoprite had given him a Shoprite carrier bag in which a Parow Mark carrier bag was placed containing noodles, yoghurt and tin of tomato paste as well as the Shoprite receipt. He visited his wife that night in the cells taking her food and medication. The following day she was released from the cells and on the next day, when they attended at the Bellville Magistrate's Court, the charge against her was withdrawn.

[20] In cross-examination of Mr Agholar, it emerged that he had been determined to reach his wife and child who were being detained at Shoprite and had remained with them until asked to leave by the police. Mr Agholar stated that the door to the security office had been locked when he was inside but conceded that he had never tried to leave the office nor had he asked for the door to be unlocked.

### **The defendants' evidence**

[21] The Minister led the evidence of the arresting officer, Sergeant Khumbuza, and two other police officials who dealt with Mrs Emordi at Parow police cells. FBS led the evidence of the security guard, Mr Canda, who first apprehended Mrs Emordi whilst CIVA placed the evidence of the floorwalker, Mr Lebeta, before the Court. Shoprite led the evidence of its manager, Mrs Fourie. It is appropriate to set out their evidence in the order in which the incident unfolded.

### **Mr Rorisang Lebeta**

[22] Mr Lebeta testified that had been employed as a floorwalker by CIVA and was on duty at the store on the day in question. His job entailed dressing in civilian clothes and posing as a customer whilst looking out for shoplifters or incidents of shoplifting. The first thing he looks out for are shoppers who are pushing a pram since he views such

persons as immediately suspect. If he does not see an actual incident of shoplifting, he takes no action. If he sees such an incident, he will inform the security guards when the suspect has walked past the tills without paying. The guard will stop that person and take them to the security office where he or she will be told why he or she has been stopped. The person is then searched and if items are found which have not been paid for, the manager is informed. He or she will then follow the protocol and call the police. At the time of the incident, he had a year and eight months' experience as a floorwalker.

[23] Mrs Emordi had entered the store through the side entrance. She was pushing a pram with a child in it and had no shopping bag with her. She took a Squish juice off a shelf and gave it to her child. He continued to follow Mrs Emordi but not so closely so as to be noticed. Before reaching the fruit and vegetable section, she stopped at a cold items fridge and discarded the empty juice container in it. When she got to the fruit and vegetable section, he was able to observe her closely. She took potatoes and oranges and placed them in separate roller bags but did not have them weighed and priced at that counter as is required in Shoprite. She placed the items in the bottom of the child's pram and then went to the express tills but just walked past them whilst holding her child and pushing the pram. He went to the entrance and informed a security guard that Mrs Emordi had stolen items. She was then stopped by the security guard who accompanied her to the security office. He himself did not speak to Mrs Emordi until they were inside the office where other security guards, two females, were present. Inside the office, they asked one of the female guards to search the child's pram and the oranges and potatoes were produced from the bottom of the pram, still in roller bags. There was nothing else in the pram. He asked Mrs Emordi for a till slip but she did not have one. Although he had heard Mrs Emordi's testimony in court that she purchased noodles and yoghurt before

she was apprehended, he had not seen this.

[24] Mr Lebeta testified that Mrs Emordi had not run out of the security office to the cashier to get a Shoprite till slip. He went to the store manager, Mrs Fourie, and told her that Mrs Emordi had taken items and could produce no till slip. The witness was shown Exhibit B, the Parow Mark bag, and it was put to him that the potatoes and oranges were in that bag in separate roller bags. He denied this, saying that he was seeing the Parow Mark bag for the first time in court. The atmosphere in the security office had not been calm since Mrs Emordi was shouting. The manager, Mrs Fourie, had come into the office and asked what was going on. She asked questions of Mrs Emordi but there was no answer. She also asked Mr Lebeta to go with her to view the video footage and together they did so. Following his employer's protocol, he had asked Mrs Fourie to call the police. This was not his decision but it was his employer's procedure for the police to be called in such situations. Mrs Fourie did so. He took the fruit and vegetables back to the relevant counter to be weighed and given a price and, through Mrs Fourie, obtained a training-mode till slip to get the value of the various items. A copy of this till slip was produced as Exhibit C. When Mr Agholar arrived later, Mrs Emordi started shouting and pointed at him (Mr Lebeta) whereupon Mr Agholar assaulted him. Security guards intervened but not before Mrs Emordi had also hit him.

[25] The police only arrived after the store had closed. He had explained to them what had happened and they too asked to see the video footage. With Mrs Fourie's permission they all viewed the video footage in the camera room. There was a policeman who spoke Xhosa and one who could speak Afrikaans who spoke to Mrs Fourie. The witness is not conversant in Afrikaans and speaks only '*diluted*' Xhosa, his home language being Sotho. After viewing the footage, he went with the police to the boardroom where his

statement was taken and which he duly identified in the trial bundle. He was also shown a further affidavit apparently made by him on or about 26 August 2016. Mr Lebeta said that he had never seen this statement before and the signature on it purporting to be his was not his. Shown pictures of the exit from the security office to the public passage way, he stated that there had been a lot of Nigerian people gathered outside shouting and protesting over Mrs Emordi's detention. He was not able to leave the store after the police arrested Mrs Emordi because of the crowd's hostility. He never worked again at that store. Mrs Fourie had called his employer the following day saying that the Nigerian people intended to harm him and he must be taken to work at another store. He still works for CIVA but now only as a camera video operator. Regarding the Squish juice, he said that it was he who retrieved it from the cold items fridge and that there had been no security sticker on it.

[26] Under cross-examination on behalf of Mrs Emordi, he stated that his police statement was neither read to him nor given to him to read. He could read but cannot understand English well. He stated, repeatedly, that the police officer who had written his statement had already viewed the video footage. When it was put to him that Sergeant Khumbuza denied ever seeing the video footage the witness said that he thought that the policeman had forgotten this because the incident had happened so long ago. He agreed that the video footage would be important evidence but could not say whether it had been preserved. At the time, he had been a floorwalker and had only limited knowledge of the video camera system. He had not been taught to save footage. A portion of his police statement where he stated that Mrs Emordi *'paid for yoghurt and other stuff'* was put to him and he was asked to explain this apparently conflicting evidence. He said that the incident had happened a long time ago but that in any event Mrs Emordi had gone past

the tills without paying.

[27] Mr Lebeta refused to answer questions regarding his August 2016 statement, saying that it was not his and nor had he ever consulted with any attorney or with his employer regarding it. He had not been in Cape Town in August 2016 but in the Eastern Cape on sick leave recovering from a road accident. It was pointed out to him that the statement was dated two days after the plaintiff's summons was served on CIVA but he insisted that he had never been requested by his employer to make any such statement.

[28] Confronted again with that portion of his police statement indicating that Mrs Emordi had paid for some items at Shoprite, Mr Lebeta appeared to suggest that this may had happened unseen by him when he went to alert the security guard – but in the same breath he added this could only have taken him five seconds. When asked directly whether Mrs Emordi had paid for the yoghurt and '*other stuff*' his answer was that he could not remember since the incident had happened a long time ago. He continued to insist that Mrs Emordi had been pushing a pram. When it was put to Mr Lebeta that Mrs Emordi had testified that she had bought the fruit and vegetables from Parow Mark and that he had assumed incorrectly that she had taken them from Shoprite, his response was that he had not been present (at Parow Mark) and did not even know where it was. He also appeared to deny that Mrs Emordi had ever mentioned that she bought the items from Parow Mark. Shown the Shoprite till slip, Mr Lebeta stated that he did not remember seeing it and that the incident had happened a long time ago, but he did not dispute it. He testified there were language difficulties between him and the police but that they had arrested Mrs Emordi based on what he had said and what they saw on the video footage. When it was put to him that he could not recollect the events of the day in question and was making up his version as he went along, his answer was that he had a

*'bit of a memory'* of what happened that day. When Mrs Emordi was apprehended by Mr Canda (and himself), it had appeared to them as if the fruit and vegetables had been stolen because there was no price sticker on either roller bag or any receipt to account for them.

### **Mr Mfundo Canda**

[29] Mr Canda was a security officer employed by FBS and was on duty at the main entrance of the shop on the day in question. Mr Lebeta had approached him and told him that Mrs Emordi had stolen something from the shop and that he should stop her when she left. He did so and took her to the staff/security office. She was with a child and had oranges and potatoes in roller bags in her possession. In the security office she was asked for the till slip for the fruit and vegetables but could not produce one. Mr Lebeta also asked her where the juice was that she had but he cannot remember her response. Mr Lebeta left to go and call the manager because Mrs Emordi was *'fighting'* with them. Mrs Emordi had said that they were accusing her of stealing but she had not done so. She had even hit Mr Lebeta. A crowd had gathered outside the security gate in the public passage – way behind the shop and there was much shouting. When Mr Lebeta came back with the manager, Mrs Fourie, she asked Mrs Emordi what had happened but the latter just shouted at her. Mrs Fourie and Mr Lebeta left for the camera room to look at the video footage. Mr Lebeta came back in due course and Mrs Fourie called the police. He himself had not seen the video footage nor did he at any stage see any plastic shopping bag, including a Parow Mark bag. At some point Mr Agholar arrived, looking for his wife and child. He too tried to hit Mr Lebeta and Mr Canda had been required to intervene between them. Mr Agholar had also slapped one of the female security guards. Mr Agholar stayed in the security office but he had behaved in an unruly fashion. He

eventually left with his child when employees of a security firm ADT, arrived.

[30] In his evidence in chief, Mr Canda said that Mrs Emordi never asked to be allowed to go to Parow Mark to fetch a receipt. Under cross-examination however he said that whilst in the security office she had said that she had got the potatoes and oranges from Parow Mark. He testified that it was Mrs Fourie's decision whether the police are called or not. Mr Canda stated that suspects are detained only when the security staff are certain that the person had stolen. He added that the security guards had trusted Mr Lebeta on this occasion because he had never made a *'false arrest'*.

[31] Under cross-examination, Mr Canda conceded that there were facts that he could not recall because the incident had taken place so long ago. He had no knowledge of whether Mrs Emordi had bought any items such as noodles and yoghurt from Shoprite. All that he had been told about were the oranges and potatoes. Presented with Exhibit B – the Parow Mark carrier bag – Mr Canda confirmed that the seal on it was a Shoprite seal and that it was part of the security guards' processes that such a bag is sealed when a customer entered the store with items bought from another shop.

