

Not reportable  
Delivered: 19 June 2008

/BH

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)  
CASE NO: 5159/2006

IN THE MATTER BETWEEN:

HENRY JOHN LUITERS

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY  
MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT

FIRST DEFENDANT

SECOND DEFENDANT

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JUDGMENT

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SERITI

1. INTRODUCTION

This matter came to Court by way of action.

In the Particulars of Claim, the plaintiff alleges that on or about 18 February 2003 and at Witbank, Mr Willem Johannes Jackson applied for a family violence interdict against him and same was granted by Magistrate M J

Venter on the same date.

On the same date, at about 15:00 a copy of the interim order issued by the Magistrate M J Venter was served on him by captain Bezuidenhout.

On the same date, at about 17:00 and near French street, Witbank he was unlawfully arrested, without being in possession of a warrant of arrest by police officers unknown to him. During his arrest, he was verbally abused and assaulted with fists and hands by the police officers who arrested him.

He was detained and appeared at Court on 21 February 2003. At his court appearance, he was told by the prosecutor and the Magistrate that his arrest was a mistake and the charges preferred against him were withdrawn.

On 28 February 2008, on advice of his attorney he attended the Witbank

Magistrate's Court in order to obtain copy of the charge sheet relating to charges that were withdrawn.

Whilst still at the Magistrate's Court, he was approached by inspector Van Loggerenberg who arrested him again unlawfully.

He was again detained at Witbank police cells – During his detention and on 2 March 2003 he was taken to hospital for medical attention – He was in leg irons.

On 1 March 2003, whilst in custody, he was kept with approximately 37 other detainees, and in the said cell, he was stripped off his clothes and sodomised several times by approximately 10 of the unknown detainees and he did not receive protection from the police officers who were on duty.

Particulars of claim further allege that on 3 March 2003 he appeared at Witbank Magistrate's Court and he was released on a R1000-00 bail. After appearing several times in court, on 11 April 2003, all charges against him were withdrawn.

On the same date the interim protection order issued on 18 February 2003 was discharged.

He is claiming following amounts for following incidents:

- |    |                                     |             |
|----|-------------------------------------|-------------|
| 1. | Unlawful arrest on 18 February 2003 | R250 000-00 |
| 2. | Assault of 18 February 2003         | R250 000-00 |
| 3. | Unlawful arrest of 28 February 2003 | R500 000-00 |

4. Failure of police officers to protect him from other  
detainees whilst in custody R2500 000-00
5. Continuous pain and suffering, loss of freedom, loss of  
comfort, humiliation and general damages occasioned by  
the wrongful issuing of the interim order. R400 000-00
6. Wrongful issuing of warrant of arrest  
by Magistrate R400 000-00

The amounts mentioned under claims 1, 2, 3 and 4 are claimed against the first defendant and the amounts mentioned in claims 5 and 6 against second defendant.

In its plea, the first defendant pleaded that on 18 February 2003, and at or near French street, Witbank, the plaintiff was arrested in terms of a warrant of arrest issued on 18 February 2003. After the lawful arrest of the plaintiff he was detained at Witbank Police Station.

On 28 February 2003 Inspector Van Loggerenberg lawfully arrested the plaintiff in terms of a warrant of arrest.

The defendants further denied that the plaintiff was assaulted nor sodomised as alleged.

First defendant denies any negligence on the part of its employees and denies that the plaintiff suffered any damages as a result of the actions of its employees.

The second defendant pleaded that she is not responsible for the judicial actions of the Magistrate. When issuing the interim order and the warrants of arrest, the Magistrate was exercising her judicial discretion.

In the opening address, the parties informed the Court that the J88 medical form and medical records from Witbank Hospital were admitted.

Plaintiff's counsel informed the court that there are 3 main issues which the court should decide. The said issues were described as follows:

- (a) Whether plaintiff's arrests were lawful or not?
- (b) Whether plaintiff was assaulted or not during his first arrest.
- (c) Whether or not plaintiff was sodomised during his detention.

## 2. PLAINTIFF'S EVIDENCE

The first witness to testify was the plaintiff, Mr Henry John Luiters. He testified that during February 2003 he was a friend to Ms Jeanette Jackson. On 14 February 2003 he went to visit his friend at Witbank.

