

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/6573

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> /NO
(3)	REVISED.
<u>5<sup>th</sup> October 2012</u>	
DATE	<u><i>Saldulker</i></u>
	SIGNATURE

In the matter between:

**MAHLANGU, MPHO THELMA**

Plaintiff

and

**THE MINISTER OF POLICE**

Defendant

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**J U D G M E N T**

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SALDULKER, J:

INTRODUCTION

[1] The plaintiff, a young woman has instituted a claim for damages in the amount of R150 000, suffered as a result of being unlawfully arrested on Saturday 23 October 2010 and detained for about two days at the Jeppe Police Station cells, and released on the Monday morning, without appearing in a court of law.

[2] The defendant is alleged to be vicariously liable on the basis of the conduct of police officers acting in the course and scope of their employment with the defendant. Initially the defendant relied on the provisions of s 40(1)(a) of the Criminal Procedure Act, 51 of 1977 ("the Act") which was amended before the trial commenced, to refer to s 40(1)(b) of the Act.

[3] The defendant's amended plea read as follows: *'Defendant pleads that Plaintiff was lawfully arrested in accordance with the provisions of Section 40(1)(b) of Act 51 of 1977 as amended ('the Act') for aiding a lawfully arrested person to attempt to escape from custody and in terms of the provisions of section 40(1)(b) of the Act for assaulting a police officer when a dangerous wound is inflicted, and that he (sic) was detained in accordance with section 50(1)<sup>1</sup> of the Act.'*

#### THE LEGAL PRINCIPLES

[4] In terms of s 40(1)(b) :

*"40. Arrest by Peace Officer without warrant: A peace officer may without warrant arrest any person – 'whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'"*

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<sup>1</sup> S 50 Procedure after arrest: (1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant. (b) a person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings. (c ) Subject to paragraph (d), if such an arrested person is not released by reason that- (i) no charge is to be brought against him or her; or (ii) bail is not granted to him or her in terms of section 59 Or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest',

[5] It is clear from the foregoing section that escaping from lawful custody which is listed in Schedule 1<sup>2</sup> is expressly excluded in s40(1)(b), and is dealt with in s 40 (1)(c)<sup>3</sup> of the Act. Only a person who was in custody because of a Schedule 1 offence and who escapes from lawful custody commits a Schedule 1 offence.

[6] In *Minister of Safety & Security v Sekhoto & Another* 2011 (1) SACR 315 (SCA) at para 6, the following was stated by Harms DP: 'As was held in *Duncan v Minister of Law and Order*,<sup>4</sup> the jurisdictional facts for a s40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and (iv) the suspicion must rest on reasonable grounds.

And at para [16]:

*'The Bill of Rights guarantees the right of security and freedom of the person, which includes the right 'not to be deprived of freedom arbitrarily or without just cause'-s12 (1) (a)...any deprivation of freedom has always been regarded as prima facie unlawful, and required justification by the arresting officer. This explains the rule that a plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove justification'.*

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<sup>2</sup> Schedule 1 offences include inter alia treason, murder, public violence, assault when a dangerous wound is inflicted, any offence, except the offence of escaping from lawful custody in circumstances, other than the circumstances referred to immediately hereafter, ie escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule 1 or is in such custody in respect of the offence of escaping from lawful custody.

<sup>3</sup> S40(1) A peace officer may without warrant arrest any person-(c) who has escaped or who attempts to escape from lawful custody'

<sup>4</sup> *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H; *Minister of Safety and Security; Jonathan Daniels; v Johannes Francois Swart* (194/11) [2012] ZASCA 16 (22 March 2012), para[17]

And at para [17] :

*'In terms of s35(1), an arrested person has the right to be brought before court as soon as reasonably possible, but not later than 48 hours after arrest (depending on court hours) and to be released from detention subject to reasonable conditions if the interests of justice so permit'.*

[7] It is well-established that the *onus* rests on the arresting officer to prove the lawfulness of the arrest. Rabie CJ stated in *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F at para [19] the following:

*'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'*

[8] The defendant accepted that it bore the *onus* to prove the lawfulness of the arrest and detention, and testified first. The facts which gave rise to this matter can be summarized as follows.

