



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

**CASE NO: D6600/2020**

In the matter between:

**VUSUMUZI VINCENT SHOBEDE**

**FIRST PLAINTIFF**

**BUSISIWE THROUPATHRA SHOBEDE**

**SECOND PLAINTIFF**

and

**THE MINISTER OF POLICE**

**DEFENDANT**

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**ORDER**

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**The following order is made:**

1. The arrest of the plaintiffs by members of the defendant on 5 April 2020, was unlawful.
2. The defendant is held liable to pay damages suffered by each of the plaintiffs flowing from their unlawful arrest, detention and assault.
3. The defendant is to pay the plaintiffs' costs of suit on scale B.

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## JUDGMENT

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**Sibiya AJ**

### **Introduction**

[1] This is an action in which the plaintiffs seek damages arising from their unlawful arrest, detention and assault by members of the South African Police Service ('SAPS') on 5 April 2020, during the COVID-19 Alert level 5 lockdown ('the lockdown'). The defendant is cited in his official capacity as a member of the National Executive, who exercises authority and oversight on the administration of the affairs of the SAPS. Consequently, the defendant is vicariously liable for the wrongful acts of the members of the SAPS.

[2] By order of Bezuidenhout J, dated 7 September 2023<sup>1</sup> there was a separation of issues and the trial proceeded solely on determination of liability.

### **The pleadings**

[3] The plaintiffs have pleaded that on 5 April 2020, they were wrongfully and unlawfully arrested without a warrant of arrest by members of the SAPS, whose names and ranks were unknown. During and prior to their arrest, they were pepper sprayed and assaulted with clenched fists and an unknown object. As a result of the assault, the first plaintiff sustained multiple abrasions and contusions on the chest, arms, thighs, knee and ankle and a swelling of the right eardrum. The second plaintiff sustained a laceration on the right eye and an abrasion and contusion on her lip. Subsequent to their arrest and assault, the plaintiffs were transported to Bhekithemba Police Station, where they were unlawfully detained for approximately 13 hours before they were released without any criminal proceedings being instituted against them, alternatively, the criminal proceedings were withdrawn on 6 April 2020.

[4] The defendant denies liability and, in his amended plea dated 4 April 2023, he admits the arrest and detention, averring that the plaintiffs' arrest without a warrant was premised on the provisions of s 40(1)(a) and (j) of the Criminal Procedure Act 51 of 1977 ('the CPA'). The defendant's contention is that the plaintiffs had sold liquor in contravention of s 29(1) and (2) of the Disaster Management Act 57 of 2002 ('the Disaster Management Act') and had wilfully obstructed members of the SAPS in the execution of their duties when they sought to search the plaintiffs' premises for liquor. The defendant's contention in this regard is that the Disaster Management Act prohibited the sale, distribution and transportation of liquor during the lockdown. The defendant disputes that the plaintiffs were assaulted by members of the SAPS and that the plaintiffs had sustained injuries. In further clarification, the defendant averred that any injuries allegedly sustained by the plaintiffs were solely consequent upon the police's use of necessary force to subdue the plaintiffs when they resisted arrest.

### **The onus of proof and duty to begin**

[5] At the commencement of the trial, and in the minutes of the pre-trial conference of 9 May 2023, it was agreed between the parties that the overall onus to prove the plaintiffs' claim lies with the plaintiffs. However, the onus to justify the arrest and detention lies on the defendant, thereby the defendant bore a duty to lead evidence first. I agreed with the concession made in light of the decision in *Minister of Law and Order and others v Hurley and Another*,<sup>1</sup> where the appellate court had held that: 'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'

### **The evidence**

[6] The defendant called one witness, the arresting officer, Sergeant Emmanuel Skhumbuzo Mokoena ('Mokoena') and thereafter the plaintiffs testified in support of

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<sup>1</sup> *Minister of Law and Order and Others v Hurley and Another* [1986] ZASCA 53; [1986] 2 All SA 428 (A) paras 65-66. See also *Mahlangu and Another v Minister of Police* [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) para 32.

their claims. Various exhibits were handed in by consent during the course of the trial. Mokoena testified that he has been in the service of the SAPS for 20 years and is currently stationed at Bhekithemba Police Station. Prior to the plaintiffs' arrest, he was familiar with the plaintiffs as residents of J section, Umlazi, and the owners of a tavern called 'Thembi's tavern'. The tavern is annexed to the plaintiffs' residential property.

