



THE REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE HIGH COURT, CAPE TOWN**

Case No: **5023 & 5024 / 2008**

In the matter between:

**JULIA SHEILA REYNOLDS**

1<sup>st</sup> Plaintiff

**RALPH RAY REYNOLDS**  
Plaintiff

2<sup>nd</sup>

and

**THE MINISTER OF SAFETY AND SECURITY**

Defendant

**REPORTABLE JUDGMENT : 08 FEBRUARY 2011**

Judgment:

**BOZALEK, J**

Counsel for Plaintiffs:

**Adv. PE Jooste**

Instructing Attorney:

GP Van Rhyn, Minnaar & Co.  
*Mr. FA Swanepoel*

Counsel for Defendant:

**Adv. S Seria**

Instructing Attorney:

State Attorney

*Mr. AA Duminy*

Dates of Hearing:

15, 16, 17, 18 & 22 November 2010

Date of Judgment:

08 February 2011

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**J U D G M E N T : 0 8 F E B R U A R Y 2 0 1 1**

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**BOZALEK J:**

- 1] This matter comprises two damages actions consolidated for the purposes of trial. The first plaintiff is Mrs. Julia Reynolds and the second plaintiff is her son, Mr. Ralph Reynolds. Both sue the Minister of Safety and Security for damages arising out of what they allege was their unlawful arrest in July 2006 by members of the South African Police Services (SAPS) and their subsequent detention for a period of approximately 48 hours. The plaintiffs also seek damages for alleged assaults upon them by such members at the time of their arrest. By agreement the court was requested to determine the issue of the defendant's alleged liability before the

other issues.

- 2] The actions arise out of a domestic dispute between first plaintiff and her husband, to whom I shall refer as the 'complainant', at their residence in Parow on the night of 18 July 2006. Two SAPS members spent nearly 3 hours in their residence before arresting first plaintiff. They also arrested second plaintiff for allegedly obstructing them in the execution of their duties, more particularly for trying to prevent them from arresting the first plaintiff.
- 3] In her particulars of claim first plaintiff alleges that she was unlawfully and wrongfully arrested without a warrant of arrest and thereafter unlawfully detained in the police cells. She alleges further that the relevant SAPS members knew, or should have known, that no reasonable grounds existed for her initial arrest or her subsequent detention and that the arrest was effected *animo iniuriandi*. Second plaintiff's claim is pleaded in the same terms. In both instances the plaintiffs also alleged that they were wrongfully prosecuted, but at the hearing they disavowed any reliance on this aspect of the pleaded claims.
- 4] The defences raised by the defendant to both actions were likewise very similar. It was denied that the plaintiffs' arrests were wrongful, unlawful or effected *animo iniuriandi*. It was alleged that first plaintiff was lawfully and justifiably arrested by the defendant's servants,

acting in the course of their employment, pursuant to the provisions of s 3 of the Domestic Violence Act 116 of 1998, read with the provisions of s 40(1)(q) of the Criminal Procedure Act 51 of 1977; further that this was in response to a complaint from the complainant that first plaintiff had physically abused him and damaged his property. It was pleaded that police assistance was required in order to protect the complainant from further abuse by first plaintiff. In the alternative, reliance was placed on the provisions of s 40(1)(b) of Act 51 of 1977, namely, that there were reasonable grounds to suspect that first plaintiff had committed First Schedule offences i.e. assault, when a dangerous wound was inflicted, and malicious injury to property.

5] In the case of second plaintiff it was pleaded that his arrest was lawful and justified pursuant to the provisions of s 40(1)(j) of Act 51 of 1977 in that he had wilfully obstructed peace officers in the execution of their duties, namely, arresting first plaintiff, and, furthermore, that he had resisted his own arrest on this charge. In relation to the assaults alleged by both plaintiffs the defendant pleaded that, in accordance with the provisions of s 49 of Act 51 of 1977, such force as was reasonably necessary and proportionate had been used to effect the plaintiffs' arrest and overcome their resistance thereto.

6] In broad terms then, the issues for determination are the lawfulness

of the arrest and detention of the plaintiffs and the related issue of whether the plaintiffs were assaulted in the course of their arrest.

- 7] The only evidence led on behalf of the plaintiffs was that of first plaintiff and, on behalf of the defendant, that of the arresting officer, former Inspector Vos (“Vos”). Somewhat surprisingly neither second plaintiff, nor any of the other police officers involved in the incident testified. Although there was agreement on the broad outline of what took place that night there was a considerable difference in the detail furnished by the respective witnesses and it is necessary to summarise these versions and evaluate them.

