

SOUTH AFRICA / JUDGMENT

Minister of Police v Heleni (Appeal) (CA 4/2022) [2023] ZAECMKHC 55 (11 May 2023)

[2023] ZAECMKHC 55

COURT

Eastern Cape High Court, Makhanda

BEFORE

Hartle, Rusi

CASE / FILE NUMBER

CA 4/2022

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NOT

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

CASE

NO. CA 4/2022

In

the matter between:

THE

MINISTER OF POLICE Appellant

and

BUHLALI

HELENI Respondent

APPEAL

JUDGMENT

HARTLE J

Introduction:

[1] Both parties, with the leave of the court below, appeal against aspects of a judgment and order of the regional court delivered on 4 October 2021 in an action for damages for assault (claim 1) and malicious, alternatively wrongful and unlawful arrest and detention (claim 2).

[2] I will refer to the parties as they were in the court below.

Grounds of appeal:

[3] The defendant appeals against the trial court's finding that the plaintiff's arrest and subsequent detention over a period of two days (approximately 51 hours) was wrongful and unlawful; the award of damages in respect thereof; interest thereon; and the punitive costs order made in the plaintiff's favour. The defendant also challenges the trial court's decision to have deprived him of his costs in respect of the plaintiff's claim of assault which it had dismissed, but in respect of which it failed to apply the general rule that the successful party is entitled to costs in his/her favour.

[4] The plaintiff in her cross appeal challenges the dismissal of the assault claim as well as the court's failure to have found in her favour in respect of her claim that the arrest and detention was malicious, as opposed to merely being wrongful and unlawful. In the latter respect it was contended that a finding by the trial court that her arrest (and subsequent detention) were entirely without just cause and effected with malice - apart from being the appropriate and correct finding on the evidence, would have properly elevated the gravity of the matter and justified her claim for special damages arising. It was contended on her behalf at the appeal that the trial court in any event failed to give recognition to the fact that, in consequence of the incident, the plaintiff suffered from an adjustment disorder with mixed anxiety and depressed mood, an aggravating feature of the whole debacle that, apart from having a natural causal connection with the claimed assault, ought to have provided a significant underpinning

for the damages claimed in this respect.[1] Such costs would enable her to seek therapy and medication to ameliorate her symptoms which, even at the time of the trial, were

notably still in evidence.

The pleadings:**The Plaintiff's particulars of claim:**

- [5] The plaintiff alleged, in respect of claim 1, that on 7 December 2016 she had been wrongfully and unlawfully assaulted by Sergeant Oliver and other members of the South African Police Service (“the Service”) in the street in front of her home, who, inter alia, violently pushed and shoved her against a wall, stamped on her right foot, grabbed her, and dragged her along the ground to a police van. Sergeant Oliver had also subjected her to verbal abuse. Members of the Service had allowed an I-Patrol member by the name of “Robert” to further assault her by pepper-spraying her.[2] She claimed to have sustained various physical injuries for which she received medical treatment, together with emotional trauma, which manifested itself, inter alia, in the form of symptoms of post-traumatic stress disorder, for which she also received therapy.
- [6] In respect of claim 2 it was pleaded that she had been wrongfully, unlawfully, and maliciously arrested without a warrant by members of the Service on “false charges of assault on Police and Interference with Police Duties”.
- [7] In order to give context to her complaint that her arrest was wrongful, unlawful, and malicious, she pleaded that she had not committed any offence in the presence of a peace officer; no reasonable suspicion could have existed that she had committed a schedule 1 offence; the arresting officers had no reasonable and probable cause to arrest her on the supposed charges, and that they had effected the arrest *animo injuriandi* (with malice).
- [8] It was further alleged that (in any event) the arresting officer had failed to explain her constitutional rights to her, or to have complied with sections (4) and (8) of the Police Standing Order G341 relating to the reading of her rights to her at the scene of her putative arrest.
- [9] She alleged further that she was detained arbitrarily and without just cause on the said false charges at the Humewood Police Station in Gqeberha from Friday 7 December 2016 until her release from court (but without any actual appearance before a magistrate) on Monday 9 December 2016. During this period, she was treated abysmally by members of the Service and was even verbally abused by the Station Commander who shouted at her and raised his hand to her as if he had wanted to hit her. He further threatened to keep her for a week at the police station.
- [10] The bases upon which she claimed that her detention was similarly malicious in all the circumstances are that there were no reasonable and or objective grounds to justify the charges; the arresting officer and other implicated members failed to apply their minds in respect of her detention and the circumstances relating thereto; she

was not informed of her right to institute bail proceedings as required by section 50 (1)(b) of the Criminal Procedure Act, No. 51 of 1977 (“CPA”); she was not released on police bail in terms of section 59 (1)(a) or section 59A of the CPA; her detention was motivated by malice as the charges brought against her were false; and she was not brought before a court of law as soon as reasonably possible after her arrest.

- [11] Her detention on this basis infringed her various constitutional rights and caused her to suffer humiliation. She also suffered psychological trauma as a result of the incident which she claimed would need to be redressed through future psychotherapy and pharmacotherapy, which special damages were costed in the sum of R23 600.00.

The defendant's plea:

- [12] The defendant denied that the plaintiff was assaulted by the Police or at all (or in effect that the incident foreshadowed by her particulars of claim had ever occurred) and put her to the proof. Indeed, neither was any basis laid to suggest that any injuries alleged to have been sustained by her might in fact have been incurred as a result of the members having used minimal and reasonable force during the admitted arrest.
- [13] The arrest and subsequent detention were claimed justified under the mantle of the Police's entitlement to have arrested her without a warrant on the basis provided for in terms of section 40 (1)(a) of the CPA. In this respect it was vaguely asserted that she had committed "an offence" in the presence of the arresting

officer (who was also a peace officer), which matter "was investigated under Humewood Cas 109/12/2016". (It is common

cause that the plaintiff was arrested "together" with a Mr. Olwethu Peter. Although on the face of the A1 statement (SAPS 3M (b)) in the docket in question the offence concerned is described as "Attempted Theft, Assault on Police, Possession of Dangerous weapon, Interference," the notice of rights issued to the plaintiff per SAP14 confined itself to confirmation that she had been detained for "Assault on Police...Interference in Police duties." These are the same offences with which she was formally charged later that evening, whereas Mr. Peter was separately warned, shortly after her own deposition, on charges of "Attempted theft, Assault on Police, Possession of Dangerous weapon.")

- [14] Also denied were the claimed verbal assault or the pepper-spraying incident. The defendant even surprisingly feigned ignorance of the fact that the plaintiff had as a result of the claimed assault on her laid a criminal charge at the implicated members' own police station under Humewood Cas 146/12/2016.
- [15] The injuries alleged to have been suffered by the plaintiff were denied, but a closer reading of the plea rather entails a denial that they were purportedly caused at the hands of the defendant's members.

In any event the plaintiff was also put to the proof of her claimed injuries and sequelae, and their connection with police conduct.

- [16] For the rest the defendant denied that his officers had not acted procedurally or with due regard to accepted and standard arrest and detention protocols, or that they had acted unlawfully or unconstitutionally, or with malice, or outside of the bounds of rationality. Rather, so the Minister pleaded, his officers, more especially the "relevant peace

officer” (not named in his plea despite it being common cause that Sergeant Oliver amongst them accepted responsibility for the arrest), had acted in line with the provisions of section 205 (3) of the Constitution.

[17] The police’s holding of the plaintiff after her arrest was justified on the generic basis that her detention and or deprivation

of liberty “until her release on bail” (sic)[3] was lawful in terms of section 50 (1), as read with section 39 (3) of the CPA.[4] The minutiae of her claim that the police’s conduct toward her was highhanded and her continued detention malicious for the specific reasons outlined in paragraph 10 above, were not specifically replied to in the defendant’s plea. The plaintiff’s further

claims that she had been verbally abused and threatened by the Station Commander; that her reasonable requests to receive medical

attention or be provided with her allergy medication were ignored during her detention at the police station; and that she never even formally appeared in court before a magistrate on the purported charges before being released from police custody shortly after 13h00 on 9 December 2016, were laconically and baldly denied.

The evidence:

[18] At the trial, which ensued almost four years after the incident, the plaintiff commenced leading evidence. Broadly she testified regarding her unfortunate experience at the hands of Sergeant Oliver and the implicated members of the Service, firstly in front of her home where the impugned arrest took place (without just cause and in her perception with malice) and where she was assaulted in the manner and under the peculiar circumstances pleaded by her; and secondly at the Humewood Police Station where she was detained, according to her under hugely offending conditions. According to her further testimony all of this culminated in her informal release from police custody at the magistrate’s court on 9 December 2016 around 13h00.[5] She also testified as to the significant enduring trauma suffered by her as a result of the incident and the deleterious impact to her generally by the whole debacle. Two relatives (a male and female cousin respectively who lived with her) also testified on her behalf as to the events which went down at the scene of the arrest and as to their recall of their interaction with the Police at the Humewood Police Station after her arrest and in the course of interposing themselves on her behalf. They also provided personal input as to the profound effect that the incident had on the plaintiff.

[19] The defendant called the arresting officer, Sergeant Oliver (who on everyone’s account made a very poor impression as a witness) and one Sergeant Baadjies who had been involved in charging the plaintiff on the evening of her arrest at the Humewood Police Station and taking her formal warning statement. It appeared to be common cause that he had treated the plaintiff amiably and fairly in respect of his brief interaction with her that night even to the extent of making a trip to her home to fetch stuff she needed.

[20] The defendant surprisingly closed his case without calling several witnesses who were ostensibly available, and necessary both to give flesh to the elaborate premise for his defence that was foreshadowed by the cross-examination of the plaintiff's witnesses and to countervail the plaintiff's testimony, leaving his case

somewhat bare and, as the trial court correctly recognized in its judgement, vitiating in respect of vital aspects of her case that called for an answer.

[21] Certain documents were handed in as exhibits by agreement on the customary basis without any admissions as to their correctness. This included two medical reports by general medical practitioners who had

examined the plaintiff on 9 and 12 December 2016 respectively. Both the police docket under which the plaintiff was charged as well as the second one opened pursuant to which she had indubitably laid her own charge of assault against the police soon after her release from their custody on 9 December 2016, also served before the trial court.

[22] A joint minute was procured in respect of the professional input of two clinical psychologists, one who had privately consulted with the plaintiff shortly after the incident, Ms. Mochela, and the second who examined her closer to the trial at the behest of the defendant, Mr. De Jager. The latter minute also referenced and echoed the earlier medical reports concerning the injuries and emotional trauma suffered by the plaintiff closer to the date of the incident.

[23] The crux of the clinical psychologists' agreement is recorded thus:

"The psychologists agree that Ms Heleni was involved in the incident on 07/12/2016. The incident affected her psychologically. After

consideration and discussion, both psychologists agree that Ms Heleni's condition does not fulfill the criteria for a Posttraumatic

Stress Disorder, but constitutes an Adjustment Disorder with Mixed Anxiety and Depressed mood. Both agree that Ms Helen's condition

ameliorated over time."