#### EVIDENCE FOR THE DEFENDANT

[9] Warrant Officer Masongo testified that he is a member of the South African Police Service, stationed at Jeppe Police Station, having been employed as a police officer since 2001. On 23 October 2010, he was the driver of a police motor vehicle and armed with a 9 mm firearm. His crew was Student Constable Nyoni, who was armed with both a 9mm firearm and an R5 assault rifle as protocol demanded. Student constables attended a year

course at a police college, which included training in the handling of weapons. After 6 months they were assigned to the charge offices for field work, with a certificate that they had passed the competency test in the handling of firearms, and were then issued with firearms. Whilst performing patrol duties in the Jeppe and Bertrams area they were summoned to the charge office via the police two-way radio, where they found Mr Matanzima, who complained about the theft of his cell phone.

[10] Masongo and Nyoni accompanied by Matanzima, then went to a block of flats, at 36 Davis Street, Doornfontein and questioned the residents about the cellphone theft. Whilst doing so, a certain gentleman, later known as Mr Flip Mcina, interrupted their investigation, vilifying Matanzima, threatening to assault him. Masongo warned Mcina that he should not intimidate Matanzima, but Mcina did not heed him. Mcina's conduct incited the residents that had gathered there, and they became aggressive towards the policemen and hurled abuse and insults at them. As Masongo viewed the threats by Mcina as serious, he then approached Mcina and placed him under arrest, hand cuffing him from behind.

[11] Mcina's wife, Ms Mpho Mahlangu, the plaintiff in this matter, became vulgar and abusive, hurling insults at the police officers saying that they had come to arrest innocent people. Masongo and Nyoni then took Mcina down the flight of stairs in the flats. Mcina walked ahead, followed by Masongo, and behind him was Nyoni. The plaintiff followed them hurling abuse at them. As they were about to reach the ground floor, Masongo heard gun shots, and

saw Nyoni and Mcina falling down, and the plaintiff behind Nyoni. He saw the plaintiff rushing to assist Mcina.

[12] Nyoni informed Masongo that he had been pushed from behind by the plaintiff and, that as a result, his assault rifle fell, discharging shots, and in the process injured Nyoni on his left foot and Mcina on both of his legs. Masongo took the rifle and put it on 'safe'. He then called for backup and summoned an ambulance. Captain Ramaila and other senior police officials from the Jeppe Police Station arrived. Masongo related to Detective Warrant Officer Akoo what Nyoni had related to him about the cause of the shooting. The plaintiff was then arrested by Akoo for assault on a police official and/or aiding an arrested person to escape. Nyoni was taken to the hospital, and Mcina was first taken to the police station for documents to be completed before being taken to the hospital.

[13] Masongo testified that he had arrested Mcina for 'intimidation' and his threats to assault Matanzima. Although the plaintiff had insulted and verbally abused them, he did not arrest her at that stage, because he did not take her insults seriously. He denied that the subsequent release of both Mcina and the plaintiff, and the reason for the case against them not being pursued in court, was because the police had realised that they were 'in trouble' and wanted to cover up the negligent handling of the rifle by Nyoni.

[14] Masongo opened a docket for the arrest of Mcina for intimidation and assault but conceded that the charge of assault against Mcina was incorrect,

as it was the plaintiff who had committed the offence of an assault on a police officer, and had caused an R5 rifle to be discharged. He did not see the plaintiff aiding her husband to escape from their custody. He, however, insisted that the arrest of Mcina was not unlawful as the life of Matanzima had been in danger. He conceded that the dockets were handled poorly by the investigators.