## **FIRST PLAINTIFF’S EVIDENCE**

- 8] At the time in question first plaintiff and the complainant had been married for some 20 years. They had two sons, one being the second plaintiff then aged 20 years and residing with his parents. First plaintiff testified that she and the complainant went to bed early that night. While her husband slept a message arrived on his cell phone. When she studied it she discovered a series of messages between him and an internet dating service as well as a compromising picture of himself. When first plaintiff woke the complainant and demanded an explanation he seized the cell phone and ran out of the room, deleting the messages. First plaintiff pursued him trying to regain the phone so as to confront him with the messages which he was denying. In the back yard she saw a

rake comprising a plastic handle and an iron head. She grabbed the rake by its head and struck at the phone in her husband's hands with the handle in order to get it out of his grasp. In the process she accidentally struck him on his wrist. The complainant took refuge in the bathroom and first plaintiff used a bar stool to knock on the door, as she put it, with a view to gaining entrance thereto, in the process causing very slight damage to the door. The complainant managed to get out of the bathroom and left the house. First plaintiff retired to her bedroom and, consoled by second plaintiff, cried herself to sleep. She awoke sometime later to the sound of voices in the lounge and emerged to find Vos, accompanied by a policewoman, interviewing her husband.

- 9] First plaintiff testified that upon her asking the police what they were doing there they told her that they were there on the instructions of the complainant who had complained that she had hit him and damaged property. She tried to explain the situation to them but they were '*not interested*'. She testified also that she told them that it was a matter to be resolved between herself and her husband and asked them to leave but they refused. First plaintiff went back to her room where she was joined by second plaintiff. After some time the policeman (Vos) came to her room and told her that her husband wanted his wallet and car keys. If he received these it would be the end of the matter. Her response was to give the police the keys and the wallet save one credit card which she refused to

hand over because it gave access to a bank account with a R150 000.00 credit mortgage facility in both their names. Her concern was that if the complainant got possession of the card before she could stop the account he would squander these monies. When she refused to hand over the card the policeman radioed for reinforcements and when, at the suggestion of the second plaintiff, she handed the card to him 'for safekeeping', a policeman immediately said 'hy is hardegat, gryp hom'. The second plaintiff was then pinned to the bed face down, and arrested. The first plaintiff tried to intervene and this is when she was thrown to the ground. Two female police officers put their knees on the back of her legs whilst one policeman put his knee on her neck. In this position she was handcuffed behind her back. At the time she was dressed only in her nightclothes, a top and long pants, and in the scuffle her breast was exposed. First plaintiff was placed in one police van and her son in another. She was left there for between 20 minutes to half an hour and then taken to Parow Police Station where she was kept overnight in the cells.

10] The following day she was interviewed twice by detectives and told that she would only be released the following day after she appeared in court. After spending another night in the cells, again in what she described as very unhygienic conditions, she appeared in the Bellville magistrates' court on charges of assault with intent to do bodily harm, malicious injury to property, obstruction of the



police in their duties and resisting arrest. On her subsequent appearance all charges were withdrawn.

11] Apart from the conditions in the police cells, first plaintiff complained of the rough manner in which she was treated by the police during and after her arrest, what she saw as their insulting behaviour towards her and aspects of her failed attempt to obtain medical assistance that night. These issues are, however, not material to a determination of the lawfulness of the arrest. The events of the night in question led to the estrangement of first plaintiff and her husband and they were divorced not long afterwards.

12] Second plaintiff was similarly detained at the Parow police cells until he too appeared in the magistrates' court some 48 hours later and was released on his own recognisances on charges of obstructing the police in their duties and, possibly, resisting arrest. Likewise, on his next appearance in court the charges were withdrawn.

## **DEFENDANT'S CASE**

13] On behalf of the defendant Vos, an officer with 17 years experience, testified that he arrived at the scene in response to a radio report at about 22h00 on the night in question. He was accompanied by student constable Ludick, a female officer on her first night of duty. Outside he encountered the complainant who advised that he had been assaulted by his wife and chased around

the house. He appeared to be in shock and showed a swelling on his right forearm. Inside the house Vos encountered first and second plaintiffs. The complainant led him around, showing him a saucer-shaped hole in the bathroom door and a long iron pipe covered with green plastic. Outside, the complainant showed Vos a garden fork which he said had been used by the first plaintiff to assault him. Vos took possession of the garden fork and a steel pipe as well as a brick or half brick which he found on the scene. He was unable to indicate what role the latter has played but vaguely recalled an allegation of damage to a motor vehicle.

14] Vos stated that after being shown around the residence he listened to the versions of both the complainant and first plaintiff. According to him the latter did not take issue with the complainant's version. He then took a written sworn statement from the complainant in the course of which first plaintiff locked herself in her bedroom. The complainant wished to lay charges against first plaintiff relating to the assault and damage to property. After taking the statement Vos concluded that he was dealing with an unusual incident of domestic violence in that there was a visible injury as well as objects that had been pointed out to him as having been used in the incident. He regarded it as a more serious instance of domestic violence which required immediate action. In these circumstances he decided to arrest first plaintiff on the charge of assault GBH, in the context of domestic violence, and malicious injury to property.

