



IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

11/02/2015

CASE NO: 2924/2007

CASE NO: 2905/2007

In the matter between:

REDDY, SAGREN

1ST PLAINTIFF

MOODLEY, DHARAMSEELA MURUGAS

2ND PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

1ST DEFENDANT

DIRECTOR OF TSHWANE METROPOLITAN

2ND DEFENDANT

POLICE DEPARTMENT

JUDGMENT

MAKHAFOLA J:

INTRODUCTION:

- [1] Two plaintiffs who call themselves brothers issued summons against the 1st and 2nd defendants comprising 3 similar claims of unlawful assault, injuria and unlawful arrest and detention. The 1st plaintiff claims a total of R150 000.00 for his 3 claims whereas the 2nd plaintiff claims a total of R300 000.00 for his 3 claims. Before the trial all claims against the 2nd

defendant were withdrawn by the plaintiffs. The claims against the 1st defendant is the subject of this trial on liability only. The claims relate to unlawful assault, injuria and unlawful arrest and detention. The merits have been separated from quantum.

CONSOLIDATION:

- [2] The two cases were consolidated because of their similar facts, time and place where the incidents had occurred at Montana Traders Square, Pretoria.

[3] **EXHIBITS**

- (a) Exhibit A = embodies the 1st plaintiff's combined summons case no: 2924/2007 and the 1st defendant's plea thereto.
- (b) Exhibit C = contains the 2nd plaintiff's combined summons case no: 2905/2007 and the 1st defendant's plea thereto.
- (c) Exhibit X = embodies a warrant of search and seizure, police statements of the plaintiffs, Sergeant Steenkamp's Police Statement, a photo album without a sketch-plan and key and other documents that were not used in the trial.

ONUS TO BEGIN:

- [4] By agreement between the parties, the plaintiffs had to testify first.

CASE FOR 1ST PLAINTIFF:

- [5] SARGEN REDDY is employed as a laboratory administrator in the Department of Water and Sanitation and he has been employed for about 9 years. He resides at Kwaggasrand West Park.
- [6] He was at Montana Traders Square on 01 July 2006 on the date of the incident together with his brother Moodley, his sister and niece. It was a Saturday before 4pm. They had gone there to buy a dog. This square being flea-market has different stalls.
- [7] On arrival at the square, his sister and niece decided to enter a woman's clothing shop whilst he and his brother (2nd plaintiff) remained outside chatting about soccer. They stood outside directly opposite the woman's clothing shop where his sister and niece were.
- [8] During their chat 2 white gentlemen who were sitting at the centre island approached them and told them that they must go to Pakistan where they came from. These two unknown white gentlemen appear on photo1 as "A" and "B". This photo was taken by the 2nd plaintiff after they (plaintiffs) were released.
- [9] Now he knows that the two white gentlemen are employed in SAPS in the Commercial Crime Unit. His brother asked the 2 gentlemen to identify themselves after they said they (plaintiffs) must go to Parkistan. His

brother said: "Excuse me" and the gentlemen said to them that they must listen once. These 2 gentlemen wore civilian clothes. After they had refused to identify themselves his brother requested them not to use derogatory names to them.

[10] Another man who is not on photo1 arrived at the scene and asked his brother where he (2nd plaintiff) worked. He has no idea about stores B1 and B2. He knows the white male on photo8 marked "C". he works for SAPS. But, at the time of the incident he did not know where he was working because he was wearing civilian clothes. This man asked where his brother was working but he had refused to identify himself. His brother (2nd plaintiff) asked this man to leave them alone because they (the plaintiffs were not interfering with them).

[11] When officer Steenkamp arrived at the scene he stood in front of his brother and him. He identified himself and told the white "guys" that he knows all commanders in the Metro Police and the 2nd plaintiff was not one of them. He asked his brother what his ID was but his brother refused to identify himself. Then Steenkamp said: we are going to show you 'coolies' who we are". Two black males appeared at the scene and surrounded his brother. One of the black males works for SAPS. In total there were 5 males surrounding his brother. He was surrounded by a person marked "B" in photo1 and the other marked "2" in photo2.

