



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No.: 2051/2020

In the matter between:

INGA MKOKO

PLANTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

Mqobi AJ

Introduction

[1] The plaintiff instituted action proceedings seeking to recover damages from the defendant on a vicarious liability basis, consequent upon his alleged unlawful assault, arrest and detention by members of the defendant on 04 April 2020.

[2] The matter proceeded on merits with the issue of quantum having been postponed *sine die* by agreement for a later determination. In accordance with rule

33(4) of the Uniform Rules of Court (the Uniform Rules), an order separating the issue of merits from quantum was granted.

Pleadings

[3] Under claim A, the plaintiff is claiming damages arising out of the alleged unlawful arrest and detention from 04 April 2020 until 08h00 on 05 April 2020. He alleges that this arrest was unlawful, mainly on the ground that the plaintiff had not committed any offence in the presence of a peace officer. Furthermore, the arresting officer had no reasonable suspicion that he had committed any offence listed in schedule 1 of the Criminal Procedure Act 51 of 1977 (the CPA).

[4] The plaintiff pleaded that his arrest was not authorised by a warrant of arrest and that he was detained unlawfully, arbitrarily and without just cause at Dalasile Police Station (the police station) until 08h00 on 5 April 2020, when a police officer named Gcume transported him to his home.

[5] The plaintiff alleges that his detention was wrongful and unlawful in that the arresting officer knew, alternatively should have known that no reasonable grounds existed for his arrest and detention. Furthermore, there was no reasonable apprehension that he would fail to attend court had summons or written warning been issued to secure his attendance.

[6] Claim B relates to an assault allegedly perpetrated on the plaintiff by members of the South African Police Services (the Service) in the following manner:

6.1 The members of the South African Police Services assaulted the plaintiff by open hands, clenched fists, kicking him with booted feet and was sjamboked.

6.2 When he fell down, the police officers continued to assault him and dragged him on the ground.

6.3 On 5 April 2020, he was taken to Engcobo Police Station for him to sign a statement admitting that he had committed an offence. When he refused, he was assaulted again with open hands and a metal ruler or measuring instrument.

[7] The plaintiff pleaded that he suffered multiple serious bodily injuries including bruises on his left side of the abdomen, his left upper limbs, his right upper limbs and laceration on his right knee.

[8] The defendant is resisting the action, and whilst admitting that the plaintiff was arrested without a warrant, pleaded that the arrest was lawful as it was effected by a peace officer in terms of section 47 of the CPA 51 of 1977. This is on the basis that the plaintiff had committed a crime in the presence of the said peace officer by contravening Covid-19 Regulations (the regulations) and obstructing the police in the performance of their duties. It was further pleaded that the plaintiff was heavily drunk at the time of his arrest. The assault was denied. While the plea refers to section 47 of the CPA, I have dealt with this matter on the basis that it was intended to refer to section 40 of the CPA as section 47 is of no relevance to the issue at hand.

Issues for determination

[9] The issue that falls to be determined is whether the members of the Service on 04 April 2020 unlawfully assaulted, arrested and detained the plaintiff.

[10] In accordance with rule 39 (13) of the Uniform Rules¹, the parties agreed that the plaintiff bore the onus to prove the alleged assault and therefore the duty to begin. The defendant bore the onus to justify the plaintiff's arrest and detention.

Common cause facts

¹ The rule provides that "[w]here the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him."

[11] The following facts are either common cause or undisputed:

11.1 that the plaintiff was arrested without a warrant by the members of the Service on 4 April 2020, at a business village owned by Mntsantsa which comprises of the car wash, internet shop, bar (liquor outlet), gymnasium and a mini guesthouse (the car wash) at Nkondlo Administrative Area in Ngcobo, at about 7 pm. He was detained at about 22h45 at Dalasile Police Station. He was released before 7h00 on the following day, 05 April 2020.

11.2 that the car wash was not the plaintiff's home.

11.3 that during the time when the plaintiff was arrested, Covid-19 Regulations which were issued in terms of the Disaster Management Act² (the Act) were in operation. In terms of the aforesaid Regulations the movement of persons and goods was restricted.

