# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

# JUDGMENT

**Reportable**

Case no: 20431/2014

In the matter between:

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| **CHARMAINE NAIDOO** | **APPELLANT** |

And

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| **MINISTER OF POLICE** | **FIRST RESPONDENT** |
| **T S MOLEFE** | **SECOND RESPONDENT** |
| **ISIAH TUANYANE MAMPEILE** | **THIRD RESPONDENT** |
| **IVAN PERUMAL** | **FOURTH RESPONDENT** |
| **LINDY KHAZI** | **FIFTH RESPONDENT** |
| **WOMEN'S LEGAL CENTRE TRUST INTERVENING** | **AMICUS CURIAE** |

**Neutral citation:** *Naidoo v Minister of Police* (20431/2014) [2015] ZASCA 152 (2 October 2015)

**Coram:** Maya ADP, Lewis, Petse, Mbha and Mathopo JJA
**Heard:** 31 August 2015
**Delivered:** 2 October 2015

**Summary**: Negligence ─ Duty of care ─ police conduct in breaching rights under the Domestic Violence Act 116 of 1998 actionable. Arrest ─ legality of ─ arrest without a warrant ─ person arrested whilst seeking assistance from the police under the Domestic Violence Act ─ arrest by police without warrant under s 40(1)*(b)* or *(q)* of the Criminal Procedure Act 51 of 1977 not absolving police from liability if requirements of the section not met. Damages ─ assault ─ appellant a victim of domestic violence assaulted by police while seeking assistance from them ─ appellant suffering secondary victimisation ─ that factor aggravating the *contumelia* element of the assault.

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**ORDER**

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**On appeal from**: Gauteng Local Division of the High Court, Johannesburg (Mbongwe AJ sitting as court of first instance):

1 The appeal is upheld.

2 The order of the court below is set aside and there is substituted therefor the following:

'1 The first defendant is ordered to pay the following sums to the plaintiff;

(a) the amount of R200 000 in respect of claim one;

(b) the amount of R70 000 in respect of claim two;

(c) the amount of R10 000 in respect of claim three.

(2) The first defendant shall pay interest on the aforesaid amounts at the rate of 15,5 per cent per annum from the date of service of the summons to the date of payment.

(3) No order as to costs is made.'

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**JUDGMENT**

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**Petse JA (Maya ADP, Lewis, Mbha and Mathopo JJA concurring):**

**Introduction**

[1] In the early evening of 12 April 2010 the appellant (Ms Charmaine Naidoo) was assaulted and injured by her former husband, Mr Charlton Naidoo, at their common home in Lenasia South, Johannesburg. She was rendered unconscious. The plaintiff's daughter, Ms Cindy Naidoo, solicited the assistance of the police and paramedics who responded at different times. The appellant was conveyed by ambulance to and admitted at Chris Hani Baragwanath Hospital where she received medical treatment

overnight. The next day she was discharged from hospital. This incident was a manifestation of a long-standing marital conflict between the parties.

[2] On Wednesday 14 April 2010 the appellant and her sister, Ms Roelene Vandeyar, went to the Lenasia South Police Station to lay a charge of assault against Naidoo under the Domestic Violence Act 116 of 1998. A police officer who attended to the appellant told her that she required a protection order from the magistrates' court before the police could assist her. In consequence, the appellant went to the magistrates' court. There she was advised that a protection order was not a pre-requisite for a charge being laid. She then returned to the police station for assistance but alas none was rendered. What followed thereafter was a dreadful series of traumatic, humiliating, dehumanising and flagrant violations of the appellant's right to dignity, freedom, security of her person and bodily integrity. Instead of being assisted, she was arrested, ostensibly pursuant to a charge of assault laid against her by Naidoo at the instigation of an Inspector Molefe, and detained overnight. The next day, when she was being taken to the Vereeniging Magistrates' Court, she was assaulted by a police officer who threw her into the rear of a police van. She suffered physical injury comprising soft tissue injuries in the right arm and right leg with severe swelling. In court, the charges against her were withdrawn by the prosecutor.

[3] The appellant instituted a delictual action in the Gauteng Local Division of the High Court, Johannesburg against the Minister of Police (the Minister) and certain members of the South African Police Service (SAPS) for damages. She claimed that members of the SAPS had wrongfully and negligently failed to comply with the legal duties they owed to her in terms of the Domestic Violence Act 116 of 1998 (the Act), the Regulations and National Instructions issued in terms of the Act; that they were guilty of unlawful arrest and detention and assault; that they had breached the constitutional duty owed to her by them; and that they breached a statutory duty in consequence of which she again allegedly became a victim of domestic violence on 2 September 2010.

[4] It was common cause on the pleadings that at all times material to the appellant's claims the members of the SAPS, in their dealings with the appellant, were acting in the course and within the scope of their employment as servants of the Minister and that the Minister was vicariously liable for their wrongful actions. The trial came before Mbongwe AJ who, at its conclusion, dismissed the appellant's action with costs.