[7] On Sunday, 5 April 2020, he was on duty from 14h00 and, due to the country being on lockdown, was posted at a road block at J section, Umlazi. He was deployed with a team consisting of members of the SAPS and the South African Defence Force ('SANDF'). They were tasked to conduct crime prevention duties which included visible policing, and stop and search of vehicles. During the same afternoon, Mokoena and his team stopped and searched a vehicle driven by one Mr Thabethe who was in the company of a Mr Majola. On finding liquor inside the vehicle and on enquiring from Thabethe and Majola where they purchased the liquor from, their response was that it was bought from the plaintiffs' tavern. Following this, they proceeded to the plaintiffs' tavern, together with approximately 10 SAPS members and 20 SANDF members.

[8] On arrival at the plaintiffs' tavern, Thabethe, knocked at the closed roller door which leads into the tavern. When the first plaintiff opened the door, he advised the first plaintiff about Thabethe and Majola's report. The first plaintiff denied selling liquor and denied knowing either Thabethe or Majola. Mokoena then advised the first plaintiff that he was not permitted to trade in liquor without a valid license, stating that, to his knowledge, the plaintiffs were operating the tavern without a license. When the first plaintiff disputed the presence of liquor on the premises, Mokoena informed him that he needed to conduct a search of the premises. Upon the first plaintiff's refusal to consent to the search, Mokoena pushed the first plaintiff, instructing him to enter the tavern so that the search could proceed. In the absence of the first plaintiff's consent, Mokoena and his team forcefully entered the tavern, where they found and seized liquor. Under cross-examination, Mokoena testified that he could not recall whether he had informed the first plaintiff of the specific reason for the search.

[9] While talking to the first plaintiff, he observed the second plaintiff emerge from the house and, without any provocation, punched him on the forehead. He proceeded to hold the second plaintiff with her garments while calling out to two female police officers present, to assist contain her. The plaintiffs were thereafter arrested and transported to Bhekithemba police station where they were detained and charged for committing the following offences:

- (a) Dealing in liquor in contravention of the regulations pertaining to Alert Level 5 lockdown;
- (b) Obstruction of the police in the execution of their duties; and
- (c) Resisting arrest.

[10] Under cross-examination, he conceded that he did not mention in his written police statement, dated 5 April 2020, that the second plaintiff had punched him on the forehead, but had instead written that she pushed him. He averred that his intention had been to state that she had punched him. He further testified that Thabethe and Majola were never arrested for the possession, sale and transportation of liquor and no written statements were obtained from them with a view to turn them into State witnesses.

[11] He denied that the plaintiffs were assaulted by members of the SAPS and that they had sustained visible injuries. When shown the photographs depicting the injuries sustained by the plaintiffs on the day of arrest, his response was that he was at the police station when he noticed a swelling on the first plaintiff's forehead and blood on the second plaintiffs face. He did not know where the blood was coming from. He had also observed that the first plaintiff's eyes were red and had attributed the redness to the possibility of the first plaintiff having been pepper sprayed. He had considered the plaintiffs' injuries as minor and being consequent upon the police's use of minimum and necessary force to subdue the plaintiffs when they resisted arrest. He averred that when the first plaintiff resisted arrest, he had grabbed the first plaintiff with his t-shirt in order subdue him, and had observed other members of the SAPS had joined to assist in restraining the first plaintiff in order to lodge him inside the police van.

[12] When counsel for the plaintiffs, Mr *Khanyile*, put it to Mokoena that s 29(1) and (2) of the Disaster Management Act provide for the establishment of a provincial disaster management centre, and not limitations on the sale of liquor, Mokoena's response was that a copy of the legislation he had possessed had provided for the blanket prohibition on the sale and transportation of liquor during the lockdown. When he was shown a copy of the regulations which were issued in terms of s 27(2) of the Disaster Management Act, his response was that it was for the first time, in court, to have sight of the said regulations, He averred that a copy of the regulations he had possessed was distinct from the one shown to him in court. He did not however provide copies of the legal authorities he had relied on.