[12] Regulation 11B(1)(a) of the regulations issued in terms of section 27(2) of the Act provides as follows:

“For the period of lockdown-

- (i) Every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, or seeking emergency, life-saving, or chronic medical attention;*
- (ii) Every gathering, as defined in regulation 1 is hereby prohibited, except for funeral as provided for in sub regulation (8)”*

Plaintiff's evidence

² Act 57 of 2002

[13] The plaintiff testified that he is currently staying in Cape Town. However, on 4 April 2020, he was at the car wash for purposes of doing landscaping. During early evening, he was in his bedroom when he heard some noise and went outside to establish what was happening because the place had already closed. He saw many policemen in the yard who were talking to the owner. He sat on the cement table, took out a cigarette and started smoking.

[14] He testified that there were only three people at the car wash. It was himself, his witness Mntsantsa and the security guard whose name he did not mention. The security guard was also a relative of Mntsantsa.

[15] One of the police officers approached him and asked him why he was disrespectful and smoking in their presence. The policeman asked him whether he thinks that President Ramaphosa and Bheki Cele were mad when they said people should not smoke.

[16] The said police officer dragged him by the scruff of his neck and a second police officer clapped him with open hands. They assaulted him until he fell down on his right knee and also kicked him with booted feet. More policemen joined in and also assaulted him.

[17] The police officers dragged him on the cement floor towards the gate. He resisted but they overcame him and pushed him into the police vehicle. They took him to Dalasile Police Station where they further dragged him inside the police station.

[18] He was asked to sign a form but he refused because he had not done anything wrong. One of the police officers assaulted him with a big ruler/T-square, twice on his head and told him to sign the form, which he eventually signed because he was in pain. The policemen presented him with another form and instructed him to sign, but he refused.

[19] The plaintiff's belongings were taken and he was led to the cells where he was detained. After some time, his name was called out and Gcume told him to fix or shape up his overalls which were torn as a result of the assault. He was then driven to Ngcobo Police Station where he was asked to sign another form but again, he refused. It was explained that he had disobeyed Covid-19 Regulations. He was given options either to pay an admission of guilt fine of Five Hundred Rand (R500.00) or appear in court to answer to those allegations and he chose the latter option.

[20] The plaintiff testified that Gcume took him back to the car wash. The owner of the car wash was shocked to see his injuries and asked him where the police took him to and he explained what happened.

[21] As a result of the assault, he sustained injuries on his right knee which resulted in him limping. He had hit marks all over his body as a result of the sjamboking. He could not set his right foot on the ground as it was painful and swollen.

[22] He could not go to the hospital earlier than 20 May 2020 because of the Covid - 19 restrictions. Before he went hospital, he picked up J88 forms from the police station for completion by a medical doctor.

[23] He took the completed J88 forms back to the police station and opened a criminal case of assault against the police. However, he waited for a very long time without getting a case number until he eventually lost his cell phone.

[24] Prior to his arrest, he was not informed of the offence he had committed. His constitutional rights and the reason for his arrest were also not explained. He thereafter appeared in court and was told that Gcume apologised for not attending court.

[25] He continued to attend court without the arresting officer attending until he was advised that he should not come to court again. He testified that it was later established that Gcume gave a false statement.

[26] He had not taken alcohol on the day of his arrest. The car wash was closed due to lockdown. He was assaulted without having contravened any law or committing any criminal offence.

[27] Under cross-examination, the plaintiff conceded that there was a group of people in the car wash premises which was dispersed by the police. He insisted that Gcume returned him to the car wash and did not take him to his home at Masonwabe Location (Masonwabe) on the morning of 5 April 2020.

[28] He was never told the reasons for his arrest and detention until he appeared in court where he was told that he was arrested for disobeying the regulations.

[29] He had been severely assaulted as a result of which it was difficult to set his right foot on the ground. He recovered after three months but after a year he still found it difficult to use his right foot. His head was swollen and the swelling lasted for about three weeks.

