REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

19/5/14

CASE NO: 36871/10

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19 May 2014
DATE

SIGNATURE

In the matter between:

DIEDERICK JAMES BOTHA Plaintiff

and

MINISTER OF POLICE First Defendant

CONSTABLE MHLONGO Second Defendant

J U D G M E N T

TEFFO, J:

[1] The plaintiff sued the defendants for damages for unlawful arrest and detention. This claim arises from an incident which took place on 2 April 2010

when the plaintiff was arrested without a warrant at the Stabilis Treatment Centre by the second defendant, a member of the first defendant, and caused him to be detained at Wonderboom police station from 2 April 2010 to 6 April 2010 for allegedly contravening a domestic violence protection order that was issued against him.

[2] The charge against him was subsequently withdrawn.

[3] Although the arrest of the plaintiff was conceded, the defendants dispute that his arrest was unlawful and pleaded that it was effected in terms of the provisions of section 8(4)(b) of the Domestic Violence Act 116 of 1998 ("*the Act*").

[4] The defendants also dispute that the detention of the plaintiff was unlawful.

[5] It was also alleged that the plaintiff was refused food and medical attention for 30 hours of his detention. The defendants dispute the allegations.

[6] It is common cause between the parties that at the time of the arrest and detention of the plaintiff, the second defendant was acting in the course and scope of his employment with the first defendant.

THE EVIDENCE

[7] Although the defendants had the duty to begin to prove that the arrest of the plaintiff was unlawful, the parties agreed the plaintiff should first adduce evidence.

[8] The plaintiff testified that he was initially charged for the assault of the complainant who is his nephew and presently his ex-wife's boyfriend. As a result of this incident an interim protection order was issued against him but it was never served on him. He did not know about it until on the date of his arrest. In terms of the interim protection order the court ordered him not to assault, nor abuse the complainant physically, emotionally, financially and verbally. The court further ordered him not to enter the complainant's residence at 514 Casper Laan, Eloffsdal, Pretoria, not to enter the complainant's place of employment at No 1200 Startkey Laan, Waverley and that he should not commit any of the following acts, to wit, no threats, no damage to property.

[9] He was arrested on Friday, 2 April 2010 at 12h00 while he was at the Stabilis Treatment Centre at the eating place. As he was at the eating hall three police officers arrived in two different motor vehicles. The second defendant arrested him and advised him of his constitutional rights. When he asked him why was he arresting him, he told him that he has contravened a protection order. At that time he was standing on the queue between the reception and the kitchen and there were a lot of people around him. He was

then put at the back of one of the police vehicles and they drove directly to the police station where a docket was opened against him and he was locked up in the cells. He was with other people in the same cell and the first two days they did not get food.

[10] He stated that from Friday, 2 April 2010 he was taken to court on 6 April 2010 because he was arrested during Easter weekend. He further testified that he told the second defendant that he was on medication at the time and still on his rehabilitation programme at the Stabilis Treatment Centre. Furthermore that he did not see the interim protection order which he was informed he had contravened and that he was adamant that his arrest was false. The second defendant then informed him that if he was falsely arrested, he was going to be a rich man. He appeared in court on Tuesday, 6 April 2010 and the charges against him were withdrawn. He subsequently returned to the Stabilis Treatment Centre to complete his course but he did not do the full course. He then proceeded to Denmar where he managed to complete the full course.

[11] The conditions in the cells were bad in that the cells were dirty and smelling, the blankets were smelling urine and the first two days they did not drink and have food. He was depressed and felt like he was humiliated in front of the people at the Stabilis Treatment Centre.

[12] After the psychological treatment and assistance he got, he feels better. He was psycho-legally evaluated by Dr Elsabe Swanepoel after being

referred to her by his attorneys with regard to his personality and emotional functioning, possible traumatic symptoms he is suffering due to unlawful arrest and incarceration and possible future functioning. Dr Swanepoel then compiled a report which was admitted into the record as evidence.