[24] The psychologists further agreed in principle that the plaintiff should receive ten sessions of psychotherapy given the fact that her symptoms were still present and because she had received only intermittent and limited psychotherapy to ameliorate the impact of the incident to her, and that she would benefit from three sessions with a psychiatrist to assess the need for pharmacotherapy.

The trial court's judgment:

[25] After a long trial, the court found, firstly in respect of claim 2, that the defendant, relying on the sole evidence of Sergeant Oliver (which it found to be contradictory and unreliable), had failed to discharge the onus on him to "prove the existence of the grounds in justification of

the infraction,” meaning, in the latter respect, the plaintiff’s arrest without a warrant. (This was ostensibly all the court focused on, forgetting that the plaintiff’s primary claim was for malicious arrest.) Further and in any event, the trial court purported to determine the issue of whether the defendant had made out a case justifying the arrest of the plaintiff against the basis provided for in section 40 (1)(j) of

the CPA, whereas the defendant had instead expressly relied on the provisions of subsection (1) (a) in pleading justification for the arrest.

[26] Regarding the supposed criminal misconduct on the plaintiff’s part that had purportedly conducted to her arrest, the trial court discounted Sergeant Oliver’s version. It did so however, not by holding it up to a comparison with the plaintiff’s version and resolving the disputed issues by a consideration of her and Sergeant’s Oliver’s respective credibility and reliability against the inherent probabilities and improbabilities of the matter, but instead with reference solely to contradictions between her testimony and Sergeant Baadjies’; discrepancies between her oral testimony and arrest affidavit and between her and her colleagues’ police statements; a surprise admission by her that she had pepper-sprayed the plaintiff herself (this co-incidentally in itself constituting an assault on the plaintiff); and the “lack of corroboration” to be found for her version in the testimony of her implicated colleagues (according to the narratives reflected in their police statements) and “Robert” of I-Patrol.

[27] The trial court concluded additionally, correctly so in my view albeit for a different reason, that no proper discretion had been exercised by Sergeant Oliver in occasioning either the arrest or detention of the plaintiff and that there had simply been no just cause to detain her. It further accepted, ostensibly based on a concession made by Sergeant Baadjies in this respect, that there had been no reason why the plaintiff could not have been released on bail from the police station.

[28] It determined that her detention too was unlawful following inexorably upon her unlawful arrest and awarded damages in the sum of R180 000.00 for claim 2.

[29] Interest at the legal rate of 7% per annum (evidently applicable at the time of judgment) was awarded as prayed for in the plaintiff’s particulars of claim calculated from date of demand to date of payment, and costs on the scale of attorney and client as had also been prayed for and specifically motivated in argument, although no reasons were furnished in the court’s judgment for either ancillary order made.

[30] Having regard to the plaintiff’s complaint that she had been assaulted by Sergeant Oliver, ostensibly isolating, and ring-fencing the evidence in respect of this claim, the trial court embarked in similar fashion on an exercise of criticism of her evidence in a vacuum, concluding ultimately that there were “material contradictions in her own evidence and the evidence of (her) witnesses” and dismissed this claim ostensibly for such reason.

[31] Despite by implication having preferred the plaintiff's version concerning the scenario that had played itself out before her arrest (concerning the very same interlude during which the assault was said

to have been perpetrated), the court mechanically ticked off ten examples of "contradictions" by the plaintiff which it determined were material and damning of her case in respect of the assault claim.

[32] Mostly these relate to discrepancies between her testimony and that of her two cousins who testified on her behalf which, as I indicate below, given the fluidity of the scene; the different perspectives

from which each of the witnesses viewed the incident; and the long length of time since the event had passed, I regard as non-material.

Another example concerns an allegation made in her particulars of claim that she was pointed with a firearm which she had disavowed in her oral testimony. Even though this averment was withdrawn during the conduct of the trial on the basis that its inclusion had been the result of an unfortunate copy-and-paste mistake (for which her attorney took full responsibility), the court exemplified the so-called inconsistency as one seriously impugning her credibility.

[33] Another concerns a difference in the injuries that the two doctors recorded when examining her on 9 and 12 December 2016 respectively. The first doctor, Dr. van der Merwe, according to the judgment, only recorded a scratch mark on her right foot,[6] whereas Dr. Koester, upon examining her three days later, made a note on a formal J88 medical report utilized in the criminal prosecution

of her claim of assault, that she had sustained injuries to her back, arms and legs.[7] Apart from concluding that "these injuries are inconsistent with the evidence of the Plaintiff," the clarification given by the plaintiff in her testimony regarding her and her family's concern that they were unhappy with the service given by the first doctor was not referenced by the trial court in its judgment at all.

[34] The final nail in the coffin of the plaintiff's credibility according to the trial court concerned an allegation in her particulars of claim that she suffered from depression inter alia and had consulted with clinical psychologist Ms. Mochela to help her cope with the effects of the incident who had diagnosed her with "post-traumatic stress disorder". The court noted by implication in this respect that this allegation was untrue since "both experts met and filed a joint minute that the Plaintiff did not at any stage suffer from Post Traumatic Stress Disorder." A proper review of the joint minute does not however support such a

conclusion.

[35] In respect of the arrest and detention claim, the court concluded that: "Due to the contradictory, unreliable evidence of Oliver the Court is of the opinion that the Defence did not prove the existence of the grounds in justification of the infraction." and, in respect of

issue of the assault claim, that: "In the light of the abovementioned material contradictions the Court is of the opinion that the Plaintiff did not satisfy the Court on a preponderance of probabilities that her version is true and accurate and therefore acceptable. Claim one of the plaintiff is therefore dismissed."

- [36] No separate costs order was made even though, as the defendant contended at the appeal, he had successfully defeated the assault claim and should have been awarded his costs.

The court's flawed approach in assessing the evidence:

- [37] Given the unconventional compartmentalized method applied by the trial court in evaluating the evidence, it is no wonder that the chief ground of the main appeal by the defendant is that it failed to adopt the correct approach in assessing the credibility of the witnesses and in resolving the mutually destructive versions that were before it. It also evidently failed to appreciate the nuances of the plaintiff's second claim as primarily entailing a malicious

arrest and detention.

- [38] As a starting point, to succeed, the litigant who bears the onus of proof in a civil trial should satisfy the court on a preponderance of probabilities that his or her version is true and accurate and therefore is acceptable, and that the other version advanced by the defendant is false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.[8]

- [39] In *National Employers' General Insurance Co Ltd v Jagers*,[9] the court set out the correct approach to be adopted in analysing and assessing evidence in a civil case as follows:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid--Afrikaanse Spoorweë en Hawens* (supra) [10] and *African Eagle Assurance Co Ltd v Cainer* (supra)[11]:

"I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[40] In *Stellenbosch Farmers' Winery Group Ltd & Another v Martell & Cie SA & Others*[12] the Supreme Court of Appeal also observed what it fell to the trial court to do in a civil matter when there are two irreconcilable

versions and so too on a number of peripheral areas of dispute which it reckoned could have a bearing on the probabilities:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

- (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case,

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”[13]

[41] In this instance the trial court quite evidently floundered in the manner in which it analyzed the evidence and purported to resolve the disputed issues. It made no reference whatsoever to the customary approach or even that there were mutually destructive versions before it. It further said not a word about the probabilities.

[42] It self-evidently compartmentalized the evidence within each claim instead of having regard to a conspectus of all the evidence in order to get to a common baseline or to establish the more plausibly accepted version by an analysis and evaluation of the probabilities

or improbabilities of each party's version on each of the dispute issues.[14]

[43] Indeed, it purported rather by some awkward process to annihilate whichever of the parties' versions in respect of each claim bore the most “contradictions” without even assessing how and why those contradictions impacted their respective credibility.

[44] Although both parties sought to persuade this court, for reasons unique to the position each were advancing, that we should be weary of interfering with the factual findings made by the trial court because these depended upon the credibility of the witnesses upon which it had formed a view, in my opinion its findings of fact and credibility, especially concerning the plaintiff, were clearly wrong and this court is therefore at liberty to interfere on appeal.

What was required to be established on the evidence:

[45] It is apposite to begin with an expectation of what the plaintiff had to prove in order to succeed. Firstly, regarding the assault, she had to establish the physical interference (and verbal abuse) alleged, since this was denied. An established interference would be *prima facie* wrongful and implies an intention to injure even if committed during the course of an arrest performed by a police officer pursuant to the exercise of a discretion to arrest. Although not part of his pleaded case, it would have been for the defendant to allege and prove a lack of intention to injure and or justification for the physical violation. For example, a concession made by Sergeant Oliver that she pepper-sprayed the plaintiff, dropped like a “hot potato” during her testimony, had to be given a context within the claimed justification related in her evidence for doing so.

[46] The plaintiff would also have had to prove that she suffered the harm and patrimonial damages claimed as a result, and the extent of these. The experts were already in agreement as to three things, viz, that the incident had happened (which in itself corroborates the plaintiff's version that she suffered a traumatic event whereas the defendant denied any event as claimed by her); that the assault or incident caused her damage; and the extent of these, at least in the sense of determining what treatment she required going forward, the number of sessions and the unit price for her required therapy applicable at the time.

[47] I digress to point out that the joint minute had of necessity to be read together with the experts' respective reports to

understand their agreement in context. One point of particular significance is that the experts conceded and made allowance for the fact that the plaintiff's condition (which they accepted bore a causal connection with the incident) had improved over the course of time and the professional diagnostic criterion for post-traumatic stress disorder had also changed since then.[15] One only has to read Mr. De Jager's report to notice that despite the changes in clinical approach he was yet able to confirm,

using the current post traumatic stress disorder checklist and by applying it to the plaintiff's responses to rate the frequency

and intensity of her symptoms on a five point scale for the three months in the immediate aftermath of the incident, that her score for that period was "69" and her score in the past month before the date of her assessment, "58". Both these tallies were "above the cut-off score of 38 for post-traumatic stress disorder". However, using the tools to measure the severity of her symptoms, her score of "16" was mild at most, thus rendering his conclusion that the plaintiff ostensibly at the time of assessment did not satisfy the criterion for the diagnosis of post-traumatic stress disorder.[16]

[48] I mention this to highlight the unfounded criticism of the plaintiff by the trial court that she falsely projected her diagnosis of post-traumatic stress disorder in her particulars of claim as a show of her supposed unreliability as a witness.[17]

[49] In respect of this issue, it mattered not in my view what the plaintiff's ultimate diagnosis was, but rather that there was in fact an incident that caused her harm in the realm of psychology at all. That showing in itself supported the plaintiff's case that she was subjected to an unprovoked traumatic assault and mind-altering incident but detracted from the defendant's countervailing version presented through the sole testimony of Sergeant Oliver that she had interfered in the arrest of Mr. Peter and was the aggressor.

[50] Regarding claim 2, the plaintiff's action for malicious arrest and detention (analogous to malicious prosecution) lies where the defendant has intentionally, maliciously and without reasonable and probable cause, instigated the arrest or detention of the plaintiff by the proper authorities. In this instance the police officers implicated just so happened to be those "proper

authorities" who were responsible for putting the plaintiff through the wringer, as it were, under the guise of an arrest.[18]

[51] A plaintiff must prove that the defendant:

- (a) instigated the arrest; (b) acted without reasonable and probable cause; and
- (c) had animus iniuriandi which includes malice.