[13] That concluded the evidence on behalf of the defendant.

### ***Evidence of the first plaintiff***

[14] The first plaintiff testified that he resides with his wife, the second plaintiff, and their adult son at J[...] D[...] Road, Umlazi ('J[...]'). His house is annexed to a shop from where he sells food. He disputed Mokoena's evidence that the house is annexed to a tavern and that he sold liquor from J[...]. He testified that he runs a licensed business of selling liquor from J[...]2 Z[...] Road, Umlazi ('J[...]2'). As a result of the lockdown and due to security concerns at J[...]2, he had moved the liquor from his business at J[...]2 to his residence at J[...] for safekeeping.

[15] During the afternoon of 5 April 2020 he was at his house at J[...], in the company of the second plaintiff and their son, when he heard a rough knock at the roller door which is next to the public road and opens into the shop. On opening the roller door, he came across approximately seven members of the SAPS and an unknown number of SANDF members who immediately entered the shop and surrounded him. Mokoena and one tall police officer accused him of having sold liquor. When he enquired from Mokoena the identity of the people he had sold liquor to, Mokoena and the tall officer informed him not to teach them how to do their job.

[16] When Mokoena and his team demanded access into the outbuilding to search for liquor, he requested to see a warrant of search, however Mokoena had

responded by stating that they do not require any during the lockdown. On refusing to open the outbuilding, members of the SAPS pepper sprayed him on his eyes and forcefully broke the locks to gain entry into the outbuilding. Members of the SAPS began to assault him with water pipes and fists and, on falling down, they kicked him with booted feet. The members of the SANDF did not partake in the assaults but had merely stood by and threatened him.

[17] From a distance, the first plaintiff could see the second plaintiff quarrelling with Mokoena. The second plaintiff was attempting to get to where he was being assaulted, in order to offer assistance, however, Mokoena had blocked her. He had shouted to his son not come out of the house for fear of the son being assaulted as well. He had requested that he be arrested instead of being assaulted however, the assaults had continued unabated. He was thereafter lodged inside a police van and transported to Bhekithemba Police Station.

[18] At the police station, he had realised that he could not walk properly and had to hold onto the walls of the police station to move around. His parents visited him at the police station and brought him water because there was none available at the police station. He requested Mokoena to take him to the SANDF ambulance for medical attention however Mokoena had refused. It was only after the intervention of the members of the SANDF that he was taken to the ambulance for a pain injection to be administered. He was thereafter detained inside the holding cell and transported to court on the following day where the charges were withdrawn by a prosecutor without any appearance before a magistrate.

[19] As a result of the assaults, the first respondent had sustained contusions and lacerations on the chest, neck, knee, shoulders, arm and back. He confirmed that the injuries were as depicted on photographs 21 to 27 of the Index to photographic evidence. The photographs were taken by his sister on 6 April 2020 when he was admitted at Isipingo Hospital for treatment. He had also on a later date consulted a doctor because his right ear drum was swollen and had a foul odour due to being kicked by members of the SAPS during his arrest.

[20] He felt humiliated by his ordeal because the assaults had occurred in the presence of his wife, who had attempted to rescue him without success. Furthermore, the assaults were broadcast on ENCA TV channel, exposing his ordeal to people who knew him. He was able to recover his seized liquor however, this was after a considerable delay and after encountering many obstructions from members of the SAPS. He has opened a criminal case against Mokoena and members of the SAPS who assaulted him.

### ***Evidence of the second plaintiff***

[21] The second plaintiff testified that on 5 April 2020, she was in her kitchen cooking when the first plaintiff alerted her to the noise which was coming from their roller door. When the noise moved to the yard, she went outside the house to investigate. She observed the presence of a number of police officers and members of the SANDF, inside the yard. Mokoena and two unknown members of the SAPS had approached her and reported that they came across people who bought liquor from the premises. When she enquired about the reason the first plaintiff was being assaulted, Mokoena and the two officers informed her that the first plaintiff had refused to grant them permission to search the premises for liquor. On further questioning, asking Mokoena whether they possessed a warrant to search, Mokoena accused her of interfering with the execution of his duties.