15] Having made this decision he knocked on first plaintiff's locked bedroom door but to no avail. Accordingly he radioed for reinforcements and sometime later Insp. Brand and student Constable Jacobs, a female officer, arrived. He knocked again on the door whereupon it was opened. Upon entering he advised first plaintiff of the charges against her and that he was placing her under arrest. She would not co-operate however and he instructed the two female police members to arrest her and bring her under control. When, during the ensuing scuffle he took hold of first plaintiff's arm, second plaintiff jumped on his back and put his arm around his neck, trying to pull him (Vos) off his mother and in the process choked Vos. Vos regarded second plaintiff's actions as obstruction of the police in their duty and, after rolling him onto the bed, placed him under arrest. Both plaintiffs were handcuffed. He stated that he remained on the scene for a minute or two before taking first plaintiff to the Parow police cells in the back of his police van.

## THE LAW

16] It is appropriate first to set out our law regarding the requirements to prove an unlawful arrest and detention where s 40 has been invoked by the arresting officer. In *Minister of Safety and Security v Tshei Jonas Sekhoto and Others* (131/2010) [2010] ZASCA 141 (19 November 2010) the Supreme Court of Appeal recently dealt with

the jurisdictional requirements for a valid arrest in terms of s 40(1) of the Criminal Procedure Act 51 of 1977, the nature of the discretion to be exercised by the arresting officer and the onus of proof in such matters. The court rejected the notion, articulated *inter alia* in *Louw and Another v Minister of Safety and Security and Others* 2006 (2) SACR 178 (T), that it is constitutionally untenable for a police officer to exercise the power to arrest without a warrant in terms of s 40(1) without first having a reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained or a notice or summons to appear in court is issued instead. The court held that there was no 'fifth jurisdictional fact' over and above those in s 40(1), the empowering provision for arrests without a warrant.<sup>1</sup>

17] The court found, however, that once the jurisdictional facts for an arrest are present a discretion arises, since it is clear from the wording of the section that the officer is not obliged to effect an arrest. It proceeded to analyse the nature of this discretion emphasizing that the decision to arrest must be based on an intention to 'bring the arrested person to justice'. The court, per Harms DP, cited examples of where persons were arrested for an ulterior purpose and stated as follows:

*'The law in this regard has always been clear. Such an arrest is not bona fide but in fraudem legis because the arrestor has used a power for an ulterior purpose. But a distinction must be drawn between the*

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<sup>1</sup> At para 22.

*object of the arrest and the arrestor's motive ... object is relevant while motive is not.'*<sup>2</sup>

18] The court then analysed the pre- and post-constitutional requirements for the proper exercise of the arresting officer's discretion, focussing upon that of rationality. In this regard it concluded:

*'...it remains a general requirement that any discretion must be exercised in good faith, rationally and not arbitrarily.*

*This would mean that peace officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of rationality. The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.'*<sup>3</sup>

19] Observing that the statute is silent on what factors a peace officer must weigh up in exercising his discretion, the court stated:

*'An official who has discretionary powers must, as alluded to earlier, naturally exercise them within the limits of the authorising statute read in the light of the Bill of Rights'.<sup>4</sup>*

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<sup>2</sup> At para 30 and 31.

<sup>3</sup> At para 38 – 39.

<sup>4</sup> At para 40.

20] Harms DP added:

*'While the purpose of arrest is to bring the suspect to trial the arrestor has a limited role in that process. He or she is not called upon to determine whether the suspect ought to be detained pending a trial. That is the role of the court (or in some cases a senior officer). The purpose of the arrest is no more than to bring the suspect before the court (or the senior officer) so as to enable that role to be performed. It seems to me to follow that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: the enquiry is only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). Whether his decision on that question is rational depends upon the particular facts but it is clear that in cases of serious crime – and those listed in Schedule 1 are serious, not only because the Legislature thought so – a peace officer could seldom be criticized for arresting a suspect for that purpose. On the other hand there will be cases, particularly where the suspected offence is relatively trivial, where the circumstances are such that it would clearly be irrational to arrest.'*<sup>5</sup>

21] Dealing with the question of onus the court concluded that since the proper exercise of the discretion was not a jurisdictional fact for an arrest, the onus of proving this element did not rest upon the arrestor. The court quoted with approval the dictum from *Minister of Law and Order and Another v Dempsey*<sup>6</sup> that a distinction must be drawn between the forming of the required opinion i.e. the jurisdictional fact, and the separate issue of whether the opinion

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<sup>5</sup> At para 44.

<sup>6</sup> 1988 (3) SA 19 (A) at 37B–39F.

was improperly formed. In the latter case it is for the party who makes the allegation to prove it.

22] Applying the principles enunciated in *Sekhoto* to the present matter, the jurisdictional facts required to be proved by the defendant in relation to the arrest of the first plaintiff would be as follows:

- (i) the arrestor must have been a peace officer;
- (ii) the arrestor must have entertained a suspicion;
- iii) the suspicion must have been that the arrestee committed an act of domestic violence as contemplated in s 1 of the Domestic Violence Act 1998 and that act must constitute an offence in respect of which violence is an element;
- iv) the suspicion must have rested on reasonable grounds.

