



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 11275/2012

In the matter between:

NEELKA MAHARAJ

PLAINTIFF

and

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

Date of Hearing : 18-19 September 2017

Date of Judgment : 05 October 2017

ORDER

It is hereby ordered that:

The defendant is liable for the unlawful arrest, detention and treatment of the plaintiff whilst she was in custody between 4-6 August 2011.

JUDGMENT

D. Pillay J:Introduction

[1] The plaintiff is Ms Neelka Maharaj a widow born on 8 March 1974 and residing at the time of the incident in Clayfield, Phoenix, KwaZulu-Natal. The defendant is the Minister of Police. The plaintiff sues the defendant for R2 167 869 in damages arising from her unlawful arrest, detention and sexual harassment whilst in police custody. Typically the defendant delivered a bare denial plea. In 2016 the defendant conceded the arrest and detention of the plaintiff but denied the sexual harassment. Despite undertaking to amend its plea at the pre-trial conference the defendant failed to do so. The trial proceeded on the issue of liability only.

The facts

[2] On 4 August 2011 Detective Sergeant Nadasen received instructions from Colonel Munien to interview and arrest the plaintiff from her workplace at the White House Shopping Mall in Phoenix. Accompanied by Detective Sergeant Hurrinath, Detective Nadasen took the plaintiff from her workplace into custody as a suspect in the murder of Mohan Juggath.

[3] Later Detective Nadasen also took her brother Pravesh Maharaj into custody from his workplace at the Playhouse Theatre. The police officers brought the plaintiff and her brother to the Phoenix police station. The plaintiff remained in the custody of Detective Nadasen whilst her brother remained with Detective Hurrinath. Whilst in his custody the plaintiff alleges that he sexually harassed her.

[4] At about 15h26 Detective Nadasen informed her that he was arresting her for the murder of Mr Juggath. She was allowed to make a telephone call to her domestic worker to arrange the care for her daughter of seven years. Detective Nadasen booked her into a cell at Phoenix police station. He did not allow her to keep her handbag, her cellular phone or her medication. She was on medication

prescribed for arthritis and pain after undergoing back surgery about two weeks earlier.

[5] She was detained under appalling conditions. The next morning many policemen came to look at her. They offensively touched her lips and her face. None checked on her needs and her wellbeing. At some point she was taken to meet her erstwhile attorney Vasie Chetty and then returned to the cells.

[6] She and her brother were handcuffed and taken to Tongaat police station. There she was detained under conditions worse than the previous night at Phoenix. She received her painkillers but not any other medication. The cold cell aggravated her arthritis and back pain.

[7] In the absence of her attorney, Lieutenant Naidoo and Captain Govender of Tongaat police station questioned her about the nature of her investments with Mohan Juggath. She answered all the questions. She spent her second night in jail alone in a cell.

[8] The next day, Saturday, Lieutenant Naidoo and Captain Govender took the plaintiff to her shop to search it. They found nothing incriminating. They proceeded to search her vehicle and her house. There they collected two rifles belonging to her late husband and her father. They went to her brother's house where they took his licensed firearm for ballistic testing. They returned to Tongaat police station where they released her after telling her that she could not be held for longer than 48 hours in police custody. She was not involved in any further investigation of the murder.

The plaintiff's evidence

[9] The plaintiff testified that Detectives Nadasen and Hurrinath arrived at her store pretending to be customers. Then they told her that they were arresting her for the murder of Mohan Juggath. They escorted her out of the store through the mall to their vehicle which was parked about half a kilometre away despite there being parking in front of her store. Whilst walking Detective Nadasen announced to curious onlookers that he was arresting her for murder.

[10] In the car she sat in the back seat with Detective Nadasen. Detective Hurrinath drove the vehicle. The police questioned her about the murder weapon and where her brother lived. They proceeded to her brother's house nearby. He was not at home. Detective Nadasen asked her to contact her brother on her cellular phone. She did so. He spoke to her brother. They proceeded to the Playhouse. On the way Detective Nadasen put his hands on her knees and passed sexual innuendos. After Detective Nadasen arrested her brother from the Playhouse he returned to the vehicle to sit with the plaintiff in the back seat. On the way to Phoenix police station Detective Nadasen screamed and shouted threats at her. She had still not been advised of her rights to legal representation.

[11] At the police station she informed Detective Nadasen that he had arrested her for no reason and that he should ask Vasie Chetty, her attorney, and her broker, Robert Baichan, about her claims against the deceased. Despite her pleas Detective Nadasen did not contact them. He insisted that he had two statements from Omprakash Singh and his wife that implicated her.

