

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1)	REPORTABLE: Electronic Reporting.
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: Yes
31-03-2013 <i>P.A. Mge</i>	

Case No. 23302/2002

In the matter between:

LIONEL MERVIN GREENBERG

Plaintiff

and

RENIER DU PREEZ  
MINISTER OF SAFETY AND SECURITY

First Defendant  
Second Defendant

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JUDGMENT

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MEYER, J

[1] The plaintiff claims damages in this action for wrongful arrest and detention. The first defendant, who was a detective sergeant and stationed at the SAPS Edenvale at the time, arrested him on 6 July 2000. It is the plaintiff's case that he was also wrongfully deprived of his liberty for a period of almost sixteen hours, from about 8:15 pm on 6 July 2000 until about noon on 7 July 2000.

[2] The defendants in terms of their plea aver that '... the plaintiff was arrested on a warrant and that such arrest is thus lawful' or in the alternative that he '... was arrested by the first defendant in terms of section 40 of the Criminal Procedure Act 51 of 1971, since the first defendant reasonably believed him to have committed an offence listed in Schedule 1 of the said Act and was thus entitled to arrest the plaintiff without a warrant.' At the commencement of the trial the defendants' counsel disavowed any reliance by the defendants on s 40(1)(b) of the Criminal Procedure Act ('the CPA'), which provides that '[a] peace officer may without warrant arrest any person - ... whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'. The defendants' counsel informed the court that the defendants rely only on s 40(1)(q) of the CPA read with s 3 of the Domestic Violence Act 116 of 1998 ('the DVA').

[3] S 40(1)(q) of the CPA provides that '[a] peace officer may without warrant arrest any person - ... who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.' S 3 of the DVA provides that '[a] peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.'

[4] The plaintiff and his former wife, Mrs Greenberg, went through a very acrimonious divorce. He left their former common home at about the end of April 2000. On 9 June 2000, Mrs Greenberg obtained an interim protection order in terms of s 5(2) of the DVA against him. The plaintiff was in terms of the order prohibited from entering

their former matrimonial residence at 13 Cork Avenue, Marais Steyn Park, Edenvale ('Mrs Greenberg's residence'); from entering her place of employment, which was at her residence; from preventing her or any child who ordinarily lived at her residence from entering or remaining in it; from following her; from sending faxes to her attorney; and from leaving messages on her answering machine.

[5] The plaintiff testified that Ms Rose Malotane, who was employed as a domestic worker at Mrs Greenberg's residence, telephonically informed him on 5 July 2000 at about 7.00 pm that the son of the plaintiff and of Mrs Greenberg, who at that stage was almost thirteen years old, had disappeared from Mrs Greenberg's residence. The plaintiff, accompanied by a co-worker, Mr Madau, thereupon went in search of their son. The plaintiff met Mrs Malotane and her husband at a garage from where Mrs Malotane had telephoned him and where they had arranged to meet. The garage was about 400 metres away from Mrs Greenberg's residence. The plaintiff arrived at Mrs Greenberg's residence at about 7.15 pm. His intention was not to enter her residence and merely to enquire via the intercom system about the disappearance of their son. He ran into a large open park situated across the road from Mrs Greenberg's residence, calling the name of their son to no avail. The plaintiff testified that his '...first point of departure was to go and look for him in the park immediately after (he) had picked up Mrs Malotane.'

[6] Mrs Greenberg approached the gate that gives access to her residence from the street at a time when Mrs Malotani opened it for her and her husband to enter. The plaintiff was standing on the street next to his car. He asked Mrs Greenberg about the whereabouts of their son. A verbal altercation ensued between the two of them. A

police officer, Sgt Richard Kgomo, arrived at the scene. The plaintiff testified that Mrs Greenberg was 'hysterical and screaming' saying that she had a domestic violence interdict and that the plaintiff should not be at her residence. The plaintiff testified that he at all times remained calm and standing at his car. He explained to Sgt Kgomo that he was looking for his son who had gone missing. Sgt Kgomo requested him to leave and to go to the Edenvale police station. The plaintiff complied with his request.