[52] Malice in the sense of absence of an honest belief coincides with want of reasonable and probable cause in the subjective sense, and will be inferred from the latter. In cases where malice has been inferred from want of reasonable and probable cause, there has been an absence of an honest belief in the guilt of the accused. Where absence of reasonable and probable cause in the subjective sense is not relied upon, want of reasonable and probable cause in the objective sense must be proved and, in addition, there must be malice in the sense of absence of purpose for which the law allowed the arrest. Want of lawful purpose in the case of malicious arrest means that the defendant had some purpose other than that of bringing the plaintiff to justice and having him or her convicted or having

judgment

given against him or her.

[53] Absence of reasonable and probable cause means either:

- (a) that subjectively the defendant had no honest belief that the plaintiff had committed an unlawful act for which he or she could have been arrested; or
- (b) that objectively on the facts and the law as known to the defendant at the time a reasonable person could not have concluded that the plaintiff had committed such unlawful act.

[54] If neither element is proved, the plaintiff will not have shown absence of reasonable and probable cause and his or her action will fail. Conversely, if either element is proved the defendant would have acted without reasonable and probable cause.

[55] The defendant, although denying malice or the absence of reasonable probable cause admitted the arrest at least without a warrant. The court properly observed that the onus was on him to prove justification for the arrest on his version. But the question whether the plaintiff had *prima facie* committed an offence in the presence of Sergeant Oliver, this being the pleaded basis for the defendant's justification for the arrest,[19] speaks to the corresponding element that the plaintiff was required to establish on her pleaded case in respect of the claim of malicious arrest, namely, that there was no reasonable or probable cause for Sergeant Oliver to have arrested her since she had not committed any offence at all, nor give her any reason to have arrested and detained her.

[56] Sergeant Oliver claimed responsibility for arresting the plaintiff although professing to have done so under the guise of the maintained justification for it.

[57] The plaintiff therefore at least established the first essential ingredient of her cause of action which is that the defendant, or at least his employee(s), procured or instigated the arrest using the machinery of the law at their ready disposal.[20] (As an aside, it appears that the false statements deposed to by her and Sergeant Van Reenen in the docket also formed the basis for Sergeant Baadjies to have concluded that there was reasonable cause to charge her and Mr. Peter on the night of their arrest.)

[58] Further, if one accepts the plaintiff's version as to what happened on the street in front of her house that morning (to the exclusion of the defendant's) it is not hard to find additionally that both further elements of malice and the absence of reasonable and probable cause would have been equally established by the evidence. In that event Sergeant Oliver could subjectively have had no honest belief that the plaintiff had committed an unlawful act for which she could have been arrested which would be grist to the mill of the plaintiff's case that Sergeant Oliver and Constable

Van Reenen, acting in conjunction, made up a false charge merely to cover her outrageous conduct. Even applying an objective test, on the facts and the law as known to Sergeant Oliver at the time, on an acceptance that the plaintiff's version is the more plausible account, a reasonable person could not have concluded that the defendant had committed the unlawful act for which the plaintiff was purportedly arrested, charged, and subsequently held in police custody.

[59] The assault charge against the plaintiff was co-incidentally hardly given any flesh in Sergeant Oliver's evidence, or prominence in her police statement. Indeed, she is not even recorded as a complainant in the docket ostensibly opened as a formal recordal of her supposedly being a victim of assault at the hands of the plaintiff.[21]

[60] As for the plaintiff's alleged interference with the duties of the police officers, section 67 (1) (a) of the South African Police Service Act, No. 68 of 1995, defines when such interference constitutes actionable criminal conduct. In this respect it provides that any person who: "...

(a) resists or wilfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member wilfully interferes with such member or his or her uniform or equipment or any part thereof ..." shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding twelve months.

[61] Assuming such conduct to have been prima facie observed by Sergeant Oliver before arresting the plaintiff it might have served to have objectively justified the plaintiff's

arrest and for having charged her for such an offence; and for having kept her in police custody as a continuing justification thereafter flowing from her supposed criminal conduct. However, the misdemeanour falling within that description that the defendant says the plaintiff purportedly made herself guilty of concerned her supposed attempt to get in the way of Mr. Peter being arrested which, so the plaintiff said, never happened.[22]

[62] As I will demonstrate below this is an issue that the trial court correctly disposed of in favour of the plaintiff.

A review of the evidence:

The Plaintiff's testimony:

- [63] The plaintiff's evidence was that shortly after returning home that morning after dropping her grandmother off at the taxi rank, they were drawn to a noisy fracas outside. Upon exiting from her house at no. 26 Campbell Street, she noticed residents in the street and two police officers. It is common cause that the officers involved at this point were Sergeant Oliver and her partner, Constable Ashley Van Reenen. She noticed Constable Van Reenen assaulting an already handcuffed man lying on the ground who later became known to her as Mr. Peter.[23] He was later joined by Sergeant Oliver who came to where Mr. Peter was lying on the ground and stamped on him with her booted foot. Mr. Peter was crying out for help.
- [64] The residents were hit up about the incident and her and her "brother" (Luyanda Majola)[24] and his girlfriend at the time (Ms. Vuyo Ntshingana), were screaming for them to stop and not hit him further. They were agitating for the officers to rather put Mr. Peter in the van and get on with it, so to speak.
- [65] The police officers instead became embroiled in exchanging words with the residents (including the plaintiff) in what she described as a "crazy commotion". Whilst initially observing all of this from their home at no 26 Campbell Street, the plaintiff latterly noticed her brother approaching from the opposite direction coming from up the road. She assumed that he must have disappeared at some stage during the uproar as originally they had all been observing the incident from their stoep. At this stage Mr. Peter was by now in the police van and the residents had been agitating for the police to "just go" now. She noticed her brother and Constable Van Reenen exchanging words and having a face-off with each other. She then observed the officer hitting him with a fist on his chest, well at least this is how she perceived it from her perspective.[25]
- [66] She advanced to where they were and instinctively interposed herself between them as if to protect him. She was angry. She was joined by his girlfriend who together with her created a barrier to ward off any further attack on him. She enquired indignantly from Constable Van Reenen why he was hitting him. She did not actually give him a chance to respond and challenged that if her brother did not press charges against him for doing so, that she would do so herself. He asked who she thought she was.
- [67] During this heated and angry verbal exchange (at least for her part) she denied any physical altercation with him or that she had supposedly grabbed hold of any police officer's shirt. The commotion continued and she momentarily lost sight of her brother whilst the brawl moved to in front of 28 Campbell Street. Whilst still so engaged, Sergeant Oliver came towards her aggressively pointing and shouting at her in Afrikaans. The witnesses asked her to speak in English so that she could understand her. Sergeant Oliver grabbed her and shoved her against the wall. Ms. Ntshingana screamed in Sergeant Oliver's face to desist, warning her that she was not permitted to touch the plaintiff. She noticed at this time in the

background

that another police van had arrived carrying two white male officers (Warrant Officer Geoffrey McIntyre and Captain Verdun Van Niekerk), bringing the police contingent to four.

[68] Sergeant Oliver was at this time pointing in Ms. Ntshingana's face. The plaintiff urged her to stop but she instead turned her attention to her and stamped hard on her foot, keeping her booted foot down on it to maintain a pressure, and causing it to bleed. The plaintiff screamed that Sergeant Oliver was hurting her. She noticed

that the two additional officers who had arrived on the scene were just standing there watching, evidently confused. When the pain

became unbearable she reached out her hand to "pat" Sergeant Oliver on her shoulder to get her attention, intimating to her verbally that she was hurting her and that she should release her foot.

[69] At this point one of the two white police officers grabbed her and dragged her down to the ground remonstrating with her that she was not allowed to touch a police officer. In falling down to the ground

from the height of the neighbour's stoep to where the brawl had in the meantime migrated, she sustained a cut on her finger. She further sustained another injury to her foot by being dragged on the ground to the police van by the last two officers who had arrived on the scene.

[70] She resisted their efforts to be placed in the van with Mr. Peter who was an absolute stranger to her, reconciling herself to the fact that she was now being arrested. It was during this struggle that "Robert"

from I-Patrol appeared on the scene and came to pepper-spray her. This ended her resistance to the whole debacle.

[71] She was clear that she was conveyed to the Humewood Police Station in a van marked "Humewood 13" in the company of Mr. Peter. This was in itself anxiety provoking for her as she surmised that

anything could have happened to her in the back of the van together with a male stranger.

[72] Regarding process, she averred that she was not informed of any reason for her arrest or read her rights at the scene of arrest. At the police station and whilst in the van still, a senior white police officer arrived (it was common cause that this was Lieutenant-Colonel Houwlands), who spoke in Afrikaans to the two white male members.

Sergeant Oliver opened a window at the back of the van and announced: "This is my boss". She added: "Tell him you said you were going to report me. I know you think you have got rights, but I can limit them". Her demeanour towards the plaintiff was one of rudeness. The plaintiff immediately felt powerless and angry not only by what Sergeant Oliver had conveyed to her, but also because the police officers were clearly discussing her in her presence in a language that she

could not understand. She felt like a “nobody” in her own country and reflected that it was a brutal and unnecessary arrest.

[73] When the van door was opened, Lieutenant-Colonel Houwlands continued to engage with her in Afrikaans. When she requested him to speak English he said “Ek sal jou ...” He did not finish his sentence, but raised his hand as if to indicate that he might strike her. She replied, “Try it”, to which he responded

“You think you are clever. I will punish you. You will stay here for a week.”

[74] She was in pain from her injuries and the pepper-spray had taken her existing allergies “to another level”, as she described it. Her back was hurting. Her chest ached from the hard shove and both her feet were paining. Her open wounds to them were bleeding.

[75] She was not immediately read her rights at the Humewood Police Station. She was however prevailed upon to sign a SAP 14 notice, this two hours after her arrest, without being afforded an opportunity to first read the document. She was taken to the holding cells in the meantime. Her request to make a phone call was deferred on the premise that she needed to “wait” for the persons who had brought her there to process her arrest.

[76] When signing the SAP 14 notice almost two hours later Constable Van Reenen, who was in attendance, suggested to her that her brother was supposed to be the one there, not her. He remarked that her brother

was “lucky” because she had protected him.

[77] In the evening at 19h32 she was formally charged by Sergeant Baadjies who she claimed told her that she would appear in court on the morning succeeding the day of her arrest. She pointed out her injuries to him, most notably those on each foot, which he acknowledged in the template forming the prelude to her warning statement. He further recorded her description of how these wounds had been occasioned to her, namely by Sergeant Oliver stamping her on her foot and in the course of her being arrested. She denied that she was “free of injuries” as had been recorded by Constable Van Reenen in the station’s official records shown to her. She added that the injuries to her feet would have been abundantly

visible to anyone as she was barefoot in the holding cells.