His friend went to her parental home at Witbank on 7 February 2003. At that stage, he was staying at Primrose, Germiston.

On 14 February 2003 he arrived at his friend's parental home at 1920 French Avenue, Witbank at about 19:20. On arrival at his friend's home, he found her father, her step-mother and his friend. He was meeting her parents for the first time.

He arrived on a Friday, and on that day they visited some other people together and went to bed at about 23:00.



Following day, arrangements were made for a “braaivleis” in the afternoon. During the morning part of the day, he held various discussions with his friend’s parents. Later, one of his friend’s sisters, called Tracey, telephoned and suggested that they should all come to her house. Jeanette was uncomfortable with that suggestion and he gained the impression that Jeanette and Tracy are not in good terms. They went to Tracey’s home, and they were offered drinks.

At a later stage, he noticed that Jeanette’s step-mother was misusing alcohol. There was tension between Jeanette and her stepmother and they were arguing. He told Jeanette not to argue with her step-mother. They all went to sleep.

Following day, which was a Sunday, the atmosphere was still tense. He sat

around with Jeanette's father and they had a discussion.

On Monday morning they all had breakfast, sat around in the house and listened to music. In the afternoon there was conflict between Jeanette and her stepmother. He was not involved in the conflict, and he went out into the garden for about two hours. He then told Jeanette's father that the following day, he is going home and Jeanette's father requested him to leave only on Wednesday.

On Tuesday Jeanette's parents left without saying where they were going, and he remained at their home reading newspapers and listening to music. Later at about 14:00 a police captain came with certain documents, which he was asked to sign. The police captain informed Jeanette and him that they should leave the Jackson's premises before 18:00. He informed the police officer that he will immediately make arrangements to leave the Jackson's

premises and the police officer left.

He packed his bags and left the premises between 17:00 and 17:30. He had his bags and Jeanette and also her luggage.

They left their luggage in the yard and went to a nearby café. At that stage, somebody was on his way to come and collect them.

Jeanette was worried about a certain document and when they came back from the café, Jeanette said she wants to discuss the said document with her father. At that time, her parents were back at home.

Jeanette climbed over the gate and went inside the yard and he remained outside. After about 20 minutes police van approached him. Two police officers came to him and informed him that they are arresting him. He asked

them why they are arresting him and they did not reply him. At that stage, a bakkie stopped next to them and the driver thereof came to them and introduced himself as Kobus Jackson, brother of Jeanette. He told the police officer that he is not on Jackson's property, they insulted him and told him that he is under arrest and tried to force him into the police van, he resisted, he was hit with a fist on the left lower jaw – The blow was so hard that it pushed him into the van. In the process he was injured on the knee, etc. Door of van was closed. Later door of van was opened and Jeanette was brought in. I asked the police if we can pick up our luggage which was in the yard and next to the wall of the Jackson's house. Police agreed, they picked their luggage and went back into the police van.

Motor-vehicle that was supposed to take them to Germiston arrived. It had to turn back and they were transported to Witbank Police station. They were detained in different cells. He further testified that he was arrested for an

alleged violation of an interim protection order although he has never argued with Jeanette's father or step-mother.

When he was detained, the police officers did not ask for his statement.

After 21:34 he was taken to a cell where he found about 37 other detainees. The said detainees took all his belongings, namely cigarettes, cigarette lighter and his shoes.

Following day he got back his shoes and he was taken to court. At court, his case was postponed to 21 March 2003 for formal bail application. Charge put to him was contempt of a court order. He was taken back to the cells.

When he appeared in Court his case was separated from that of Jeanette as the latter signed a particular document.

At the police cells, other detainees made threats, and said that there are black snakes in the cell, and he understood that to mean male sexual organs. They also said “Air force 100”, although he does not know what that means.

On 21 February he appeared again in court. He pleaded not guilty. Magistrate asked him to explain what happened, he showed Magistrate marks on his body caused by the police officers and the Magistrate made a note. Magistrate then told him that the police made a mistake and that he is free to go. He left, went to the police cells to collect his luggage and went to Germiston.

