

IN THE KWAZULU NATAL HIGH COURT, DURBAN  
REPUBLIC OF SOUTH AFRICA

CASE NO. 7079/08

In the matter between:

**MS KHANYILE**

**PLAINTIFF**

**and**

**MINISTER OF SAFETY AND SECURITY  
M GAMEDE**

**FIRST DEFENDANT  
SECOND DEFENDANT**

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**JUDGMENT**

**Delivered 27 January 2012**

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**MURUGASEN, J.**

[1] This is an action for damages for unlawful arrest and detention.

[2] The plaintiff, Musawenkosi Simphiwe Khanyile, instituted an action for damages for unlawful arrest and detention in the sum of R165 150 against the defendants, the Minister of Safety and Security and Inspector Victor Muzi Gumede (Gumede). The plaintiff alleges that the warrant for his arrest authorized in terms of Section 8 (1) (a) of the Domestic Violence Act No 116 of 1998 ('the Act') and issued for violation of an interim protection order was invalid because the complainant had not yet made a statement; and that consequently, there was "no basis" for his arrest by Gumede, who in executing the warrant, acted in the course and scope of his employment with the first defendant. The plaintiff alleges further that as a result of such unlawful arrest and detention from 26 January 2007 to 27 January 2007, he suffered the damages aforesaid, for which the first and second defendants were jointly and severally liable.

[3] The defendants contend that the plaintiff was lawfully arrested and detained as the warrant of arrest was duly authorized and issued for the violation by the plaintiff of an interim protection order. Although the defendants initially denied that the plaintiff was arrested before the complainant made a statement, they subsequently admitted that the arrest of the plaintiff was effected before the statement was made. The defendants nevertheless persist that the warrant was not invalid when executed and that the arrest and detention of the plaintiff was lawful. They therefore deny that they are liable to the plaintiff as claimed, and submit that the plaintiff's claim lies to be dismissed.

[4] As the issues of liability and quantum were separated by consent, only the issue of liability lay for determination by this court.

**Factual Background.**

[5] An interim protection order in terms of Section 5 (2) of the Act was granted on application by the plaintiff's girlfriend, Hlakaniphile Zandile Ntshuntsha ('the complainant') against the plaintiff under Case No 81/2007 in the Durban Magistrate's Court on 5 January 2007.

[6] In terms of clause 3.1.2.1 of the order, the plaintiff was ordered :  
    '3.1.2.1 \*not to commit the following act(s) of domestic violence:  
            Threaten, harass emotionally or physically abuse applicant'.

[7] In accordance with the usual form of such interim protection orders and in terms of Clause 4.2 of thereof, a warrant for the arrest of the plaintiff was authorized and the execution thereof was suspended subject to compliance by the plaintiff with the provisions of the order.

[8] On 25 January 2007 the complainant applied for and was furnished with a certified copy of the interim protection order and a warrant of arrest contemplated in section 8 (1) (a) of the Act.

[9] On 26 January 2007 the complainant handed the warrant of arrest to Gumede at the Durban Central Police Station. Neither the interim protection order nor any affidavit or statement was annexed to the warrant of arrest. The second defendant then executed the warrant and arrested the plaintiff at his residence at approximately 14h30. The plaintiff was detained until approximately 19h00 on 27 January 2007, when he was released on bail.

[10] It is common cause that the complainant furnished Gumede with the interim protection order after the arrest, at approximately 16h00, which is when he took a statement from her.

[11] At all material times the second defendant was acting in the course and scope of his employment with the first defendant.

[12] Subsequently the charge was withdrawn by the Public Prosecutor who did not consider that the plaintiff's alleged conduct constituted a breach of the interim Protection Order granted under Case No 81/2007 in the Durban Magistrate's Court and a certificate of Nolle Prosequi was issued.

**Issues for determination :**

[13] Was the warrant of arrest invalid as the interim protection order and affidavit referred to therein were not attached to the warrant when it was handed to the second defendant, and the complainant had not made a statement about the alleged contravention of the order by the plaintiff, thereby rendering the execution of the warrant and the arrest of the plaintiff by him unlawful?