[30] By the time he consulted the doctor, the swelling had gone down but there were still sjambok marks that were still visible. He did not know that he could seek medical attention before 20 May 2020 due to the lockdown.

[31] He admitted that he appeared in court on 28 April 2020, but no note of any visible injuries or his inability to set his right foot on the ground was made by the Magistrate.

[32] He testified that he was staying at extension 5, Masonwabe but he occasionally went to the car wash for purposes of maintaining the landscaping. He was at the car wash before the date on which the state of disaster was declared and could not return to his home due to the lockdown. He did not remember the date on which he arrived at the car wash.

[33] On the day of his arrest, he was not drunk. The police officers arrested him because he was smoking and was not wearing a mask.

Mntsantsa's evidence

[34] He testified that he is the owner of the car wash and that the plaintiff is his nephew. On 4 April 2020, he was at his car wash together with the plaintiff and the security guard. At around 7pm to 8pm in the evening, policemen came to investigate saying that they had received information that he was selling liquor during lockdown.

[35] There were about six to seven policemen in his yard. He spoke to their commander who told him the reason for their visit and warned him not to sell alcohol. The commander advised him to take their visit seriously as the violation of the regulations could result in a criminal record.

[36] The plaintiff came out of his room at the car wash whilst he was talking to the police, lit a cigarette and started smoking. Two policemen approached the plaintiff and asked him why he was disrespectful and smoking in their presence. They asked him if he was not aware that tobacco was prohibited. They started assaulting him with open hands and booted feet and dragged him outside the yard. He did not intervene, because of the harsh/aggressive tone the policemen used when they warned him.

[37] He thereafter saw the plaintiff the next day and noticed that his clothes on the upper body were torn. He asked the plaintiff what happened and he told him that he had been assaulted.

[38] Mntsantsa disputed that the police found more than 50 people in his yard. He further disputed that the plaintiff was drunk and that he shouted at the police whilst they were dispersing the gathering. He testified that the plaintiff was arrested because he was smoking in the presence of the police.

[39] He could not describe the nature of the injuries he observed on the plaintiff save to state that the plaintiff seemed to be very much in pain and was not willing to talk about what happened to him. He could not recall when the plaintiff arrived at his place prior to the arrest.

[40] Under cross-examination he testified that upon the plaintiff's return, on 5 April 2020, he noticed an open injury (haematoma) on the plaintiff's head which seemed very painful. The plaintiff looked very upset so much that he did not want to dwell deep into his situation. The plaintiff had a slight limp but could set his foot on the ground.

[41] He disputed that the security guard who worked at his place was his relative contrary to the plaintiff's testimony in this regard. He further disputed that the plaintiff was arrested because he interfered with the police when they dispersed the crowd at his premises.

[42] He could not answer further questions but was quick to explain that he had to leave for Bloemfontein for business purposes immediately upon the plaintiff's return on 5 April 2020.

Defendant's case

[43] Gcume testified that he is a police officer occupying the rank of a sergeant stationed at Dalasile Police Station, Ngcobo. At that stage he had 16 years of experience as a police officer.

[44] On 4 April 2020, he was doing patrol and charge office duties when he received a call from the Station Commissioner, Mr Matomane, who told him that there was a group of people who were gathered next to the car wash at Nkondlo. Mr Matomane instructed him to disperse the crowd because the gatherings were prohibited by Covid-19 Regulations.

[45] He requested a backup from Ngcobo Police Station before proceeding to the car wash with Constable Xhamlashe. On arrival, they saw groups of people who were gathered around the car wash, some were across the road and the other group was inside the car wash.

[46] They approached all the different groups and instructed them to leave as they were prohibited from gathering. People were reluctant and hesitant to move as they

did not quite understand but his team pleaded with them and explained that the purpose was not to arrest but to disperse them.

[47] Whilst they were talking to the group of people that was outside the car wash, the plaintiff raised an argument with the police and told them that they did not know what they were doing and they were adopting apartheid police style to oppress people. He told the plaintiff that the police were doing their work and that he must not say anything that he did not know. He warned the plaintiff not to interfere with the police in their work.

