

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES |

Case Number: **2021-56553**

13 March 2025

DATE

A handwritten signature in black ink, which appears to be "M. J. M. J.", is written over a black rectangular stamp.

SIGNATURE

In the matter between:

MARINA VENETTE WILSON

PLAINTIFF

and

MINISTER OF POLICE

FIRST DEFENDANT

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

SECOND DEFENDANT

ORDER

Judgment is granted in favour of the plaintiff against the first defendant, the Minister of Police, for:

- (1) Payment of the amount of R400 000.00;

- (2) Interest on the amount of R400 000.00 from date of judgment to date in full at the rate prescribed in the Prescribed Rate of Interest Act, from time to time;
- (3) Costs of suit, to be taxed on Scale B.

JUDGMENT

D MARAIS AJ

The plaintiff's case as pleaded

- [1] In this action, the plaintiff, Ms Marina Venette Wilson, instituted action against the defendants, the Minister of Police, as first defendant, and the National Director of Public Prosecutions, as second defendant, for payment of damages in the amount of R500 000.00 for unlawful arrest and detention.
- [2] The plaintiff's claim against the Minister of Police is based on the allegation that on 19 November 2020 she was unlawfully arrested without a warrant of arrest by members of the South African Police Service, acting within the course and scope of their employment with the Minister of Police.
- [3] It was also alleged that when the plaintiff was arrested the relevant member of the SAPS did not apply his mind or failed to exercise his discretion when arresting the plaintiff.
- [4] The plaintiff alleged that the arrest was unlawful because the plaintiff did not commit the offence of "violation of a protection order".
- [5] The plaintiff then, somewhat paradoxically, also alleged in the alternative that if the plaintiff's arrest was justified, then her detention was unlawful in that the arresting officer "knew that there were no reasonable grounds to arrest and detain the plaintiff".

- [6] In the further alternative, it was pleaded that if the plaintiff's initial arrest was lawful, then the senior police official on duty or the investigating officer unlawfully failed to release the plaintiff on warning in terms of the Criminal Procedure Act, 197 ("CPA").
- [7] The case against the National Director of Public Prosecutions (NDPP) was based on an allegation that the public prosecutor failed to study the information placed before him or her at the plaintiff's first appearance in the Magistrates' Court on 19 November 2020, failed to study the police docket, failed to inform the court that there were no reason to further detain the plaintiff and failed to consent to bail.
- [8] A further allegation against the member(s) of the SAPS, as an alternative to the allegation against the NDPP in paragraph [7] above, was that the SAPS failed to provide necessary information to the public prosecutor during the hearing of the matter in the Magistrates' Court, resulting in the refusal of bail and the continued detention of the plaintiff after the first appearance in court.
- [9] It was finally pleaded that the case against the plaintiff was remanded until 26 November 2020, when she was released on bail, and that during July 2021 she was acquitted on a charge of contravening a protection order. Regarding the latter allegation, it was common cause that the plaintiff was discharged after the State case in terms of section 174 of the CPA.

Claim against NDPP abandoned

- [10] At the commencement of the trial of this matter, the plaintiff abandoned the claim against the National Director of Public Prosecutions. As will be evident hereunder, the abandonment of the claim against the NDPP was correctly done, as on the facts of this matter, the claim against the NDPP was completely unjustified.

Discussion of the plaintiff's cause of action

- [11] The plaintiff's claim against the Minister of Police is one of damages for the unlawful deprivation of her freedom, resulting from her unlawful arrest and detention.
- [12] It is important to note that as far as the plaintiff's detention after her first appearance in court is concerned, the plaintiff principally sought to hold the NDPP liable, but in the alternative alleged that the SAPS failed to place information before the prosecutor relevant to the granting of bail, with the result that bail was refused.
- [13] The latter allegation does not appear to be intended to support an independent delictual cause of action against the Minister of Police, separate from the claim based on the alleged initial unlawful arrest and detention (which is notionally possible).
- [14] In the premises, the plaintiff's particulars of claim should be interpreted on the basis that the plaintiff is relying on the commission of a single delict, being the initial unlawful arrest, and is claiming damages on that single basis for the entire duration of the plaintiff's detention (including the period after her first appearance in court until she was released on bail on 26 November 2020).
- [15] The plaintiff also did not seek to split her claim for damages between the damages up to the first appearance in court, and the damages suffered after her first appearance. She claimed one globular amount.

The defences raised by the defendants

- [16] The defendants raised special pleas that the plaintiff failed to comply with certain statutory notice requirements. Based on allegations of non-compliance with the statutory notice provisions, a conditional plea of prescription was also raised. These special pleas were also abandoned at the commencement of the trial and need not be considered.
- [17] The defendants' defences against the plaintiff's claims can be summarised as follows:

