

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

Reportable

Case No.: EC09/2008

In the matter between:

HAMOUD ADDOU OSMAN

Complainant

and

**MINISTER OF SAFETY & SECURITY
NATIONAL COMMISSION OF THE
SOUTH AFRICAN POLICE SERVICE
SOUTH AFRICAN POLICE SERVICE,
WESTERN CAPE
STATION COMMANDER, MILNERTON
POLICE STATION**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

CORAM	:	D M DAVIS J
JUDGMENT BY	:	DAVIS J
FOR THE COMPLAINANT	:	ADV R NYMAN
INSTRUCTED BY	:	UCT LAW CLINIC
FOR THE RESPONDENTS	:	ADV D O POTGIETER SC & ADV F ESSOP
INSTRUCTED BY	:	STATE ATTORNEY
DATE OF HEARINGS	:	11 OCTOBER 2010
DATE OF JUDGMENT	:	15 DECEMBER 2010

REPORTABLE

IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE, CAPE TOWN)

5 CASE NUMBER:

EC09/2008

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In the matter between:

HAMOUD ADDOU OSMAN

Plaintiff

10 and

MINISTER OF SAFETY & SECURITY1st DefendantNATIONAL COMMISSIONER OF THESOUTH AFRICAN POLICE SERVICE2nd DefendantSOUTH AFRICAN POLICE SERVICE,15 WESTERN CAPE3rd DefendantSTATION COMMANDER, MILNERTONPOLICE STATION4th Defendant

J U D G M E N T

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DAVIS, J:Introduction:

This case concerns a complaint of unfair discrimination based
25 on the grounds of ethnicity and social origin instituted in terms
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of section 20 of the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000 ("the Act"). In brief, complainant contends that on 22 May 2008 during a period of violence which was described as being of a xenophobic nature, which occurred in Dunoon, certain identified police officers, who were armed, refused to come to complainant's assistance to remove goods from his shop ('the Blue Lagoon'), when they most certainly had the means and ability to do so.

10 In complainant's view, their failure to assist him, was because he was regarded as "a foreign national", who did not deserve the same protection as South African citizens. Complainant contends that this conduct was based on xenophobia and falls within the framework of the Act. Accordingly, he claims

15 damages in the amount of R515 000,00.

The Factual Background:

On the evening of Thursday, 22 May 2008 at approximately 18:00, a meeting was called at the Sophakama Primary School in Dunoon by various community structures, including the SAPS in Milnerton, for both local and foreign residents, in order to convey a message of anti-xenophobia, particularly in the light of xenophobic attacks that occurred in Gauteng during this period. A pamphlet, which advertised the meeting and which was made part of the record, makes the object to the

meeting clear. All of this was common cause.

It is also common cause that shortly after this meeting was adjourned, crowds in the Dunoon and Joe Slovo informal
5 settlements, gathered on the streets and commenced a looting spree by attacking and ransacking foreign owned shops in the area. It appears also to be common cause that South African shops and businesses were not attacked on the evening in question. Respondents were thus not required to use
10 resources to protect local businesses.

The sole evidence to buttress the complaint came from the complainant. He testified that on the evening of 22 May 2008, he had attended the meeting in the school hall at Sophakama
15 Primary School in Dunoon. He testified about the tense atmosphere in the school. He alleged that the crowds in the school hall pointed to him and shouted "Somali we will kill you". I should add that during cross-examination, he appeared to deny the nature of this evidence, ascribing it to a wrong
20 interpretation by the court interpreter when so confronted during cross-examination. It appeared that the people in question spoke Xhosa and he did not understand the essential contents of their conversation.

25 He further testified, however, that when he left the premises,

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he went to his shop, where he told his employees to lock the doors of the premises as the situation had become dangerous. He then left Dunoon at approximately 18:30 and returned to his home in Bellville. At home in Bellville, he received a
5 telephone call from one of his employees at approximately 20:00, who informed him that his shop had been broken into and that crowds had commenced looting the contents thereof. At this stage his employees had fled the shop and were, of course, not calling him from the premises. At this stage it
10 appeared that neither he nor his employees had contacted the police and informed them that his shop had been attacked.

