IN THE CAPE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

[Reportable]

CASE NO: 9165/2004

In the matter between:

NAZEER AHMED SERIA

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY **1st**

Defendant

DETECTIVE INSPECTOR (F) L LEONARD **2ND**

Defendant

DETECTIVE INSPECTOR W STEVENS **3RD**

Defendant

JUDGMENT: 15 OCTOBER 2004

MEER, J:

Introduction

The plaintiff claimed damages in the sum of R150 000 in an action for unlawful arrest arising out of his arrest by the second and third defendants on 28

September 2002, and subsequent detention until 29 September 2002. The arrest was carried out under the auspices of the Domestic Violence Act, No 116 of 1998, ('the Act') for an alleged breach of a protection order[1] granted against plaintiff and in favour of his former wife Naziema du Toit. The arrest was authorized by a warrant of arrest issued in terms of section 8(1)(a) of the Act.

In enunciating his claim, the plaintiff disputed the validity of both the protection order and the warrant of arrest issued therewith to secure his arrest. In addition, he claimed that the allegations by Naziema du Toit which caused his arrest were false and failed to satisfy the threshold requirements for effecting an arrest in terms of the Act.

The defendants in turn pleaded that plaintiff was lawfully and justifiably arrested pursuant to a valid warrant of arrest, for an alleged breach of the protection order issued in favour of Naziema du Toit. There were, so they pleaded, reasonable grounds to suspect that Naziema du Toit may suffer imminent harm as a result of the alleged breach.

Legislative Framework

The Domestic Violence Act was promulgated in response to the alarmingly high incidence of domestic violence within South African society. The purpose of the Act is to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide and accords with that of similar legislation in different parts of the world.[2] The term domestic violence is widely defined in the Act to include;

"(a) *physical abuse;*

1 Granted in terms of section 6 of the Act

2 See for example the Domestic Violence Act, 86 of 1995, of New Zealand; the Family Law Act, 1996, of the United Kingdom; The Domestic Violence Act, 1996, of Ireland; The Domestic Violence Protection Act, 2000, of Ontario, Canada and the Domestic Violence Bill of India.

b) sexual abuse;

c) emotional, verbal and psychological abuse;

d) economic abuse;

e) intimidation;

f) harassment;

g) stalking;

h) damage to property;

i) entry into the complainant's residence without consent, where the parties do not share the same residence; or

j) any other controlling or abusive behaviour towards a complainant,

where such conduct harms of may cause imminent harm to, the safety, health or wellbeing of the complainant".[3]

Central to the purpose of the Act, is the granting of a protection order for the protection of a victim of domestic violence, and the simultaneous issue of a warrant for the arrest of the perpetrator. The execution of the warrant is however suspended, but becomes activated in the event of an alleged breach of a protection order, if it appears to a member of the police service that there are reasonable grounds to suspect that the complainant may suffer imminent harm. In that event the police officer must execute the warrant and arrest the perpetrator.[4] Sections 5 and 6 of the Act provide for the granting of interim and final protection orders, following upon an application under section 4. Section 8 enables the issuing of warrants of arrest and subsequent arrests. It is useful at the outset, to set out the relevant subsections which have a bearing on this case.

3 S 1 of the Act

[4] See s 8(4)(b) as discussed below.

Sections 5 and 6 of the Act read as follows:

"***5 Consideration of application and issuing of interim protection order***

(1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(2) If the court is satisfied that there is prima facie evidence that-

(a) The respondent is committing, or has committed an act of domestic violence; and

(b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in sub-section (1), issue an interim protection order against the respondent, in the prescribed manner.

(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 sub-section (1) must be served on the respondent together with the interim protection order.

(4) ….

(5) ….

(6) An interim protection order shall have no force and effect

until it has been served on the respondent.

(7) Upon service or upon receipt of a return of service of an interim protection order, the clerk of the court must forthwith cause –

(a) a certified copy of the interim protection order; and

(b) the original warrant of arrest contemplated in section 8(1)(a),

to be served on the complainant.

6 Issuing of protection order

(1) If the respondent does not appear on a return date contemplated in section 5(3) or (4), and if the court is satisfied that;

(a) proper service has been effected on the respondent; and

(b) the application contains prima facie evidence that the respondent has committed or is committing an act of domestic violence,

the court must issue a protection order in the prescribed form.

(2) …

(3) …

(4) …

(5) Upon the issuing of a protection order the clerk of the court must forthwith in the prescribed manner cause-

(a) the original of such order to be served on the respondent; and

(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8(1)(a), to be served on the complainant.

(6) The clerk of the court must forthwith in the prescribed manner forward certified copies of any protection order and of the warrant of arrest contemplated section 8(1)(a) to the police station of the complainant's choice."

Section 8 of the Act provides for the issuing of a warrant of arrest simultaneously with the issuing of a protection order and crucially makes provision for arresting a respondent.

> ***"8 Warrant of Arrest upon issuing of a protection order***
>
> *1) Whenever a court issues a protection order, the court must make an order-*
>
> *(a) authorizing the issue of a warrant for the arrest of the respondent, in the prescribed form; and*
>
> *(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 sub-section 1(a) remains in force unless the protection order is set aside, or it is cancelled after execution.*
>
> *3) ….*
>
> *(4) (a) 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 sub-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).*[5]
>
> *(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms*

5 The offences referred to in s 17(a) are the contravention of any prohibition, condition, obligation or order imposed in terms of s 7.

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 a 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.

Against the backdrop of the relevant legislative provisions, I turn to consider the plaintiff's arrest.