[15] To a large extent the evidence of Nyoni was similar to that of Masongo. Nyoni confirmed that he was on patrol duty with Masongo on the day in question. As a crew to Masongo he was armed with a pistol and an R5 assault rifle. Masongo was armed with a firearm and both of them also carried pepper spray in a pouch in their belts. He testified that he was trained to handle a shotgun, an R5 assault rifle and a pistol. He had spent 6 months at the police training college where he received both practical and theoretical training in Criminal Law and Procedure, and thereafter he was posted to the charge office and assigned to the Crime Prevention unit. He confirmed Masongo's evidence in regard to the arrest of Mcina, and the torrent of verbal abuse meted out to them by the plaintiff and the residents of the flats, after they had arrested Mcina, the plaintiff's husband. As the residents of the flats showed hostility towards them, he realised that the situation was not safe for both Masongo and himself. He then changed the mechanism of his R5 assault rifle to 'R', that is, on repeat, ready to fire shots. The rifle was not on 'safe' any longer.

[16] Nyoni testified that they then walked down the stairs with Mcina in the front, followed by Masongo and himself. As they walked down, he was pushed from behind by the plaintiff who had been following him. He lost his balance, and the rifle fell out of his hand, discharging shots, injuring both Mcina and himself in their legs. As he lay there injured he saw the plaintiff jump over him and rush to Mcina, pulling him attempting to help Mcina to escape. He conveyed all this information to the police officers and Warrant Officer Akoo who attended the scene. He also made a statement to the police as to how the shooting had occurred.

[17] Constable Stephen Vuyeka testified that he arrived at the scene together with Akoo. On their arrival, they were informed that a shooting had occurred when the police officers were descending the stairs together with Mcina, a suspect who had been arrested for intimidation. The plaintiff was pointed out by Masongo and Nyoni as the person who had pushed Nyoni which had resulted in the shooting incident. Akoo then arrested the plaintiff. At the police station he explained her 'rights' to the plaintiff, and she exercised her right to remain silent. She did not ask to be admitted to bail or to obtain legal representation. Had she made such requests, the custody officer in charge of the plaintiff after her detention would have assisted her.

[18] Detective Warrant Officer Akoo testified that he attended the scene, where he found Captain Ramaila and Captain Mokwena who briefed him on the shooting incident. Masongo informed him that while he and Nyoni were attending to a complaint of the theft of a cell phone, Mcina had been arrested

for intimidation. They were in the process of bringing Mcina down the stairs, when his wife, the plaintiff who was following them, insulted and verbally abused them. Akoo questioned Nyoni who informed him that he had felt a “nudge” behind him, whilst they were accompanying Mcina down the stairs. Nyoni told him that it was the plaintiff who had pushed him, and as a result he lost his balance and the rifle released shots, injuring both Mcina and himself. He found Nyoni at the foot of the stairs, and Mcina lying on the floor, both were bleeding. He established that both had been injured on their legs. Nyoni also informed him that he believed that the plaintiff ‘wanted’ to assist her husband to escape.

[19] Armed with this information, Akoo questioned the plaintiff, who denied Nyoni’s account of the shooting. She accused the police officers of lies and denied that she had been walking behind them when the shooting occurred. He then confronted Masongo who told him that he had personally seen the plaintiff following Nyoni. After evaluating the information and verifying Nyoni’s version with Masongo, Akoo concluded that the version of Nyoni appeared probable and reasonable. Akoo testified that he *‘could not leave her unarrested because it would place the police in an unfair position, It would have created friction’*. Akoo then approached the plaintiff and informed her of the allegations against her, read to her ‘her rights’ and placed her under arrest. Nyoni was advised to open a police docket but due to his medical condition he could not do so. Akoo opened a docket of assault and aiding a prisoner to escape against the plaintiff.

[20] Akoo indicated that he would have had no problem with the plaintiff being released on bail or warning. When it was put to him that the plaintiff's detention period had expired over the weekend, he testified that she could still be detained until at least 13h00 on the Monday morning, when the 48 hours would have expired. Had he not effected the arrest of the plaintiff, it would have placed the police in an 'unfair' position at that stage. He discussed the matter with senior police officers on the scene, and proposed that the duty officer should compile a report so that further investigations could take place. According to the docket, it appeared that four investigating officers were appointed to investigate the matter. He conceded that the charges had not been investigated properly, and should have been pursued. He was surprised that the case was not placed on the roll for the Monday morning because this was a serious offence.

The defence then closed its case.

