



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

CASE NO.: 2882/2018

In the matter between:

SIMPIWE MEXWELL SABANI

1st Plaintiff

AKIWE TIYA

2nd Plaintiff

LWANELE NGEBULANA

3rd Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Zono AJ:

Introduction

- [1] The plaintiffs are three major male South African citizens who instituted their separate action proceedings for their assault, arrest and detention by members of South African Police Service (SAPS) under case numbers

2882/2018, 5251/2018 and 1635/2019. The defendant is sued as a nominal defendant; as an executive authority responsible for the department of police¹. It is averred that he is liable for the delicts and wrongs of the police or members of SAPS acting within the course and scope of their employment with him or Department of police.

- [2] In the course of time, an application for consolidation was made or brought apparently by the plaintiffs, who were applicants therein, and that application culminated in a court order dated 25th February 2020, consolidating the three separate actions under case number 2882/2018. In recognition of the consolidation order the plaintiffs amended their particulars of claim to, *inter alia*, reflect one joint action by the plaintiffs under case number 2882/2018. The amended particulars of claim are dated 06th September 2023. That was followed by the filing of defendant's amended plea dated 03rd November 2025. The amended plea also acknowledged the fact of consolidation. No replication was delivered by the plaintiffs.

Pleadings

- [3] The plaintiffs plead in their amended particulars of claim that on 10th February 2018 they were travelling in a Toyota quantum (Taxi) and when the taxi was stationary, they was approached by members of SAPS who demanded to search it. The members manhandled the plaintiffs out of the Taxi and assaulted them by kicking and hitting them with clenched fists without any reasons, and then left. The plaintiffs after taking photos of number plate of the police vehicle, drove to central police station to report

¹ Section 2 of State Liability Act 20 of 1957, as amended.

the incident. The members chased the plaintiffs and caught them at central police station where they were arrested in front of other police officers and community members and charged for obstructing the course of justice. They were thereafter detained in the police cells that were extremely unhygienic. The conditions in the cells were appalling.

[4] On 12th February 2018 the plaintiffs were taken to Mthatha Magistrate's Court where they were detained in the holding cells from 08:00 to 16:00. At 16:30 the plaintiffs were instructed by the police to go as the senior public prosecutor declined to prosecute. The plaintiffs hold the view that their arrest and detention were unlawful and wrongful, for the members did not have the warrant of arrest and search warrant. They aver that they did not commit any offence. Equally, they aver that their assault was wrongful, unlawful and malicious.

[5] In its plea, the defendant aver that this matter belongs to Magistrate's Court. The defendant admits that the members arrested the plaintiffs together with Sinoyolo Titi. The defendant avers that the plaintiffs' taxi was stationery on the road. However, the defendant denies ever assaulting the plaintiffs. The defendant further avers that the members started chasing plaintiffs' taxi when it started swerving in front of the police van near Cicira College. The plaintiffs insulted the members. The defendant avers that the plaintiffs were released on 12th February 2018 at 11:30. The defendant denies that the arrest and detention was unlawful as they rely on the provisions of section 40(1) (a) and (b) of the CPA in that the plaintiffs were driving recklessly and negligently in the presence of the police. When the police tried to stop the taxi in which the plaintiffs were travelling, it did

not stop and they chased it. When they caught it at Central Police Station one (1) round of live ammunition was found in the taxi. The plaintiffs refuted knowledge or ownership of the live ammunition. The defendant further avers that the arrest was lawful because the plaintiffs violated the Road Traffic Rules in the presence of the police.

- [6] During trial the parties indicated that there shall be no separation of issues- both liability and quantum would be dealt with simultaneously. It was further agreed that the onus of proof in respect of the assault rests on the plaintiffs, and the onus of proof in respect of the arrest and detention rests on the defendant. However, it was further agreed that plaintiffs bear a duty to begin². Rule 39(13) of URC provides thus:

“13. Where 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”.

- [7] There is one crucial aspect that needs attention as I have alluded to above that only Simpiwe Sabani, the first plaintiff and Akiwe Tiya, testified in their trial. Lwanele Ngebulana did not testify. I may mention that the plaintiffs are listed in the court process and notices in a haphazard and confusing manner. In some instances, Akiwe Tiya is the second plaintiff and in others he is the third Plaintiff, exchanging those positions with Lwanele Ngebulana. For purposes of this judgment, Akiwe Tiya is the second plaintiff and Lwanele Ngebulana is the third plaintiff. Both Counsel could not explain the confusing listing and reference to the two plaintiffs.