[5] In dismissing the appellant's claims under the various heads the court below held, inter alia, that: (a) the Minister could not be held liable because the members of the SAPS who were said to have breached the legal duty allegedly owed to the appellant under the Act were not cited as defendants and in consequence 'the court [could] not entertain a claim unless all the parties who stand to be affected by an order the court may give have been brought before court'; (b) as the third [respondent] had died before trial, it was incumbent upon the appellant to substitute his estate or its representative as a party in the action; and (c) the arrest and detention of the appellant was lawful for there had been a complaint of domestic violence laid against the appellant by her former husband. Mbongwe AJ subsequently dismissed the appellant's application for leave to appeal which was granted by this court on petition to it.

**The facts**

[6] It is necessary to set out the facts as they appear from the evidence led at the trial in some detail. During the evening of 12 April 2010 the appellant was severely assaulted by Naidoo, from whom she is now divorced. As a result of the scuffle that had ensued, he pushed the appellant causing her to fall to the kitchen floor, hitting her head against the door. She suffered a concussion and when she regained her consciousness she was surrounded by paramedics who stabilised her and thereafter conveyed her to hospital for treatment. She was admitted to hospital, treated overnight and discharged the next day.

[7] On 14 April 2010 she went to the Lenasia South Police Station accompanied by Vandeyar, to report the assault and lay a criminal charge of domestic violence against Naidoo. There, as explained above, she was attended to by an unidentified member of

the SAPS who informed her that before she could lay a charge of domestic violence it was necessary for her to first apply for and obtain a protection order under the Act which she could do at the Lenasia Magistrates' Court. She then went to the magistrates' court as advised, to apply for a protection order. She was attended by a certain Ms Buthelezi who informed her that a protection order was not a prerequisite for her to lay a criminal charge under the Act. She was also told that she could, if so inclined, apply for a protection order once she had laid a charge.

[8] The appellant returned to the charge office and reported to the same officer who had attended to her in the first instance as to what Buthelezi had advised her. That officer then approached Inspector Molefe, the second respondent, and requested him to assist the appellant. Molefe asked her for Naidoo's telephone numbers which she furnished. Molefe then telephoned Naidoo and requested him to report to the charge office, and then advised the appellant to wait until he arrived. When Naidoo ultimately arrived Molefe first spoke to him on the side, after which he told Naidoo and the appellant to discuss the matter between themselves to see if they could resolve their dispute amicably. This failed.

[9] The appellant reported to Molefe that their negotiations had come to nought and that she was consequently intent on pursuing the charge against Naidoo. Molefe advised her that Naidoo would similarly lay a charge against her and if this were to happen she would also be liable to be arrested. Molefe then asked both the appellant and Naidoo to write their respective statements. Once they had done so, they were both arrested, charged and detained in separate police cells at the police station.

[10] The following morning (15 April 2010) the third respondent, Mr Isiah Mampeile, then a member of the SAPS, since deceased, informed the appellant in her police cell that he had come to take her to court. As she was being escorted to a police van she asked Mampeile to allow her a moment in order to speak to the fourth respondent, Colonel Ivan Perumal. But Mampeile would have none of that and sternly ordered her to board the police van. Mampeile then forcibly flung her into the rear of the police van. As

a result of this she was traumatised and suffered pain and swelling in the right side of her body. She then just lay tearfully in the rear of the police van. At this stage Perumal appeared and inquired as to what had happened. She made a report to Perumal who directed that she alight from the rear of the van and sit in the cab. The police van drove to the Vereeniging Magistrate's Court where the charge against her was withdrawn. She was then released from custody.

[11] Upon her release, the appellant obtained a medical examination report form (referred to in the evidence as J88) from the Lenasia Charge Office and consulted a Dr Munchi in relation to her assault by Mampeile. The doctor recorded in his medical report that the appellant had suffered soft tissue injuries in her right arm and right leg with severe swelling. On 16 April 2010 the appellant consulted Ms Lisa Vetten, working for a non-governmental organisation called Tshwaranang Legal Advocacy Centre that rendered free counselling to abused women and children. She had three sessions with a social worker. The social worker subsequently referred the appellant to a counselling psychologist, Mr Charl Louw, who was in private practice in Johannesburg at the time but also did consulting work for a number of governmental and non-governmental organisations. Louw had emigrated to New Zealand by the time the matter came to trial. For this reason an application was made during the trial to allow Louw to testify via video link which the court below granted.

[12] Louw prepared a psychological impact report which was admitted into evidence at the trial by agreement between the parties. In essence this report deals with the following: (a) the psychological assessment of the appellant; (b) clinical impressions formed by Louw; (c) the impact of the trauma on the appellant; and (d) his conclusion and recommendations. Like the social worker, Louw had three separate sessions of one hour each with the appellant. Moreover, in his report, which was confirmed in his evidence at the trial and which was not seriously challenged by the respondents, Louw expressed the opinion that because of her experience with the police both on 14 and 15 April 2010 the appellant had difficulty in overcoming her ordeal and was in fact suffering from chronic Post Traumatic Stress Disorder. The appellant told the counselling

psychologist that whenever she recalled the incidents she would experience flashbacks that emotionally overwhelmed her. She was still emotionally distressed and this left her irritable and at times depressed. And Louw opined that the appellant's traumatic experiences, whilst not entirely discounting the impact of the initial assault by Naidoo, were causally linked to the experiences she had been subjected to at the hands of the police. Louw attributed this to the fact that the appellant's anguish was intensified because the police had, by their conduct, exacerbated her sense of vulnerability.