[12] Regarding the Singhs, after her husband had passed away ten months earlier Mr Singh frequently made a nuisance of himself at her house. She would tell him to leave her alone but he would become argumentative and bitter. In the past he had been abusive and violent towards his wife and the plaintiff had to intervene often. Records at the Phoenix police station would bear her out, she told Detective Nadasen.

[13] When she was alone with Detective Nadasen he took her to an ablution facility where he sexually harassed her. She was so traumatised by the entire experience that she started menstruating. When Detective Nadasen booked her into her cell she asked him for her prescription medication; he refused to give it to her.

[14] After their release her brother's wife picked them up from the police station. The following day, after the *Sunday Tribune Herald* carried a headline implicating her brother in the murder, her sister-in-law declared that she wanted to have nothing to do with the plaintiff. She testified about the pain and suffering that she endured whilst

in police custody, and the impact of the arrest and detention on her relationship with her family, friends and her mental health. She had to seek psychiatric help initially and currently receives psychological therapy. Her business suffered and she closed it down.

The evidence for the defendant

[15] Detective Sergeant Nadasen testified that he is a police officer for twenty-two years, ten years of which has been at Phoenix police station. Colonel Munien instructed him to interview and arrest the plaintiff. They parked their vehicle next to the plaintiff's shop, entered the shop, introduced themselves to the plaintiff, produced their appointment certificate and informed her that they were investigating the murder of Mohan Jaggath under a Tongaat case number. The plaintiff became aggressive and rude. Detective Nadasen then informed her that he 'would appreciate it' if she would accompany them. She agreed. She walked the distance of about four to five metres to their vehicle. He denied that they had parked the vehicle half a kilometre away because as 'fat guys' they would have taken the most convenient parking rather than walk a distance. He denied being aggressive. Unconvincingly he began narrating the alleged protocols for being careful when dealing with an aggressive, rude suspect in a murder investigation, especially if she is a female.

[16] After arresting Mr Maharaj he put him in the back seat of the car before he took his seat next to the driver. Again he narrated how unethical it would be for him to sit next to a female suspect in the backseat of a car if she did not look like a flight risk. He had no reason to sit with the plaintiff. He denied touching her inappropriately and passing innuendos. As a person who had been 'trained tactically' he would not put a suspect next to the driver or behind the driver. Hence he put her brother behind his seat and the plaintiff behind the driver's seat as they proceeded to Phoenix police station.

[17] After questioning the plaintiff and her brother, the police established a link between the Maharajs and murder of Mr Jaggath. Based on the statements of the Singhs, a decision was taken to detain the plaintiff and her brother. Omprakash Singh had approached the branch commander Colonel Munien first. Detective

Nadasen, who had not met the Singhs previously, was not aware of the Singhs' daughter being friendly with his wife's family. He persisted that he took the statements from the Singhs because Colonel Munien instructed him to, not because they were friends as the plaintiff alleged.

[18] He denied that the plaintiff was under arrest when he took her into custody; that he searched and harassed her in a toilet or in the car; that he would jeopardise his job by refusing to give her medication to her if she had asked him.

[19] Detective Hurrinath substantially corroborated Detective Nadasen about the arrest of the plaintiff and her brother, about where she sat in the car, and about the toilets being publicly accessible. He denied taking the plaintiff's PIN number from her cellular phone or sending her text messages.

Evaluation

[20] The quantity and quality of the evidence for both sides was disappointingly inadequate. The plaintiff closed her case before the court adjourned for lunch. The defendant's witnesses completed their evidence by 16h15 on the first day of the trial. The brevity of the trial was due to a failure by both sides to call relevant witnesses and to cross-examine effectively. Whether these omissions were deliberate, inadvertent or for some other reason is hard to tell.

[21] The plaintiff testified but called no other witnesses. Her brother and other shop attendants in the mall were material witnesses who should have been subpoenaed if they were unwilling to testify. Only Detectives Nadasen and Hurrinath testified for the defendant. As one who was keen to impress the court that he was mindful of the ethics of managing female arrestees, he gave no evidence of the plaintiff ever being in the care of a policewoman at any stage whilst she was in custody. Like Road Accident Fund claims, actions for damages against the police are so prone to corruption and collusion that it compels the court to raise the bar on the quantity and quality of the evidence. In the search for truth dependence on the rules for admissibility and the tests for reliability of the evidence is ever greater.