- a. That on 19 November 2019, at approximately 08h35, plaintiff was lawfully arrested by a member of the South African Police Services stationed at Sophiatown Police Station, in execution of a warrant issued under the provisions of section 11(1)(a) of the Protection from Harassment Act 17 of 2011 ("PHA") upon receipt of a complaint, from one Rashieda Mohammed, that plaintiff had violated the final protection order granted by the Johannesburg Magistrate's Court, in her favour, under the provisions of Act 17 of 2011 on 30 January 2020.
- b. It was alleged that the arresting officer had reasonable grounds to suspect that the complainant and her family were suffering or may suffer imminent harm as a result of the breach of the Protection Order by the Plaintiff.
- c. Subsequent to her lawful arrest, Plaintiff was lawfully detained, in terms of section 50 of Act 51 of 1977, in the cells at Sophiatown Police Station, under cell register reference SAP14186/11/2019 and was charged under Sophiatown Police Station CAS 203/11/2020 for violating the final Protection Order granted by the Johannesburg Magistrate's court.
- d. Plaintiff was lawfully detained until 08h55 on 20 November 2019 when she was taken to court.
- e. At plaintiff's first appearance at court on 20 November 2019 the prosecution enrolled the matter on the basis that they held an honest belief founded on reasonable grounds that the institution of the criminal proceedings against the Plaintiff was justified.
- f. It was admitted that:
 - i. The plaintiff was afforded a section 174 (Act 51 of 1977) discharge on 23 July 2021 and
 - ii. That the relevant members of the South African Police Services and court prosecutor/s, were acting within the course and scope of their respective employment with First and Second Defendants.

- g. The other allegations made by the plaintiff were denied, including allegation that the plaintiff suffered damages as a result of the arrest and detention.

Onus of proof and duty to begin

[18] It was correctly accepted that the onus to prove the lawfulness of the plaintiff's initial arrest and detention was on the Minister of Police. Consequently, the first defendant assumed the duty to begin leading evidence in the matter.

[19] As such, the Minister of Police clearly also did not view the defendant's allegation that the SAPS failed to provide information to the prosecutor as a separate standalone claim in respect of which the onus may have been on the plaintiff.

Status of the police docket and record of proceedings in the Magistrates' Court

[20] At the commencement of the trial, the parties agreed to admit into evidence a copy of the relevant police docket, charge sheet and court record.

Witnesses

[21] The investigating officer in this matter, Constable Sandile Mkhize, regrettably, died before the hearing of this trial and the first defendant called as its only witness Mr Riebeeck Anthonie Burger, a public prosecutor, who testified that he was the public prosecutor on 19 November 2020 when the plaintiff first appeared in court, and on 26 November 2020, when the plaintiff was released on bail. He was an excellent witness and provided valuable information to the court regarding the police docket, the events in court and the question regarding the granting of bail to the plaintiff. However, his evidence is obviously of limited value, as he was not involved in the decision to arrest the plaintiff. His evidence also did not traverse all the relevant issues in this matter.

[22] There are certain affidavits by the investigating officer in the police docket, including a statement regarding the alleged arrest of the plaintiff. These statements, having been admitted in evidence by agreement, obviously also

have limited evidential value due to the absence of Constable Mkhize and the lack of cross-examination in respect thereof.

[23] The plaintiff energetically and emotively testified in support of her own case. She used an interesting and colourful vernacular of Afrikaans, which the interpreter sometimes, quite reasonably, had difficulty in interpreting, despite doing an exceedingly good job in general and for which he must be highly commended. The energetic, fast paced manner in which the plaintiff testified, evidently also permeated the process by which she gave instructions to her counsel, with the result that there was some confusion regarding the sequence of events during her evidence. This was cleared up in a satisfactory manner during her evidence. In general, the plaintiff was a satisfactory witness, who gave a detailed account of the events and made concessions where such concessions were justified. Her factual evidence was also not really disputed during cross-examination. To the extent that her evidence must be treated with circumspection, in view of the fact that the investigating officer died and was not available to testify, I am satisfied that her evidence was generally acceptable.

[24] The result of this is that the facts of this matter were largely common cause. The parties diverge on the conclusions to be drawn from the available facts.

The protection order against the plaintiff and suspended warrant of arrest

[25] It is common cause that the complainant in the matter obtained a final protection order in terms of PHA against the plaintiff on 30 January 2020. This order was also served on the plaintiff on 30 January 2020, and she was fully aware of the order.

[26] The order interdicted the plaintiff from:

- a. Engaging in or attempting to engage in harassment of the complainant;
- b. Insulting the complainant; and
- c. Physically abusing the complainant.

[27] The court also ordered the plaintiff not to accost the complainant and not to have any contact with the complainant directly or indirectly, including social media contact.

[28] In terms of PHA a warrant for the arrest of plaintiff was issued, but suspended subject to compliance by the plaintiff with the terms of the order.

The legislative framework of PHA

[29] PHA has been enacted to make provision for the issuing of protection orders to prevent harassment.

[30] “Harassment” is defined in the Act as meaning directly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably:

- a. following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;
- b. engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or
- c. sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person.

[31] The definition also includes sexual harassment, which is further defined in the Act.

[32] Sections 2, 3 and 9 of the Act make provision for the granting of an interim and final protection order against a respondent who engaged in harassment of an

applicant, or a related person. Section 10 provides the court with wide powers to make an order aimed at preventing harassment.

[33] In the present matter, the provisions of section 11 are of importance. Section 11(1) provides that when a court makes a protection order it must make an order authorising the issuing of a warrant of arrest of the respondent and suspend the execution of the warrant subject to compliance with the order by the respondent.