He testified that he immediately drove back to Dunoon. It took him approximately between 15 to 20 minutes to return to his
15 shop. When he arrived in the vicinity of his shop, three police vans were standing nearby, whilst the crowds were still carrying goods out of his shop. He testified that he approached one of the police officers for assistance in removing the remaining goods from his shop. The police
20 officer responded that they would only assist him if his employees were still in the shop, but they would not assist simply to remove goods. He was then instructed by the police to leave Dunoon as the situation was becoming more dangerous. According to his evidence, he left the area and
25 went back home, only to return to his shop on Sunday, 25 May

2008.

In his evidence, he reported that he was particularly upset as he had seen his shop being destroyed whilst several heavily
5 armed policemen merely looked on as though this was part of an 'evening's entertainment'. During cross-examination, complainant's version of the events did not appear to be as coherent as when he presented it in examination in chief. He was confronted with the statement that he had made at the
10 Milnerton Police Station on 25 May 2008 when he went to lay a charge of theft and public violence. According to this statement, he was present at his shop at 20:00 on the evening of 22 May 2008 when crowds arrived. He ran away with his employees when his shop was attacked. He later returned to
15 his shop at 23:00 accompanied by the police and when he tried to remove the remaining goods from his shop, the police advised him to leave the shop for his own safety.

In cross-examination, he alleged that it was the community
20 that told him to return home. There is no reference in this particular piece of evidence to any wrongdoing on the part of the police, although I shall return to this particular aspect later in my judgment. In his testimony before the Court, he did allege that he was not present when the looting occurred. He
25 had only come to his shop after receiving a call from his
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employee. He alleged that after speaking to the police officer, he left, returned later that evening at 23:00, when he was told by the community to leave the shop for his own safety. During his evidence in chief he never mentioned returning to his shop
5 at 23:00 that night. In fact he testified that he went home after his first visit to the shop, only to return on Sunday, 25 May 2008. In essence, that was the only evidence that the Court was provided with in support of the complainant's case.

10 Mr Potgieter, who appeared together with Ms Essop on behalf of the respondents, submitted that the complainant was neither a credible nor a reliable witness as his version of events had changed numerous times, some of which I have indicated in my description of his evidence *viva voce* and the statement which
15 he provided to the police. In Mr Potgieter's view, he had contradicted himself in material respects. In particular Mr Potgieter referred to his testimony as to what was said at the meeting in Xhosa, that is in a language he did not understand.

20 Mr Potgieter submitted that the complainant's attempt at criticism of the interpreter was disingenuous in that the Court had observed that the complainant was reasonably well versed in English and in fact had spontaneously given some of his evidence in English to the Court. He would thus, in Mr
25 Potgieter's view, have heard if the interpreter had not

interpreted his evidence properly and he could then have corrected it as he had done on other occasions. At one stage he testified that the crowds were pointing at him and shouting "nas amakweri nas", alternatively that he had the feeling that they were saying the latter phrase while pointing at him. In Mr Potgieter's view, his evidence about the situation at the school was unreliable and was indicative of the general quality of his evidence.

10 Ms Nyman, who appeared on behalf of the complainant, sought to defend the quality of the complainant's evidence. She submitted that it was his belief that the police officer had manifestly failed to come to his assistance, because of xenophobic considerations. In support of this allegation, she referred to testimony of the complainant that when his previous shop had been looted in Fish Hoek, the police there had come to his assistance. In other words, he had firsthand experience of having dealt with the police under similar circumstances. The basis of his belief that it was xenophobia which had been at the source of the police omission, was accordingly based on a comparison with previous experience of the police under similar circumstances. According to the complainant in this particular case, the police officers had clearly acted in a passive fashion, as if the entire looting spree was no more than "entertainment".

Ms Nyman also sought to explain the contents of the statement which the complainant had provided to the police and of which Mr Potgieter had made much in his argument. In her view, it
5 was unlikely that a vulnerable person such as the complainant, would have set out his entire complaint with the police when giving a statement to the very people about whom he was complaining. Ms Nyman, therefore, submitted that even though there were contradictions between the police statement
10 and his evidence, these contradictions did not negate the credibility of his evidence that the looting had taken place in the presence of police officers.