[14] Did the second defendant have '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, although the interim protection order and affidavit were not furnished to him by the applicant with the warrant?

## **Argument**

[15] It was contended by Mr Gunase on behalf of the plaintiff that there were insufficient grounds for the arrest of the plaintiff as Gumede arrested the plaintiff before the complainant had made a statement and the warrant was not presented with the annexures. Even after the statement was taken from the complainant Gumede failed to exercise his discretion despite there being no indication in that statement that the plaintiff had contravened the terms of the interdict. Further he had not investigated the matter further. Consequently he had not acted as a prudent and reasonable police officer in arresting the plaintiff. The arrest was therefore unlawful and wrongful.

[16] In response Ms Naidoo for the defendants submitted that Gumede, as the arresting officer, was satisfied that he could arrest the plaintiff as he had been furnished with a warrant which was authorized by a Magistrate, he was advised by the complainant that she was abused in contravention of the protection order and he could not question or interfere with the warrant. In arresting the plaintiff, he had therefore acted on a reasonable suspicion that the plaintiff had contravened the order, and the arrest and detention of the plaintiff was consequently not unlawful.

## **Evidence**

[17] At the commencement of the trial the court was advised that as most of the facts were common cause and the onus was on the defendant to prove that the arrest of the plaintiff was lawful, the plaintiff did not intend to lead any evidence, and the defendants would proceed with their case.

[18] Only one witness was called, the second defendant, Gumede, who holds the rank of warrant officer in the South African Police Services and was stationed at the Durban Central Police Station in January 2007.

Gumede testified that he did not know the complainant prior to the 26 January 2007 when she brought the warrant of arrest issued on 25 January 2007 in terms

of S8 (1) (a) of the Domestic Violence Act to him. The complainant advised him that the respondent (the Plaintiff) had breached the conditions of the interim protection order.

Gumede testified that as the warrant had been issued by the magistrate, he was of the belief that the magistrate would have attended to the procedural requirements and necessary enquiries before issuing the warrant. He did not think it was necessary for him to check the warrant to ensure that it was properly issued. It was incumbent on him only to execute the warrant.

Under cross-examination Gumede confirmed that he had arrested the plaintiff although there was no affidavit attached to the warrant of arrest. In his view the court would not issue the warrant unless it was satisfied that the complainant was at risk of harm from the respondent.

Further the warrant authorized him to effect an arrest if there were reasonable grounds to do so. The complainant appeared to be in distress and emotionally distraught although she had not been physically assaulted. The complainant had informed him that she was abused by being threatened. He therefore did not deem it necessary to take a statement first or to have sight of the protection order before effecting the plaintiff's arrest.

[19] Although Gumede had not previously executed a warrant of arrest in a domestic violence matter or read the Act or received any training on its implementation, he was aware that many women have suffered abuse because the police took too long to execute such warrants. Therefore when the complainant told him that she would return with the protection order, he was satisfied that he could deal with the administration later and proceeded to execute the warrant in the interim. He effected the arrest of the plaintiff at approximately 14h30 and took the statement from the complainant at about 16h00 when she returned with a copy of the protection order.

[20] Gumede was also satisfied that the contravention of the order had taken place within the jurisdiction of the Durban Central Police Station as the contravention had occurred at the premises of the Durban Magistrate's Court.

[21] The defendants closed their case without calling further witnesses. The plaintiff closed his case without calling any witnesses.

### **The Interim Protection Order and the Warrant of Arrest**

[22] The arrest of the plaintiff was effected by the execution of a warrant issued in terms of Section 8 of the Act. The relevant clauses of Section 8 are :

- “(1) Whenever a court issues a protection order, the court must make an order –
  - (a) authorizing the issue of a warrant for the arrest for the respondent, in the prescribed form; and
  - (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.
- 2) The warrant referred to in subsection (1) (a) remains in force unless the protection order is set aside or it is cancelled after execution.
- 3) .....
- (4) (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.
  - b) If it appears to the member concerned that, subject to 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 in section 17(a).