### **Mrs Magdalene Fourie**

[32] Mrs Fourie was the manager of the Shoprite store in Parow on the day in question although she had since retired. The store's opening hours were Monday to Thursday from 8am to 6pm. Security in the store had been outsourced to FBS which provided security guards to be on the lookout for any shoplifting incidents or other trouble. CIVA provided the services of video camera operators and floorwalkers. The floorwalker/s patrol/s the store on the lookout for shoplifters while the camera operator/s sit/s in the camera room and looks at monitors which cover most of the store. In certain instances, there is only a



floorwalker on duty who has some knowledge of how to operate the camera and this had been the case on the day in question. In cases of shoplifting, one waits until the person has passed the tills because by then it is clear that they do not intend paying for the items they have taken. The protocol is to take the suspect to the security office where they are searched. If the culprit is a child, the child is brought to her office and family members are called in to fetch the child. A similar policy applies to elderly people because they are prone to forgetting to pay for items. In such an instance, she would call for a family member of the person. Security staff will tell her what they saw and what they found on the search. Sometimes people admit theft, in other cases they do not. When they do not admit the theft she asks to see the video footage. If the video footage shows the theft, she then phones the police. If the video footage is not conclusive, she still calls the police and leaves it up to them. Before the police arrives the person is detained '*at the back*' by the security guards. The police will always ask for the video footage and she would go with them and the camera operator to the camera room to view the footage. Mrs Fourie estimated that there were approximately two to four shoplifting incidents per week at the store.

[33] On the day in question, shortly before closing time, Mr Lebeta came to tell her that he had caught a lady giving her child a Squish juice and then taking potatoes and oranges without paying for them. She went down to the security office, opened the door and encountered a big commotion inside. There were many people standing outside in the public passage way behind the store. She tried to ask Mrs Emordi what had happened but through that noise nobody answered. She does not know if this was a result of that noise. Mrs Emordi had a young child in her arms. Mrs Fourie had asked '*what is happening, what is the problem*' but there was no response. The crowd behind the mesh gate was

shouting and screaming. She then went with the floorwalker to see the video footage but before doing so he showed her the packets and the items that Mrs Emordi had allegedly taken. There were potatoes in one roller bag and oranges in another with no price sticker on either. At that time, customers had to weigh their fruit and vegetables at that particular counter. The only other item she saw was an empty Squish juice container. In the camera room, Mr Lebeta showed her footage of a lady taking a roller bag and putting potatoes in it and then putting oranges in another bag. Mrs Fourie could not remember what this person had done with the bags after that. She could not remember if there was any footage showing the Squish juice. There was also video footage of Mrs Emordi passing the tills. She could not remember seeing any footage of Mrs Emordi pushing a pram or a trolley.

[34] When the police arrived she and Mr Lebeta showed them the footage after which one of the policemen said *'Dan het die vrou gesteel – dit is 'n saak'*. The police then went with Mr Lebeta to the boardroom where a statement was taken from him. The potatoes, oranges and juice container were scanned and a *'training-mode'* till slip produced giving their value. A copy of this till slip (trial bundle, page 30) reflected the oranges as having a price of R4.61, the potatoes R9.30 and the *'Squish and Go baby food'* as having a price of R7.59 i.e. a total of R21.50. If the Squish juice had been bought from another Shoprite store it would scan again in her shop but if bought from another shop would not scan.

[35] When she first came into the security office, she had asked Mrs Emordi what was going on but had asked her nothing else. Mrs Fourie stated it was correct that she takes the decision whether to call the police and in doing so she had exercised her discretion. She was referred to the protocols for dealing with minors and elderly persons suspected

of shoplifting contained in the written agreements with FBS and CIVA and said that she had never seen these but had only been advised about them in meetings. When the Shoprite till slip showing the purchase of yoghurt and noodles was put to her, Mrs Fourie stated that she could not speak to it but could not dispute it. She could only testify regarding the Squish juice and the fruit and vegetables. When it was put to her that Mrs Emordi's version was that she bought the potatoes and oranges shortly before at Parow Mark, Mrs Fourie's response was that she had seen her taking the fruit and vegetables on the video footage. When shown the Parow Mark receipt she stated that she did not know whether she disputed it or not. She herself had heard no talk at the time of getting a receipt from Parow Mark. She had seen nothing on the video footage regarding the Squish juice. Certain aisles are not covered by the camera, only '*hotspots*', one of which was the fruit and vegetable section.

[36] Asked what her reasons were for accusing of Mrs Emordi of stealing the Squish juice, her answer was that Mr Lebeta had told her so and secondly, that everyone knows that when you come into the store you must show what you are bringing in. When she was asked about the language used in her dealings with Mr Lebeta, Mrs Fourie stated that the latter spoke to Mr Canda and Mr Canda then spoke to her. She referred to Mr Lebeta's English as being '*broken*' English. She confirmed that that had been Mr Lebeta's last working day. Asked whether she had instructed anyone to keep the video footage in question, Mrs Fourie's reply was that the police normally come back after a few days and ask for the footage whereupon it is cut to a CD. She had never heard the outcome of the case and as branch manager had many areas of responsibility. Why, she asked rhetorically, would one stress over one case?

**The third defendant's case****Sergeant Nceba Khumbuza**

[37] Sergeant Khumbuza testified that he had been driving a patrol van on the day in question and responded to complaints. When he came on duty at 17h45, he received a handover complaint from the day staff and made his way to the Shoprite store in Parow for a shoplifting complaint. There he met the complainant, Mr Lebeta, who pointed out the suspect explaining that she took a baby juice called Squish, which her child drank. Thereafter, he was told, she dropped the container near the chicken fridge before proceeding to the fruit and vegetables section where she put oranges and potatoes in two roller bags and then walked past the tills without paying for any of these items. When she was stopped by the security guard she was unable to produce a till slip.

[38] The witness found Mrs Emordi in the security office handcuffed near a television monitor. He took a written statement from Mr Lebeta and asked the staff to release Mrs Emordi from her handcuffs. He then explained her rights to her and the reason for her arrest, namely, an allegation of theft from Shoprite but gave no further details. He based the charge solely on the information from Mr Lebeta and the latter's description of her clothing. Mrs Emordi had said nothing to him. He and his partner, Constable Tsewu, took Mrs Emordi to the police station in the back of a police van but did not handcuff her. There he wrote up her notice of rights but Mrs Emordi refused to sign it or any other documents. She suffered no illness and required no medication in his presence. He then left her with a cell guard, Sergeant Kevin Adams.

[39] The witness stated that according to Mr Lebeta there was video footage available. However, it was not retrievable or viewable when the police arrived because it was after hours. The witness did not think viewing the footage was necessary to arrest Mrs Emordi

because of what Mr Lebeta had told him, which in his view was reason enough to arrest her. Asked why he did not release Mrs Emordi on warning, his answer was that only the investigating officer or a senior officer can do that. He took Mrs Emordi into custody at about 7:30pm at Shoprite. Under cross-examination by Mrs Emordi's counsel, the witness was unable to recall if there was a crowd outside the security entrance to Shoprite. He insisted that the store's security guards had handcuffed Mrs Emordi to the rails of a staircase.

[40] Sergeant Khumbuza said that he had never asked Mrs Emordi for her version before or after arresting her but went solely on Mr Lebeta's version of events. It was put to him that to have arrived at a reasonable suspicion that Mrs Emordi had committed theft he would have had to have view the video footage and his response was that he agreed, but the footage was not retrievable because it was after hours. He was also referred to SAPS standing orders stating that an arrest was a drastic infringement of rights. His response was that it was the decision of the investigating officer or the senior officer to release a suspect on bail. He agreed that he should have asked Mrs Emordi what her version of events was. He said that there was a reason for him not doing so but could not recall it. He explained that the Shoprite staff had waited for the police for three hours and everyone wanted to go home. He did not see any evidence that Mrs Emordi had bought yoghurt and noodles. He denied that he had not told Mrs Emordi the reason for her arrest. Much cross-examination of Sergeant Khumbuza concerned Mrs Emordi's experience after she was brought to Parow police station but it is not necessary to deal with this material.

[41] In summary, it was put to the witness that Mrs Emordi's arrest had been unlawful because as a police officer he had failed to act on a reasonable suspicion and had not

exercised a proper discretion through failing to take into account Mrs Emordi's version of events and not considering the video footage before her arrest. It was also put to the witness that he should have released Mrs Emordi and spared her a day's detention. His answer again was that a suspect can only be released after verification of her address and the decision as to whether to do so was that of the investigating officer or an officer more senior than he was.

[42] In cross-examination on behalf of other defendants, the witness conceded that his recollection of events on the day in question was not good. He could not remember any crowd of people outside making a great deal of noise and was nonplussed when told that Shoprite would never have handcuffed Mrs Emordi. He insisted that he took Mr Lebeta's statement in a security office and not in the boardroom upstairs. He insisted that neither he nor his colleague saw the video footage and said that neither would have said anything in Afrikaans since this was not their language. He had no explanation for not asking Mrs Emordi whether she had a till slip or where she got the items. In response to a question from the Court, the witness said he could have mixed up this particular incident with another shoplifting incident. Sergeant Khumbuza stated that it was the duty of the investigating officer to take a statement from a suspect. He would not arrest an innocent person and he had believed that Mr Lebeta would not make an unjustified allegation.

[43] Sergeant Kevin Adams and Constable Melanie Jantjies testified on behalf of the third defendant regarding Mrs Emordi's detention at the Parow police cells. Again, this evidence is not material to the questions, which the Court must determine and need not be canvassed.

**Absolution**

[44] At the conclusion of the plaintiffs' case all defendants applied for absolution from the instance in respect of the second plaintiff's claims for general damages and material losses arising out of his detention. This application was granted on the basis that it was clear that the second plaintiff was at all times in the security office of his own free will and could have left at any time.

**The respective cases for the parties**

[45] Mrs Emordi's case was that her version of events should be accepted, namely, that she had stolen none of the items in question from Shoprite's store and that had she been afforded an opportunity to fetch the receipt from Parow Mark, which had been unreasonably refused, she would have been able to demonstrate that she had not stolen the fruit and vegetables in question.

[46] On behalf of FBS it was contended that Mrs Emordi's version should be dismissed by reason of her lack of credibility and reliability as a witness coupled with the probable facts which supported the reasonable suspicion that Mrs Emordi had committed shoplifting in respect of all three items. It was further contended that FBS should not be held liable since, although its employees did not see any act of theft themselves, they were informed thereof by Mr Lebeta and were justified in relying on his allegations. Together with the fact that Mrs Emordi had been unable to provide proof of purchase of the items allegedly stolen, its employees had acted reasonably in the circumstances. Counsel also relied on Mrs Emordi's concession that if someone was discovered leaving a store with fruit and vegetables in a roller bag without a sticker, it might well be considered that the items had not been paid for. Ultimately, therefore, it had not been unreasonable to suspect Mrs Emordi of shoplifting and to detain her on that suspicion.

[47] The primary argument raised on behalf of Shoprite was that there was no evidence that, as pleaded by Mrs Emordi, '*employees of the second defendant (the store employees)*' wrongfully and unlawfully arrested and detained her; further in this regard, that the first plaintiff had not pleaded that the actions of FBS or CIVA could be attributed to Shoprite on the basis of vicarious liability or for any other legal reason. Shoprite pointed out that it had pleaded that Mrs Emordi was detained by security guards in the employ of FBS and CIVA who acted in the course and scope of their employment with such parties. Furthermore, it had pleaded a specific denial that its employees ever arrested the first plaintiff. In the alternative, that if it was found that its employees had arrested and detained the first plaintiff, such acts were lawful in that there was evidence implicating Mrs Emordi in the theft of items, which was reasonable cause for her arrest and detention. As regards its third party claims, Shoprite relied on the terms of the agreements with FBS and CIVA and the fact that neither delivered a plea denying any of the allegations made by Shoprite in its Rule 13 notice. Since no such allegations had been disputed, Shoprite – if found liable – was entitled to contractual indemnity.

