

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

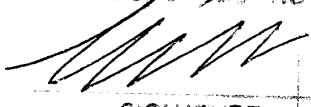
CASE NO: 22262/02

In the matter between:

GREENBERG, LIONEL MERVIN

Plaintiff

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO
(2) OF INTEREST TO OTHER JUDGES	<input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO
(3) REVISED	
DATE 20-1-09	
	SIGNATURE

GOUWS, MARGARET
MINISTER OF SAFETY AND SECURITY

First Defendant
Second Defendant

JUDGMENT

FRANKLIN AJ :

Introduction

[1] This is an action for damages brought by the Plaintiff for his allegedly wrongful arrest and detention by the First Defendant ("Gouws") acting in

the course and scope of her employment as an inspector employed by the South African Police Services ("SAPS"), which is represented by the Second Defendant. The case is the product of an exceedingly acrimonious relationship between the Plaintiff and his ex-wife, Mrs Felicia Greenberg ("Mrs Greenberg") which has seen the Plaintiff being arrested no fewer than fifteen times in connection with ongoing matrimonial and other disputes between them.

[2] It is common cause that Gouws, acting within the course and scope of her employment with the SAPS, arrested the Plaintiff at the Edenvale Police Station on 21 September 2000 and that he was thereafter detained first in the police cells and then at the Boksburg prison, until his release some 22 days later on 12 October 2000. The Plaintiff alleges that his arrest was without any legal justification or cause. The Defendants admit the arrest and detention but plead that the Plaintiff was arrested in terms of a lawful warrant, alternatively that he was arrested in terms of Section 40 of the Criminal Procedure Act, 51 of 1977 since Gouws reasonably believed him to have committed an offence listed in Schedule 1 of the Act.

[3] An arrest or detention is *prima facie* wrongful and unlawful and it is for the defendant to allege and prove the lawfulness of the arrest or detention once these are admitted: *Brand v Minister of Justice* 1959 (4) SA 712 (A) at 714; *Lombo v African National Congress* 2002 (5) SA 668 (SCA) at para

32. However if an arrest takes place pursuant to a valid warrant, the plaintiff bears the onus of proving the wrongfulness of the arrest: *Cresto Machines (Edms) Beperk v Die Afdeling Speuroffissier S A Polisie Noord Transvaal* 1972 (1) SA 376 (A) at 394.

- [4] The Defendants rely on a warrant of arrest which was issued by the Germiston Magistrates Court in terms of Section 8(1)(a) of the Domestic Violence Act, 116 of 1998. ("the "DVA"). Section 4 of the DVA allows complainants in domestic violence matters to apply to a Magistrates Court for a protection order. The court is entitled to issue a protection order in the prescribed format if it finds that the respondent has committed or is committing an act of domestic violence as defined. Section 8 stipulates that whenever a court issues a protection order, it must also make an order authorizing the issue of a warrant for the arrest of the respondent, and suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of Section 7. Section 8(2) provides that such warrant remains in force unless the protection order is set aside or is cancelled after execution. Section 8(4)(b) provides as follows:

"If it appears to the member concerned that, subject to sub-section (S), there are reasonable grounds to suspect that the complainant may suffer imminent harm as the 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). "

Section 8(5) goes on to provide as follows:

"(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in sub-section 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. "

[5] The case of *Seria v Minister of Safety and Security and Others 2005 (5) SA 130 (C)* contains a comprehensive summary of the workings of the DVA and will be referred to further below.

[6] An interim protection order was granted against the Plaintiff by the Germiston Magistrates Court on 19 June 2000. This order was made final on 3 August 2000. In terms of the protection order the Plaintiff was ordered (*inter alia*) not to assault or threaten Mrs Greenberg, not to enter her residence, not to follow her, not to send faxes to her attorney and not to leave messages on her answering machine. In terms of para 4.2 of the protection order, a warrant was authorized for the arrest of the Plaintiff ("the warrant"), the execution of which was suspended subject to the Plaintiff's compliance with the provisions of the protection order.