#### EVIDENCE FOR THE PLAINTIFF

[21] Ms Pinky Langa testified that she stayed in the same block of flats as Mcina and the plaintiff. On the morning of the incident, she had gone to the Spaza shop, which is three metres away from the flats. When she returned, on entering the flats, she noticed two policemen, and Mcina, coming down the stairs, with one policeman walking at his side and another behind him. They were about to get to the ground floor, when she heard the sound of gunshots. She did not see where the shots came from. She saw a policeman fall at her feet on the ground floor, and at the edge of the stairs she saw Mcina falling.

She did not see the plaintiff on the stairs. She became frightened and ran back to the Spaza shop to report the shooting. When she returned she found the plaintiff at her husband's side crying and comforting him. Another resident of the flats, Ms Sonto Ndebele testified that she was in her flat when Masongo and Nyoni arrived in the company of Matanzima. Matanzima had complained that the residents of the flats had stolen his cellphone. Mcina, the plaintiff's husband who was in his room, shouted in a loud voice that Matanzima was 'mad' for calling the police. As a result, the police ordered Mcina out of his room and cuffed him behind his back. She did not hear the plaintiff hurl insults and abuse at the police officers. The police officers then walked with Mcina, down the stairs. She followed them and saw the police dragging Mcina by his legs, down the stairs. She became frightened and turned back to call the plaintiff to see what the police officers were doing to her husband. The plaintiff then picked up her child and ran down the stairs. Immediately, thereafter she heard gunshots and heard the plaintiff scream. She saw Mcina and the police lying injured on the ground floor of the flats. The plaintiff cried and comforted her husband asking Masongo to remove his handcuffs.

[22] The plaintiff, Ms Mpho Mahlangu testified that Flip Mcina is her husband and she has a daughter by him who was about two and a half years old at the time of the incident. On the morning of 23 October 2010 she was informed by Sonto that Matanzima had reported a case against the residents of the flats about the theft of his cellphone and had summoned the police.

[23] The plaintiff then went to the passage area of the flats where other residents had gathered with the police officers. Her husband, Mcina, who was in their room at the time, shouted that Matanzima is 'mad'. The police officers then went to the room, ordered Mcina to dress and accompany them out. Mcina was handcuffed behind his back. She enquired the reason for this but received no reply from the police officers.

[24] When the police walked away with her husband, she sat on the floor holding her child on her lap. Whilst so seated, Sonto told her to check on her husband. She stood up and walked quickly down the stairs carrying the child. She was on the second floor when she heard the sound of a gunshot. She became frightened, put her child down, and ran down the stairs. On the ground floor, she saw two people lying on the floor. She went to her husband Mcina, lifted him up, and put his head on her lap. Her husband was crying and she asked the police to remove the cuffs as they were hurting him.

[25] She was later questioned by Akoo about the shooting incident, and told to accompany him to the police van. She walked with him to the van with her child. As the van was full in the front, she climbed into the back. The police van was driven to the police station. She waited in the waiting room for about one hour, and her child then began to cry as she was hungry. When she questioned Akoo as to why she had been brought to the police station, he informed her that she was under arrest.

[26] When she enquired the reason for her arrest, Akoo told her that Nyoni had informed him that before the shots went off, she had pushed Nyoni from behind, and had tried to assist her husband to escape from custody. She denied Nyoni's version and informed Akoo that she was not present when the shots were fired. A police officer then came and took her to another room with her child. A while later, when a friend came to visit her at the police station, she asked her to take the child away.

[27] Another police officer then locked her up. He later returned with a document which he read and handed to her. Thereafter she was taken to another cell where there were other women. She slept in that cell on the Saturday evening. A woman in the cell soiled herself on her way to the toilet, and when they complained about the foul smell, they were removed to another cell.

[28] The conditions in her cell were unhygienic and dirty. The food that was given to her was inedible. She lost her appetite and did not eat. The police brought her a plastic bag containing a lumber jacket and stockings sent by relatives. The police told her she was not allowed to see them because she was 'dangerous'. She was not given an opportunity to make a telephone call and nobody explained to her about bail.