(c) .....

(d) .....

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account –

- (a) the risk to the safety, health or wellbeing of the complainant;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred.”

[23] In accordance with the foregoing provisions, in particular Section 8 (1), Clause 4.2 of the protection order provides as follows :

‘4.2 A warrant is authorized for the arrest of the respondent, the execution of which is suspended subject to the respondent’s compliance with the provisions of the Protection Order as stated above.’

[24] In casu, the protection order and warrant were authorized and the warrant suspended on 5 January 2007. The warrant was issued by the magistrate on 25 January 2007 when the complainant alleged that the plaintiff had contravened the protection order.

[25] The warrant of arrest is addressed to “All members of the South African Police Service” and reads as follows :

‘Whereas the attached protection Order was granted against the respondent by the Magistrate’s Court for the district of Durban on the 5 January 2007 and

Whereas the complainant has stated in the affidavit attached that the respondent has breached (a) condition(s) of the Protection Order;

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.

[26] The affidavit referred to in the warrant is the 'Affidavit Regarding Contravention of Protection Order' in terms of Section 8 (4) of the Domestic Violence Act 116 of 1998 (Exhibit B page 21), which has to be completed by a complainant who alleges that a protection order granted on application by him/her has been contravened by the respondent thereto. It is apparent from a perusal of the warrant that this affidavit must be completed before the warrant is executed as the warrant may only be executed consequent to the alleged contravention of the order, which is set out in the affidavit.

[27] Contrary to the submission on behalf of the defendants that the issue of the warrant was premature because the interim order had not been confirmed, a warrant may be authorised in terms of Section 8 (1) (a) and served on the complainant in terms of Section 5 (7) (b) even in respect of an interim protection order, once the order has been served on the respondent.

[28] However the responsibility to conduct any the investigation and enquiry prior to the execution of the warrant lies with the member to whom the complainant hands the affidavit as he /she may execute the warrant only if satisfied that the alleged contravention of the interim order as set out in the affidavit sustains the execution of the warrant.

[29] In my view the mere failure to furnish Gumede with the annexures did not invalidate the warrant as it was properly authorised; the warrant was however incomplete as the order and affidavit in terms of Section 8(4)(a) were not



annexed thereto.

See **Seria v The Minister of Safety and Security & Others 2005 (5) SA 130 at 144 E-G**, where it was held per **Meer J** that :

**‘....the validity of a warrant of arrest lay in the authority for its issue being ordered by a court under Section 8(1)(a) of the Act simultaneously with the issue of a protection order. In the case of the warrant in question being undated and contrary to the regulations and prescribed form, whilst a serious omission, did not detract from its validity. The plaintiff’s arrest occurred pursuant to a valid protection order and valid warrant of arrest as contemplated by S 8(1) of the Act.’**

[30] The warrant refers to the ‘attached’ protection order and affidavit and authorizes and orders the police to forthwith arrest the respondent ‘if there are **reasonable grounds** to suspect that the complainant may suffer imminent harm.’

The execution of the warrant is therefore constrained by the annexures thereto. The protection order sets out the nature of the interdict against the respondent and the affidavit must contain details of the alleged contravention of the interdict by the respondent. Only after a perusal of the annexures will a ‘member’ to whom the warrant is handed, be able to exercise his/her discretion as allowed in terms of Section 8(4) (b) of the Act read with Subsection (5), and decide if there are reasonable grounds that the complainant is at risk which justifies his arrest alternatively whether a notice in terms of Section 8(4)(c) should be served on the respondent.

[31] In casu, the complainant only handed the warrant of arrest to Gumede when she reported the alleged contravention. She advised him that she had forgotten the protection order and that she would return with it later. He thereupon executed the warrant and arrested the plaintiff.