[48] He asked the plaintiff why he was at the car wash and he said that he was busy doing landscaping. He told the plaintiff that even being at the car wash which was not his place of residence was a contravention of the regulations. The plaintiff continued to insult the police and told them that what they wanted to achieve was not going to happen.

[49] He noticed that the plaintiff's aggressive attitude was as a result of him being intoxicated. He told him to go and sleep and warned him that if he continued to interfere with their duties, he was going to arrest him.

[50] He asked to talk to the owner of the car wash and explained to him the purpose of their visit. He asked the owner of the car wash to close the place and not allow any gatherings. The owner co-operated and expressed gratitude for the work that the police were doing after they had explained to him the seriousness of the Covid-19 pandemic and how it was spread through gatherings.

[51] Whilst he was still talking to the owner, he noticed that there were policemen who were wrestling with the plaintiff. He approached the plaintiff and told him that it was time for him to be arrested. He informed him of his constitutional rights and told him that he was arresting him for contravention of the regulations, not wearing a mask and being under the influence of intoxicating liquor. The plaintiff resisted the arrest but they managed to put him inside the police van after a struggle.

[52] The plaintiff was the only person who was arrested because he did not co-operate. The purpose of their visit to the car wash was not to arrest anyone but to disperse the gathering.

[53] They patrolled the area around the car wash to ensure that everyone had dispersed before they drove to the police station with the plaintiff. Upon arrival at the police station, he again advised the plaintiff of his constitutional rights and completed relevant documentation. The plaintiff refused to sign SAP14 notice of rights form despite the purpose thereof having been explained to him.

[54] They took the plaintiff to a cell and kept him alone for his own safety. They conducted hourly visits to his cell until he was released. After the plaintiff reached his state of sobriety, Gcume took him back to the charge office where he again informed him of his constitutional rights and the plaintiff again refused to sign the notice of rights.

[55] Gcume asked the plaintiff where his home was so that he could take him there. The plaintiff told him that he was staying at Masonwabe. Gcume took the plaintiff to Masonwabe and dropped him off at a place he pointed out as his home.

[56] Before taking the plaintiff to his home, Gcume completed J534 form and gave the plaintiff an option to either pay a fine or appear in court. The plaintiff elected to appear in court.

[57] He denied that the plaintiff was assaulted by the police at any stage. The plaintiff was arrested lawfully and the purpose thereof was explained to him prior to the arrest and at the police station.

[58] Under cross-examination, he testified that on their way to the car wash, they had to wait for the backup. He was with constable Xhamlashe, who was his van crew. It might have been around 7pm. It was after sunset but it was not yet dark.

[59] On their arrival at the car wash, people were gathered outside the car wash, across the road and inside the car wash. Some were in their vehicles playing music and others were sitting on camp chairs whilst others were braaiing meat.

[60] He could not say whether all the people in the group were wearing masks. However, he conceded that some members of the group may have contravened Covid-19 Regulations and reiterated that their intention was not to arrest but to disperse the gathering.

[61] The plaintiff approached the policemen shouting in a disruptive manner whilst they were busy dispersing the group. He did not take notice of the state of sobriety of other members of the group because they did not interfere with the duties of the police officers.

[62] The reason he asked to speak to the owner was to advise him that it was unlawful to allow gatherings in his premisses and warned him not to do it again. He did not take any statement from the owner.

[63] He disputed that the plaintiff came out of his bedroom to investigate because he heard noise and that the plaintiff was assaulted and dragged outside the premises by the police officers.

[64] It was the plaintiff's conduct that led to his arrest as he had been earlier warned to leave the gathering, but he continued to disrupt the police in their work. He arrested the plaintiff for contravention of the regulations and being in the crowd without having a mask on.

[65] He detained the plaintiff because he was drunk and it was not safe to release him at that time of the night due to his drunken state. He kept him in custody for him to regain his state of sobriety before releasing him.