[22] She witnessed the first plaintiff being assaulted with pipes, however, she could not recall the number of officers who were assaulting him. She used her hands to push Mokoena on his chest, in order to get him out of the way, with the intention to offer assistance to the first plaintiff. Mokoena had responded by hitting her twice with a fist on the face, resulting in her sustaining a contusion on the mouth as well as a laceration on the right eye. She confirmed her injuries were as depicted on photograph 28 and 29 of the Index to photographic evidence. The photos were obtained from a broadcast by ENCA TV channel. Mokoena had informed her that he was arresting her and the first plaintiff for selling liquor in contravention of COVID-19 laws. She was thereafter transported to Bhekithemba Police Station where she was detained overnight. On the following day she was transported to court where the

charges were withdrawn without having to appear before a Magistrate. On 6 April 2020, she consulted a doctor at Isipingo Hospital.

[23] Under cross-examination she denied that she had punched Mokoena on the forehead and that Mokoena had sought the assistance of female police officers to restrain her. She stated that she had resisted arrest because she knew she had not sold liquor and had not contravened any COVID-19 laws.

[24] That concludes the evidence of the plaintiffs.

***Does the defendant's plea accord with the evidence led?***

[25] Mr *Khanyile* submitted that the defendant, by leading evidence suggesting that the plaintiffs were arrested for operating a tavern without a license and had contravened the regulations issued in terms of s 27(2) of the Disaster Management Act, seeks to introduce new defences which were not pleaded. He contended that, in the absence of an application by the defendant to amend the pleadings, the defendant stands and falls by his pleadings. In response to the above submission, Mr *Giba*, on behalf of the defendant, advised the court that the defendant's initial plea as well as the amended plea were drafted and delivered without any consultation with Mokoena or any other witness. He stated that he had struggled to get hold of Mokoena and had only been able to consult with him for the first time on 16 August 2024, just three days prior to the trial commencing.

[26] In *Minister of Safety and Security v Slabbert*,<sup>2</sup> the Supreme Court of Appeal, in dealing with the purpose of pleadings, held as follows

'[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible

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<sup>2</sup> *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) paras 11-12.

for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said :

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue." (Footnotes omitted)

[27] It is common cause that the defendant's amended plea makes no reference to the plaintiffs having operated a tavern without an operating license and of contravening the regulations. It is noted further that prior to the commencement of the trial, the parties attended a pre-trial conference and had thereafter filed a statement of issues in accordance with rule 37A(9)(a). The defences now complained of are not listed in the statement of issues for the court's determination. I have noted further that, during the parties' opening addresses, Mr *Giba* did not mention the new defences sought to be introduced.

[28] I find it difficult to comprehend how the defendant managed to raise defences in his plea and to hold a pre-trial conference without having consulted with his witness. Mr *Giba's* concession, in my view, indicates that the defendant's representatives, did not, during the pre-trial conference, engage with the plaintiffs' counsel in good faith. I agree with Mr *Khanyile* that the defendant seeks to conduct a trial by ambush. As stated in *Slabbert*<sup>3</sup>, it is fundamental that the pleadings must align with the evidence led. The defendant is bound by his pleadings and therefore, must stand and fall by them.

### ***Is the arrest of the plaintiffs lawful?***

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<sup>3</sup> Ibid para 11

[29] Mr *Giba* has submitted in his written heads of argument that the plaintiffs' arrest, without a warrant, is lawful because the defendant has satisfied the four jurisdictional requirements provided for in s 40 of the CPA in that the members of the defendant who are peace officers, had entertained a reasonable suspicion that the plaintiffs had committed the following offences:

- (a) Had sold liquor in contravention of the regulations which were issued in Gazette Notice No. 43107 on 17 March 2020;
- (b) Had obstructed the police in the execution of their duties by refusing to grant permission to members of the SAPS to search the premises for liquor, and
- (c) Had resisted arrest.