The Legal Basis of Complainant's Case:

15 Given that I have set out the essence of the complainant's evidence, it is now necessary to turn to the law upon which the complaint is predicated. Section 1 of the Act defines discrimination as:

20 "Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligation or disadvantage on; or withholds benefits, opportunities, advantage from any persons on one
25 or more of the prohibited grounds."

Ethnicity and social origin are listed as prohibited grounds of unfair discrimination in subsection (1)(a) of the Act. Section 1 defines nationality to mean:

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"Ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature, but does not include rights and obligations normally associated with citizenship."

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In President of the Republic of South Africa & Another v Hugo 1997 (4) SA 1 (CC), Goldstone, J, on behalf of the majority of the court, paragraph 41, explained that the object of the prohibition of unfair discrimination and the manner of approach

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unfair discrimination, should be dealt with as follows:

"The prohibition of unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups, it seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional democratic orders, the establishment of a society in which all human beings will be

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accorded equal dignity and respect, regardless of their membership of particular groups."

The court held that in order to determine whether the impact of discrimination was unfair, it was necessary to look at the group who was disadvantaged, the nature of the power in terms of which the discrimination was effected and the nature of the interest which had been effected by the discrimination. In Union of Refugee Women & others v Director Private Security Industry Regulatory Authority & Others 2007 (4) SA 395 (CC), the court held that refugees constituted a vulnerable group in our society, because "they had been forced to flee their homes as a result of persecution, human rights violations and conflict and very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or social origin." (at para 28).

This case turns to a considerable degree on the facts as set out and the law which applies to the burden of proof. Much of the law as I have set it out, is common cause and there is no conflict between the parties as to the legal basis upon which the complaint was predicated. Having said that, however, it is perhaps necessary to say something about the concept of xenophobia which lay at the heart of the events which gave rise to this dispute. It is this concept of xenophobia which

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makes this case so deeply troubling, because whatever the quality of the evidence of the complainant, the fact is that as a result of this violence, complainant lost a vibrant livelihood with which he was able to provide a decent standard of living for his family. The fact that he was able to do this, after having to flee his own country and re-establish himself in our constitutional democracy and then be confronted with the horror of the xenophobia which unfolded on the evening in question, only compounds the poignancy of this case.

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To the extent that it is relevant, therefore, Sachs, J, in his minority judgment in the Union of Refugee Women case, at para 143 and 144, provides a useful description of the nature of the violence which unfolded on the evening in question. He refers in particular to the Braamfontein declaration:

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"Xenophobia is the deep dislike of non-nationals by nationals of recipient state. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances."

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Sachs, J then continues:

"This prejudice is strong in South Africa. It strikes

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at the heart of our Bill of Rights. Special care accordingly needs to be taken to prevent it from even unconsciously tainting the manner in which laws are interpreted and applied. If refugees are
5 treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined... The constitutional response to
10 xenophobia need not, of course, involve exaggerated xenophilia. Just as refugees should be protected from irrational prejudice, so they should not be able to lay claim to irrational privilege. The law... must be applied in a manner that is fair,
15 objective, appropriately focused and keeping with the letter and spirit of our international and national legal obligations. Exercises of power that purport to have a neutral foundation, but track stereotypes are often seen as flowing from a reinforcing
20 negative presuppositions. Indeed the routinised way in which power is exercised, can readily become entangled in the public mind with existing prejudicial assumptions reinforcing prejudice as establishing a downward spiral of disempowerment.
25 One of the purposes of refugee law is precisely to

overcome the experience of trauma in displacement and make the refugee feel at home and welcome. Disproportionate and uncalled for adverse treatment would defeat that objective and induce an unacceptable and avoidable experience of alienation and helplessness. It would be most unfortunate that the left hand of government supervises the security industry took away what the right hand of government, that accords to accredited refugees a special status, gives."