- [12] His brother was grabbed by his arms and legs and he was pulled towards the steel palisade fence close to the store they had been standing at.
- [13] Steenkamp handcuffed his brother's hands at the back whilst he, (Reddy) was taken by the 2 white men, as described, to the palisade fence. One grabbed him by his neck and the other by his shoulder, bashing him against the palisade and he fell to the ground. When he was about to stand up Steenkamp threw him against the palisade fence and he fell to the ground.
- [14] Whilst on the ground, white male on photo 2 marked "D" kicked him on his ribs. White male marked "B" on photo1 fisted him on his neck whilst he was on the ground.
- [15] He was held to the concrete floor by white male "D" on photo2 by holding both his hands behind his back. White male "D" went to fetch a strap which was placed on his left hand, but it was short. Steenkamp fetched a handcuffed person and cuffed him with this person. He made him to stand by his brother who was already handcuffed. His brother again asked them to identify themselves but they refused. He thought these people arrested them because they were foreigners. They were not told that they were going to be arrested. They were surprised because they were called Pakistanis and 'coolies'. They assumed that these people were police because Steenkamp was present.

- [16] Whilst Steenkamp was sitting next to them his brother asked him why he had handcuffed them. He replied that they had defeated the ends of justice without explaining what that meant. When all these occurred his sister and niece were standing outside the clothing store saying nothing. Steenkamp uncuffed his brother at 15H50. They were time conscious and they kept on looking at their watches.
- [17] When Steenkamp was asked by his brother why he uncuffed him, Steenkamp replied that he did not want any embarrassment.
- [18] He (Reddy) took his brother's cellphone and called his brother's boss one Kamila. Oosthuizen arrived at the scene after they had been uncuffed. Sarina Gouws arrived and his brother explained to her what had taken place. She informed them that their arresters were from the Commercial Crime Unit and told them (plaintiffs) to leave at 5:30pm.
- [19] She had advised them to go and open a case of unlawful arrest and assault at the Sinoville Police Station to which they had been accompanied by Oosthuizen. He became scared as a foreigner because he was handcuffed with a person he did not know. He (Reddy) is a South African and his race is Indian. After that incident, he now fears the police. He felt offended by being called Pakistanis because he is not one. He went to Dr. Garach for medical attention and they also attended one session of counselling from the same doctor.

CASE FOR THE 2ND PLAINTIFF:

- [20] DHARAMSEELA MURUGAS MOODLEY resides at Manganese Street, Westpark, Pretoria-West in Pretoria. He has been employed by the Tshwane Police Department in the Department of Group Audit and Risk for 16 years.
- [21] On 01 July 2006 he was in the company of his family when he proceeded to Montana Traders Square to buy a puppy where they arrived at 15H45. He was in the company of the 1st plaintiff (Reddy) outside. His sister and niece proceeded to a women's store at about 15H50 whilst he and Reddy stood directly across stores B1 and B2.
- [22] He and Reddy were speaking about the soccer match they were going to watch on television. They were standing in the middle of the entrance facing B1 as depicted on photo8 and about 15 – 20 meters opposite B1.
- [23] There is a flower pot which is about 1 Meter high where there were 2 white males, as depicted on photo1. A person marked "A" was wearing a civilian black jacket and the other marked "B" wore a greyish jacket and was smoking.
- [24] Whilst standing there with his brother, white male "A" pointed them with a finger and said: "you must go to Pakistan where you came from". He (Moodley) said: "excuse me" and the white male "A" said: "you coolies must listen once", whilst white male "B" said: "coolies wake up". He told

"A" and "B" humbly to leave them (plaintiffs) alone as they were not interfering with them.

[25] White male "B" asked him to identify himself. He did so by saying he is Moodley in his private capacity. In turn, he (Moodley) requested "A" and "B" to identify themselves because he wanted to engage them because he regarded them to be civilians.

[26] "C" appearing on photo3 wearing the blue clothes asked him (Moodley) where he worked. He answered that he worked at Metro Police as Commander at Strategic Processes. Again he asked "A", "B" and "C" what they wanted and who they were. They refused to identify themselves.

[27] He then asked "A", "B" and "C" to leave his brother (Reddy) alone and not to interfere with him. In reply "C" told him the following: "you are Pakistani man". At this moment "B" was laughing and said: "he is working for Metro Police and he is a commander".

