

SOUTH AFRICA / JUDGMENT

Greenberg v De Beer and Another (22261/02) [2011]

ZAGPJHC 66 (21 July 2011)

[2011] ZAGPJHC 66

COURT

South Gauteng High Court, Johannesburg

BEFORE

T M Masipa

CASE / FILE NUMBER

22261/02

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Policy

SOUTH

GAUTENG HIGH COURT, JOHANNESBURG

CASE

NO: 22261/02

DATE:21/07/2011

In

the matter between:

GREENBERG

LIONEL

MERVYN.....

Plaintiff

and

DE

BEER

ELMARIE.....

First Defendant

MINISTER

OF SAFETY AND

SECURITY.....

Second Defendant

JUDGMENT

MASIPA, J:

INTRODUCTION

[1] The plaintiff instituted an action against the first and second Defendants claiming damages in the sum of R450 000 for unlawful

arrest and detention.

PLEADINGS

[2] The plaintiffs claim against the defendants is, inter alia, based on the following grounds:

[3] On 5 April 2001 at Johannesburg, the plaintiff was wrongfully and unlawfully deprived of his freedom and liberty for six (6) days by the first defendant acting at all material times within the course and scope of her employment with the second defendant.

[4] Alternatively, the first defendant wrongfully and maliciously arrested the plaintiff without reasonable or probable cause.

[5] Alternatively, the first defendant was actuated by an indirect or improper motive when she arrested the plaintiff.

[6] The first defendant wrongfully and unlawfully arrested the plaintiff under case number MAS 351/04/01 without legal justification and cause and the plaintiff was detained from 5 to 10 April 2001

[7] The plaintiff claims that as a result of the conduct of the defendants he suffered damages, more particularly contumelia, loss of self-respect, humiliation, degradation, loss of dignity and an unusual and cruel punishment post-traumatic stress disorder in

respect of which he is claiming R450 000.

He is also claiming a sum of R25 000 which amount he states he expended in respect, of legal fees and disbursements.

[8] The plaintiff further alleges that he suffered loss of earnings in the amount of R10 000 for the period of his incarceration.

[9] The defendants denied liability for any wrongdoing and filed two special pleas and a plea.

[10] in the first special plea the defendants raised a defence of prescription contending that the plaintiff had failed to comply with section 57(1) of the South African Police Act No. 68 of 1995 as amended ("the Police Act). The defendants contended that the plaintiff's claim had prescribed in that it was instituted after the expiry of twelve calendar months after the date upon which the plaintiff became aware of the alleged act or omission.

[11] In the second special plea the defendants contended that the plaintiff failed to comply with section 57(2) of the Police Act,

which requires one month notice to be served on the defendants prior to institution of any legal action, and pleaded that plaintiff failed to give such notice and was barred from instituting these proceedings.

[12] Having considered all the relevant facts in the matter I am of the view that a case has been made out for the condonation application.

Detailed reasons for this finding are not necessary in view of the fact that this Court granted a condonation application in the matter where the same plaintiff was suing Inspector Gouws as the first defendant and the Minister of Safety and Security as the second defendant, in that case the plaintiff relied on the same facts as those in the present case. The condonation application is therefore granted.

[13] in their plea the defendants first denied that any arrest took place. Alternatively, they contended that the plaintiff was lawfully arrested and detained in accordance with the provisions of a warrant of arrest: alternatively that the plaintiff was arrested in terms of section 40 of the Criminal Procedure Act 51 of 1977; alternatively that the plaintiff was lawfully arrested on a valid warrant of arrest issued in terms of the Domestic Violence Act.

[14] The defendants also denied that the plaintiff suffered any damages as a result of the defendants' conduct.

HISTORICAL

BACKGROUND

[15] The plaintiff, Mr Greenberg, and the complainant, Mrs Greenberg, whose complaint triggered the arrest in this matter, are former

husband and wife.

[16] Or 7 February 2001 the parties were granted a divorce by order of this Court in terms of which the plaintiff was not allowed to have access to his two minor children G and K (I pause to state that the said order was subsequently varied by this Court and the plaintiff was granted the care and custody of the one minor child, K. The events which led to the arrest of the plaintiff occurred before the order was varied.)