[34] Section 11(4)(a) provides that a complainant may hand the warrant of arrest, together with an affidavit in the prescribed form stating that the respondent has contravened any specified prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.

[35] Section 11(4)(b) provides that if it appears to the member of the South African Police Service concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant or related person is suffering harm or may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member *must immediately* arrest the respondent for allegedly committing the offence referred to in section 18 (1) (a).

[36] Section 11(4)(c) provides that if the member of the South African Police Service concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must immediately hand to the respondent a written notice in the prescribed form, which-

- a. specifies the name, the residential and work address and the occupation or status of the respondent;
- b. calls upon the respondent to appear before a court on the date and at the time specified in the notice, on a charge of committing the offence referred to in section 18 (1) (a); and
- c. contains a certificate signed by the member of the South African Police Service concerned to the effect that he or she handed the original notice

to the respondent and that he or she explained its import to the respondent.

[37] Section 11(5) states that, in considering whether or not the complainant or related person is suffering harm or may suffer imminent harm, as provided for in subsection (4) (b), the member of the South African Police Service must take into account the:

- a. risk to the safety or well-being of the complainant or related person;
- b. seriousness of the conduct comprising an alleged breach of the protection order;
- c. length of time since the alleged breach occurred; and
- d. nature and extent of the harm previously suffered by the complainant or related person.

[38] Section 18(1) determined that, notwithstanding the provisions of any other law, any person who-

- a. contravenes any prohibition, condition, obligation or order imposed in terms of section 10 (1) or (2); or
- b. in an affidavit referred to in section 11 (4) (a), makes a false statement in a material respect,

is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.

[39] In terms of regulation 24 of the Protection from Harassment Regulations, 2013, it was prescribed that an affidavit referred to in section 11(4)(a) of the Act in which it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order must be in a form which corresponds substantially with Form 22.

[40] Form 22 provides for detail of the parties and the formal detail of the protection order to be contained in the affidavit. It also requires the complainant to indicate

whether a copy of the protection order indicating what orders were made by the court and the original warrant of arrest are attached, or to state why a copy of the protection order and/or the original warrant of arrest cannot be attached.

[41] The form also requires the following information:

- a. The date(s) of breach of protection order;
- b. Place(s) where breach of protection order took place;
- c. Full details on how any specified prohibition, condition, obligation or order contained in the protection order was breached;
- d. Reasons, if any, for believing that imminent harm may be suffered as a result of the breach of the protection order by the respondent.

[42] The obvious purpose of PHA is to protect members of the public from harassment. The ordinary meaning of “harassment” is repeated harmful conduct against a victim. A single event cannot be regarded as harassment. The extended definition of “harassment” in PHA is not a model of clarity, but on a proper interpretation relates to repeated conduct.

[43] A protection order in terms of PHA is in essence a statutory interdict. PHA created a new statutory offence, and created a new mechanism whereby an alleged contemnor can be arrested by any member of the SAPS upon an affidavit being presented by a complainant that the protection order was breached. This is a far-reaching departure from the common law, in terms of which a contemnor can only be imprisoned for contempt of court on application to the court. In such a common law contempt application the alleged contemnor can escape a sanction by merely creating reasonable doubt as to whether he or she wilfully disregarded the court order. Importantly, an order will only be granted if the principles of *audi alteram partem* had been complied with.

[44] A complainant can also lay a charge of contempt of court against an alleged contemnor. A variety of other complaints in relation to common law offences can also be laid. The SAPS must then act in accordance with the CPA in securing the attendance of the alleged perpetrator. Notably, contempt of court

is not a CPA Schedule 1 offence for which a person can be arrested without warrant of arrest. Usually, contempt of court would not justify an arrest, and the alleged contemnor should be brought before the court by way of a summons. The situation will be different if the contemnor is simultaneously also accused of other serious crimes.

- [45] In an ideal world, only actual victims who are themselves unblemished make use of the law to protect themselves. However, experience teaches that often people abuse the law for their own unlawful purposes, and that the abuse of process is used as a form of harassment.
- [46] Whilst PHA was designed to protect innocent victims, the reality is that the Act finds application in a robust environment where the participants may be less than scrupulous, and the complainant may also be a perpetrator of harassment, other crimes and also perjury. The facts of this matter illustrate this; after an eventual trial the Magistrate found the complainant and her husband's evidence so improbable and contradictory that the court in essence rejected it out of hand and discharged the plaintiff in terms of CPA section 174. For this to happen, the quality of the complainant's evidence must have been exceedingly poor.
- [47] Against this background, it could never have been the purpose of PHA to infringe upon the alleged contemnor's constitutional rights of freedom, dignity and a fair trial. The Act must accordingly be interpreted as far as possible to be consistent with these fundamental rights.
- [48] To the extent that PHA created a special mechanism whereby an alleged contemnor can be arrested, at the same time it created strict requirements that must be present before a person can be arrested. Notably, a person cannot be arrested for simply contravening the protection order. PHA requires that the member of the SAPS must have reasonable grounds to suspect that the complainant or related person is suffering harm or may suffer imminent harm as a result of the alleged breach of the protection order. The Act then, in peremptory terms, requires the police official to take certain mandatory factors into consideration.