[48] The Minister relied on sec 40(1)(b) of the Criminal Procedure Act which provides that a peace officer may, without a warrant arrest, any person reasonably suspected of having committed an offence referred to Schedule 1, which includes theft. Reliance was also placed on case law to the effect that in determining the lawfulness of an arrest, object as opposed to motive was important; and further that when a peace officer exercised the discretion to arrest this too would be lawful provided that the decision was within the bounds of rationality. It was submitted on behalf of the Minister that Sergeant Khumbuza had formed the necessary reasonable suspicion based on Mr Lebeta's account of Mrs Emordi removing various items without paying for them, the confirmation by Mr Lebeta



and Mrs Fourie that they had viewed the video footage confirming the above account and the fact that Mrs Emordi had been unable to produce a receipt for any of the items in question.

[49] On behalf of CIVA it was contended that its denial that its employee, Mr Lebeta, had detained and arrested Mrs Emordi should be upheld, inasmuch as her detention was effected by FBS' employees and not by Mr Lebeta, further that, even if this was not found to be the case, Mr Lebeta had held a genuine belief, founded on reasonable grounds that Mrs Emordi had committed theft. It was further contended that any discussion of CIVA's liability should focus on a period of alleged detention and arrest before the police arrived since any possible liability on the part of CIVA ceased when the police arrested Mrs Emordi.

### **The Law**

[50] The first plaintiff's claim is based on the deprivation of her liberty, following a wrongful arrest. LAWSA<sup>1</sup> contains an enlightening discussion on the infringement of the right to *corpus* through the wrongful deprivation of liberty, which consists in the unjustifiable and intentional infliction of a restraint upon a plaintiff's personal freedom.

[51] The defendant or his or her agent must have effected the deprivation, as is the case where a police officer arrests and detains a suspect. *Relyant Trading (Pty) Ltd v Shongwe*<sup>2</sup> concerned an action for damages by a party arrested by the police pursuant to a complaint from a retailer that a customer had fraudulently purchased items. The Court, per Malan AJA, observed that '*to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or*

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<sup>1</sup> Vol 15, 3<sup>rd</sup> Ed, para 100.

<sup>2</sup> [2007] 1 All SA 375 (SCA).

*employee deprived him of his liberty. Generally, where the defendant merely furnishes a police officer with information on the strength on which the latter decides to arrest the plaintiff the defendant does not effect the arrest’.*

[52] The deprivation must be shown to be wrongful; in other words, the Court must be satisfied that liability should ensue in delict. The authors note that deprivation of liberty is inconsistent with the founding constitutional values of freedom and constitutes a serious invasion of one’s constitutional and private law rights. As such, it is *prima facie* unlawful. Public policy dictates that the onus is on the plaintiff to establish when and where the detention occurred and that it is sufficient merely to plead that the detention was unlawful; thereafter the person who caused the deprivation bears the onus to justify the conduct and prove that the conduct was lawful. The enquiry is objective and, if a person is arrested, the defendant’s bona fides or motive does not effect the lawfulness or otherwise of the arrest. The standard is whether there are *‘facts and circumstances sufficient to warrant a prudent man in suspecting that the accused had committed, or was about to commit a criminal offence ...’*.<sup>3</sup>

[53] The premium that the Courts place on personal liberty has been repeatedly stressed. In *Olivier v Minister of Safety and Security and Another*<sup>4</sup> Horn J held:

*‘Personal liberty weighs heavily with the Courts. A balance has to be found between the right to individual liberty on the one hand and the avoidance of unnecessary restriction of the authority of the police in the exercise of their duties on the other hand. There is no doubt that when these factors are evenly balanced, the scales in a democratic constitutional society would fall on the side of individual liberty’*.<sup>5</sup>

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<sup>3</sup> *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

<sup>4</sup> 2008 (2) SACR 387 (WLD).

<sup>5</sup> At page 393 G.

[54] It was pointed out in *Latakomo v Minister of Safety and Security*<sup>6</sup> by a full bench of the Gauteng Division that sec 12(1)(a) and (b) of the Bill of Rights provides that ‘everyone has the right to freedom and security of the person, which includes rights – (a) Not to be deprived of freedom arbitrarily or without just cause; (b) Not to be detained without trial ...’. Whilst sec 39(2) provides that ‘when interpreting any legislation, and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

[55] In the present matter, there is no real distinction to be drawn between the Minister, who relies on the provisions of sec 40(1)(b) of the Criminal Procedure Act as the legal basis upon which its servants were entitled to arrest the plaintiff, and the balance of the defendants who rely on sec 42(1), since for both the key element is a ‘reasonable suspicion’ of the Schedule 1 offence having been committed. The sections read respectively as follows:

‘40. Arrest by peace officer without warrant

(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.

42. Arrest by private person without arrest

(1) Any private person may without warrant arrest any person –

(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1.’

It is common cause that theft is one of the offences referred to in Schedule 1.

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<sup>6</sup> 2016 JDR 1601 (GP).

[56] There are many cases dealing with the circumstances in which police officials may rely on the provisions of sec 40(1)(b) but less so regarding the circumstances in which members of the public may rely on the provisions of sec 42(1)(a), often concerned with the species of theft commonly referred to as shoplifting.

[57] One such latter case is *Damon v Greatermans Store Ltd and Another*.<sup>7</sup> In that matter, the Court discussed the requirements for a party relying on sec 42(1)(a) and also the effect of sec 51 of the Criminal Procedure Act which provides that a person arrested without a warrant must as soon as possible be brought to a police station. The Court held that where a person has been lawfully arrested in terms of sec 42(1)(a), such person must as soon as possible be brought to a police station failing which the person detaining the arrested person makes himself liable to an action for wrongful imprisonment.

[58] A question which the Court faced, was whether that provision entitles a security officer or other employee of a store, when making an arrest, to take the person suspected of theft and arrested back into the store to be questioned about the suspected theft. The Court held that in the case of suspected shoplifting, it is not practicable to arrest the suspected person until he has left the premises without paying for items which he has taken; further, it will not be practicable for the person in charge of security to decide whether a charge should be made unless a subordinate or other employees are entitled to take an arrested person back to the premises before he is handed over to the police. The Court stated as follows:<sup>8</sup>

*‘What is of considerable importance is that it is in the interest of an arrested person himself that he should not be charged without being given an opportunity of offering any explanation or making any representation to a responsible officer.*

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<sup>7</sup> 1984 (4) SA 143 (WLD).

<sup>8</sup> Page 149 B – D.

*It is to his own advantage that this opportunity should be given in the privacy of an office with the minimum possible number of persons present. If all these steps are therefore taken with reasonable expedition and an arrested person is only thereafter brought to a police station, it cannot be contended that he was not brought to a police station as soon as possible within the meaning of the phrase in the section'.*

[59] That reasoning in *Duncan* was followed and quoted with approval in a similar manner, *Susman v Mr Price Ltd*,<sup>9</sup> where Saldulker J dealt with a claim for damages for *inter alia* unlawful detention in circumstances where the plaintiff was detained by store staff on suspicion of having stolen the shoes that she was wearing. The plaintiff was asked to produce a receipt for the shoes but did not, explaining that she had purchased them at another of the defendant's branches the previous day. It was common cause that the plaintiff remained at the store for at least two hours until her husband arrived with the till slip. The police were not called and no prosecution followed. There was a dispute as to whether the plaintiff was held against her will during the period in question or whether she was told that she could leave the store but did not, remaining there while she waited for her husband to bring the proof of purchase. The Court found thus that the plaintiff had failed to establish with cogent evidence that she was unlawfully and wrongfully detained in the store. It stated as follows in general:

*'A store owner cannot be prevented from carrying out an investigation at his store. If he suspects a customer of theft or shoplifting it would be reasonable for him to approach such a customer inside the store or at the exit and to request from the customer, as in this case, to produce proof of purchase for the item that is in the possession of the customer which bears the store owner's price tag. To make such enquiries would be lawful, and to make the enquiries at a convenient place in the privacy of its offices in the store would be reasonable and justified. Such*

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<sup>9</sup> 2011 JDR 0992 (GSJ).

*conduct by a store owner would not be tantamount to unlawfully detaining the customer. In this way customers would be given an opportunity to prove their innocence and to pay for the item in their possession, if it has not already been paid for, whilst they are still inside the store or they can produce the proof of purchase at the door’.*

[60] Turning to the role of the police when relying on sec 40(1)(b), the following was said in *Mabona and Another v Minister of Law and Order*:<sup>10</sup>

*‘The test of whether a suspicion is reasonably entertained within the meaning of sec 40(1)(b) of the Criminal Procedure Act 51 of 1977 is objective: would a reasonable man in the particular defendant’s (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 or offences for which he sought to arrest the plaintiffs (conspiracy to commit robbery or possession of stolen property knowing it had been stolen?) It seems 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. The 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 engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’ [my underlining]*

[61] I pause to observe that there is no reason why the views quoted above regarding the value of personal liberty and the concomitant obligations on a would-be arrestor to

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<sup>10</sup> 1988 (2) SA 654 (SECLD).

critically analyse and assess the quality of information upon which the suspicion which he/she entertains is based, should not apply to lay persons who invoke the provisions of sec 42(1)(a) of the Criminal Procedure Act, regard being had to the fact that the consequences for the arrested person are equally drastic.

[62] Coming back to arrest by police officers, a leading Appellate Division case dealing with the prerequisites for the validity of an arrest without a warrant was *Duncan v Minister of Law and Order*.<sup>11</sup> The Court found it unnecessary to decide the question of the burden of proof in regard to the existence or absence of reasonable grounds for suspicion but assumed in favour of the appellant that the onus rested on the respondent (the arrestor). Van Heerden JA set out the so-called jurisdictional facts which must exist before the power conferred by sec 40(1)(b) of the Act may be invoked, namely:

1. the arrestor must be a peace officer;
2. he/she must entertain a suspicion;
3. it must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act;
4. the suspicion must rest on reasonable grounds.

[63] The Court also discussed the question of, how, once such requirements are satisfied, the peace officer may exercise his discretion as to whether or not to exercise that power. It stated in this regard that an exercise of that discretion would be clearly unlawful if the arrestor knowingly invoked the power to arrest for a purpose not contemplated by the Legislator.

[64] *Duncan* was discussed in the matter of *Minister of Safety and Security v Sekhoto and another*<sup>12</sup> where the Court was principally concerned with a series of cases in the

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<sup>11</sup> 1986 (2) 805 (AD).

<sup>12</sup> 2011 (5) SA 367 (SCA).