[66] He disputed that he took the plaintiff back to the car wash on the morning of 5 April 2020 and re-iterated that he took the plaintiff to Masonwabe.

[67] Gcume conceded that he never signed the notice of rights after he had earlier testified that he is the one who signed it.

Submissions on behalf of the plaintiff

[68] Mr Melane, counsel for the plaintiff submitted that the main issue in contention was the lawfulness or otherwise of plaintiff's assault, arrest and detention. It is common cause that the plaintiff was arrested during the time of Covid-19 hard lockdown and was detained until the next morning. It is further common cause that he was given the notice to appear in court.

[69] The plaintiff only went to the hospital on 20 May 2020 for the purpose of having J88 forms completed by the doctors so that he could lay a criminal charge against the police.

[70] He submitted that the reason plaintiff was at the car wash was that he was doing landscaping. The plaintiff initially testified that there were no crowds of people in the premises, but conceded during cross examination that there were crowds of people outside the premises.

[71] He submitted that the plaintiff's evidence was corroborated by the owner regarding the fact that there were no other people except himself, the owner and the security guard in the premises.

[72] Mr Melane conceded that the plaintiff exaggerated the injuries he allegedly sustained by claiming that he could not set his right foot on the ground. He submitted that the inconsistencies in the plaintiff's evidence under cross- examination are not fatal to his case.

[73] He submitted that despite Mntsantsa having failed to answer some questions, he corroborated the plaintiff's evidence regarding their relationship, the fact that the plaintiff was working there and that sometimes he stayed over. Their version should be accepted as a true reflection of what happened on the day in question.

[74] Mntsantsa saw the plaintiff when he came back on the next day and noticed that his clothes were torn and that he was injured.

[75] Mr Melane submitted that the defendant's witness was a single witness whose evidence must be viewed with caution as it was uncorroborated. He submitted further that there were inconsistencies between the defendant's version which was put to the plaintiff and Gcume's testimony in relation to whether the owner assisted the police when dispersing the crowd.

[76] The notice of rights referred only to the contravention of Covid-19 Regulations and said nothing about the plaintiff being drunk or not wearing a mask. He submitted that the wearing of masks was in any event not enforced at that time.

Defendant's submissions

[77] Mr Madubela, counsel for the defendant submitted that there are mutually destructive versions before court. The plaintiff bears the onus to prove the assault. The onus in civil proceedings does not shift to the defendant. The defendant has an evidential burden to rebut.

[78] He submitted that the plaintiff cannot rely on what he has not pleaded. He did not plead the defendant's failure to inform him of his constitutional rights.

[79] He submitted that the arrest was lawful as the plaintiff was arrested for contravention of the regulations by not being at his place of residence.

[80] Both the plaintiff and his witness could not remember when exactly the plaintiff arrived at the car wash prior to the lockdown. The plaintiff was evasive about his home which was crucial in this matter as the plaintiff's presence at the car wash had to be justified.

[81] The plaintiff's version contradicted that of his own witness. During cross-examination the plaintiff denied knowledge of Masonwabe whilst Mntsantsa testified that Masonwabe was the plaintiff's brother's home.

[82] The plaintiff admitted under cross-examination that there were groups of people that the police officers were dispersing contrary to his earlier evidence in this regard.

[83] Mr Madubela submitted that the plaintiff's counsel conceded that there were discrepancies in the plaintiff's evidence and that the plaintiff exaggerated the injuries he allegedly suffered as a result of the alleged assault by the police. The plaintiff could have sustained the injuries he is imputing to the defendant elsewhere at any time. On the other hand, the defendant's witness did not contradict himself in any material respects.

[84] He submitted that the plaintiff contradicted his own witness in respect of the relationship between the owner of the car wash and the security guard. Mntsantsa vehemently denied that he was related to the security guard.