Of course the question which vexes this Court is whether, on the evidence provided, it can be concluded that complainant suffered discrimination because of the xenophobia as Sachs, J has described it and which would then bring his complaint within the scope of the Act.

As mentioned earlier, therefore, the key question in the light of all of this legal and evidential analysis, turns on the burden of proof. The Supreme Court of Appeal has recently dealt with this question in a joint judgment Navsa and Nhlantla, JJA set out the position with regard to proof in Manong & Associates (Pty) Ltd v City Manager, City of Cape Town & Others [2010] ZASCA 169 (SCA) at para 54-55:

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“As stated earlier in this judgment, the court below approached the evidence on the basis that it was for the CCT (respondent) to prove that it had not discriminated against the company. The burden of proof in cases of discrimination brought in the Equality Court, is dealt with in S13 of the Act. The relevant part of S13(1) provides:

1. If the defendant makes out a *prima facie* case of discrimination:

(a) The respondent must prove, on the facts before the court, that the discrimination did not take place as alleged....”

Discrimination is defined in S1 of the Act as follows:

“It means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly:

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages for many persons on one or more of the prohibited grounds.

The prohibited ground of unfair discrimination relied on by the company is race and as pointed out above, it relied specifically

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on ss 7(c) and (e). In Prinsloo v Van der Linde & Another 1997 (3) SA 1012 (CC) para 23, the Constitutional Court, in dealing with the equality clause in the interim Constitution said the following:

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"The idea of discrimination (to employ a neutral description term) seems to lie at the heart of equality jurisprudence in general and of the s 8 right or rights in particular."

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Thus to even begin to get off the ground, the company must, at the very least, show that it was treated differently to other engineering consultants in relation to COT or CCT projects. The company had to show that in the totality of City projects, it receives disproportionately fewer contracts so in relation to other consultants. Since the very premise of the company's case was race, it had to establish a *prima facie* case that the discrimination was race based."

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In the present dispute, the complainant was required to show that he had been subjected to treatment from the police which discriminated against him on the grounds of ethnicity or social origin. In short, his case was that the treatment that he received had been based on xenophobic considerations, that is

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discrimination, because he was a Somali national and was not a South African.

I had decided earlier during the proceedings that complainant's
5 evidence established a *prima facie* case. That then required
respondent to show, in the first place, that no discrimination,
as alleged, had taken place. To this end, respondent called
two witnesses. Colonel Van Wyk testified that he was the
Station Commander SAPS in Milnerton on 22 May 2008. The
10 Milnerton Police Precinct was responsible, *inter alia*, for the
policing of Dunoon and the Joe Slovo informal settlements.
Colonel Van Wyk confirmed that there were a large number of
foreigners and refugees living in these areas and that they ran
approximately 100 spaza shops in this area.

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He testified that a good relationship had existed between the
police and the foreign community in the area and that he had
never received any complaints from foreigners in the area
about police officers acting in a discriminatory nature, neither
20 from individuals nor from the various associations. He
testified that in early May 2008, the Milnerton Police had
become aware of xenophobic attacks that had spread through
parts of the country and particularly in Gauteng. It was
decided, therefore, that a pre-empting strategy was needed to
25 protect foreigners in their area and to prevent such attacks

from occurring.

In the week leading up to the events which, on the basis of this case, Colonel Van Wyk testified that he deployed extra police
5 patrols in the Dunoon area where most of the foreign nationals resided and there was enhanced police intelligence in order to pre-empt any attacks that might occur. No report backs of any unusual activity in the area were received. He testified further that the various community structures in the area requested
10 that a meeting be held in order to plan how the police in the community could deal with any xenophobic attacks in the event that they occur in the area. A planning meeting was, therefore, held on 19 May 2008 at the Dunoon Resource Centre. It was attended by various civic organisations, sector
15 crime fora, street committees, foreigners residing in the area and the local councillor, Stemele. Colonel Van Wyk could not attend the meeting, but sent Lieutenant Colonel Ncata and Colonel Hobana, who attended on his behalf.