As will become apparent I do not find it necessary to deal with the alternative ground upon which the lawfulness of the arrest is sought to be justified, namely, the exercise of a discretion in terms of s 40(1)(b) of the Criminal Procedure Act.

23] In the case of second plaintiff the jurisdictional facts would be –

- ‘(i) the arrestor must have been a peace officer;
- (ii) the arrestee must have been wilfully obstructing the arrestor in the execution of his duty.’

24] Should the defendant discharge the onus of proving these

jurisdictional facts, the question which then arises, having regard to *Sekhoto*, is whether the arrestor properly exercised his discretion to arrest the plaintiffs. Although a failure to do so was not expressly pleaded by the plaintiffs, that question was extensively addressed both in evidence and in argument and is therefore an issue which can properly be determined by the court.<sup>7</sup>

## ANALYSIS

25] It was argued on behalf of first plaintiff that any assault on the complainant was no more than a common assault whilst the damage to the bathroom door was of a trivial nature. It was contended further that in any event the arresting officer had failed to exercise his discretion properly in the circumstances *inter alia* by failing to either ascertain or take into account the relevant circumstances.

26] It is first necessary to determine whether the defendant proved the various jurisdictional requirements in respect of the arrests of the plaintiffs. It is common cause that Vos was a police officer and that upon his arrival the complainant advised him that he had been chased around the house and assaulted by his wife. Although the evidence is somewhat unclear, it appears that he explained to Vos that he had been struck on his right forearm with the garden rake and showed him the fresh swelling which this had caused. The rake was one of the objects seized by Vos and removed from the scene.

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<sup>7</sup> See *Middleton v Carr* 1949 (2) SA 374 (AD) at 385-386.



There is no suggestion that first plaintiff disputed this version in the presence of Vos. She testified in court that it was not a deliberate assault but an inadvertent blow to the complainant's forearm with the handle of the rake while she was trying to retrieve the cell phone.

27] This explanation seems unlikely, however. On her own evidence first plaintiff was very angry about what she had discovered on her husband's cell phone and that he was denying the allegations and deleting the messages. It is more likely that she deliberately struck him. Similarly, it was undisputed that damage had been caused to the door of the bathroom. On first plaintiff's version this was a mere chipping of the paint but no evidence of the unrepaired door, such as a photograph, was produced by first plaintiff to verify this, although as the remaining occupant, this would have been easy for her to have obtained. Vos testified that he found a hole the size of a saucer in the door. Whatever the true extent of the damage, on first plaintiff's own version she was banging on the door with a bar stool. In a statement made by second plaintiff in support of a subsequent complaint to the police about the events of that night, he described his mother as "hammering" on the bathroom door with the barstool.

28] In s 1 of the Domestic Violence Act, 'domestic violence' is defined *inter alia* as:

(a) *physical abuse*; ...

(h) *damage to property;*

*... where such conduct harms, or may cause imminent harm to, the safety, health or well being of the complainant.'*

29] For reasons which will be considered later, Vos appeared never to have heard a countervailing version of events from first plaintiff regarding the alleged assault or malicious damage to property. In the circumstances it appears that Vos, at the very least, entertained a suspicion, based on reasonable grounds, that an act or acts of domestic violence had been committed by first plaintiff.

30] The focus must now turn to the manner in which Vos exercised his discretion to arrest without a warrant. He testified that he decided to arrest first plaintiff on the basis of the assault and malicious injury to property which he considered had already taken place but, more importantly and primarily, because he foresaw the very real possibility of first plaintiff committing further assaults upon the complainant should he not arrest her. In this context he described her as a 'dreigende gevaar'. Vos' state of mind is best summed up by his response to a question from the Court as to what indications there were that the assaults would continue unless he arrested first plaintiff. His answer was, in part:

*'...ja, dit is a baie dun lyn, ek hoor wat u sê ... (onduidelik). Die elemente, die pyp, die tuinvurk, me. Reynolds se houding op die toneel, die feit dat sy gaan wegkruip het, het my tot 'n gevolgtrekking*

*gebring dat daar sterk moontlikheid is dat aanranding wel kan plaasvind. My hele siening was dat sy nie kalm was nie, nie bedaard nie, nie selfbeheerd was nie ... Dat sy nie kalm is nie, nie selfbeheers is nie en dat haar fisiese toestand, emosioneel, liggaamlik vir my aantoon dat verdere aanranding wel kan plaasvind en dat optrede moet plaasvind om dit te verhoed'.*

31]The witness expanded:

*'... die toesluit van die persoon van haarself in die kamer het vir my laat – dit het vir my gesê dat ek gesien het dat sy is onstabiel en haarself gaan wegsteek het omdat sy geweet het verdere optrede en arrestasie gaan plaasvind in die lig van optrede, haar aanranding en haar optrede op die toneel, die manier hoe sy optree het en die woorde wat sy geuiter het wat ek nie spesifiek kan ongelukkig onthou nie. Ek kan sê daar was skelwoorde, lelike woord ...'.*