[7] The warrant states *inter alia* as follows:

"Therefore you are hereby authorized and ordered to forthwith arrest the respondent in terms of the provisions of the Domestic Violence Act, 1998, if 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." (my emphasis)

[8] The Plaintiff denies that he was arrested in terms of this or any other warrant. Gouws' evidence is to the contrary effect. This is one of the first disputes which I need to resolve. Secondly, the Plaintiff contends that even if he was arrested in terms of the warrant, Gouws had no reasonable grounds to suspect that Mrs Greenberg might suffer imminent harm as a

result of any breach of the protection order by him. Gouws on the other hand testified that she had adequate grounds upon which so to conclude and that it was precisely because she concluded he was in breach of the protection order that she arrested the Plaintiff. This is the second major issue which requires resolution.

[9] The Court's task in this matter was not made easier by the disorderly presentation of documents throughout the trial and the parties' failure to agree a combined bundle. I was told that the matter came before court in September 2005 and then again in August 2007 and that the bundles presented on those occasions differ from the bundles made available to me. This is unfortunate not only for the conduct of the case but also because a transcript of an alleged conversation held between the Plaintiff and Mrs Greenberg on 18 September featured prominently in the matter but the question of its status was never properly addressed by the parties. In the result only a few of the many documents handed in are relevant to the issues at hand.

[10] In evidence much time was taken up in traversing other complaints laid by Mrs Greenberg against the Plaintiff' both before and after the incident giving rise to this action. It is apparent that the Plaintiff and Mrs Greenberg are quite unable to deal with one another without acrimony, conflict and

ultimately the intervention of the SAPS. It is within this unfortunate context that this matter arises.

[11] The Plaintiff is currently 49 years of age and is self-employed. He has a matric and various technical qualifications. He and his ex-wife have two sons, one of 24 and one of 21 years old. The Plaintiff has an acrimonious relationship with his older son but gets on well with his younger boy.

[12] As indicated, the Plaintiff has been arrested numerous times at the instance of his ex-wife or members of her family, who have raised various complaints against him. The dockets in some of these matters were placed before me. In particular the following cases featured in evidence –

[12.1] On 6 July 2000 the Plaintiff was arrested under Case No. 119/07/2000 by an Inspector Khubeka at the Edenvale Police Station for an alleged failure to comply with a court order.

[12.2] On 29 July 2000 the Plaintiff was arrested under Case No. 698/07/2000 by an Inspector Khumalo at the Edenvale Police Station in connection with the alleged theft of Mrs Greenberg's brother's cellphone. It appears that Inspector Gouws subsequently took over as investigating officer in this matter.

[12.3] On 7 August 2000 the Plaintiff was arrested under Case No. 194/08/2000 by Gouws at the Edenvale Police Station in connection

with his alleged breach of a custody order by taking his younger son with him to Skukuza. ("the Skukuza case")

[12.4] On 21 September 2000 he was arrested under Case No. 415/09/2000 by Gouws at Edenvale Police Station for the alleged breach of the protection order issued on 3 August 2000. This is the arrest which forms the subject matter of the present action.

[13] Gouws testified about her interaction with the Plaintiff in connection with the Skukuza case. She said she formed a clear impression of his disregard for the law as a consequence of that encounter. I return to this in due course. The Plaintiff testified that he previously sued Gouws in connection with his detention in the Skukuza matter. That case has been finalized but is presently on appeal. None of the other cases listed above led to a conviction of the Plaintiff on the charges which were brought against him.

[14] Against that background I turn now to consider the testimony given by the Plaintiff.