On a certain day, he consulted a lawyer about his unlawful arrest and assault. His lawyer advised him to go and lay a criminal charge at Witbank police station, go and see a district surgeon and also obtain copy of a charge sheet

relating to his arrest and appearance at court.

On Monday 24 February 2003 he went back to Witbank Magistrate Court to obtain copy of charge sheet. He was told that his lawyer should request copy of charge sheet in writing. He then went to the police station to lay a criminal charge against his assailants and thereafter he went to the district surgeon. He was sent for x-rays and a medical report was completed. He then went back to Germiston with a completed medical report.

On Friday 28 February 2003 he went back to Witbank Magistrate's Court with a letter from his attorney requesting copy of a charge sheet. Whilst still waiting for copy of charge sheet at Witbank Magistrate's Court, Captain Van Loggenberg came to him, asked him if he is Mr Luiters, he confirmed and the Captain advised him that he is under arrest. She did not explain to him why he was arrested. He was taken to Witbank Police Station at about

12:00. He was detained.

In the cell where he was detained, there were about 30 detainees.

On Saturday during the day, he informed police officers that he is diabetic and he does not have his medication, and the police officers informed him that they will follow up. He did not eat any food as he did not have his insulin injection. He started feeling dizzy, thirsty and tired. When he went to Witbank he did not take his medication along as he intended going back home on the same day.

On Saturday evening, in the cell, he noticed that there is a possibility that the other detainees, who appeared to him like a gang, might attack him. One person, who appeared and behaved like a leader of the gang, gave the other detainees certain instructions in their language. He did not understand what



was said. Detainees then interfered with the lighting in the cell, and blocked the lighting with a plastic container, and that reduced the lighting by about 80%, and in the cell it became relative dark.

Leader of the group smoked dagga. Leader of the group again gave certain instructions and the detainees started dancing, stamping their feet and singing. All the detainees, with the exception of about 8 of them were involved in the dancing and singing.

Leader of the gang, again gave certain instructions, the dancers came to him, grabbed him. He protested and screamed. They undressed him and he remained naked. He was put on a mattress, opened his legs or pulled his legs apart. One person, who was standing in front of him, took out his male organ and pushed it into his mouth, and the others penetrated him from behind. He lost his consciousness. When he regained it, they were still busy

with him. They stopped and instructed him to go and wash himself, he found his clothes and dressed up. He later slept.

Following morning, which was a Sunday, the cell was opened at 6:00 or 7:00. He informed the police officer that his health conditions is deteriorating because he does not have his diabetic medication. At about 11:00 he was taken to hospital. He was in leg irons. At hospital, he went to registration department and thereafter he went to see a doctor in an examination cubicle. There was limited privacy as his guards were nearby. Doctor gave him medication. He asked the doctor if he can be admitted and the doctor said it is not possible. The doctor asked him why he wants to be admitted; he informed the doctor that he was not feeling well.

He further testified that he wanted to be admitted as he was scared to go back to the cell.

After finishing with the doctor, he was taken back to the cells. On that night, he did not sleep as he was scared that the other detainees will repeat what they did to him the previous night.

The following day, Monday, he was taken to court. When he appeared in court, no charges were read to him, bail was fixed at R1 000-00 and case was postponed. He was taken back to the police cells. He asked a police officer to be allowed to phone, his request was turned down.

The following morning, which was a Tuesday, he was allowed to telephone his friend, Willie Boshoff, and the latter brought him money and he paid bail at about 16:00 and he was released.

He later appeared in Court and case was again postponed. In the net

appearance, charges against him were withdrawn and his bail money was refunded.

Under cross-examination he testified that at time of incidents under consideration he was unemployed. He first met Jeanette a year prior to him going to Witbank to visit her parents.

Jeanette had a foul mouth, and he heard her swearing at her step-mother. There was tension between Jeanette and her step-mother. Jeanette's father was about 75 years old and her step-mother was over 60 years of age. Jeanette's father was not happy at all, he did not have control over Jeanette. Jeanette was making life difficult for her parents. When Jeanette was arguing with her step-mother, he did not intervene but instead he took a stroll in the garden.