[78] According to her she was not informed by Sergeant Baadjies of her right to apply to be released on bail. If she had, so she submitted, her family would immediately have been able to secure her release from police custody. She acknowledged however that she had not really questioned him about anything as the whole process was “foreign”

to her. Despite Sergeant Baadjies' intimation to her that she would appear in court the following morning, what happened instead is that she was awoken early the next day only to have photographs taken but returned to the cells thereafter to endure a further anxious wait. During this time, she encountered Lieutenant-Colonel Houwlands again who knocked, saw it was her and remarked "Oh, it's you", whereupon she was left to her further seclusion.

[79] She confirmed that Sergeant Baadjies had assisted her by going to her house at her request to fetch clothing and medication because she was really cold and still barefoot. He returned with a bag containing her red coat, a pair of slippers, KFC and water. No medication arrived, but he offered the explanation to her that her sisters had not been able to find her medicine at home.

[80] On the Friday morning, after first being subjected to the taking of a DNA sample, the plaintiff was transported by van to the magistrate's

court where she was detained in a holding cell with four other women. Her name was not called to appear. The magistrate, noticing her presence there, enquired who she was and instructed officials to go and look for her docket. After a while the female officer instructed to make the enquiries returned and said something to the magistrate. The latter then informed her that she could go home.[26]

[81] After her release she consulted Dr. van der Merwe and a few days later Dr. Koester on the advice of her grandmother who perceived that she was not getting any better. The latter examined her more comprehensively. She laid a criminal charge of assault against Sergeant Oliver on the same day of her release. She lamented even on the day of the trial in the court a quo that she had heard absolutely nothing from the Humewood Police Station to that day, more than three and a half years after lodging her complaint.

[82] She also related that on the same date she lodged her J88 report, she had been warned by one "Sharky", a resident of Richmond Hill, to drop the case. She relocated from Campbell Street soon thereafter because she feared for her life.[27]

[83] Regarding the report of the psychologist, Mr. de Jager, she was careful to point out which aspects of the collateral provided to him by her ex-partner and father of her child (deceased by the time of trial) regarding her response to the traumatic incident were correct and which not, even owning up to characterizations of her behaviour

that were by their very nature against her interests to admit.

[84] So, for example, she did not hesitate to own up to the fact that she had anger outbursts and that on occasions she had been emotionally and physically abusive towards him, and once broke a window.

[85] According to her she was never given an opportunity by Mr. de Jager himself to respond to these negative assertions made against her by her ex-partner which provided fertile ground for aggressive cross examination of her during the trial as if her late ex-partner had himself testified. She pointed out parts of his recorded narrative in the report that did not accord with her true version of the events given at the trial, which she noted to be incorrect.

[86] Under cross examination Mr. Madokwe[28] similarly held up accounts recorded by the plaintiff's psychologist in her report, as being "gospel" in an attempt to show the plaintiff up an unreliable witness, such as for example the vignette concerning the perceived assault on her brother

that had prompted her to leave the precincts of her home to interpose herself on his behalf.[29] The plaintiff moted in this respect that she had been extremely traumatised still when she consulted with Ms. Mochela. She added that she was not responsible for the latter's summary neither had she read what the psychologist had recorded in her professional

report with a view to vouching for its correctness concerning the finer details of the background recorded by her.[30]

The evidence of Mr. Majola:

[87] The plaintiff's cousins, Mr. Majola and Ms. Peter, in essence confirmed the plaintiff's account of the events outside in the street of the day in question most particularly that she had not interfered in the arrest of Mr. Peter neither had she assaulted Sergeant Oliver or given them any reasonable or probable cause to have arrested and detained her.

[88] Mr. Majola related his own involvement and confirmed his plea to the police at the scene to put Mr. Peter in the van since he had already been handcuffed and was not resisting arrest yet the police were kicking him whilst he was down on the ground. The male officer (Constable Van Reenen) was hostile to him, urged him to back off and pushed him with his hand near his chest. He then became aware of the plaintiff's presence a short distance behind him. She was screaming at Constable Van Reenen and questioning his right to have gotten physical with him.

[89] As for the plaintiff interposing herself on behalf of Mr. Peter, she simply asked that they put him in the van because the children were watching.[31] Right after the plaintiff told Constable Van Reenen off about pushing him, he noticed a scuffle behind him involving the plaintiff. He saw her falling while she was with Sergeant Oliver. His girlfriend, Vuyo Ntshingana, was also screaming at the officer and their sister, Ms. Peter, at the time was recording what was happening on her cell phone.

[90] He noticed when the plaintiff fell that she had hit her knee. She got up and wanted to assault Sergeant Oliver but they stopped her. She was then dragged to the van by Sergeant Oliver, assisted by Constable

Van Reenen. She was held on each side by a police officer and was kicking and screaming. Another van arrived with two white officers,

which brought the tally of vehicles on the scene to three including “Robert’s” from I-Patrol.

[91] Roberts came up to them while they were trying to put the plaintiff in the van. He approached with pepper-spray when close to the van and sprayed it in the plaintiff’s face. He backed off from coming

to her defence ultimately upon the advice of his girlfriend, although he had tried to grab the plaintiff’s hand at some point to show support for her. She was screaming and in pain.

[92] He did not himself witness the shoving or stomping of the plaintiff. He only saw when she fell and was taken to the van afterwards. After she had been put in the van with Mr. Peter (to which she objected) he asked Sergeant Oliver for what reason they were arresting her, to which Constable Van Reenen responded they would find a reason or make it up. As far as he could recall she was not informed of any reason for her arrest or read her rights. He acknowledged however that it would have been difficult for any officer to have informed her of her rights at the time, given the resistance she had put up to the arrest.

[93] When the plaintiff was removed from the scene he had fortuitously noticed that the van in which she was taken away bore the insignia of the Humewood Police station which is where he, his girlfriend, and sister (Ms. Peter), followed immediately afterwards on foot.

[94] Upon their arrival at the police station his family and girlfriend engaged with Lieutenant-Colonel Houwlands who branded the plaintiff as exceptionally rude and violent. When he chuckled at this unfair depiction of his sister, Lieutenant-Colonel Houwlands put him out of his office. Whilst discounting that his sister was capable of violence, he however acknowledged that she may have acted out of character at the scene, given that she had been in pain.

[95] His girlfriend and sister were also given short shrift by Lieutenant-Colonel Houwlands, but he could not say why. He called the plaintiff’s parents who were concerned and intimidated that they should arrange for her bail if they could. His family were however not permitted to see the plaintiff who the officers at the charge office referenced as “the rude girl”. They were further denied the opportunity to bring her any food or medication. He had learned from the plaintiff’s father that she would appear in court the next day and went there to await her arrival, but to no avail. She was instead released on the Friday morning from the side door of the magistrates court. When he observed the plaintiff, her arms were folded as if she were cold, her eyes were swollen and red, she was limping, and was quiet and withdrawn. Once at home she mostly lay on the bed and kept to herself.

[96] He denied under cross examination the defendant's version put to him that the plaintiff had interfered with police duties by trying to pull Mr. Peter out of the van; or that she had persisted in supposedly hindering the police after being warned to step back; or that as a further result of her supposed interference Mr. Peter had succeeded in getting to get back to the ground from out of the van as he was being loaded.

Ms. Aganathi Peter's evidence:

[97] Ms. Aganathi Peter (no relation whatsoever to Mr. Peter), the plaintiff's "sister," also testified on her behalf.

She had not witnessed any interaction between Mr. Majola and Constable Van Reenen, most notably because at a certain stage she had gone indoors to get her cell phone to record the unfortunate incident concerning Mr. Peter. She too stated that he had been beaten up on by both Sergeant Oliver and Constable Van Reenen and that he was screaming and handcuffed during his ordeal although her recall was that his hands had been bound up with cable ties instead. She too confirmed the scene as "very chaotic" and characterised the onlookers as being upset about the officers' handling of the situation. (As an aside this much was common cause, the police accepting that they had been accused at the scene of "police brutality.") Her family was not invested especially, except to join in the call for the police to not mistreat Mr. Peter. According to her the latter did not resist being arrested and had been loaded up in the van by the time she returned to the scene with her cell phone.

[98] When she came back from her home, she observed the shoving of the plaintiff against the wall and the stomping on her foot by Sergeant Oliver. So too, she observed how the plaintiff had patted Sergeant Oliver on her shoulder and complained to her that she was hurting her. She saw how in response Sergeant Oliver grabbed her sister and pulled her down to the ground. Sergeant Oliver was joined by a second officer who assisted her in subduing the plaintiff who put up a resistance to being pulled along by them to the van. This rendered the scene even more chaotic in her view and she now too involved herself by demanding to know why they were arresting her. The two white male officers who had latterly come on the scene also joined in in "dragging" the plaintiff to the van where she was placed together with Mr. Peter. Before the culmination of it all "Robert" from I- Patrol arrived in his vehicle and pepper sprayed the plaintiff in her face. The plaintiff relented finally. She was coughing.

[99] She denied that the plaintiff had assaulted Sergeant Oliver although she conceded that she had "patted" her on her shoulder to cause her to remove her boot from off her bare foot. She also did not hesitate to concede the plaintiff's anger that had

been quite palpable to all in her view.

[100] Sergeant Oliver informed her in response to her question what she was arresting the plaintiff for, that she would make something

up. She did not observe the plaintiff being informed of her constitutional rights in her presence at all.

[101] Immediately the police departed from the scene they proceeded directly on foot to the Humewood police station. It took them about

twenty minutes to get there. Having asked at the front desk about the plaintiff she, together with her brother and his girlfriend,

including Mr. Peter's girlfriend, were taken upstairs to see Lieutenant-Colonel Houwlands. Upon their arrival there her brother

was asked to step out after annoying the officer about something. Evidently Lieutenant-Colonel Houwlands had already been apprized of the situation regarding the plaintiff and remarked that she was the talk of the station. He stated that he had seen her and that she was an angry person. He did not entertain any questions about her situation and asked them to leave his office. No discussion was had with him about any allegations of assault at all.

[102] They were assisted at the front desk by a kind officer who even drove them home after relating to him that they had come to the station on foot. Notwithstanding her concern for the plaintiff especially since she had been pepper sprayed, he yet refused them

permission to see her. He did however receive a pair of sandals she had brought from home for the plaintiff since she had left home barefoot. He advised her that the plaintiff would appear in court the following day although this did not happen.

[103] After leaving the police station she related that she had ended up at the house of "Sharky" at the instance of her aunt (the plaintiff's mother) who had suggested that she should find out from him if he knew an attorney who could assist the family to apply for bail for her sister. Serendipitously upon arriving there she happened to encounter Sergeant Oliver talking to him in his bedroom whilst on the phone to her aunt. She claims that she gave her phone to Sergeant Oliver to speak with her aunt and that she walked off with her cell phone to have a conversation with her.

[104] She returned to the station twice more, the first time in the company of her neighbour, "Aunty" Barbara, to leave some food for the plaintiff and to establish when she would appear in court, and the second on the Thursday to enquire why the plaintiff had not in fact appeared in court that morning as they had been informed she would. On the last occasion she was told that the plaintiff would appear on the Friday morning instead, but she was not given any reason for the change in plan. On neither of these two further occasions was she permitted to see the plaintiff.