Evidence and Circumstances of Plaintiff's arrest

The plaintiff, an architect by profession, residing in the Cape Town suburb of Athlone, was formerly married to one Naziema du Toit. In about November 2001 Ms du Toit moved out of the marital home and took up residence in the family holiday home at Betty's Bay in the magisterial district of Caledon. Whilst residing at Betty's Bay, she obtained an interim protection order against the plaintiff out of the Caledon Magistrates' Court on 14 December 2001, with a return day of 25 January 2002. The interim order was served personally on the plaintiff at Betty's Bay.

In terms of the interim protection order the plaintiff was ordered not to commit the following acts of domestic violence against Ms Du Toit:

- assault, threaten or emotionally abuse her;
- obtain the assistance of another person to assault, threaten or emotionally abuse her.

He was also ordered:

- not to enter the dwelling situated at 2152 Park Road, Betty's Bay;
- not to remove the motor vehicle in her possession.

In accordance with the Act, the Court ordered a copy of the interim protection order and the warrant of arrest issued simultaneously therewith to be sent to the Kleinmond police station as soon as the interim order was served on the plaintiff. The warrant of arrest did not adhere to the format prescribed by the regulations promulgated under the Act[6] ('the Regulations') and it was undated, the date stamp omitting to display the date of issue.

The plaintiff's undisputed testimony was that after obtaining the interim protection order, Ms Du Toit returned for a period to the marital home but they did not become reconciled. They however came to an agreement that the interim

6 Regulation 9 of the regulations promulgated in terms of the Domestic Violence Act No 116 of 1998, Regulation Gazette No 6666 - 5 November 1999, Vol. 413 No 20601

protection order would be withdrawn. Accordingly on the return day of the interim order, 25 January 2002, plaintiff drove Ms Du Toit to the Caledon Magistrates' Court for the purpose of withdrawing the interim order. There, plaintiff remained in the car whilst Ms Du Toit went into the court, emerging half an hour later to inform him that the interim order had been withdrawn.

Unbeknown to plaintiff however, Ms Du Toit did not withdraw the interim order. Instead a final protection order was granted at the Caledon Magistrates' Court on 25 January 2001. Thereafter Ms Du Toit moved from Betty's Bay to a flat in Mouille Point, Cape Town, and her file was transferred from the Caledon to the Wynberg Magistrates' Court. Ms Smit, a senior clerk at the Wynberg Magistrates' Court, testified that (as had been established from the Caledon clerk of the court), the final protection order once granted, was not served on the plaintiff as provided for in the Act.

In September 2002 the plaintiff and Ms Du Toit obtained an Islamic divorce, or *Talaaq*. By that stage there were protracted and acrimonious interactions between them pertaining primarily, it would seem, to the proprietary consequences of their marriage. Plaintiff referred to an e-mail Ms Du Toit had sent him on 23 May 2002 threatening to reinstate the court order and have him arrested. Relations between them had deteriorated to such an extent he said, that she would stop at nothing to get him arrested.

On 13 September 2002, some nine months after the final protection order was granted, plaintiff began to suspect that the interim protection order had not been withdrawn, when Ms du Toit, accompanied by members of the Lansdowne Police, arrived at his house. Inspector Jackson ordered him to hand over the keys to the Betty's Bay house, to reconnect the telephone at Ms Du Toit's Moullie Point flat and pay her outstanding electricity accounts. Plaintiff handed over the

keys. When he asked Ms Du Toit whether she had in fact withdrawn the interim order, she had become abusive and driven away.

About two weeks later the plaintiff was arrested for allegedly contravening the protection order. The events which precipitated his arrest were as follows:

On 26 September 2002 Ms Du Toit attested to an affidavit at the Lansdowne Police Station, an extract from which stated:

> *"On 2002.09.13 …. my estranged husband telephonically abused me and threatened that he would beat me up beyond recognition if I do not move out of our holiday house in Betty's Bay.*
>
> *He has threatened to take my car away from me, the order states that he may not.*
> *Nazeer has assaulted me on many occasions in the past which I did not report but I do feel afraid and threatened by his threats."*

On the following morning, Friday 27 September 2002, Inspector Jenny Leonard, who has been a police officer since July 1983 and has experience of over 100 family violence cases, was made investigating officer in Ms Du Toit's case. Inspector Leonard testified that on receiving the file shortly before 09:40am, she had spoken telephonically to Ms Du Toit. Immediately thereafter and at 09:40 (the time as recorded by her), she made an entry in her investigation diary to the effect that the plaintiff will be arrested, writing the words, "*Verdagte sal gearresteer word"*.

Inspector Leonard did nothing further in the case that day and said she had locked the file in her office when she went off duty on the afternoon of 27 September 2002.

On the evening of Friday 27 September 2002 Ms Du Toit returned to the Lansdowne Police Station and once again lodged a complaint against the

complainant, this time with Sgt Van Wyk who was on duty that evening. The incident book entry by Sgt Van Wyk (written much later at 1:10 am on Saturday 28 September 2002), erroneously refers to Ms Du Toit's case as one of common assault. It states also that she had asked that the plaintiff be locked up.

Acting on Ms Du Toit's complaint, Sgt Van Wyk proceeded to the plaintiff's house and asked that he accompany him to the police station, which the plaintiff did in the company of his lawyer. The plaintiff testified that as they left his home, he observed Ms Du Toit sitting outside the house in her vehicle and she waved to them. At the police station, he was informed Ms Du Toit had complained that he had sworn at her telephonically in September 2002, contrary to the protection order. After discussions with the police it was agreed that plaintiff would not be arrested. Instead he and his lawyer would return to the police station on the morning of Monday 30 September 2002. Plaintiff was allowed to return to his home, which he did, after midnight.