[15] The Plaintiff's Evidence

[15.1] The Plaintiff testified that on the day of his arrest (21 September 2000) he went to Mrs Greenberg's house which is situated approximately one kilometer from the Edenvale Police Station. One of the many disputes between the parties concerns Mrs Greenberg's

retention of certain personal belongings allegedly owned by the Plaintiff. The Plaintiff had made a number of attempts to retrieve these belongings without success. He went to her premises that day to attempt once more to retrieve them, as he had previously told her he would do. Mrs Greenberg told him he was not allowed to come to her house. (One of the conditions in the protection order was that the Plaintiff was not allowed to enter Mrs Greenberg's premises). Met with this response the Plaintiff said he would go and seek the assistance of the police in recovering his belongings. He behaved himself perfectly reasonably in this encounter without shouting, threatening or intimidating Mrs Greenberg in any manner.

[15.2] The Plaintiff then went to the Edenvale Police Station where he intended approaching one or other of the detectives there to assist him with his complaint. As he ascended the stairs towards the detectives' offices he was met by Gouws and another unidentified male policeman. He knew Gouws because of her involvement in previous arrests. Gouws summarily arrested the Plaintiff on the stairs without informing him of the charges against him and without having any warrant authorizing her to do so. All he was told was that he was being arrested because he refused to leave his ex-wife

alone. He was then taken to the police cells where he was detained overnight.

[15.3] The following day (22 September 2000) the Plaintiff was taken to court where he launched a bail application. This was opposed by the State at the insistence of Gouws who stated that she needed to investigate the matter further. Bail was refused and the Plaintiff was kept in custody until, upon the advice of his attorney and in order to secure his freedom, he pleaded guilty to the charges of breaching the protection order by threatening the complainant and sending faxes to her attorneys.

[15.4] Gouws acted as a functionary of the Plaintiff's who used her as a pawn in their matrimonial battle. The reason for the arrest was not because he constituted any threat to Mrs Greenberg. Rather it was a malicious attempt to teach him a lesson. Gouws knew him well from previous arrests. She knew where he lived and that his residence was close to the Edenvale Police Station. He had always cooperated with her in previous matters and had always attended court when warned to do so. There was no reason in the present instance to arrest him. Gouws knew he would voluntarily have come to court to face any fresh charges brought against him.

[15.5] During his time in prison the conditions were appalling. His cell was massively overcrowded, he was required to sleep on a cement floor, and the sanitary conditions were disgusting. His incarceration caused him not only great physical discomfort but intense anxiety and depression as well.

[15.6] The Plaintiff encountered Gouws at the Germiston Magistrates Court about a year after his arrest. On that occasion she said to him that she ought never to have arrested him because according to the warrant, an arrest was only justified if Mrs Greenberg faced imminent harm at the hands of the Plaintiff, which was not the case.

[15.7] The Plaintiff gave details of costs he had incurred and damages he had suffered as a consequence of his arrest and detention. However in argument before me Mr Saladino representing the Plaintiff, informed me that the Plaintiff did not persist with his Claim C for loss of income.

[15.7] Although the Plaintiff referred in his evidence-in-chief to a telephone call he had made to Mrs Greenberg on 18 September 2000, little detail of this was given. This call was however canvassed extensively in cross-examination since it formed the primary basis for the later arrest on 21 September.

[16] It is common cause that the Plaintiff telephoned Mrs Greenberg on 18 September.

As indicated, there is a transcript of this conversation in the bundle made available to the Court. The Plaintiff did not accept the accuracy of the transcript when it was put to him during cross-examination. However, in the event, he was taken through the transcript and either admitted or did not seriously dispute the material parts of it that were put to him. To all intents and purposes, it was accepted by the Plaintiff as an accurate recordal. It is principally on the strength of this conversation that the Defendants contend that Gouws was entitled to arrest the Plaintiff. They allege the transcript evidences a breach of the protection order in that the Plaintiff threatened Mrs Greenberg. It is necessary therefore to examine the detail of what was said.