[17] It is common cause that the acrimony between the plaintiff and Mrs Greenberg which led to the divorce progressed post divorce, in fact it grew out of proportion as over the years each party tried to outdo the other by relentlessly pursuing the other through litigation. Victor J in the minority judgment of *Greenberg Lionel Mervyn v Gouws Margaret and Minister of Safety and Security* Case No. 22262/02 SGHC dated 7 October 2010, recorded 57 cases initiated at the instance of Mrs Greenberg against the plaintiff and 30 cases initiated by the plaintiff against Mrs Greenberg.

[18] It is against this background that this matter ought to be viewed. COMMON CAUSE

FACTS

[19] On 7 February 2001 a High Court order was granted which prevented the plaintiff from having reasonable access to his minor children.

[20] On 17 March 2001 the plaintiff was sitting in a synagogue when his son, Kevin came to sit with him. Later that day Kevin disappeared and was returned to his mother two days later. Subsequently the plaintiff was charged with kidnapping at the Sydenham Police Station. The case, however, was never pursued.

[21] On 5 April 2001 a breach of domestic violence docket was opened at the Johannesburg Police Station. The same day the plaintiff was arrested by the first defendant at the Johannesburg Magistrates' Court and taken to Germiston Court whereafter the matter was

remanded.

[22] On 8 April 2001 and at Johannesburg Magistrates' Court the first defendant opposed a bail application against the plaintiff. He was however, released on bail.

[23] The matter was subsequently struck off the roll when the docket was repeatedly not brought to court.

EVIDENCE

The Plaintiff's Case

[24] The plaintiff, Mr Greenberg, gave evidence that at about 11h20 on 5 April 2001 he was arrested by the first defendant, at the

Johannesburg Magistrates' Court in the presence of a fellow police officer, Inspector Venter, as he was leaving the court room, after having attended a remand in another criminal case which had been laid against him by his ex-wife.

[25] He was informed that he was being arrested for domestic violence. When he asked to see the warrant of arrest the first defendant told him that it was in her office and was not shown the warrant of arrest concerned. He was then taken to Johannesburg Central Police Station where he was informed that he was being charged -with a breach of the Domestic Violence Act. He was not given any details.

[26] The first defendant used foul language and had a laugh with inspector Venter at the fact that they had "got him again". She further used foul language, told him to leave his ex-wife alone and threatened that she would teach him a lesson.

[27] In the afternoon the plaintiff was taken to Germiston Magistrates' Court where the magistrate stated that the matter could not be heard there as the plaintiff was known to the magistrates.

- [28] He subsequently appeared in the Johannesburg Magistrates' Court and the matter was postponed so that the State could investigate the matter further.
- [29] Subsequently when he applied for bail the first defendant opposed it. He was, however, granted bail in the sum of R5 000. He appeared in court thereafter repeatedly where the docket was not brought to court. Finally both the docket and the charge sheet were not brought to court and the matter was struck from the roll.
- [30] The plaintiff stated that he was employed in the computer industry. He has two children born out of his marriage to his ex-wife, the complainant. He told this Court how his former wife bombarded him with numerous criminal charges since the divorce. The charges invariably led to his arrest, detention and, if pursued, his acquittal.
- [31] He spoke about his high profile as a member of the Jewish community; he is a member of two choirs, Johannesburg Male Choir and the Synagogue Choir: he is involved in charitable community work. His arrest was common knowledge and was widely published in the community in which he lives.
- [32] He stated that he was incarcerated with criminals. The conditions under which he was incarcerated were unhygienic; the toilets were dirty; there were lice on the blankets; the cells were dirty. He was traumatised by the experience and felt humiliated when arrested and thereafter detained. His esteem in the eyes of his associates and family was lowered.

The Defence Case

- [33] Two witnesses, namely Mrs Greenberg and inspector De Beer gave evidence on behalf of the defendants
- [34] Mrs Greenberg's evidence can briefly be summarised as follows:
- [35] She described how, after an acrimonious divorce, she was granted custody and guardianship of the two minor children while the plaintiff was denied access.
- [35] She had to place Kevin under intensive psychological therapy. She had taken out a domestic violence order against the plaintiff which she caused to be amended from time to time. She felt that it was necessary to, inter alia., prevent the plaintiff from influencing the children because he was abusing them psychologically and emotionally. Hence the necessity to obtain a domestic violence order against the plaintiff.
- [37] In February 2001 she obtained a further (ex parte) addendum to the domestic violence order which stated that the plaintiff be not allowed to have any contact with the children until the high court had ordered otherwise; the plaintiff was not to enlist the help of others to send messages to her or the children; the plaintiff was to pay R20 000 for urgent medical treatment.