Sgt Van Wyk's entry in the incident book records the agreement with the police that plaintiff would not be detained. The entry (which incorrectly refers to the plaintiff as Mr Du Toit), states that as a result of representations made by plaintiff's lawyer, the station commissioner, Superintendent Olivier, had deliberated with the station commander, Captain Christiaans, about the necessity for detaining the plaintiff. Captain Christiaans had come to the view that it was not necessary to hold the plaintiff and Superintendent Olivier had conveyed this to Sgt Van Wyk with the instruction that plaintiff and his lawyer were to return to the police station on the morning of 30 September. The entry also records that, at the request of plaintiff's lawyer, Sgt Van Wyk had handed in both the interim and final protection orders for safekeeping. The "SAP 13 Register" which records documents handed in for safe keeping, records these documents as well as the warrant of arrest issued by the Caledon Magistrate's Court.

Notwithstanding this agreement, the plaintiff was arrested on Saturday 28 September 2002 by Inspector Leonard. When Inspector Leonard resumed duty on the morning of 28 September, she was not informed by her superiors or Sgt Van Wyk about the previous night's developments in the case and the arrangement not to arrest the plaintiff. Nor did Inspector Leonard read Sgt Van Wyk's incident book entry about the previous night's occurrences, which, she conceded, as an experienced investigating officer, she ought to have done.

So, oblivious to the previous night's arrangement, Inspector Leonard took the decision to arrest the plaintiff on Saturday 28 September 2002.

The events which lead up to his arrest were as follows:

That morning, Ms Du Toit arrived at the police station shortly after 10:00am in a hysterical state, saying her life was in danger and that she had been threatened by the plaintiff. As proof thereof she produced a computer generated note, ('the threatening note'), which she said she had found in her mailbox at 11:50pm the previous night, and suspected was written by plaintiff. An extract from the note stated:

"YOU ARE BEING WATCHED

YOUR TIME IS LIMITED
YOU WILL NOT LIVE TO SEE YOUR SON COME BACK HOME FROM ENGLAND. "

Ms Du Toit told Inspector Leonard that she had been so shaken by the note, that she had fled her flat and spent the night with family in Goodwood. She said she could not return to her flat, as she feared for her life.

In addition to the note Ms Du Toit handed Inspector Leonard a further statement, headed "ADDITIONAL INFORMATION TO STATEMENT - CASE NO.

324/09/2002" ('the additional statement') wherein she states that she can only suspect that the threatening letter is from the plaintiff. The additional statement furthermore refers to plaintiff's attendance at the police station the previous evening and the arrangement not to arrest him, in the following extract:

> "On 27 September 2002 Captain Christiaans ordered the night personnel to arrest Nazeer Seria. His advocate, Mr Paul Eia, arrived at his house and accompanied him to the Lansdowne Charge Office. He was not arrested. *An appointment was made for me to see Detective Inspector Stevens at 10:00 on 28 September 2002 where this matter could be discussed further*".

Notwithstanding this reference to the plaintiff's presence at the charge office the night before, Inspector Leonard was not alerted to the previous night's events. Nor was she so alerted when, as she testified, Ms Du Toit made mention that Sgt Van Wyk had removed the protection orders and handed them in for safekeeping the night before. She had not paid much attention to this information, she said, because Ms Du Toit was hysterical and had told her "*so many things*." Inspector Leonard had thus not seen fit to investigate what had transpired the previous night.

Inspector Leonard came to the view that Ms Du Toit's life was in danger and took a decision to arrest the plaintiff on the basis of the threatening note and its effect on Ms Du Toit, the additional statement and the earlier one of 26 September 2002. She was of the opinion that in the light of these documents and the protection order, it was not necessary for her to investigate further, or take another statement in order to effect the arrest of the plaintiff. In addition she said the fact that the warrant of arrest issued by the Caledon Magistrate's Court was undated, did not cause her to question its validity.

Inspector Leonard, together with Inspector Stevens, arrested the plaintiff at his home at about 3:30pm on Saturday 28 September 2002. The plaintiff was entertaining guests and preparing to have a braai at the time. His testimony is that he was shown neither a warrant of arrest nor a charge sheet, nor informed why he was being arrested. Nor was he confronted with or asked about the threatening letter. The plaintiff described the police officers as rude and insensitive in effecting his arrest. All the while his guests were in attendance. One of the guests, Mr Hall, corroborated plaintiff's version of the arrest adding however that he was not always within earshot of plaintiff and the police officers. The plaintiff was permitted to take warm clothes and medication for his heart condition, with him.

Inspector Leonard, by contrast said she had shown plaintiff a warrant and informed him that he was being charged for allegedly contravening a protection order granted in favour of Ms Du Toit. Her testimony as to whether she had used the original warrant of arrest to effect plaintiff's arrest was however vague and somewhat confusing. She conceded that she had not shown him the threatening note, nor questioned him about it. The plaintiff was taken initially to the Lansdowne Police Station where he was kept from 16h:00 to 19h:30 in full view of members of the public. Here, he said he was shown a document, "Notice of Rights" which spelt out his rights as a detainee.

He was then taken to the Athlone Police Station where he was initially locked in a cell on his own and thereafter made to share a cell with a drug addict for the night. Whilst there, an attempt was made to bring an urgent application to secure his release. At noon the following morning, Sunday 29 September 2002, plaintiff was taken back to the Lansdowne Police Station, where, according to him, Inspector Leonard had said "*[i]t's about time you come right, why is everybody worried about you, you didn't have a heart attack*."