[17] Not surprisingly, the conversation traverses a number of the issues giving rise to the acrimonious relationship between the parties, including the custody of their children and Mrs Greenberg's retention of the Plaintiff's belongings. The Plaintiff was evidently concerned that a court would, at Mrs Greenberg's instance, rule that the Plaintiff was forbidden from having any contact whatsoever with his sons. The constant theme of the conversation concerned the consequences which Mrs Greenberg would suffer if she continued - according to the Plaintiff - unjustifiably involving the children in the disputes between the two of them and in her attempts to

prevent him from seeing his children. In summary the Plaintiff made the following statements to Mrs Greenberg, which the Defendants contend are evidence of threats and intimidation against her -

- *"I am going to cost you nearly a million rand if you don't cooperate "*
- *"If you turn your children against my side of the family you are going to pay a very hefty price. "*
- *"You will regret the day that you tried to persuade the courts not to allow me to see my children. "*
- *"I'm going to teach your sister a severe lesson in her life. "*
- *"Your sister is going to pay the biggest price that your family has ever seen. Your sister is going to cost you people millions "*
- *"You have painted a distorted picture for eighteen years and you are going to pay the very biggest price you have ever paid in your life when your children are both in my custody. "*

The final interchange is the one upon which the Defendants place the greatest store, and it is consequently quoted in full -

"Lionel: On Wednesday I am coming with a truck to remove all my things.

Felicia: Really!

Lionel: Yes, and if you don't give in to me you will pay big time.

Felicia: Really!

Lionel: Not really, I am telling you. You are going to cough blood.

Felicia: Ok.

Lionel: If you don't give me my things you are going to pay the consequences.

Felicia: Alright.

Lionel: I'm asking you, can I have my things? You are being `dofka' with me.

Felicia: No I cannot go and see you. I'm sorry I have to end this discussion - goodbye. " (my emphasis)

[18] The Plaintiff denied the assertion put to him that the transcript reveals that he threatened Mrs Greenberg. As regards his statement, *"I am telling you*

that you are going to cough blood", the Plaintiff said this was simply a figure of speech like *"Heads will roll"*. He said it was an empty assertion and that the Defendants were taking it out of context by suggesting it constituted a threat of physical harm.

[19] It was put to the Plaintiff in cross-examination that Mrs Greenberg would testify that she felt threatened by what he said to her in the telephone call of 18 September and even more threatened when the Plaintiff came to her house on 21 September, and that that is why she went to the SAPS to lay a complaint. As it turns out Mrs Greenberg was not called to testify.

[20] Apart from a witness called to corroborate Gouws' denial of the Plaintiff's testimony that she apologized for wrongfully arresting him, Gouws was the only witness called by the Defendants.

Gouws' Testimony

[21] Gouws was the investigating officer in Case 419/09/2000 and it is she who arrested the Plaintiff for allegedly contravening the protection order by intimidating his ex-wife.

[22] Gouws had encountered the Plaintiff prior to arresting him on 21 September 2000. The occasion was the Skukuza case in which the Plaintiff was charged with contempt of court. She interviewed the Plaintiff at her office at the Edenvale Police Station. She put to him a complaint that in

contravention of a court order he had taken his son away with him for the weekend to Skukuza. The Plaintiffs response was that his son was his child and that he would do as he pleased with him. He even threatened in her presence to take the child to Botswana. This was the first time Gouws had met the Plaintiff and she formed the distinct impression that he had no respect for the law, that he was stubborn and that he liked to do as he pleased. Gouws arrested him on that occasion because he had threatened to take his son to Botswana. She had therefore formed a negative impression of the Plaintiff by the time of the incident on 21 September 2000.

[23] Gouws testified as follows regarding the events of that day.