[38] She then related how Kevin disappeared from the synagogue after he had been sitting next to his father. She reported the matter to the police station and the child was returned on the plaintiff's sister the next day. A psychologist was brought in because Kevin did not want to return to her.

[39] Subsequently she said charges against the plaintiff for kidnapping and for breaching the domestic violence order at the Sandringham

Police Station Thereafter she obtained a domestic violence warrant for the plaintiff's immediate arrest.

[40] Under cross-examination Ms Greenberg conceded that Kevin had run away from home on previous occasions and that on each occasion she had laid a charge of kidnapping against the plaintiff. She, however, stated that she felt that there was a threat of imminent harm to Kevin and that is why she had to report the matter and lay a charge.

[41] Inspector Elmarie De Beer was the next witness. She is the first respondent. Her evidence was briefly to the following effect: She was the arresting officer and not the investigating officer in case number 351/04/2001. She arrested the plaintiff for allegedly

contravening a protection order.

[42] On 5 April 2001 Mrs Greenberg came to her office to open a case for contravention of a domestic violence order. This was done after a kidnapping case had been opened at Sandringham. At the time she was sharing her office with Inspector Venter.

[43] She and Inspector Venter went to the Johannesburg Magistrates' Court in order to determine whether they could proceed with the matter in the Johannesburg Magistrates' Court. On her way there she happened to see the plaintiff and arrested him as she had the protection order and warrant in her possession. She informed him why she was arresting him, showed him the warrant and took him to the police station

[44] Her reason for arresting the plaintiff was that she felt that imminent harm was about to befall the complainant and her child and if she did not act immediately she could be prosecuted for misconduct. She was told by Mrs Greenberg that this incident kept on occurring and she did not want to take responsibility for what the plaintiff might do further to the children hence the need for immediate arrest.

[45] She denied knowing the plaintiff prior to the arrest and denied that she ever told him to stop abusing his wife.

- [46] Under cross-examination the first defendant conceded that she was not only the arresting officer in case number 351/04/2001 but also the "preliminary investigating officer. She stated that she was in the office with her partner, Inspector Venter, when the latter received a phone call. She was informed that Mrs Greenberg had gone to lay a charge at the Sandringham Police Station for domestic violence but alleged that the police there were doing nothing.
- [47] Inspector Venter then told her to go and arrest the plaintiff as he was appearing in court that morning. The Sandringham Police had difficulty tracing him as he was evasive. Mrs Greenberg later came in and spoke to Inspector Venter while she (the first defendant) merely listened in.
- [48] Subsequently she and inspector Venter went to the Johannesburg Magistrates' Court to talk to the control prosecutor about the matter but after the plaintiff was arrested this was no longer pursued and the plaintiff was taken to Germiston because the complainant resided within that jurisdiction.
- [49] When asked what documents were in the docket when she decided to arrest the plaintiff the first defendant mentioned four documents and then a fifth. While taken through the investigation diary she was referred to the document marked "A2" reflected as "verklaring vir die oortreding van die gesinsgeweldwet geliaseer" (statement for the contravention of the Domestic Violence Act filed). She alleged that this statement contained numerous other documents, including documents from case number 2472/12/00.
- [50] While the first defendant was under cross-examination a docket purportedly for case number 351/04/2001 was presented to her in the witness box. Save for one original statement from Kevin, which had nothing to do with the present case, all documents in the docket were copies. No explanation was given as to the whereabouts of the original docket.
- [51] Although the first defendant had met Kevin at court and commissioned the affidavit referred to above she had failed to take a statement from him concerning his emotional state or the breach of the domestic violence order in respect of case 351/04/2001. The first defendant conceded that she did not contact Sandringham Police Station to ascertain the status of the domestic violence case which had been opened there or to verify the allegation that the plaintiff was untraceable.
- [52] She was asked why according to the investigation diary, the docket had not been registered in the case book and it had not been seen by the unit commander until 13 June 2002, (almost a year and a half), after the arrest. She responded that it was not her job to register the matter in the case-book as she was not the investigating officer and that the investigating officer was inspector Venter. (This is clearly not true as an entry on the charge sheet in case 351/04/2001 refers to E de Beer as the investigating officer.)

[53] The first defendant's evidence was that the addendum to the domestic violence order had been granted on 19 March 2001, two days after the alleged offence had been committed. She stated that the date did not matter, what mattered was that she was in possession of a warrant and could effect an arrest.