[22] Useful to the court in these cases would be a report by the Independent Police Investigative Directorate (IPID). Neither side mentioned anything about an internal investigation into the complaint against Detective Nadasen. The plaintiff should have, but did not, lodge a complaint with IPID. Neither did the defendant take any interest in securing an independent investigation into whether the complaint has substance, at the very least from the perspective of managing its risk going forward. It should be mandatory in actions for damages against this defendant that during pre-trial, if not before, the parties must investigate, discuss and report to the court on any IPID investigation.

The arrest and detention

[23] The defendant's witnesses insist that they arrested the plaintiff only at 15h26 on 3 August 2011 after they interviewed her at the station. The reason Detective Nadasen gave for removing her from her workplace was that she was aggressive, rude and opposed to accompanying them. Under these conditions it was not conducive to interview her there. In contrast, Detective Hurrinath testified that when the detectives approached the plaintiff at her workplace she was shocked and did not want to accompany them; subsequently she agreed to. It was not his evidence that she was aggressive or rude.

[24] Detective Nadasen denied that he arrested the plaintiff when he took her into custody that morning from her work place; he persisted that she was free to leave. However this contradicts his evidence that when he put her into the back seat of the car he engaged the child lock so that she could not escape. This response emerged in another context when he was explaining that even though he did not sit with her in the back seat, he had secured her sufficiently to know that she was not a flight risk. Another contradiction emerged when the reason he gave for not walking the plaintiff through the mall was that she was not handcuffed and therefore posed a flight risk. Hence it was safer to park the vehicle closest to her work place rather than walk her to a vehicle parked half a kilometre away. Contrary to Detective Nadasen's evidence that she had a choice not to accompany him, he ensured that she had no means of escaping from custody. He recalled as an afterthought that he informed her of her

rights at her shop. What rights did he inform her of if he did not arrest her that morning?

[25] In the circumstances I find that Detective Nadasen did arrest the plaintiff that morning at about 10h00. The question is why did he deny doing so? The answer lies in whether the arrest that morning was lawful.

[26] The arrest was without a warrant in terms of s 40(1)(b) of the Criminal Procedure Act, 1977. The jurisdictional facts for such an arrest were set out in *Duncan v Minister of Law and Order*¹ and confirmed by the Constitutional Court.² Of relevance to this case is the fourth requirement: the suspicion must rest on reasonable grounds. Although the Supreme Court of Appeal held in *Minister of Safety and Security v Sekhoto & another* that s 40(1)(b) does not embody 'the fifth jurisdictional fact' that requires the police to consider less invasive options to bring a suspect to court,³ it emphasised that the officer is not obliged to but 'may' effect an arrest.⁴ Once the jurisdictional facts are established then the arresting officer has to exercise his discretion properly and rationally in deciding whether to arrest.⁵ However, the exercise of such discretion can be questioned only on narrowly circumscribed grounds.⁶ It is a 'fact specific enquiry,' one that requires 'a measure of flexibility' so as to avoid 'the unintended consequence' of interfering with the police officers' discretion.⁷ Such facts must justify the arrest, which is 'a drastic invasion of a person's liberty and an impairment of their rights to dignity.'⁸

[27] The discretion must be exercised 'in the light of the Bill of Rights' in the Constitution of the Republic of South Africa, 1996; police officers must 'weigh and

¹ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H. They were reiterated by the SCA in *Minister of Safety and Security v Sekhoto & another* 2011 (5) SA 367 (SCA) para 6.

² *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* 2016 (10) BCLR 1326 (CC) para 44.

³ *Minister of Safety and Security v Sekhoto & another* above para 23.

⁴ *Minister of Safety and Security v Sekhoto & another* para 28 applying *Groenewald v Minister van Justisie* 1973 (3) SA 877 (A) at 883G-884B.; *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 41-43.

⁵ *Minister of Safety and Security v Sekhoto & another* above para 28-29; 36-40; *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 44.

⁶ *Minister of Safety and Security v Sekhoto & another* para 41.

⁷ *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 42.