Thereafter he was released. Inspector Leonard explained that his release came about after she received telephonic instructions from the public prosecutor, Wynberg Magistrates' Court, on the morning of Sunday, 29 September 2002, to release him on a warning.

The following morning, Monday 30 September 2002, plaintiff appeared in the Wynberg Magistrates' Court on a charge of contravening the protection order, by behaving in a threatening manner or using threatening words towards Ms Du Toit. On 14 March 2003 he was found not guilty and discharged.

The plaintiff said he had learned about the threatening note which had precipitated his arrest for the first time when Ms Du Toit's lawyer referred to it in court on 30 September 2002. He vehemently denied that he was the author of the computer generated note, saying he was not computer literate and that Ms Du Toit's mail box was not accessible to him. To reach it, he said, an electronic gate first had to be triggered by someone in the building where she lived. His arrest, he said was the most humiliating and degrading event he had ever experienced. Sadly the matter did not end there, for two weeks after his arrest, on 18 October 2002, plaintiff and Ms Du Toit found themselves in court once more, this time at his instigation. His motor vehicles and lounge were destroyed in a fire, he suspected Ms Du Toit was involved and she was charged in connection therewith.

My overall impression of the plaintiff was that of a credible and satisfactory witness. His evidence on matters pertaining to Ms Du Toit was not placed in dispute, and Ms Du Toit herself was not called as a witness for the defence. Plaintiff's evidence as corroborated by Mr Hall, that he was arrested without a

warrant, was however disputed by both Inspectors Leonard and Stevens.

Inspector Leonard's vague and even confusing testimony as to which warrant of arrest was used and the evidence as recorded in the incident book that the warrant had been handed in for safekeeping, did not help clarify the situation. No great store was however placed on this point of departure by the parties and it was neither pursued nor clarified during the trial. Instead the case proceeded on the assumption that an undated warrant of arrest was relied upon to effect plaintiff's arrest. Attention was focused instead on analyzing the validity of an undated warrant. It may well be that whilst the second and third defendants relied on the warrant to arrest plaintiff, it was not actually shown to him.

The above notwithstanding, regard being had to plaintiff's general demeanour and the quality of his evidence as a whole, I accept plaintiff's testimony. I add also that plaintiff's version withstood the rigours of cross-examination.

Inspector Leonard by contrast performed poorly under cross-examination and was not as satisfactory a witness. She was unable to adequately explain how she had come to the view that there were reasonable grounds to suspect that Ms Du Toit may suffer imminent harm on the basis of the information placed before her. With regard to the threatening note, Inspector Leonard conceded that the additional statement mentioned the plaintiff as the suspected as opposed to confirmed author thereof. She conceded that the tenor of the additional statement was not hysterical and the statement made no reference to Ms Du Toit having to flee from her flat. When asked why she had not investigated further before arresting the plaintiff she replied, "*I should have done it, but I didn't*".

Further, with regard to the additional statement, she could not clarify why, if

it was handed to her on 28 September 2002, it had been signed only on the following day, 29 September, nor why the statement had only been recorded in her events diary on Sunday 29 September 2002. She however vehemently denied that she had only received this statement on 29 September 2002 after the arrest of the plaintiff and the suggestion implicit therein that she had collaborated with Ms Du Toit to effect plaintiff's arrest. Crucially, Inspector Leonard gave no indication that in considering whether Ms Du Toit may suffer imminent harm, she had taken cognisance of the mandatory factors set out at section 8(5) of the Act, namely the risk to her safety, health or well-being, the seriousness of the plaintiff's conduct comprising the alleged breach and the length of time since it had occurred.

Perhaps as disturbing was Inspector Leonard's inability to explain why on the evidence before her she had elected to arrest plaintiff under section 8(4)(b) of the Act, as opposed to hand him a notice to appear in court under section 8(4)(c). She appeared not to understand that she could elect not to arrest the plaintiff, nor to appreciate the distinction between sections 8(4)(b) and 8(4)(c) of the Act and that it was the former section only which provided for an arrest. She professed to understand the procedure to be that even where a person is issued with a written notice in terms of section 8(4)(c), such person must be arrested and then brought to court, her understanding of sections 8(4)(b) and 8(4)(c) of the Act erroneously being that both sections call for an arrest. She however conceded when directed to the regulations and specifically to form 11, being the notice given to a person to appear before court in terms of section 8(4)(c), that the form made no reference to arrest. That form, she said, was not used at the Lansdowne Police Station.

Whilst Inspector Leonard conceded that she had a duty to use her discretion properly in deciding whether to arrest the plaintiff, she was unable to

satisfactorily explain how she had exercised her discretion with reference to the standards set by the Act. Inspector Leonard could also not enlighten the Court why she had written in her investigation diary on the morning of Friday 27 September with reference to the plaintiff, the words, "V*erdagte sal gearresteer word*" before she had even read the contents of the file and properly acquainted herself with the case. The best she could offer by way of explanation was that because the plaintiff had broken a condition of the protection order, he had to be brought before court in one or other manner and for this he had to be arrested.

Nor could Inspector Leonard say why she had not taken the trouble to read the incident book entry (of 1:10am on the Saturday morning), by Sergeant Van Wyk, when she came on duty later that morning. She conceded that had she done so, she would have known about the arrangement on the Friday night not to arrest the plaintiff. She could throw no light on how Sergeant Van Wyk had obtained documents from the file on the Friday night and handed them in for safe keeping, given that she had locked the file in her office before she went on duty.