[7] Having regard to the factors listed in s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 I was of the opinion that the plaintiff's application for the admission of the affidavit evidence of Sgt Richard Kgomo regarding the events at Mrs Greenberg's residence should be granted in the interests of justice, and it was accordingly so admitted. There was no suggestion that Sgt Kgomo was known to the plaintiff or to the defendant. He was the police officer who in his official capacity attended at Mrs Greenberg's residence upon him having '... received a complaint of a missing person at 13 Cork Ave, Marais Steyn Park.' The nature of the evidence contained in his affidavit is an account of the events that transpired in his presence and of the official actions which he took. The purpose for which the affidavit evidence was tendered was to corroborate the account of the plaintiff. The probative value of the affidavit evidence outweighed any prejudice to the defendant which the admission thereof might have entailed. The affidavit evidence was in material respects corroborated by the evidence of the plaintiff, who was extensively cross-examined on behalf of the defendant, and the defendant was at liberty to call Mrs Greenberg as a witness if it wished to refute the evidence of the plaintiff or any of the allegations made in the affidavit of Sgt Kgomo. I was informed by the plaintiff's counsel that the reason

why Sgt Kgomo could not be called as a witness was because he was on leave. Having regard to the *quantum* of damages involved in any potential award in this matter if the plaintiff was to be successful, I could well understand why the plaintiff did not apply for a postponement of the trial in order to secure the attendance of Sgt Kgomo as a witness before he had closed his case.

[8] It is *inter alia* stated in the affidavit of Sgt Kgomo that he attended at Mrs Greenberg's residence at about 20:00 having received a complaint of a missing person at the complainant's residence. Paragraphs 4 and 5 of the affidavit read as follows:

'When I arrived at the scene I found Mrs. Greenberg shouting and crying. She told me that she didn't want her husband Mr. Greenberg there. Mr Greenberg was standing at his vehicle and didn't say anything. I asked him what the problem was and he said that he was looking for his child. I told him that he must leave, because of his wife's emotional state. He then just left without his child and came to the police station.

While I was on the scene Mr. Greenberg never got aggressive or abusive. When they arrived at the police station Mrs Greenberg opened a case against her husband. I then had to leave for complaints outside. They were fighting about the child.'

[9] Mr Greenberg testified that while he was inside the client service centre or charge office of the Edenvale police station Mrs Greenberg also arrived. The plaintiff and the first defendant testified about the events that transpired at the police station. Mrs Greenberg was not called as a witness.

[10] The first defendant testified that he came across a heated argument between the plaintiff and Mrs Greenberg when he walked into the charge office. It appears that it was a continuation of the argument that had erupted between them outside Mrs Greenberg's residence. The first defendant testified that 'there was a screaming match' between the two of them. She was talking about a protection order and he about their son that was missing. A uniformed police officer was trying to attend to them to no

avail. The first defendant considered it appropriate for him to intervene and he then attempted to establish what the problem was between them. Mrs Greenberg was, according to the first defendant, hysterical and the plaintiff was domineering. The first defendant testified that whenever Mrs Greenberg tried to furnish him with her version the plaintiff interrupted and did not give her an opportunity to speak. This, according to the first defendant, is why he decided to detain the plaintiff in the holding cells area. The plaintiff denied that he conducted himself in the way alleged by the first defendant. The first defendant, according to the plaintiff, merely locked him up in the holding cells area without more soon after he had entered the charge office.

[11] I find the evidence of the first defendant to be more probable on this aspect of the case, especially in the light of the undisputed domestic quarrel between the two former spouses that clearly got out of control to such an extent that the first defendant, who did not know them, considered it appropriate to intervene as well as their emotional states, the plaintiff being very concerned about their son's disappearance and Mrs Greenberg being hysterical.

[12] It is common cause that the first defendant detained the plaintiff in the holding cells area of the Edenvale police station. The plaintiff's unchallenged time estimation is that his detention commenced at about 8:15 pm, which was soon after their arrival at the police station. The first defendant testified that while the plaintiff was kept in detention in the holding cells area he obtained the version and sworn statement of Mrs Greenberg. She also produced the interim protection order. Her assumption was that the plaintiff acted in breach of the interim protection order by having followed her, because he, in the company of two other males, was standing outside her residence