32]Vos was, however, unable to provide any details of first plaintiff's unruly behaviour prior to her arrest or relating to her use of foul language. Similarly his evidence that first plaintiff appeared to be emotionally unstable and out of control was generalised and unsubstantiated. By contrast the first plaintiff's version was that for the bulk of the time that Vos must have spent in the house she had little to do with him. After initially enquiring as to the nature of his business there and unsuccessfully seeking to persuade him that the dispute could be resolved between her and the complainant, she retired to her room until the events leading up the arrest of her son

and herself.

33] The major factual dispute between the parties related to the role of the complainant's car keys, wallet and credit card in the incident. On Vos's evidence their role was limited to the fact that their removal by first plaintiff was the original cause of the dispute between the parties but they played no part in his decision to arrest first plaintiff. He denied that there was ever any talk of an agreement that if first plaintiff handed over these items the charges against her would be dropped although he did concede that there could well have been discussions to this effect. By contrast, according to first plaintiff the withholding of the property played a central role in the interaction between her and the police that night and, by clear implication, in Vos's decision to arrest. Her evidence was that the leading policeman, who could have only been Vos, told her that if she handed over the property that would be the end of the matter. When she refused to hand over the bank card and it was taken by her son that was the trigger for his arrest followed by hers.

34] It is necessary to determine this factual dispute. First plaintiff was not a model witness. She tended to exaggerate those aspects of her evidence which cast the police in an unfavourable light and downplay those which did not reflect well on her case. For example, she was reluctant to concede that she had been angry at her

husband when all the evidence suggests, understandably, that she must have been livid. Another example was her initial claim that one of her rings had been cut off her finger by the police. On closer questioning it transpired that part of the ring had been very thin and had broken when a police woman tried to remove it for the purpose of fingerprinting. These criticisms aside, much of first plaintiff's evidence is uncontested and confirmed, at least in its main elements, by that of Vos.

35] Vos himself was not a satisfactory witness. His recollection of important aspects of the events was in many instances very vague if not non-existent. This did not deter him, however, from making factual statements that he was unable to substantiate. In that sense much of his evidence relating to first plaintiff seemed to comprise no more than an impression which he could half remember, an altogether unpromising foundation for evidence on disputed aspects. I accept that the incident had taken place some four and a half years previously and that no busy policeman would have a photographic recall thereof. It was, however, an unusual incident and Vos spent an extended time at first plaintiff's residence that night. It was also the subject of an initial complaint and this litigation in both of which Vos played a leading role. In the circumstances I would have expected a much clearer recollection on his part. I was unable to avoid the impression that at times Vos's poor recollection was simply a convenient bolt hole.

36] There are several independent indications that the withholding of the property played an important role in events that night. Unfortunately much of the original documentation relating to the criminal case was lost, with only the docket cover remaining as well as extracts from cell registers, occurrence books and pocket books. Significantly, Vos's own brief pocket book entry refers to '*weerhouding van sy eiendom*'. The pocket book entry of student constable Ludick, who accompanied Vos throughout, reads as follows:

*'On arrival we talked to (the complainant) the husband in the house complainant (sic) that his wife Mrs. Julia Reynold won't give his bank/credit cards and two car keys.'*

37] It would appear that by no later than July 2007 first plaintiff had lodged a complaint against the police arising out of the incident which was supported by a lengthy and detailed statement from second plaintiff. In certain respects that statement does not wholeheartedly support first plaintiff's version in court which in my view tends to suggest that second plaintiff's version was even-handed. In this statement too the withholding of property assumes a prominent role in the arrests:

*'They began questioning my father and it was during this time that my mother got up and came to see what was happening. She told the police that this was a matter between her and my father. My mother then returned to her room, I got up and followed her. Sometime later*

*the male cop came to the room and told my mother that allegedly she had my father's car keys and bank cards and that he would leave as soon as they were returned. My mother then told him that they were married in community of property and that she was unable to return them as he (my father) might withdraw the money from the "one account". He returned to the lounge and a short while later came to the room and told my mother that he was going to arrest her. I got up and followed him to the lounge and told him that there is no ways that he will be able to arrest my mother as he has no reason to do so. I went back to my mother's bedroom and she closed the door. He then came banging on the closed door, telling us that locking this door will be resisting arrest and that was going to have to make a note of this in his report. He then entered the room and told my mother to come as she is now under arrest, my mother told him once again that this is a matter between her and my father and that he should leave. He (the 100kg police officer) then radioed for back-up, which arrived remarkably quickly. Yet another police duo arrived (consisting of a male (approximately 100kg) and female). They then entered the house and came straight to the bedroom, demanding that my mother is under arrest and that she needs to hand over the card and keys. I then told my mother it is fine and that she should rather just give the keys to me and then the police will leave as they have promised earlier. My mother handed me the keys, as I placed them in my pocket (it was as if I was drawing a weapon) the cop violently grabbed me and through (sic) me onto the bed and began to suffocate me by forcing his forearm onto the back of my head. He continued to handcuff me; it was at this stage that I heard my mother scream and I managed to force my head sideways, so as not just to take breath but*