[85] The plaintiff was not a credible witness as he exaggerated the injuries allegedly sustained during the alleged assault and further contradicted the evidence of his own witness. From the totality of evidence led by Gcume, it is clear that the plaintiff was drunk. He was the only one arrested out of the group of people that was there and he was released after he regained his state of sobriety. He was warned to appear in court. Furthermore, the exaggerated injuries such as head injuries and the fact that he was unable to set his right foot on the ground were not recorded on the J88 forms. Therefore, the credibility and reliability of the plaintiff's evidence in its entirety was questionable.

[86] He submitted that the discrepancies and contradictions in the plaintiff's evidence were material as they related to the only issue which is to be determined by the court.

[87] The plaintiff lacked credibility in that he misled the court in material respects in relation to his place of residence, the reason why he was at the car wash, the injuries he sustained and the number of people who were in the premises of the car wash.

[88] Mr Madubela submitted that it was highly improbable that the plaintiff sustained injuries as the result of the police conduct. Had that been the case, the plaintiff would have sought medical attention without delay as he claimed to have suffered severe injuries. Furthermore, seeking emergency medical treatment at the time was not prohibited.

[89] He submitted that the defendant's version was the most probable version in that Gcume's evidence was credible and was without any material contradictions. The defendant's evidence of a single witness was reliable and sufficient to support the defendant's case.

[90] He further submitted that the plaintiff's failure to go to hospital or seek medical attention timeously was a clear indication that he suffered no injuries as a result of the police conduct. Moreover, he appeared in court on 28 April 2020, but the injuries he claimed to have suffered were not noted.

[91] The onus to prove the assault on a balance of probabilities was on the plaintiff, however, he failed to do so. His evidence falls to be rejected as a fabrication.

[92] He submitted that the plaintiff's case falls to be dismissed with costs on a party and party scale on a magistrate's court scale.

Discussion

[93] A pronouncement on the lawfulness or otherwise of the impugned arrest and detention can only be made upon a consideration of the legal principles granting the police authority to arrest without a warrant of arrest.

[94] In terms of section 40(1)(a) of the CPA, a peace officer may, without warrant, arrest any person who commits or attempts to commit any offence in her/his presence. The jurisdictional factors that must be established for a successful invocation of section 40(1)(a) are –

- (a) the arrestor must be a peace officer;

(b) an offence must have been committed by the suspect or there must have been an attempt by the suspect to commit an offence; and

(c) the offence or attempt must occur in the presence of the arrestor.

[95] It is trite that once the arrest has been admitted, it is for the defendant to allege and prove the existence of grounds in justification of his conduct.

[96] For the defendant to succeed in the defence raised, he must justify the arrest and detention by establishing that an offence was committed in the presence of the police.

[97] The approach, when faced with mutually destructive versions was set out in the case of *National Employers General Insurance Co Ltd v Jagers*³ by Eksteen AJP when he stated:

“... where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes

³ 1984 (4) SA 437 (ECD) at p. 440 D-G

him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-öperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra)* and *African Eagle Assurance Co Ltd v Cainer*. I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities".

[98] As a starting point, to succeed, the litigant who bears the onus of proof in a civil trial should satisfy the court, on a preponderance of probabilities, that his or her version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.⁴

[99] The test propounded by *Wessels JA in National Employer's Mutual General Insurance Association v Gany*⁵ is to the effect that where there are two stories which are mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false.

⁴ *Baring Eiendom Bpk v Roux* 2001 (1) All SA 399 (SCA).

⁵ 1931 AD 187 at 199

[100] In *Stellenbosch Farmers' Winery Group Ltd & Another v Martell & Cie SA & Others*⁶ the Supreme Court of Appeal also observed what it fell to the trial court to do in a civil matter when there are two irreconcilable versions and so too on a number of peripheral areas of dispute which it reckoned could have a bearing on the probabilities:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

⁶ [2002] ZASCA 98 (6 September 2002)

[101] In light of the contradicting versions presented, it is the duty of the court to make a finding as to which version is more plausible, bearing in mind that the defendant bears the onus to justify the arrest and detention.

