IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG, JOHANNESBURG

CASE NO: 07/20296
REPORTABLE

In the matter between:

MNONELELI MAXWELL MVU Plaintiff

and

MINISTER OF SAFETY AND SECURITY First Defendant

DIGNITY GABELA Second Defendant

JUDGMENT

WILLIS J:

[1] This is a claim for damages consequent upon an alleged unlawful arrest *and* detention. It is common cause that the plaintiff was arrested,

without a warrant, by the second defendant, acting within the course and scope of his employment with the South African Police Service, during the night of 23rd September, 2004 at the Moroka Police Station, Soweto, held in custody there in the so-called "police cells" and set free the following day in the afternoon when he was "released on warning". He was charged with malicious injury to property. The case turns on whether the arrest *and* detention were unlawful[1].

[2] The plaintiff is himself an Inspector in the South African Police Service, attached to the Organised Crime Unit and is based in Mthatha. He has been a police officer since 1990. At the time of his arrest and detention, he held the same rank as Inspector but was attached to the Detective Branch in Mthatha. Since 1999 the plaintiff has been divorced from the mother of his twin daughters, T and T M who lived with their mother in Chiawelo. At the time of the plaintiff's arrest, these two children were 15 years' old. The plaintiff enjoyed a civil relationship with the mother of these two children. The twins regularly visited him in Transkei and, from time to time, he would visit them here in Gauteng. At the time of the incidents giving rise to this claim, the plaintiff was in Gauteng on work-related business and was based at the Sandton Police Station. He took advantage of the opportunity to visit his daughters.

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[1] The word "*and*" in the sentence in question is used both conjunctively and disjunctively.

[3] It is common cause that the plaintiff became incandescent with rage with his daughters when he discovered that they had cellular telephones ("cellphones") which they had received as a result of a "love relationship". He took the cellphones from them and threw them to the ground, seriously damaging the cellphones in the process. The plaintiff has added an embellishment to the story: that he believed, by reason of what he had been told by his daughters' mother, that the cellphones had been given to his daughters by "gangsters" in order to lure them into drug trafficking. This was a further reason why he had acted as he did: he wanted to put an end to this unwholesome relationship. The plaintiff says that he informed the second defendant about this aspect of the suspected "gangsterism" but the second defendant denies this. Not much really turns on the point but I shall deal with it later.

[4] The plaintiff's daughters, no doubt distressed, like most teenagers, at being deprived of cellphone contact with the world, went with their uncle, Ntlahla Nhlapho, to lay a charge of malicious injury to property against the plaintiff, at the Moroka police station on 23rd September, 2004. The second defendant was seized with the matter. Acting on information given to him by the plaintiff's daughters, the second defendant telephoned the plaintiff at the plaintiff's cellphone at about 9 pm. The plaintiff immediately travelled from Sandton to meet the second defendant. The second defendant decided, in view of the fact that it was

common cause that the plaintiff had damaged his daughters' cellphones as he did, that he should arrest the plaintiff, which he did at about 10pm. The second defendant then proceeded to incarcerate the plaintiff in the police cells where the plaintiff spent the night with about six other men, among whom were suspected rapists and robbers. The plaintiff, unsurprisingly, found this deeply distressing and humiliating. The second defendant seemed to believe that he had no option but to detain the plaintiff.

[5] There is a dispute as to whether the plaintiff did, in fact, produce his "appointment certificate" as police officer to the second defendant. This certificate is not a "piece of paper". Instead it is a plastic card indistinguishable in shape, size and texture from the plastic credit cards, debit cards, membership cards, etc of which the court believes it may fairly take judicial notice festoon the wallets of almost all the citizenry nowadays. Again, not much turns on this factual dispute as the second defendant admits that not only did the plaintiff inform him that he, the plaintiff, was an Inspector, but also that the plaintiff's daughters told him that this was the case. Although the second defendant seemed to have changed his version as to whether or not the fact of plaintiff being a police officer was an easily verifiable fact, it is common cause that the second defendant removed from the plaintiff his possession of his police-issue firearm before placing him in the police cell. In other words, the act

of taking possession of the firearm from the plaintiff would, in itself, have alerted the second defendant to the fact that the plaintiff was, in all probability, a police officer. It is scarcely probable that a person in unlawful possession of a police-issue firearm would calmly present himself to the police station accordingly. I shall also deal with my finding on the factual dispute relating to the plaintiff's production of his "appointment certificate" later.