*see what was happening to my mother. The remaining three officers had forced her face down onto the ground.'*

38] Apart from the virtually contemporaneous indications in the pocket books and the contents of second plaintiff's statement, the cross-examination of first plaintiff lent credence to her evidence that the withholding of property played a central role in the fracas. It was put to her that all four policemen would testify that when they arrived on the scene they were told she was withholding the wallet and keys; further that, when in her bedroom she had refused to hand over the car keys and card and instead her son took possession of them, "*events in the room became quite heated*" and "*things started going awry*". It is difficult to reconcile the putting of these propositions by defendant's counsel to first plaintiff with Vos's later evidence that the withholding of the property, although the original cause of the dispute, thereafter played a minimal role in the incident.

39] A further relevant factor in this regard is the amount of time spent by Vos and fellow officers at the scene. He testified that he arrived at 22h00 and effected the arrest at 00h46. Allowing a generous amount of time for the summoning and arrival of reinforcements, at least two hours must have passed between Vos's arrival and his knocking on the first plaintiff's door to announce his decision to arrest her. Again it is difficult to see, and Vos had difficulty in explaining, how an inspection of the scene, an interview with the complainant and the taking of a statement from him, which



incidentally is disputed by first plaintiff, could have taken so long. If, however, as first plaintiff testified, there were discussions and negotiations regarding the handing over of the disputed property, this would account at least in part for the considerable time that the police spent on the scene.

40] Given the evidence which I have referred to above, and having regard to the overall probabilities, I consider that the withholding of the complainant's property as recounted by first plaintiff indeed played a pivotal role in the events that night. On the probabilities, furthermore, although denied on behalf of the defendant, it is likely that there were discussions, if not an agreement, that if first plaintiff restored her husband's possessions to him that would be the end of the matter. If this was not the case the decision to arrest first plaintiff on the grounds relied upon by Vos would most likely have been taken and executed much earlier that night.

41] By the time Vos testified he was well aware that any arrest based on first plaintiff's refusal to hand over her husband's possessions would be highly questionable. This emerged when, in answer to questions from the court, the witness explained that in the case of a dispute over property of that nature, the police's role would be limited to explaining to the parties their rights, in particular their right to seek an interdict under the Domestic Violence Act. Clearly, Vos's evidence as to his reasons for first plaintiff's arrest must be critically

examined with a view to determining whether the exercise of his discretion to arrest was rational.

42] First plaintiff testified that the initial incident took place much earlier that evening and that by the time the police arrived she had cried herself to sleep. This Vos is unable to dispute. She testified that upon hearing voices she emerged from her room and asked the police, who were busy with the complainant in the lounge, the nature of their business. She added that she told them that it was a private dispute which she and her husband would be able to resolve but they showed no interest in this. Vos did not confirm this evidence but conceded that this exchange may well have taken place. His evidence as to how first plaintiff behaved upon their arrival was both vague and contradictory. Initially he described her as simply walking around in the immediate vicinity but playing no active role. He repeatedly stated that before she locked herself in her room she had been “vermydend”. As his evidence proceeded however Vos ascribed increasingly agitated behaviour to first plaintiff which was at odds with his initial evidence. When asked for details as to how she had been unruly, wild and not able to control herself, Vos was at a loss and fell back upon his poor memory. Nor could he remember the substance of any conversation or exchange which he had with the first plaintiff prior to arriving at the decision to arrest her. He was hesitant and vague when asked to explain what the cause of the domestic violence was.

43] Although Vos conceded that it was important to obtain both sides of the story in such a situation he seems to have made little or no effort to establish from first plaintiff what had led to the domestic violence, her version of events and whether it was likely to continue should the police leave. In this regard he testified first plaintiff was “vermydend” and had not approached him and given her version. However, it appears that Vos focussed his attention upon the complainant and paid little attention to first plaintiff. He testified that he had not asked her whether any further violence could be expected should the police leave without arresting her nor had he warned her that if there was any further violence she would be arrested. Although interacting with first plaintiff along these lines might not have produced answers which would have resolved the dispute, at the very least asking these questions would have enabled Vos to get a better sense of whether there was a real threat of further violence in the event of his not arresting first plaintiff.

44] There was no suggestion of any dangerous weapon being used by first plaintiff. The injury which the complainant showed, although not trivial, was hardly of a serious nature. The damage to property, even on Vos’s version of events, was very limited. As an experienced police officer Vos must have realised that even were first plaintiff prosecuted and convicted on the charges embodied in

the complainant's statement she was unlikely to have been sentenced to anything more than a fine or, at worst, a wholly suspended sentence of imprisonment.