High Court in which it had been held that there was a fifth jurisdictional fact, namely, that there must have been no less invasive options available in order to bring the suspect before court. It held that there was nothing in sec 40(1)(b) that could lead to the conclusion that its words contained a hidden fifth jurisdictional fact. It held that, once the required jurisdictional facts were present, a discretion whether or not to arrest arose. Peace officers were entitled to exercise this discretion as they saw fit provided they stayed within the bounds of rationality. This standard was not breached because an officer exercised a discretion in a manner other than that deemed optimal by the Court. The standard was not perfection, or even the optimum judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached.<sup>13</sup> Harms DP stated inter alia as follows: *'whether his decision on that question is rational naturally depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious – not only because the Legislature thought so, a peace officer could seldom be criticised for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest'*. The Court found that the matter could be disposed of on a simple basis that a proper exercise of the arresting officer's discretion was never an issue between the parties since it had not been raised in the pleadings nor ventilated during the hearing. This, I should mention, is not the case in the present matter since, although not specifically pleaded, the issue was fully ventilated in evidence and in argument.

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<sup>13</sup> Paragraphs [28] and [39] at 379 D – E and 382 F.



[65] Finally, *Lapane v Minister of Police*<sup>14</sup> also concerned a damages claim arising out of an unlawful arrest and detention, and prosecution. In holding the Minister of Police liable, the Court found that the arresting officer had not considered the reasonableness of the suspect's explanation and had not tried to evaluate its authenticity. It found that the arresting officer had failed to show that he had reasonable grounds for suspicion justifying arrest and had acted over-hastily and imprudently. In this regard, it stated as follows: *'The Case law is clear that, in arresting, it is not only the arresting officer's mindset and his objective he must also look at the explanations given by the arrestee. He must strike a balance between the two'*.<sup>15</sup> It quoted with approval from *Fose v Minister of Safety and Security*<sup>16</sup> where the Court held that there was a constitutional duty on the police officers and public prosecutor(s) handling the case to ascertain the reasons for any further detention of the suspect and the prosecutor and to place such reasons or lack thereof before Court.

### **Evaluation of the evidence**

[66] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*<sup>17</sup> Nienaber JA stated as follows regarding the assessment of disputes between factual witnesses:

*'[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the courts finding on the credibility of a particular witness will depend upon its impression about the veracity of the witness. ' That in turn will depend on a variety of subsidiary factors, not necessarily*

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<sup>14</sup> 2015 (2) SACR 138 (LT).

<sup>15</sup> Para 24 page 142.

<sup>16</sup> 1997 (3) SA 786 (CC).

<sup>17</sup> 2003 (1) SA 11 (SCA).

*in order of importance, such as, - (i) the witness's candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf or with established facts or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail'.*

[67] Mrs Emordi was by no means an entirely satisfactory or reliable witness. She testified through an interpreter when all the indications were that she was fluent in English. She came across as rather dogmatic and as tending to tailor her evidence to suit the exigencies of the moment. She often did not give straightforward answers, instead offering longwinded replies and repeating her evidence time after time. There were improbabilities and contradictions in her evidence and she also tended to exaggerate her evidence in order to favour her own case. Some examples will suffice. She testified that her husband was detained in the security office but this at best was an exaggeration since he was free to leave at any stage. She testified that neither she nor her husband had ever

struck any of the Shoprite employees or security guards. I find this evidence unconvincing. Both Mr Lebeta and Mr Canda testified that both plaintiffs behaved in a volatile manner and physically lashed out at security staff on occasion. Mrs Emordi came across as an emotional and somewhat fiery person, an impression which seems to have been borne out by her conduct on the day in question after her detention.

[68] Mrs Emordi's cross-examination based on a comparison of her evidence with what she had told a psychologist, Ms Pam Tudin, some three months after the incident, revealed significant contradictions of, or variations from her evidence in Court. To mention some of the more important discrepancies emerging from that report: Mrs Emordi told Ms Tudin she had not obtained a Shoprite carrier bag whereas in her evidence she insisted she had; she told her she had the Shoprite receipt when she was apprehended but in her evidence said she had to run and fetch it from the cashier; she spoke of being photographed in the security office but made no mention of this in her evidence; she reported how a security guard had stepped on her child but again did not testify about this in her evidence; she spoke of the police telling her at the police station that they knew she was innocent and that they had only arrested her to prevent a scene at Shoprite but disavowed such evidence when she testified.

[69] It must be said, nonetheless, that much, indeed the core, of what is recorded in Ms Tudin's report as having emanated from Mrs Emordi was indeed the version which she recounted before Court, namely, that she had bought oranges, potatoes and tomato paste in Parow Mark, discarded the receipt, proceeded to Shoprite and there purchased yoghurt and three packets of noodles. She is also recorded as having explained how she begged to be allowed to go to Parow Mark to fetch the receipt for the fruit and vegetables.

[70] Mrs Emordi's evidence therefore can definitely not be accepted wholesale but nor can it be simply rejected; rather it needs to be looked at critically in relation to other proven facts and the probabilities.

[71] The other central witness, and whose version is in direct conflict with Mrs Emordi, is Mr Lebeta. He also testified through an interpreter, speaking Sotho. As a result, it was difficult to gain an impression of his language and communication skills in any language other than Sotho but by his own account he spoke '*diluted*' English and Xhosa. Mr Lebeta's evidence falls very much into two halves. He gave his evidence in chief in a very confident and forthright manner creating a strong impression of someone who clearly remembered the events of the day and who was able to recount them with precision and certainty. By the time his cross examination had concluded, however, a very different picture had emerged.

[72] In essence, Mr Lebeta's evidence in chief was that he had noticed the first plaintiff when she arrived at the store pushing a pram which had aroused his suspicion and as a result of which, he had literally followed her around the store, never losing sight of her and had seen exactly what she had done. This included her taking fruit and vegetables without paying for them as well as removing the juice and giving it to her child, later disposing of the empty container in a fridge. He testified that Mrs Emordi had walked straight past the tills and had purchased or removed no other items than those which I have just mentioned. To a lesser or greater degree all these elements were in doubt by the time Mr Lebeta concluded his evidence. Firstly, Mrs Emordi insisted that she had not come into the store with a pram or a push chair and no other witness spoke of seeing a pram or a push chair at any time during Mrs Emordi's detention in the shop for a period of some two and a half hours. Secondly, Mr Lebeta's evidence that he never lost sight of

Mrs Emordi and that she walked straight past the tills is irreconcilable with objective evidence that Mrs Emordi purchased the noodles and yoghurt in Shoprite. The significance of this error cannot be understated, particularly in light of the certainty of Mr Lebeta's evidence, at least during his examination in chief.

[73] By the conclusion of his evidence, Mr Lebeta's earlier certainty had been replaced by a curious mixture of his conceding that his recollection of events was not that clear coupled with a stubborn clinging to his earlier evidence. A few examples will suffice. He was asked by the Court whether if Mrs Emordi had bought groceries from Shoprite would he have seen this and his answer was that he '*could*' have seen it. He explained that when he went to the main door, presumably in order to alert the security guard, he might have missed something as Mrs Emordi was approaching the tills but then said that this had been a period of only some five seconds. Reminded that there was objective evidence that she had bought yoghurt and noodles from Shoprite his response was telling, namely that the incident happened '*quite some time ago so I can't, I don't remember*'. Pressed, Mr Lebeta then said it was not a case of him not having seen her purchase those things but a case of him not remembering this. The follow-up question was how good his memory of the incident was if he couldn't remember Mrs Emordi selecting other groceries and paying for them, to which no satisfactory answer was forthcoming from the witness. Mr Lebeta volunteered that what made him remember the incident was because it had been the main reason for him being removed from the Parow store, particularly in that Mrs Emordi and her husband '*and the family members wanted to assault me, because I was unsafe there*'. Told that there was evidence that Mrs Emordi must have had a Parow Mark bag, the witness insisted that she had not and continued to maintain that she had concealed items in a pram. Asked what effect the incident had on him he replied that

it did not sit well at all with him. He had to be escorted from the store that evening by a security company and the crowd that had gathered outside wanted to attack the vehicle in which he was removed. Asked whether the entire incident could have affected his memory, his reply that he had been scared but other than that had felt normal. Nonetheless, I consider it quite possible that the emotionally charged events of the day in question and their consequences for Mr Lebeta may well have played a negative role in his recollection of the actual alleged shoplifting incident.

[74] Another major factor impacting on Mr Lebeta's credibility were the previous statements he made. It appears very likely that Mr Lebeta made another much more detailed affidavit on or about 26 August 2016, which was discovered by his employer, CIVA. Mr Lebeta testified that it was not his statement but it appears to bear his signature and, absent an explanation from CIVA, the probabilities strongly suggest that it was indeed his statement. A reading of that statement gives every indication that it was indeed made by him and it reveals discrepancies with his *viva voce* evidence. I regard as significant Mr Lebeta's insistence that the statement was a forgery which in no way emanated from him, since it demonstrated his penchant for stubbornly adhering to evidence even when clearly shown to be untenable or unlikely.

[75] There are also questions regarding Mr Lebeta's impartiality. His role as the floorwalker made him the central figure in the case against Mrs Emordi and it was on the basis of his allegations that she was arrested. By the time, he gave evidence five years later it would have been difficult for him to concede that he had been mistaken in what he saw or that he had been instrumental in an unwarranted arrest or detention.

[76] There are thus serious difficulties in accepting Mr Lebeta's version of events. As

mentioned, although he initially appears to be an impressive witness with a clear recollection of the relatively simple tale that he told, under cross-examination his reliability and his credibility were seriously compromised. Although I did not gain the clear impression that he was being deliberately untruthful or trying to mislead the Court, Mr Lebeta's over-confident manner cannot obscure the fact that he was essentially an unreliable witness, seemingly unaware of his own shortcomings in this regard. His evidence must likewise be approached with caution and tested against objective evidence and the probabilities.

### **The video footage evidence**

[77] This brings me to the matter of the video evidence. Had it been preserved it may well have resolved many of the disputes of fact in this matter. The reasons given for the video footage not being saved reveal a lamentable state of affairs at Shoprite. It appears that between them, Shoprite and CIVA do not go to the trouble of preserving allegedly incriminating video footage of alleged shoplifters even where they have been charged with theft. Instead, Shoprite waits for the police to ask for the footage with a default position that footage is deleted after 30 days. The carelessness and short-sightedness of this practice is to be deprecated.