[105] On the Friday morning at court the plaintiff's name was still not on the list of persons due to appear in court, but she emerged together with Mr. Peter free to go without any formal appearance before the magistrate.

[106] The plaintiff was limping, her foot was swollen, she looked depressed and was smelling foul. She went home, she took a shower and then left in the company of their grandmother to visit a doctor. When she returned, she drank her pills and kept herself locked up in her bedroom. She was in an emotional state for a while, was slow to talk about her experience, and became more and more reserved, keeping to herself mostly. She seemed to get by by taking pills to calm her and to help her sleep.

[107] Before the incident the plaintiff had been a bubbly, very loud, talkative person who loved cracking jokes. It saddened her to see such a different person. Although she could say at the time of trial that the plaintiff was “much better” by then, she confirmed that her depressed state had endured for a period of at least six months after the incident.

[108] She emphatically denied under cross examination that the plaintiff had interfered with the police when they were trying to load Mr. Peter in the van and that he had supposedly managed to get out of the van again.

Sergeant Oliver’s testimony:

[109] Sergeant Oliver testified that on the day in question she was doing crime prevention duties and patrols together with Constable Van

Reenen. In response to a request for “police assistance” they proceeded to 23 Campbell Street to keep a presence while a caretaker at a commune changed locks there. Whilst overseeing the latter’s work he came to report that he had been assaulted by two occupants, one being Mr. Peter, who also took off with the caretaker’s toolbox. Constable Van Reenen chased after him. She followed. When Constable Van Reenen closed in on him Mr. Peter drew a knife. They struggled to disarm Mr. Peter. (She described him as “crazy violent”.) Ultimately however with the assistance of Constable Van Reenen they managed to get Mr. Peter to the ground. She prised open his hand to take the knife off him and promptly returned to 23 Campbell Street to fetch the police van.

[110] She called for backup because she could see that they were not going to manage to get Mr. Peter into the van or even to handcuff him because he was too aggressive. When she got back to where Constable Van Reenen was waiting, Robert from I-Patrol had also stopped by to render assistance. Two other members arrived, Captain Van Niekerk and Warrant Officer McIntyre. The five of them struggled to get handcuffs on Mr. Peter’s wrists and to get him into the van.

[111] Whilst they were struggling they were approached by members of the community on the street who accused them of police brutality.

[112] She denied that either her or partner had assaulted Mr. Peter at all. Instead, it was he who was violent, so she explained, to the

extent that when “Robert” came on the scene he actually broke the top off of the latter’s pepper spray to render it unusable. (She offered this as a preface to her belated admission that the plaintiff was not pepper-sprayed by “Robert,”

but rather by her herself.) Two people in the crowd, one of them being the plaintiff and the other her brother, interfered whilst the five of them were trying to get Mr. Peter into the van. They did so by pulling, grabbing on to the police, and preventing them from putting him inside of the van.

[113] She claims that she had repeatedly asked the plaintiff to stop interfering and stand out of the way on the pavement but that she had instead turned her attention onto her. She started shouting and pointing at her in her face and pushing her in front of her chest. She carried on shouting and advancing to her.

[114] Warrant Officer McIntyre tried to calm her down, but she continued to advance. She warned her that she would place her under arrest because she was interfering in their duties but the plaintiff came right up to the van and pulled on his shirt. The plaintiff and

her brother managed to pull Mr. Peter out of the van. The witness ordered her to remove herself because she was interfering with her duties, failing which she would arrest her.

[115] An argument ensued between the two of them. She asked her to stop and after the plaintiff purportedly pushed her, she informed her

that she was going to place her under arrest. She had warned her that she should not touch her or advance to her. Since she did not listen and continued to be a hindrance however, she decided to place her under arrest.

[116] The plaintiff did not want to get into the van and would not move from the pavement where she had told her to stand. Warrant Officer McIntyre came to assist her by taking her and loading her into the van. The plaintiff was not willing to cooperate and resisted. In order to obviate her resistance, she pepper-sprayed her. She claims that the plaintiff was wild. She pulled and tore Warrant

Officer McIntyre's shirt. Ultimately they managed to effect the arrest and put her in the back of the van.

[117] She denied that she had hit the plaintiff against the wall pointing out that there was no wall nearby because they were standing

in the street near the police van. She denied that any of this had happened on a neighbour's stoep at no. 28 Campbell Street or that the plaintiff had fallen on her knees. She also denied stepping on her foot.

[118] She insisted that she had read the plaintiff her rights and in fact had pre-warned her that she was going to arrest her that if she

did not stop interfering. Once she had been placed inside the van, she read the plaintiff her rights and explained to her again why she was arresting her, but she was shouting and not even listening to a word she said.

[119] She volunteered that later at the police station her partner first processed Mr. Peter's arrest as if to justify why they had remained in the vehicle waiting outside of the police station for a while before entering. (As an aside, the official police records reveal that the plaintiff signed her SAP14 only five minutes before Mr. Peter did his. The time reflected on the notice concerning him is 12h25 and on the one relating to her, 12h30. This leaves the rest of the time from when the plaintiff was first removed from Campbell Street in the van at about 10h30 until her being processed at the police station at 12h25 entirely unaccounted for.)[32]

[120] She further volunteered that while they were waiting to process her, Lieutenant-Colonel Houwlands came by and spoke to the plaintiff while she was still in the back of the van because she was still screaming and shouting and very rude. Ultimately after waiting

in line outside the charge office to be permitted to enter after Mr. Peter had been processed, she formally advised her that she was charging her for assault on police and interference in police duties, this purportedly being the same offence she had informed her of at the scene of arrest. She denied having intimated to anyone at the scene of arrest that she would make up a charge or think of something with which to charge the plaintiff.

[121] She claims that she explained all the rights referenced in the SAP 14 notice to the plaintiff before she signed the notice whereafter she booked her into the police cells. According to her, the plaintiff declined to make a phone call when the opportunity was presented to her. Instead at the time she was shouting at her and swearing.

[122] She denied that Lieutenant-Colonel Houwlands had insulted or threatened to assault the plaintiff in her presence. She further broadly denied that the cells were dirty or the bedding unclean or that the plaintiff's experience of her incarceration should have been dramatic for any reason in particular.

[123] She coincidentally confirmed (with reference to the random testimony of Ms. Aganathi Peter in this respect) that she had been in

the company of one "Sharkey" at his home later on that same day after arresting the plaintiff when Ms. Peter called at his house. She was careful though to discredit him as a drug dealer and explained that the reason for her presence there (in fact together with the same three officers involved in the plaintiff's arrest) is because they were searching a "drug post." She denied that she had been chatting to "Sharkey" casually in his room when Ms. Peter had arrived on her version to ask him for advice on legal representation to arrange bail for the plaintiff. She further denied that she had taken Ms. Peter's cell phone allegedly handed to her via "Sharkey" to hold a conversation with the plaintiff's mother about her possible release on bail.

[124] Under cross examination she could not convincingly explain why it had never been put to the plaintiff that she had herself pepper

sprayed her at the scene of arrest or why this had not been pleaded.

[125] She acknowledged that she had also not revealed this important detail in her police statement that she, rather than “Robert”

had pepper-sprayed the plaintiff, claiming that she assumed that when she testified she would then have a chance to explain it. She brushed the oversight off as a trivial matter. (I digress to point out however that it is hugely improbable that it could have been a mere oversight. Indeed, if she had disclosed this narrative to those consulting with her on behalf of the defendant, the plea would have been framed very differently.)

[126] She was adamant that when Warrant Officer McIntyre and Captain Van Niekerk had arrived on the scene Mr. Peter had been pulled out of the van by the plaintiff at that point. She then corrected herself and suggested that he was halfway inside the van holding on the outside with his back with his other half out of the van. He had not yet been locked into the back, so she explained, and in fact they were still struggling with him when the back-up arrived.

[127] Put to her that Warrant Officer McIntyre in his police statement said that when he arrived on the scene Mr. Peter was already in the back of the patrol van and highlighting his disavowal that he had rendered any assistance purportedly to have put him into the van, all she could say was well that was his version and that was how he experienced it. She was reluctant to concede that his

statement contradicted her own testimony in this regard.

[128] It was pointed out to her that the premise had been put to the plaintiff’s witnesses, well at least to Ms. Peter, that the

plaintiff had actually torn Warrant Officer McIntyre’s buttons from his shirt, which was also contrary to what he said in his police statement.

[129] Several contradictions between her oral testimony and her own police statement were also pointed out to her. She suggested in this

respect that the court should prefer her testimony given at the hearing four years later as representing the more reliable account

than what she had articulated in her police statement made on the same day of the plaintiff’s arrest.

[130] She could not give a proper account for the delay in charging the plaintiff at the police station after having arrested her two hours earlier. She was not even prepared to commit to how long it would have taken the police to reach the police station by vehicle

from the scene of the plaintiff’s arrest, justifying Ms. Du Toit’s criticism of her as an evasive witness.

[131] She acknowledged her realization at the police station that the plaintiff was barefoot although she claims to have not seen any injuries to her feet or any blood on them. She did not wish to be drawn on the suggestion that it was improbable that she would not have

noticed these injuries given that the plaintiff was barefoot at the time. She clarified that she had recorded that the plaintiff was “free from injuries” in her statement because she verily believed that she did not have any injuries neither did she in fact see any.[33] She firmly denied having caused the injuries to the plaintiff’s feet.

[132] She denied that either she or Warrant Officer McIntyre had dragged the plaintiff to the van. She says that they lifted her and placed her inside the van. According to her the plaintiff was taken there ever kicking and resisting.

[133] She rejected the plaintiff’s version that her family had to make their own assumptions about where the police had removed her

to. She claimed for the first time under cross examination that she had spoken to the girlfriend of Mr. Peter and told her that he was going to be detained at the Humewood Police Station. She could not explain why this had not been put to the plaintiff witnesses.

[134] She denied telling the plaintiff that she could limit her rights and disagreed that there had been any negative interaction with Lieutenant-Colonel Houwlands or that he had threatened the plaintiff with gestures as if he was going to hit her.

[135] Further, and generally, she denied the premise of the plaintiff’s case put to her and confirmed her insistence that she had arrested her because she had interfered with her arrest of Mr. Peter. She could not explain why it does not appear from her police statement that she had warned the plaintiff repeatedly not to interfere, failing which she would arrest her.

[136] Asked under cross examination to account for why she had pepper sprayed the plaintiff, she asserted that it was just for minimal force that she used it. (I have already noted above that in the defendant’s plea any assault at all had been placed firmly in contention.)

The evidence of Sergeant Mananteau Baadjies:

[137] Sergeant Baadjies testified that he came on duty at the Humewood police station on the evening of the 7th of December 2016. He was involved in charging the plaintiff. At the time of doing so the only documentation available in the docket

(apart from the instructions written in the police the diary), were the statements of the complainant and one of the police members.[34] Having read these, he made a decision to charge her and Mr. Peter and was further satisfied that a prima facie case existed to do so.