Other aspects which Inspector Leonard was unable to clarify were:

- Why in her statement in preparation for this case, she had omitted to state that Ms Du Toit was hysterical, had to flee from her flat and that she was in imminent harm;
- Why her entry in the incident book on Saturday 28 September at 17:00 did not record the reason for the plaintiff's arrest, or the charge against him;
- Whether she had used the original warrant of arrest to effect the plaintiff's arrest. Whilst she contended that she had used the original warrant, she did not dispute that this document had been handed in for safekeeping by Sgt Van Wyk on the Friday night.

The final witness was Mr Le Riche, the Magistrate of the Caledon Magistrates' Court who granted the interim and final protection orders. He was called by the defence to testify about the validity of the undated warrant of arrest

and non served protection order. Mr Le Riche conceded that the warrant of arrest issued by him did not comply with the requirements as prescribed by the regulations under the Act. Although the warrant was approximated on the prescribed form 8,[7] all the information specified at form 8 had not been completed thereon including the date. He accepted that it was impossible to ascertain from the warrant itself when it had been issued but said this did not detract from its validity. Once a warrant was issued, he said, it was valid and remained so even if on the return day a protection order was withdrawn. In that event, it was the responsibility of the clerk of the court to inform the police station to which the warrant had been sent, of the situation and request that the warrant be returned. In a case like the present where an undated warrant of arrest had been issued ten months previously, had the police officer been in doubt of its validity, she ought, in his opinion, to have phoned the Kleinmond police station to investigate its validity.

On the question of service, (or lack thereof) of the final protection order upon the plaintiff, Mr Le Riche explained that the practice at the Caledon Magistrates' Court at the time the protection order against the plaintiff was granted, was for the clerk of the court to serve a copy of a final order by ordinary post upon a respondent. He admitted that this practice was at odds with section 6(5)(a) of the Act, read with section 15 of the regulations, which provided for service by registered post. This, he said, did not detract from the validity of the final order, nor did the lack of service do so.

Was plaintiff's arrest unlawful?

In order for plainitiff's arrest to have been lawful, it must have occurred pursuant to the issue of a valid protection order and valid warrant of arrest as contemplated at section 8(1) of the Act. In addition, his arrest must have

7 Annexed to the regulations

followed upon the proper exercising of a discretion to arrest him by Inspector Leonard in accordance with sections 8(4) and (5) of the Act. I shall consider each of these requirements in turn.

Mr Eia for the plaintiff submitted that the failure to serve the protection order rendered it invalid. To ascertain the validity of the unserved protection order, one needs, I believe, look no further than the Act itself. The Act does not state that service of a final protection order is a condition for its validity. As emphasised by Mr Jacobs for the defendants, the Act at section 6, in providing for the issue of a (final) protection order, does not specifically hinge the validity and efficacy thereof upon its being served as it does in respect of an interim protection order. Section 5(6) expressly provides that an interim protection order shall have no force and effect until it has been served on the respondent. The Act does not similarly state that a final protection order shall have no validity until it is served. Section 6(5), which refers to the service of a final order, merely states that upon the issue of a protection order, the clerk of the court must forthwith and in the prescribed manner cause the original to be served upon the respondent,[8] and a certified copy thereof, together with the warrant of arrest to be served on the complainant.[9] Thereafter, section 6(6) mandates the clerk of the court to forward certified copies of the final protection order and the warrant of arrest to the police station of the complainant's choice.

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

8 S 6(5)(a)
9 S 6(5)(b)

legal proceedings against him or her,[10] 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[11] that proper service of an interim protection order is a prerequisite for the issuing of a final order.

In this way a final protection order cannot be issued against a respondent who has not been given notice of the proceedings and afforded an opportunity to respond on the return day. The validity of a final protection order lies, therefore, not in its service but in its issue by the Court. Once issued and valid it is the responsibility of the clerk of the court (and not that of an applicant as in the case of a civil interdict), to effect service of a final protection order upon a respondent.

Likewise, the validity of a warrant of arrest lies in the authority for its issue being ordered by a Court under section 8(1)(a) of the Act simultaneously with the issue of a protection order. In the case of this specific warrant, it being undated and contrary to the regulations and prescribed form, whilst a serious omission, does not in my view detract from its validity.

I accordingly find that the plaintiff's arrest occurred pursuant to a valid protection order and valid warrant of arrest as contemplated at section 8(1) of the Act.

I now turn to consider the all important question as to whether Inspector Leonard properly exercised the discretion entrusted to her in arriving at the decision to arrest the plaintiff. In order for me to pronounce that she did so exercise her discretion, I must conclude that plaintiff's arrest was in accordance with section 8(4) of the Act, and that Inspector Leonard applied the standards specified at

10 Erasmus *Superior Court Practice* B1-20
11 at section 6(1)(a)

section 8(5) in arriving at the decision to arrest him.

These sections, as quoted above, make clear that, for Inspector Leonard to have been permitted to arrest the plaintiff in terms of the Act, it would have had to appear to her that there were **reasonable grounds to suspect** that Ms Du Toit may suffer **imminent harm** as a result of the alleged breach of the protection order. Moreover, in considering whether or not Ms Du Toit may suffer imminent harm, Inspector Leonard must have taken into account the mandatory factors at section 8(5), namely, the risk to Ms Du Toit's safety, health or well-being; the seriousness of the conduct comprising plaintiff's alleged breach of the protection order and the length of time since it occurred.

The term 'reasonable grounds to suspect' has enjoyed considerable attention by our courts. In *R v Van Heerden* 1958 (3) SA 150 (T) at 152E Galgut, AJ (as he then was) stated that:

> *"[t]hese words must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion."*

See also *S v Nell* 1967 (4) SA 489 (SWA); *S v Purcell-Gilpin* 1971 (3) SA 548 (RA); *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 579E-580E; *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T) at 346A.