He was in good terms with Mr Jackson. He realised that there was also tension between Jeanette and her other sister, Tracy. He had no problems with Jakobus, Jeanette's brother.

After service of the interim order on him, he decided to go back to Germiston. The interim order was served on him by Captain Bezuidenhout. He was asked why Mr Jackson, with whom he was in good terms, obtained an interdict against him, he said he has no answer.

He further testified that Mr Jackson was influenced by his wife to obtain an interdict. He was asked why, Mrs Jackson, with whom he also had a good relationship, should have influenced Mr Jackson to obtain an interdict against him, he again said he has no answer.

After Captain Bezuidenhout informed them to leave before 18:00, together

with Jeanette they packed their bags as they were going to leave together. They left their bags in the property and thought they will come and collect them later.

At Court, Jeanette pleaded guilty to contravening the protection order as she was forced to do so.

It was put to him that Anton, the police officer who arrested him arrived at the scene at 19:45, and he accepted that.

He further testified that prior to his first arrest, he came back from the café with Jeanette, and the latter said she is going to confront her father, he told her that she cannot go back home but she did not listen to him. He accompanied her back to her home as he wanted to collect his luggage which was in the Jackson's premises. When Sergeant Antoncich arrived, he (the

witness) was sitting on a pavement and Jeanette was in the house. When he was arrested, both police officers were wearing their uniforms and they were driving a marked police van. They wanted to arrest him and he resisted. He was forced into the van and in the process he sustained injuries. When he was facing the police van, Sergeant Antoncich hit him with a fist on the back of his ear. He later said he did not see who hit him with a fist, and he further said but he was with police officers only.

He further testified that on 19 February 2003 he appeared in court. He pleaded not guilty but no charges were put to him. He was referred to the notes made by the Magistrates during his court appearance and he said that the notes of the Magistrate are incorrect. He was referred to a note made by the Magistrate, where it is noted that he told Magistrate that he was kicked on the head, and he said he cannot explain why such a note was made.

He further testified that he received no treatment for injuries he sustained when he was sodomised. At a later stage he went for HIV test, and same was negative.

He denied that whilst in police custody there was a guard who carried out an inspection every hour.

On a question from the court, he testified that he was using tablets for his diabetes. At the hospital, he was given tablets for his diabetes. He did not see who hit him on the head as he was hit from behind.

The plaintiff's counsel informed the court that by agreement between the parties, reports by Messrs Truter ad Joubert, together with their joint minutes will be handed in as exhibits.



Plaintiff closed his case.

### 3. DEFENDANT'S EVIDENCE

The first defendant's witness was Sergeant Antoncich.

He testified that on 18 February 2003 he was in the patrol motor vehicle doing patrol duties. He was with a reservist.

In the evening, whilst on patrol duties he received a call out about fighting and contravention of the Family Violence Protection Order. He drove to 29 French Street. He stopped outside the yard and saw a male and female sitting on the pavement. They came towards him and he asked them what the problem was. At that stage, an elderly male person came from the yard. He asked the later why he telephoned the police, and he replied and said that

he was threatened and he has a protection order against the two people, sitting on the pavement. The elderly person went back into the house and came back with the protection order. Elderly gentlemen handed him a protection order and a warrant of arrest attached to the back of the said order. He was informed that the two people sitting on the pavement entered the yard contrary to the protection order, and that Mr Luiters was threatening him.

His colleague remained with the two suspects outside and he went into the house with the elderly gentleman. He took a statement from him, went outside the house and approached the two people who were sitting on the pavement. Mr Jackson went out with him. The male person, who turned out to be Mr Luiters became aggressive towards Mr Jackson. He screamed at him, pointed fingers at him and he (the witness) tried to calm down Mr Luiters. He told Mr Luiters to stop making threats against Mr Jackson. He

told them they are under arrest for contravening the Protection Order. He explained to them reason for their arrest and ordered them to get into the back of the police van he was driving. He told them that they should not enter Mr Jackson's premises and Mr Luiters said that he was not in the premises. He found their luggage on the premises.