EVALUATION OF EVIDENCE

[54] The plaintiff was credible as a witness. Although he was in the witness box for a considerable period he did fairly well under

cross-examination. He explained that at the time of his arrest he reported regularly at the Sandringham Police Station as part of his bail conditions in a case pending against him. His arrest was, therefore, not necessary as the police at the Sandringham Police saw him regularly and also knew where to find him if he contravened the bail conditions. Lending credence to this version is the fact that Venter herself knew where the plaintiff could be found. It is very unlikely that she would not have passed this information to the first defendant who was to use her discretion (on the first Defendant's version), whether to make the arrest or not.

[55] On her own version the first defendant conceded that she was indeed given the necessary background information. She stated on page 28 of the record:

"Sergeant Venter was the investigating officer, she gave me the background in regards to the investigation that happened in the Sandringham case. She was personally involved there ..."

[56] Mrs Greenberg's evidence merely set out the background which led to the arrest of the plaintiff. If necessary her evidence shall be discussed with that of Mrs De Beer, the first defendant.

[57] The first defendant was a pathetic witness who chopped and changed her version as she went along. She made spurious allegations where there were no facts to support such and was in general evasive in the extreme. She contradicted herself several times and when this was pointed out she became visibly uncomfortable and, suddenly, conveniently, could not remember as "the incident happened long ago". On more than one occasion she would make a statement only to recant a few minutes later.

[58] The defendants' case was rendered less credible even more by the many contradictions between what was put by defendants' counsel to the plaintiff and what was stated by the witnesses under oath. Part of the version put to the plaintiff was not even relied upon by the defendants.

[59] It was put to the plaintiff, on behalf of the defendants, for example, that the first defendant would say the reason the plaintiff

was arrested only on 5 April - more than two weeks after the incident

- was that they (the police) were looking for him and could not find him. Strangely the first defendant said nothing of the sort in her evidence. On her own version she did not look for the plaintiff. She could not have since the complaint only came to her attention on the day of the plaintiff's arrest.

[60] It was also put to the plaintiff that the first defendant was going to deny that there were no investigations done before the plaintiff was arrested. Contrary to the above the first defendant conceded that she did no investigation at all in the matter before she arrested the plaintiff. She was given instructions to arrest the plaintiff on the morning of 5 April - instructions that she followed with amazing alacrity. That very same day she arrested the plaintiff. The arrest was based on the documents presented to her by-inspector Venter who received them from Mrs Greenberg. It is clear that the say-so of Mrs Greenberg was not questioned and she was the main source of information that was relied upon. This over-confidence in Mrs Greenberg's version was misplaced especially given the history of her relationship with the plaintiff. Had the first defendant done any investigations at all she might have learnt of the acrimonious relationship between Mrs Greenberg and the plaintiff. More importantly she might have learnt that Kevin had run away from his mother more than once and that each time that happened a case was opened against the plaintiff which case was later abandoned. In fact the psychologist who was called in after Kevin's disappearance was called because Kevin was refusing to return to his mother. not for any other reason.

[61] A puzzling feature about this case is that although the first defendant commissioned a statement by Kevin, on something different,

on the day the plaintiff was arrested, she failed to take a statement from him concerning this matter. Her explanation that Kevin was "deurmekaaf" does not make sense since she took what Kevin stated in the statement she commissioned seriously and in fact sought to rely on it in the present case.

Was there a warrant of arrest?

[62] The plaintiff's evidence was that although he asked to see a warrant of arrest it was not shown to me. Although the first defendant denied this and stated that she arrested the plaintiff on a warrant of arrest no such warrant of arrest was produced in court. Even on the first defendant's version she could not say whether she had an original warrant of arrest or had only a copy at the time. The inference is irresistible that the plaintiff was arrested without a warrant of arrest.

Was there justification for an arrest without a warrant?

[63] Section 40(1) of the Criminal Procedure Act No. 51 of 1977 provides for an arrest without a warrant of arrest. The relevant portion thereof reads:

"A peace officer may without warrant arrest any person -

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

[64] The offences allegedly committed by the plaintiff do not fall within the ambit of section 40.