[23.1] Mrs Greenberg came to see her at the Edenvale Police Station at about 10h00 in the morning. She had made a recording of the conversation held between her and the Plaintiff on the 18th (although the transcript was not yet to hand) and told her about that call. She told Gouws that the Plaintiff harassed her continuously and that she was scared for her life. She said the Plaintiff had threatened that she (Mrs Greenberg) was going to cough blood. She explained that the Plaintiff had consulted a psychologist who had reported that the Plaintiff had psychotic tendencies. Mrs Greenberg gave Gouws a psychiatric report, which although not in the docket, is recorded in Gouws' investigation diary. Mrs Greenberg said she was scared the

Plaintiff was going to do something to her. Mrs Greenberg had already written out a statement by the time she visited the police station. She had done so the previous day. She gave this to Gouws who then read and considered it and then administered the oath. Mrs Greenberg told her that she was frustrated because nobody would help her and because the Plaintiff would not stop harassing her. Gouws promised to investigate the matter. Mrs Greenberg left the station.

[23.2] Later, at about 15h00 on the same day, Gouws received a call from Mrs Greenberg who was hysterical, saying that the Plaintiff was in front of her gate, at her residence, and that he was going to harm her. She asked Gouws to please come and help her. Gouws immediately called one of her fellow policemen so that they could together proceed to arrest the Plaintiff. Gouws was particularly motivated by the statement earlier conveyed to her by Mrs Greenberg that the Plaintiff had threatened she would cough blood.

[23.3] When Gouws and her colleague were descending the stairs, they met the Plaintiff who was on the way up. She immediately arrested him in accordance with the warrant. Gouws told the Plaintiff that he had threatened his ex-wife in contravention of the protection order and that she was arresting him for that offence. She then took the

Plaintiff to the charge office where she read him his rights and required him to sign a warning statement, which he did. According to the statement (which the Plaintiff admitted in cross-examination he had signed), the Plaintiff was informed that Gouws was involved in the investigation of contempt of court and intimidation offences allegedly committed on 18 September. Gouws emphasized the seriousness of the charges to him.

[23.4] Gouws formally charged the Plaintiff the next day (22 September 2000) and a bail hearing was held. Gouws was called as a witness for the State. Gouws testified that she was very worried for Mrs Greenberg because of what she had seen and heard, because of the threat that Mrs Greenberg would cough blood, and because she was aware of other cases in which the Plaintiff was involved. She opposed the granting of bail primarily because she felt that Mrs Greenberg would suffer harm if the Plaintiff was not arrested. Indeed she said she thought the Plaintiff might kill Mrs Greenberg. Bail was refused and the Plaintiff was thereafter held at the Boksburg Prison as an awaiting trial prisoner.

[23.5] On 12 October 2000 the Plaintiff appeared in court and pleaded guilty to certain charges. By this stage, the charges brought under

Case 415/09/2000 had been combined with those brought under Case No. 194/08/2000. He was thereupon released.

[24] Gouws denied ever apologizing to the Plaintiff for wrongfully arresting him on 21 September. She was supported in this denial by Ms Sharon Larson who testified on behalf of the Defendants. Ms Larson is an erstwhile employee of the SAPS. On a date she could not recall she was required to attend at the Germiston Magistrates Court in her official capacity and Gouws accompanied her. There they encountered the Plaintiff, who said to Gouws that she ought not to have arrested him. Gouws responded that she had only done her duty. She did not apologise in any way or say that she was wrong to have arrested him. I have no hesitation in accepting this evidence which accords with the probabilities. It is highly unlikely that Gouws would have admitted a wrongful arrest. She was adamant in her testimony before me that she had proper grounds to arrest the Plaintiff on 21 September and it is unlikely that she held a different view in the aftermath of the arrest.

Unlawful Arrest?

[25] The first question to be determined is whether Gouws arrested the Plaintiff in terms of the warrant (as she testified) or whether the Plaintiff is correct that he was arrested without a warrant.

[26] In support of his version the Plaintiff stressed that the warrant was missing from the docket opened under Case No. 415/09/2000 (which Gouws accepted although she says the warrant was certainly in the docket initially). It was also put to Gouws that she could not have used the warrant to arrest the Plaintiff on 21 September 2000 because the same warrant had been used to arrest him in the earlier Skukuza case and, once executed, such warrant was cancelled and could not be used again. However, it was also suggested that in a case brought against the Plaintiff In December 20000 (under Case No. 2472/12/2000) the Plaintiff had been arrested on the same warrant, the inference being that the warrant could not therefore have been used to effect the 21 September arrest since if it had been so used it would thereafter have been cancelled.