[49] For an alleged contemnor to be arrested in terms of PHA, there must obviously be compliance with these requirements. If the requirements of PHA for an arrest are not present, then the Act makes provision for a notice to appear in court. Alternatively, the SAPS must make use of the CPA to secure the alleged offender's presence in court.

The incidents allegedly constituting a breach of the protection order by the plaintiff

[50] On 8 November 2020, 9 November 2020 and 12 November 2020 there were incidents of an unpleasant nature involving the complainant and the plaintiff, as well as their respective families. The plaintiff gave evidence regarding these incidents during the trial, but it is not necessary for purposes of this matter to make a finding regarding the exact events that took place.

[51] What is of importance in the present matter is that the complainant approached the SAPS on 13 November 2020 and made a complaint that the plaintiff had contravened the protection order and deposed to an affidavit to that effect. This affidavit was not on the prescribed Form 22. The following was, *inter alia*, stated by the complainant:

- a. That on 8 November 2020 the plaintiff's daughter, acting under instructions from the plaintiff, smashed the window of a car belonging to the complainant's family and as a result her husband opened a case of malicious damage to property against the plaintiff and her daughter;
- b. After the aforesaid incident, at about 12h30 during the evening of Sunday, 8 November 2020, the plaintiff passed the complainant's house and swore at the plaintiff, calling her an "aids bitch", that she would see to it that members of the Fast Guns gang would rape the complainant. It was also alleged that the plaintiff instigated her daughter to "throw the complainant's daughter with bricks". By this the complainant presumably meant to say that bricks were hurled at her daughter.

- c. On 9 November 2020 the plaintiff and her daughter were allegedly arrested in relation to the damage to the car windscreen but were released on unknown conditions.
- d. At about 16h00 on 9 November 2020, the plaintiff passed the complainant and stated that the complainant “will get what is coming to her” as she “knows people”. The plaintiff stated that the complainant will not live to see the new year and that her son, Jermaine Booyens, will “take care” of the complainant’s husband, as he (Jermaine) is a member of the Fastguns.
- e. On 12 November 2020 at about 14h30 the plaintiff again passed the complainant’s house and started swearing at the complainant, calling her a “witch” and a “black-hearted bitch”, whose witchcraft will not work on her. She repeated that the complainant was an “aids-bitch” and a prostitute who was selling her body to the Varodo gangsters. She also said that she will make sure that her husband would lose his firearm, and that her husband will die before the end of the year.
- f. At this time, the plaintiff’s son, Jermaine Booyens, stood with her and also swore at them, threatening the complainant’s husband, saying that he must “watch his back”.

[52] The fact that the affidavit was not made on the prescribed form was clearly not fatal, as the regulation required the affidavit to be substantially in accordance with the form. Consequently, the question is whether the affidavit complied materially with the requirements. Notably, the affidavit did not particularly deal in full detail with the manner in which any aspect of the protection order was contravened. It was left to the reader to analyse the allegations and assess whether the order was contravened.

[53] Importantly, the affidavit did not deal with the question whether the complainant had any belief that imminent harm may be suffered as a result of the breach of the protection order by the respondent.

Did the investigating office arrest in the plaintiff in terms of PHA and was there compliance with PHA?

- [54] As indicated above PHA section 11(4)(b) provides that if it appears to the member of the South African Police Service concerned that there are reasonable grounds to suspect that the complainant or related person is suffering harm or may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must immediately arrest the respondent for allegedly committing the offence referred to in section 18(1)(a).
- [55] It is evident from the affidavit made by the complainant that extremely serious threats were allegedly made towards her by the plaintiff, which was not confined to swearing and insults, but included the threat that the plaintiff would orchestrate the rape and killing of the complainant.
- [56] Despite the apparent seriousness of the allegations, the investigating officer did not arrest the plaintiff immediately after the complaint was made. The complainant's affidavit was not accompanied by the warrant of arrest, as required. The investigating officer had to first obtain the warrant from the complainant, which he did on 14 November 2020. Even then he did not arrest the plaintiff. Instead, he only interviewed the plaintiff on 17 November 2020 in connection with this charge and after informing her of her rights (evidenced also by a written acknowledgement by the plaintiff to that effect), obtained a written warning statement from her, and allowed the plaintiff to go free without being arrested.
- [57] These events were intertwined with the case against the plaintiff's daughter for allegedly breaking the car windscreen, and the allegation that the plaintiff instructed her to do so. On the plaintiff's evidence, both she and her daughter were arrested on this charge, but both were released on warning to appear in court on the 19th of November 2020.
- [58] It does not appear from the evidence that the investigating officer took the complainant's allegations too seriously. The police docket indicate that the complainant's complaint was about "swearing", and this was repeated in an

affidavit which he made at the request of the public prosecutor in respect of the question of bail, as will be more fully dealt with hereunder.