Mr Luiters, who was under the influence of alcohol, resisted arrest despite the fact that he explained to him why he was arresting them and also explained to them their constitutional rights. Mr Luiters smelt of liquor, his eyes were blood-shot and was unstable on his feet.

As Mr Luiters was resisting arrest, he used minimum force to get him into the van. Ms Jackson got into the van voluntarily, and she was also under the influence of alcohol. At no stage did he assault Mr Luiters.

On 2 March 2008 he took Mr Luiters to the hospital. Mr Luiters's legs were in the leg-irons as it is required by their regulations and procedures.

Under cross-examination, he testified that, when he found Ms Jackson and Mr Luiters on the pavement, the former advised him that she had a problem with her mother who was inside the house. When Mr Jackson first spoke to him, Mr Jackson was in the yard and he was outside.

He thinks he spoke to a daughter and son of Mr Jackson in the yard.

At the police station, a certain person came and enquired about Mr Luiters and stated that he is from Germiston and he was coming to collect him.

On the scene where Mr Luiters was arrested, he gained the impression that if Mr Luiters is granted bail, he will go back to 29 French street and cause

more trouble.

He read the Protection Order and Warrant of Arrest in the house, prior to taking a statement from Mr Jackson.

He took a decision to arrest Mr Luiters because he was swearing and verbally threatening Mr Jackson, he became aggressive towards him and Mr Jackson told him that the plaintiff was on the premises contrary to the Protection Order.

In his statement, he did not write the fact that Mr Jackson told him that Mr Luiters was also on the premises.

When he went into the house with Mr Jackson, he found the house in a chaotic state. Furniture was moved around. When he went out of the house,

he was intending to arrest only Jeanette Jackson.

He spoke to Jeanette and she was rude. She implicated Mr Luiters. She said she did not go into the house but she was in the yard with Mr Luiters to fetch their luggage. Their luggage was still in the premises; he went into the yard to collect it.

Before arresting Mr Luiters, he told him that he is contravening the Protection Order and he should stop harassing Mr Jackson.

After getting Mr Luiters and Ms Jackson into the police van, he went straight to the police station.

He was referred to his affidavit that he made immediately after arresting them, where in he stated that Jeanette was in the house and not on the

pavement, he conceded that his evidence in Court, on that point is incorrect and the correct version is the one contained in his affidavit. He also conceded that the correct version is that he accompanied Mr Luiters inside the premises to collect their luggage and not the version he testified about in court on that point.

He further testified that in his affidavit mentioned above, he did not mention the fact that Mr Luiters threatened Mr Jackson, and he said that that was caused by the fact that he was too busy.

He further testified that prior to arresting Mr Luiters he did not have an affidavit stating that Mr Luiters has contravened the Protection Order.

He arrested Mr Luiters because he thought that the latter might cause harm to the complainant, unless he is arrested.

## FINDINGS

### 4.1 ARREST – 18 FEBRUARY 2008

In the Particulars of Claim and in his oral evidence, the plaintiff alleged that on 18 February 2003 at approximately 17:00 he was arrested unlawfully by police officers who had no warrant of arrest.

It is common cause that on 18 February 2003, Mr Jackson approached the Magistrate's Court for an Interim Protection Order against the plaintiff and Ms Jeanette Jackson. The said order was granted on the same date and it was served on both the respondents. When the order was served on them at 15:00 by Captain Bezuidenhout, the latter informed them that they should leave premises of Mr Jackson by 18:00.



Plaintiff alleges that they packed their luggage, left them in the premises and went to a café where they bought food and a telephone card. They later went back to Mr Jackson's house, Jeanette went into the house and he remained outside the yard near the premises. He further alleged that Captain Bezuidenhout gave him only form 4 and not copy of the affidavit on the basis of which the interim order was granted.

The papers before Court, indicates that the Interim Protection Order was issued by a Magistrate after considering the allegations made by Mr Jackson, and Captain Bezuidenhout served the order as required by law.

Sergeant Antoncich testified that Mr Jackson gave him the protection order and a warrant of arrest. This fact, indicates that all the documents as required by the law were available.

On receipt of the interim order from Captain Bezuidenhout, plaintiff read it, and they packed their bags.