[27] In my view the Defendants have succeeded in showing that the arrest took place pursuant to the warrant and I accept Gouws' testimony to this effect. Apart from the fact that the propositions set out above about the use of the warrant to effect other arrests are mutually contradictory. Gouws denied the correctness of both and no evidence was led by the Plaintiff in support thereof. In addition, the warrant is referred to in paragraph 3 of Mrs Greenberg's statement given to Gouws on the morning of 21 September and was attached to that statement. Gouws read the statement. It is highly unlikely that if a valid warrant existed and had been given to her that same

day Gouws would have proceeded to arrest the Plaintiff at the police station without it. It is therefore my finding that the Plaintiff's arrest on 21 September 2000 was effected pursuant to a valid warrant issued under the DVA.

[28] That is of course not the end of the matter because the Plaintiffs arrest was only lawful if the terms of the warrant were complied with - namely, if Gouws had reasonable grounds to suspect that Mrs Greenberg may suffer imminent harm as a result of a breach of the protection order by the Plaintiff.

[29] It was held in *Seria's* case (*supra*) that the "*reasonable suspicion*" enquiry is an objective one. At page 145A - 146D the learned judge said as follows –

"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:

'These 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 s 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 836 I837B 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:

'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 authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to serve out a warrant, ie something which otherwise would be an invasion of private rights and (t)he reasonable man will therefore analyse and assess 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.'

As to what comprises 'imminent harm ', the Concise Oxford Dictionary defines imminent as 'about to happen'. In Abakor Ltd v Crafcor Framing (Pty) Ltd t/a Riversdale Feedlot and Another 2000 (1) SA 973 (N) Magid J at 978G 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.'

'Immiment peril' is described in West's Legal Thesaurus Dictionary I S 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. The Ontario Court of Appeal in R v Adams described the concept as follows:

`(I)t 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. "

In applying the test, the factors listed in Section 8(5) of the DVA must be considered.

[30] Gouws testified emphatically that she formed the impression that the Plaintiff posed a grave danger to the safety of Mrs Greenberg and that if not arrested, he might well cause her physical harm. She reached this conclusion relying on the following: in her previous encounter with the Plaintiff he had brazenly stated that he would do as he pleased and showed scant regard for the custody order issued by this Court; on 18 September the Plaintiff had said to Mrs Greenberg that she would cough blood, by which she understood he intended to cause her physical harm resulting in her coughing on her own blood; and on 21 September an hysterical Mrs Greenberg had telephoned her to say that the Plaintiff was outside her premises and she feared he would do her harm.

[31] Having observed Gouws in the witness box I accept that she *bona fide* believed that she was doing the right thing by arresting the Plaintiff and that it was necessary to do so in order to protect Mrs Greenberg. However I have reached the conclusion that, when viewed objectively, her conclusion was not based upon reasonable grounds. I do so for the reasons set out below.

[31.1] First and most obviously, although Mrs Greenberg says she feared imminent harm at the hands of the Plaintiff by virtue of the conversation they had held on 18 September, she only reported the incident to Gouws on 21 September, three days later. Although

there was evidence that Mrs Greenberg had first laid a complaint at the Sandringham Police Station, where officials refused to deal with the matter because it was outside of their jurisdiction, that report itself was only made on 20 September. If the 18 September conversation was a threatening one and if Mrs Greenberg truly feared for her life as a consequence thereof it is strange that the report was not made immediately. This is a material fact which Gouws ought to have taken into account in deciding whether there was imminent harm.