² Rule 39(13) of URC.

However, Simpiwe Maxwell Sabani consistently remained the first plaintiff.

Evidence

[8] The first plaintiff, Simpiwe Sabani, testified as follows: On or about 10th February 2018 (Saturday) at about 15H00 they, as plaintiffs, were in their neighbours taxi from Mthatha. When they were at Chris Hani Village, Section B, the last commuter alighted. It is at that time the police's mini Bus (Nissan) emerged. The police officers therein violently approached their taxi, asking them as to why they stopped their motor vehicle on the road. They opened the drivers and passenger doors. The plaintiffs were thereafter assaulted by the police and were forcefully removed and taken out of the taxi. He testified that he was slapped with open hands and dragged out of the taxi as he was seated at the back seat. They then ran away leaving the taxi on the road. They return to their taxi after the police had left. Realizing that what the police did to them was wrong, they decided to follow the police vehicle for purposes of obtaining its registration letters and numbers. They would use those registration letters and numbers to lay criminal charges of assault against the police officials who were in the police mini bus.

[9] They saw the police vehicle next to the turn to the airport and they followed it to the airport direction. They took the registration letters and numbers and turned back. It transpired that the police saw them when they were turning back and they also turned to chase them. The plaintiffs sped off as they were being chased by the police. He testified also that they were speeding to Central Police Station to lay charges. They arrived at Central

Police Station almost at the same time with the police who were chasing them. They then ran inside the police station. As the plaintiffs ran for a cover behind the police station counter, the police officers who were chasing them grabbed them from behind the counter and took them outside. They were handcuffed and caused to stay there for some time as the police officers were conversing to each other. They were then taken back to the police station and the police officers said: “*these are taxi violence young men.*” They were then taken to Nelson Mandela Hospital in the police vehicle for blood extraction to test alcohol level in the blood. However, they were taken back to Central Police Station, leaving only the driver at the Hospital for blood extraction.

[10] At central police station, the plaintiffs were detained. On 11th February 2018 (the following day), their finger prints were taken. On 12th February 2018 (Monday) the plaintiffs were taken to court, where they were kept in the holding cells until afternoon when they were advised to go as free men. They were never taken to court. He testified that he does not know the charges he was facing, but when they were still at Central Police Station he saw something written in one of the documents, “*defeating the ends of justice*”. He denied that there was ever a mention of a live round of ammunition found in their taxi.

[11] In cross examination, the first plaintiff denied that they stopped their motor vehicle in the middle of the road obstructing the traffic. He denied that the police officers shouted, advising them to stop on the road side and that a hooter was blown as a result of which they ran away. He testified that they followed the police vehicle and made a U-turn just behind it after they had

taken the registration letters and numbers. He denied that they insulted the police and attempted to block their way. He testified that they did not open the criminal case even after they were released from police custody. They were discouraged by their apprehension of bias as the police at the police station did not intervene when they were roughly handled. He admitted signing the warning statement and notice of rights, but denied that they were advised of their Constitutional rights.

[12] Akhiwe Tiya, next testified. Akhiwe Tiya is the second plaintiff. He testified as follows:

On 10th February 2018 at about 15H00, he together with other plaintiffs were passengers in a taxi from Mthatha. When the taxi was dropping off the last passenger at Vuka Street, Chris Hani Village, he saw a number of police officers in front of their taxi as it was stationery. They opened the doors and started beating them by kicking and slapping them with open hands and they ran away to different directions leaving the taxi on the road. They returned to the taxi when the police officers had left. He testified that the road was narrow, but another vehicle was and would be able to pass. As they were returning he complained of the conduct of the police who assaulted them. They were accused of having parked a motor vehicle on the road when they were not drivers. They decided to follow the police vehicle for purposes of taking its registration letters and numbers as they wanted to open a case against the police officers for they had assaulted them without any basis. They found the police vehicle next to Cicira College enroute to airport. He took the registration letters and numbers with a pen and they turned back to

the direction of Mthatha. They turned back just behind the police vehicle to rush to central police station.