[13] The second and fifth respondents also testified at the trial. But for present purposes only the evidence of Molefe is material. He testified that on 14 April 2010 he was on duty at the Lenasia Charge Office and attended to the appellant and Naidoo when they laid charges of domestic violence against each other. After Molefe had explained to them (wrongly, as I shall show) that he was required to arrest them both, he arrested and detained them in separate cells. On 15 April 2010 they were both taken to the Vereeniging Magistrates' Court but the charges were withdrawn by the public prosecutor, Mr Ludick, apparently for further investigation. However, nothing came of the further investigation for the appellant's daughter, Cindy, declined to make a statement to him. Later, both the appellant and Naidoo withdrew the charges that they had laid against each other and signed withdrawal statements confirming that they had no desire to pursue their respective cases against each other. When asked how many cases of domestic violence he had dealt with in his police career, Molefe said it was 'quite a lot' although he could not give an estimation of the number. He also stated that he was 'not quite sure' if he knew about the National Instructions 7 of 1999 issued by the National Police Commissioner. I shall elaborate on these national instructions later. And yet he confirmed that if the appellant was told that she could not lay a charge without a protection order, as she had testified, that advice was wrong. When pressed to explain why he thought it necessary to arrest the appellant if the charge laid against her was common assault, Molefe could offer no plausible answer, about which more will be said later.

[14] On 26 January 2015 this court granted the Women's Legal Centre Trust (the Trust) leave to intervene as an *amicus curiae* and to make written submissions. At the hearing of the appeal the Trust was permitted to address the court.

[15] It bears mentioning at the outset that at the hearing of the appeal counsel for the appellant informed us that the appellant was no longer persisting in claims 4, 5 and 6 on appeal. Consequently only claims 1, 2 and 3 are the subject of this appeal.

[16] I now turn to consider the legal requirements for delictual claims of the nature in issue in this appeal. As I have already stated, the appellant instituted a delictual claim in which she sought to hold the Minister vicariously liable for the alleged wrongful acts of the members of the SAPS in their dealings with her on 14 and 15 April 2010.

[17] It is trite that acts causing physical and emotional harm to a plaintiff are wrongful. The claims made by the appellants were based on a series of acts and breaches of statutory duty.

[18] The Constitutional Court had occasion to state in *S v Baloyi (Minister of Justice & another Intervening)* [1999] ZACC 195; 2000 (2) SA 425 (CC) para 13 that freedom from violence is fundamental to the equal enjoyment of human rights and freedom. It went on to state ─ an observation that is pertinent in the present context ─ that the sting of domestic violence lies in its 'hidden, repetitive character and its immeasurable ripple effect on society and in particular family life'. The Constitutional Court also stressed that domestic violence reinforces patriarchal domination given its 'systemic, pervasive and overwhelmingly gender-specific' nature (para 12). And that its harrowing effects are made all the more devastating because of 'the ineffectiveness of the criminal justice system in addressing family violence' which in turn 'intensifies the subordination and helplessness of the victims' (para 12).

[19] Mr Wesley, who appeared with Ms Kazee for the appellant, contended that the court below erred in rejecting the evidence of the appellant and that had it considered it

against the relevant constitutional and statutory backdrop it would have been driven to a different conclusion. Mr Wesley submitted that the court below gave a cursory summation of the evidence which manifests a fundamental misconception on its part.

[20] At this juncture it is necessary to remind oneself that the appellant approached the police to seek assistance under the Act, its Regulations and the police standing orders as encapsulated in the National Instruction 7 of 1999[1] issued by the National Commissioner of Police pursuant to s 18(3) of the Act. In *Minister of Safety and Security v Venter & others* [2011] ZASCA 42; 2011 (2) SACR 67 (SCA) this court, recognising the extensive nature of the rights and remedies accorded victims of domestic violence under the Act, emphasised (para 19) the manifest object of the Act spelt out in the preamble which is to 'afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide.'

[21] Section 2 of the Act provides that:

'**2 Duty to assist and inform complainant of rights**

Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—

*(a)* render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;

*(b)* if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and

*(c)* if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.'

[22] Equally important are the provisions of paragraph 7(1) of the National Instruction that impose a duty on members of the SAPS to render assistance to victims of domestic

[1] Promulgated in GN207, 28581, 3 March 2006. In essence National Instruction 7 of 1999 contains a host of comprehensive guidelines having force of law which prescribes to members of the SAPS how they must deal with domestic violence complaints and what they may or may not do.

violence by receiving and investigating the complaint and which further decrees that they may not shirk this responsibility by directing the complainant to seek other means[2] as Molefe had sought to do. Some of the acts complained of by the appellant were plainly deliberate. Others, such as the giving of incorrect advice and failing to comply with duties imposed on members of the SAPS, were not. Thus the question arises as to whether they were negligent and in determining that one must ask whether a reasonable person in the position of the members of the SAPS would have taken precautions to guard against the harm suffered by the appellant. The answer must be in the affirmative regard being had to: (a) the nature of the appellant's complaint; (b) the wide ranging remedies accorded a victim of domestic violence by the Act; (c) the comprehensive and explicit directives given to members of the SAPS both in the Regulations promulgated under s 18(3) of the Act and the National Instructions 7 issued by the National Commissioner of Police all of which proclaim a single-minded objective which is to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide.[3]

**Negligence**

[23] In *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-H this court stated the test for negligence as follows:

'For the purposes of liability *culpa* arises if —

(a) a *diligens paterfamilias* in the position of the defendant —

(i) would forsee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant has failed to take such steps.