[31.2] Secondly, it is noteworthy that in paragraph 5 of the statement which Mrs Greenberg gave to Gouws on 21 September, Mrs Greenberg records her understanding that the "*cough blood*" threat was directed not at her but against her sister. ("*He is going to teach my sister a lesson and that she is going to cough blood*"). Mrs Greenberg was never called to confirm what she said to Gouws and to explain precisely why she felt that she was in danger of imminent harm. Had she been called then this discrepancy would no doubt have been pursued in cross-examination.

[31.3] Thirdly, it is not readily apparent from the context of the entire conversation on 18 September that the Plaintiff's use of the cough blood phrase was intended to or should have been understood by

Mrs Greenberg as involving a threat of physical harm. The tenor of the conversation was that Mrs Greenberg and her family would suffer financially if Mrs Greenberg stood her ground on the custody dispute between the parties. No threats of physical harm are made.

[31.4] Fourthly, Gouws did not immediately proceed to arrest the Plaintiff when she first received Mrs Greenberg's complaint at about 10h00 on the morning of 21 September. The arrest took place at about 15h10 and only after the phone call that Gouws received from Mrs Greenberg saying that the Plaintiff was at that moment outside her premises. It is this call which triggered the arrest. As indicated above, Gouws' testimony was that Mrs Greenberg telephoned her to say that the Plaintiff was outside her gate and that she feared for her life. Crucially, Gouws did not enquire as to precisely what the Plaintiff had said or done on this visit which caused Mrs Greenberg to entertain this fear. The Plaintiff himself testified that during the discussion he had with Mrs Greenberg on 21 September whilst he was outside her house he had asked her to give back his belongings and when she refused he said he would proceed to the police station to enlist their support. Mrs Greenberg was not called to contradict this version. On the Plaintiffs version, which I am bound to accept, that encounter does not provide any basis for Mrs Greenberg to fear

physical harm at the hands of the Plaintiff. The fact that the Plaintiff proceeded to the police station corroborates his version and makes it highly unlikely that he had given his ex-wife any cause to fear for her life. That is the conclusion which Gouws ought to have come to had she made the necessary enquiries of Mrs Greenberg. Instead she accepted without more what Mrs Greenberg told her and on the strength of an untested expression of fear she proceeded to arrest the Plaintiff.

[32] Having so concluded, I must note that the Plaintiff's own conduct left much to be desired. On 21 September he visited his son's school ostensibly to give him a letter, in circumstances where he knew he was not permitted to see her. His call to Mrs Greenberg on 18 September and what he said during the course of that conversation, was certainly inappropriate and foolish in the light of the protection order and the history of conflict between them. His visit to Mrs Greenberg's premises on 21 September was ill-advised, provocative, and no doubt unnerving for Mrs Greenberg, and fell just short of being a contravention of the protection order, which forbade him from entering her premises. The Plaintiff had already threatened urgent proceedings to recover his possessions in correspondence dated 19 September. Despite this and despite knowing that Mrs Greenberg

would not give up the disputed goods, he nevertheless went to her premises to get them. He ought not to have done so.

[33] However the Plaintiffs inappropriate conduct was no justification for concluding, objectively speaking, that he posed a physical danger to Mrs Greenberg and that he should be arrested and detained as a consequence. I formed the impression that Gouws was in a difficult predicament but too readily allowed herself to be swayed by Mrs Greenberg without checking the facts. Given the history of the relationship between the Greenbergs, of which Gouws was aware, she ought to have guarded against doing Mrs Greenberg's bidding without properly satisfying herself that there really was a danger of imminent harm and before taking the drastic step of arresting the Plaintiff.

[34] Since there was no threat of imminent harm at his hands, I find that the Plaintiffs subsequent incarceration was similarly unjustified. There was also no need to keep the Plaintiff in prison for purposes of further investigation since, as Gouws herself acknowledged, what further investigation was there to conduct? Furthermore, Gouws was aware that the Plaintiff had a fixed residence, that he had previously cooperated with the police in attending court and that he had no history of violent conduct.

[35] In all the circumstances I find that the Plaintiff's arrest and subsequent detention were wrongful, unlawful and without proper justification.