[78] The absence of the video footage gives rise to a dilemma in that both Mr Lebeta and Mrs Fourie referred to it repeatedly and in effect sought to use it to corroborate their own evidence. The question is what weight is to be given to such evidence when the video footage is not only lost but was never viewed by Mrs Emordi. Mr Lebeta testified that when he looked at the video footage it confirmed in its entirety his evidence of what Mrs Emordi did and did not do. Mrs Fourie testified that the footage confirmed Mr Lebeta's account of Mrs Emordi removing fruit and vegetables without having them

weighed. She stated, however, she could not recall that it showed anything relating to the Squish juice, explaining that the video cameras focussed on certain '*hotspots*' of which the baby food section was not one. This incidentally casts doubt on what Mr Lebeta testified he saw on the video footage. Without the actual video footage or at the very least a clear and contemporaneous account of what it showed, little weight can be attached to any such evidence. As was put to counsel in argument, experience shows that video footage taken by security cameras is often grainy, shot from a distance and unclear. Different persons looking at the same footage can arrive at different conclusions as to what it shows, since viewing footage can also involve a process of drawing inferences or conclusions. In this regard, it must be remembered that Mrs Fourie was viewing the footage against the background of Mr Lebeta having told her that Mrs Emordi had removed fruit and vegetables without weighing it or paying for it. It is possible that Mrs Fourie saw the first plaintiff in the fruit and vegetables section, possibly even handling the produce but not selecting any items, or she could have mistaken someone else for Mrs Emordi.

[79] I initially considered whether, from a policy point of view, any reliance on the video footage by the witnesses should be completely excluded bearing in mind that it had not been preserved nor seen (and recollected) by any independent party including, most importantly, Mrs Emordi. This, however, I consider to be too blunt an approach. Evidence that something was allegedly seen on video footage which is no longer available can, I consider, be taken into account by a Court depending on the circumstances, but recognising that such evidence cannot be meaningfully tested. In other words, the weight to be given to such evidence will vary again depending on the circumstances. In the present circumstances, I consider that the weight to be given to the



video footage, to the extent that it is relied on by Mr Lebeta and Mrs Fourie, can be no more than marginal given that Shoprite negligently failed to preserve the footage, the fact it was not seen by the party against whom it is invoked and its potentially ambiguous nature.

### **Mr Mfundo Canda**

[80] Mr Canda was a diffident witness who gave his evidence somewhat hesitantly. In evaluating Mr Canda's evidence, two features stood out. Firstly, he too did not have a very clear recollection of what took place that day relating to Mrs Emordi and secondly, he appeared to have played no more than a supporting role to Mr Lebeta. Overall, the impression I gained was that although he sincerely tried to give his best recollection, Mr Canda was a rather mediocre witness with a limited recall of the day's events.

### **Mrs Fourie**

[81] Mrs Fourie testified in a quiet and calm manner but her evidence implicating Mrs Emordi in shoplifting was to a large extent reliant on the version given to her by Mr Lebeta. Her evidence of seeing the video footage has very limited weight for the reasons already given. Mrs Fourie testified that she saw the plaintiff take the fruit and vegetables on the video footage. Even on its own terms, there are difficulties with this evidence. Firstly, it does not accord with the objective evidence suggesting that on the probabilities Mrs Emordi did not take any potatoes or oranges from the Shoprite store; secondly it is subject to the reservations I expressed earlier, namely, including that what a witness 'sees' is often informed by a prior account of what the footage will show. Mrs Fourie's evidence was that she had extremely limited interaction with Mrs Emordi in semi-chaotic circumstances. It appears that her primary concern was the commotion caused by the crowd of people demanding Mrs Emordi's release. Mrs Fourie stated several times that

the shoplifting incident was a minor occurrence and that she had other business that day and could not simply concentrate on a shoplifting incident. This was reflected in the perfunctory manner she dealt with the entire incident. She conceded that her memory could be faulty, pointing out that the incident happened five years previously. Overall, I consider Mrs Fourie to be an honest witness but having a limited view of events because of the secondary role she played and her disinterest in the incident on the day.

### **Sergeant Nceba Khumbuza**

[82] There was agreement virtually across the board that Sergeant Khumbuza was a particularly poor witness with a very limited recall of the events of the day. The discrepancies between his evidence and that of other witnesses were numerous. He testified that he found Mrs Emordi already handcuffed upon his arrival when all the other evidence suggested that this was not the case. He stated categorically that he had not viewed the video footage of the incident when two other witnesses said that the police had viewed such footage. He testified in chief that Mrs Emordi never gave him any explanation in response to the allegation that she had stolen items from the shop but virtually in the same breath conceded that he had not asked her for an explanation at any stage. He was not able to recall whether there was a crowd outside the store agitating for the plaintiff's release when this was something that made a strong impression on every other witness. He knew nothing about Mrs Emordi having bought noodles and yoghurt at Shoprite. Sergeant Khumbuza said he took Mr Lebete's statement downstairs whereas two other primary witnesses say it was taken upstairs in the boardroom. He himself agreed that his recollection of events was not good and in cross-examination came to doubt much of his own evidence in chief. Overall, it is clear that where Sergeant Khumbuza's evidence conflicts with credible evidence given by other witnesses the latter

is to be preferred.

### **Evaluation of the evidence**

[83] A major difficulty in determining the factual disputes in the evidence, is that the two main figures, Mrs Emordi and Mr Lebeta, were unreliable witnesses. A useful starting point to resolving these disputes is to identify what it is common cause and, in so doing, to use, as far as possible, objective or real evidence. Much of what took place in the Shoprite store on the afternoon and evening of 19 October 2015 is common cause but important parts thereof are the subject of conflicting versions. A determination of whether the first plaintiff was unlawfully arrested and detained requires the Court to establish, taking into account the credibility of the various witnesses and the probabilities, what happened that day. It is common cause that Mrs Emordi was asked to accompany the security guard and the floorwalker to the security office shortly before she left the store. The Shoprite till slip which she produced relating to her purchases that afternoon reflects the time of purchase as being 16h49. All the evidence suggests that the police formally arrested her at approximately 19h30 that evening. It is thus safe to conclude that Mrs Emordi was detained at the store for slightly over two and a half hours before being taken to Parow police cells pursuant to her arrest by the police.

[84] It is also common cause that the first plaintiff was found with oranges and potatoes in roller bags for which she could produce no till slip. Nor could she produce a till slip for the juice which, according to her evidence, her child had brought into Shoprite but which, according to Mr Lebeta's evidence, she had removed from a shelf and not paid for it. Mrs Emordi stated that when she was detained she also had items which she had purchased from Shoprite, namely, a pack of mini yoghurts and several packets of noodles. She testified that she also had with her a tin of Gilda tomato paste purchased

from Parow Mark.

[85] All of the defendants' witnesses testified either that Mrs Emordi had no items in her possession other than the fresh produce or they professed no knowledge of any other items. The issue is, however, illuminated by objective evidence, namely, the copy of the Shoprite receipt which Mrs Emordi was able to produce (trial bundle 31). It reflects a purchase of three packets of noodles and a packet of mini yoghurt for a total of R19.92 having been made at 16h49. There is further evidence of these purchases in the form of Mr Lebeta's initial statement to the police where he was recorded as saying '*she proceeded to the till points and she paid the yoghurt and the other stuff*'.

[86] Mrs Emordi insisted that she had purchased the fresh produce from Parow Mark and at the trial produced a copy of a till slip purporting to confirm this fact. Her evidence that upon her release from custody she had immediately gone to Parow Mark to obtain a copy of the receipt, was not seriously disputed by any of the defendants. Furthermore, her evidence in this regard was, on its own terms, convincing. She testified that even before the Parow Mark manager would search for a copy of the receipt on the system he or she first satisfied himself on their CCTV footage that Mrs Emordi had been in the shop at the time and on the day in question. Thereafter, the receipt (trial bundle 29) was produced. It reflects that at 16h27 on 19 October 2015 someone had purchased items to the value of R20.40 from Parow Mark comprising a tin of Gilda tomato paste (R5.95), potatoes (R10.59) and oranges (R3.94) totalling R20.40. It is noticeable that the values of the oranges and potatoes purchased were much the same as those allegedly stolen by Mrs Emordi from Parow Shoprite (R3.94 versus R4.61 and R9.30 versus R10.59). Mrs Emordi was able to explain a voiding transaction on the Parow Mark receipt, namely, that after the potatoes had first been weighed at the till she had decided to purchase fewer,

hence the deduction of R2.27. She testified, unchallenged, that at Parow Mark fresh produce is weighed at the main tills and hence any roller bags which she used for such produce at Parow Mark would not have had a sticker reflecting its price or weight. The time stamp on the Parow Mark receipt is some 22 minutes before she purchased the items at Shoprite. This accords with her evidence that it was a walk of three to five minutes from Parow Mark to Shoprite, bearing in mind that her daughter walked at a toddler's pace and that she then went into the Shoprite store to select various items before proceeding to the till. As mentioned, Mrs Emordi's evidence that she purchased the items in question from Parow Mark was not seriously disputed by any defendant. Similarly, although not formally or informally admitted, the till slip's authenticity was not disputed by any defendant. Somewhat disconcerting in this regard, however, was the tendency of the defendants' counsel, save for Mr Van Reenen on behalf of Shoprite, to completely disregard this vital piece of evidence in argument.

[87] Another significant aspect of the Parow Mark receipt is that it revealed that the purchaser had also purchased a carrier bag at a cost of 60 cents. This ties in with Mrs Emordi's evidence that she left Parow Mark with the items which she had purchased in a Parow Mark carrier bag. Her evidence went further inasmuch as she produced at trial what she testified was the very same carrier bag, Exhibit B, and to which was still attached a faded Shoprite security seal in the form of a piece of tape. That seal was identified as a Shoprite seal by Mr Canda. In my view, this evidence as a whole, strongly supports Mrs Emordi's evidence of having bought potatoes and oranges from Parow Mark some 22 minutes before making her purchases at Shoprite.

[88] The central issue in this matter is whether there was a reasonable suspicion that Mrs Emordi stole the fresh produce and the juice from Shoprite. This issue is intertwined

with the issue of what she actually took or did in the store before she was apprehended and in this regard there are two conflicting versions which require assessment: Mrs Emordi's on the one hand and, on the other, that of Mr Lebeta, supported to a lesser or greater extent by the evidence of Mrs Fourie and Mr Canda. Before deciding whether Mrs Emordi's arrest and detention were justified, it is necessary in my view to determine whether she stole the fruit and vegetables and, if not, whether she asked to be allowed to fetch a receipt of Parow Mark. Answering these questions is a preliminary step to determining the primary issue of whether any defendant entertained a reasonable suspicion that Mrs Emordi had stolen items.

[89] Having now established, on the probabilities, what items Mrs Emordi purchased on the afternoon in question is a first step in determining whether she stole items from the Shoprite store. In this latter regard, we primarily have the evidence of Mr Lebeta and Mrs Fourie on the one hand and that of Mrs Emordi on the other. Mrs Emordi insisted that she had brought the oranges and potatoes which she had bought at Parow Mark into the Shoprite store whilst Mr Lebeta, supported to a limited extent by the evidence of Mrs Fourie, testified that she took potatoes and oranges from the fruit and vegetables section, placed them in roller bags and proceeded to leave the store without paying for them.