[28] They called the person appearing on photo 17 one Steenkamp who came closer to us and said: "Ek ken al die foken commanders in die metro polisie en hierdie man is nie 'n commander nie". He did not know Steenkamp who was wearing a golf T-Shirt and Metro Police combat trousers. At that stage Steenkamp did not have a name-tag to his clothes.

[29] Steenkamp stood in front of him (Moodley) whilst pointing a finger at him (Moodley) and asked him what his problem was. He (Moodley) asked Steenkamp to identify himself so that he (Moodley) may identify him. Then Steenkamp uttered the following words: "today we are going to show you coolies who we are". After he had asked Steenkamp not to point a finger at him he heard them raising their voices and he did not raise his. He does not remember if his brother said anything in reply to Steenkamp.

[30] At this stage he was not aware that there was any police operation or anything going on, because that portion where they were was not condoned off and he had freedom of movement there.

[31] They were surrounded by black and white males as depicted on photos¹ and 6 where "A", "C" and "E" appear and there was another black gentleman he did not photograph. At that moment Metro Policeman appearing on photo¹⁷ one Steenkamp held him (Moodley) with a collar. Males "A" and "D" stood in front of his brother.

[32] Steenkamp held him by his shoulder and he (Steenkamp) was in the presence of 2 whites "A" and "C" together with the black gentleman "E". male "B" held him by his shoulder whereas male "D" caught him by his throat whilst they pushed him towards the palisade fence where they bashed him twice against the said fence. He did not resist.

- [33] He again asked them what they wanted from them with force. He also asked them who they were. They refused to identify themselves. As a result of the bashing against the fence he sustained injuries to his neck and back where he had bruises and red marks.
- [34] He assumed that Steenkamp was a Metro Police Officer. His hands were held to the back by black male "E" on photo1 who said in English: "Pakistan what now" that was the time when officer Steenkamp handcuffed him. He was not warned of his rights because they said nothing. He could not resist arrest or bashing against the palisade fence because everything happened very quickly.
- [35] He (Moodley) has been trained to effect arrest. When one arrests one applies Section 39 of the Criminal Procedure Act 51 of 1977. White male "A" on photo1 said "fok off" when he (Moodley) asked him to identify himself. His brother was dragged towards the palisade fence where he was bashed against it by Steenkamp and he (Reddy) fell to the ground. He had also punched Reddy at the neck.
- [36] They tried to handcuff his brother with a red strap which was short and could not hold two hands. An Asian man was brought to his brother and the left hand of Reddy was handcuffed to this Asian man. And this was done in the presence of the public who were not laughing. He and his brother stood at the scene from 4pm to 4:50pm. White male "A" on photo1 said to him: "you can stand with your brother from Pakistan".

[37] He telephoned one Kamila and related to him what had happened. He also got hold of Commander Oosthuizen who said he would come to the scene. Oosthuizen arrived at the scene at 4:45pm and Serina arrived 5 minutes later. Steenkamp had told him that he (Steenkamp) had cuffed his brother because: "we defeated the ends of justice". He and his brother were not charged for any crime. At the time Steenkamp uncuffed him he asked him why he was doing that and he told him: "I don't want to embarrass you, sir".

[38] Photos 13, 14 and 15 depict the injuries of his brother. He received medical treatment from Dr Garach who also does trauma counselling. It took him few days before he was able to sleep. He also received painkiller "equalom" for his condition. When the incident occurred he thought it was a xenophobic attack on them.

[39] Mr. Moodley testified that there are many stores at Montana Traders' Square. He took photos when he saw the metro police. He took the photos in Exhibit X with his cellphone whilst he stood outside B2 on 01 July 2006. He was between passages of stores B1 and B2. He took photos 3, 5, 6 and 7 whilst he was also in the passage. Photo8 was taken just outside store B1 on the left hand side. He is the one who marked all these photos. Photo16 is a newspaper clipping.

CASE FOR THE 1ST DEFENDANT

[40] KAGISO MICHAEL DITLOPO testified in Setswana that he is a warrant

officer in SAPS and that he is stationed at the Johannesburg Central Police Station. He has been in SAPS for 32 years now.