[29] She testified that she slept in the police cell on the Sunday evening and was released on Monday morning. She was told that she could go home

because the police were still investigating the case. She walked home which was a thirty minute walk from the police station.

[30] The plaintiff's husband, Mr Flip Mcina testified and corroborated the plaintiff in material respects. On 23 October 2010, police officers knocked on the door of his room and arrested him. He did not enquire the reason for his arrest, and when his wife did, the police officers did not explain.

[31] The police officers took him down the stairs of the flats with Masongo pulling him by the leg. Whilst on the stairs he fell and did not realise that he had been shot. As he lay there, his wife came and picked him up and indicated that he had wounds on his leg and on his thigh. He was taken by ambulance to the Johannesburg hospital, where he was operated on the same day and discharged five days later.

[32] Detective Constable Vukeya visited him in hospital, took his fingerprints, and told him that Matanzima had opened a case of theft of a cell phone against him. When he was released from the hospital, he went to the police station to open a case of unlawful arrest and assault in respect of the injuries he had sustained.

[33] Mr Keyser, a candidate attorney at Bessinger Attorneys was also called to testify. He was previously a police officer for 17 years and was experienced in handling case dockets. It is not necessary to go into his evidence in any detail.

## ASSESSMENT

[34] The defendant bears the *onus* of proof concerning the lawfulness of the arrest of the plaintiff by Akoo. The defendant contends that the arrest without a warrant was lawful in that the plaintiff had in the presence of the police, committed an offence described in Schedule 1 of the Criminal procedure Act 51 of 1977 (as amended), as contemplated in s 40(1)(b), namely, assault on a police officer and aiding a prisoner/arrested person to escape. As a result of the assault, serious injuries resulting from an R5 assault rifle were inflicted on Nyoni and the plaintiff's husband, Mcina. Both suffered gunshot wounds to the legs.

[35] The reasonableness of the suspicion of any arresting officer acting under section 40(1)(b) must be approached objectively. The question is whether a reasonable person, confronted with the same set of facts, would form a suspicion that a person has committed a Schedule 1 offence<sup>5</sup>. Schedule 1 offences are serious offences.

[36] Akoo decided to arrest the plaintiff, on the information given to him by Nyoni that the plaintiff 'nudged' or 'pushed' him, causing the R5 assault rifle to fall from his hand, which discharged shots, injuring both her husband and himself, and Nyoni's belief that in doing so, she tried to free her handcuffed husband from the clutches of heavily armed police officers. Akoo did not question any of the residents to confirm the police officers' version of the shooting incident. It also does not appear from the evidence of Masongo and

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<sup>5</sup> *Sekhoto* (supra), at para [21]; *MVU v Minister of Safety and Security* 2009 (2) SACR 291 (GSJ).

Nyoni that they informed Akoo that Nyoni had prior to the shooting incident, put the assault rifle on 'R', 'repeat'; 'rapid fire'; ready to fire shots.

[37] Nyoni's justification for changing the mechanism of the assault rifle to 'R', 'ready to fire shots', was because he had perceived the situation to be 'unsafe'. The residents of the flats became hostile and abusive towards them after the plaintiff's husband had been arrested. After he was pushed by the plaintiff, he lost his balance, and the rifle fell out of his hands, firing shots automatically.

[38] In the police statement made by Nyoni he stated the following: *'Flip's girlfriend who was behind me as I was few steps to the exit I was pushed very hard from my back by Flip girlfriend as to reach W/O Masongo so that the suspect can escape. I then loose the balance ... as the R5 rifle was an automatic it went off as a result ... shot on my leg.'* (my emphasis)

[39] This is in contradiction to his testimony in court that he had deliberately changed the mechanism of the assault rifle to 'ready' to fire shots. Masongo confirmed that he had pushed the switch of the R5 rifle to 'safe'. Had they informed Akoo who questioned them later, that Nyoni had changed the mechanism of the assault rifle from 'safe' to ready to fire shots, perhaps Akoo's investigation may have included whether Nyoni had been negligent in the handling of the assault rifle in a block of flats which was inhabited by unarmed civilians.

