IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: A57/15

DATE: 18/22/016

In the matter between:

FRANCOIS CARL KRUGER **APPELLANT**

AND

THE MINISTER OF POLICE **RESPONDENT**

JUDGMENT

MOLEFE J

[1) This is an appeal against the whole judgment of Magistrate B Matlape handed down on 19 December 2014 in the Pretoria North Magistrate court. The appellant's claim for unlawful arrest and detention was dismissed by the court a *quo,* each party ordered to pay each own costs. The complainant was the second defendant at the trial but the court a *quo* granted absolution against her.

[2] The appellant's cause of action against the respondent is unlawful arrest and detention. The appellant averred that he was arrested without a warrant with an alternative plea that if the arrest was effected with a warrant, that the arresting officer did not comply with the requirements of the *Domestic Violence Act, Act 116 of 1998 ("the* Act'). As a result of the arrest and detention, the appellant claimed R100 000, 00 damages from the respondent.

[3] The following facts are common cause:

3.1 The complainant (in the court a *quo* the second defendant) Ms Chrisna Kruger, appellant's sister, had applied for and was granted an interim protection order ("the order") in terms of section 5 (2) of the Act against the appellant on 5 May 2010 at the Pretoria North Magistrate Court;

3.2 The appellant, the complainant and their other sibling are co-owners of the property at [8…] Stratia Lane, Dorandia, Pretoria North ("the property"). The complainant and her two minor sons resided in the main house of the property at the time when the order was granted;

3.3 The order contained the following prohibition:

> ". . . . . om *nie die klaer of enige kind wat gewoonlik in die gedeelte woning te Stratialaan [8..], Dorandia, Pretoria Noord woon of gewoon het, te verhoed* om *die gedee/de woning of enige deel daarvan binne te gaan of daarin te vertoef**nie. . . . "***

3.4 The order was served on the appellant on 6 May 2010 at approximately 06h30 by Warrant Officer Holtzhausen. The appellant was arrested by W/0 Holtzhausen, at the property on *6* May 2010 at approximately 18h30 for allegedly contravening the

order. W/0 Holtzhausen, a member of the South African Police Services ("SAPS"), acting within the course and scope of his employment arrested the appellant on a charge of contempt of the court order, being the interim protection order.

[4] The respondent in its plea, admitted that the appellant was arrested on 6 May 2010, by a member of the SAPS without a warrant, and further pleaded that the appellant's arrest was effected by a peace officer in terms of section 3 of the Domestic Violence Act, and as such was lawful.

[5] Warrant Officer Holtzhausen testified on behalf of the respondent and his testimony was that he served the order on the appellant on 6 May 2010 at approximately 06h30. Later on the same day, he received a call from the complainant that the appellant had changed the locks to the house, thereby preventing her and her children from entering the property and thereby contravening the interim protection order. On his arrival at the premises, Holtzhausen was unable to unlock the house with the keys which the complainant had. He then summoned the appellant to come to the property and after the appellant had unlocked the house, he arrested him for contempt of court.

W/0 Holtzhausen further testified that he arrested the appellant before he obtained a sworn affidavit of the complainant for the appellant's contempt of court and that the reason he arrested the complaint was that he did not comply with the order. Hotzhausen did not deny the appellant's version that the complainant was in possession of the keys to the house and that when the arrest was effected the house was not locked.

[6] The learned magistrate's reasons for making a finding that the arrest and detention were lawful were *inter alia* that:

". . . . as *soon* as *the plaintiff was served with the interim protection order he was supposed to have removed the cause of the complaint. Plaintiff was supposed to have put back the original locks of the house to allow the erstwhile 2nd defendant and her children access into the house. Plaintiff failed to do* so *and in this court's opinion he committed an act of domestic violence"* [1].

[7] Section 40 (1) (q) of the *Criminal Procedure Act, Act 51 of 1977 ("CPA'J* provides that:

"(1)A peace officer may without a *warrant arrest any person -*

a) - - - - - - -

b) - - - - - - --

c) - - - - - - -

(q) who is reasonably suspected of having committed an act of domestic violence as *contemplated in section 1 of the Domestic Violence Act, 1998 which constitutes an offence in respect of which violence is an element".*

[8] Although the respondent in its plea did not rely on section 40 (1) (q) of the CPA, I am also of the opinion that the police officer could not have acted in accordance with section 40 (1) (q) as there was no imminent harm to the complainant and no *act* of domestic violence was contravened by the plaintiff at the scene of the incident.