[55] In the circumstances the defendants bore the onus of establishing the lawfulness of the plaintiffs arrest on a balance of probabilities (Minister of Law and Order and Another v Dempsey 1988 (3) SA IS (A) at 38B-C; Zealand v Minister of Justice and Constitutional Development and Another 2008 (2) 3ACR 1 (CC) paras [241 and [25],. Whether or not the onus had been discharged would depend on the facts of each case. The facts and circumstances of this case clearly show that the defendants failed to discharge the onus.

Was there a necessity to arrest?

[66] It is trite that police are obliged to consider in each case when a charge has been laid for which a suspect might be arrested whether there are no less invasive options to bring the suspect before court.

[67] Arrest is a drastic interference with the rights of an individual to freedom of movement and dignity and arrest should only be the last resort as a means of producing a person in court.

[68] An immediate detention of the person concerned, therefore, if there is no reasonable apprehension that the suspect will abscond or fail to appear in court if a warrant is first obtained for his/her arrest or a notice of summons to appear in court is obtained, is constitutionally untenable and the exercise of the power to arrest would constitute an abuse of process.

[69] In *Tsose v Minister of Justice and Others* 1951 (3) SA 10 (A) 17G-H it was stated:

"An arrest is of course in general a harsher method of initiating prosecution than citation by way of summons but if the circumstances

exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to Court such an arrest is not unlawful even if it is made because the arrestor believes that the arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal."

[70] Similarly in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 at page 186C Bertelsmann J stated that an arrest, being as drastic, an invasion of personal liberty as it is, must still be justifiable

according to the demands of the Bill of Rights.

[71] It is clear that the arresting officer has a discretion whether or not to exercise that power but the exercise of such a discretion will be clearly unlawful if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislature.

[72] In the present case the first defendant stated that her purpose in arresting the plaintiff was in order to secure his attendance at court because she was not sure if he would comply with a summons or notice to appear ,n court. There was no cogent reason for uncertainty at all as the plaintiff was clearly traceable.

[73] That the plaintiff was easy to trace is supported by written information provided by inspector Venter to the prosecutor on 19 February 2001 in case 2472/12/00. In that case inspector Venter responded to e pro forma questionnaire and answered, inter alia, in the following manner

"EVADED/RESISTED ARREST?.....NO,

EASY TO TRACE?YES.

CO-OPERATED WITH POLICE YES "

[74] The above is significant because it was at the instruction or request of Inspector Venter that the plaintiff was arrested and it is highly unlikely that Inspector Venter would withhold this vital piece of information from the first defendant. I have already stated that the first defendant conceded that she was given background information by inspector Venter.

[75] The inference is irresistible that the first defendant knew that the plaintiff could be easily traced. That might explain why she did not make any investigations at all before she made the arrest. Such investigations were not necessary since the address, the identity, place of business and place of residence of the plaintiff were available and could easily be verified by the first defendant.

[76] In fact when asked what steps she took to find out if plaintiff was evasive she gave a startling response:

"So what did you do to establish that he was evasive? - What did I do?

Yes? Did you phone up Sandringham Police Station to find out if he was evasive? - / am here to do the arrest, not to do the investigation

no.

[77] in my view not only is this an astounding response but it is also an indictment to the South African Police Service

Was the plaintiff properly arrested in terms of the Domestic Violence Act?

[78] In terms of section 3 of the Domestic Violence Act the only time that an officer may effect an arrest without a warrant is at the scene of domestic violence.

- [79] It is common cause that in casu the plaintiff was arrested inside court premises some weeks after the alleged offences had taken place in a synagogue. The first defendant then needed a warrant of arrest before she could arrest the plaintiff. No such original warrant could be produced.
- [80] Defendants' counsel made an undertaking that the original warrant would be produced during the course of the proceedings. However, no such warrant was produced and no reasons were given for this failure. The defendants had an onus to show that the plaintiff was arrested in terms of a warrant of arrest for domestic violence. They failed to discharge this onus.
- [81] The first defendant sought to rely on the allegation that there was imminent harm to Kevin. The first defendant's suspicion of imminent harm, however, was not based on reasonable grounds especially since the plaintiff was arrested two weeks after the alleged incident. As arresting officer, she asked no questions and merely accepted the say so of her partner, inspector Venter. Although her evidence was that she used her own discretion her conduct shows otherwise.
- [82] A reasonable police officer in the position of the first defendant would have analysed and assessed the quality of the information at her disposal critically and would have verified it before making a decision whether to make an arrest or not.
- [83] In casu had the first defendant acted reasonably she would have asked questions and would have been apprised of the history and the nature of the plaintiff's relationship with his ex-wife and would have subjected the information furnished to her to careful scrutiny. Having regard to the circumstances in this matter I find that the plaintiff's arrest was wrongful, unlawful and without proper justification.