45] When Vos's reasons are examined for concluding that there would be further violence if he did not arrest first plaintiff they do not stand up to scrutiny. These reasons were, in short, the objects which were pointed out to him by the complainant as having been used in the earlier altercation, the fact that first plaintiff had locked herself in her room and Vos's conclusion that she was not calm or in control of herself. The existence of the objects which Vos seized, namely, the rake, the pole and the half brick, did not in themselves indicate the probability or even the possibility of further violence and Vos himself had difficulty in explaining their relevance to the question of the possibility of future violent behaviour by first plaintiff.

46] One has difficulty, furthermore, in understanding why first plaintiff's conduct in closing herself off and even locking herself in her room during the hours that Vos spent in the house, apparently conversing with and taking a statement from the complainant, could have signified to him the likelihood of further violent behaviour on her part. He appeared also to read into her conduct in this regard a desire to somehow escape from the police, again an inference wholly unsupported by this or any other evidence. As mentioned earlier, Vos's evidence that first plaintiff was unstable and unable to

control herself was not only in contrast with his initial evidence regarding her conduct but unsubstantiated by any concrete detail or other independent evidence. Ultimately it appeared to be no more than an impression of first plaintiff which Vos vaguely recalled and which he was not able to substantiate in any way.

47]When one has regard to that part of Vos's evidence which is detailed, it appears that first plaintiff only reacted strongly when he and other police officials entered her room and arrested her and her son. Taking all the circumstances of the night's events into account her reaction was hardly surprising. Having regard to both the inherent quality of their evidence, the substantiating factors and the probabilities, I accept first plaintiff's version of what unfolded in her bedroom above that of Vos's where there is any material conflict. In my view Vos minimized the role of first plaintiff's refusal to restore the complainant's property probably because it undercut the claimed rationale for his decision to arrest her without a warrant, namely, his view that unless he did so there could or would very well be a further assault or acts of domestic violence by her upon the complainant.

48]In my view, on the probabilities Vos did not, as he contended, take an early considered decision to arrest the first plaintiff. Rather, this was a decision which he took when the efforts of the police to resolve the immediate dispute by having first plaintiff hand back to

the complainant his property, foundered; and the arrests were triggered when first plaintiff handed some of the property, be it the card or the car keys, to her son. Second plaintiff was then arrested for “obstruction” which in turn precipitated a reaction from first plaintiff who was arrested immediately thereafter. This sequence explains the paucity of Vos’s reasons for deciding to arrest first plaintiff, even before entering her bedroom, the considerable time that he spent in the house and his failure to ascribe any significant role to negotiations or discussions concerning the handing over of the property.

49] Accepting first plaintiff’s account of what led to the arrests, I am unpersuaded that the purpose of first plaintiff’s arrest was to procure her attendance in court or even a concern that she might again attack the complainant. It arose, rather, out of, and was motivated by first plaintiff’s failure to hand her husband’s property back to him. Police officials attending upon scenes of domestic violence face a difficult and unenviable task in maintaining law and order and resolving disputes. No doubt they are often faced with difficult decisions as to whether to make an arrest without a warrant or not. What is clear, however, is that it is not the function of the police to arrest a party to such a dispute because such party will not fall in with a solution to a proprietary dispute which the police officials feel would be best.

50]I have accepted first plaintiff's account of what took place in her bedroom immediately prior to the arrest. From her account, it is clear that the precipitating factor in her arrest was her failure to cooperate with the police in regard to handing over the complainant's property. It is also clear that had she complied with the police request no arrest would have followed and, in all probability, no charges would have been preferred. Even if the charges of assault with intent and malicious injury to property had been pursued it is most unlikely that they would have been preceded by her arrest. In this regard it is significant that no explanation was forthcoming from the defendant as to why all charges were dropped against the plaintiffs.

51]On the proven facts and on an analysis of the probabilities I find that Vos's exercise of his discretion was not made in good faith and was not based on an intention to bring first plaintiff to justice. It was effected for some other reason, in all probability to put an end to first plaintiff's resistance to handing over the complainant's property, assisted by her son. As is made clear in *Sekhoto*, such an arrest is not *bona fide* but *in fraudem legis* because the arrestor has used the power to arrest for an ulterior purpose. However, even apart from the question of an ulterior motive, I consider that, taking all the circumstances into account, Vos's decision to arrest the first plaintiff that night was irrational. These circumstances include, but are not limited to, the following:

- (i) when Vos arrived at the scene peace had been restored;
- (ii) the relatively minimal nature of the injuries and damage to property which he observed;
- iii) the fact that Vos must have, or should have been aware of the earlier circumstances which gave rise to first plaintiff's initial violent conduct and which placed such conduct in context;
- iv) Vos's failure to meaningfully engage with first plaintiff with a view to determine whether she would engage in any further violent conduct or to deter her from doing so;
- v) the absence of any clear indication that first plaintiff would again resort to violence were she not arrested.