[1] Index Volume page 24 par 2

[9] The definition section of the *Domestic Violence Act* defines domestic violence as *"where such conduct harm, or may cause eminent harm to the safety, health or we/I-being of the complainant".*

In **Seria v Minister of Safety and Security and Others 2005 (5) 130 C,** it was stated that *"imminent harm"* is:

> *"It is the danger of harm of* a *certain degree of immediacy that activates the protection . . . that* is *to harm which* is *impending, threateningly ready to overtake or coming on shortly".*

[10] Section 3 of the *Domestic Violence Act* states the following:

> *"3.* ***Arrest by peace officer without warrant***
>
> *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 the complainant".*

[11] An interim protection order must in terms of the provisions of section 5 (3) (a) of the Act be served on the respondent in the prescribed manner. In terms of section 5 (3) (b) of the Act, a copy of the application, the record of any additional evidence considered by the court and the interim protection order must be served on the respondent. In terms of sections 5 (3); (6) and (13) of the Act, as well as Regulation 15, the interim protection order must be served by the Clerk of the Court, the Sheriff or a Peace Officer according to the Rules of the Magistrate's Court.

I am satisfied that in *casu,* the interim protection order was prior to the appellant's arrest, served on the appellant in the prescribed manner.

Enforcement of an interim protection order

[12] Section 5 (7) of the Act provides that the original warrant of arrest must be served by the Clerk of the Court on the complainant upon service or upon receipt of a return of service of an interim protection order.

[13] Section 8 (4) (a) of the Act reads as follows:

> *"A complainant may hand* a *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 section (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 para (b), he or she must forthwith hand* a *written notice to the Respondent which –*
>
> *i) - - - - - - - -*

ii) calls upon the Respondent to appear before a Court, and on the date and the time specified in the notice; on a charge of committing the offence referred to in section 17 (a)".

[14] Appellant's counsel[2] submitted that the learned magistrate misdirected herself in finding that it was the duty of the court *a quo* to determine if the arrest was based on a reasonable suspicion that a schedule 1 was committed. I agree with counsel's submission in this regard.

[15] The question to be determined by this Court is whether the respondent satisfied the *onus* to prove that the arrest was indeed lawful. I have considered the evidence of Warrant Officer Holtzhausen that he arrested the appellant for contempt of court as the appellant did not comply with the interim protection order. Holtzhausen did not however deny the appellant's version that when he was arrested, the complainant was in possession of the house keys, that the house was not locked and that the complainant had full access to the house.

[16] In **Greenberg v Gouws and Another 2011 (2) SACR 389 (GSJ)** at paragraph 25 to 29, the Court held that:

"Reasonable grounds' in terms of s 8 of the Domestic Violence Act empowers the court which issues a protection order pursuant to domestic violence to authorize a warrant of arrest against the person whom a protection order is directed. The warrant of arrest is generally suspended but if it appears to a police officer that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the breach of the protection order, the police official may lawfully arrest the person who is in breach of the protection order. The suspicion of the arresting

[2] Advocate M Bouwer

officer will be reasonable if it is objectively sustainable ***(S B (4)*** *(b)) of Act 116 of* ***1998".***

[17] It is clear that there must be physical violence inflicted or imminent before an arrest can be effected. In **Minister of Safety and Security v M (CA 350/2012) 2014 ZAECG HC 58** delivered on 10 July 2014, the Court held:

> *"[24] One must bear in mind that the requirements of S 40 (1) (q) is not just* a *suspicion that an act of domestic violence as contemplated in S1 of the Domestic Violence Act has been committed, but that the act of domestic violence must constitute an offence in respect of which violence is an element. The violence referred to in the subsection must be physical violence. If* a *suspicion that merely an act of domestic violence as contemplated in S 1 of the Domestic Violence Act has been committed was sufficient, there would be no need for the qualification that the act must constitute an offence of which violence is an element. Bearing in mind that the purpose of arrest is to bring the arrested person before* a *court, there must be a suspicion that a legally recognised criminal offence has been committed".*

[18] An act of domestic violence in the form of emotional abuse, as in *casu,* does not constitute an offence containing an element of violence against the complainant. In **Minister of Safety and Security v M supra at paragraph 25,** it was held:

> *"As was submitted on behalf of the respondent, the acts of domestic violence in that definition, which constitute an offence in respect of which violence is an element are physical abuse and sexual abuse. It was submitted on behalf of the appellant that there was information that emotional abuse had occurred.*

An act of domestic violence in the form of emotional abuse would however not suffice for the purposes of S 40 (1) (q) of the Act. Nor would it suffice for the purposes of S 3 of the Domestic Violence Act . . ."