20 It was decided at this meeting that there was a need for a bigger meeting which would include a broader local and foreign audience drawn from the community of Dunoon, in order to disseminate a message which would prevent xenophobic attacks from occurring. 22 May 2008 was the date set for this
25 particular meeting which was to be held at the Sophakama

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Primary School Hall in Dunoon. According to Van Wyk, this was the venue which was generally chosen for such meetings in the area. The police undertook to assist in advertising the meeting by printing and helping to distribute pamphlets, to
5 which reference has been already made. Accordingly some 200 English and Xhosa pamphlets were distributed over the period 21/22 May 2008 by members of the police, the street committee members, as well as Bambanani Neighbourhood Watch members. The police used a PA System in their
10 vehicles to announce the meeting.

The message that was conveyed was that the police and the community were very concerned to prevent any xenophobic attacks and that the meeting had been called to serve this
15 purpose. Van Wyk also testified that he and Lieutenant Colonel Ncata attended a meeting on 20 May 2008, which had been called by the third respondent, Disa Court in Bishop Lavis. Police, various civil society representatives, media and foreign nationals were present at the meeting, which had been
20 called to discuss the way forward in the Western Cape, should attacks similar to that which had occurred in Gauteng occur in this province. According to Van Wyk, third respondent addressed the various civil society stakeholders, followed by a media briefing and lastly met with various station commanders
25 in the Western Cape.

In this meeting, all station commanders were instructed to formulate contingency plans to deal with possible attacks that may arise in and around the Western Cape. Van Wyk testified
5 that pursuant to this meeting on 21 May 2008, he organised a meeting at the Milnerton Medi-Clinic with all the main role players in the Milnerton area. He met with various officials from the Milnerton Fire Brigade, the ambulance service, the hospital manager, disaster management, the Metro Police
10 Service, members from the neighbourhood police stations, as well as the key holder of the Killarney Racetrack. He included the key holder in the meeting as part of their contingency plan to use the racetrack as a venue to accommodate foreigners and refugees who might need shelter should any of these
15 attacks occur.

He testified that, on 22 May 2008, the day had begun without any untoward incidents. He had to leave Milnerton to attend the Provincial Crime Combating Forum in Bishop Lavis, but
20 was intent to return for the community meeting. His meeting took longer than anticipated and accordingly he asked Ncata and Hobana to represent him at the community meeting. They were in constant telephonic contact with regard to the progress of the meeting. Van Wyk testified that Ncata informed him
25 that hundreds of local and foreigners had come to the school

hall for the meeting. It was decided to move the meeting outside on to the school's soccer field. It was now becoming dark, there was no electricity on the soccer field. A power sound system was organised and the meeting decided to
5 postpone the meeting to the Saturday afternoon. An announcement by Councillor Stemele was then made.

Van Wyk arrived at the school to meet up with Ncata at approximately 19:00. At that stage the crowds had left the
10 school premises. Shortly thereafter, he received the first report of a foreign shop which had been attacked in Dunoon. When they arrived on the scene, he found that the foreign shop had been looted. Police had cordoned off the area for further investigation. He then received further reports of
15 violence and immediately called for backup. He gave instructions to the joint operation centre to be activated to the Killarney Racetrack. He then activated the various emergency services, the air wing support and the crime control units. He further called the Provincial Commissioner Petros to inform
20 him of the situation in Dunoon and Commissioner Petros, who lived in the Milnerton area, began to walk immediately towards Dunoon.

Van Wyk despatched his branch commander to pick up Commissioner Petros en route to Dunoon. They drove
25 through Dunoon and eventually to the Killarney Racetrack.

When they arrived at the racetrack, the SAPS helicopter was on standby and Commissioner Petros and Van Wyk boarded the helicopter. Van Wyk testified that he monitored the situation from the helicopter, issued instructions. He saw the attacks
5 unfolding on the ground. The attacks had begun to intensify. Bigger groups started splitting with the smaller groups and the violence spread all over Dunoon into the Joe Slovo area. Van Wyk testified if a complaint was reported to the joint operation centre, details were recorded and a vehicle was despatched to
10 the particular scene. The complaint and the follow up would be reported in the occurrence book. There were no entries in the occurrence book between 20:00 and 21:00 on the night of 22 May 2008 of any complaints received of attacks which had occurred at the Blue Lagoon, that is, of course, the location of
15 complainant's shop.