[30] Even though Mr *Giba* did not provide the subsection he relies on, the jurisdictional requirements he referred to are in respect of an arrest in terms of s 40(1)(b), which has not been pleaded by the defendant. It is noted further that it was not Mokoena's testimony that he had held a reasonable suspicion that the plaintiffs had committed a schedule 1 offence, and in any event, the offences referred to in paragraph 29 above, are not listed as schedule 1 offences.

[31] The defendant's plea is that the members of the defendant acted in terms of s 40(1)(a) and (j) of the CPA. The subsection authorises a peace officer to arrest without a warrant in respect of any person:

- '(a) who commits or attempts to commit any offence in his presence;
- (j) who wilfully obstructs him in the execution of his duty;'

[32] The jurisdictional facts to be proved by the defendant for an arrest in terms of s 40(1)(a) to be lawful are that:

- (a) the arrest was effected by peace officers;
- (b) the plaintiffs committed or attempted to commit an offence; and
- (c) the commission or attempted commission of the offence took place in the presence of the arresting peace officers. The enquiries that follow from

these provisions are factual. It is common cause that the members of the defendant are peace officers.

***Did the plaintiffs commit or attempt to commit an offence in the presence of the police?***

[33] It was undisputed that Mokoena and his team were not present when Thabethe and Majola bought liquor from the plaintiffs' premises. On arrival at the plaintiffs' premises, members of the SAPS did not encounter any patron and the roller door leading to the alleged tavern had been closed. There is no evidence that the plaintiffs sold or attempted to sell liquor in the presence of the police and as such the defendant's case on this jurisdictional fact must fail.

***Did the plaintiffs wilfully obstruct the police in the execution of their duties?***

[34] With regards to the enquiry pertaining to s 40(1)(j), Mr *Giba* has submitted that the plaintiffs' refusal to consent to the search of the premises, as testified by Mokoena, amounts to a 'wilful obstruction of the police in the execution of their duties', which he averred, is an offence which occurs in the presence of the arresting peace officers.

[35] Section 14 of the Constitution protects everyone's right to privacy, which includes the right not to have: '(a) their person or home searched; (b) their property searched; (c) their possessions seized'. Any limitation of this fundamental right must be reasonable and justifiable as envisaged in s 36<sup>4</sup> of the Constitution.

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<sup>4</sup> Section 36 of the Constitution provides:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including ...,

(a) the nature of the right;  
(b) the importance of the purpose of the limitation;  
(c) the nature and extent of the limitation;  
(d) the relation between the limitation and its purpose; and  
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights'.

[36] In *Mistry v Interim Medical and Dental Council and others* the Constitutional Court, at paragraph 25, has held that: 'the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state'.

[37] Section 22 of the CPA provides for circumstances in which an article may be seized without a search warrant. It states thus:

'A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable ground believes-

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such would defeat the object of the search'.

[38] In the absence of the plaintiff's consent to the search and seizure, Mokoena could have acted in terms of s 22(b), provided he could justify the same. The plaintiffs have a constitutionally protected right to withhold their consent to the search and seizure if they so wish. The first plaintiff's refusal to consent to the search and seizure does not amount to an offence. There is no evidence that the second plaintiff was requested to permit the search and seizure and as such, and consequently, the allegation that she obstructed the police in this regard is misplaced. The defendant failed to prove the jurisdictional fact that the arrest in terms of s 40(1)(j) was justified.

[39] Mokoena's evidence that the plaintiffs' refusal to be arrested amounts to their obstruction of the police in the execution of their duties is misplaced. The first plaintiff's testimony was that he had requested that he be arrested instead of being assaulted, however, the assaults had continued unabated. It was only the second plaintiff who had testified that she had resisted arrest stating that she had not

committed any offence as alleged. I have considered that there were three adult persons at the plaintiffs' premises when Mokoena and his team arrived at the scene of arrest. If the defendant's version was to be accepted, it is improbable that all three adults would have, at the same time, sold the liquor to Thabethe and Majola. There is no evidence that Mokoena and his team had sought to establish or investigate this important fact. The second plaintiff witnessed the assault on the first plaintiff and she had also been assaulted. Her refusal to subject herself to the authority of the members of the defendant in circumstances where she was experiencing police brutality is justified.