Malice

- [84] Counsel for the plaintiff submitted that the conduct of the first defendant in arresting the plaintiff in the manner that she did was indicative of malice. There is merit in this submission. Both the arrest and the detention have the hallmark of malice.
- [85] A puzzling feature in this case is that it is not clear why it was the first defendant who was the arresting officer when Mrs Greenberg specifically reported the matter to inspector Venter and when the latter was even available at the time of arrest. The role played by Inspector Venter, therefore, as well as the relationship she had with the first defendant cannot, in the circumstances of this case, be ignored and clearly points to something sinister going on.
- [86] It was submitted on behalf of the plaintiff that inspector Venter knew that it would be improper for her to go and arrest the plaintiff at court as he was there on a matter in which she was the investigating officer. She could not arrest him and allege that his details had not been verified and, therefore, he should remain in custody. However, a new investigating officer would be in a position to do so. This submission has merit, in my view.

[87] Although the first defendant denied that there was any mala fide on her part when she arrested the plaintiff it is difficult not to infer mala fide from the circumstances of this case especially since the defendants failed to call Inspector Venter as a witness. What is also of great concern to this Court is that the first defendant flatly denied of any knowledge of a case of corruption laid by the plaintiff against Inspector Gouws, one of the police officers involved in one of his cases for allegedly taking a bribe from Mrs Greenberg.

She was constrained to admit under cross-examination that she knew about this and had in fact made a note of this fact in her own handwriting. A conclusion is irresistible that the first defendant was deliberately attempting to play ignorant for an ulterior motive and that she had something to hide.

[88] There are other clear indications that we are here dealing with a case of malicious arrest and detention. The plaintiff's evidence was that the first, defendant and inspector Venter laughed at the fact that they had "got. him again", that the first defendant told him to leave his ex-wife alone and threatened that she was going to teach him a lesson. Although the first defendant denied this the plaintiff's version has a ring of truth and is the more probable version.

[89] A sinister motive can be inferred from the fact that the first defendant lied about how and where the plaintiff was arrested; why she and inspector Venter went to the Johannesburg Magistrate's Court. First she said it was to find out from the senior prosecutor whether they could proceed with the case there. Later she said it was to arrest the plaintiff. Finally she said both those reasons applied.

[90] What seals the fate of the first defendant is that her denial that she was the investigating officer in this matter is clearly a lie. I have already referred to the charge sheet where it is clearly noted that she is the investigating officer. One can only conclude that she stuck to this version to exonerate herself from all blame relating to the conduct of the case. She failed to say what happened to the docket or docket was never brought to court. In my view the motive from the start was to harass the plaintiff into desisting from bothering his ex-wife. It was clearly not to proceed with the prosecution.

[91] in view of the above I find that malice on the part of the first defendant has been established

QUANTUM

[92] "The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para [17]; Rudolph & Others v Minister of Safety and Security and Others (380/2008) 2009 (5) SA 94 (SCA) paras [26] to [29]).

[93] in Seymour supra, it was held that the assessment of awards of general damages with reference to awards made in previous cases was fraught with difficulty. It was held, further, that the facts of a particular case had to be looked at as a whole, and that few cases were directly comparable. They were a useful guide to what other courts had considered to be appropriate, but they had no higher value than that (para [17] at 325B).

194; incursions upon persona! liberty are viewed seriously by our courts. However, it has to be borne in mind that money can never be more than a crude solatium for the deprivation of what can never be restored (see Seymour p 327)

[95] It was argued on behalf of the defendants correctly, in my view, that unlawful detention ceased after a suspect has been brought to court and his further detention was ordered by the court (see Isaacs v Minister van Wet en Orde 1996 (1) SACR 314 (SCA) at 351 G-I).

[96] in Isaacs supra the court a quo found that unlawful detention ceased when the appellant was brought before the magistrate. On appeal it was argued, inter alia, that if the arrest was unlawful steps taken, thereafter, were similarly unlawful. The Supreme Court of Appeal rejected this argument and upheld the finding of the court a quo in this regard.