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[2] Paragraph 7 (1) reads thus:
'In terms of the Domestic Violence Act a complainant may approach the Service for assistance at any time, irrespective of when or where the incident took place. Where a criminal charge is laid by the complainant, it is the responsibility of the member receiving the complaint to open a docket and have it registered for investigation and the member may not avoid doing so by directing the complaint to counselling or conciliation services.'

[3] See in this regard the Preamble to the Act which recognises that domestic violence is a serious social evil, prevalent in the country, affecting the most vulnerable member of society and that current remedies available having proved ineffective to deal with this scourge. And its expressed purpose is to, inter alia, provide measures to ensure that the relevant organs of state give full effect to the provisions of the Act.

. . . Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.'

[24] In determining the question of negligence one must of course pay heed to the warning of Nicholas AJA in *S v Bochris Investments (Pty) Ltd & another* [1987] ZASCA 140; 1988 (1) SA 861 (A) at 866I-867C that:

'In considering this question [reasonable forseability], one must guard against what Williamson JA called "insidious subconscious influence of *ex post facto* knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight". (*S v Burger* [1975 (4) SA 877 (A)] at 879D). In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961 AC 388 (PC) ([1961] All ER 104) Viscount Simonds said at 424 (AC) and at 414G-H (in All ER):

"After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine liability."'

See also in this regard: *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* [1999] ZASCA 87; 2000 (1) SA 827 (SCA) para 27.

[25] It is trite that the question whether the precautions taken to guard against foreseeable harm were reasonable or not is a factual one. This was explained by Scott JA in *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) as follows (para 7):

'Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be:

> "*(a)* the degree or extent of the risk created by the actor's conduct; *(b)* the gravity of the possible consequences if the risk of harm materialises; *(c)* the utility of the actor's conduct; and *(d)* the burden of eliminating the risk of harm'.
>
> . . . If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence."' (Citations omitted)

On the facts of this case the question to be answered is whether a reasonable person in the position of the members of the SAPS would have taken precautions to guard against the harm suffered by the appellant. Put differently, the question is whether in the light of the peculiar facts of this case the conduct of the police fell short of the conduct of the notional reasonable person. (See in this regard *Sea Harvest Corporation* para 21.) Undoubtedly, the answer must be in the affirmative.

**Factual and legal causation**

[26] In *Minister of Safety and Security & another v Carmichele* [2003] ZASCA 117 2004 (3) SA 305 (SCA) this court reaffirmed a well-established principle that causation has two elements. In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (AD) at 700E-I Corbett CJ explained these elements as follows:

'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry 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; *aliter*, if 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. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".' (Citations omitted.)

**Claim one**

[27] Counsel for the *amicus* referred us to a number of international and regional instruments whose purpose is to eradicate all forms of gender-based discrimination that have the effect of impairing the enjoyment by women of fundamental rights and

freedom. It is internationally accepted that states that subscribed to those instruments must take all measures necessary to provide effective protection to women against all forms of violence. The Convention on the Elimination of All Forms of Discrimination Against Women[4] and the Protocol to the African Charter on Human Peoples' Rights on the Rights of Women in Africa,[5] amongst others, have as their particular focus the protection of the right to human dignity and the protection of women against all forms of violence that member states are obliged to enforce by legislative measures. Both the Constitutional Court and this court have reaffirmed the principle that the State is obliged under international law to protect women against violent crime and gender discrimination inherent in violence against women.[6]

[28] Taking cognisance of the international and regional initiatives relating to the protection of women against all gender-based discrimination, South Africa enacted the Act. One of the objects of the Act in the preamble declares that:

'AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child; . . .'

[29] Counsel for the appellant argued that the respondents violated the appellant's right to freedom and security of her person and treated her in a cruel and degrading way. Consequently, concluded the argument, the appellant was subjected to secondary victimisation which intensified and prolonged her trauma. And such conduct was in breach of their statutory obligations both under the Act, the Regulations and paragraph 7(1) of the National Instruction[7] which, amongst others, impose a duty on members of the SAPS to render assistance to victims of domestic violence.

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[4] Ratified by South Africa on 15 December 1995.
[5] Ratified by South Africa on 17 December 2004.
[6] See, eg, *Baloyi* (para 13); *Carmichele* (para 62) and *Van Eeden* (para 15).
[7] Footnote 1.