- [59] The immediate temptation is to criticise the investigating officer for taking the complainant's serious complaints so lightly, but consideration must be given to the fact that the plaintiff deposed to a warning statement on 17 November 2020, in which she also made certain allegations of abuse committed by the complainant against her, including an allegation that the complainant had stated to her that her husband will shoot and kill her son, Jermaine, just like her other son had "gevrek". The Afrikaans word "vrek" is similar in meaning with the word "sterf" (die), but the proper use of the word is confined to the death of animals. Properly interpreted, the complainant, therefore, allegedly stated to the plaintiff that her son Jermaine would be shot and killed, just like her other son was dispatched like an animal. A statement like this is made with absolute contempt for human life. In her statement the plaintiff also denied the complainant's allegations and stated that all she wanted was peace.
- [60] The situation that confronted the investigating officer under the circumstances was that two members of the community were allegedly hurling crude and uncivilised abuse at each other. In the process they were making serious threats against each other. The investigating officer clearly did not interpret the serious threats the parties made against each other literally. Under the circumstances, he seemingly acted wisely in regarding this tit for tat with circumspection. In this regard, it is of note that the public prosecutor, after the plaintiff's first appearance in court, requested the investigating officer to assist the plaintiff in opening her own case against the complainant.
- [61] The plaintiff's undisputed evidence is that on 18 November 2020 the investigating officer left her a message, requesting her to report to the police station on 19 November 2020.
- [62] It must be noted that an offence in terms of section 18(1) of PHA is an offence in terms of Schedule 1 of the Criminal Procedure Act, 1977, being "any offence . . . the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine".

- [63] In terms of section 40(1)(b) of the Criminal Procedure Act, a peace officer may arrest a person whom he reasonably suspects of having committed an offence referred to in Schedule 1, without a warrant of arrest.
- [64] However, the Minister of Police did not raise the defence that the plaintiff was arrested in terms of section 40(1)(b), nor was this possible defence ventilated during the trial before me. There is intricate detail and thought processes involved in the question whether an arrest without a warrant was justified. Consequently, in the circumstances of this matter, this is not a defence that may be entertained. There is also no indication on the evidence, tested or not, that the plaintiff was arrested in terms of section 40(1)(b), or could have been arrested in terms of that section without a warrant of arrest.
- [65] The defence raised by the Minister of Police was confined to the allegation that the SAPS had executed the warrant of arrest issued in terms of section 11(1) of PHA, specifically because there was allegedly a threat of imminent harm.
- [66] Constable Mkhize's affidavit does not reveal that he was in any way motivated by considerations of imminent harm in arresting the plaintiff. He expressly stated that the plaintiff handed herself over for contravening the protection order, and that he then arrested her. There is no indication that he considered himself to have a discretion in the matter, as provided in PHA, nor does his affidavit indicate that he applied his mind to any of the mandatory considerations provided for by the Act. In a subsequent affidavit that he made in respect of the question of bail, he stated that the complaint was about "swearing" and made no allegation that the plaintiff should be denied bail because of the threat of imminent harm to the complainant.
- [67] PHA obliges a police officer to immediately ("must immediately") arrest the alleged perpetrator upon information of a breach of the order and imminent harm being received in the prescribed manner. The investigator officer clearly did not deem it necessary to immediately arrest the plaintiff, and clearly did not act in terms of PHA in arresting the plaintiff.
- [68] In this regard, the investigating officer's affidavits do not support the defence pleaded by the Minister of Police and the probabilities are overwhelming that

he never arrested the plaintiff on the basis of any threat of imminent harm as pleaded.

[69] More fundamentally, the investigating officer's affidavit also does not even reveal that the plaintiff was arrested on the basis of the warrant of arrest issued in terms of PHA, as pleaded by the Minister of Police.

[70] The plaintiff's evidence seems to suggest that the investigating officer dealt with the matter on a rather informal manner. Having requested her to come to the Police Station, he then told her that he was going to take her to court. She then got into a motor vehicle with him and was taken to the "Westgate Court", as the Johannesburg Magistrates' Court is referred to colloquially. There she was taken to the holding cells, and detained.

[71] The plaintiff testified that she was arrested without a warrant of arrest. On her evidence, there is no indication that the investigating officer revealed the existence of the warrant to her, nor that he informed her that he was executing a warrant of arrest. In this regard, apart from putting it to the plaintiff that there was a warrant for her arrest in terms of PHA, the plaintiff's version was not materially challenged. The investigating officer's simple version, that the plaintiff was arrested for contravening the protection order, without any reference to the warrant of arrest or any specific motivation for the arrest, is also not incompatible with the plaintiff's version that she was arrested without a warrant.

[72] In the final analysis, there is no evidence in support of the defence raised by the Minister of Police that the plaintiff was arrested in the execution of the warrant, because of the fear or imminent harm. Consequently, the Minister failed to discharge onus resting on it to demonstrate the lawfulness of the arrest.

Release on warning

[73] The plaintiff also alleges that upon her arrest she should have been released on warning by the SAPS in terms of the CPA.

- [74] However, despite the plaintiff's reliance on the CPA in this regard, this issue is in reality intertwined with the defence pleaded by the Minister, based on the provisions of PHA.
- [75] Where the investigating officer clearly did not deem it necessary to arrest the plaintiff immediately for the safety of the complainant, he was required by section 11(4)(c) of PHA to refrain from arresting the plaintiff and should have given the plaintiff a written notice to appear in court on a charge of contravening section 18(1) of PHA.
- [76] From the finding that the investigating officer did not arrest the plaintiff in terms of PHA, it automatically follows that she should have given a written warning to appear in terms of PHA. Although this was not exactly the point made by the plaintiff, the facts from which this conclusion follows have been fully ventilated and there would be no prejudice to the Minister if the matter is approached on this basis.
- [77] Consequently, I agree that the plaintiff should have been given a written warning to appear. I hold, however, that the plaintiff should not have been arrested at all.