Similarly the phrase 'reasonable suspicion' has been oft considered particularly within the context of section 40(1)(b) of the Criminal Procedure Act, 51 of 1977. The section permits an arrest by a police officer without a warrant where the arrestor "reasonably suspects" the arrestee of having committed an offence. In *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 836I-837B Van Der Spuy AJ held that there must be an investigation into the essentials relevant to the particular offence before it can be said that

there is a reasonable suspicion that it has been committed.

How the reasonable man arrives at a reasonable suspicion, was succinctly described by De Vos J in *Ralekwa* (*supra*) at 347E-G:

> "To decide what is a reasonable suspicion there must be evidence that the arresting officer formed a suspicion which is objectively sustainable." It was described thus by Jones J in ***Mabona and Another v Minister of Law and Order and Others:***[12]
>
> *'Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating this information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and ... (t)he reasonable man will therefore analyse and asses the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest.'"*[13]

As to what comprises 'imminent harm', the Concise Oxford English

12 1988 (2) SA 654 (SE); *S v Purcell-Gilpin* 1971 (3) SA 548 (RA) at 554C-D

13 More recently the phrase 'reasonable grounds to suspect' has been considered as it appears within the context of the National Prosecuting Authority Act, 32 of 1998. Section 29(5)(b) of that Act permits the issue of a search warrant by a judicial officer where there is a reasonable suspicion of the actual or attempted commission of a specified offence. See in this regard *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at paras 35-38 and 44-52.

Dictionay defines imminent as, "*about to happen*".[14] In *Abakor Ltd v Crafcor Farming (Pty) Ltd t/a Riversdale Feedlot and Another* 2000 (1) SA 973 (N) Magid J at 978F-G described 'imminent' as follows:

> "*If something is possible or even likely it is not true to say that it is 'imminent', which word connotes an event which is both certain and is about to occur."*

'Imminent peril' is described in West's Legal Thesaurus Dictionary[15] as *"such position of danger to the plaintiff that if existing circumstances remain unchanged injury to the plaintiff is reasonably certain."*

The phrase "imminent harm" finds expression in the Canadian Criminal Code[16]. The Ontario Court of Appeal in *R v Adams* [17] described the concept as follows:

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

It is safe to say therefore that 'imminent harm' is harm which is about to happen, if not certain to happen.

Inspector Leonard displayed little appreciation for the concepts 'reasonable grounds to suspect' and 'imminent harm' or the yardsticks prescribed by the Act for considering whether imminent harm may be suffered. Likewise she displayed little understanding of how objectively one might arrive at 'reasonable grounds to suspect.' There is no indication that Inspector Leonard in arriving at her decision to arrest the plaintiff, employed the standards set out at subsections 8(4) and 8(5). At best she arrested the plaintiff on the basis of:

i) the complainant's insufficiently substantiated say so that she feared

14 Tenth edition 2002 Oxford University Press
15 1985, West Publishing Company
16 at section 285 thereof
17 1993 18 W.C.B. (2d) 462 at para 48

for her life because of plaintiff's threatening behaviour;

ii) the contents of the threatening note and Ms Du Toit's report that she fled her home on receipt thereof;

iii) the additional statement which named the plaintiff as the suspected author of the threatening and abusive note.

She had tested none of these. Absent from Inspector Leonard's testimony was any indication that she had taken into account the risk plaintiff's alleged threats posed to Ms Du Toit or indeed the seriousness of the threats as required by the Act. One gained the impression that in deciding to arrest the plaintiff, Inspector Leonard was so swayed by the hysterical demeanour and persistence of Ms Du Toit, and her own desire to help her that she failed to sufficiently and objectively scrutinize and consider the information before her.

A proper consideration of the additional statement, dated 28 September 2002, would have revealed that the plaintiff and his lawyer had attended at the Lansdowne Police Station the previous night but he had not been arrested. As much appears explicitly in the statement, as is quoted above. Such revelation ought logically to have prompted Inspector Leonard to enquire about Friday night's events. Had she done so, she would have learnt that her superiors had decided at about midnight the previous night that there were not reasonable grounds to suspect that Ms Du Toit may suffer imminent harm and accordingly the plaintiff was not arrested.

This information one assumes would have lead her to consult with her superiors as to whether the novel events which transpired between Friday and Saturday, namely the receipt of the threatening note by Ms Du Toit and her reaction thereto, were reasonable grounds to suspect she was in danger of imminent harm. This is an exercise which Inspector Leonard would in any event

have had to perform when confronted with the note on her arrival at work on Saturday: Did the contents of the note provide reasonable grounds to suspect that Ms Du Toit may suffer imminent harm? The contents of the note, whilst cause for considerable concern, do not in my view convey the message that harm to Ms Du Toit is reasonably certain and about to occur.

The additional statement by Ms Du Toit dated 28 September 2002, refers to the novel incident of the note as follows:

> "When I arrived home last night at about 11:50pm I emptied my mailbox and found a threatening letter which I can only suspect is from Nazeer Seria. I telephoned the Lansdowne SAPS immediately and reported the receipt thereof. I was told to bring the letter to my appointed D/ Inspector Stevens".

The statement refers to the plaintiff as the suspected author of the threatening note. Inspector Leonard ought to have considered whether this, measured against the factors prescribed at section 8(5), uncorroborated and on its own, provided reasonable grounds to suspect that Ms Du Toit may suffer imminent harm. An exercise of this nature would have required her to objectively and critically assess the quality of the information before her, prompted her to investigate further (a fact which she herself conceded under cross-examination), and at the very least caused her to have confronted the plaintiff with the note. Only thereafter should she have allowed herself to entertain a suspicion leading to the plaintiff's arrest.