[13] Apparently the police saw them and they also made a U-turn and chased them. When the plaintiffs arrived at Central Police Station premises the police officers were also arriving. They ran into the Police Station where Lwanele and Simpiwe (other plaintiffs) jumped over the counter as they thought that the police would further assault them. The police apprehended and handcuffed them and took them to the police vehicle. As they were there, the police conversed to each other and then called the taxi driver. They went to the taxi with the driver and searched it. They thereafter took the plaintiffs to Nelson Mandela Hospital for blood extraction. At Nelson Mandela the police talked among themselves and thereafter took the driver to one of the rooms leaving them standing at the passage. After 30 minutes, the Police officers came back and took them to Central Police Station where they told them to call their next of kins and advise them that they were under arrest.

[14] They were caused to sign a document containing their rights and no one explained those rights. They were then taken to the cells for detention. They were charged on 11th February 2018 (Sunday) and further detained until Monday, 12th February 2018 when they were taken to court, where they were kept in the holding cells. At about 11:00 the driver was taken out to court and he came back stating that he was admitted to bail in the amount of R850.00. A lady police officer told the plaintiffs to leave at about 16:00. Akhiwe questioned their release without being taken to court. Nothing thereafter happened about the case.

[15] In cross examination, Akhiwe denied that the police activated the siren and that they shouted that the taxi must be moved from the road and that the police alighted only when the taxi driver was not responding. He denied that they ran away as the police were approaching them. He added that if the fault of wrongly stopping the vehicle was with the driver, it would not be necessary for them to run away. He confirmed that the police vehicle drove pass their taxi as there was a space to do so, although there were potholes. He denied that they blocked the way of the police officers when they wanted to search the taxi. He stated that they were in no position to do so as they were handcuffed. The police talked with the driver about the search, and not them. He denied that they were advised of their rights. He denied that at police station the police found them in the taxi or next to it. They found the plaintiffs inside the police station. He denied that the police demanded to search the taxi when they were arriving at police station.

[16] Plaintiff's case was closed without the evidence of Lwanele Ngebulana who is the third plaintiff. That failure has a bearing on the nature of the order I shall grant.

[17] The defendant opened his case and called the evidence of the arresting officer, Sergeant Siyabulela Mputa, who testified that: on 10th February 2018 he and his colleagues were on the road between Mthatha and Bedford when they came across a taxi standing in the middle of the road with some occupants inside. Their driver activated the siren and turned on blue lights, shouting to the driver of the taxi to move his vehicle. The Taxi driver did not move the vehicle and the police went out of their vehicle to establish from the taxi driver as to the problem. Before arriving at the taxi the taxi

occupants ran away. The police looked through taxi windows and thereafter went back to their vehicle. They drove past the taxi and then joined R61 towards Airport as they were going to their work place at group 46. When at Dosi junction, next to Cicira College, the same taxi emerged and drove next and parallel to their vehicle and the youngmen inside the taxi peeped through their windows pointing fingers and hurling insults at them. They sometimes would attempt to bump the police vehicle with their taxi. It then drove in front of the police vehicle and when police vehicle stopped they turned back to Mthatha direction. The police then also turn to chase them. They activated the siren, flickering lights with a view to stop them to no avail. The taxi ultimately got into Central Police Station Premises.

[18] At Central Police Station premises, the police officers approached the taxi, others towards the driver's side and others towards the passenger door. They then introduced themselves and requested to search the taxi and the driver thereof consented. The youngmen who were passengers behind the driver's seat opened the door and stopped at the entrance, as they were insulting the police. The police requested to search the motor vehicle and their bodies. They continued with their insults and condescendence. They refused to be searched and the search to be conducted in the taxi. The police then told them that they are under arrest for obstructing the course of justice. The plaintiffs were then arrested and were processed inside the Central Police Station. They were informed of their rights and the reason for their arrest. They signed their notices of rights.

[19] The police took the plaintiffs to the cells for detention. A police officer in charge of the cells asked if the plaintiffs were not injured before they could

be recorded in the register and when it was clear that they were not injured the plaintiffs were registered in the cell register. The police thereafter left the plaintiffs in the police cells and the arresting officer, Sergeant Mputa did not come across that case again. After cross examination of this witness the defendant closed his case.