[30] Counsel for the appellant readily accepted that although the conduct of Molefe constituted a breach of his constitutional and statutory duties owed to the appellant in a most fundamental way, that conduct was not pertinently relied upon as underpinning this part of the appellant's action. It was, however, contended that the evidence led at the trial to which the respondents acquiesced, relating to the conduct of Molefe, meant that the court below was not precluded from considering such evidence. Of course, it is trite that litigants are obliged to allege in their pleadings all the material facts on which they rely for their cause of action. Ordinarily it is impermissible for a party to plead a particular cause and at trial seek to establish a different case. Nor is it permissible for a trial court to base its decision on something outside the parameters of the pleadings.[8]

[31] But that practice, hallowed though it is, is not cast in stone. Where the issue has been fully canvassed in evidence and will not occasion prejudice to the opponent a party may be allowed to rely on an issue not covered in the pleadings. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) this court put it thus (at 714G):

'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the court was expected to pronounce upon it as an issue.'[9]

[32] On his own version, Molefe did not assist the appellant immediately when she sought assistance upon returning from the magistrates' court. He caused her to wait because he had asked Naidoo to come to the police station first. When Naidoo eventually arrived he suggested to the parties that they should rather endeavour to reconcile. When the appellant informed him that she was still determined to pursue her charge against Naidoo, Molefe suggested that he lay a counter-charge against the appellant pointing out to the latter that she also faced arrest.

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[8] *Imprefed (Pty) Ltd v National Transport Commission* [1993] ZASCA 36; 1993 (3) SA 94 (A) at 107A-E.
[9] See also *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) paras 11-12.

[33] Counsel for the respondents argued first that the appellant was assisted by the police to lay her charge, albeit belatedly, after Naidoo had arrived at the police station and had himself also laid a counter-charge against the appellant. Second, it was submitted that if the appellant had established that the members of the SAPS had breached their legal duty as alleged, she was not without a remedy and that her recourse was to require that the police invoke s 18(4)*(a)* of the Act. Section 18(4)*(a)* provides, inter alia, that failure by a member of the SAPS to comply with an obligation imposed in terms of the Act or the national instructions issued by the Commissioner under subsection (3) constitutes misconduct. These submissions are without merit. The first submission is belied by the evidence led at the trial which has already been set out above. The second submission based on s 18(4)*(a)* of the Act is similarly misplaced. That section, as already explained above, does not purport to provide for delictual liability flowing from a breach of a legal duty imposed on members of the SAPS to take reasonable positive steps to prevent harm to persons in the position of the appellant. Accordingly, I am satisfied that what the appellant experienced on 14 April 2010 at the hands of members of SAPS constituted a breach of the legal duty that those members owed to her. Thus the emotional harm, humiliation and trauma that the appellant was subjected to is the antithesis of what the Act, the Regulations and the National Instruction ─ with their extensive remedies ─ seek to accomplish.

**Did appellant suffer psychological harm?**

[34] In support of this part of her claim the appellant called Louw, a counselling psychologist, as an expert witness. As I have stated before, the expert report of Louw was admitted by consent and its contents and his evidence at the trial were not seriously challenged by the respondents. After interviewing the appellant on three different occasions Louw set out to ascertain whether the appellant exhibited any symptoms of Post-Traumatic Stress Disorder. For this purpose he employed two psychometric methods. First, he used the Impact of Event Scale-Revised (IES-R) which is designed to assess current subjective distress for any specific life event. Second, he used the DSM-IV Criteria for Post-Traumatic Stress Disorder. According to Louw the results of the IES-R assessment revealed that the appellant, inter alia: (a) re-

experienced the traumatic event ‘at a clinically significant level’; (b) attempted to avoid being reminded about the traumatic event to a clinically significant level; and (c) is ‘. . . exposed to feelings of psychological and physical hyperarousal and that she feels irritable, struggles to concentrate, has an exaggerated startle response and feels restless as a result of the trauma’.

[35] The diagnostic results of the DSM-IV are set out in Louw’s report from which he concluded that the incidents that befell the appellant ‘continue[d] to have a significant impact’ on her and that ‘she is affected on various social, interpersonal, emotional and psychological areas of functioning’ which is indicative of the severity of the incident. And that the information elicited from the appellant ‘is consistent with a person suffering from chronic Post Traumatic Stress Disorder’, directly attributable to the incidents.

[36] It was contended on behalf of the respondents that because the appellant was already traumatised as a result of the domestic violence perpetrated by Naidoo before she went to the police it could not be asserted with reasonable certainty that her psychological condition was caused by the incidents that she experienced at the police station. In my view, this aspect was adequately dealt with by Louw in his evidence at the trial in response to what was put to him. It was put to Louw under cross-examination as to whether he had investigated the trauma suffered by the appellant following the physical abuse perpetrated by Naidoo. In response, Louw said that he had asked the appellant specifically about this and that he had focussed, in his assessment, on that very aspect ‘to gain an insight into how she understands that trauma’. And his assessment was that her traumatic experiences ‘link[ed] specifically to experiences she had at the police station’. This was likewise taken up by the trial court which sought elucidation from Louw as to ‘how he would draw the line in [his] assessment and say these effects are as a result of the abuse by [Naidoo] and these . . . are as a result of the conduct of the police…’ Again Louw explained that given his training and expertise as a clinician he was able, from the sessions he had with the appellant and whilst acknowledging that the impact of the domestic violence could not be entirely discounted, to conclude that the appellant could clearly relate to her experiences at the

police station as harrowing. Moreover there has been no suggestion from the evidence that the appellant was malingering.

[37] In light of the aforegoing I am satisfied that the appellant has succeeded in establishing her first claim against the respondents.