[90] There are significant problems with the version given by Mr Lebeta. Its starting point is that he was suspicious of Mrs Emordi from the outset when she entered the store pushing a pram, according to him often the *modus operandi* of shoplifters. There was no evidence at all to support Mr Lebeta's version that Mrs Emordi was pushing a pram, an allegation she strongly denied. Mr Canda gave no such evidence and nor did Mrs Fourie. In the brief statement made to the police on the night of the arrest, Mr Lebeta makes no

mention of Mrs Emordi pushing a pram. In his August 2016 statement, he talks of seeing Mrs Emordi with a baby in her arms i.e. making no mention of a pram. On the probabilities, I find Mrs Emordi simply brought in her child without any pram or push chair. When testifying, initially at least, Mr Lebeta denied that Mrs Emordi made any purchases at all in Shoprite. In his police statement, however, he said that she then proceeded to the till point '*and she paid the yoghurt and the other stuff*' – a clear contradiction of his evidence before Court. As I have found, Mrs Emordi clearly bought the items from Shoprite reflected on its till slip. These aspects call into serious doubt Mr Lebeta's powers of observation or recollection since they were important elements of his version, namely, the pram and Mrs Emordi's failure to purchase any items at all. They also call into question Mr Lebeta's evidence that he observed her throughout whilst she was in the store since, if he had, he would have seen her select the yoghurt and noodles and pay for them at a till.

[91] Neither Mr Lebeta, Mr Canda nor Mrs Fourie were prepared to concede that Mrs Emordi brought a Parow Mark bag into the store carrying potatoes, oranges and a can of tomato paste. This however was her evidence and she never deviated from it. I have already found that she purchased these items from Parow Mark nearly 20 minutes before and also a Parow Mark carrier bag. On the overwhelming probabilities, she brought those items into the store in the same Parow Mark bag. Mrs Emordi testified that when she entered the store that very bag was sealed by a security guard. The exhibit Parow Mark carrier bag, Exhibit B, which she produced had such a seal on it. In my view on the probabilities, she indeed brought that bag into the store after having it sealed.

[92] Mr Lebeta insisted throughout that he observed Mrs Emordi take oranges and potatoes from the fruit and vegetables section, place them in roller bags and leave without

paying for them. On the objective and accepted evidence, this is improbable. There was nothing on, or about, the roller bags to indicate that they were taken from the Shoprite store. Mrs Emordi's evidence was that one purchases fruit and vegetables from Parow Mark by placing it in similar roller bags but that these bags were not marked at that store with price stickers (as opposed to the practice in Shoprite), which thus ties in with her evidence of what was found in her possession in the Shoprite store. The question one needs must ask is why would Mrs Emordi steal or attempt to steal items from Shoprite (potatoes and oranges) when she had just purchased them from Parow Mark. It is noteworthy that at Parow Mark she bought R10.95 worth of potatoes and R3.94 worth of oranges. When compared with the Shoprite training mode till slip used by Mr Lebeta to value these items, the values of the potatoes and oranges were very similar to those on the Parow Mark till slip. This supports the notion that what he had weighed and priced were the very potatoes and oranges which Mrs Emordi had already bought from Parow Mark and brought into Shoprite.

[93] Having regard to this evidence as a whole it seems most unlikely that Mrs Emordi stole or attempted to steal fruit and vegetables from Shoprite and Mr Lebeta's evidence to this effect must be rejected as false or mistaken. His evidence and that of Mrs Fourie, that this is what was visible on the video footage cannot be accepted. That evidence can carry little if any weight for the reasons I have given.

[94] Mrs Emordi testified that she purchased a Shoprite bag and placed her purchases from that store in it. On the probabilities, it is doubtful whether this was so since the till slip reveals no proof of purchase of a Shoprite carrier bag. What may well have happened, and which is supported by the probabilities, is that she placed her purchases from Shoprite in the Parow Mark carrier bag, in the process probably breaking the seal to



do so. When she was apprehended by Mr Lebeta and store's security guard/s she would have had a Parow Mark carrier bag and, inside it, yoghurt, noodles, a tin of tomato paste and the potatoes and oranges in roller bags. According to Mrs Emordi's evidence, she was eventually able to obtain the Shoprite receipt by dashing back to the Shoprite cashier and obtaining it there. This latter fact was disputed both by Mr Lebeta and Mr Canda who stated that once she was in the security room she was not allowed to leave. Whatever the case may be, one way or the other she must have produced the Shoprite receipt, firstly because she was able to produce a copy in evidence and, secondly, because if she had not produced that receipt to Shoprite staff then she would have been charged with theft of the yoghurt and the noodles, which did not occur.

[95] Looking at the picture as a whole what may well have happened is that when the contents of Mrs Emordi's Parow Mark shopping bag were examined, apart from the items purchased from Shoprite (yoghurt and noodles), a can of tomato paste and the potatoes and oranges, unpriced and unweighed and in roller bags, were found and Mrs Emordi could produce no till slip for such items. It was then incorrectly assumed that she had stolen the fruit and vegetables from Shoprite. Mrs Emordi was not charged with theft of the tomato paste because Shoprite staff must have realised that the store did not stock that particular product. It was in fact Mrs Emordi's evidence that, that particular tomato paste, her preferred choice, was not stocked by Shoprite. Based principally on Mr Lebeta's allegations however, Mrs Emordi was treated as having stolen the fruit and vegetables as well as the Squish juice from the Shoprite store.

[96] I have found that, on the probabilities, Mrs Emordi entered Shoprite with potatoes and oranges in roller bags and did not steal these items from Shoprite. A more difficult question is the provenance of the Squish juice. It is common cause that Mrs Emordi's

daughter had such juice in her hand whilst she was in the Shoprite store that day. In Mrs Emordi's account, she had it and gave it to the child at home on the day in question and her child still had it when she entered Shoprite. On Mr Lebeta's version, he saw Mrs Emordi take the juice from a shelf in Shoprite, give it to her child and then dispose of the empty container before leaving the store. Unlike the potatoes and oranges there is no till slip which tilts the probabilities in favour of Mrs Emordi's version. According to Mr Lebeta, he salvaged the juice container and used it to produce the training mode till slip. Other evidence was that if the juice had been bought anywhere else than at a Shoprite outlet it would not have registered on the training mode slip. This is not conclusive proof of its theft, however, since Mrs Emordi could have purchased the juice from that Shoprite at another time or from another Shoprite store.

[97] There are difficulties both with Mr Lebeta's version and that of Mrs Emordi regarding the juice. As previously mentioned, Mr Lebeta's evidence that the theft of the juice was recorded on the video footage was contradicted by Mrs Fourie's evidence who said that she saw nothing on the footage relating to a juice and that the store cameras do not cover that particular aisle. In his two statements, Mr Lebeta reversed the sequence in which Mrs Emordi allegedly stole the juice and the fresh produce. Mr Canda's evidence was that Mr Lebeta asked Mrs Emordi where the empty juice container was, but this was denied by Mr Lebeta. Mrs Emordi testified that the juice was marked with some sort of seal by the same security guard who sealed the Parow Mark bag when she entered the store. However, she only made mention of any seal being placed on the juice in cross-examination. That evidence raises the question why any seal was not identified by any security guard or by Mr Lebeta when handling the juice container. When questioned about this, Mrs Emordi's answers were confused and unsatisfactory.

[98] Having regard to all these factors, I am unable to find that the probabilities favour one version of where the Squish juice came from. Mrs Emordi's version that she brought it into the store is problematic and relies solely upon her testimony. On the other hand, however, Mr Lebeta's version of its theft is also problematic and similarly relies solely upon his testimony. Neither Mrs Emordi nor Mr Lebeta were witnesses whose evidence can safely be accepted where it is unsupported by other credible evidence or by the probabilities. In the result, the issue must be determined on the basis of the incidence of the onus which in this instance rests upon the defendant. I find then that the defendants failed to prove that Mrs Emordi stole the juice from the store. However, even if I am wrong in so finding I do not believe that this affects the overall outcome of the matter for reasons which will become apparent.

[99] The next issue to be determined is whether, as Mrs Emordi testified, she pleaded to be allowed to go and get the Parow Mark receipt from that store. Here again there is a dispute between her evidence and that of Mr Lebeta. In my view, on the probabilities Mrs Emordi would have made such a request for the reasons that follow. As I have found, she had just purchased these items from Parow Mark and on being apprehended would have realised that she was in trouble, being accused of theft of these items from Shoprite. In those circumstances, the natural thing would be for her to explain that she had bought the items from Parow Mark and ask to be allowed to fetch the receipt. Mrs Emordi gave quite detailed evidence of how she even offered to leave her child at Shoprite whilst she fetched the receipt and, when this request was refused, how she requested that she be accompanied by a security guard or guards to Parow Mark which was only a short distance away. Support for Mrs Emordi's evidence is to be found in Mr Canda's evidence. Asked by Mrs Emordi's counsel whether he ever heard her say that

she got the potatoes and oranges at Parow Mark, his reply was that she had said this in the security office. This was a significant piece of evidence, coming from a witness who was not in Mrs Emordi's camp.

[100] On the probabilities, I find that Mrs Emordi bought oranges and potatoes from the Parow Mark store and brought them into the Shoprite store, 10 to 15 minutes later in roller bags, contained in a Parow Mark carrier bag. That bag was sealed but after purchasing yoghurt and noodles, she probably broke the seal and placed those items into the Parow Mark bag. When she was apprehended by Mr Canda and Mr Lebeta there was no price sticker on either roller bag and nor did Mrs Emordi have any receipt to account for them. She then pleaded, to no avail, to be allowed to fetch the receipt for the fresh produce from Parow Mark. As far as the Squish juice is concerned, it is not possible to determine whether on the probabilities this was indeed stolen or taken by Mrs Emordi from a shelf in the shop and not paid for as described by Mr Lebeta, or whether she brought it into the shop as she testified.

[101] This brings me to the core question of whether the defendants '*reasonably suspected*' Mrs Emordi of having committed the offence of theft. The starting point of the enquiry is Mr Lebeta's evidence that he observed Mrs Emordi place the fresh produce items in roller bags and leave the Shoprite store without paying for them or the juice and that when asked for a till slip evidencing their purchase, she was unable to do so. I have found, on the probabilities, that the fruit and vegetables were purchased by Mrs Emordi from Parow Mark and that the position is unclear as to whether she attempted to steal the juice from the Shoprite store. It follows that Mr Lebeta's evidence in regard to the fresh produce having been stolen was either mistaken or fabricated. If the evidence was fabricated it could never found a reasonable suspicion of theft or attempted theft. If that

evidence was, however, only mistaken this does still not assist Mr Lebeta, or Mr Canda for that matter, since critically, any suspicion of theft could have been dispelled by giving Mrs Emordi an opportunity to show that she had not stolen the items. According to Mrs Emordi she explained to those who apprehended her that she bought the fruit and vegetables items from Parow Mark but had left the slip there; further that she asked to be allowed to go to Parow Mark and retrieve the till slip (or perhaps a duplicate or other proof of purchase). As I have indicated, I accept her evidence on this aspect. In my view, furthermore, Mrs Emordi's request was entirely reasonable. Her evidence that Parow Mark was only a few minutes' walk away was not disputed and it would have been a matter of ease for a security guard (or Mr Lebeta) to have accompanied her to Parow Mark to allow her to retrieve the till slip, or even simply get a cashier's confirmation that she had made the purchases, and thereby prove her innocence. It is noteworthy that Mrs Emordi's even offered to leave her infant child behind. At the very least her plea to be permitted to go back to Parow Mark, together with the fact that she had a Parow Mark bag containing the tomato paste which Shoprite did not stock should have brought home to Mr Lebeta and the security guards that Mrs Emordi's explanation and request could not simply be dismissed out of hand.