Conclusion regarding the lawfulness of the arrest and initial detention

- [78] Consequently, I hold that the plaintiff's arrest at about 8h00 on 19 November 2020 was unlawful, as well as her detention until at least her first appearance before the Magistrates' Court later that morning.

The continued detention of the plaintiff after her first appearance in court

- [79] Regarding the plaintiff's continued detention after the postponement of the case until 26 November 2020, the plaintiff alleged that the SAPS acted unlawfully by not placing evidence before the court that would have lead to her release on bail at her first appearance in court on 19 November 2020.

[80] Very little, if any attention was given to this aspect during the trial and it does not contribute much to the adjudication of this matter. It is also an issue which can become very speculative and hypothetic in the circumstances of this matter.

[81] The bottom line is that the plaintiff should not have been arrested and held in custody. The issue of bail should never have arisen in this matter.

The issue of causation in relation to the plaintiff's continued detention

[82] In *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) the majority of the court held that the question of the Minister of Police's liability for an accused's detention after the first appearance depends on the question of causation. The mere fact that the initial arrest and detention was unlawful does not automatically result in the continued detention being unlawful. Conversely, the mere fact that the initial arrest and detention was lawful does not automatically result in the continued detention being lawful.

[83] The court held that the Minister of Police's liability for continued detention after the first appearance, where the initial arrest was unlawful, depends on the application of the traditional *condictio sine qua non* – test (also expressed as the “but-for test”), coupled with considerations of legal policy to prevent limitless liability. In this regard, the foreseeability of the harm or damage also plays a role. The question is also whether the failure by the court to grant bail was a *novus actus interveniens*, which disrupted the causal chain.

[84] Thus, in *De Klerk* the Constitutional Court held that at all times when the SAPS unlawfully arrested the applicant it was foreseen that the magistrate would upon the first appearance simply postpone the matter for a period and that the accused would remain in custody for that period. Consequently, the court held that the “but-for” test was satisfied, in that, but for the unlawful arrest, the matter would not have been postponed at the first appearance. Policy considerations dictated that liability should not be limited for this factual consequence.

[85] In the present matter, there is no suggestion on the evidence that the magistrate in the reception court of the Johannesburg Magistrates' Court was oblivious or

indifferent to his or her statutory and constitutional obligations regarding the granting of bail. However, this matter demonstrates a systemic issue with very practical realities and consequences. The reality is that after arrest an accused person is brought before a reception court, which is on all accounts a very busy court. The evidence is that such court can have up to 50 cases on the roll on any given day. If it is optimistically assumed that the court actually sits for five to six hours per day, this means that there is six to seven minutes available per case. The evidence is that an indigent accused who elects to make use of a Legal Aid attorney is systemically forced into a hurried consultation with the attorney. If the matter is uncomplicated and bail is for good reasons not opposed by the State, this may effectively result in accused being released on bail forthwith without much time being spent. However, various factors may complicate the issue of bail, which may require, sometimes unjustifiably, the accused to bring a formal bail application, with the onus being on the accused to show why it is in the interest of justice that he or she be released on bail. In a busy reception court having 50 matters on the roll, the court clearly has no capacity to hear formal bail applications on the first appearance. Nor would an accused person, especially an indigent person, be in a position to bring a formal bail application on the first appearance. The systemic reality is that it is a forgone conclusion that if the accused needs to bring a formal bail application, the matter will be postponed for that purpose. In the process there is a high risk that lip service will be paid to the accused person's statutory and constitutional rights.

[86] The plaintiff's evidence, which I have no reason to doubt, was that her first appearance in court was a rushed event, during which there was no real opportunity for her to be advised by, or consult with, the Legal Aid attorney. While she had no understanding of the process, her matter was postponed without bail being fixed.

[87] In *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) paras 40-41 the principles relating to factual causation were described as follows:

"Although different theories have developed on causation, the one frequently employed by courts in determining factual causation is the *condictio sine qua non* theory or but-for test. This test is not without problems, especially when determining whether a specific omission caused a certain consequence. According to this test the enquiry to determine causal link, put in its simplest formulation, is whether 'one fact follows from another'. The test –

"may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise."

In the case of "positive" conduct or commission on the part of the defendant, the conduct is mentally removed to determine whether the relevant consequence would still have resulted. However, in the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility. The other reason is because it is not always easy to draw the line between a positive act and an omission. Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case."

- [88] It is said that the "but-for" test requires the judge to think away the relevant unlawful conduct that is potentially the cause of the harm and then ask whether the harm would have ensued in any event. If it would have ensued in any event, the relevant conduct is not factually the cause of the harm. On the facts of *De Klerk* this process is relatively simple; if the accused person was unlawfully arrested because there were no grounds for forming a reasonable suspicion that the person had committed an offence for which the person could be arrested without a warrant, thinking away the unlawful arrest will quite simply result in the conclusion that the continued detention after the first appearance would not have eventuated. The accused would never have appeared in court and the matter would never have been postponed. The causal link is evidently there.