[40] The defendant's case is that the plaintiff pushed Nyoni who was armed with a rifle in order to assist her husband to escape from the custody of two armed policemen. Yet Nyoni testified that the plaintiff tried to assist her husband to escape after he was shot, which is not only improbable but impossible considering that he was injured in the foot and handcuffed. The only evidence regarding an assault perpetrated by the plaintiff is Nyoni's. He testified that he was pushed from behind on his lower back. Nyoni's evidence stands alone as Masongo could neither support the push as alleged by Nyoni, nor could he shed any light on the manner in which it happened. According to Akoo's testimony, Nyoni had felt a 'nudge'. This is in contrast to his police statement that he 'was pushed very hard' by the plaintiff on his back, and his testimony that he was 'pushed' by the plaintiff.

[41] The crisp question is whether Akoo, as the arresting officer formed a reasonable suspicion that the plaintiff had committed a Schedule 1 offence. The objective facts available to Akoo were that the plaintiff was a young woman with a small child. Her husband had been arrested on a 'trifling' charge. He had been handcuffed and led away by two armed police officers, one of whom had been carrying an assault rifle, a highly dangerous and lethal weapon. Had he considered these facts he would not for one instant have suspected that the plaintiff had assaulted Nyoni with the intention of setting Mcina free from their custody, so that he could escape from his own home to become a man wanted by the police and that the plaintiff would be obliged to flee with him or face arrest herself.

[42] Nothing in the evidence suggests that even if the plaintiff had pushed Nyoni that it was with any intention to assault. On the contrary, the evidence (if accepted that Nyoni was indeed pushed) is compatible with an unintentional action and as such, it cannot amount to an assault. If Akoo believed at the time of his arrest of the plaintiff, that the plaintiff's 'pushing' of Nyoni had led to the serious injury of two people, one of whom was a police officer, it is inexplicable why no investigation of the charges against the plaintiff was carried out throughout the period of the plaintiff's incarceration or even at a later stage. The police officers conceded that no investigation of the charges against the plaintiff for the assault on a police officer was carried out. The case against the plaintiff was simply marked 'nolle prosequi'.

[43] The defendant specifically pleaded that the plaintiff's detention was in terms of s 50(1) of the Act, which implied that there was an intention to comply with its terms. However, there is no evidence that the plaintiff's appearance in a court of law was seriously intended. On Akoo's own version he arrested the plaintiff because 'it would have placed the police in an unfair position. It would have created friction'. Akoo's investigation as to how the shooting occurred was in my view arbitrary. He accepted the police officers' versions that the plaintiff had pushed Nyoni and rejected the plaintiff's version. Akoo did not investigate how the shots from the assault rifle came to be discharged nor did Nyoni disclose to him that he had altered the mechanism of the rifle ready to fire shots prior to the shooting incident.

[44] In my view Akoo's discretion to arrest the plaintiff with her young child was improperly exercised. He did not investigate properly the explanation by the plaintiff that she was not the cause of the shooting incident. Akoo did not question Masongo or Nyoni as to how the rifle fell and discharged shots. He simply assumed that the 'nudge' by the plaintiff gave rise to the shooting incident in which a police officer was shot.

[45] The plaintiff was charged with assault and aiding and abetting a prisoner to escape. There is no evidence that the plaintiff's husband was trying to escape from lawful custody and that the plaintiff was assisting him. The relevant sub-section, s 40(1)(b), in any event excludes this offence. No statements were taken from any independent witnesses. In fact in his own police statement, Akoo stated that he had arrested the plaintiff and charged her with '*aiding and abetting a prisoner to escape and assault common*'. The offence of 'common assault' is not an offence falling within the ambit of Schedule 1 offences. As Akoo had no personal knowledge of the shooting incident, and was not present when the alleged offences were committed by the plaintiff, and had merely relied on the police officers' reports *ex post facto*, he should have been alive to the fact that by arresting the plaintiff without a warrant, there was a risk that he was depriving a young woman, a mother of a young child of her liberty when he was not properly in a position to decide whether she had in fact committed the offences attributed to her by the police officers. Nor did he consider other avenues of securing the plaintiff's attendance in court. On the contrary, she was arrested and released after two days in detention without having to appear in court. Clearly

the decision to arrest the plaintiff by Akoo was not based on an intention to bring the plaintiff to justice. It was therefore irrational and unreasonable in the circumstances of this case.