[102] It is common cause that Mrs Emordi was not free to leave the Shoprite store from the time that she was approached by Mr Lebeta and the security guards and asked to go to the security office. In keeping with the approach in *Olivier*, *Susman* and the *Damon* cases, Shoprite (and its contractors) were entitled an opportunity to investigate the basis for their suspicion of theft. However, even by their own protocols, this should have involved taking Mrs Emordi to a place of privacy, such as the boardroom referred to, or Mrs Fourie's office, in order to explain to her the basis of their suspicions and afford her

an opportunity to respond thereto. Furthermore, Mrs Emordi and her husband's request to view the video footage which allegedly implicated her should, in my view, have been acceded to. However, none of this was done, and what action those defendants took seems in my view to fall well below what could reasonably be expected of a storekeeper and security officials in their position.

[103] Mr Lebeta's enquiries of and/or discussion with Mrs Emordi was superficial and unsatisfactory. It must be borne in mind that Mr Lebeta was a floorwalker, apparently untrained in enquiries or interactions with customers suspected of shoplifting. He also had communication difficulties, the only language in which he was fluent being Sotho. It seems Mr Lebeta simply asked Mrs Emordi for the slip and when she could not produce this he reported to Mrs Fourie that a person had taken items and could produce no till slip for them. Even his evidence in this regard is questionable since it is clear that Mrs Emordi had purchased certain items from Shoprite, namely the yoghurt and the noodles, had paid for them and that the till slip had been produced. Yet Mr Lebeta's evidence was that he had not even seen the noodles and the yoghurt, let alone the till slip. If he had enquired more carefully it would have become evident to him that Mrs Emordi had not simply walked past the tills. Then there is the matter of the Parow Mark bag. I have found that, when stopped, Mrs Emordi was in possession of Parow Mark bag and which had a Shoprite seal on it. This alone should have alerted Mr Lebeta or the security guards to the distinct possibility that she could have purchased some or all of the items, which she was suspected of having stolen from Parow Mark. In turn this would have lent weight to her request to be allowed to retrieve the till slip from Parow Mark. None of this appeared to feature in Mr Lebeta's thinking or that of the security guards. He simply reported his suspicions (or allegations) to Mrs Fourie. Unfortunately, this did not result in a more

Careful consideration of the matter by her either.

[104] Mrs Fourie's interaction with Mrs Emordi was very limited to say the least and took place in the security office where the circumstances were far from ideal. That office or space opened, through a mesh gate, onto a public thoroughfare and it appears that a crowd comprising people of Nigerian origin gathered there noisily demanding Mrs Emordi's release. It was in these circumstances, Mrs Fourie testified, that she asked Mrs Emordi '*what was going on?*' and did not receive an answer. This intervention or general question could hardly substitute for Mrs Fourie taking Mrs Emordi to an office or private space and holding a discussion with her in order to assess any suspicion of theft in the light of Mrs Emordi's explanation. A further major shortcoming in the manner in which the matter was dealt with was the failure to allow Mrs Emordi to view the video footage which, would have afforded her an opportunity to correct any incorrect impression it may have created. Nor, it seems, did Mrs Fourie, or anyone for that matter, meaningfully interact with Mrs Emordi's husband, who also requested to view the video footage.

[105] Importantly, such dignified and interactive treatment of a suspected shoplifter is precisely what CIVA/Shoprite's own protocol provided for when dealing with the arrest of a person with a child, namely, that such persons are taken to the manager's office (who is to be informed immediately); such person/s must be out of sight of the public and asked if they have a medical condition that needs immediate medical attention. This was not done. Instead, Mrs Emordi and her infant child were kept in an open area for some two and a half hours in full visibility of staff coming and going from the security office and the crowd of persons at the gate calling for her release. The manner in which Shoprite, and the security guards employed by FBS, treated Mrs Emordi constituted a breach of her right to personal liberty and fell well short of the standards set *inter alia* in

*Oliver, Susman and Damon* referred to earlier.

[106] Essentially, Mrs Fourie relied on no more than Mr Lebeta's allegations that he had seen Mrs Emordi take the items in question, her own viewing of the video footage and her addressing a perfunctory query remark to Mrs Emordi. The video footage is of little assistance to Shoprite for the reasons already discussed. Mr Lebeta's observations were, at the least, inaccurate, and his enquiry, virtually non-existent. In the absence of a proper conversation with Mrs Emordi, and given the superficiality of her own investigation of the facts, Mrs Fourie was not even aware that Mrs Emordi claimed to be able to produce a receipt for the fresh produce (if allowed to go back to Parow Mark) and also claimed to have brought the juice into the store. It was Mrs Fourie who took the key decision to call the police. From this point on Mrs Emordi's detention was no longer for the purpose of enquiries or investigation. It follows that if the basis for Mrs Fourie's suspicions of theft was not reasonable at that stage, Mrs Emordi's detention from that point on was not lawful.

[107] In my view, by that stage Mrs Fourie's suspicions were not reasonable, principally because they had not been properly assessed. Furthermore, the manner in which the suspicion of theft on the part of Mrs Emordi was evaluated fell well short of the standard required of a reasonable person in the position of the first, second and third defendants, as set out *inter alia* in *Mabona* and *Lapane* referred to above. Had Mrs Emordi been timeously afforded a proper opportunity to offer an explanation it is likely that she would have been able to show that she had purchased the fruit and vegetables from Parow Mark or that she should at least be given a chance to prove this. This would, at worst for Mrs Emordi, have left Mrs Fourie with a suspicion that Mrs Emordi had taken the juice without paying for it but without any video footage confirming or



supporting the suspicion. It is speculative to consider what might have followed had the matter of the fruit and vegetables been cleared up leaving only the suspicion of the theft of the juice and this is a materially different case to the one made by Shoprite. Mrs Fourie's evidence was that in such circumstances the person involved is offered an opportunity to pay for the items. Whatever the case I regard it as highly unlikely that Mrs Fourie would have laid a charge of theft against Mrs Emordi in those circumstances or summonsed the police. In the circumstances, it seems probable that, had there been a proper scrutiny of the allegations of theft involving Mrs Emordi she would not have been detained pending the arrival of the police. I therefore conclude that for the period between Mrs Fourie's decision to call the police and Mrs Emordi's arrest by the police she was unlawfully detained. Given the superficiality of the enquiries made, as well as Sergeant's Khumbuza's evidence of receiving the complaint when he came on duty at 17h45, that decision must have been taken by 17h30.

[108] The individual liability of the first, second and fourth defendants for Mrs Emordi's unlawful detention must also be determined.

[109] On behalf of both Shoprite and CIVA it was contended as an alternative defence that since its employees had not physically apprehended or detained Mrs Emordi they could not be held liable for any unlawful arrest or detention; further that only FBS could be held liable in its capacity as the employer of the security guards who physically ensured that Mrs Emordi did not leave the premises until the police arrived. This argument does not assist Shoprite. Although Mr Lebeta was the guiding force behind the initial decision to detain the plaintiff, it was Mrs Fourie who, after a perfunctory enquiry, ultimately decided to call the police and, by clear implication, require that the plaintiff be detained pending their arrival. The role of the security guards employed by FBS in

effecting Mrs Emordi's detention is inarguable but after Mrs Fourie's decision to call the police they were in effect acting on her instructions.

[110] Accordingly, on a proper analysis of the facts, Mrs Emordi was detained at the behest of the first and second defendant between approximately 16h50 until her arrest by the police at approximately 19h30. For the sake of clarity, I do not regard the period between 16h50 and 17h30 when the police were called as amounting to unlawful detention but a period during which the suspicion of theft on the part of Mrs Emordi was enquired into, unfortunately only superficially and without any meaningful interaction with her. It follows that, at the least, the first and second defendants are liable for Mrs Emordi's unlawful detention between 17h30 and 19h30.

[111] As far as CIVA, the fourth defendant, is concerned, Mr Lebeta testified that he had no authority to detain a suspected shoplifter and had to request the security guards to do so; furthermore that although it was his employer's protocol to call the police in instances of shoplifting this decision was not his to take but that of Mrs Fourie. I did not understand the first or second defendant to dispute this evidence. In light of the requirement in law that only a party or parties who effect an arrest and detention (in the absence of a claim for malicious arrest and detention) there is no basis to hold the fourth defendant liable for Mrs Emordi's arrest and detention, notwithstanding Mr Lebeta's key role therein in. This finding renders it unnecessary to consider, in relation to the fourth defendant, its alternative argument that any liability would cease after Mrs Emordi's arrest by the police. That argument must be considered, however, in relation to the first and second defendants i.e. whether their liability for any further detention of Mrs Emordi ceased when the police arrested Mrs Emordi on the basis that this constituted a *novus interveniens actus*.

[112] In the present instance, it was not a foregone conclusion, once the matter had been reported to the police, that Mrs Emordi would be arrested and detained. It was up to the police to take a decision as to whether to arrest her and, even after her arrest, whether to detain Mrs Emordi or release her on warning or by other means ensure she would attend court. Indeed, as is made clear in *Mabona*, *Lapane* and *Sekhoto*, it was incumbent upon the police officials seized with the matter to conduct their own enquiry and firstly satisfy themselves that there was a reasonable suspicion that Mrs Emordi had stolen items and thereafter, that arresting and detaining her would not amount to an irrational exercise of their discretion. However, in my view, once the police took the decision to arrest and detain Mrs Emordi whether justified or not, any liability on the part of the first and second defendants ceased since she was no longer being deprived of her liberty at their instance but at that of the police. This would also be in keeping with the approach of the Supreme Court of Appeal in *Relyant Trading* where it was held that, generally speaking, where a party merely furnishes the police with information on the strength of which they decide to arrest such person, the arrest is effected by the police and not the complainant.

[113] The next issue is whether the Minister is liable for her unlawful detention from the point at which they arrested and detained her. The Minister relies on sec 42(1)(b), cited above and which has been the subject of numerous decisions of the Courts. The question is, in the first instance, whether a reasonable man in Sergeant Khumbuza's position, and possessed of the same information, would have considered that there were sufficient grounds for a reasonable suspicion that Mrs Emordi had stolen items from Shoprite. Sergeant Khumbuza relied upon the information furnished to him by Mr Lebete and, possibly, on a viewing of the video footage.