[41] In July 2006 he was stationed at the same Police Station working in the Crime Prevention Uniform Unit. He is currently in the detective unit. He does not remember well as to whether Metro Police were part of the operation at Montana Traders' Square on July 2006, but he was present there and he was a part of the operation. Most of the members in the operation came from Johannesburg. He thinks the late Kaogora was in charge of the operation. All the police in the operation wore civilian clothes.

[42] He has personally seen a warrant of search and seizure of counterfeit DVD's and CD's which were to be confiscated. When they were briefed about the operation at the Police Station in the morning of 01 July 2006 they had been shown same. His name appears on that warrant. Maimela Matsheke came from the same Police Station as himself. Other members of the operation came from different Police Stations.

[43] There are different stalls at Montana Traders' Square which were to be searched. His role was to arrest those selling counterfeit DVD's and CD's at shop B2 and was to prevent customers from entering the same shop where he was posted.

- [44] He could not give the exact number of the members of the operation because their convoy was made up of motor vehicle and buses. B1 and B2 stalls are close to each other and he was posted there. He is the black male "E" on photo1 of exhibit X the photo which was taken by the 2nd plaintiff.
- [45] Whilst he was posted at B2 stall he saw 2 males of Indian descent. They were shouting at the police saying police do not know what they are doing and do not know their work. Both these 2 men were uttering these words. One of these men told the police that he was Chief of Metro Police and a Commander. The words that police did not know what they were doing were uttered several times by these 2 men.
- [46] Whilst the 2 gentlemen were shouting, a traffic officer emerged. He was in traffic uniform. He approached the 2 gentlemen and wanted to find the reason for their shouting. He did not hear the whole conversation. He later knew the said traffic officer to be Mr. Steenkamp.
- [47] Steenkamp said he did not know the one gentleman who said he was a chief officer in the Metro Police. He specifically asked him for his appointment card. The 2 Indian gentlemen screamed at Steenkamp when he asked them for appointment cards. They started pushing Steenkamp around. The other police who had been watching the spectacle went to assist Steenkamp. When these police arrived to assist him, Steenkamp produced handcuffs. Because, the 2 Indian gentlemen had been pushing Steenkamp the other police officers came and

separated them from Steenkamp. They grabbed the one who was arrested first with strength to separate him from Steenkamp. Then Steenkamp handcuffed Moodley.

[48] According to his observation not one policeman could arrest him because he had been warned many times about his violent conduct to the police. The police expected him to be mild in his conduct after the appearance of Steenkamp, but Mr. Moodley continued to be hostile.

[49] He did not see Mr. Moodley being bashed against the palisade fence before being handcuffed. To his knowledge he was arrested for interfering with what the police were doing. He was disturbing the operation and the concentration of the police. Police could not concentrate because of the shouting of Moodley. He (Ditlopo) was placed at shop B2 where he was supposed not to allow people to enter the store, and he also had in his care 2 suspects. Mr. Moodley disturbed concentration, and without it these suspects could have run away.

[50] He denied that white male "A" ever told Moodley: "you Pakistan go home". He saw how Reddy was arrested after having been grabbed. He did not see Steenkamp handcuff him because Steenkamp's handcuffs were on Moodley. He cannot remember who had handcuffed Reddy. He also did not see the alleged bashing, kicking and the police placing a knee on Reddy.

[51] It was not possible for the police to bring Reddy under control without use of force. Reddy was detained near B2.

[52] After the arrest of Reddy and Moodley a senior traffic officer appeared at the scene and confirmed that Moodley is their colleague. The police held a short meeting because the senior traffic officer pleaded leniency for Moodley. The police spoke to Moodley who showed remorse for his behavior. Moodley was forgiven for his behavior, thereafter he was uncuffed, by Steenkamp.

PIETER STEPHANUS ALBERTUS JOHANNES

[53] STEENKAMP is a Sergeant in the Tshwane Metro Police after joining the police in 2000. He was at Montana Traders' Square between 15H30 and 17hours for personal reasons.

[54] There was an incident involving him and Commander Moodley. On that day he was wearing full Metro Police uniform. He came from one of the shops and there he heard a verbal scuffle. He was approached and told that there was a person claiming to be a commander of the metro police. He proceeded to the place where there was swearing to find out what the problem was.