⁸ *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 43.

consider the prevailing circumstances and decide whether an arrest is necessary.’⁹ For example an arrest without a warrant for a trivial offence would be irrational.¹⁰ So too would the arrest of a child be if she does not pose a safety or flight risk.¹¹

[28] An arrest is distinct from detention.¹² The discretion differs for each process with s 40 specifying the requirements for a lawful arrest. However, an arrest leads to detention. Consequently police officers must also exercise their discretion as to whether the ensuing detention would be justified. In this regard the conditions and duration of the detention come into focus. Detaining a child or any human being longer than is necessary or under inhumane hazardous conditions will be unjustified under various sections of the Bill of Rights including the rights to human dignity in s 10, to freedom and security of person under s 12, to freedom of movement under s 21, to a safe and hygienic environment in s 24 and to the protections afforded to arrestees and detainees under s 35 of the Constitution. Whether the detention is unduly long or the conditions oppressive are questions of fact.

[29] As for the onus the defendant bears the onus of establishing the jurisdictional facts¹³ but the plaintiff bears the onus of proving that the police exercised their discretion improperly.¹⁴

[30] The only information on which Detective Nadasen based his decision to arrest the plaintiff was the statements of Mr and Mrs Singh. He had taken their statements two days earlier. He undertook no further investigations before he arrested the plaintiff.

[31] In his statement Mr Singh stated that in November 2010, his wife reported to him that the plaintiff next door had something wrapped in a yellow towel to give to him. He unwrapped the towel and saw a revolver, a pistol and ammunition. He asked the plaintiff why she wanted him to keep the weapons. She replied that her broker had been found dead in a sugar cane field in Tongaat and that she might be the first

⁹*Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 42.

¹⁰ *Minister of Safety and Security v Sekhoto & another* para 44.

¹¹ *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 52, 65.

¹² *Raduvha v Minister of Safety and Security (Centre for Child Law as amicus curiae)* para 39.

¹³ *Minister of Safety and Security v Sekhoto & another* para 45.

¹⁴ *Minister of Safety and Security v Sekhoto & another* para 46, 49.

suspect in his murder. She gave the firearms to his wife as she was frightened. He asked her if she was involved in the death of the broker and she replied that 'the person who pulled the trigger was paid well enough and will not implicate anyone.' He refused to keep the weapon. The plaintiff then contacted her brother to whom she handed the weapons. He undertook his own investigation and discovered at the end of July 2011 that a broker by the name of Mohan had been shot. He proceeded to the charge office at Phoenix police station where he found Detective Nadasen. He and his wife made their statements to Detective Nadasen. Detective Nadasen questioned Mr Singh about his delay in reporting the matter but did not record his response, which was that Mr Singh had changed his mind and decided to report the matter then.

[32] The statement contains sufficient information for the police to form a reasonable suspicion that the plaintiff might be involved in the commission of a crime. The jurisdictional requirements in s 40(1) were established. However, the police then had to exercise their discretion as to whether they should arrest her and whether they should do so with or without a warrant.

[33] Detective Nadasen's evidence was that his instructions from Colonel Munien were to interview and to arrest the plaintiff. The interview was necessary considering the inadequacies in the Singhs' statements. At most their evidence was circumstantial about the murder. The delay in reporting to the police raised the possibility of an ulterior motive for reporting. That a suspect would gratuitously volunteer incriminating information of so serious a crime as murder is unusual.

[34] The instructions to the plaintiff before Detective Nadasen took her into custody did not amount to an interview. Although the Singhs' statements established a prima facie case of possession of firearms possibly used in the commission of murder, neither she nor her premises were searched for weapons and ammunition. She was not questioned about the whereabouts of the weapons, their licences or anything pertaining to the murder. In short there was no rational connection between the grounds of suspicion i.e. the alleged possession of weapons and ammunition and the arrest without a search or an interview. By arresting her without interviewing

her, without following Colonel Munien's instructions, the detectives omitted to get further and better information necessary to justify the arrest that morning.

[35] Eventually Detective Nadasen interrogated the plaintiff at the Phoenix police station by shouting at her. The defendant did not dispute that the plaintiff advised Detective Nadasen repeatedly that her attorney and her broker would assist the police with whatever information they required concerning her involvement with the deceased. Without taking up her suggestion, Detective Nadasen detained the plaintiff in the police cells. He offered no explanation as to what transpired during the interview, what information he gleaned from her, how it affected his discretion, and most importantly, why he did not contact her attorney and her broker. Even on his version that he arrested her only at 15h26, his discussions with her made no difference to his decision to arrest her that morning.

[36] Detective Nadasen had established that the plaintiff was not a flight risk. She had fixed addresses and a business. It was not apparent from the statement that the police had any reason to act urgently considering that the Singhs made their statement more than six months after the incident. If anything was urgent at all it was a search for the firearms and ammunition.