[6] The plaintiff was arraigned on a charge of malicious injury to property in the magistrate's court for the district of Johannesburg in Protea, Soweto on 24th September, 2004 and released on warning. He was warned to appear in court on 27th September, 2004. On that date, the trial was postponed to 16th November, 2004. On 16th November, 2004, the matter was struck from the roll. The charge was reinstated and the trial set down for 5th October, 2005. On 6th October, 2005, the plaintiff was found not guilty and discharged at the close of the State's case in terms of section 174 of the Criminal Procedure Act No 51 of 1977, as amended ("the Act"). It is not clear why this occurred but it is, ultimately, irrelevant to the determination of the case.

[7] Having regard to the principles and criteria set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie*,[2] *African Eagle*

[2] 2003 (1) SA (SCA) at para [5]

Life Assurance Co Ltd v Cainer,[3] *National Employers' General Insurance v Jagers*,[4] *Baring Eiendomme Bpk v Roux*,[5] *Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens*,[6] *National Employers Mutual General Insurance Association v Gany*[7] and *AA Onderlinge Assuransie Assosiasie v De Beer*,[8] I am of the view that the plaintiff neither acted as he did because he was worried about his daughters being lured into "gansterism" nor did he tell the second defendant this. As the second defendant observed, if this is indeed what he believed, the most obvious way of dealing with the matter, especially as he was an experienced police officer, would have been to enlist the help of the police themselves. Moreover, intact cellphones would have provided valuable records of telephone calls that could have assisted in tracking down these "gansters". The plaintiff, when pressed to explain why he did not act accordingly, could give no satisfactory answer. In *Ocean Accident and Guarantee Corporation Ltd v Koch* [9] Holmes JA said:

> As to the balancing of probabilities, I agree with the remarks of Selke J, in *Govan v Skidmore* 1952 (1) SA 732 (N) at 734, namely
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> "... in finding facts or making inferences in a civil case, it seems to me, that one may, as Wigmore conveys in his work on *Evidence,* 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural or plausible, conclusion from amongst several conceivable ones, even though that conclusion is not the only

[3] 1980 (2) SA 234 (W) at 237. The reasoning of Coetzee J, as he then was, was approved and developed slightly in *National Employers' General Insurance v Jagers* 1984 (4) SA 432 (ECD) by Eksteen AJP at 440E-441A.
[4] 1984 (4) SA 432 (ECD) by Eksteen AJP at 440E-441A
[5] [2001] 1 All SA 399 (A) at para [7] in which the passage by Ecksteen AJP in *National Employers' General Insurance v Jagers* (*supra*) at 440E-441A was unanimously approved by the Supreme Court of Appeal
[6] 1974 (4) SA 420 (W) at 425
[7] 1931 AD 187 at 199
[8] 1982 (2) SA 603 (A) at 614H
[9] 1963 (4) SA 147 (A) at 159C

reasonable one."

This *dictum* has been referred to with approval in innumerable cases.[10] It hardly needs to be added that "plausible" is not here used in its negative sense of specious, but in the connotation which is conveyed by words such as acceptable, credible, or suitable.[11] Having regard to the facts, disputed and undisputed, set out above, I consider the most "voor-die-hand liggende en aanvaarbare afleiding"[12] and the more plausible, acceptable and credible conclusion, on a balance of probabilities, is that the plaintiff acted as he did, in regard to his daughters' cellphones, in a moment of over-zealousness and perhaps even the over-protectiveness that is common among fathers when their daughters are teenagers.

[8] Employing the same fact-finding tools set out in paragraph [7] above, I conclude that the plaintiff did show his "appointment certificate" to the second defendant at the Moroka police station. It is common cause that the plaintiff informed the second defendant of his status as an Inspector in the South African Police Service. In all the circumstances of this case, it is hardly credible that the plaintiff would not have demonstrated this not unimportant fact through the simple expedient of producing his card known as an "appointment certificate".

[9] In terms of section 40(1)(b) of the Act:

> (1) A peace officer may without a warrant arrest any person-
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> …

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[10] See, for example: *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 713 E-G; *Smit v Arthur* 1976 (3) SA 378 (A) at 386B-D; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) at 1028B-C; *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at para [14]; *Jordaan v Bloemfontein Transitional Local Authority* 2004 (3) SA 371 (SCA) at para [379]; *De Maayer v Serebro; Serebro v Road Accident Fund* 2005 (5) SA 588 (SCA) at para [18]

[11] See, for example: The *Oxford Dictionary*, and Webster's *International Dictionary*

[12] See, *AA Onderlinge Assuransie Assosiasie v De Beer* 1982 (2) SA 603 (A) at 614H

> (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1,[13] other than an offence of escaping from custody.

