REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 49653/2021

DOH: 20 – 22 & 27 November 2023

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
.....	**13 MARCH 2024**
SIGNATURE	**DATE**

In the matter of:

ELIZABETH MANTOMBI MATLALA **PLAINTIFF**

And

MINISTER OF POLICE **DEFENDANT**

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY E-MAIL. THE DATE AND TIME OF HAND DOWN IS DEEMED TO BE 13 MARCH 2024

Bam J

1. This a delictual claim for non-patrimonial damages arising from the unlawful and wrongful arrest and detention of the plaintiff. The facts are largely common cause and may be summarised thus: On 25 May 2011, at around 22h00, the plaintiff, Ms Elizabeth Mantombi Matlala, then 61, was arrested from her residence in Mamelodi East by members of the South African Police. The members were identified as Detective Sergeant Thobejane (Sgt T) who was accompanied by Constable Mathogwane (Constable) both of whom were then acting within the course and scope of their duties with the defendant. She was taken to Mamelodi police station in the middle of the night where she was detained for two[1] full days and released on the third day without appearing in court.

2. On 4 October 2021, the plaintiff issued a summons against the defendant for damages based on amongst others, deprivation of freedom, contumelia, severe emotional shock and post-traumatic stress disorder, PTSD, all of which is said to have arisen from the unlawful arrest and detention. The defendant is defending the claim. Their defence,

[1] The particulars of claim refer to three days but this is incorrect. Evidence led in court confirmed that it was two days.

which hinges on Section 40 (1)(q) of the Criminal Procedure Act[2], is that the plaintiff had threatened one Mpho, a young woman born of her late husband from a previous relationship. In so doing, the plaintiff breached the terms of a protection order obtained by Mpho against her. In line with the reasoning of the court in *Mahlangu and Another* v *Minister of Police*[3], the defendant was the first to take to the stand. Before considering the evidence led, it is convenient to first introduce the parties and thereafter set out at high level the background facts.

A. Parties

3. The plaintiff, Ms Elizabeth M Matlala, is a widow and now retired seamstress. She resides in Mamelodi, Gauteng.

4. The defendant is the Minister of Police who is cited in his official capacity as the executive head of the South African Police Service. The defendant was served via the State Attorneys in Salu Building, at 316 Thabo Sehume Street, Pretoria.

B. Background

5. According to the uncontroverted evidence led in court, Sgt Thobejane was on duty on the night in question when he learnt of a complaint by Mpho Chauke, the plaintiff's step

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[2] Act 51 of 1977 as amended

[3] *Mahlangu and Another v Minister of Police* (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021), paragraph 31:

> 'when the arrest or imprisonment has been admitted or proved, it is for the defendant to allege and prove the existence of grounds in justification of the infraction.'

daughter. The complaint had been made before he commenced his shift on that evening. Following up on the complaint, he telephoned Mpho and invited her to the police station. Upon arrival at the station, Sgt T, Constable M and Mpho drove to the plaintiff's residence. There the plaintiff was arrested and taken to the Mamelodi Police Station where she was detained until she was released after two days without being formally charged. The basis for the arrest according to Sgt Thobejane was that the plaintiff had made a threat in his presence, directed at Mpho, by saying, '*I will show you*.'

C. The defendant's case

6. The only witness led by the defendant to contest the claims of unlawful arrest and detention was Sgt T. His testimony was brief. He stated that it had emerged during his interview with Mpho that she resided at the same residence as the plaintiff and that the plaintiff's conduct of threatening Mpho had made life difficult for the latter. After the interview, the three went off to drop Mpho off and that is when the plaintiff made the threat in the presence of Sgt T. It was also said that the plaintiff refused to talk to Sgt T and would not answer any questions.

7. It was put to Sgt T during cross-examination that Mpho did not and had never resided with the plaintiff. As demonstration that she did not reside with the plaintiff, after the plaintiff was arrested, Sgt T went to drop off Mpho at her home. Sgt T maintained that Mpho had informed him that she resided with the plaintiff. He was referred to the

statement made by Mpho on the evening of the arrest. The relevant parts of the statement read:

> 'On 25 May 2021, at about 11h25 I asked Ms Ntombizodwa Matlala that I am willing to come back home and she refused. The court told [her] to move out …and she agreed. It was 23 April. …She agreed that she would leave on 25 April 2021 and on 26 April she won't leave. Even today she does not want to leave and it is my father's house.'

8. It was put to Sgt T that, from a plain reading of Mpho's statement, she did not live with the plaintiff at the time. In fact, the complaint, it was said, had less to do with Mpho having been threatened and more about her desire to eject the plaintiff out of her marital home, because Mpho claimed it is her father's residence. Sgt Thobejane simply repeated his initial answer that Mpho had informed him that she resided in the same residence. On the question of the alleged threat, it was put to Sgt T that the threat was not only denied by the plaintiff and her witness who had witnessed the arrest, but that the statement of arrest made no reference to any threat made by the plaintiff. Sgt T could not explain why the contemporaneous statement of arrest made no reference to the threat.