The probabilities are that Captain Bezuidenhout gave the plaintiff all the necessary documents. There is no reason for Captain Bezuidenhout not to give the plaintiff all the necessary documents.

Plaintiff denied that he contravened the protection order. He also denied that he was under the influence of alcohol as alleged by Sergeant Antoncich.

Mr Jacobus Christian Jackson, in his affidavit stated that he saw the plaintiff in the premises and the latter jumped over the wall. Sergeant Antoncich testified that Mr Jackson senior informed him that the plaintiff was in the premises. When Ms Jackson was arrested, she alleged that she was in the

yard with the plaintiff to fetch their luggage.

In her section 112(2) statement, which she made when she appeared at Court, Ms Jeanette Jackson stated, *inter alia*, that she went to Protea Hotel with the plaintiff where they consumed alcohol. She corroborated the version of Sergeant Antoncich who testified that the plaintiff was under the influence of alcohol. The denial of the plaintiff that he was under the influence of alcohol is, in all probabilities false.

As stated earlier, Sergeant Antoncich stated that he arrested the plaintiff after receiving copy of the Interim Protection Order and the Warrant of Arrest from Mr Jackson because:

- (i) Mr Jackson told him that plaintiff was in the premises contrary to the Interim Protection Order;

- (ii) Plaintiff was swearing and verbally threatening Mr Jackson;
- (iii) Plaintiff became aggressive to him.

Section 8(4)(b) of the Domestic Violence Act 116 of 1998 stipulates that:

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

Subsection 5 details factors that must be taken into account in considering whether or not the complainant may suffer immanent harm. Section 17(a) states that a contravention of a protection order is an offence.

In *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 CPD at 145, Meer J, after considering various authorities at 146D said:

“It is safe to say therefore that ‘immanent harm’ is harm which is about to happen, if not certain to happen.”

Section 1 of the Domestic Violence Act *supra*, contains, *inter alia*, a definition of domestic violence. Intimidation, harassment, emotional, verbal and psychological abuse and any other abusive behaviour towards a complainant amounts to domestic violence.

The plaintiff, in the presence of Sergeant Antoncich, committed domestic violence by threatening and swearing at Mr Jackson. Besides that, Sergeant Antoncich was entitled to arrest the plaintiff as what he was told by Mr Jackson, together with the behaviour of the plaintiff, in his presence, and the

fact that plaintiff was under the influence of alcohol, demonstrates that Mr Jackson was being harmed and raised a reasonable suspicion that if the plaintiff is not arrested, the plaintiff was going to cause further harm to Mr Jackson.

The plaintiff's counsel submitted, *inter alia*, that the Domestic Violence Act is not applicable in this case as the relationship between the plaintiff on the one hand and Mr and Mrs Jackson on the other hand is not the type of relationship which renders the Domestic Violence Act applicable.

The above-mentioned submission is without merits. Section 1(f) of the Domestic Violence Act defines a domestic relationship as including people who share or recently shared the same residence.

The evidence before Court indicates that the plaintiff shared residence with

the Jacksons from 14 February 2003 until he was served with the Interim Protection Order on 18 February 2003 at 15:00. He was staying at the Jackson's home together with his girlfriend Jeanette.

#### 4.2 ALLEGED ASSAULT OF PLAINTIFF

It is common cause that when the plaintiff was to be arrested, he resisted arrest and the police officers had to use force to arrest him.

It is also common cause that during his arrest, the plaintiff sustained certain injuries when he was placed under arrest.

The plaintiff alleges that during his arrest, he was hit with a fist on the head just next to the ear or on the left lower jaw. On the other hand, Sergeant Antoncich denies that the plaintiff was hit with a fist.

From the plaintiff's evidence, it is not clear who he alleges hit him with a fist. In his evidence in chief, he did not mention who he alleges hit him with a fist. Under cross-examination he said that Sergeant Antoncich hit him with a fist. He later changed his version and said that he did not see who hit him with a fist. In his statement that he made to the police, he said that he was assaulted by Inspector Fursentburg.

During his court appearance he told the Magistrate that he was kicked on the head. He was asked, by the defendant's counsel why he said so, he replied and said I cannot explain that.