In *Duncan v Minister of Law and Order*[14], Van Heerden JA said that, in order to enjoy the protection of this section, an arrestor must establish the following four requirements:[15]

(i) He is a peace officer:

(ii) He must entertain a suspicion;

(iii) It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 of the Act;

(iv) The suspicion must rest on reasonable grounds.

The fourth requirement, i.e. that the suspicion must rest on reasonable grounds, is objectively justiciable: "...the test is not whether a policeman believes that he has reason to suspect, but whether on an objective approach, he in fact has reasonable grounds for his suspicion".[16] Furthermore, not only must the arrestor prove that the had reasonable grounds for believing that the arrestee has committed an offence listed in the Schedule, but also that he had reasonable grounds for believing that the arrestee had the mental element for committing the offence.[17] "Malicious injury to property" is an offence appearing in Schedule 1 of the Act. Mr *Henana*, who appeared for the plaintiff, accepted that he could not successfully argue, in the circumstances of the matter, that the second defendant had acted *mala fide*. Counsel for the plaintiff went on to argue, albeit faintly, that the second defendant should have investigated the matter further before arresting the plaintiff. Against the

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[13] This refers, obviously to Schedule 1 of the Act.

[14] 1986 (2) SA 805 (A) at 818G-H. See, also: *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A) at 577I-589G and *Minister of Law and Order and Others v Pavlicevic* 1989 (3) SA 679 (A) at 684G-685A which related to not dissimilar provisions in section 29 (1) of the Internal Security Act, No.74 of 1982.

[15] Referred to in the judgment as "jurisdictional facts" – see p818G

[16] *Duncan v Minister of Law and Order* (*supra*) at 814D-E; See, also: *Minister of Law and Order v Hurley and Another* (*supra*) at 579F-G and *Minister of Law and Order and Others v Pavlicevic* (s*upra*) at 684G.

[17] See *Minister of Law and Order and Others v Pavlicevic* (s*upra*) at 693E-F

background of events and the facts that were common a cause at the time, it is clear that the second defendant is protected by the provisions of section 40 (1) (b) of the Act and that the arrest was not unlawful. That is not the end of the matter. The claim is based not only on an alleged unlawful arrest but also upon alleged unlawful detention. That there is an important distinction between the two is, in my respectful opinion, not properly understood by many - and it is not only police officers who have erred in this regard.

[10] In *Hofmeyr v Minister of Justice and Another*[18] King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto and that the failure by a police officer properly to do so, is unlawful. The Minister's appeal was unanimously dismissed by what was then known as the Appellate Division of the Supreme Court.[19] It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all. This, it seems to me, and in my very respectful opinion, enables one to get a better grip on an issue which has been debated in the law reports in recent cases such as *Minister of Correctional Services v Tobani*;[20] *Ralekwa v Minister of Safety and Security*;[21] *Louw v Minister of Safety and Security and Others*;[22] *Charles v Minister of Safety and Security*;[23] *Olivier v Minister of Safety and Security*[24] and *Van Rensburg v City of Johannresburg*.[25] On the question of unlawful detention, *per se*, as a

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[18] 1992 (3) SA 108 (C)
[19] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 157I
[20] 2003(5) SA 126 (E); [2001] 1 All SA 370 (E)
[21] 2008 (2) SACR 387 (W)
[22] 2006 (2) SACR 178(T)
[23] 2007 (2) SACR 137 (W)
[24] 2008 (2) SACR 387 (W)
[25] 2009 (1) SACR 32 (W)

concept to be considered separately from the question of arrest, it is, in my respectful view, instructive to read the *Tobani* case in which Jones and Leach JJ, together with Govender AJ, upheld, in an appeal to the full court, the judgment of Froneman J. I also agree with the general approach of Horwitz AJ in the *Van Rensburg* case even though, in that case, the facts are distinguishable from the present one at least inasmuch as a warrant for arrest had been issued.

[11] Our Constitution gives everyone the right to:

> freedom and security of the person, which includes the right-
> (a) not to be deprived of freedom arbitrarily or wihout just cause;
> (b) not to be detained without trial.[26]

Moreover, section 35 of the Constitution provides detailed rights to arrested, detained and accused persons, including the right to be released if the interests of justice permit and upon reasonable conditions, and to humane conditions of detention.