9. He was challenged that the threat was a last minute thought to shore up the unlawful and baseless arrest. It was further put to him that both the plaintiff and her witness would testify that the only reason for the plaintiff's arrest was because she had refused to vacate her home. Sgt T remained adamant that the basis of the arrest was the threat made in front of him by the plaintiff. After St T's testimony, the defendant closed their case.

Plaintiff's case

10. The undisputed evidence of the plaintiff suggests that she was woken up by her sister and informed that the police were outside looking for her. She estimated the time to have been round 22h00. She looked through the window and saw Mpho accompanied by policemen. Upon speaking to the police, she was informed that they were there to arrest her for refusing to vacate her home. She was instructed to go and put on warm clothes after which she was driven to Mamelodi Police Station where she was detained until she was released.

11. The plaintiff further testified that she had known Mpho since she was young. She used to visit when her husband was still alive. At times, she and her husband would bring Mpho over for weekends or school holidays to spend time with them. She testified that she posed no harm to anybody, much less to her step daughter. She felt she was humiliated by the arrest as she had never been arrested before. She found the place extremely unhygienic and unbearable. Throughout the time of her detention, she was crying. She also could not comprehend the reason for her arrest. She denied the defendant's assertions that she refused to speak or that she threatened Mpho. She denied being belligerent or aggressive when the police spoke to her. She said she felt degraded and humiliated when she was locked up in the police cell. On the third day, she was taken to court but her case was not called. Instead, she was told to go home. She stated that the incident had scarred her and she could no longer sleep without taking alcohol to induce sleep.

12. The plaintiff was cross-examined extensively on whether Mpho regarded her marital home as her home. She replied that Mpho used to visit her home. She may very well have regarded the plaintiff's residence as her home but she had never stayed there as in the sense of residing there on a full time basis. She was also cross-examined on her use of alcohol in a bid to demonstrate that she had been taking alcohol long before her arrest. The plaintiff answered that she used to take alcohol socially but had never taken it to induce sleep.

13. I was impressed by the plaintiff as a witness. Her answers were clear. When she could not remember something, she simply said so. Her answers did not appear concocted or made up. No damage was done to her as a witness during cross-examination and her version remained intact. The plaintiff's second witness was her sister, Joana Smiley Matlala. Her testimony largely corroborated that of the plaintiff. She opened the gate for the police. The police initially mistook her for the plaintiff and called out the name of the plaintiff stating they were there to arrest her. Her cross-examination was uneventful and her version remained intact.

14. The last witness to testify was an expert witness, Ms Narropi Sewpershad, a Clinical Psychologist, with special interest in Neuropsychology. She has a Master's Degree in Psychology and more than 20 years' experience as a clinical psychologist. Ms Sewpershad's testimony was in line with her expert report[4] of 26 September 2022. She

[4] Caselines 06-5.

had examined the plaintiff on 11 August 2022. Her conclusions were that the event had scarred the plaintiff for life. The plaintiff suffered from, *inter alia*, Post Traumatic Stress Disorder. According to her, the incident obliterated the trust the plaintiff had in the police. She mentioned that the plaintiff will likely remain fearful of the police wherever she goes. Due to the fact that she was never called to court to answer any case, she could not reach closure hence the constant fear of police. She opined that the plaintiff would require treatment in order to heal. Ms Sewpershad was cross-examined but the cross-examination left her testimony undisturbed. The plaintiff closed her case after Ms Sewpershad.

Analysis of evidence

15. It is my conclusion that the answers proffered by the Sgt T were not persuasive. Firstly, with regard to the alleged threat, I do not accept that Sgt T or any officer of his rank and experience would omit to include in their statement of arrest, which was prepared less than two hours since the arrest, an element as fundamental as a threat made in their presence, only to remember it more than two years later. It is highly implausible. The most probable version is that of the plaintiff, that she was arrested for refusing to vacate her home. I am fortified in my reasoning by the remarks of the court in *Cooper and Another* v *Merchant Trade Finance Ltd*, with reference to *Govan* v *Skidmore*, that:

> '…in finding facts or making inferences in a civil case, … one may, as Wigmore conveys in his work on Evidence, (3rd ed. para 32), by balancing probabilities select a conclusion which

> seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'[5]

[See also *Stellenbosch Farmers' Winery Group Ltd. and Another* v *Martell & Cie SA and Others* (427/01) [2002] ZASCA 98 (6 September 2002), paragraph 5]