soon after her arrival. The first defendant testified that he also telephoned Mrs Malotane. She, according to the first defendant, contradicted the version of the plaintiff. She informed the first defendant that the plaintiff arrived at Mrs Greenberg's residence after she had telephonically told the plaintiff that her services had been terminated because of a charge that Mrs Malotane had laid against the plaintiff's father. I interpolate to mention that it is common cause that Mrs Malotane accompanied by the plaintiff laid a charge against Mrs Greenberg's father in connection with his alleged conduct vis-à-vis the son of the plaintiff and Mrs Greenberg earlier on the same day. The first defendant testified that Mrs Malotane also informed him that the son of the plaintiff and Mrs Greenberg disappeared during the domestic dispute that ensued between the plaintiff and Mrs Greenberg after the plaintiff had arrived at her residence. The first defendant testified that Mrs Malotane was not prepared to make a statement in this matter since she had already deposed to one earlier that afternoon. The first defendant's evidence in this regard is consistent with the entry that he made in the investigation diary on 6 July 2000 at 22:10. The first defendant testified that he also consulted the station commander, Lt – Col Swart, about the matter. He testified that he formed the *prima facie* view that the plaintiff had acted in breach of the Interim Protection Order that was produced.

[13] The first defendant testified that he arrested the plaintiff while he was still being detained in the holding cells area. He conceded that the arrest of the plaintiff was without a warrant. He testified that he arrested him based on the sworn statement of Mrs Greenberg; the interim protection order that she produced; the plaintiff's version, which, in the words of the first defendant, 'had no back-up'; and after consultation with

Lt – Col Swart. The first defendant testified that he never received formal training relating to the provisions of the DVA and that he, at that stage, did not deal with domestic violence cases. The first defendant testified that he arrested the plaintiff for having violated an interim protection order when he, according to Mrs Greenberg, followed her home.

[14] I accept that the first defendant's evidence about what he was informed by Mrs Greenberg and by Mrs Malotane was not tendered to establish the truth thereof, but to explain the basis upon which he formed the view that the plaintiff had acted in breach of the interim protection order. The probative value of the information that Mrs Greenberg and Mrs Malotane furnished to him obviously depends upon their credibility and they were not called as witnesses. The defendants also did not apply for such evidence to be admitted in terms of s 3(1)(c) of the Law of Evidence Amendment Act. The defendants did not call any witness to gainsay the account of the plaintiff about the events that had transpired prior to the plaintiff and Mrs Greenberg arriving at the Edenvale police station. The plaintiff's evidence that he did not act in contravention of the interim protection order has in certain material respects been corroborated by the affidavit evidence of Sgt Kgomo.

[15] The evidence of the plaintiff that his release on warning or on bail was initially refused despite the endeavours of his attorney, Mr Gary Hirschowitz, and of his counsel, Mr Laurentz Barrett, and that it was only through the intervention of a Mr Peter Uko, who discussed the matter telephonically with the station commander, Lt – Col Swart, that he was ultimately released into the custody of Mr Uko during the early morning

hours on 7 July 2000, is more probable. It is consistent with the entries made in the official registers and with the unchallenged evidence of Mr Uco.

[16] The date and time of the plaintiff's arrest that was recorded in the docket was 6 July 2000 at 10:30. The date and time of his release that was recorded in the investigation diary was 7 July 2000 at 0:45. His release from the holding cells area accordingly only occurred two hours and fifteen minutes after he had been arrested. The release on warning document A972617 that was issued at the time records that the plaintiff was released on warning and warned to appear before the Magistrate's Court at Germiston at 9:00 am on 7 July 2000 'on a charge of intimidation ....'. However, the following was also recorded in the investigation diary:

'Die verdagte word vrygelaat op J127 A972617 en geplaas in die toesig van Peter Ugo; Mnr Hugo neem volle verantwoordelik vir die beskuldigde VB 311/07/2000 verwys.'