[97] This case is distinguishable on the facts. It is common cause that the plaintiff was taken to court on Thursday 5 April 2001 but to the Germiston Magistrates' Court. The Johannesburg Magistrates' Court is right across from the Johannesburg Police Station. No cogent reason could be given why the plaintiff was not taken to Johannesburg immediately he was arrested. The delay in launching a formal bail application was caused deliberately by the arresting officer as there is no evidence that any investigations were done after the plaintiff's arrest. It, therefore, cannot be said that the plaintiff's detention became lawful from the time he appeared in court. Where it has been established that the further detention of a suspect was caused by the delaying tactics of the police the latter cannot hide behind a court detention order. Police have a duty to assist a suspect to appear in court as soon as possible to enable such suspect to exercise his right to apply for bail.

[98] Counsel for the defendants submitted that there was nothing exceptional about the facts of this case and that, therefore, damages

awarded should be lesser than the average especially since the plaintiff was the author of his own misfortune. He submitted that an appropriate award would be R25 000. I disagree. A decision whether a litigant is the author of his own misfortune can only be taken by a court. In the present case no such decision was taken as the matter was simply not proceeded with.

[99] In assessing damages a court is enjoined to take into consideration all the relevant factors in that particular case. Awards will, therefore, vary from case to case depending on the circumstances of each case.

[100] In Stapelberg v Afdeimingsraad van die Kaap 1988 (4) SA 875 (C) a young attorney on his honeymoon in Cape Town spent some three hours in a police cell after being arrested and verbally abused by the arresting officer. He was awarded R10 000 for wrongful arrest and

detention. Although he had not been physically assaulted before or during his detention he was humiliated and treated disgracefully by the traffic officer who accused him of, inter alia, pretending to be an attorney. Calculated according to the consumer price index referred to in Robert J Koch, The Quantum Year Book

2007. the present day value of the above award is about R57 000

[101] This Court was also referred to *Ochse v King Williams Town Municipality* 1990 (2) SA 855 (E) where a journalist was detained for a short time on a charge of having maliciously damaged speed testing cables by slamming on his brakes when he saw the cables on the road in front of him. He was awarded R7 500 for malicious prosecution. Calculated according to the consumer price index referred to in Robert J Koch, The Quantum Year Book 2007, the present day value of the above award is about R30 000

[102] In *Bentley and Another v Mcpherson* 1999 (3) SA 854 ECD the respondent was a 45 year old housewife and grandmother. She suffered from diabetes and high blood pressure. She was unlawfully deprived of her liberty for approximately nine and a half hours, during which time she suffered the indignity of detention in police cells. At the time of her arrest there were a number of people in the street. Her evidence that she felt deeply humiliated was not challenged. Her evidence was that once she was released people near her home looked askance at her and children would mock her saying she was a "bandiet" who belonged in the cells. An award of R15 000 was made by the magistrate. The present day value calculated according to the consumer price index referred to in Robert J Koch, The Quantum Year Book 2007 is R32 000 *

[103] I have carefully analysed the facts in this matter, in addition I have considered awards made in previous cases, bearing in mind, however, that such cases can only be used as guidelines and nothing more

[104] I have analysed the facts that triggered the arrest, the humiliation that, the plaintiff suffered as a result of the arrest, the trauma he suffered, the period spent in detention as well as the indignity that comes with being detained. Also taken into consideration is the unreasonable conduct of the first defendant who effected arrest without any verification of facts furnished to her and without even considering other means of bringing the plaintiff to court. Furthermore, the first defendant proceeded to oppose the plaintiff's bail application, albeit unsuccessfully, when, on her own version, she was not the investigating officer and who, on her own version, at the time, no longer had anything to do with case 351/04/01.

[105] Bearing all the circumstances in mind I think an appropriate award is R90 000 for damages plus R25 000 for legal fees. Loss of income was not proved.

[106] Accordingly, I make the following order:

1. There will be judgment in favour of the plaintiff against the defendants jointly and severally the one paying the other to be

absolved in the sum of R115 000.

2. The defendants are ordered to pay the costs on a High Court scale jointly and severally.

T M MASIPA

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF: C SNOYMAN

INSTRUCTED BY: LARRY MARKS ATTORNEYS

COUNSEL FOR THE DEFENDANTS: H W SIBUYI

INSTRUCTED BY: STATE ATTORNEY

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DATE OF JUDGMENT: 21 JULY 2011

*The figures from The Quantum Year Book; were kindly provided to this Court by counsel for the defendants.

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