[12] "If the sentence likely to be imposed upon conviction in any case will be in the form of a fine or one other than imprisonment it is highly undesirable that the accused person should be subjected to pre-trial detention".[27] I agree in a resolute degree. In this particular case, Mr *Nkosi*, who appeared for the defendants, very fairly and correctly conceded that it was most undesirable, taking into account the plaintiff's standing as a police officer (more particularly, one of long service and very respectable rank), his entirely cooperative attitude and the circumstances relating to the commission of the alleged offence, that the

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[26] Section 12
[27] Lansdown & Campbell South African Criminal Law and Procedure (vol v); Criminal Procedure and Evidence Juta's (1982) 324. See, also: *S V Moeti* 1991 (1) SACR 362 (B) at 463*h*.

plaintiff should not have been detained at all, never mind kept for some 17 hours in a police dell with suspected rapists and robbers. Mr *Nkosi* also accepted that, viewed objectively, the second defendant could have not only have applied his mind to avoiding the detention of the plaintiff and but could indeed also have avoided detaining him.

[13] Section 59 (1) (a) of the Act provides as follows:

> An accused person who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such official.

"Malicious injury to property" is not an offence referred to in either Part I or Part II of Schedule 2 of the Act. During the course of argument there appeared to be some degree of confusion and uncertainty as to whether the second defendant, as an Inspector, is a "commissioned officer" or a "non-commissioned officer" or neither and, accordingly, whether or not the second defendant was a police official *of* or *above* the rank of a non-commissioned officer in terms of this section. The Act provides no definitions or either "commissioned officer" or a "non-commissioned officer". Section 1 (the definitions section) of the South African Police Service Act, No. 68 of 1995 provides no definition of a "non-commissioned officer" but defines a "commissioned officer" as meaning "a commissioned officer appointed under section 33(1) (v)". Reference to section 33(1)

(v) provides no further assistance in the solving of the problem. As far as I am aware, a "commissioned officer" in the police service is an officer of or above the rank of Inspector and a "non-commissioned officer" is a police officer *under* the rank of Inspector. In any event, whatever the correct position as to who is or is not either a "commissioned officer" or a "non-commissioned officer", it is common cause that there is always, at the police station in question, a police officer above the rank of non-commissioned officer, who is either on duty or "on call".

Section 50 (3) of the Act provides as follows:

> Subject to the provisions of subsection (6),[28] nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court.

Counsel for parties were *ad idem* that the second defendant should either have released the plaintiff on warning or arranged with a commissioned officer for this to have been done. The detention of the plaintiff was accordingly wrongful and unlawful.

[14] Counsel from both sides referred me to various cases relevant to the question of *quantum*. I have read others as well. The court also had occasion to refer to these cases in the matter of *Seymour v Minister of Safety and Security*.[29] These, in chronological order, are the cases in question: *May v Union Govt.*;[30] *Solomon v Visser and Another*;[31] *Donono v*

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[28] It is common cause that as "malicious injury to property" does not fall in Schedule 6 of the Act, this subsection does not apply
[29] 2006 (5) SA 495 (W) at para [9]
[30] 1954 (3) SA (N)

Minister of Prisons;[32] *Areff v Minister van Polisie*;[33] *Minister van Polisie en 'n Ander v Gamble en 'n Ander*;[34] *Minister van Wet & Orde v Van Den Heever*;[35] *Stapelberg v Afdelingsraad Van Die Kaap*;[36] *Ramakulukusha v The Commander Venda National Force*;[37] *Ochse v King Williams' Town Municipality*;[38] *Thandani v Minister of Law & Order*;[39] *Mthimkulu and Another v Minister of Law and Order*;[40] *Tödt v Ipser*;[41] *Moses v Minister of Law and Order*;[42] *Bentley and Another v Mc Pherson*;[43] *Themba v Minister of Safety and Security*;[44] *Tobani v Minister of Correctional Services NO*;[45] *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino*;[46] *Manase v Minister of Safety and Security and Another*.[47] Each case must, however, be decided on its own merits and the facts in each of the above cases are distinguishable from the facts in the present one. Moreover, it must be borne in mind that these cases relate to unlawful arrest more than they do to the somewhat narrower issue of unlawful detention.