[17] The plaintiff testified that he was released into the custody of Mr Uko at about 12.30 am on 7 July 2000 and that he thereafter spent the rest of the night at the home of Mr Uko. He testified that his liberty was curtailed and he was not free to go to his own home. Mr Uko took him to the Magistrates' Court in the morning. The evidence of Mr Uko, who for 24 years served on the town Council of Edenvale and its successors and also several times as deputy mayor and as mayor, is unchallenged. He was married to the plaintiff's sister prior to May 1999. At about 10.00 pm on 6 July 2000 he received a telephone call from the plaintiff's sister seeking his assistance, because her brother, the plaintiff, had been arrested. He went to the Edenvale police station and after much discussion and well after midnight the station commander, Lt – Col Swart, instructed the police officers to release the plaintiff into his custody. The instructions

which Mr Uko received from Lt – Col Swart and the undertaking that he gave to Lt – Col Swart were that he would be responsible to detain the plaintiff and to ensure that he is handed over to the Clerk of the Court the next morning at 8.30 am. Mr Uko and the plaintiff arrived at Mr Uko's house at about 1.30 – 2.00 am where the plaintiff spent the night. The plaintiff, according to Mr Uko, 'was not a free man.' Mr Uko recalled that upon their arrival at his house he said to the plaintiff '... welcome to my prison.' This was also the testimony of the plaintiff. Mr Uko testified that he duly took the plaintiff to the Magistrates' Court the next morning where he handed the plaintiff over into the custody of the clerk of the court. The plaintiff testified that he was thereafter locked up and detained in the 'interview cells' at the Germiston Magistrates' Court from where he was moved to a cell which adjoins the court in which he appeared at about noon when he was released on warning or in his words on 'free bail'.

[18] The inevitable conclusion is that the arrest and detention of the plaintiff were unlawful in all the circumstances. S 3 of the Domestic Violence Act authorises the arrest of a person without a warrant in circumscribed circumstances. The jurisdictional facts which must exist before an arrest without a warrant is authorised in terms of that section were not met in this instance. The arrest of the plaintiff did not take place 'at the scene of an incident of domestic violence' nor was it suggested that the offence which the plaintiff was alleged to have committed contained 'an element of violence against' Mrs Greenberg.

[19] Having so concluded it remains to determine the quantum of damages that should be awarded to the plaintiff as a consequence of the defendants' unlawful conduct. LAWSA Vol 20 Part 1 1<sup>st</sup> Reissue para 320 contains a useful and concise

summary of factors which may have an influence on the award to be made in cases of wrongful arrest and deprivation of liberty. They include:

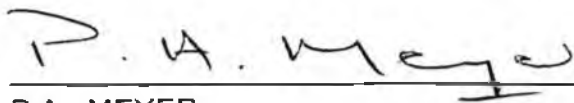
'...the circumstances under which the interference with liberty took place, the absence or presence of malice or an improper motive on the part of the defendant, the duration of the restriction of liberty, the social status of the plaintiff, the degree of publicity afforded the deprivation of liberty, and whether the defendant apologized for or gave a satisfactory explanation as to what took place. In addition, awards in previous cases, allowing for inflation, must be considered.' Footnotes omitted.

[20] Counsel referred me to various awards made in previous cases. The unreported judgment of Mokgoatleng, J is notable. It is a matter in which the present plaintiff was unlawfully arrested on 18 August 2000 at the same police station in Edenvale also in relation to a matrimonial issue between him and Mrs Greenberg concerning their son and he was detained at the police station for a period of about seventeen and a half hours. He was awarded an amount of R30 000.00 and High Court costs. See: *Greenberg v Minister of Safety & Security* (WLD Case No 22263/03).

[21] Having regard to all the relevant factors in this case and the previous award made to the plaintiff in relation to his wrongful arrest and detention soon after his arrest and the deprivation of his liberty in this instance, I am of the view that an appropriate and equitable award would be a similar one than the one awarded to him by Mokgoatleng J. The plaintiff's costs should in my view be paid by the second defendant alone.

[22] In the result I make the following order:

1. The second defendant is ordered to pay to the plaintiff the sum of R30 000.00 in damages in respect of his unlawful arrest on 6 July 2000 and deprivation of his liberty.
2. The second defendant is ordered to pay the plaintiff's costs on the High Court scale as between party and party.



P.A. MEYER  
JUDGE OF THE HIGH COURT

31 March 2013

Date of hearing:	29 January – 1 February 2013
Plaintiff's counsel:	Adv MD Saladino
Plaintiff's attorneys:	Larry Marks Attorneys, Johannesburg
Defendants' counsel:	Adv DW Joubert
Defendants' attorneys:	State Attorney, Johannesburg