Damages

[36] It remains to determine the quantum of damages to be awarded to the Plaintiff as a consequence of the Defendants' unlawful conduct. The following factors are listed in *LAWSA Vol 20 Part 1 1st Reissue* para 320 as having an influence on the quantum of damages for wrongful arrest or imprisonment:

"The circumstances under which the interference of liberty took place, the absence or presence of malice or an improper motive on the part of the defendant, the duration of the restriction of liberty, the social status of the plaintiff, the degree of publicity afforded the deprivation of liberty and whether the defendant apologized for or gave a satisfactory explanation as to what took place. In addition, awards in previous cases, allowing for inflation, must be considered

[37] In terms of Claim A the Plaintiff claimed general damages in the sum of R150 000,00 for "*contumelia*, loss of self-respect, humiliation, degradation, loss of dignity and cruel and unusual punishment". Under Claims B and C he sought to be reimbursed for certain patrimonial loss which he said he

suffered as a result of his incarceration. However during argument before me, Claim C was not pressed, and rightly so, since there was no proper proof of such damages. So too, there was insufficient proof of the damages allegedly suffered under Claim B. It is therefore only general damages which I need consider.

[38] I do not find that there is any malice on the part of the Defendants in effecting the arrest. As I indicated above, it was my view that Gouws was *bona fide*, if misguided, in arresting the Plaintiff. I also take account of the circumstances under which the arrest took place and in particular, the Plaintiff's own role in precipitating the arrest.

[39] The Plaintiff's counsel placed considerable stress, as well he might, on the fact that the Plaintiff was deprived of his liberty for some 27 days and suffered appalling conditions during his incarceration in jail. However Mr Sibuyi, who appeared for the Defendants, relied on *Isaacs v Minister van Wet en Order* 1996 [1] All SA 343 (A) in support of an argument that once the Plaintiff was detained by virtue of a court order following his unsuccessful bail application on 22 September 2000, his continued detention became lawful, whatever the circumstances of the arrest leading to such detention. (See also *Grootboom v Minister van Justisie* [1997] 3 All SA 51 (DE) at 54i - 55h). Mr Saladino accepted the correctness of this proposition and agreed that for purposes of establishing quantum I should

consider only the period from the arrest until the bail application. This is a period of one day.

[40] In *Seria's* case (*supra*) the court considered a number of awards in similar cases (at page 149G - 151A). I was also referred to *Ochse v King William's Town Municipality 1990 (2) SA 855 (E)*. Regard being had to these cases, as well as to the circumstances highlighted above, I conclude that a fair and proper award for the deprivation of the Plaintiffs liberty occasioned by his unlawful arrest and detention, is R75 000,00.

[41] In the absence of malice or *mala fides* on her part, I see no reason why the First Defendant should be made to bear any part of the damages occasioned by her actions carried out in the course and scope of her employment with the Second Defendant. In my view the damages should be paid by the Second Defendant alone.

Costs

[42] Costs ought to follow the result. However, for the same reasons given above, the First Defendant should not be burdened with a costs award. In my view the proper order is that the Second Defendant alone should bear the costs. I am also satisfied that given the subject matter of the claim costs should be awarded on the High Court scale, even though the amount of

damages ultimately awarded is within the jurisdiction of the Magistrates Court.

[43] I accordingly make the following order:

- 1 The Second Defendant is ordered to pay the Plaintiff the sum of R75 000,00 in damages in respect of his unlawful arrest and detention.
- 2 The Second Defendant is ordered to pay the Plaintiff's costs of suit on the High Court scale as between party and party.

FRANKLIN AJ



DATE OF HEARING: 4/ 5 SEPTEMBER 2008; 2 OCTOBER 2008

DATE OF JUDGMENT: JANUARY 2009

Appearing for the Plaintiff: Mr Saladino

(Instructed by Larry Marks Attorneys)

Appearing for the Respondents: Mr Sibuyi

(Instructed by the State Attorney)