[37] The contents of the Singhs' statements were insufficient to form a reasonable suspicion to effect an arrest; Colonel Munien recognised the need for the plaintiff to be interviewed first. Detective Nadasen understood that the interview was a prerequisite to enable him to exercise his decision properly. Failing to interview her before arresting her, interrogating instead of interviewing her and continuing to detain her without attempting to verify information she gave results in the only reasonable inference namely, that the purpose of the arrest and detention was to intimidate and harass the plaintiff. Detective Nadasen's exercise of his discretion to arrest her without a warrant was irrational, unreasonable and a disproportionate limitation of her right to her freedom and security of her person under s 12 and her right to freedom of movement under s 21 of the Constitution. Furthermore her arrest and detention violated s 35 (1) (f) being the right to be released from detention when the interests of justice permitted, subject to reasonable conditions if necessary.

The conditions of custody

Sexual harassment

[38] The plaintiff testified that Detective Nadasen took her to an ablution facility at Phoenix police station. There she noticed a toilet and asked to use it. When she emerged from the toilet cubicle, Detective Nadasen instructed her to strip naked and to perform oral sex on him. She refused. He insisted that he had to search her. Without touching her he subjected her to other indignities. She put on her underwear. He called a female officer to search her handbag. That officer emptied the contents of her bag onto the floor of the ablution facility and moved the items about with her feet laughing and joking with Detective Nadasen as she did so. The plaintiff did not know the name of female officer. Detective Nadasen told her to dress and that he was arresting her. He was upset that she had not acceded to his sexual advances.

[39] Detective Nadasen denied that he took the plaintiff to a toilet, that he searched and harassed her in the toilet, which is a public place accessible to all the police officers and members of the public. He persisted that he had a key to his office, that he could have strip-searched her in the privacy of his office if he wanted to and therefore that her version was improbable.

[40] However, counsel for the defendant did not cross-examine the plaintiff to the effect that her version was improbable because the public had access to the toilets; that the toilets were unlocked; and furthermore that Detective Nadasen had a private office that he could have locked if he wanted to harass her.

[41] Counsel for the plaintiff did not assist the court either. She also failed to cross-examine Detective Nadasen about public access to the toilet; the alleged privacy of his office and who, if not Detective Nadasen, had searched the plaintiff. She also failed to clarify the exact location of the toilet. The plaintiff's evidence that she was in an ablution facility where she found a toilet suggests that she might not have been taken to the usual staff and public toilets. The fact that the plaintiff was unable to say

whether it was marked male or female fortifies this possibility. Neither side invited the court to inspect the Phoenix police station; the court's attempt to arrange an inspection in the time available was unsuccessful. So the court has to look elsewhere for the probabilities.

[42] When the two detectives brought the plaintiff and her brother to the police station, Detective Hurrinath testified that Detective Nadasen took the plaintiff away to be searched. The defendant led no evidence of the police searching the plaintiff. The only evidence that the plaintiff was searched at all emerged from the plaintiff herself. And that is the search in the toilet when she was sexually harassed.

[43] The plaintiff had a handbag in which she testified she 'carried her entire life'. Considering that the allegations against her was that she might have had the murder weapon, searching her person and her bag from the moment she was taken into custody should have been a priority. The defendant did not lead any evidence that a female police officer ever attended on the plaintiff at any time during her arrest and detention to either search her or to ensure that she was physically comfortable.

[44] Detective Nadasen, like the plaintiff, was a single witness on this issue. The plaintiff bore the onus of proving the harassment; the defendant bore the overall onus of proving the lawfulness of the conditions of her detention. At first blush the plaintiff's version of the incident in the toilet seemed improbable, not least because the alleged harassment was so brazen. However, closer scrutiny of all the evidence shores up the porousness of the defendant's case. The plaintiff could not find corroboration for her version. The defendant could. Its failure to lead any evidence by a woman police officer about searching and attending to the plaintiff's personal needs for the entire duration of her detention is destructive of the defendant's case regarding the complaint of sexual harassment in a toilet. Accordingly, I find that Detective Nadasen sexually harassed the plaintiff at Phoenix police station.

[45] As for the plaintiff's allegations that Detective Nadasen walked her through the mall and harassed her in the car when he took her into custody, the plaintiff failed to call witnesses to corroborate her. Her brother should have testified about where Detective Nadasen had been seated and where in the backseat she had been

seated. Although Detective Nadasen was not a credible witness, and Detective Hurrinath was not an independent, impartial witness, more was needed for the plaintiff to discharge her onus. She could have subpoenaed her brother if he was unwilling to testify. Her failure to adduce corroboration results in her failing to discharge her onus on these aspects.