[55] On arrival at the scene he found the people involved being 2 gentlemen, 2 ladies and a couple of SAPS members. The 2 gentlemen were swearing and yelling at SAPS members and obstructing their duties. The

SAPS members were on duty for seizure of illegal DVD's because that is what he was told by the police.

[56] He went first to the person who it was said claimed to be a commander of metro Police. This man was aggressive, speaking loudly and swearing at the police telling them that they did not know what they were doing. He was making a scene. He placed his hand on his chest and asked him to step aside and he asked him to identify himself.

[57] At this stage a person he did not see well, came and slapped him on his face. Then people converged to rescue him (Steenkamp). These people pushed this person against the palisade fence and one gentleman asked if he had handcuffs to handcuff him. He could not remember this person who asked for his handcuffs but it was a Captain.

[58] The handcuffed person told him that he was going to call somebody one Commander Oosthuizen to come and identify him. These 2 gentlemen according to him were not arrested they were held to calm them down.

[59] He denied handcuffing the plaintiffs and using any derogatory words against them. According to his observation the plaintiffs had been interfering with the police performing their duties.

[60] Commander Oosthuizen did arrive and he (Steenkamp) went to him upon his arrival. He related to him that Mr. Moodley told them he was a commander. This was confirmed by Oosthuizen. Steenkamp apologized

to Mr. Moodley by saying he was sorry about what happened. He (Steenkamp) uncuffed Mr. Moodley.

[61] **THE LAW**

1. SOUTH AFRICAN POLICE SERVICE ACT, NO 68 of 1995 Section 67(1) provides:
 - (1) Any person who -
 - (a) *resists or willfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member willfully interferes with such member or his or her uniform or equipment or any part thereof; or*
 - (b) *in order to compel a member to perform or to abstain performing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon such member or any of his or her relatives or dependents, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants,*

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.
2. *In RV WEYER [1958(3)] SA 467 (G) at 472 A-B the court said: "I have no doubt that his action in standing where he did constituted an obstruction or hindrance even though he stood still. In common parlance a man who obstructs is a man who impedes or withstands or stops someone; a man who hinders is a man who deters, delays or frustrates action".*
3. *In BENNETT V MINISTER OF POLICE [1980] 3 ALL SA 817 (C) the court intimated that a plaintiff must allege and prove impairment of the relevant aspect of personality relied on.*
4. *Act 51 of 1977 Section 40(1)(j) provides that: A peace officer may without a warrant arrest any person –*
 - (j) who willfully obstructs him in the execution of his duty.*
5. *Act 51 of 1977 Section 49 provides that: if any person authorized under the Act to arrest or to assist in arresting another, attempts to arrest such person and such person – resists the attempt and cannot be arrested without the use of force, the arrestor may use reasonable force the arrest the suspect.*

6. *IN PILLAY V KRISHNA AND ANOTHER 1946 AD at 947 the court stated that the onus rests upon the party who asserts the affirmative in substance and upon the party who would be unsuccessful if no evidence were led.*

And, in this respect I am alive to the fact that the plaintiffs bear the onus of proving their claims. But, where the defendant, as here, has admitted some of the allegations and pleaded justification he must then prove the justification.

EVIDENCE ANALYSIS AND EVALUATION

- [62] The mere fact that the plaintiffs uttered the words that "the police did not know what they were doing" confirms that they had known that the police were present and executing the "counterfeit operation) as stated in the 1st plaintiff's police statement.

Vide: Exhibit X paginated pages 23 par 5 lines 10-11.

- [63] Again, in his police statement the 1st plaintiff refers to the police as SAPS members.

Vide: Exhibit X paginated page 24 par 8 line 1.

It is further on record that both plaintiffs were together when they were allegedly racially abused by the police. There is no logic to defy the fact that Mr. Reddy would not have referred to SAPS members in his police statement if he and his brother (but specifically himself) did not know about the presence of the South African Police. Their denial in this regard is not honest and falls to be rejected as untenable.

[64] In the case of S v SALVIER 1993(1) SACR 168(E) at 171d the court intimated the following: "In the present case the Magistrate was, in my view, correct in holding that on his own showing the accused knew that Paulsen and Phooko were members of the SA Police, but at very least he must reasonably have foreseen that they were about the execution of their duties or functions". These sentiments are apposite in the present case because of the facts already stated above.