[13] He stated that the initial charge that led to the interim protection order has been disposed off in that he was convicted after pleading guilty and sentenced to two years imprisonment, six months of the sentence was suspended for five years on condition that he was not convicted of a similar offence during the period of suspension. He did not give details of the date when he was convicted and sentenced.

[14] Under cross-examination he testified that on 2 April 2010 he was not meeting the second defendant for the first time. Although he could not say when was the first time he met with the second defendant, he conceded that the second defendant had knowledge of the initial criminal charge against him and that he interacted with him during the investigation of the initial charge. He also conceded that the complainant in the initial and second charge is the same person and that the second defendant was the investigating officer in both matters. He was referred to the interim protection order against him and he maintained that he never signed it as he did not receive it. He also conceded that he knew where the complainant resided and that he once shot at him and he and his minor child got injured in the process.

[15] He disputed that the second defendant phoned him on 29 March 2010 and spoke to him about a breach of the protection order. He stated that he cannot remember him calling him to come to the police station. He also disputed that he promised the second defendant that he would come to the police station the following day. He disputed that he was at Eugene Marais hospital in April 2010.

[16] He conceded that he was seen by other experts, viz, Dr L P Steenkamp at Denmar Psychiatric hospital and Dr Rene Cruickshank other than Dr Swanepoel who compiled the report. He admitted that on 28 March 2010 he stopped his motor vehicle outside the street next to the complainant's residence and high rafted its engine but denied that a neighbour chased him away. He maintained that he drove away on his own. He explained that the reason he did what he did was because he wanted to talk to the complainant and his ex-wife but they did not come out. They later came out as a result of the noise until at the front door.

[17] He conceded that he knew that they were refusing to talk to him. He also conceded that he shot at the complainant while outside his residence previously but was not surprised that they did not come out when he was revving his vehicle outside his residence. He disputed that he revved his vehicle outside the complainant's residence to intimidate him and his ex-wife and stated that he only wanted to get their attention.

[18] Under re-examination he disputed that he breached the interim protection order as alleged.

[19] Constable Leonard Mhlongo testified on behalf of the defendants. He is currently a member of the South African Police Service ("*SAPS*") stationed at Wonderboom police station where he was also stationed in 2010. He was six years in the SAPS at the time of the incident in 2010. He arrested the plaintiff twice in 2010 for two different cases. The first case was for attempted murder and the second one was for contempt of court. He arrested the plaintiff on the second case at Stanvas in Villiera (the Stabilis Treatment Centre) on 2 April 2010 in the company of five police officers. He brought other police officers along because he knew the plaintiff as an aggressive person.

[20] On 28 March 2010 the plaintiff revved his motor vehicle in front of the complainant's house. The complainant then felt unsafe as a result. He had with him background information about what happened previously between the plaintiff and the complainant and then arrested the plaintiff. Between the period of the incident that led to the arrest of the plaintiff, viz, 28 March 2010, and the date of his arrest, viz, 2 April 2010, he phoned the plaintiff and told him about the second case that was opened against him and the plaintiff agreed that he would come and see him the following day. He did not come. He phoned him and enquired why he did not come. He could not remember the response that the plaintiff gave him but he informed him that because he did not come to see him as agreed, he was following his tracks.

[21] As he was communicating with the complainant and his father, he got information that the plaintiff was at Eugene Marais hospital. He indeed went to Eugene Marais hospital, entered through the main entrance, but was later informed that the plaintiff had escaped with another exit. He later got to know that he was at the Stabilis Treatment Centre where he went to arrest him.

[22] When he arrested him he was not aggressive but was also not cooperative. He managed to arrest him because he was in the company of other police officers.

[23] When asked what offence did he commit, he said by arriving at the complainant's residence, revving his motor vehicle, driving recklessly at the complainant's residence, the plaintiff made him to believe that he was abusing the complainant's rights. The complainant and his girlfriend told him that because of his previous conduct which led to the first case, when he went to their house for the second time, they felt unsafe. They felt traumatised about the first case in that he shot at the complainant and their minor child got injured in the process and they were afraid of him. As a result he concluded that the plaintiff should be arrested and justice should take its course.