***Did the plaintiffs contravene the provisions of the Disaster Management Act?***

[40] At paragraph 4.4 of the defendant's amended plea, the defendant has averred that the plaintiffs were advised that they had operated a tavern and sold liquor in contravention of s 29(1) and (2) of the Disaster Management Act. The same was also confirmed by Mokoena in his testimony. Mr *Khanyile* has submitted that s 29 does not create an offence and as such the plaintiffs' arrest and detention on this ground is unlawful.

[41] Section 29 of the Disaster Management Act provides:

- '(1) Each province must establish a disaster management centre;
- (2) A provincial disaster management centre forms part of and functions within, a department designated by the Premier in the provincial administration."

[42] It is a basic principle of our criminal law that there is no crime without law. In the absence of evidence that the plaintiffs committed a crime, the plaintiffs' arrest was unlawful. In *S v Mchunu*,<sup>5</sup> the court, in dealing with the principle of legality, held as follows:

'In its broadest sense, the principle of legality can be described as a mechanism to ensure that the State, its organs and its officials do not

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<sup>5</sup> *S v Mchunu* [2011] ZAKZDHC 89 para 30.

consider themselves to be above the law in the exercise of their functions but remain subject to it. In the field of criminal law the principle fulfils the important task of preventing the arbitral)' punishment of people by State officials, and of ensuring that the determination of criminal liability and the passing of sentence correspond with clear and existing rules of law...'

***The regulations Issued in terms of s 27 of the Disaster Management Act***

[43] Mr *Giba* has submitted in his heads of argument that the plaintiffs' arrest was lawful because the arresting officers had entertained a reasonable suspicion that the plaintiffs had sold liquor to Thabethe and Majola in contravention of regulation 8(5)(i) which provided that 'all off-consumption premises selling liquor must be closed between 18h00 and 09h00 the next morning on weekdays and Saturdays'.

(44) It is common cause that the defendant's plea makes no reference to the regulations. Even though Mokoena had testified that the plaintiffs had contravened COVID-19 regulations, he did not specify the regulations he was referring to. This was so even after Mr *Khanyile* had shown him the regulations which were applicable to Alert level 5 lockdown. Mr *Giba's* submissions, in my view, are aimed at obfuscating the issues because they are not consistent with the defendant's plea and the evidence led by Mokoena. Mokoena's testimony was that there was a blanket prohibition on the sale of liquor. He did not mention any time-frames for the sale of liquor, and I have noted further that the date of arrest, 5 April 2020, fell on a Sunday, and a tavern, in regulation 8, is considered an 'on-consumption premises selling liquor',<sup>6</sup> not an 'off- consumption premises' as Mr *Giba* submitted.

[45] There is no evidence to suggest that the plaintiffs committed any offence in the presence of the police, nor that they obstructed the police in the execution of their duties. The plaintiffs' arrest on 5 April 2020 and their subsequent detention by the members of the defendant were unlawful.

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<sup>6</sup> Regulations issued in terms of s 27(2) of the Disaster Management Act 57 of 2002, originally published in Government Notice No. 318 published in Government Gazette No. 43107 of 18 March 2020, and amended by Government Notice No. 398 published in Government Gazette No. 43148 of 25 March 2020; amended by Government Notice No. 419 published in Government Gazette No. 43168 of 26 March 2020; amended by Government Notice No. 446 published in Government Gazette No. 43199 of 2 April 2020.

### ***Were the plaintiffs assaulted?***

[46] Mr *Khanyile* has submitted that it should be found that the plaintiffs were credible witnesses. He averred it is improbable that the second plaintiff could have punched Mokoena in the presence of many members of the SAPS and SANDF. In addition, he submitted that the injuries sustained by the plaintiffs were consistent with one being assaulted as the plaintiffs testified and the fact that the first plaintiff became emotional and had cried while testifying about his ordeal in the presence of his wife, indicates that perhaps the first plaintiff was not fabricating his evidence. He implored the court to reject Mokoena's evidence and to draw a negative inference from the defendant's failure to call available and competent witnesses to corroborate Mokoena's testimony because there were many SAPS members at the scene of arrest. He requested the court to find that the plaintiffs have discharged the overall onus placed on them.