16. Secondly, the answers proffered by the Sgt indicate strongly that prior to the arrest he had neither investigated the matter nor had he applied his mind to the facts in order to exercise his discretion. My comments must be understood against the background of the wording of Mpho's statement. A claim that a house belongs to one's father's estate and that they are willing to come back home is rather vague for anyone to have reached the conclusion that the complainant resided with the plaintiff and that her life was under threat. If it was true that Mpho had indeed resided with the plaintiff and had somehow been chased out of her home, it is more likely that she would have wanted to have challenges properly ventilated so that she moves back home. The demand by Mpho that her late father's wife vacate her marital home so that she comes back home is way too extreme and unnatural and could hardly be a basis to conclude that unless an arrest is effected, Mpho faced imminent harm. Counsel for the plaintiff put it bluntly that Sgt T chose to allow his law enforcement status to be used in the unlawful exercise of intimidating the plaintiff so that she vacates her home but the plaintiff was brave enough not to allow them hence she was arrested.

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[5] (474/97) [1999] ZASCA 97 (1 December 1999), paragraph 7

17. The upshot of my findings, based on probabilities and the circumstances of this case, is that Mpho was at no stage faced with an imminent threat from the plaintiff. Had the police properly interrogated her complaint, it would have been clear that:

    a) She did and had not prior to the complaint shared a residence with the plaintiff.

    b) She was not under any threat from the plaintiff.

    c) She had gone to court to seek a protection order so that the plaintiff vacate her matrimonial home because, as she claimed, her late father was the owner of the property.

18. The answer to Mpho's claims or concerns lied not in obtaining a Protection Order to eject her late father's wife from her matrimonial home. She had to follow the orderly process of lodging her claim, if she had any, with the executor or representative of her father's estate. In different words, the suggestions set out in paragraphs 17 and 18 were put by the plaintiff's counsel to the defendant's sole witness, Sgt Thobejane. They were met with no cogent opposition.

Legal principles

19. Our Constitution in section 12 (1), guarantees everyone the right to freedom and security of the person, 'which includes the right:

    (a) not to be deprived of freedom arbitrarily or without just cause;

    (b) not to be detained without trial,…'

20. The Constitutional Court put it aptly in *Mahlangu*[6] thus*:*

> *'*The prism through which liability for unlawful arrest and detention should be considered is the constitutional right guaranteed in section 12(1) not to be arbitrarily deprived of freedom and security of the person. The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in the Republic. These rights, together with the right to human dignity are fundamental rights entrenched in the Bill of Rights…'

21. In circumstances where the arrest is lawful, courts have maintained that the arresting officer must still apply their mind as to whether the detention is necessary and that failure to do so is unlawful[7]. The question to be answered is whether there were reasonable grounds to suspect that the complainant faced or was likely to face imminent harm on the basis of the alleged breach of the protection order. The test is an objective one. In *Seria* v *Minister of Safety and Security and Others*, it was said:

> '[t]hese words [reasonable grounds to suspect] must be interpreted objectively and the grounds of suspicion must be those which would induce a reasonable man to have the suspicion."…[8]

22. Before considering the relevant provisions of the Domestic Violence Act, it is useful to remind ourselves of what the plaintiff has to prove to succeed in the present claim. Those requirements are elegantly encapsulated in *De Klerk* v *Minister of Police*:

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[6] Note 3 *supra,* paragraph 25.

[7] This was affirmed by the court in *Mvu v Minister of Safety and Security and Another* (07/20296) [2009] ZAGPJHC 5, (GSJ) (31 March 2009), paragraph 10:

> 'In Hofmeyr v Minister of Justice and Another, King J, as he then was, held that even where an arrest is lawful, a police officer must apply his mind to the arrestee's detention and the circumstances relating thereto and that the failure by a police officer properly to do so, is unlawful…. It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all.'

[8] (9165/2004) [2004] ZAWCHC 26; 2005 (5) SA 130 (C); [2005] 2 All SA 614 (C) (15 October 2004), page 23.

‘A claim under the actio iniuriarum for unlawful arrest and detention has specific requirements:

(a) the plaintiff must establish that their liberty has been interfered with;

(b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so;

(c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and

(d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought.’[9]

23. Section 8 (4)(b) of the Domestic Violence Act[10] provides that:

‘(a)…

(b) 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 may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17 (a) .

Subsection (5) reads: In considering whether the complainant may suffer imminent harm, as contemplated in subsection 8 (4) (b), the member of the South African Police Service must take into account-

(a) The risk to the safety, health or wellbeing of the complainant;

(b) The seriousness of the conduct comprising an alleged breach of the

protection order; and

(c) The length of time since the alleged breach occurred.'

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[9] (CCT 95/18) [2019] ZACC 32, (22 August 2019), paragraph 14.

[10] Act 116 of 1998.