[46] Nyoni was a student constable, who in my view failed abysmally to properly assess the situation he was confronted with in the residential flats. There is no evidence that the police officers found themselves in a life-threatening situation that justified Nyoni having to change the mechanism of his rifle from 'safe' to 'ready to fire shots', in order for him to discharge his duties as a police officer to uphold and enforce the law. The R5 assault rifle contained live ammunition which if discharged could have killed any of the residents of the flats. The plaintiff's 'nudging' of Nyoni, even if it was intentional would not have led to the discharge of shots if the rifle had been on 'safe'. His decision to change the mechanism of the rifle from 'safe' to 'R', ready to fire shots was a mistake which eventually lead to grave consequences.

[47] By accepting Nyoni's report on the shooting incident, Akoo stepped into the quicksand of Nyoni's negligent and irresponsible conduct. Nyoni had taken his rifle off safety, descended the stairs with it, lost his balance and shot himself in the foot, while at the same time wounding a detainee in his custody. Nyoni was highly motivated to deflect blame from himself onto the plaintiff, who happened to be the detainee's wife. What seems more probable on the facts of this case is that the plaintiff was arrested because the rifle discharged. That the charges against her were spurious is borne out by the refusal to

prosecute her. That the firing of the shots was accidental and not deliberate is therefore clear. It is also obvious that the police officers who were there to investigate the complaint of the theft of the cell phone abandoned their investigation, and arrested the plaintiff's husband instead.

[48] In my view the plaintiff and her witnesses testified in a clear and coherent manner. They corroborated each other's versions in material respects. There are no reasons to reject their testimony. The plaintiff's version that she did not 'push' Nyoni nor did she assist her husband to escape is credible, reliable and plausible. It is improbable that the plaintiff would have assaulted Nyoni and Masongo, as both were heavily armed as they descended the stairs. On Nyoni's own version, the atmosphere in the flats was tense. Removing his R5 rifle from 'safe' ready to fire shots in flats occupied by women and children, was in itself irresponsible.

[49] The defendant's witnesses, in my view, did not testify in a credible and satisfactory manner in regard to the shooting incident. Furthermore no investigation was carried out by the police in relation to the plaintiff's alleged assault on Nyoni. Nyoni was a poor witness whose evidence must be rejected. Akoo could not have formed a suspicion that a crime had been committed by the plaintiff based on the facts that he had at his disposal. Akoo was not present at the time of shooting and the suspicion formed by him was not reasonable in the circumstances of this case.

## CONCLUSION

[50] In the premises I find that the defendant did not discharge the onus of proving on a preponderance of probabilities that the arrest and detention of the plaintiff was justified in the circumstances of this case. The listed jurisdictional facts for a defence based on s 40(1)(b) were not established by the defendant. It follows therefore that Akoo's suspicion was not based on reasonable grounds. There are no facts present to justify the plaintiff's arrest without a warrant. There was no suspicion that she had committed an offence referred to in Schedule 1. The plaintiff's arrest and detention was clearly unlawful.

## THE AWARD

[51] There can be no doubt that the plaintiff suffered an arbitrary deprivation of her personal liberty, humiliation and trauma as a result of her unlawful arrest and detention. In my view the manner in which the plaintiff, a young 25 year old woman at the time of the incident, was placed with her child at the back of the police van and incarcerated at the police station unnecessarily for 48 hours is unreasonable and unjustifiable. The plaintiff had to endure unhygienic conditions in the cell, eat inedible food, and was not allowed visitors or a telephone call to a lawyer. It was a serious inroad into her liberty. The plaintiff's arrest and detention was not only demeaning, her dignity and reputation were gravely impaired.