**Claim two**

[38] The appellant's second cause of action, as will be recalled, was that her arrest and detention were unlawful. The Minister resisted this claim and invoked s 40(1)*(b)* and *(q)* of the Criminal Procedure Act 51 of 1977 to justify the arrest. Section 40 (1)*(b)* and *(q)* of the CPA provide that a peace officer (such as Molefe) may without warrant arrest any person ─

'*(b)* whom he reasonably suspects of having committed an offence referred to in Schedule 1 . . .;

. . .

*(q)* 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 of which violence is an element*.' (My emphasis.)

[39] The Bill of Rights in the Constitution guarantees the right of security and freedom of the person, including the right, in the words of s 12(1)*(a)* of the Constitution, 'not to be deprived of freedom arbitrarily or without just cause'. In *Zealand v Minister of Justice and Constitutional Development & another* [2008] ZACC 3; 2008 (4) SA 458 (CC) para 25, the Constitutional Court said the following:

'This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground for justification. In *Minister van Wet en Orde v Matshoba* [1989] ZASCA 129 (A); 1990 (1) SA 280, the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy. The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was

sufficient in such a case. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.'[10]

[40] And, as was explained by Van Heerden JA in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H, once the jurisdictional requirements of the section are satisfied, the peace officer may, in the exercise of his discretion, invoke the power to arrest permitted by the law. However, the discretion conferred by s 40(1) of the CPA must be properly exercised, that is, exercised in good faith, rationally and not arbitrarily. If not, reliance on s 40(1) will not avail the peace officer.

[41] It is now settled that the purpose of the arrest is to bring the arrestee before the court for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial. (See *Minister of Safety and Security v Sekhotho & another* [2010] ZASCA 141; 2011 (5) SA 367 paras 30-31.) Thus it goes without saying that an arrest will be irrational and consequently unlawful if the arrestor exercised his discretion to arrest for a purpose not contemplated by law. This brings me to the next inquiry, that is, whether the respondents established at the trial that Molefe exercised the discretion to arrest the appellant in a proper manner.[11] On this aspect the evidence of Molefe is critical. Under cross-examination he said:

'It is domestic violence. I cannot allow the two people to go back under the same roof again. I do not know what is going to happen there. So it is better if we separate them until then, they will go to court and court decide. . . . Because sometimes court say one must leave the house and go stay, look for a place somewhere. But that should be decided by court, not me.'

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[10] See also: *Minister of Law and Order & others v Hurley & another* [1986] ZASCA 53; 1986 (3) SA 568 (A) at 589E-F which held that: 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

[11] Footnote 11 at 818H-J.

[42] In my view this piece of evidence ineluctably leads to the conclusion that Molefe either exercised his discretion to arrest arbitrarily or for an improper purpose, that is, to separate the appellant from Naidoo until she was brought to court the following day. This is all the more so if regard is had to the fact that it was: (a) only at his instance that Naidoo laid a counter-charge of domestic violence against the appellant; and (b) he had, contrary to the prescripts of the Act, the Regulations and the National Instructions, insidiously advised the appellant to settle the matter with Naidoo under threat of arrest in the event that the matter was not settled. Accordingly, in the light of the foregoing it cannot be said that Molefe, in exercising his discretion to arrest as he saw fit, 'stayed within the bounds of rationality'. Moreover, on his own account, Molefe considered himself obliged to arrest the appellant because a docket of domestic violence had been opened against her and that she was therefore liable to be arrested as a matter of course. The court below agreed and held that 'it was standard practice' that an arrest had to follow as a matter of course. No consideration was given to the crucial question whether the charge of common assault laid by Naidoo against the appellant was an offence referred to in Schedule I so as to satisfy one of the jurisdictional facts required for the proper exercise of the power under s 40(1)*(b)* of the CPA. And in any event the ostensible charge laid against the appellant by Naidoo was, on the evidence, instigated by Molefe himself as a ruse to cajole her to withdraw the charge that she had laid against him.

[43] As to s 40(1)*(q)* of the CPA the *amicus* argued that it too does not avail the respondents even had it been relied upon by them. The gravamen of the *amicus'* submission was that there was no evidence led at the trial to establish that Molefe had entertained a reasonable suspicion that the appellant had committed an act of domestic violence constituting an offence of which violence is an element. Consequently, concluded the argument, it could not be asserted that Molefe had exercised any discretion he might have had in good faith, rationally and not arbitrarily. In my view, it is not open to the respondents to invoke s 40(1)*(q)* of the CPA for the same reasons set out above in relation to s 40(1)*(b)*. And there was no serious suggestion, still less

evidence, that the appellant had committed an act of domestic violence which constitutes an offence of which violence is an element.

**Claim three**

[44] The appellant's third cause of action was the allegation in her particulars of claim that on 15 April 2010 she was assaulted by a member of the SAPS. But, as I have already stated, the member concerned had died by the time the matter came to trial. The court below held that this claim could not be entertained and, in consequence, it was similarly dismissed. In so doing the court below reasoned thus:

'The aforementioned principle and consequence of a failure to bring an interested party before the court applies equally to the plaintiff's claim 3. The plaintiff was advised during a pre trial conference that the 3rd defendant had since passed on. Since the plaintiff's claim is for monetary compensation, it was necessary for the plaintiff to reign in the estate of the deceased or the representative thereof as a party to the proceedings in the stead of the deceased for, any order that may be granted in favour of the plaintiff will impact on the deceased's estate. The plaintiff failed to reign in the estate and, in the result this claim must fail.'