[138] He used the standard warning statement template. He read the plaintiff her rights, read the statement back to her after she made

it, and commissioned it in her presence. The narrative contained therein was obtained from the plaintiff herself.

- [139] He noticed during the interview with the plaintiff that she had no shoes on and that she had bruises on both her feet. He recorded this on the warning template, and what she had told him concerning how she sustained these injuries, viz, that “during the arrest the police stamped (her) foot”.
- [140] He acknowledged that the entries in the police record to the effect that both the plaintiff and Mr. Peter were free from injury was not a correct assertion. He could say so concerning Mr. Peter as well since he also formally charged him and noted injuries sustained by him as well.
- [141] He remembered fetching certain things for the plaintiff at her home after taking her statement, such as clothing, something to eat and a pair of shoes. The food was in the package brought from the plaintiff’s home.[35] The medication was asked for but her family at home could not find it.
- [142] As far as he was concerned when he charged the plaintiff, further investigations were envisaged and still outstanding which entailed the taking of statements from other people in Campbell Street, most notably the caretaker at no. 23.
- [143] He also completed the bail application form. The information contained therein was mostly obtained from the plaintiff but it was

his opinion that no further discovery was necessary. According to him the plaintiff did not ask to be released on bail but he conceded that there could have been no objection to her being released on such a basis. He acknowledged the probability that if she had been charged on a separate docket, the further investigation deemed necessary essentially concerning Mr. Peter, would not have been a reason for her separate appearance in court to have been delayed from the Thursday until the Friday.

The defendant’s failure to call available witnesses:

- [144] Conspicuous by its absence was any testimony on behalf of the defendant by Constable Van Reenen who was focal to the issues of the arrest of the plaintiff. Indeed, he was the person who opened the docket in which the plaintiff and Mr. Peter were charged under CAS 109/12/2016.
- [145] Further both Captain Van Niekerk and Warrant Officer McIntyre who were on the scene and anticipated to have supported Sergeant Oliver’s premise of a near manic plaintiff assaulting her on her version and hindering the police in their work, entailing the arrest of a supposedly equally “crazy violent” Mr. Peter, did not testify.
- [146] Although the plaintiff exonerated Lieutenant-Colonel Houwlands of any unbecoming behaviour or threats uttered toward the plaintiff

after her arrest, he too failed to give any personal account of his obvious interaction with the plaintiff at the Humewood Police Station on the morning in question. (On any one's account in my view, the sight of a suspect even just suffering from the effects of being pepper-sprayed, screaming, and shouting on Sergeant Oliver's version, should have caused him as a commanding officer to take an interest in her situation for a very different reason than to reprimand her for making a noise).

[147] Likewise, no other authoritative members stepped forward to vouch for the state of the police cells or the disposal of decent sleeping material to the plaintiff or essentially concerning how she was treated by the members whilst under police custody to gainsay her

evidence as to her overall experience of her incarceration as being uncomfortable, isolating, belittling and anxiety provoking.

[148] Lastly "Robert" from I-Patrol certainly needed to give an account for his supposed necessary involvement at the scene of arrest, even if only to explain, on Sergeant Oliver's version, why he had stood poised to pepper spray Mr. Peter before the latter broke the top off of his spray device.[36] He would also notably have been able to support the defendant's premise (on which the latter's entire defence hinged) of a dangerous situation and two supposedly out of control suspects.

[149] The trial court was correct in my view to infer that the only reason for the defendant's failure to call at least Constable

Van Reenen, Warrant Officers McIntyre and "Robert" is that their evidence would be contradictory to Sergeant Oliver's.

The authorities concerning the failure by a litigant to call an available witness are trite. Evidently all of the witnesses referred

to above were available to testify and indeed no basis was laid during the trial to suggest that any one of them were biased, hostile

or unreliable.

The significance of the police statements:

[150] The police statements were contradictory in a number of respects to the oral testimony of Sergeant Oliver that went to the essential issue of whether the plaintiff had made herself guilty of interfering in their arrest of Mr. Peter and whether she assaulted Sergeant Oliver in the manner contended for by her.

[151] It was not an unreasonable expectation that the statements in the two police dockets heralded what those witnesses might say if called to testify, hence it was permissible for the parties' respective legal representatives to have referenced them during cross examination on that assumption. Indeed, when holding a police officer to account in their official capacities, one should certainly be able to set store by what they say concerning the

performance of their duties in a formal statement. That they are true, however is not necessarily so. In this instance, for example, the plaintiff by her contrary evidence did not accept every detail in them which meant that the defendant was obliged to call the relevant officers to verify their supposed accounts insofar as their anticipated versions differed from the plaintiff's and to subject themselves to cross examination. Since they did not testify, the adverse portions of their accounts relative to the issues in dispute at the trial, remain of a hearsay nature.[37] Conversely allegations in them consistent with the plaintiff's account support her credibility.

[152] The statements of Sergeant Oliver and Constable Van Reenen were however admissible for a different objective, namely, to serve as documentary evidence of the official accounts given by each of them regarding why and how the plaintiff was arrested. Sergeant Baadjies, for example, based his decision to charge the plaintiff and Mr. Peter predicated on what their sworn affidavits say. The prosecutor also declined to prosecute because of contradictory statements in the docket which necessarily formed part of the important evidentiary material.[38]

Discussion:

[153] Having regard to the respective credibility of the witnesses, the trial court cannot be criticised for concluding that Sergeant Oliver's evidence was contradictory and unreliable, but having done so it is difficult to fathom why it did not consider it

necessary to adopt the same caution in relation to the analysis and evaluation of the same evidence essentially, applying it to the assault claim.

[154] Indeed, having found no justification for the arrest on the very same facts, any physical interference with the plaintiff's

body was equally required to be examined under the same prism.

[155] I have dealt above with some of the concerns of this court regarding the trial court's wholesale rejection of the plaintiff's testimony in respect of the assault claim. Apart from these examples, I cannot agree that her testimony was subpar or lacking in any respects. To the contrary, she was a credible witness whose evidence, despite lengthy and rigorous cross examination remained consistent, in particular in respect of the material issues in dispute between the parties.

[156] The trial court was certainly correct to highlight contradictions between her evidence and those of her witnesses, but to my mind these were immaterial and went to peripheral issues of no moment.

[157] Their differences in account by the plaintiff and her siblings was to be expected given that each perceived the incident from their own unique perspectives in a fast moving, chaotic, scene that evidently was over just as soon as it had begun. The plaintiff cannot be condemned, for example, for stating that she witnessed her brother being struck with a fist

whereas he said he was merely pushed on his chest. She viewed the attack on him while his back was turned to her. For the rest, in respect of the discrepancies that were exhaustively held up to the plaintiff and her siblings under cross examination, these were minor immaterial side shows, as

it were. In essence everyone including the defendant were agreed that the police were challenged for their overreach and “brutality”

in handling the arrest of Mr. Peter, which quickly erupted into a scene.

[158] The plaintiff remained consistent in respect of her version of the significant events. She easily made concessions where these were due, gave a sober and unexaggerated account of the incident, and was evidently not beaten down by lengthy and demanding cross examination. The plaintiff siblings too were correctly not at all criticised for their demeanour or branded as unreliable or untruthful witnesses.

[159] Ironically the most random astonishing thing that Ms. Peter revealed (evidently quite unexpectedly so) was her coincidental meeting with “Sharkey” after the plaintiff’s arrest that morning. This revelation at first blush appeared incredulous, yet Sergeant Oliver felt herself obliged to give account for her presence at his home when she testified later on. This to my mind confirms, inter alia, the intensity with which the family were pursuing options to get the plaintiff released on bail; Ms. Peter’s critical recall of the day’s most unusual events; and the sharpness of her observations in particular. Further, and more importantly, even this chance encounter between Ms. Peter and Sergeant Oliver after the plaintiff’s arrest, confirms that there was nothing inherently improbable in the plaintiffs’ witnesses accounts.

[160] There was further corroboration to be found in the fact that the plaintiff suffered injuries (as did Mr. Peter)[39] whilst in police custody (vitaly confirmed by Sergeant Baadjies in his testimony) which was consistent with the reports of the general medical practitioners and more especially the professional opinions of both clinical psychologists. It is hard to fathom why the trial court imagined that the medical evidence did not support the plaintiff’s case or deduced that her injuries were inconsistent with the account given by her of the events of the day in question.

[161] The emotional trauma suffered by her, the symptoms of which were still in evidence closer to the trial according to the professionals, provides significant corroboration that the plaintiff suffered a traumatic event. Indeed, the effect of the psychologists’

agreement is an acceptance that the plaintiff was not malingering in this respect and that the emotional trauma to her was very real, and further that there was a causal link between her symptoms and a significantly traumatic event that had, on the probabilities,

occurred in fact.

[162] The significant confirmation by Sergeant Baadjies that the plaintiff was barefoot and had injuries to both her feet casts serious doubt on the entries in the official police records, firstly, by Constable Van Reenen to the effect that the plaintiff and Mr. Peter were free of visible injuries when they were brought to the police station and, secondly, by Sergeant Oliver (despite her

admission made latterly at the trial that she had pepper sprayed the plaintiff) who declared in her sworn statement that the plaintiff was free from injuries. It was common cause that the plaintiff was barefoot when she was detained at the Humewood Police Station and it is thus highly improbable that Constable Van Reenen and Sergeant Oliver would not have seen the clearly visible injuries on both her feet. The fact that they instead vouched for a “free of injury” declaration in respect of the plaintiff and Mr. Peter (despite all that on Sergeant Oliver’s version had happened at the scene of the arrest concerning both of them) raises a serious question mark over their honesty and the veracity of Sergeant Oliver’s testimony. It is also not hard to find that they contrived a case against the plaintiff based on their clearly false account of the events to cover their tracks, which served effectively to pull the wool over Sergeant Baadjies’ eyes and convince him that there was a real supposed basis to charge the plaintiff and to hold her in police custody under the pretext that she was to be prosecuted for the offence.

[163] Sergeant Oliver was ultimately the only witness who purported to countervail the plaintiff’s version pertaining to the events

leading to her assault and arrest and detention. I accept Ms. Du Toit’s submission regarding her demeanour as a witness that she cut a sorry and defensive figure in the witness box. Her evidence can rightly be criticised as contradictory, confusing, evasive, and improbable. She was an exceptionally poor, unreliable, and downright dishonest witness.

[164] I am satisfied that the plaintiff’s evidence was the most probable, credible, and reliable when compared with the false and contradictory evidence tendered by Sergeant Oliver.

[165] I am further satisfied on the acceptable proven evidence that the plaintiff made out a case for both claims for assault and malicious

arrest. This is a clear case of a police officer having made improper use of the legal process to deprive the plaintiff of her liberty on the back of a contrived case, in the process violating her dignity and other aspects of her personality.[40]

[166] In my view it is unnecessary to comb through every other alleged nuance of the illegality of the plaintiff’s arrest and detention as relied upon by her which are in a sense eclipsed by the finding that the arrest was malicious. The arrest on this basis conduced to the overall harm and was the sole cause of it. If the defendant had been a private person who had instigated the arrest one might be interested in the defence raised through Sergeant Baadjies’ testimony that there was a prima facie case made out in the founding statements provided to the police that exonerated the Minister from any claim that there was not a reasonable basis upon which to have justified charging the plaintiff with an offence, but he

was equally on the hook for the delicts of Sergeant Oliver and Constable Van Reenen as well, both of whom made themselves guilty of abusing the legal machinery to have arrested the plaintiff and by necessary implication were responsible for her continuing detention (and its full fallout) as well.