[47] Mr *Giba* has submitted that Mokoena's evidence regarding the plaintiffs' injuries being minor is probable, because the first plaintiff was wearing a vest at the time of his arrest. He suggested that the injuries may have been covered by the vest and only became visible once the vest was removed at the hospital and photographs taken. He submitted further that there is a contradiction in the plaintiffs' case because it was put to Mokoena that the first plaintiff was assaulted with a rubber-like object whereas the plaintiffs testified that the first plaintiff was assaulted with a water pipe. He averred that s 49 of CPA authorises the police to use force in circumstances where the arrestor resists arrest.

[48] The plaintiffs provided their evidence in a clear and forthright manner, without any contradictions. The second plaintiff witnessed the assault on the first plaintiff and her assault was as a result of her attempt to assist the first plaintiff. The second plaintiff's evidence that she had pushed Mokoena found corroboration in Mokoena's written statement. I find that Mokoena's evidence in court, that she was punched on the forehead, was a recent fabrication sought to paint the second plaintiff as the aggressor.

[49] The injuries sustained by the first plaintiff are consistent with being hit with fists, being kicked and being hit with a hard object like a water pipe, as testified by the plaintiffs. The injuries sustained by the second plaintiff are consistent with being hit with a fist on the mouth and on the eye. I agree with Mr *Khanyile* that it is improbable that the plaintiffs would have injured themselves as depicted in the photographs if it was not done by members of the SAPS. It is also improbable that the plaintiffs would have been violent against the members of the SAPS who were in the company of about 20 SANDF members. The plaintiffs did not exaggerate their evidence, particularly in that they had testified that the members of the SANDF did not assault them. I accept the plaintiffs' evidence that they were assaulted without any justification and provocation.

[50] Mokoena's evidence is unreliable in that whenever he was asked what his colleagues were doing at the scene of arrest, he repeatedly testified that he could not recall even though he had testified that he was present at the scene until the plaintiffs were transported to the police station. He had initially denied having witnessed any assaults and the injuries on the plaintiffs, however under cross-examination he admitted to having observed a swelling on the first plaintiff's forehead and that the second plaintiff was bleeding on her face. If he was not involved in the assault of the plaintiff, he would have tried to find out where the blood on the second plaintiff's face was coming from. Consequently, I reject Mokoena's evidence as being improbable in the circumstances.

## **Conclusion**

[51] Having considered the evidence in totality and the legal principles applicable, I accept the plaintiffs' evidence that they did not commit the offences as alleged by Mokoena and that they were assaulted by members of the defendant. I find that the plaintiffs have discharged the overall onus placed on them to prove their claims. The defendant has failed to justify the arrest and detention of the plaintiffs. In the absence of a legal basis for the arrest, I find that the plaintiffs' arrest on 5 April 2020 by members of the defendant was unlawful. It therefore follows that the plaintiffs'

subsequent detention in the hands of members of the defendant was also unlawful. I also find that the plaintiffs were assaulted by members of the SAPS, as they testified.

## **Costs**

[52] The general rule that costs follow the event finds application in this matter. The conduct of the representatives of the defendant in delivering their plea and in engaging in a pre-trial conference without having consulted with its witnesses needs consideration for the determination of the scale of costs to be awarded. The defendant's representatives wasted the court's time with their fishing expedition and trial by ambush. This was apparent from Mokoena and Mr *Giba's* attempts to introduce new defences which were not pleaded. In the circumstances, I am of the view that a cost order on scale B, as envisaged in rule 67A read with rule 69, is warranted.

## **Order**

[53] I accordingly make the following order:

1. The arrest of the plaintiffs by members of the defendant on 5 April 2020, was unlawful.
2. The defendant is held liable to pay damages suffered by each of the plaintiffs flowing from their unlawful arrest, detention and assault.
3. The defendant is to pay the plaintiffs' costs of suit on scale B.

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**SIBIYA AJ**

## **Case information**

Appearances

Counsel for the Plaintiff : S Khanyile (Mr)

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Dates of Hearing : 19, 20 & 21 August 2024

Submission of written Heads : 11 September 2024

Date of Judgment : 19 February 2025