Van Wyk testified that he continued to co-ordinate the operation from the helicopter, until it needed to refuel. He then returned to the racetrack to ensure that foreigners will be
20 accommodated. The main instruction given to the police was to remove all foreigners out of any harm and to ensure that they were taken to a place of safety. The principal priority was to save lives. Later that evening when large SAPS and other trucks arrived on the scene, they did try to save some of the
25 goods from the various foreign owned shops. He testified it

was a very slow process removing goods from these shops, as they were small items that had to be loaded on to trucks. He had one truck at the Milnerton Police Station, but he requested Metro Police and the City to send through further trucks to
5 assist. Van Wyk testified that the members of the police did their very best to assist as many foreigners as possible in extraordinary difficult circumstances.

The police tried to prevent looting by shooting numerous
10 rounds of rubber bullets into the crowds and were trying effect arrests. Indeed they ran out of ammunition and were required to replenish their stock. All dockets opened in respect of the incident were allocated to special investigation teams under the command of Inspector Boltney, who had been designated
15 to deal with these issues. Colonel Van Wyk denied that he or any of his police officers would have acted in a discriminatory manner towards the foreigners on the night in question. He found it most unlikely that a police officer would bluntly refuse to assist a foreigner, as had been testified by the complainant.
20 Most of the police officers, including himself, worked for close to a 24 hour shift during the events in question without any demure or demanding an compensation. He confirmed that each police officer was required to wear a name plate. If the complainant had identified a particular police officer with whom
25 he allegedly dealt, the matter would have been investigated,

and if any wrongdoing established, disciplinary action would have been taken. The first, however, that he came to hear of the complainant's case was when he received notice of the full proceedings, by then he was no longer at the Milnerton SAPS
5 and he had been redeployed to the Claremont SAPS.

Lieutenant Colonel Ncata sought to corroborate the evidence of Van Wyk in material respects. He testified that he was present at the meeting of the community representatives on 19
10 may 2008, as well as the meeting of the third respondent on 20 May 2008 and the meeting of 22 May 2008, which he had attended on behalf of Van Wyk. He confirmed that there were no xenophobic statements expressed by the crowd in the school hall or on the evening of 22 May 2008. He denied that
15 members of the crowd were rowdy or that they had carried weapons. Neither he nor any of the police officers posted at the entrance to the school hall had observed the crowd carrying weapons. If they had noticed people carrying weapons, they would have confiscated such weapons. He
20 testified it was only after the crowd had been dispersed that the first report of attacks were received, and this was all after 20:00.

He testified that many of the foreign nationals, as well as local
25 community members had called him to come out and assist the

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foreigners. It was mainly a group of young people who were involved in the looting, but most of the older community members disapproved of this conduct. Ncata testified that he found it very difficult to believe that a police officer would
5 refuse to help a foreigner on the night in question, as there were many high ranking police officers, politicians, members of the media and representatives of NGO's present in the area that night. Any misconduct on the part of any police officer, would have been exposed very easily. In any event he
10 testified that as far as he could ascertain, all the police officers that evening had tried their very best to prevent looting and to assist foreigners as far as is possible. None of the police officers, in his view, would have acted in a discriminatory manner towards foreigners.

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Proof

The evidence having been summarised, it is possible now to return again to the question of proof. The phrase *prima facie*
20 case employed in section 13 of the Act, presumably is used in its generally accepted meaning of 'in the absence of further evidence from the other side, that which is *prima facie* now becomes conclusive proof'. See S v Boesak 2000 (3) SA 381 (SCA) at 396. In terms of section 13 of the Act, a *prima facie*
25 case triggers an obligation upon the defendant to prove that

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discrimination did not take place. That, of course, raises the question of whether, upon a *prima facie* case having been made, the onus now shifts conclusively to the respondent, who bears the ultimate burden, or whether the ultimate burden still
5 remains with the complainant. The Act, of course, is hardly a model of clarity of drafting and makes this question all the more difficult to determine.