[114] As mentioned, Sergeant Khumbuza was a poor witness with a very limited

independent recollection of events. He denied ever viewing any video footage notwithstanding the evidence of Mrs Fourie and Mr Lebeta that the police had viewed such video footage. In any event, that footage would not have taken things much further for the reasons already discussed. It would not have showed any theft of a juice and is most unlikely to have implicated Mrs Emordi in the theft of the oranges and potatoes. Even accepting for argument's sake that Sergeant Khumbuza did view the footage, he should at least have given Mrs Emordi an opportunity to do so or at least to respond to it. This was not done.

[115] However, the greatest difficulty facing the Minister in discharging its onus was Sergeant Khumbuza's admission that he at no stage spoke to Mrs Emordi, evidence not disputed by any of the witnesses for the other defendants. Had he conversed with her it is highly likely that, as she had done earlier, she would have protested her innocence and advised him that she had bought the potatoes and oranges at Parow Mark, that she had left the till slip there and that she had requested to be allowed to retrieve it earlier but had been refused. It is noteworthy that in the warning statement taken from her at the police station a little later, this is indeed what she stated *'I did not steal anything. I bought the stuff by Parow Flea (sic) Market'*. Sergeant Khumbuza would also probably have been told by her that she had brought the juice onto Shoprite's premises. It follows from what I have stated that Sergeant Khumbuza's handling of the matter fell well short of the standard set for persons in his position as set out in *Mabona* and *Lapane*.

[116] Had this basic step been taken i.e. the allegations of theft put to Mrs Emordi and her response sought, it is unlikely that Sergeant Khumbuza, or any reasonable person in his position, would have nonetheless concluded that there was a reasonable suspicion that Mrs Emordi had stolen items from Shoprite requiring her to be arrested and further

detained. Rather, I consider, he would have realised that the suspicion of theft rested on very shaky foundations and therefore was not reasonable. At the worst for Mrs Emordi, he may have entertained a reasonable suspicion that she might have stolen the juice. In my view, even if this had been the case, a reasonable person in Sergeant Khumbuza's shoes, acting rationally, would, in such event, not have decided to arrest or detain her when her presence in court could be obtained by other means. Furthermore, given Mrs Emordi's explanation for her possession of the juice and the trivial amount involved, in my view, a decision to arrest and detain her in such circumstances would have fallen outside the bounds of rationality as referral to in *Sekhoto*. The third defendant sought to justify Mrs Emordi's detention for the night on the basis that only a senior officer could authorise her release on warning on bail and that her address had to be checked or confirmed. In my view, neither of these justify Mrs Emordi's detention overnight. Sergeant Khumbuza had adequate opportunity to check her address, if he felt this was necessary and no reason was furnished why, even if she was initially arrested, an official with the necessary authority had not released her after she had been 'booked'.

[117] The SAPS standing orders regarding arrests are instructive. Standing Order (G) 341 provides inter alia as follows:

'Background

*Arrest constitutes one of the most drastic infringements of the rights of an individual. The rules that have been laid down by the Constitution of the Republic of South Africa, 1996, the Criminal Procedure Act, 1977 (Act No. 51 of 1977), other legislation and this Order, concerning the circumstances when a person may be arrested and how such person should be treated. Must therefor (sic) be strictly adhered to.*

3. Securing the attendance of an accused at the trial by other means than arrest

*(1) There are various methods by which an accused's attendance at a trial may be*

*secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.*

*(2) It is impossible to lay down hard and fast rules regarding the manner in which the attendance of an accused at a trial should be secured. Each case must be dealt with according to its own merits. A member must always exercise his or her discretion in a proper manner when deciding whether a suspect must be arrested or rather be dealt with as provided for in subparagraph (3).*

*(3) A member even though authorised by law, should normally refrain from arresting a person if -*

- (a) the attendance of the person may be secured by means of a summons as provided for in section 54 of the Criminal Procedure Act, 1977; or*
- (b) the member believes on reasonable grounds that a magistrate's court, on convicting such person of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette, in which such member may hand to the accused a written notice [J 534] as a method of securing his or her attendance in the magistrate's court in accordance with section 56 of the Criminal Procedure Act, 1977.*

#### 4. The object of an arrest

##### (1) General rule

*As a general rule, the object of an arrest is to secure the attendance of such person at his or her trial. A member may not arrest a person in order to punish, scare, or harass such person;*

##### (2) Exceptions to the general rule

*There are circumstances where the law permits a member to arrest a person although the purpose with the arrest is not solely to take the person to court. These circumstances are outlined below and constitute exceptions to the general rule that the object of an arrest must be to secure the*

*attendance of an accused at his or her trial. These exceptions must be studied carefully and members must take special note of the requirements that must be complied with before an arrest in those circumstances will be regarded as lawful.*

...

*(b) Arrest to verify a name and/or address*

*In the circumstances provided for in section 41(1) of the Criminal Procedure Act, 1977, a member may request a person to furnish his or her full name and address. If such a person furnishes a name or address which the member reasonably suspects to be false, such member may arrest the person and detain him or her for a period of twelve hours in order to verify the name and address.'*

[118] Nothing in these quoted sections, applied to the facts of the present matter, suggest that Sergeant Khumbuza's decision to arrest Mrs Emordi, as opposed to a less invasive means of procuring her attendance at Court, was justified, nor any decision to detain her overnight. In this sense, Sergeant Khumbuza did not seek to justify Mrs Emordi's arrest by suggesting, for example, that he had any reason to suspect that her name or address (which he could have confirmed with her husband, Mr Agholar) were false.

[119] A subsidiary issue is whether Janelle, the plaintiffs' infant child, was wrongfully and unlawfully detained at Shoprite's premises. The only evidence in this respect was that Janelle was with her mother in the store and in the security office and that she had eventually been taken away by the second plaintiff when the police arrived and instructed or requested him to take the child home. As I have found earlier in these proceedings, there was never an impediment to Mr Agholar leaving the premises of Shoprite and he was there at all times of his own free will. It follows that he would have been free to take his child away at any time after his arrival there but chose not to do so. Furthermore, on a proper interpretation of what took place there was never any intention or act of arresting

or detaining the child. It was the first plaintiff, Mrs Emordi, who was detained, initially for the purposes of an enquiry/investigation and thereafter pending the arrival of the police. The fact that Janelle remained with her mother during this period was merely incidental to the latter's detention and a recognition that an infant child could not and should not be separated from the mother in the absence of another acceptable arrangement. In the result, the claim by the first plaintiff on behalf of her child lacks any merit.

[120] For these reasons, I consider that the arrestors and detentors of the plaintiff from approximately 19h30 onwards were the Minister's servants that such arrest and detention was unlawful and accordingly that liability for any damages flowing from such arrest and detention cannot be visited on any defendant other than the third defendant.

[121] In the result, I conclude that the first and second defendants are liable for the plaintiff's unlawful arrest and detention for the period from 17h30 to approximately 19h30 on the day in question and that the third defendant is liable for any damages which the plaintiff may prove for the period from approximately 19h30 until her release the following day.

[122] This brings me to the final issue, namely, whether Shoprite is entitled to an indemnity from the first and fourth defendants. The basis of Shoprite's claim against the first and fourth defendants for an indemnity lay in the written service agreements concluded between the parties in July 2011 and August 2012 respectively and which form part of the trial bundle. All parties agreed that the documents forming part of the trial bundle were what they purported to be and were not required to be proved in the normal manner. Both agreements were referred to in evidence and in argument.



Accordingly, they were properly before Court.

[123] In each instance the indemnity clause is identical, the relevant part reading as follows:

*‘17. Indemnity*

*17.1 The Service Provider hereby irrevocably indemnifies Shoprite, its directors and employees and holds them harmless against any claim which may be made against any one or all of them, the cause of action of which arose out of or in connection with any act or omission on the part of the Service Provider or its personnel or any breach by the Service Provider or its personnel of any of the terms and conditions contained herein, including breach of warranty.’*

[124] The terms of the indemnity are wide, encompassing ‘any act or omission’ giving rise to the cause of action upon which the claim against Shoprite is based. Mrs Emordi’s claim for unlawful arrest and detention arose primarily out of the actions of Mr Lebeta, who initiated the allegations of theft against her, and the security guards who effected her arrest and detention acting upon Mr Lebeta’s advices. To the extent that Mrs Fourie was involved, she relied to a large extent on Mr Lebeta’s observations. Thus although Mrs Fourie took the ultimate decision to call the police, the employees of both FBS and CIVA, through their employees, played a consequential role in Mrs Emordi’s arrest and detention. I do not consider that the first and fourth defendants can escape the reach of the indemnities simply by reason of the fact that the second defendant’s employee, Mrs Fourie, also bore responsibility for the first plaintiff’s arrest and detention. In the result I am satisfied that the second defendant is entitled to the indemnities it claims from the first and fourth defendants.

**Costs**

[125] Mrs Emordi is plainly entitled to her costs against those defendants against whom she has been successful, which excludes only the fourth defendant. Although unsuccessful against the fourth defendant, I see no good reason why Mrs Emordi should be held liable for its costs. Its employee, Mr Lebeta, was the person who initiated her arrest and detention in circumstances where this was ultimately not justified. Even if not cited by the first plaintiff, the fourth defendant would in all likelihood still have been joined as a third party to the proceedings by the second defendant and, by reason of the indemnity relief granted against it, is already jointly and severally liable for the first plaintiff's cost vis-à-vis the second defendant. The fourth defendant's citing by the plaintiffs has therefore not resulted in any additional costs for it. Finally, as regards the second plaintiff's claim where absolution was granted but a costs order deferred, I can see no reason not to award the defendants their costs in respect of such claim.

[126] In the result and for these reasons the following order is made:

1. It is declared that the first and second defendants are jointly and severally liable to the first plaintiff for any damages which she may prove arising out of her unlawful arrest and detention at Shoprite, Parow on 19 October 2015 between 17h30 and 19h30;
2. The third respondent is declared to be liable for any damages which the first plaintiff may prove as a result of her unlawful arrest and detention by the third defendant's servants between 19h30 on 19 October 2015 and her release on 20 October 2015;
3. The first, second and third defendants shall pay the first plaintiff's costs of suit, jointly and severally, the one paying the others to be absolved;
4. The first and fourth defendants are held liable and directed to indemnify the second defendant in respect of the award and costs order made against it in favour of the first plaintiff, as referred to in paragraphs 1 and 3 above, jointly and severally, the one paying the other to be absolved, and are directed to pay the second defendant's costs in the third party proceedings;

5. The second plaintiff is ordered to pay the costs of the defendants arising out of the dismissal of his claim.

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**BOZALEK J**

For the Plaintiff As Instructed	:	Adv R Appoles Jonathen Cohen Attorneys
For the 1 <sup>st</sup> Defendant As Instructed	:	Adv A Montzinger Erasmus Ranchod & Associates
For the 2 <sup>nd</sup> Defendant As Instructed	:	Adv D Van Reenen Clyde & Co
For the 3 <sup>rd</sup> Defendant As Instructed	:	Adv P Van Wyk State Attorney
For the 4 <sup>th</sup> Defendant As Instructed	:	Adv C Tait M F Oosthuizen Attorneys