The court cannot rely on the evidence of the plaintiff. He alleges, in evidence that he was hit with a fist, but when he appeared in court, shortly after the alleged assault, he told the Magistrate that he was kicked on the



head.

Plaintiff failed to prove that he was unlawfully assaulted by the police.

#### 4.3 ARREST – 28 FEBRUARY 2008

It is common cause that the plaintiff was arrested by Inspector Van Loggerenberg at Witbank Magistrate's Court.

As stated earlier, Mr Jackson obtained an Interim Protection Order against the plaintiff with a return date.

Prior to the return date, but after the plaintiff was released from custody after the first arrest Mr Jackson obtained another Warrant of Arrest against the plaintiff. The Warrant of Arrest was issued, *inter alia*, on the strength of the

affidavit of Ms Margaret Elizabeth Wilken.

The latter stated, *inter alia*, that the plaintiff “keeps threatening the applicant and his family.”

The second Warrant of Arrest was issued in accordance with the provisions of Section 8(3) of the Act *supra*.

In his heads of argument, the plaintiff’s counsel, and during oral argument submitted, *inter alia*, that the arrest of the plaintiff was unlawful as Inspector van Loggerenberg failed to exercise his discretion as required by section 8(4) and (5) of the Act.

There is no evidence before the court that at the time Inspector van Loggerenberg arrested the plaintiff, the complainant was likely to suffer any

harm unless the plaintiff is arrested. There was no reason for the plaintiff to be arrested forthwith and detained.

Section 8(4)(c) of the Act provides that if there are insufficient reasons for arresting the respondent, the respondent must be given a written notice to appear before a court.

The plaintiff was arrested in the Magistrate's Court building. There is no reason why he was not taken to court to appear before a Magistrate or given a written notice to appear in Court on a specified date and time.

My view is that the arrest of the plaintiff was unlawful.

#### 4.4 ALLEGED FAILURE OF THE POLICE TO PROTECT THE PLAINTIFF WHILST THE LATTER WAS IN CUSTODY

The plaintiff, in his evidence, testified about the manner in which he was sodomised in the police cells by fellow detainees on the night of 1 March 2008.

According to the plaintiff the said evening, the other detainees, about 20-22 of them started singing, dancing and stamping their feet. They grabbed him and he screamed. They undressed him. He was sodomised. He does not know how many of them penetrated him from the back. He lost his consciousness. When he regained it, they were still busy. They later stopped and said he should go and wash himself.

Following day in the morning, the cell was opened. He could not eat as his diabetes was serious. He did not have his insulin injection.

He approached the person who opened the cell and advised him that he needs medication for his diabetes.

At about 11:00 police officer called him and advised him that they are taking him to hospital.

At the hospital, he was examined by a doctor. He was examined in a cubicle. He requested the doctor to admit him in the hospital, and the doctor asked him why he should be admitted, he informed the doctor that he is not feeling well. Doctor informed him that he cannot be admitted as the hospital is full, and there are no beds.

He further testified that he wanted to be admitted at the hospital as he was scared to go back to the police cells. He was taken back to the cells.

On Monday he was taken to Witbank Court. He appeared in Court and his bail was fixed at R1 000-00. When he appeared in court, he did not inform the Magistrate about the alleged sodomy.

Outside the cells where he was detained on the night in question, there was a guard outside and inspections were done at certain intervals. No complaint was received by the police officers.

Plaintiff testified that he does not know the names of the detainees who sodomised him but it is some of the 37 or so detainees who were in the cell with him.

Plaintiff had ample opportunity to report to the police officers or the doctor at the hospital or the Magistrate when he appeared in court, but he did not do so. Plaintiff failed to inform the doctor about the alleged sodomy, despite

the fact that, as he alleged, he was seriously sexually abused to a point where he lost his consciousness.

He alleged that he wanted to be hospitalised as he was scared of going back to the cell, but when asked why he wants to be hospitalised he tells the doctor that he is not feeling well. The probabilities are that if he had told the doctor about how he was allegedly sodomised, and that he even lost his consciousness during the alleged ordeal, the doctor would have admitted him into the hospital.