- [89] However, as stated by the Constitutional Court, there are situations where, in order to effectively apply the *condictio sine qua non* – test, the exercise entails not merely discounting the perceived cause but also postulating a hypothetical lawful course of events instead of the perceived cause.
- [90] Regarding this possible hypothesis as part of the causation test, it must be emphasised that the Minister did not rely on section 40(1)(b) of the CPA that the arrest without a warrant was lawful, or that the plaintiff could have been lawfully arrested in terms of section 40(1)(b). Consequently, the hypothetical possibility that the plaintiff could have been lawfully arrested in terms of section 40(1)(b) and lawfully brought to court on that basis cannot be introduced through the back door in the context of factual causation.
- [91] In the present matter, it will be appropriate for the investigating officer's unlawful conduct to be substituted with lawful conduct on his part in the application of the "but-for" test. As I held above, if the investigating officer acted lawfully in terms of PHA, in the absence of evidence that he considered the complainant to be in imminent danger, he should have given the plaintiff a notice to appear in court, instead of arresting her. If this had happened, the plaintiff would not have been in custody at her first appearance in court, and there would have been no need for her to apply for bail. The matter against her would have been remanded and she would have been warned to appear at the next hearing. The harm inherent in her continued detention would not have occurred.
- [92] Consequently, there is a direct causal link between the unlawful conduct of the SAPS and the plaintiff's continued detention after her first appearance in court.
- [93] It is now trite law that an unlawful arrest does not necessarily render the enrolment of the matter unlawful. If there is a *prima facie* case against an accused which justifies a prosecution, the unlawful arrest does not render the proceedings in court unlawful. This was confirmed in *De Klerk*. In the present matter, there was a *prima facie* case against the plaintiff that she contravened section 18(1) of PHA. Consequently, the public prosecutor correctly decided to prosecute the plaintiff and correctly enrolled the matter.

- [94] Did this valid action on the part of the prosecutor constitute a *novus actus interveniens* which legally disrupted the causal chain? In my view the valid decision on the part of the prosecutor to enrol the case is irrelevant to the question of causation *in casu* and did not constitute a *novus actus interveniens*. The simple fact is that if the investigating officer acted lawfully and gave the plaintiff a written notice to appear in court, the prosecutor would have decided to prosecute and would have enrolled the matter in any event, and the plaintiff would have been warned to appear on the next date. The issue of bail would never have arisen. The valid decision is a neutral factor as far as causation is concerned.
- [95] In this regard, I am of the view that the same reasoning applies to the question whether the Minister's liability should be limited on the basis of policy considerations. I perceive no valid considerations to limit the Minister's liability.
- [96] The Minister of Police lead extensive evidence by the prosecutor regarding the procedure to be followed in terms of section 60 of the CPA regarding bail applications. The prosecutor displayed a high degree of knowledge and competence in his evidence, which clearly accorded with the provisions of the CPA. His evidence is summarised in what follows.
- [97] Schedule 5 of the Criminal Procedure Act includes an offence, being an offence referred to in Schedule 1:
- a. where the accused has previously been convicted of an offence referred to in Schedule 1; or
 - b. which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.
- [98] The plaintiff was previously convicted of malicious damage to property. Consequently, the Schedule 1 offence the plaintiff allegedly committed was, objectively, also a Schedule 5 offence.

- [99] Even prior to the amendment of the Criminal Procedure Act in 2022, the plaintiff was obliged to inform the court of any prior convictions she may have, and any pending case in respect of which she was on bail.
- [100] The record of proceedings reflect that the plaintiff failed to inform the court of her previous convictions, which included not only a previous conviction on a charge of malicious damage to property, but also common assault.
- [101] The importance of this is that in terms of section 60(11)(b) of the Criminal Procedure Act, an accused may only be released on bail in respect of a Schedule 5 offence if the accused convinces the court by evidence that his or her release on bail is in the interests of justice. In this instance the onus is on the accused to demonstrate why it was in the interest of justice that he or she be released on bail. This also means that the accused must make application for bail and must place the necessary evidence before the court.
- [102] Currently section 60(11)(c), read with section 59(1), provides that a person charged with the contravention of section 18(1) of PHA shall be kept in custody, unless the accused, having been given a reasonable opportunity to do so, adduces evidence showing that it is in the interests of justice that he or she be released on bail. However, this subsection only became operative in 2022 and is not relevant herein.
- [103] The undisputed evidence by the prosecutor was that he opposed bail on 19 November 2020, as he deemed it a risk for the plaintiff to be released on bail, having regard to the serious allegations against the plaintiff. The plaintiff also had another case against her pending for which she had to appear in court on the same day (the case involving the damage to the complainant's husband's car window). Consequently, he asked the investigating officer to provide an affidavit, setting out an overview of the different cases against the plaintiff.
- [104] On 26 November 2020 there was an affidavit by the investigating officer in the police docket, but such affidavit was inadequate and did not provide the detail requested by the prosecutor. Importantly, at that stage, the plaintiff's previous convictions were not known, and the plaintiff, represented by a Legal Aid

attorney, expressly informed the court the plaintiff had no previous convictions. In this regard, I hold that the plaintiff misled the court.