[65] In the context of Mr. Reddy's police statement both plaintiffs had been aware that the police were busy with a "counterfeit operation", nothing detracts from that unless a reasonable explanation is offered for this material discrepancy with the plaintiffs' evidence in court.

[66] I turn to deal with the defendant's case anchored on the evidence of Ditlopo and Steenkamp. Their evidence confirms the fact that the plaintiffs were obstructing the police in the performance of their duties, and that they were shouting or yelling at the police.

[67] The 1st defendant has justified the use of force to calm the plaintiffs down because they had been violent and have interfered with the performance of the police duties.

[68] All evidence by the plaintiffs point to Sgt Steenkamp as the arresting officer, but he has denied this, and this point was not pursued further during cross-examination. Steenkamp is not a member of SAPS and could not have been acting under the scope of employment with the 1st

defendant. The case against the 2nd defendant has been withdrawn.

[69] It would not be good enough for a litigant (in particular here, the defendant) to admit damning allegations by the plaintiffs and expect absolution from them unless a raw justification is based on facts and the law. Where justification has been proved and it is reasonable in the circumstances of the facts, the justification ought to be sustained, as I hereby do.

[70] If I were to accept that Mr. Moodley had refused to identify himself by refusing to produce his appointment card because he had claimed to the police to be a commander in the Metro Police, then I must accept, as I do, that Steenkamp was called to identify him. Otherwise, there would be no reason for Steenkamp to have been called to the scene because he was not on duty there. He was at that centre on his private business.

[71] I also accept that on Mr. Moodley's refusal to identify himself, Commander Oosthuizen did arrive, after having been contacted, at the scene and correctly identified Mr. Moodley as a Commander in the Tshwane Metro Police.

[72] In my view, logic dictates that had Mr. Moodley positively identified himself by producing his appointment card the events would have developed differently. As depicted by evidence the situation was defused by Commander Oosthuizen because after he had identified Mr. Moodley, Steenkamp apologized for what had happened.

[73] The police were entitled in law to execute their "counterfeit operation" by virtue of the Warrant in their possession. They were also entitled to demand not to be interfered with in the execution of their duties. In law, they were also entitled to deal with anybody who interfered with them.

[74] The attack of Steenkamp has been corroborated by Ditlopo. He testified that the two plaintiffs had been pushing Steenkamp and as a result the SAPS members came and separated them using strength. Mr. Moodley was handcuffed after this scuffle. That, and that alone is a justifiable cause to handcuff and arrest the plaintiffs.

[75] It can also be accepted that Steenkamp had handcuffed Mr. Moodley, though he had denied it. Ditlopo's evidence has confirmed that Mr. Moodley was handcuffed by Steenkamp. A police officer in the position of Steenkamp could not be attacked in the presence of the police and they be expected to fold their arms and enjoy the spectacle. The fact that Steenkamp was slapped was never denied and disputed by the plaintiffs.

CREDIBILITY

[76] Both plaintiffs were at pains to explain why, if indeed, they had been seriously injured, did not seek medical treatment the same day of the incident. The unreasonable explanation was the unavailability of Dr. Garach who does not work on weekends. They could also not explain why they did not go to any private or public health facility. They failed to

prove any injuries or injuries at all caused by the police.

[77] Dr Garach was not called to testify about their alleged injuries which had been disputed by the defendant. The defendant had also disputed that Dr. Garach was a qualified trauma counsellor. No evidence to support same was placed on record. Mr. Moodley received painkillers for his condition. He had gone for medical treatment some 3 to 4 days after the incident.

[78] According to Mr. Reddy he was handcuffed to another Pakistani person by Steenkamp. The same Steenkamp handcuffed Mr. Moodley. Yet, the testimony of Steenkamp is that he had only one pair of handcuffs. If the plaintiffs' version is correct then it is expected that they should give a reasonable explanation for the discrepancy.

Vide: S v MAFALADISO EN ANDERE 2003(1) SACR 583 (SCA)

Both plaintiffs were impressive witnesses when they testified during their examination-in-chief, but were a disaster when they testified during their cross-examination. They were evasive to direction questions, and lacked substantiation to their allegations.