[24] When told that the plaintiff says that he was never served with the interim protection order, he said the interim protection order that he sees is not complete. He stated that it should have a portion where the suspect acknowledged receipt of it. He further confirmed that when he received the docket as far as he can recall there was a statement by the complainant and a

copy of the interim protection order. He was then referred to page C17 and explained that the offence is described as a violation of a protection order. He stated that the complainant's statement was taken by Warrant Officer (W/O) Bruwer and that when he decided to charge the plaintiff, he was satisfied that an offence in terms of the Domestic Violence Act had been committed.

[25] Under cross-examination he conceded that the proof of service of the interim protection order cannot be found in Bundle C. When told that it was never put to the plaintiff that the protection order was served upon him when he testified that he did not receive it, he stated that what he knows was that the interim protection order was served upon the plaintiff and that the proof thereof was in the docket. He also conceded that the warrant of arrest was not there. When it was put to him that in terms of the provisions of section 8(4)(b) of the Domestic Violence Act, he could not arrest the plaintiff for breach of the interim protection order if there was no proper service of the protection order against him he maintained that the proof of service was in the docket but as he was testifying it was not there. He was also told that he could not have arrested the plaintiff because there was no warrant. His response was that if the warrant was not there, it was obvious that the arrest was unlawful.

[26] The issue for determination is whether the arrest and detention of the plaintiff was lawful entitling him to a claim of damages.

[27] Section 8 of the Act states:

"*(1) Whenever a court issues a protection order, the court must make an order –*

(a) authorising the issue of a warrant for the arrest of the respondent in the prescribed form;

(b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.

(2) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside, or it is cancelled after execution.

(3) The clerk of court must issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in the prescribed form in which it is stated that such warrant is required for his or her protection and that the existing warrant of arrest has been -

(a) executed and cancelled; or

(b) lost or destroyed.

(4) (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.

(b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).

(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which –

(i) specifies the name, the residential address and the occupation or status of the respondent;

(ii) calls upon the respondent to appear before a court, and on the date and at the time, specified in the notice, on a charge of committing the offence referred to in section 17(a); and

(iii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent.

(d) The member must forthwith forward a duplicate original of a notice referred to in paragraph (c) to the clerk of the court concerned, and the mere production in the court of such duplicate original shall be prima facie proof that the original thereof was handed to the respondent specified therein.

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account -

(a) the risk to the safety, health or wellbeing of the complainant;

(b) the seriousness of the conduct comprising an alleged breach of the protection order; and

(c) the length of time since the alleged breach occurred.

(6) Whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge."

[28] Section 5 of the Act reads:

" (3) *(a) An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.*

(b) A copy of the application referred to in section 4(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order.

(6) *An interim protection order shall have no force or effect until it has been served on the respondent."*

[29] In *Serial v The Minister of Safety and Security and others* [2004] JOL 13101 (C) the following remarks were made:

> *"The reason why the Act hinges the validity of an interim protection order upon its service and not so for a final protection order, I would venture, goes to the nature of an interim as opposed to a final interdict. For as with an interim interdict, an interim protection order is the first step towards procuring a (final) protection order. In keeping with the principle that a person is entitled to notice of legal proceedings against him or her, the Act ensures that the interim protection order which commences legal proceedings is not valid until notice thereof is given by its service upon the respondent. The Act ensures also that in the absence of service of an interim protection order, subsequent proceedings cannot ensue, prescribing as it does that proper service of an interim protection order is a prerequisite for the issuing of a final order."*

[30] It is trite that the *onus* rests on a defendant to justify an arrest. As Rabie CJ explained in *Minister of Law and Order and others v Hurley and Another* 1986 (3) SA 568 (A) at 589E-F:

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

[31] According to the defendant the arrest of the plaintiff was justified in that it was effected in terms of the provisions of section 8(4)(b) of the Act.