[45] The court below elaborated upon this reasoning in its judgment refusing leave to appeal and stated that the withdrawal statement signed by the appellant (which was common cause) exonerated the [respondents]. In this court the reasoning of the court below was criticised by the appellant's counsel. As to the so-called failure by the appellant to substitute the estate of the deceased police officer, it was contended that the fact that the respondents had admitted in their plea that the Minister's servant who assaulted the appellant was acting in the course and scope of his employment was tantamount to an admission that the Minister was vicariously liable for the wrongful conduct of the member concerned. As to the withdrawal statement, it was argued that on its terms it amounted to no more than a withdrawal of the charge that the appellant had laid against Naidoo under the Act. It was not and did not purport to be a waiver by the appellant of her rights to hold the Minister delictually liable for the wrongful conduct of the Minister's servants.

[46] Counsel for the Minister accepted in this court that the Minister is vicariously liable for the wrongful acts of his servants. But he persisted in his support of the reasoning of the court below in relation to the withdrawal statement. I am satisfied, however, that the appellant's contention must prevail and that the respondents' counter is without merit and must be rejected for the following reasons. First, when the appellant signed the statement she had had no discussion with Molefe that she was contemplating instituting action for delictual damages against the respondents. Second, when the charge against the appellant was withdrawn by the prosecutor on 15 April 2010 this was to allow Molefe, as investigating officer, time to conduct further investigations. Hence Molefe sought a statement from the appellant's daughter who declined to furnish one. Third, once Molefe accepted that there was no prospect of obtaining a statement from the appellant's daughter, he turned to the appellant who told him that she and Naidoo had decided to withdraw their respective charges against each other. Fourth, is the text of the statement itself. What was withdrawn was 'the case against the accused'. It cannot reasonably be suggested that the respondents are the accused referred to therein for the appellant had laid no charge against them. Nor was Molefe investigating any charge against the respondents. How it was then thought by the court below that the withdrawal statement was a waiver of the appellant's rights to claim delictual damages against the respondents is difficult to fathom.

**Quantum**

[47] This brings me to the issue of quantum. The appellant claimed R200 000 for the breach of the legal duty owed to her by the members of the SAPS, R70 000 for her unlawful arrest and detention and R10 000 for assault. It was argued on behalf of the appellant that these amounts are both fair and reasonable when viewed against past awards in comparable cases. On the other hand counsel for the respondents submitted that these amounts are excessive and call for moderation. Counsel submitted that this court should apply apportionment so as to ameliorate the respondents' situation. But the difficulty confronting the respondents on this score is that apportionment was neither pleaded nor canvassed at the trial. It was also not even foreshadowed in the

respondents' heads of argument.[12] In any event I fail to see how it could conceivably be said that the appellant was contributorily negligent in relation to the damages suffered by her on the facts of this case.

[48] It should, however, be emphasised that the facts of this case need to be considered in their entirety. Whilst it is permissible to have regard to past awards in comparable cases the court must take cognisance of the fact that few cases are directly comparable. And, as Nugent JA observed in *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA), 'money can never be more than a crude solatium for the deprivation' of liberty.

[49] An examination of the earlier cases awarding damages of the nature in issue in this case reveals that our courts have consistently placed a high premium on personal liberty, the infringement of rights to dignity and the right to freedom and security of the person. And where these rights have been gratuitously undermined, as has happened in this case, an award of aggravated damages (as opposed to punitive damages that are not allowed) may be justifiable.[13] References have already been made to the appellant's traumatic experiences as a consequence of the egregious conduct of the members of the SAPS and these need not be repeated. Suffice it to say that, in my view, the description of the appellant's experiences by Louw is apt. He said that by not assisting the appellant the police 'exacerbated her sense of vulnerability'. Consequently, and taking into account all the circumstances, the amounts claimed under the three heads in issue in this appeal are, in my view, appropriate.

**Conduct of the trial**

[50] Before concluding, it is unfortunately necessary to comment on what I consider to be the unacceptable manner in which the learned judge conducted the trial. There are several instances that demonstrably show the frequency with which the appellant's legal

[12] See, eg, *Thompson v South Africa Broadcasting Corporation* [2001] ZASCA 7; 2001 (3) SA 746 (SCA) para 7 where it was held that the function of oral argument, especially in a court of appeal is supplementary to the written argument.
[13] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 62 and 83.

representative was hampered in her presentation of the appellant's case in the court below. On occasions too numerous to detail in this judgment, the legal representative was unduly denied the opportunity to deal with critical issues pertinent to the appellant's case. The legal representative was, inter alia, precluded from eliciting evidence from the appellant concerning: (a) what her daughter and sister had told her even though the court below had been informed that they would be called as witnesses, as indeed they were; and (b) the things that the appellant had discussed with Perumal concerning her experiences with the police. The learned trial judge disallowed these and other related questions because he wrongly perceived that the evidence that the appellant sought to give would be hearsay and thus inadmissible.