[167] On the issue of bail, the plaintiff would certainly have been entitled to be released from detention pursuant to the provisions of section 59 (1) (a) of the CPA before her expected first court appearance, a concession readily made by Sergeant Baadjies.[41] It is unnecessary to consider whether his approach in not releasing her on police bail (and delaying her appearance by a further day to allow for further investigation) was objectively justifiable. His rationalisation for detaining her further after having charged her is cancelled out by the Minister's vicarious liability for the machinations of Sergeant Oliver and Constable Van Reenen who projected a false premise that condemned the plaintiff to her unfortunate fate that can only be ameliorated by a damages award.

[168] I am coincidentally not convinced that the plaintiff unequivocally asked to be released on bail from police custody although her family were certainly keen to have her released from custody immediately if that was possible. The plaintiff's testimony in this respect was quite tentative and she conceded that she probably did not force the issue with Sergeant Baadjies. I would have trouble finding on the probabilities that he would have purposely ignored a proper request for bail. In my view, consistent with our recent finding in *Minister of Police v Fry*,[42] a police officer is not required to consider the release of a detainee on bail pending trial unless there is a request in this respect.[43] The plaintiff's lack of knowledge of what she was required to do in the circumstances however certainly does not operate to exonerate the defendant from liability for the full extent of her detention in the present scenario.

[169] In the result the plaintiff's cross appeal must succeed. The corollary of that is that the defendant's appeal in respect of the costs order on claim 1 becomes academic.

Quantum:

[170] On the issue of quantum in respect of the assault claim, the amount held up by the plaintiff as adequate compensation is in the sum of R200 000,00. Ms Du Toit referenced the police's unacceptable taking of the law into their own hands and breach of their constitutional mandate which behoves them to treat citizens with proper respect. Although the plaintiff's physical injuries were not of a serious nature or with any serious sequelae, Ms. Du Toit fairly submitted in my view that any form of invasion of a person's physical integrity no matter how trivial is indefensible in any civilised society particularly by police officers who are enjoined to protect individuals against such invasions of their physical integrity.[44]

[171] The extent of the emotional trauma suffered by the Plaintiff was however more serious and left an indelible mark on her.

- [172] Instead of offering medical attention to the plaintiff during her detention for the physical suffering caused at their hand, Sergeant Oliver and Constable Van Reenen rather attempted to cover up the fact that she had injuries by making patently false entries in the occurrence register and in their written statements. To my mind it is especially cruel that they left her in a police van or in transit somewhere to being processed at the charge office for a lengthy period after having pepper sprayed her and without access to running water to ameliorate the painful effect of it at least by being able to flush her eyes.
- [173] A further aggravating feature is that she was assaulted in full view of her family members and several members of the public.
- [174] The point is further well taken by Ms. Du Toit who appeared for the plaintiff that she was assaulted and maliciously arrested evidently to assuage Sergeant Oliver or Constable Van Reenen's wounded vanity. Clearly they took umbrage at being admonished by the plaintiff and her brother for assaulting Mr. Peter which is what sparked the flame and ultimately led to her unjustified assault and malicious arrest and detention.
- [175] I agree that taking into account these aggravating features and relevant case law contended for that an award of R200 000.00 in respect of general damages and contumelia is a suitable and equitable award to ameliorate the disgrace, humiliation, and pain and suffering that was brought to bear on her

in the peculiar circumstances of this matter.

- [176] Concerning the award for malicious arrest, it is a trite principle that malice is a basis for an increased damages award.[45] Ms. Du Toit did not however argue for an adjustment of the award made by the trial court for this claim (even assuming this court's

finding that the arrest and detention of the plaintiff was malicious) except to make allowance for the plaintiff's special damages related to the cost of psychotherapy. These were agreed between the psychologists at a cost of R1 200.00 per session, ten of which were considered necessary and reasonable to remediate the emotional harm suffered by her. Some provision ought also to be made for the suggested three sessions with a psychiatrist to assess the plaintiff's needs for pharmacotherapy. Ms. Mochela in her report costed a single session at R1 600.00 at the time.

- [177] Mr. Madokwe contended that the award of the trial court in respect of general damages for claim 2 was "grossly excessive" but this submission was evidently made on the premise that no improper motive or malice was proved by the plaintiff. Ms. Du Toit submitted that significantly, when the issue of quantum was raised in the plaintiff's heads of argument and during argument in the court below, he made no opposing submissions in his heads of argument, nor during argument in court.

- [178] She referred this court to the same comparative awards referenced in the court below which confirm to my mind that the award based on the trial court's finding of at least wrongful and unlawful arrest and detention are not off the mark and fairly represent the duration, circumstances, and unique features of the plaintiff's incarceration. Indeed, it is

important that a damages award for unlawful arrest is fair and appropriate in the factual situation of each matter and that it reflects the importance of the right of personal liberty of members of society and the seriousness with which an arbitrary deprivation of personal liberty is or should be viewed by our courts. The primary purpose of a damages award is indeed not to enrich an aggrieved party but to offer him or her some consolation for his or her injured feelings. It is also necessary to reiterate that courts take a serious view of claims for malicious proceedings by awarding substantial damages.

[179] In this instance the plaintiff was detained for just over two days under what she described as appalling conditions that caused her to experience emotional distress and led to her suffering symptoms of post-traumatic stress disorder. Even the belated kindness and consideration shown by Sergeant Baadjies in his sensitive treatment of her nine hours after her arrest could not make up for her shocking experience at the hands of the responsible police officers. Her psychological impairment as a result of the incident

was quite significant. She was arrested in full view of members of the public for offences that she did not commit and which had no lawful basis. Even after her arrest, there was a substantial delay in processing her through the police registers and an even longer hiatus before she was formally charged and able to engage with someone about her uncertain fate. No apology has ensued and indeed the Service had failed to prosecute her claim of assault against Sergeant Oliver and her colleagues to this day. One can appreciate her experience of feeling like a “nobody” and being isolated from her next of kin who tried by all means to assist from their perspective.

[180] I am satisfied that these unfortunate circumstances together with a consideration of similar awards to which Ms. Du Toit referred the court, justify an award of R200 000.00 for general damages in respect of this claim.

[181] In the result the defendant’s ground of appeal aimed at the supposed excessive award in respect of claim 2 also falls to be rejected.

Interest on the awards:

[182] Ms. Du Toit noted that in respect of the interest of the awards claimed, the court below had accepted submissions made on behalf of the plaintiff (again not challenged by Mr. Madokwe at the time) that it was appropriate for the court to have granted interest from date of demand to date of final payment in keeping with the court's discretion to award

interest in respect of unliquidated debts from the date of demand. Indeed, this is made provision for in section 2A (2) (a) of the Prescribed Rate Of Interest Act^[46] which lays down the general principle that interest accrues from the date of demand or date of service of summons whichever is the earlier date. It is open to a court, in fixing the date from which interest is to run, to give effect to its own views of what is just in all the circumstances. It had been submitted on behalf of the plaintiff that this was a proper case for the court below to have invoked that power. Whilst it is unfortunate that the court below did not indicate its reasons for the exercise of its discretion,

the inference is irresistible that it acted upon the suggestion of the plaintiff's legal representative[47] in this respect and upheld his argument.

[183] I am satisfied that in doing so it acted as it was entitled to in accordance with the power bestowed on it by section 2A (5) of the Prescribed Rate Of Interest Act, and that the granting of interest

from the date of demand to date of final payment fell within the range of permissible options open to it. I am not inclined to

interfere in this respect and intend to adopt the same approach in respect of interest on claim 1 which naturally runs together with claim 2.

Costs of Suit:

[184] The same applies with regard to the granting of costs by the trial court on the attorney and client scale. Comprehensive submissions were made on behalf of the plaintiff at the trial to persuade it to exercise its discretion on such a basis given the egregious behaviour of the police. Again, Mr. Madokwe made no opposing submissions in his heads of argument nor during argument in court, to counter the plaintiff's contention that a punitive costs award (as claimed in the plaintiff's particulars of claim) was suitably justified. The trial court can again be criticised for not stating the reasons underlying the exercise of its discretion in favour of the plaintiff on this score and stating perfunctorily that the costs should "follow the outcome," but at the end of the day it appears to be obvious that the trial court was taken in by the submissions made on behalf of the plaintiff

in this respect and was satisfied that a proper case had been made out for cost on the basis prayed by the plaintiff.

[185] I agree with Ms. Du Toit that the trial court was fully justified in granting costs on a punitive scale when taking into consideration the disgraceful conduct of Sergeant Oliver and her colleagues on the day in question. It follows that this ground of appeal raised by the defendant also falls to be rejected.

Order:

[186] In the result I issue the following order:

1. The appellant's appeal is dismissed, with costs.
2. The respondent's cross-appeal is upheld, with costs.
3. The order of the court below is set aside and substituted with the following:

"(a) The defendant is ordered to pay damages to the plaintiff in the sum of R200 000.00, in respect of Claim 1.

- (b) The defendant is ordered to pay damages to the plaintiff in the sum of R196 800.00, in respect of Claim 2.
- (c) Interest is payable on the abovementioned amounts at the prescribed legal rate calculated from date of demand (16 March 2017) to date of final payment; and
- (d) The defendant is to pay the costs of the action on an attorney and client scale within fourteen (14) days after date of taxation.”

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE,

L RUSI

DATE OF APPEAL: 28 October 2022

DATE OF JUDGMENT: 11 May 2023

Appearances:

For the Appellant: Mr. Madokwe instructed by Lulama Prins Inc., Grahamstown (ref. Ms. L Prins).

For the Respondent: Ms. Du Toit instructed by Peter McKenzie c/o N N Dullabh & Co, Grahamstown (Mr. N Dullabh).

- [1] The amount claimed in this regard was in the sum of R398 600.00 comprising of general damages for the malicious arrest and

detention, discomfort, emotional distress and contumelia, as well as special damages for her future psychotherapy and pharmacotherapy treatment costs in the sum of R23 600.00.

- [2] The full name of this person was Robert Brouwer according to the plaintiff’s counsel. Evidently I-Patrol is a local

private security service operating in the area where the plaintiff and her family lived at the time.

- [3] I assume that the defendant was here referring to the period of pre-trial detention which extends from arrest to the earliest moment when an arrestee is or can be released on bail or warning by the court, if not earlier by the police.