[32] In terms of the provisions of section 8(4)(b) of the Act if a respondent against whom a protection order has already been issued (based on

previously committed acts of domestic violence), contravenes the order and commits or threatens acts of domestic violence that could cause a complainant imminent harm, the complaint needs immediate action by the police. There is no time to approach court. The police official does have a discretion. He or she is only obliged forthwith to arrest the respondent, if it appears that there are reasonable grounds to suspect that imminent harm to the complainant may result from the alleged breach. In considering whether imminent harm may follow several factors as provided for in subsection (5) have to be taken into account. The police official may also come to the conclusion that there are insufficient grounds for an arrest and must then notify the respondent to appear before court (see Omar v Government, RSA and others 2006 (2) BCLR 253 (CC)).

[33] The provision in section 8(1) referred to supra for a warrant linked to the issuing of a protection order is clearly intended to provide a mechanism to ensure compliance with protection orders and to protect complainants against further domestic violence.

[34] It is common cause between the parties that the plaintiff was arrested without a warrant. The provisions of section 8 of the Act referred to *supra* clearly provide that a warrant must be authorised simultaneously with the issuing of the interim protection order the execution of which must be suspended subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7. The warrant referred to remains in force unless the protection order is set aside or cancelled after execution. In terms

of the provisions of section 4(a) of the Act, the complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order, contained in a protection order, to any member of the South African Police Service. No evidence was led as to the reasons why the plaintiff was arrested without a warrant where the provisions of section 8 of the Act were relied upon. The provisions of section 8(1) of the Act with regard to the authorisation of the warrant simultaneously with the issue of the protection order are peremptory. Although the police have authority to arrest without a warrant no evidence was led that the second defendant was justified in arresting the plaintiff without a warrant. Under cross-examination when it was put to the second defendant that the arrest of the plaintiff was unlawful as it was effected without a warrant, he himself conceded that fact. He specifically said "*if the warrant is not there then the arrest is unlawful*".

[35] It was submitted on behalf of the defendants that members of SAPS are empowered by section 3 of the Act to arrest without a warrant. Section 3 of the Act provides that a peace-officer may without a warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant. It was never the evidence of the defendants that the plaintiff was arrested at the scene of an incident of domestic violence. This section does not have anything to do with section 8. Reliance by the defendants on section 3 of the Act is therefore misplaced. A submission was also made by the defendants' counsel that section 5 of the Act empowers the

court to issue an interim protection order even if the respondent has not been given notice of the proceedings. This submission does not have merit taking into account that in terms of section 5(3)(a) once issued the interim protection order must be served upon the respondent.

[36] The plaintiff maintained throughout his evidence that he was never served with an interim protection order which he is alleged to have breached. It was never put to him while he was still in the witness stand that what he was saying was not the truth. It was only when the second defendant adduced evidence that he stated that he had served the interim protection order on the plaintiff. The second defendant could not furnish proof of service thereof. He contended in his evidence that the copy of the interim protection order that was included in the bundle of documents, viz, Annexure "C" was not complete and that as far as he can recall the proof of service was in the docket. This evidence was not of assistance to the defendant's case for the reasons advanced supra. The plaintiff gave a good impression to the court. His evidence was straight to the point and it was not shaken during cross-examination unlike that of the second defendant who ultimately conceded under cross-examination that the arrest of the plaintiff was unlawful.

[37] The *onus* rest on the defendants to prove the lawfulness of the plaintiff's arrest and detention. It was strange that the defendant could not furnish proof of service of the interim protection order if it was indeed served upon the plaintiff.

[38] The failure of the defendants to provide proof of service of the interim protection order confirms the plaintiff's evidence that he was never served with the order and only became aware of it at the time of his arrest.

[39] An interim protection order has no force or effect before service has taken place. The suspended warrant of arrest can only be executed once a police official has received an affidavit by the complainant stating that the protection order has been contravened. An order that has not come into force and has no effect cannot be contravened. This means that the fact that the interim protection order was not served upon the plaintiff renders it null and void and therefore he cannot be said to have contravened an order that never existed.

[40] I therefore find that the arrest and the subsequent detention of the plaintiff for allegedly breaching an interim protection order was unlawful and that the plaintiff is therefore entitled to damages suffered as a result thereof.

[41] I accordingly do not find it necessary to consider whether the second defendant exercised his discretion properly when he arrested the plaintiff.