IMPROBABILITIES

[79] The police have denied any form of *injuria* on their part. Taking into consideration the plaintiff's evidence of racial utterances and circumstances prevailing that the 1st plaintiff had been handcuffed to a

Pakistani who was never racially abused, and the presence of other Pakistanis to where they (the plaintiffs) had been taken, the improbability of the allegations militates strongly against the police having uttered the alleged injurious words.

[80] The two ladies who were with the plaintiffs, on Mr. Reddy's version, were standing outside the shop during the alleged racial slurs and abuses. There is no evidence that the two ladies and other arrested Pakistanis were included in the injurious insults. The plaintiffs' evidence is improbable on this aspect too.

[81] The plaintiffs have portrayed a scenario where they had been innocent by-standers who were, without any justifiable cause racially and physically attacked by unruly police officers who had no business to do at Montana Traders' Square. This is equally improbable.

[82] The suggestion by Mr. Moodley that he thought the police were engaged in a xenophobia attack is so improbable that it is unthinkable within the summary of all evidence before court. If, indeed, xenophobic attack was unleashed by the police the plaintiffs' sister and niece and the other Pakistanis present there could not have escaped the brunt of it.

[83] It is equally improbable that the police were hell-bent to attack the plaintiffs unknown to them, and shamefully neglect their duties that they had come to fulfill in terms of their warrant at the centre.

DILICTUAL LIABILITY

[84] If the police conduct had not been wrongful, then one arm of the foundation to establish dilictual liability is wanting. Even if the police were at fault by calming or arresting the plaintiffs that does not establish wrongfulness, where an unassailable justification has been advanced by the police for their conduct. "Fault does not presuppose the existence of wrongfulness and is irrelevant unless wrongfulness is established".

Vide: MINISTER OF SAFETY & SECURITY v VAN
DUIVENBODEN 2002(6) SA 431 (SCA)

INDAC ELECTONICS (PTY) LTD V VOLKSKAS BANK
LTD 1992(1) SA 783 (A) at 797

FINDINGS

[85] The above having been stated I hold as follows:

- i) that, I cannot find, without sufficient evidence, that the police conduct was outrageous in dealing with the plaintiffs in the manner they have done and in that resulting in a civil wrong;
- ii) that the plaintiffs have failed to testify about any start-up to the alleged ghastly police conduct that culminated in their alleged assault, humiliation and/or contumely and arrest;
- iii) that the plaintiffs' evidence considered with that of the defendant lacks the probability clout upon which I can infer that the police wronged them as

alleged; and

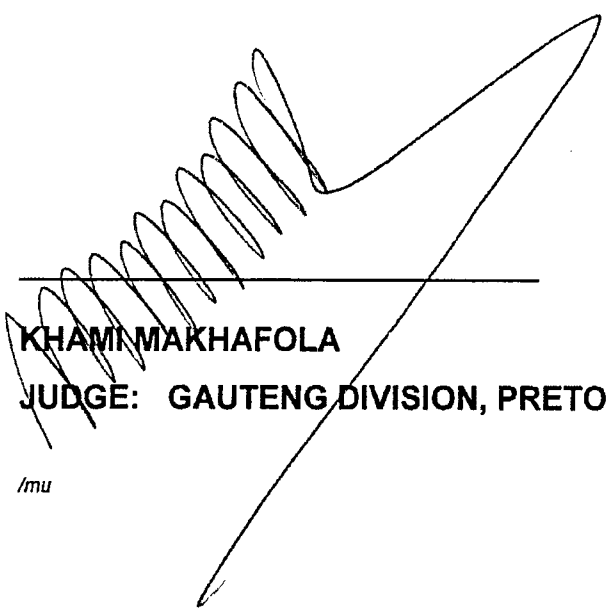
iv) that there is no evidence to sustain the plaintiffs' claims.

CONCLUSION

[86] I am of the view that the plaintiffs' have failed to discharge the *onus* they bear in order to succeed. Their claims fall to be dismissed.

ORDER

[87] Therefore, the plaintiffs' claims are dismissed with costs.



KHAMI MAKHAFOLA
JUDGE: GAUTENG DIVISION, PRETORIA

/mu