- [105] The prosecutor testified that if the plaintiff revealed her previous convictions, as she was obliged to do, in particular the malicious damages to property conviction, which rendered the alleged offence a Schedule 5 offence, the plaintiff would have been required to bring a formal bail application, as the onus would have been on the plaintiff to show why she should be released on bail in the interest of justice.
- [106] As the previous convictions were not revealed at that stage, and the investigating officer's affidavit was inconclusive, the prosecutor then decided not to oppose the granting of bail. Bail was granted by the court, but subject to the condition that the plaintiff should reside at an alternative address, to avoid conflict between the feuding parties.
- [107] It was contended that the plaintiff was not entitled to be released on bail on 26 November 2020, because objectively the offence she was accused of was a Schedule 5 offence and the plaintiff failed to adduce the required evidence to show that it was in the interests of justice that she be released on bail.
- [108] It is contended that the fact that the plaintiff remained in custody after her first appearance was because she was obliged to bring a bail application and adduce evidence, which she did not do on 19 November 2020, and the matter was postponed for a formal bail application on 26 November 2020.
- [109] Whilst the evidence by the prosecutor is correct with regards to the usual procedure to be followed in bail applications, the Minister of Police's argument is fatally flawed and amounts to a *petitio principii*. Put more plainly, the argument puts the cart before the horse. The Minister's argument completely loses sight of the fact that if the investigating officer acted lawfully by not arresting the plaintiff, and by giving her a written notice to appear instead, it would never have been necessary for the plaintiff to apply for bail at all. Where the plaintiff was brought before court in an unlawful manner, in unlawful custody, and where she should never have been in custody, it would be a complete failure in logic and justice to argue that she was obliged to bring a bail

application and persuade the court that she should be released from such unlawful custody. Consequently, the fact that the plaintiff failed to disclose her previous convictions and failed to bring a formal bail application is irrelevant in the present matter. In any event, it is clear that the plaintiff would in any event not have been able to bring a formal bail application during her first appearance, due to the systemic issues referred to above.

[110] In the premises, I hold that the Minister of Police is liable for the entire period of the plaintiff's detention, from 19 November 2020 to 26 November 2020.

Damages and compensation

[111] The plaintiff gave extensive evidence regarding the suffering she experienced while she was in detention, not only in the court holding cells, but more particularly at "Sun City" which is an ironic reference, not to the well-known entertainment resort and casino where patrons stay in luxury and international golf tournaments are hosted, but indeed the Johannesburg Prison.

[112] On the plaintiff's evidence, which was not disputed by the Minister, unsentenced detainees are held in overcrowded circumstances. There are no facilities which can be remotely regarded as decent. There is a lack of protection from other criminals, and some criminals are allowed to control life in the cells. Inhumane routines are implemented. In short, circumstances are horrendous. Consequently, the plaintiff described her suffering while in detention, in her ornate vernacular, as "n bietjie baie" (literally translated as "a little much"), which is a euphemistic way of stating that she suffered tremendously. This statement, properly understood, accords with the detail of her evidence and must be accepted.

[113] Despite the unlawfulness of the arrest, the investigating officer treated the plaintiff with some respect and transported the plaintiff to the court in a motor vehicle. He also took her to court immediately and did not detain her for long at the police station. However, this is a small consolation for the plaintiff who was held in custody for seven to eight days in horrendous conditions.

[114] Consequently, I find that there was a serious breach of the plaintiff's fundamental rights, which caused her great suffering, for which she must be appropriately compensated.

[115] In *De Klerk*, the period of the unlawful detention was the same as in the present matter, and the plaintiff was awarded the sum of R300 000.00 damages by the Constitutional Court. This was in 2019. This equates to about R380 000.00 currently.

[116] I respectfully regard the award made in *De Klerk* as a good guideline in the present matter. However, I have a discretion to determine the amount of damages in accordance with the facts of the matter and the extent of the suffering experienced by the plaintiff.

[117] As indicated above, the plaintiff experienced considerable suffering, which was entirely foreseeable. Consequently, I am of the view that the amount that should be awarded to the plaintiff should be higher than the amount that was awarded in *De Klerk*, but that a conservative approach should still be followed. Accordingly, I am of the view that an award of R400 000.00 would be appropriate in the circumstances.

Costs

[118] The costs should follow the result.

[119] Although the claim against the NDPP was abandoned, in the circumstances of this matter it is unlikely that any additional costs were incurred in respect of such claim.

Order

In the circumstances, judgment is granted in favour of the plaintiff against the first defendant, the Minister of Police, for:

(1) Payment of the amount of R400 000.00;

(2) Interest on the amount of R400 000.00 from date of judgment to date in full at the rate prescribed in the Prescribed Rate of Interest Act, from time to time;

(3) Costs of suit, to be taxed on Scale B.



DAWID MARAIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the plaintiff	Adv FF Muller instructed by Jean Keyser Attorneys Inc
For the defendant	Adv B Mathathe instructed by the State Attorney
Date of trial	8 October 2024 (written argument delivered subsequently)
Date of judgment	13 March 2025