[14] In the *Seymour* case,[48] I joined hands with the learned judge in the *Ramakulukusha* case[49] in regard to the surprise which he expressed at "the comparatively low and insignificant awards made in Southern African courts for infringements of personal safety, dignity, honour, self-

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[31] 1972 (2) SA 327 (A)
[32] 1973 (4) SA 259 (C)
[33] 1977 (2) SA 900 (A)
[34] 1979 (4) SA 759 (A)
[35] 1982 (4) SA 16 (C)
[36] 1988 (4) SA 875 (C
[37] 1989 (2) SA 813 (V)
[38] 1990 (2) SA 855 (E)
[39] 1991 (1) SA 702 (E)
[40] 1993 (3) SA 432 (E)
[41] 1993 (3) SA 577 (A)
[42] 1995 (2) SA 518 (C)
[43] 1999 (3) SA 854 (E)
[44] (unreported judgment in this division of Marais J, Case No. 14968/97 delivered 8 Mar 2000)
[45] [2000] 2 All SA 318 (SE)
[46] 2000 (4) 68 (W)
[47] 2003 (1) 567 (CkHC)
[48] Referred to in para [14] above
[49] Also referred to in para [14] above

esteem and reputation."[50] I also expressed the view that the courts should move, however glacially, to reflect in their awards for damages in cases of this nature, a change of values.[51] When the *Seymour* case went on appeal, these views did not meet with favour.[52] My award of R500 000 for five days of detention was reduced to R90 000.[53] Suitably chastened, and mindful of the well-known case of *Cassell & Co Ltd v Broome*[54] in which the then Lord Chancellor of England, Lord Hailsham of St Marylebone, stressed the importance of judicial precedent in a hierarchy of courts and gave a memorable account of why this should be so, I shall walk quietly and, I hope, in the shade, on this path created by precedent. The *Cassell* case has been referred to with approval by the Supreme Court of Appeal in the matter of *S v Kgafela*.[55]

[15] In *Seria v Minister of Safety and Security*[56] Meer J awarded R50 000. Since the appeal in the *Seymour* case, my brother Bertelsmann J awarded R75 000 in the *Louw* case,[57] my brother Horn J R50 000 in the *Olivier* case[58] and Horwitz AJ R75 000 in the *Van Rensburg* case.[59] Counsel for the parties were *ad idem* that, mindful of precedent, and the facts and circumstances of this particular case, R30 000 would be an appropriate award in this matter.

[16] In the *Hofmeyr* case,[60] although the court made an award within the jurisdiction of the magistrate's court, it nevertheless granted costs on the

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[50] at 847 B-C and see paras [10] to [13] of the *Seymour* judgment
[51] Para [10] of the *Seymour* judgment
[52] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at paras [12] to[22]
[53] Para [22] of the *Minister of Safety and Security v Seymour* case
[54] [1972] AC 1027; [1972] All ER 801 (HL)
[55] 2003 (5) SA 339 (SCA) at para [3]
[56] 2005 (5) SA 130 (C)
[57] Referred to in para [10] above
[58] Referred to in para [10] above
[59] Referred to in para [10] above
[60] Referred to in para [10] above

higher court scale. A similar approach was adopted in the *Seria* case,[61] the *Louw* case,[62] the *Olivier* case[63] and the *Van Rensburg* case.[64] The underlying principle would appear to be the importance which the courts attach to questions of unlawful arrest and detention. Mr *Nkosi* accepted that he could not argue against costs following the result and being awarded on the High Court scale.

[17] This case has a rare, but happy, result: in the end, counsel for the parties and the court were all in agreement. An appeal is therefore unlikely. Counsel for both sides requested that I should deliver a "reportable" judgment in order to encourage a wider awareness that where a lawful arrest has been made, it does not follow automatically that such person is to be detained until he or she may be brought to court at the earliest opportunity: a proper discretion is always to be exercised as to whether detention is indeed appropriate. I have been pleased to oblige such a politely directed and reasonable request by counsel.

[18] The following order is made:

The first defendant is to pay the plaintiff-

(a) The sum of R30 000 (thirty thousand rands);

(b) Interest on the aforesaid sum, at the prescribed rate of interest, from date of judgment to date of payment;

(c) Costs of suit on the High Court scale as between party and party.

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[61] See 151D of that judgment
[62] See p189 of that judgment
[63] See 399*h* to 400*b* of that judgment
[64] See p41*i-j* of that judgment

DATED AT JOHANNESBURG THIS 31st DAY of MARCH, 2009

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Advocate M.M. Hinana
Attorneys for the Plaintiff: Dudula Inc.
For the Defendant: S.T. Nkosi
Attorneys for Defendant: State Attorney

Dates of hearing: 23rd and 24th March, 2009

Date of judgment: 31st March, 2009