Conclusion

Arrest

[102] It is undisputed that Gcume went to the car wash based on information received from the Station Commander and having been instructed to disperse the crowd. He called for a backup and upon arrival at the car wash they instructed the groups to disperse and explained that it was illegal for them to gather due to the Covid 19 Regulations. He thereafter asked to speak to the owner of the car wash.

[103] Gcume testified that the reason for arresting the plaintiff was his interference with the work of the police which he later realised was as the result of his drunken state.

[104] The plaintiff conceded under cross-examination that there was a group of people which was dispersed by the police outside the car wash contrary to his earlier testimony in chief.

[105] His counsel conceded during argument that the plaintiff exaggerated his injuries and that his evidence had inconsistencies. The plaintiff and his witness contradicted each other on simple aspects such as the relationship between the security guard and the owner of the car wash; the nature of the injuries allegedly sustained by the plaintiff; and whether the plaintiff could set his right foot on the ground when he came back on 5 April 2020 or not. The serious head injury allegedly suffered by the plaintiff was not reflected on the J88 and did not appear on his particulars of claim.

[106] The plaintiff's denial of knowledge of Masonwabe which his witness knew to be his brother's home pointed to him being an unreliable witness. It is highly improbable

that Gcume would have taken the plaintiff back to the car wash which was not his home. In his particulars of claim the plaintiff pleaded that he was taken to his home on 5 April 2020. I find Gcume's version in this regard to be more probably than that of the plaintiff. His evidence was credible and reliable with no material contradictions. He was not shaken under cross-examination.

[107] Mntsantsa corroborated Gcume's evidence more specifically regarding the purpose of the visit by the police and what was communicated to him by Gcume.

[108] I accept that Gcume and his colleagues proceeded to the car wash with the intention to disperse the crowd and not to arrest anyone. It is improbable that Gcume would have arrested the plaintiff had he not contravened the regulations and interfered with the official duties of the police. Furthermore, the plaintiff was the only one who was arrested. I could find no other basis for his arrest other than what Gcume gave as the reason.

[109] I am therefore satisfied that the plaintiff contravened the regulations by not being at his place of residence and that he interfered and disrupted the police in the performance of their duties whilst under the influence of alcohol.

[110] I accordingly find that Gcume's conduct in arresting the plaintiff was justified and lawful in accordance with section 40(1)(a) of the CPA.

Detention

[111] It was not disputed that Gcume detained the plaintiff to allow him to regain his state of sobriety and that he released him when he was satisfied that he was no longer intoxicated the following morning. Gcume's version regarding the place where he dropped off the plaintiff is consistent with the reasons given for his arrest and detention. In his drunken state, the plaintiff could have been a danger to himself and others regard being had to how he conducted himself when police interacted with him.

[112] I therefore find that the plaintiff's detention was justified and lawful in the circumstances.

[113] In the premises plaintiff's claims for unlawful arrest and detention must fail.

Assault

[114] In light of the contradicting versions presented to this Court, the question is, which version is more probable bearing in mind that the plaintiff bears the onus to prove the assault and the overall onus to prove that he suffered damages.

[115] Regarding the claim for assault, the plaintiff's evidence was riddled with material contradictions and exaggerations as indicated elsewhere in this judgment. The plaintiff's version regarding the significant events pertaining to the assault is inherently improbable, his witness was evasive and contradicted his evidence.

[116] The inconsistencies in the plaintiff's evidence and his exaggeration of the injuries points to the plaintiff being an unreliable witness.

[117] I find Gcume's version to be acceptable as a credible and a more probable reflection of the events of the date in question.

[118] For all the above reasons, I accordingly find that the plaintiff has failed to discharge the onus resting upon him to prove his case in respect of the assault claim.

Order

[119] In the result, I make the following order:

1. The plaintiff's claims are accordingly dismissed with costs.
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MQOBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff	:	Mr Melane
Instructed by	:	Mgweshe Ngqeleni Inc Mthatha
For the Defendant	:	Mr Madubela
Instructed by	:	Office of the State Attorney Mthatha
Heard on	:	14 August 2024
Judgment Delivered on	:	08 April 2025