I am of the view that the abusive note and statement certainly provided grounds for the plausible inference that the plaintiff was the note's author. It did not however provide reasonable grounds for a suspicion, in the absence of further investigation that Ms Du Toit may suffer imminent harm. Inspector Leonard simply did not investigate further and thereby failed as a reasonable police officer to properly exercise the discretion entrusted to her at sections 8(4)

and 8(5) of the Act. She consequently failed to consider whether there were good and sufficient grounds for taking the harsh step of depriving the plaintiff of his liberty.

Had that exercise been conducted and the discretion entrusted to Inspector Leonard under section 8(4)(b) been properly applied, she ought in my view, not to have arrested the plaintiff, but to have proceeded instead in terms of section 8(4)(c) and handed him a notice to appear in court on a charge of contravening the protection order.[18] For the information before her provided insufficient grounds for forthwith effecting an arrest under section 8(4)(b), but certainly sufficed for apprehending him under section 8(4)(c). Sadly Inspector Leonard's understanding of the Act did not enable her to distinguish between an arrest under section 8(4)(b), where imminent harm is present, and a non arrest under section 8(4)(c).

In the circumstances the effect of Inspector Leonard incorrectly choosing to act under section 8(4)(b) as opposed to section 8(4)(c) of the Act, is that plaintiff's arrest by the second and third defendants was both unlawful and wrongful, and the first defendant as their employer is liable therefor.

I note in passing that a warrant of arrest in the hands of a complainant of domestic violence is a powerful tool which can be used or indeed abused to secure the arrest of a person against whom a protection order has been granted. Consequently section 8(4)(b) entrusts an enormous responsibility to police officers asked to effect arrests, a responsibility which must be exercised with care and wisdom, striking an equitable balance between the rights of complainants and those of respondents who may be deprived of their liberty.

The Act is a commendable and long awaited addition to our jurisprudence

18 As provided for at s 8(4)(c)(ii)

promoting the rights of equality, freedom and security of the person. In their endeavours to rout out the serious social evil that domestic violence is, it is incumbent on police officers to be properly acquainted with the Act so that its provisions are equitably and fairly applied. In making these comments, I am mindful of how difficult it must sometimes be for police officers to strike this balance when confronted with domestic violence and its accompanying emotional trauma and turmoil.

Before turning to consider the issue of *quantum*, I express my concern at the deficits inherent in both the warrant of arrest and the service (or lack thereof) of the final protection order. The issuing of an undated warrant of arrest contrary to the regulations, as well as the failure to serve the final protection order in the prescribed form, are irregular and unfortunate acts by the clerk of the Caledon Court, which cast aspersions on our justice system. The prejudice to the plaintiff occasioned by these omissions was evident.

Also of concern is the non cohesive manner in which the investigation of Ms Du Toit's case was conducted at the Lansdowne Police Station. Clearly had there been proper communication within that police station about events between Friday 27 September and Saturday 28 September 2002, the defendants in this case may well not have been faced with a claim for unlawful arrest. In the light of these comments a copy of this judgment will be sent to the Caledon and Wynberg Magistrates' Courts as well as to the Lansdowne Police Station.

Quantum of plaintiff's claim

There is no fixed formula for the assessment of damages for non patrimonial loss. It is recognized that a court has the power to estimate an amount *ex aequo et bono* and consequently enjoys a wide discretion, with fairness as the dominant norm.[19] In *Pitt v Economic Insurance Co Ltd* 1957 (3)

19 Visser and Potgieter *Law of Damages*, (Second Edition) 2003 Juta, Lansdowne, pp 438 para

SA 284 (D) Holmes J stated at 287E-F:

> "*I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense*."

Amounts previously awarded in comparable cases provide a general indication of what is fair and appropriate compensation. In *Hulley v Cox* 1923 AD 234 at 246 Innes CJ commented that *"a comparison with other cases can never be decisive; but it is instructive."* Previous awards are updated to current value, invariably employing the consumer price index.[20]

Fairness requires me to consider all relevant factors in the circumstances of this case. Distilled from the undisputed facts are the following salient features. The plaintiff is in his fifties, a parent and a grandparent. He is an architect, well known in the community where he lives and works. He is not in good health. He has a heart condition and suffers from high blood pressure. He experienced what could only have been the excruciating humiliation of being arrested in the presence of guests he was entertaining at his home on a Saturday afternoon. Thereafter he suffered the further humiliation of spending some three and a half hours in full view of the public at the Lansdowne Police station, close by, until he was locked up for the night at the Athlone Police cells, most of the time with a drug addict. He was unlawfully deprived of his liberty for approximately twenty hours and described the indignity of his detention as the worst experience of his life.

15.2.24, pp 448-449 para 15.3.1

20 Corbett and Honey in *The Quantum of Damages in Bodily and Fatal Injury Cases,* Volume V, Juta (Lansdowne) at lxiv – lxix cite the application of the consumer price index as the most reliable basis for updating previous comparable awards.

As against this it must be borne in mind that plaintiff's arrest was neither a case of mistaken identity, nor an act of malice. It arose out of a complaint that he had breached a protection order which had been granted against him. A warrant for his arrest had been issued simultaneously with the granting of the protection order.