24. Having carefully reflected on the evidence led by the state, there is no evidence that the police applied their mind to the facts of this case prior to arresting the plaintiff, much less considering whether there were reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach by the plaintiff. The court in *Seria* had the following to say on the meaning of the word imminent:

> '"If something is possible or even likely it is not true to say that it is 'imminent', which word connotes an event which is both certain and is about to occur."[11]

25. I have already dismissed the state's allegation of a threat and concluded that the plaintiff was arrested for refusing to vacate her home. The plaintiff's arrest including her detention were thus unlawful. The plaintiff led evidence of a clinical psychologist to substantiate her case of PTSD. Ms Sewpershad's expert evidence was left undisturbed after cross-examination. The established test for factual causation is the but for test. But for the defendant's unlawful conduct of arresting and detaining the plaintiff, the sequelae she suffered such as PTSD would not have occured. The question of legal causation however is much more vexing than factual causation. The court explained in *Premier of the Western Cape Province and Another* v *Loots NO*:

> '[17]… Regarding this issue it has been held by this court that the criterion in our law for determining remoteness is a flexible test, also referred to as a supple test. In accordance with the flexible test, issues of remoteness are ultimately determined by broad policy considerations as to whether right-minded people, including judges, would regard the imposition of liability on the defendant for the consequences concerned as reasonable and fair.

[11] Note 8 *supra*, page 25.

> [18] But, as also appears from the authorities to which the flexible approach owes its origin and development, its adoption did not result in a total discard of the variety of tests, such as foreseeability, adequate causation or direct consequences that were applied in the past. These tests still operate as subsidiary tests or pointers to what is indicated by legal policy….'[12]

26. The conduct of the police in this case undermined the rule of law. Arresting a 61 year old from her home without applying oneself to the facts of the case and without a consideration whether it was necessary to detain, only to have her released on the third day without formally charging her demonstrates scorn for the rule of law. I conclude that the defendant's conduct is sufficiently close to have caused the plaintiff's clinical condition of PTSD for which she will require treatment as the expert opined. That means, legal causation has been established.

Quantifying the plaintiff's damages

27. I was referred to a wide array of cases as a means of assisting in quantifying the plaintiff's damages. It is as well to refer to the remarks of the court in *Minister of Safety and Security* v *Seymour*:

> 'The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.'[13]

[12] (214/2010) [2011] ZASCA 32 (25 March 2011), paragraph 17 – 18.
[13] (295/05) [2006] ZASCA 71; [2007] 1 All SA 558 (SCA); 2006 (6) SA 320 (SCA) (30 May 2006), paragraph 17.

28. The plaintiff in *Seymour* was arrested and detained for a week on accusations of fraud. According to the facts, Mr Seymour was the leader of co-operation which he had been instrumental in setting up. He was highly respected with the community where he lived. He appeared in court after a week's detention but the Director of Public Prosecutions declined to prosecute. Among the damages Mr Seymour sought to recover were amounts for clinical depression which he unsuccessfully persuaded the court was caused by the unlawful arrest and detention. His damages on appeal were quantified at R90 000. In *De Klerk* (2019), the plaintiff was detained for 8 days after which charges were withdrawn. He was awarded R300 000. In *Seria*, the plaintiff, an architect, was awarded R50 000 for overnight's stay at police cells. Mr Seria claimed his arrest was the most humiliation and degrading experience. He was arrested from home while entertaining guests. The police were rude and had failed to exercise their discretion. He was allowed to take along his medicine and was detained at the police station in full view of the public before being transferred to police cells in a different police station and locked up with a drug addict.

29. The plaintiff seeks R 250 000 as general damages; R 150 000 for emotional shock; and R100 000 for future medical expenses. Her claim for future medical expenses was supported by uncontroverted evidence. Taking into account the circumstances of the case, I consider that the amounts of R 60 000,00 for the plaintiff's future medicals, and R130 000, 00 for general damages are fair and reasonable. All in all, the plaintiff's award works out to R190 000.

Costs

30. I am alive to the fact that the amount I have awarded falls within the jurisdiction of the Magistrates Court. Having said that, incursions in personal liberty, as the Constitutional Court said in *De Klerk*, must be viewed through the prism of section 12 (1) of the Constitution.

D. Order

31. The plaintiff's case is upheld.

32. The plaintiff's arrest and detention were unlawful and wrongful.

32.1 The defendant must pay the plaintiff's damages of R190 000,00 with costs on a High Court scale.

NN BAM
JUDGE OF THE HIGH COURT, PRETORIA

Date of Hearing: **20 – 22 & 27 November 2023**

Date of Judgment: **11 March 2024**

Appearances:

For the plaintiff: **Adv L Kalashe**

Instructed by: J M Modiba Attorneys

Pretoria

For the defendant**:**	**Adv RA Ramuhala**
Instructed by:	State Attorneys
	Pretoria