Discussion and Analysis

[20] As stated above the plaintiffs sue the defendant for the wrongs of the members of SAPS. The defendant is sued for unlawful arrest and detention of the plaintiffs from 10th February 2018 to 12th February 2018 as well as the assault. I propose to deal with the claim of unlawful arrest and detention first; and thereafter deal with the claim of assault. I will deal with the quantum and costs at the tail end.

Unlawful arrest and detention

[21] It is trite that the onus rests on a defendant to justify an arrest³. As Rabie CJ explained in *Hurley*⁴

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems 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 parties are *ad idem* that the defendant herein bears the onus to prove that plaintiffs’ arrest was justified in law. It is so because the arrest is not in dispute and that the fact that it was carried out without a warrant is not gainsaid. The defendant, in an attempt to discharge his onus, relied in his

³ *Minister of Safety and Security v Sekhoto and another* 2011 (1) SACR 315 SCA; 2011 (5) SA 367 SCA Para 7

⁴ *Minister of law and Order v Hurley* 1986 (3) SA 568 (A) at 589 E-F

plea on the provisions of section 40(1) (a) and (b) of the CPA. From the onset it is important to state that during argument defendant's counsel jettisoned the defence based on section 40(1)(b) of the CPA. No reliance is placed on those provisions. That leaves us only with a defence based on section 40(1)(a) of the CPA.

[22] Section 40(1)(a) of the CPA provides thus:

*“(1) A peace officer may without warrant arrest any person-
(a) who commits or attempts to commit any offence in his presence.”*

The jurisdictional facts for section 40(1) (a) defence is that (i) The arrestor must be a peace officer (ii) There must be an offence committed or an attempt to commit an offence (iii) In the presence of the peace officer. The aforesaid jurisdictional facts must all be present for an arrest to be lawful. In the event that one jurisdictional fact is not present, the arrest is not justified. They must all co-exist for an arrest to be justified.

[23] It is uppermost that reference must be made to the defendant's amended plea to establish the kind of a case that the plaintiff was called upon to meet. Reliance on section 40(1)(a) of the CPA is underpinned by the following pleaded facts:

“14. In amplification, the defendant avers that the arrest was in terms of section 40(1)(a) and (b) of the CPA (the Act) in that the plaintiffs motor vehicle drove recklessly and negligently in the presence of the police officers.

15. Secondly, when the police tried to stop the motor vehicle, it did not stop and they started chasing it.

16. Thirdly, when the police ultimately caught the motor vehicle at the central police station, they searched it and found one round of live ammunition inside the car.

17.Lastly, when the police questioned the occupants of the plaintiffs motor vehicle about the ownership of the live ammunition and the licence, they all disowned it hence the police arrested all of them including Titi Sinoyolo who is not cited in the proceedings” (sic).

[24] In the whole tenor of his evidence, Sergeant Mputa did not advert to and rely on the pleaded facts as the basis for the arrest. He categorically testified that he arrested the plaintiffs solely because, at Central Police Station, the plaintiffs refused to allow them to search or that the plaintiffs blocked them when they sought to search them and their taxi, thereby committing an offence of defeating the ends of justice or obstructing the course of justice. The contents of the police docket preponderantly refer to an offence of defeating the ends of justice. No other offence is referred to in the docket. There is demonstrably an internal conflict in defendant’s case. Defendant’s plea is not in synch with both the defendant’s evidence (Sergeant Mputa) and the police docket. Warning statements and notices of rights refer to the offence of defeating the ends of justice as an offence with which the plaintiffs were charged. That attests clearly to the fact that the police docket and the oral testimony of the defendant’s witness on the one hand and the defendant’s pleas on the other are at variance.

[25] It is apposite to refer to the case of *SFW*⁵, where Nienaber JA had this to say:

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may 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

⁵ *Stellenbosch Farmers Winery Group Ltd and another v Martell et CIE and others* 2002 (1) SA 11 (SCA) Para 5.

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 extracurial 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."

I have dealt above with the internal contradictions between defendant's plea and Sergeant Mputa's evidence. Defendant's amended plea is definitely irreconcilable with the defendant's witness oral testimony and that leads to a dilemma as to why were the plaintiffs arrested and detained in the first place. It is therefore difficult to rely on the defendant's version and or testimony.