- [4] In terms of section 39 (3) of the CPA the effect of an arrest is that a person is in lawful custody until he or she is lawfully

released from custody. The sub-section however deals only with the general legal consequences of an arrest, but it follows axiomatically that any

subsequent detention which is not sanctioned by the CPA cannot be legalized by section 39(3). A plaintiff must however allege and

prove why he or she contends that the detention is not sanctioned by the CPA thereby rendering it unlawful. See *Jacobs v Minister of Safety and Security* (CA 327/2012) [2013] ZAECGHC 95 (23 September 2013) at para [40]. In casu the plaintiff's case is that her arrest was a putative one from the outset not ever having warranted the need for her to have been arrested or detained. The provisions of section 50 (1) of the CPA concern themselves with the procedural imperative that an arrested person be brought as soon as reasonably possible to a police station and, unless the situation does not permit for him to be released from police custody under one of the recognized bases, to be brought before a lower court as soon as reasonably possible, but not than 48 hours after the arrest.

[5] The defendant baldly denied the plaintiff's allegation that she never appeared before a magistrate on the charge and put her to the proof thereof. The defendant however ultimately tendered no evidence to counter hers that she was released without appearing before a lower court on any charge. This plaintiff's evidence in this respect is supported by an endorsement on the face of the police docket by a prosecutor of "Nolle Prosequi." This significant occurrence goes to the element of the termination of the "proceedings" entailing her arrest, being charged, and detained in police custody until she was told around 13h00 on 9 December 2016 that she could leave. It endorses her claim of the unreasonableness of the proceedings that morphed into nothingness ultimately and gives credence to her claim that her arrest was a farce from the outset. (See *Thompson v Minister of Police*

[1971] 1 All SA 534 (E) at 539).

[6] This is not strictly correct. His report reads: "Needs J88. Stepped on foot Bumped against wall Whole body pains Scratch mark on foot Emotionally upset."

[6] This is not strictly correct. His report reads:

"Needs J88.

Stepped on foot

Bumped against wall

Whole body pains

Scratch mark on foot

Emotionally upset."

[7] The second doctor co-incidentally also noted that the plaintiff was "traumatised".

[8] *Baring Eiendomme Bpk v Roux* 2001 (1) All SA 399 (SCA).

[9] 1984

(4) SA 437 (ECD) at 440D – 441A

[10] 1974

(4) SA 420 (W) at 426 – 7.

[11] 1980

(2) 234 (W).

[12]

[2002] ZASCA 98 (6 September 2002)

[13] *Supra*, at para [5]

[14] See unreported judgment of Lowe J in *Khwatshana v Minister of Police*, Makhandia Case No. 1804/2014, at paras 47 – 48.

[15] Ms. Mochela consulted with the plaintiff two months after the incident and Mr. De Jager almost three years after the incident.

[16] The effect of a joint minute is to detail the basis upon which the experts agree, or disagree as the case may be, and in doing so they narrow the issues in dispute. This generally renders their oral testimony at a trial unnecessary if the opinions stated therein are at least cogent.

[17] At worst for her, her legal representatives failed to request an amendment to bring her particulars of claim in line with what the experts had agreed. In my view, however this was unnecessary given the corresponding experts' joint minutes and agreement on the salient issues which the parties were happy to accept.

[18] See LAWSA, 3rd Edition, Volume 28 (1), at paragraphs 38 – 42 under the heading: “Malicious Arrest or Imprisonment” and the

comprehensive list of established authorities referred to therein. This excerpt relates to paragraph [50] – [54] of this court's judgment above.

[19] *Minister of Justice & Others v Tsose* 1950 (3) SA 88 (T) at 92H – 92A. This is based upon the principle that all that is necessary for a successful reliance upon section 40 (1) (a) of the CPA is the observance of behaviour that is *prima facie* criminal.

[20] *Newman v Prinsloo* 1973 (1) SA 125 (WLD).

[21] Constable Van Reenen was the primary complainant and the claimed assault emphasised in his A1 statement was Mr. Peter's alleged assault of himself.

[22] If one accepts the plaintiff's evidence, Mr. Peter was already in the van and therefore when the plaintiff and her brother involved themselves in challenging the police, each for their own reasons, there could not have been any wilful obstruction of the police in their duties thereby. See, for an example of the court's approach to be adopted, *Smith v Burkett* 1919 EDL 203 at 209 especially. Mr. Madokwe invited the court to find that even on the plaintiff's own version that she patted Sergeant Oliver on her shoulder to release her foot, this constituted conduct that was *prima facie* criminal. The submission is farcical because the plaintiff says

she touched her shoulder to encourage Sergeant Oliver to

release her foot. It was not to interfere with the exercise of her duties. Resistance to the police carrying out their duties or “the rescue” of a suspect in the process of being arrested must be an overt, forcible act.

- [23] It was maintained throughout the trial that the plaintiff had no relationship with Mr. Peter neither did she know him. It is most improbable, on the defendant’s case that the plaintiff interfered with his arrest, that she would have gone to bat for him if she had no affinity with him. Her version that all of them were appalled by the police’s brutality to him and involved themselves only to make such a complaint, is the more plausible.
- [24] The plaintiff referred to Mr. Majola as her “brother,” although he is evidently a cousin of hers. I will refer to him as a brother in describing his involvement, her female cousin (Ms. Aganathi Peter) as her “sister” and the pair of them as her “siblings.”
- [25] Mr Majola says that he was just shoved on his chest, but his back was to the plaintiff at the time.
- [26] From the records comprising the trial bundle it is evident that the prosecutor had decided not to prosecute, but it is not clear at what time such a decision was taken. On the probabilities though it appears that the plaintiff did not formally appear in court as maintained by the defendant. On the defendant’s case that the plaintiff’s arrest was lawful, even making allowance for the contrary position taken by the prosecutor that there was no reasonable or probable cause for Sergeant Baadjies to have charged her, the time was of the essence as the 48-hour pre-trial detention outer limit would have run out around ten thirty that morning. Still the plaintiff was not informed that she was free to go. Instead, the restraint on her freedom was assumed justified, or by default continued to operate to her disadvantage, because of the putative charges against her.
- [27] This seemed a random name but Ms. Peter when she testified also happened to mention him as a person from the neighbourhood to whom she had gone to after the incident to ask for advice regarding the obtaining of legal representation for the plaintiff. When at his home she quite co-incidentally encountered Sergeant Oliver present there in his bedroom.
- [28] Mr. Madokwe appeared for the defendant both at the trial and upon appeal.
- [29] These were clearly peripheral issues that were exhaustively the subject of the defendant’s cross examination of the plaintiff and her “siblings” at the trial.
- [30] Much of the examination turned on these differences. In my view narratives taken down by medical experts are often loose,

without forensic acumen, and have little regard for their affect upon the evidence. This is why it is essential for parties in their pre-trial agreements concerning medical reports handed in as evidence to reflect on how the experts have recorded their summaries of significant events, or concerning collateral provided by persons other than the patient, to ensure that it presents

correctly. Ideally legal representatives when filing joint minutes and reports should themselves filter the background information and reserve their positions if necessary regarding anything contentious in the underlying summaries provided. In any event discrepancies between these narratives and oral testimony can hardly condemn litigants where they declare that the background stated therein is not 100% correct. It is one thing to hold up differences in a witness' oral testimony to a sworn statement made by him or her, but quite another to present a specialist's account, often relaying hearsay matter in itself, as if it were a sworn declaration and to measure the credibility of a subject witness against it.

[31] There were at least two children from the plaintiff's home who witnessed the fracas outside that day.

[32] In explaining her admitted interaction with "Sharkey" after the arrest of the plaintiff Sergeant Oliver purported to explain that they had searched his "drug post" and several other places before the afternoon on the same day. She was obviously at the charge office at 12h30 to have prevailed upon the plaintiff to sign her SAP 14, so the inference is irresistible that the processing of the plaintiff was not a priority and left until after this search (see par [123] below.)

[33] Having conceded that she used pepper-spray on the plaintiff, one wonders why she would not have acknowledged this at least as it also amounts to an injury and certainly one requiring immediate attention to alleviate the discomfort to one who is a victim of being affected by pepper spray. She ought have noted this as an injury even if "Robert" had pepper sprayed the plaintiff, but more so if she had done so herself, on her belated version.

[34] I assume that this is Constable Van Reenen's because it is the only officer's statement other than Sergeant Oliver's

that was obtained earlier that day.

[35] There was a dispute between his evidence and Ms. Peter concerning who brought what to the station but in my view nothing turns on this or impacts their credibility. Both were testifying several years after the incident.

[36] See the principle established in *Minister of Police v Ewels* 1975 (3) SA 590 A at 597A – B to the effect that a police on duty, if he witnesses an assault, has a duty to come to the assistance of the person being assaulted. His failure to do so renders the minister liable for damages flowing from his omission to act in the circumstances. This also accords with the constitutional mandate of a police officer pursuant to the provisions of section 205 (3) of the Constitution of the Republic of South Africa, repeated in the preamble to the South African Police Service Act, No. 68 of 1995.

[37] Mr. Madokwe incorrectly asserted that they stood as corroboration of Sergeant Oliver's testimony.

- [38] A perusal of what evidentiary matter made up the case against the plaintiff is essential to a court's careful scrutiny in every case where the lawfulness of an arrest is under consideration. The essential power of the police to arrest as a critical tool in the Service's arsenal to fight against crime always stands counterposed to that of a person's constitutional rights of personal liberty and dignity. A court is expected to carefully scrutinize in each case whether a prima facie infringement of these rights is legally in order, especially having regard to relevant documentation in which official accounts of the incident are journalised. The fact that Sergeant Baadjies was persuaded that good cause existed to charge the plaintiff on the basis of what the officers recorded in their statements demonstrates just how effectively Sergeant Oliver and her partner used the machinery of the arrest and detention of the plaintiff for their own nefarious purposes. The fact that the prosecutor declined by the Friday to prosecute because of contradictory statements garnered from more people at the scene is a further objective indicator of the absence of reasonable or probable cause ever having existed in the first place, except as was falsely projected by the arresting officers in their police statements.
- [39] The fact of these gives credence to the peripheral issue that the police were manhandling Mr. Peter. On the defendant's version however, he was supposed to have been the aggressor.
- [40] *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA).
- [41] The suggestion flirted with by Mr. Madokwe that the plaintiff had made herself guilty of public violence which would have excluded her from consideration for police bail is somewhat mischievous.
- [42] (CA250/2019) [2020] ZAECGHC 150 (6 December 2020)
- [43] At paras [152] – [160]
- [44] See unreported judgment of Plasket J as he then was in *Peterson v Minister of Safety and Security* (1173/2008)
- [2009] ZAECGHC 65 (23 September 2009) at paras 1, 21, 26, 27 and 28.) See also *Chirindza Ernesto Guidone v The Minister of Safety and Security*, Case no 2008/37480 (GLD, Johannesburg) dated 11 June 2015 at paras 35 and 36 and *Martins v Minister of Police* (1400/2011) [2013] ZAECPEHC 27 (4 June 2013).
- [45] *Birch v Ring* 1914 TPD 109. See also *Louw & Another v Minister of Safety and Security & Others* 2006 (2) SACR 178 (T).
- [46] Act No. 55 of 1975.
- [47] The plaintiff was represented at the trial by her attorney, Mr. McKensie, who filed detailed and comprehensive heads of argument in respect of this issue.

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