QUANTUM

[42] The plaintiff initially claimed damages in this action in the amount of R400 000,00. When the matter was argued counsel for the plaintiff moved an application to amend prayer 1 of the plaintiff's particulars of claim to read that

the plaintiff claims payment of an amount of R250 000,00. No objection was made and the amendment was accordingly granted. After referring to comparative case law counsel for the plaintiff further submitted that the award that can fairly compensate the plaintiff for his damages should be in the range of between R180 000,00 and R200 000,00.

[43] In assessing damages the court is enjoined to take into consideration all the relevant factors in that particular case. Awards, will therefore, vary from case to case depending on the circumstances of each case.

[44] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 at 326 para [20] Nugent JA remarked as follows:

> *"Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind that when making such awards there are many legitimate calls upon the public purse to ensure that the other rights that are no less important also receive protection."*

[45] In *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534H-535A Potgieter JA said the following in relation to general damages for bodily injury:

> *"It is settled law that the trial judge has a large discretion to award what he in the circumstances considers to be fair and adequate compensation to the injured for these sequelae of his injuries. Further this court will not interfere unless there is a 'substantial variation' or as it is sometimes called a 'striking disparity' between what the trial court awards and what this court considers ought to have been awarded."*

The court went on to say:

> *"Comparable cases, when available, should rather be used to afford some guidance in a general way, towards assisting the court in arriving at an award which is not substantially out of the general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where injuries and their sequelae may have been either more serious or less than those in the case under consideration."*

[46] I have considered the amounts awarded in cases such as *Minister of Safety and Security v Seymour* referred to *supra*, *Seria v Minister of Safety and Security*, 2005 (5) SA 130 (C), *Rudolph & Others v Minister of Safety and Security* 2009 (2) SACR 271 (SCA), *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA), and all other cases referred to by the parties.

[47] The plaintiff was arrested and detained in the police cells from 2 April 2010 at 13h00 and released on 6 April 2010. He had spent approximately 3½ days in the cells. He described the conditions in the cells as bad in that the cells were dirty and were smelling, the blankets were also smelling urine and that the first two days he did not drink and have food. He was also denied medication. He stated that he was depressed and humiliated in front of the people at the Stabilis Treatment Centre. As a result of his arrest he could not complete his rehabilitation at the Stabilis Treatment Centre. He had to re-do it at Denmar. The plaintiff consulted a number of experts before and after consulting with Dr Swanepoel. From Dr Swanepoel's report it appears that the

plaintiff had a number of problems prior to his arrest. His history reveals that he was involved in a motor vehicle accident when he was four years old. At the age of seven he also had many bicycle accidents. In October 2010 to April 2011 he abused alcohol, took his medication with alcohol, started hallucinating and this took 36 hours. As a result he was admitted at Denmar Psychiatric hospital. He suffered epileptic seizures in the dentist chair and consulted Dr Steenkamp, another psychiatrist. He tried to commit suicide twice and in both instances, he was drunk.

[48] Dr Swanepoel opined that the plaintiff's problems, because of his past, have not been effectively and appropriately addressed but that he was trying to deal with the traumas of such past events. She concluded that the unlawful arrest and detention of the plaintiff can certainly be seen as a significant trauma in his life, adding to the challenges that already existed which he is unable to deal with.

[49] In the circumstances I am of the view that the fair and reasonable compensation to the plaintiff for his unlawful arrest and detention is an amount of R120 000,00.

[50] In the result I make the following order:

50.1 The arrest and detention of the plaintiff by the second defendant was unlawful.

50.2 Judgment is granted in favour of the plaintiff against the first and second defendants jointly and severally the one paying the other to be absolved in the sum of R120 000,00.

50.3 The first and second defendants are ordered to pay interest on the amount of R120 000,00 from date of summons until date of final payment calculated at the rate of 15,5% per annum *tempore morae*.

50.4 The defendants are further ordered to pay the costs of the action.

M J TERFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

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INSTRUCTED BY	THE STATE ATTORNEY
DATE OF HEARING	16 MAY 2013
DATE OF JUDGMENT	19 MAY 2014