[19] The respondent in this case also relied on emotional abuse which do not comply with the requirements of physical violence and which also is not an offence on which a police officer would arrest the appellant. There was no evidence that there were reasonable grounds for the arresting officer to suspect that the complainant may suffer imminent harm as a result of the appellant's breach of the protection order. At the time when the arrest was effected, the appellant had handed over the keys to the property to the complainant who then had full access to the house. The alleged suspicion by the arresting officer of an emotional abuse, was *in casu* not objectively sustainable.

[20] It is my opinion that the respondent did not satisfy the onus to prove that the arrest and subsequent detention of the appellant were justified. The court a *quo* misdirected itself in finding that the arrest and detention were lawful. The appeal should therefore be upheld.

Quantum of Damages

[21] When assessing damages in matters such as the present, the evaluation of the personal circumstances of the plaintiff, the circumstances around the arrest and the nature and duration of the detention is taken into account[3].

[3] See Ngcobo v Minister of Police 1978 (4) SA 930 (D) at 935 B-F

The testimony of the appellant about his personal experiences and conditions that prevailed in the police cells and what effect the arrest had on him is taken into account.

[22] The appellant was 40 years old at the time of his arrest and is a landscape designer. He was arrested in front of his family members and was detained in the police and court cells at the police station for (17) seventeen hours. His stay in the cells was unbearable as it was cold. He was humiliated and degraded by the arrest.

[23] The purpose of an award for general damages in the context of a matter such as the present is to compensate the claimant for deprivation of personal liberty and freedom as well as the mental anguish and distress.

In **Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA) at par 26,** Bosielo AJA (as he was then), emphasized that the primary purpose is *"not to enrich the claimant but to offer him or her some much-needed solatium for his or her injured feelings".*

[24] Although the determination of an appropriate amount of damages is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases.

In **Rudolph and Others v Minister of Safety and Security 2009 (5) SA 94 (SCA),** the plaintiff was unlawfully arrested on Saturday evening and released on Monday morning and was awarded the current value of R89 000-00.

In **Fubesi v Minister of Safety and Security** case no 680/2009 (EC), Grahamstown, the plaintiff who was unlawfully arrested and detained for three(3) days was awarded damages in the current value of R106 000-00.

[25] I take into account the circumstances of the appellant's arrest, the duration of the detention, the personal circumstances of the appellant and the awards made in previous comparable cases. The indignity of being confined in a police cell and being deprived of liberty must have had a negative effect on the appellant. Having taken into account all the circumstances of this case, I deem R40 000-00 to be a fair and just amount of damages for the appellant.

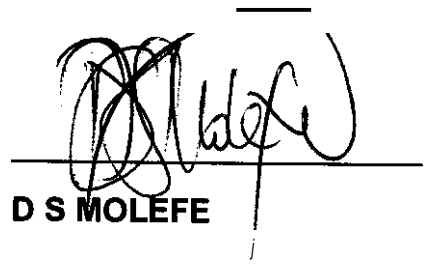
[26] In the result the appeal is upheld and the order of the court a *quo* is replaced with the following order:

26.1 1judgment is *granted in favour of the appellant;*

26.2 the respondent is *ordered to pay the appellant an amount of R40 000-00 for damages;*

26.3 interest on the amount at the prescribed rate from date of judgment to date of payment;

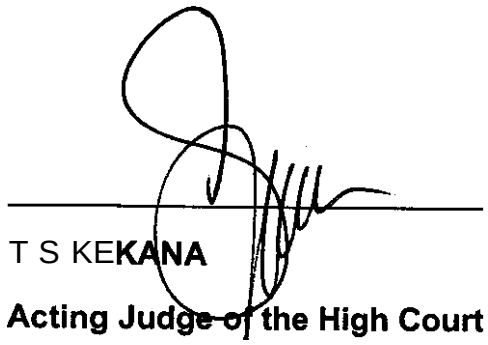
26.4 the respondent to pay the costs *of the action and the* costs *of the appeal.*



D S MOLEFE

Judge of the High Court

And it is so ordered.



T S KE**KANA**

Acting Judge of the High Court

I agree.

APPEARANCES:

Counsel on behalf of Appellant	Adv. M Bouwer
Instructed by	Potgieter, Penzhorn & Taute Inc.
Counsel on behalf of Respondent	Adv. M Bothma
Instructed by	State Attorney
Date Heard	2 February 2016
Date Delivered	18 February 2016