Conditions in the cells

[46] The undisputed evidence of the plaintiff was that she started menstruating after Detective Nadasen harassed her in the toilet. The police refused to provide her with a change of clothes. Detective Nadasen denied that he saw her pants soiled. He did not deny that she had no change of clothing and had not been allowed any family visitors.

[47] At Phoenix she was forced to share a cell, a mattress and a blanket with two women. She slept next to a filthy toilet, breathing in the stench of rotting food and faeces, which littered the cell. The conditions in the police cells were in her words 'inhumane'.

[48] At Tongaat police station, she was detained alone in a small cell in which there was nothing more than a concrete block and a filthy toilet. She asked for toilet paper as she had diarrhoea and was menstruating but received none. Her pants were soiled.

[49] In the time available, I searched for cases in which inhumane conditions of detention were found to be cruel and unusual punishment. The U.S. Supreme Court overturned a finding that 'double celling' i.e. prisoners sharing cells, amounted to cruel and unusual punishment.¹⁵ Surprisingly, I was unsuccessful in finding a South African case,¹⁶ considering that there are many reported cases of torture in

¹⁵ *Rhodes v. Chapman*, 452 U.S. 337 (1981)

¹⁶ For a historical account of the concept of cruel and unusual see *S v Bull & another; S v Chavulla & others* 2002 (1) SA 535 (SCA) para 11.

detention,¹⁷ and despite rights being recognised in the Bill of Rights. Section 12 of the Constitution entrenches the right of everyone to freedom and security of the person, including the right 'not to be treated or punished in a cruel, inhuman or degrading way'; and s 35 (2) (e) prescribes for everyone who is detained the right:

'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.

[50] One explanation for this jurisprudential deficit probably lies in the traditional practice of prosecuting damages claims as delict under the common law; ¹⁸ compensation awards increase or decrease depending on the conditions of detention. Another explanation could be weak knowledge of rights, of access to justice or quite simply of being resigned to the appalling conditions of detention as 'normal'.

[51] However, the quality of our public facilities, in particular our detention facilities should be a matter of public interest. They are a projection of what we are as a nation, and how we will execute on our 'promissory note' that is our Constitution and the international human rights instruments we ratify.¹⁹ Elevated as a matter of constitutional rights the conditions of detention are not merely matters of private delictual claims for compensation but issues of enormous public interest for which remedies have to be found in institutional reforms. Quite simply: by paying compensation to individuals for claims arising from conditions of detention the defendant does not resolve the problem of the appalling conditions. This is at the heart of matters about unlawful detention. Resolving this public interest aspect of the conditions of detention falls beyond the scope of this litigation.

¹⁷ Truth and Reconciliation Commission of South Africa Report Volume Five p 16-23 (accessed 1 October 2017 http://www.dhnet.org.br/verdade/mundo/africa/cv_africa_do_sul_volume_05.pdf.)

¹⁸ *Minister of Law and Order v Ebrahim* (97/1993) [1994] ZASCA 163 (22 November 1994)

¹⁹ *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC);[2004] ZACC 5 (4 August 2004) para 156-163.

[52] In this instance, the plaintiff is not a convict and therefore she should not have been punished. The conditions of her detention were tantamount to punishment. Her complaint is pitched at the most basic levels of hygiene and adequacy of beds, blankets and toilet paper. The defendant must at the very least provide these basic facilities.

[53] Accordingly, I find that the intolerably unhygienic environment in the cells in both police stations were inhumane and intolerable. These conditions, the sexual harassment at Phoenix police station and the failure to allow her access to her family impugned the plaintiff's human dignity in terms of 10, amounts to cruel and unusual treatment in terms of s 12, a denial of her rights as a detainee under s 35 (2) (e) above, and a violation of her environmental rights under s 24 of the Constitution. Denying her the right to communicate with her next of kin violated s 35 (2)(f)(ii) (f) of the Constitution.

Order

[54] The following order is granted:

The defendant is liable for the unlawful arrest, detention and treatment of the plaintiff whilst she was in custody between 4-6 August 2011.

D. Pillay J

APPEARANCES

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Date of Hearing	:	18-19 September 2017
Date of Judgment	:	05 October 2017