[52] I have been referred to a number of decided cases. In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA), the plaintiff was deprived of

his liberty for five days. During his detention he had access to his family and medical adviser. The court also found that he suffered no degradation beyond that inherent in being arrested and detained. However, the Supreme Court of Appeal reduced the award made by the High Court of R500 000,00 to that of R90 000,00 in 2006. At paragraph [17], Nugent JA stated as follows:

*“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.”*

[53] In *Motsei v Minister of Safety and Security* (unreported) referred to as [2010] ZAGPPHC 14, 4 March 2010, the amount of R50 000 was awarded for to the plaintiff for one night's detention.

[54] In *Olivier v Minister of Safety and Security and Another* 2009 (3) SA 434 (W), the plaintiff was a senior police officer who was arrested by the police in the full view of his colleagues and then detained at the very same police station where he worked. He had claimed R150 000,00, for such arrest where he spent about six hours in custody and the court awarded him the amount of R50 000,00 which it regarded as fair and reasonable to both parties.

[55] In *Van Rensburg v City of Johannesburg* 2009(2)SA 101 (W), the court awarded R75 000,00 in damages to a 74 year old retired accountant who was arrested by the Metro Police and spent about five hours in custody. This amount is equivalent to R104 000,00 according to Robert Koch, *“The Quantum Yearbook*, 2012.

[56] In *Areff v Minister van Polisie* 1977 (2) SA 900 (A), a 41 year old businessman who was arrested and detained for about two hours was awarded the amount of R1 000,00. This amount is equivalent to R32 000,00 in 2012.

[57] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA), the Supreme Court of Appeal awarded R15 000 (equivalent to R21000 according to The Quantum Yearbook 2012) to a magistrate who was arrested and detained for 15 minutes. The Court in the above matter further held that although the plaintiff in the matter was in custody for a relatively short period, the length of time for which a person is detained after arrest is not the only factor to be considered when determining damages. All the surrounding circumstances are to be taken into consideration. And at para [26] of the judgment the following is stated by Bosielo JA:

*"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much – needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts."*

[58] Recently, Bosielo JA, in *Minister of Safety and Security; Jonathan Daniel v Johannes Francois Swart* (194/11) [2012] ZASCA 16 (22 March 2012),

considered that an amount of R50,000 was an appropriate award for a respondent who was unlawfully arrested and detained for 4 and a half hours.

[59] In the present case, the claim for damages in the sum of R150 000,00 is not out of proportion with the indignity suffered by the plaintiff nor is it excessive, if the 48 hour period the plaintiff was detained for is taken into account. Clearly there was a serious invasion of her rights and her dignity. The defendant is liable to the plaintiff for her unlawful arrest and detention from 23 October 2010 until 25 October 2010.

[60] Finally it must be said that police officers intent on carrying out arrests and detentions must do so with the responsibility associated with their official duties. Any transgression of the power vested in them especially when it concerns the vulnerable members of our society, does not augur well for our constitutional order. Carrying an assault rifle with live ammunition and firearms into residential flats occupied by women and children, to investigate the theft of a cell phone appears to have been reckless, irresponsible and unjustifiable in the circumstances of this case.

[61] Having regard to the facts as a whole, the past awards, the relevant case law, in my view a fair and reasonable amount for the damages to be awarded to the plaintiff is the amount of R150 000,00.

[62] In the result, I make the following order:

1. Judgment is granted against the defendant in favour of the plaintiff on the merits of this matter.
2. The defendant is ordered to pay to the plaintiff the sum of R150 000,00.(one hundred and fifty thousand rands ).
3. Interest at the rate of 15,5% per annum *a tempore morae* from date of judgment to date of payment.
4. Costs of suit.



H Sالدولكر  
JUDGE OF THE SOUTH GAUTENG  
HIGH COURT, JOHANNESBURG

ATTORNEY FOR THE PLAINTIFF: BESSINGER ATTORNEYS

COUNSEL FOR THE PLAINTIFF: ADV SWWJ VAN DER SANDT

ATTORNEY FOR THE DEFENDANT: THE STATE ATTORNEY

COUNSEL FOR THE DEFENDANT: ADV LP SIGOGO

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