52] In my view, making full allowance for the exercise by the arresting officer of his discretion within a reasonable range and the pitfalls of using the benefit of hindsight or being an armchair critic, Vos's decision to arrest first plaintiff fell outside the bounds of rationality.

53] It is common cause that Vos was acting within the course of scope of his employment and it follows that the defendant is vicariously liable for the damages suffered by first plaintiff as a result of her arrest and subsequent detention for 48 hours. It bears mentioning that it is wholly unclear, no explanation having been tendered by the defendant, why first plaintiff could not have been released on bail, at the latest, on the morning after her arrest in terms of s 59 of the Criminal Procedure Act. Be that as it may first plaintiff was detained



throughout her incarceration pursuant to Vos's decision to arrest her in the early hours of 19 July 2006.

54] For the same reasons as apply to defendant's reliance on s 40(1)(q) of Act 51 of 1977, its alternative defence based on s 40(1)(b) likewise cannot succeed.

55] To the extent that the defendant's servants used force in effecting first plaintiff's arrest, that amounted to an assault upon her entitling her to damages.

## **SECOND PLAINTIFF'S CASE**

56] The defendant's case was that second plaintiff was arrested pursuant to the provisions of s 40(1)(j) of the Criminal Procedure Act for wilfully obstructing a peace officer in the execution of his duties, namely, attempting to secure the arrest of first plaintiff. I have rejected Vos's account of events in the bedroom where it conflicts with that of first plaintiff. I find further that second plaintiff was arrested when he took from first plaintiff either the complainant's car keys or the disputed bank card. That act of taking or receiving such property cannot, for the reasons set out in relation to first plaintiff's conduct, be construed as obstructing Vos or any other police officer in the execution of their duties. Such duties did not extend to compelling a party to a domestic dispute to hand over property. In any event, even on Vos's version of second plaintiff

jumping on his back and throttling him (which I do not accept) his arrest of second plaintiff remained unlawful because he was not effecting a lawful arrest of first plaintiff. In these circumstances Vos's arrest of first plaintiff constituted an assault upon her which second plaintiff, as her son, was entitled to resist or attempt to forestall.<sup>8</sup>

57] It follows that the question of whether Vos rationally exercised his discretion to arrest second defendant does not arise. The defendant has failed to prove the second preliminary jurisdictional requirement for a lawful arrest of second plaintiff, namely, that he was wilfully obstructing Vos or some other police officer in the execution of his/her duties.

58] I conclude then that the defendant has failed to discharge the onus which it bore of proving that second plaintiff's arrest and detention were lawful. Again, no explanation was proffered by the defendant as to why second plaintiff could not have been quickly released on bail by the police in terms of s 59 of Act 51 of the Criminal Procedure Act rather than being held for a full 48 hours until his appearance in court. There is no suggestion that the defendant is not vicariously liable for his servants' delicts. In the circumstances the defendant is held to be liable in damages to second plaintiff for his arrest and detention and, to the extent that force was used in

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<sup>8</sup> See *Gulyas v Minister of Law and Order* 1986 (3) SA 934 (C) at 938I-939B and the authorities there quoted. Also *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) 410h-i.

effecting his arrest, for such assault.

## **COSTS**

59] The plaintiffs sought their costs including various additional orders.

First amongst these were the costs of the plaintiffs' applications for condonation in terms of s 3(4)(c) of Act 40 of 2002. It appears that the attitude taken by the defendant's attorney in that regard was that they should first be apprised of the plaintiffs' reasons for late service of notice of the intended legal proceedings. This was not done, however, and the plaintiffs proceeded directly to court to seek condonation, the defendant abiding the court's decision in those applications. In the circumstances I see no reason to award these costs to the plaintiffs.

60] The plaintiffs also seek the costs of the application for consolidation of the two actions. The consolidation was entirely appropriate and the plaintiffs are entitled to these costs. Finally, both the plaintiffs' instructing attorney and counsel were from Port Elizabeth and they seek various orders covering their travelling and accommodation expenses on certain trial days. None of these expenses would have been incurred had the plaintiffs instructed local practitioners and no reason was offered as to why they chose not to. In the circumstances there is no warrant for the defendant having to bear any such costs or expenses. No separate order is necessary to cover the costs of counsel's preparation of heads of argument at

any stage. For the rest, costs must follow the result and the plaintiffs are entitled to their costs.

## **ORDER**

61] For these reasons the following order is made:

1. The defendant is held to be liable to first and second plaintiffs in respect of such damages as they are able to prove arising out of their unlawful arrest on or about 18 July 2006 and their subsequent detention.
2. The plaintiffs are awarded the costs of the actions to date including the costs of the application for the consolidation of first and second plaintiffs' actions. Such costs shall bear interest at the rate of 15.5% from 14 days after the date of taxation to date of payment.

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**L J B O Z A L E K**  
**Judge of the High Court**