Although it is apparent from the warrant, that the warrant was authorized and that

there was an allegation that the order had been breached by the plaintiff, it was nevertheless incumbent upon Gumede before executing the warrant to satisfy himself of the terms of the order and of the nature of the alleged breach before executing the warrant. He failed to apply his mind to the proviso that the arrest should only be effected '**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)

[32] Instead Gumede acted in the belief that he could not question the authority of the magistrate who issued the warrant and that there was no need to, because the magistrate would have made the necessary enquiries about the alleged breach prior to issuing the warrant. He was therefore satisfied that he could execute the warrant on receipt thereof and on the verbal advices of the complainant that the warrant had been issued because the plaintiff had breached the order.

However as a result of Gumede's failure to peruse the documents and to satisfy himself as aforesaid, there were no grounds to suspect that the complainant may suffer imminent harm. Clearly the threshold of 'reasonable grounds' could not be reached given the lack of information at his disposal.

[33] Even though Gumede had not been presented with a warrant of arrest in terms of the Act previously or received any training on the implementation of the provisions of the Act, in particular the execution of a warrant of arrest issued in terms of the Act, as an experienced member of the South African Police Services, he ought to have known that the arrest of an individual is a drastic infringement of the arrestee's constitutional rights to freedom and security of person ( Section 12 of the Constitution of South Africa No 108 of 1996) and a warrant should therefore not be executed in haste and without due consideration of all the pertinent facts, particularly as there was only an allegation, not conclusive proof, that the order had been breached.

[34] Further when the complainant returned with the protection order, and

deposed to a statement, it ought to have been apparent to Gumede from her statement that the alleged breach and verbal and /or emotional abuse by the plaintiff did not constitute a breach of the order, nor did plaintiff's comment expose her to imminent harm. Consequently Gumede ought to have realized that not only the arrest but the continued detention of the plaintiff was not justified. However he failed to release the plaintiff.

[35] In the premises I am persuaded that the arrest and detention of the plaintiff was unlawful.

[36] It is of great concern that despite the lapse of time since the promulgation of the Act in December 1999, the police officers who are tasked with the implementation of the significant and drastic penal provision of the Act viz warrants of arrest, have not received training in the execution of warrants issued in terms of the Act. Gumede was not aware that warrants are authorized on the granting of a protection orders in terms of Section 8 and handed to the complainants in terms of S 5(7) and therefore cannot be dealt with in the manner he considered appropriate, as the magistrates do not make the necessary investigations as he envisaged.

[37] During his testimony, he also made a very valid comment that the police are frequently criticized for not acting quickly in matters of domestic violence.

He was correct that women have become victims of assault and other serious acts of violence despite obtaining protection orders under the Act, because the police have failed to respond or act urgently. Only recently a woman was killed despite and in the presence of police, while attempting to implement the terms of the order of court she had been granted against her partner.

[38] The lack of training and the failure to inform police officers of the provisions of the Act, impacts adversely on their appreciation of their responsibility and ability to balance the rights of the complainant with the rights of the respondent. It also impacts adversely on the interests of the public, who are

not only at risk of unlawful arrest and detention (as was the case with the plaintiff) but public resources are depleted as a result of the litigation which emanates from the unlawful conduct of the police.

[39] In arresting and detaining the plaintiff, Gumede acted in the course and scope of his employment with the first defendant. As his actions may be attributed to the failure of the first defendant to train and inform him as aforesaid, I am of the view that he ought not to be penalized with an order as prayed and be held liable to compensate the plaintiff for damages jointly and severally with the first defendant. It is the first defendant that should be held liable to the plaintiff.

[40] There is no reason why costs should not follow the order.

**Order :**

- 1 Judgment is granted for the plaintiff against the first defendant for such damages as may be proved by the plaintiff or agreed;
- 2 The first defendant is ordered to pay the costs incurred by the plaintiff on the issue of liability.

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Counsel for the Plaintiff:

Adv M Naidoo

Instructed by:

MDU NKOMO & COMPANY  
SUITE 501, 5<sup>TH</sup> FLOOR  
397 SMITH STRAAT  
DURBAN

Counsel for the Respondent:

Instructed by:

Adv H Gunase  
H SMAL (Assistant State Attorney)  
STATE ATTORNEY  
SIXTH FLOOR  
METLIFE BUILDING  
391 SMITH STREET  
DURBAN