[51] The disallowance of such evidence was a manifestation of the fundamental misconception on the part of the learned judge as to what constitutes hearsay evidence. He was seemingly oblivious to the existence of the Law of Evidence Amendment Act 45 of 1988 and even most significantly and troubling the import of s 3(1)*(b)* and s 3(3) thereof both of which provide for the provisional admission of hearsay evidence if the person upon whose credibility the probative value of such evidence depends, will testify at such proceedings.[14] Thus the appellant ought to have been permitted to proffer such evidence and it was wrong of the learned judge to impose a blanket embargo, as he had done, on such evidence.

[52] Even more disconcerting were the numerous unwarranted interruptions by the learned judge when he wrongly prevented or restricted, at critical stages of the trial, the appellant's legal representative when she led or cross-examined witnesses. To

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[14] Section 3, in material parts, provides as follows:
'Hearsay evidence
(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless ─
. . .
(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
. . .
(3) Hearsay evidence may be provisionally admitted in terms of subsection 1(6) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account. . .'

compound matters, some of the interventions bordered on discourtesy and cynicism towards the witnesses, and counsel were not spared either. In *Distillers Korporasie (SA) Bpk v Kotze* 1956 (1) SA 357 (A) at 361A-H this court considered the question whether disallowing legitimate questions sought to be put to a witness by cross-examining counsel is an irregularity. This court answered that question thus:

'The first question to be considered was whether there had been an irregularity. The answer could not be in doubt. The disallowance of proper questions sought to be put to a witness by cross-examining counsel is an irregularity which entitles the party represented by the cross-examiner to relief from a Higher Court, unless that Court is satisfied that the irregularity did not prejudice him.' (Citations omitted.)

Although these remarks were made in relation to cross-examination, by parity of reasoning, they apply with equal force to examination-in-chief.

[53] The impartial adjudication of disputes which come before the courts is the cornerstone of our legal and judicial system. This requires judicial officers to conduct trials in an open-minded and fair manner.[15] It is equally vitally important that judicial officers be sensitive and compassionate to the plight of those who appear before them for the rule of law can only flourish if the citizenry's confidence in the administration of justice is entrenched.

[54] The remarks of the Constitutional Court, although made in a different albeit related context, are apposite. The Constitutional Court said the following:

'. . . Civility and courtesy should always prevail in our courts. Litigants should leave our courts with a sense that they were given a fair opportunity to present their case. This is crucial if public confidence in the judicial system is to be maintained. . . '[16]

Regrettably, the learned judge in the court below was seemingly oblivious to these judicial injunctions. Accordingly, it was perfectly understandable when counsel for the *amicus* submitted that the appellant, who had suffered primary victimisation by her former husband and secondary victimisation by the police yet again bore the brunt of tertiary victimisation during the trial.

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[15] *S v Roberts* 1999 (4) SA 915 (SCA) para 25.
[16] *Bernert v Absa Bank Ltd* [2011] ZACC 28; 2011 (3) SA 92 (CC) para 98.

[55] It remains to express our gratitude to counsel for the *amicus*, Ms O'Sullivan and Ms Williams, for their helpful submissions in this court and for making available to us copies of international and regional articles and instruments dealing with obligations of member states to combat all gender-based discrimination and violence against women that have the effect of impairing the quality and enjoyment of their fundamental rights and freedoms.

**Conclusion**

[56] It follows from what has been said above that the appeal must succeed. This conclusion renders it unnecessary to consider the appeal against the costs order made by the court below. This result would ordinarily have meant that the appellant is entitled to her costs both in this court and the court below. However, we were informed by counsel for the appellant that her legal representation both in this court and the court below is on a pro bono basis. That being the case no order as to costs is sought in both courts and consequently none will be made.

[57] There are two final issues to consider. The first is the rate at which *mora* interest is to be computed. The Prescribed Rate of Interest Act 55 of 1975 empowers the Minister of Justice to prescribe a rate of interest for purposes of the Act from time to time. By virtue of that power the Minister prescribed a new rate of interest, effective from 1 August 2014, reducing the prescribed rate of interest from 15, 5 per cent per annum to 9 per cent per annum.[17] However, as the appellant's action was instituted before the effective date the reduced rate of 9 per cent per annum does not apply in this case.[18] Allied to the first issue is the secondary issue that this court is empowered, in the exercise of its discretion, to award interest in respect of unliquidated debts from the date

[17] See GNR 554, GG 37831 dated 18 July 2014.
[18] See in this regard *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 300G-302A.

of demand. Taking into account the facts of this case this will be a proper case for this court to invoke that power.[19]

[58] Accordingly, the following order is made:

1 The appeal is upheld.

2 The order of the court below is set aside and there is substituted therefor the following:

'1 The first defendant is ordered to pay the following sums to the plaintiff;

(a) the amount of R200 000 in respect of claim one;

(b) the amount of R70 000 in respect of claim two;

(c) the amount of R10 000 in respect of claim three.

(2) The first defendant shall pay interest on the aforesaid amounts at the rate of 15,5 per cent per annum from the date of service of the summons to the date of payment.

(3) No order as to costs is made.'

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**X M Petse**
**Judge of Appeal**

[19] See s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 which empowers a court in the exercise of its discretion to award interest in respect of unliquidated debts from the date of demand.

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