During oral argument, the plaintiff's counsel submitted that probably the plaintiff informed his attorney about the sodomy during April 2003. The attorney was the first person that the plaintiff informed about the alleged sodomy.

My view is that the version of the plaintiff relating to the alleged sodomy is a fabrication and the court should reject it.

It is highly improbable that the plaintiff was sodomised as he alleged.

The plaintiff's counsel, during oral argument relied on the experts reports. The report of the plaintiff's expert, Mr Kobus Truter, a clinical psychologist is dated 30 April 2008.

The report of defendant's expert Mr Etienne Joubert, a clinical psychologist is dated 15 May 2008 and their joint minute is dated 2 June 2008.06.17

Both experts consulted the plaintiff many months after the incident and they are based mainly on the version of the plaintiff, which this court finds to be improbable.

The expert's reports does not assist the court to make any factual findings in



this case and consequently no evidential value will be placed on them.

In my view, the plaintiff has failed to prove his claim under this sub-heading.

#### 4.5 TWO CLAIMS AGAINST THE SECOND DEFENDANT

In the Particulars of Claim, the plaintiff alleges that on 18 February 2003 and on 28 February 2003 Magistrate M Venter, acting in her official capacity and within the course and scope of her employment as employee of the second respondent unlawfully issued an Interim Protection Order and a Warrant of Arrest against the plaintiff.

The Particulars of Claim further alleges that the Magistrate, whilst acting as such an employee, failed to properly exercise her discretion as required by the Domestic Violence Act and consequently caused the plaintiff to suffer

certain damages.

In *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 (CC) at pages 301I-302B (paragraph 139) Chaskalson CJ said:

“Judicial officers ought not to be put in a position of having to do this, or to engage in negotiations with the executive over their salaries.

They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining process open to them.”

As stated above, Magistrates are judicial officers. When they carry out their

judicial functions, they do not act in their capacities as employees of the second defendant. Second defendant does not have any powers to determine how they carry out their functions. They act independently from the second defendant and they are subject only to the law and our constitution.

Plaintiff has failed to disclose a cause of action against the second defendant.

## 5     QUANTUM

As stated earlier, the arrest of the plaintiff on 28 February 2003 was unlawful. Plaintiff was arrested on a Friday and he was taken to court on the following Monday. Bail of R1 000-00 was fixed and he was, apparently released on bail the following day.

He later appeared in court, charges against him were withdrawn and his bail

money refunded.

In making an award, the court must be fair to both the plaintiff and the defendant. Previous awards in comparable cases can be used as a guide.

In his heads of argument, the plaintiff's counsel submitted that there existed no reason to arrest the plaintiff as the case against the plaintiff was withdrawn on 21 February 2003. He further submitted that when arresting the plaintiff, the police were motivated by malice.

There is no evidence to support the latter submission. When the plaintiff was arrested, there was a Warrant of Arrest which was issued on the strength of the affidavit of a daughter of the complainant. Furthermore, the said Warrant of Arrest was issued prior to the expiry of the Interim Protection Order, as the return date of the said interim order was 11 April 2003.

The police officer who arrested the plaintiff, as stated earlier, failed to properly exercise discretion as provided for in section 8(4) and (5) of the Domestic Violence Act *supra*, and consequently the plaintiff was unlawfully detained for about 5 days.

After considering the authorities referred to by plaintiff's counsel, my view is that an award of R130 000-00 will be fair under this head of damages.

The plaintiff was partially successful against the first defendant and I think plaintiff should be awarded his costs against the first defendant.

Plaintiff did not succeed against the second defendant. The first and second defendants were using the same attorneys and counsel. No extra costs were incurred in order to present the defence of the second defendant.

My view is that the plaintiff should not be ordered to pay the costs of the second defendant.

The court therefore makes the following order:

1. The first defendant is to pay the plaintiff an amount of R130 000-00.
2. The first defendant must pay the plaintiff's party and party costs.

Heard on: 11 June 2008

Plaintiff's counsel: J C Klopper

Instructed by: Maritz Smith Matshidiso Inc

Defendant's counsel: I Hussain SC and P Bezuidenhout

Instructed by: State Attorney