To the extent that the onus shifts to the respondent to prove
10 that discrimination did not take place, a court surely needs to evaluate the weight of the *prima facie* case against that of the evidence produced by the respondent in order to arrive at a conclusion as to whether there has been discrimination or not and accordingly hold in favour or against the complainant. As
15 stated earlier, I found that a *prima facie* case had been made out, although the approach adopted in the Manong case, may well have made this threshold somewhat more difficult to negotiate. The judgment of the SCA was however delivered after my ruling had been made.

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Nonetheless, the question arises as to the overall evaluation of the evidence. In this case, complainant's main point is that the police officers merely watched while his shop was looted and all they did was to instruct him to leave the premises. Had
25 they made an effort to prevent the looting, to some extent at

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least, there would have been a mitigation of loss suffered by the complainant. That is, in essence, the central thrust of his case.

5 If that was the final factual matrix upon which the Court had to evaluate events, complainant may have been the victim of discrimination as defined and accordingly this Court would have been obliged to find in his favour. But that is not the only factual basis upon which this Court has to work. In
10 general terms, the following evidence is also relevant: The complainant was a single witness. He gave different versions as to how precisely he ascertained that the looting took place. In his first statement he made no mention of the police conduct, although as I have noticed, Ms Nyman sought to
15 circumvent the difficulty by saying he would have been reluctant to disclose police misconduct to the police themselves. There was no indication in his case as to the identity of the police officers who were allegedly involved in the case, even though there is no suggestion that they,
20 together with their other police colleagues, would not have had their name on their uniforms.

By contrast, the two police witnesses gave detailed accounts of police attempts to pre-empt and deal with the xenophobic
25 violence. Ms Nyman submitted that the very manner in which

the public meeting had been called and held in a venue which was so unsuitable, was in itself a contributory cause to the violence. I am uncertain as to whether this particular allegation can add much to the complainant's case. It appears
5 that the magnitude of the attendance of the meeting caught the police authorities by some surprise, but it is clear that xenophobic attacks had spread through the country and whatever explanation is offered, the set of events is a dreadfully sad reflection on the fragility of a sense of
10 community enjoyed in South Africa.

As to the evidence read as a whole, it is difficult, absent further evidence to support the complainant's version, that the Court can make a determination on his allegation. Van Wyk
15 testified about the pressure with which the police were confronted. The priority had been set to save lives before property. These attempts so exhausted the police forces that even their ammunition supply was in need of replenishment.

20 There is no indication in the detail of the occurrence book of any complaint having been received insofar as looting at the Blue Lagoon shop was concerned. It is difficult to divine any general approach by the police to discriminate on Somalis on the basis of their identity. To the extent that only foreign shops
25 were looted, that was not because the police were only
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prepared to guard shops of South Africans. It was because the violence was targeted exclusively at foreigners.

Ms Nyman submitted that, whatever the evidence of Van Wyk
5 and Ncata, it did not discount the possibility of rogue
policemen, who may well have acted in the fashion described
by complainant. It is at least possible, in the light of all the
evidence, that the police prioritised, in this particular case, too
inflexibly and perhaps they should have been more flexible in
10 the provision of assistance with regard to looting.

If that is the case, it becomes one based on negligence and
not on discrimination in terms of the Act. It may well be that
the loss suffered by the complainant was caused as a result of
15 negligence of police officers who were in the vicinity of the
shop, but that is, of course, a case different from the one that
was brought before this Court, which was based, as it has to
be, on discrimination.

20 I, of course, am unable to say more about whether there is a
case which could be mounted on the grounds of negligence. I
merely suggest that much of the trajectory of the complaint
appears to be directed in this direction as opposed to that
which would ground the cause of action in terms of the Act.

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This is not a conclusion to which I have come lightly. The tragedy which unfolded during the events in question has caused the complainant to suffer egregiously. The least, however, that I can do, is that given that this case having been brought in the manner in which it was, is to find that there should be no basis to exercise my discretion to penalise the complainant any further. Accordingly I do not intend to make any award as to costs. THE COMPLAINT, HOWEVER, IS
DISMISSED.

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DAVIS, J