Mr Jacobs, for the defendants cited as a comparable case, *Stapelberg v Afdelingsraad van die Kaap* 1988 (4) SA 875 (C) in which a young attorney on honeymoon in Cape Town, whilst helping an old man to place notices under car windscreen wipers, was assaulted by a traffic inspector and then wrongfully arrested and detained for two hours. He was awarded R10 000 in 1988, an amount which Mr Jacobs fixed currently at R44 000. On the basis of that award, he submitted R30 000 would constitute reasonable compensation in the circumstances of this case. Given that the plaintiff's detention was some 18 hours longer, than that in the *Stapelberg* case, I can see no justification for his receiving less than the award in that case.

Mr Eia for plaintiff cited two comparable cases: *Areff v Minister Van Polisie* 1977 (2) SA 900 (AD) and *Ramakulukusha v Commander, Venda National Force* (*supra*). In the former case an Indian businessman, arrested and detained for two hours, purportedly for contempt of Court after he had torn up a summons, and subjected to the humiliation of being fingerprinted, was awarded R1 000 in 1977, an amount estimated by Mr Eia to be R18 285 in today's terms. In *Ramakulukusha* a businessman of good standing was wrongly arrested for the ritual murder of a young child, and thereafter detained for eight days during which time he was viciously assaulted. In 1989 he was awarded an amount of R15 000 for the arrest and R20 000 for the detention, the current value of which is R56 940 and R75 920 respectively.

Then there are the following awards: In *Todt v Ipser* 1993 (3) SA 577 (A) a woman estate agent unlawfully arrested and kept overnight at Pollsmoor Prison in August 1988, was awarded a mere R4 000, which at current value would amount to R17 128. In *Bentley and another v McPherson* 1999 (3) SA 854 (E) a 45 year old housewife and grandmother, in poor health, wrongfully arrested on charges of kidnapping her grandchild, was awarded R15 000 for being unlawfully deprived of her liberty for nine and a half hours. She suffered the humiliation of her arrest being witnessed by people in the street. The current value of this award is R33 810.

Finally and more recently in *Liu Quin Ping v Akani Egoli (Pty) LTD t/a Gold Reef City Casino* 2000 (4) SA 68 (W) a 45-year old Chinese businessman was awarded damages in the amount of R12 000 for unlawful arrest and contumelia. He was arrested in 1998 at a casino, in the presence of the public, friends and business acquaintances, on suspicion of contravening regulations promulgated under the Gauteng Gambling Act[21], and was detained for approximately four hours at the casino. Escalated to today's value the award amounts to R18 108.

It has been acknowledged that awards by South African Courts have tended to be lower than those in most countries.[22] Visser and Potigieter comment that

"[a]*t present voices are raised in favour of the view that courts should place a high premium on personality interests and that this attitude should be reflected in the quantum of satisfaction."*[23]

In *Liu Quin Ping* (*supra*) Claasen J at 86D–F aptly states:

"*Deprivation of one's liberty is always a serious matter. This*

21 Act 4 of 1995

22 See *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para 27 and citation of unreported judgment of Broome DJP in *Wright v Multilateral Vehicle Accident Fund,* a 1997 decision of the NPD (as cited in *Corbett and Honey* vol IV E3-36)

23 *Law of Damages* (*supra*) at p 449

contention is reflected in the fact that our Constitution has entrenched the freedom and security of the person as part of the Bill of Rights. Section 12 of the Constitution of the Republic of South Africa Act 108 of 1996 states the following:

'(1) Everyone has the right to freedom and security of the person, which includes the right –

a) not to be deprived of freedom arbitrarily or without just cause;

b) not to be detained without trial.'

In a constitutional dispensation where our Bill of Rights rules and regulates the affairs of men, it would seem to me to follow that an infringement of such an entrenched right protected by the Constitution may very well attract a larger measure of damages than under a system where citizens were not accustomed to the protection of entrenched rights."

Courts, I believe are tasked with the duty of upholding the rights to liberty, safety and dignity of the individual and in so doing have a responsibility to accord an appropriate and proper value thereto, especially in the light of the extent to which these rights were devalued, indeed negated, in the brutal past of this country.

Regard being had to all of the above, the circumstances of plaintiff's arrest, its duration and nature, its distressing effect upon him, his standing, the absence of malice on the part of the defendants, and awards in comparable cases, I come to the view that a fair and proper award for the deprivation of plaintiff's liberty, occasioned by his unlawful arrest would be R50 000.

Costs

Given that this case raises matters of considerable complexity which are

in the public interest, concerning the interpretation of the recently promulgated Domestic Violence Act, I am satisfied that costs can be awarded on the High Court scale, even though the amount of damages ultimately awarded is within the Magistrate's Court jurisdiction.

The following order is made:

1. The first defendant is ordered to pay plaintiff the sum of R50 000 in damages in respect of his unlawful arrest and detention;

2. The first defendant is to pay the plaintiff's costs of suit on the High Court scale as between party and party.

_____

YS MEER

IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE **CASE NO: 9165/2004**

In the matter between:

NAZEER AHMED SERIA **Plaintiff**

and

THE MINISTER OF SAFETY AND SECURITY **1ST Defendent**

DETECTIVE INSPECTOR (F) L LEONARD **2ND Defendent**

DETECTIVE INSPECTOR W STEVENS Intervening Creditor

JUDGMENT BY : MEER, J

For the Plaintiff : Adv. P EIA

Instructed by : Mr P F Burger
E Moosa, Waglay & Petersen
Perbro House
85 Klipfontein Road
RONDEBOSCH 7700

For the Defendents :
and Intervening Creditor : Adv. D JACOBS

Instructed by : Mr A A Duminy
The State Attorney
4th Floor Liberty Life Centre
22 Long Street
CAPE TOWN 8000

Date(s) of hearing	:	02, 03, 04, 05, 10 & 11 August 2004
Judgment delivered	:	Friday, 15 October 2004