- [26] Sergeant Mputa bluntly and vaguely testified that they advised the plaintiffs of their rights. The first difficulty with that testimony is that, it is not specified as to who exactly advised the plaintiffs of their rights. Secondly, it is not clear if the reason for plaintiffs' arrest was imparted to them. Even if it can be said the plaintiffs were informed of the reasons for their arrest, it would still be difficult to understand which of the reasons

was imparted to the plaintiffs; whether the ones pleaded in the defendant's amended plea, or the one adduced during the oral testimony. That failure has a bearing not only to the clear, corroborated evidence by the plaintiffs that they were never advised of their rights and the reasons for the arrest, it also has a bearing on the provisions of section 39(2) of the CPA.

[27] Section 39 (2) of the CPA provides thus:

“(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant”.

Nowhere in the whole tenor of pleadings and evidence does it appear that Sergeant Mputa, as the arresting officer, advised the plaintiffs of the cause of their arrest. That failure rendered plaintiffs arrest invalid and unlawful from its inception⁶. It is now well established in our Constitutional jurisprudence that the right not to be deprived of freedom arbitrarily or without just cause affords both substantive and procedural protection against such deprivation⁷.

[28] O'Regan in Coetzee⁸ deal with two aspects of freedom, namely the substance and the procedural component in this fashion:

“[159] These are separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in Bernstein and Others v Bester and Others NNO [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR

⁶ Hiemstrar's Criminal Procedure, Page 5-4.

⁷ *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (2) SACR 1 (CC) Para 33-34.

⁸ *S v Coetzee and others* 1997 (3) SA 527 (CC) Para 159.

449 (CC) at paragraphs 145-7, our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the state wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair. With respect, therefore, I cannot agree with Kentridge AJ when he states at paragraph 93 of his judgment:

“In brief, if an offence of absolute liability had been created, it would not in itself have given rise to any question of the unfairness of the trial of such an offence. Where the severity of such a provision has been mitigated by allowing the accused to prove a special defence it is in my view illogical if not perverse to say that this destroys the fairness of the trial.”⁹

[29] Section 12(1)(a) of the Constitution provides that no one should be “deprived of freedom without just cause”. Section 39(2) of CPA and Section 12(1)(a) of the Constitution contextually and purposively require that the arresting officer must advise the suspect of the cause and or the reason for his arrest¹⁰. Contrary interpretation of the two provisions aforesaid would lead to absurdity. The plaintiffs were apparently and probably arrested for reasons unknown or not communicated to them. Both the substantive and procedural components of their liberty were unjustifiably violated.

[30] Cameron J in *Kirland Investments*¹¹ aptly remarked as follows:

“[82] All this indicates that this Court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable, the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal

⁹ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) Para 18.

¹⁰ *Cool Ideas 1186 (CC) v Hubbard and another* 2014 (4) SA 47 (CC) Para 28.

¹¹ *MEC for Health Eastern Cape and another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 at Para 82.

counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly" (my underlining).

[31] It is further apposite to quote the wise words of Mhlantla JA (as she then was) in *Slabbert*¹²

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

[32] It is trite that a litigant stand or fall by his or her pleadings¹³. The purpose of the pleadings is to define the issues for the other party and the court. A party is bound by his or her pleadings¹⁴. Litigation by ambush is generally impermissible. Ordinarily a party should not lightly be allowed to disavow reliance on his pleading and try to establish during trial another defence.

[33] 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 trial. The absence of an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by

¹² *Minister of Safety and Security v Slabbert* 2010 (2) ALL SA 474 (SCA) Para 11

¹³ *Nkume v TransUnion Credit Bureau (Pty) Ltd and another* 2014 (1) SA 134 (ECM) Para 7

¹⁴ *Imprefed (Pty) Ltd v The National Transport Commission* 1993 (3) SA 94

both sides in the sense that the court was expected to pronounce upon it as an issue¹⁵. A court is not bound by pleadings if a particular issue was canvassed during the trial¹⁶.

[34] In this case, the docket was made available to the plaintiffs timeously and they familiarised themselves with its contents, the issue of the offence with which the plaintiffs were charged was not only put to the plaintiffs who testified in this court, but was also adduced in evidence by the defendant's witness who was thoroughly cross examined thereon. Plaintiffs meaningfully answered questions put to them about the offence of defeating the ends of justice and their Counsel dealt with it during cross examination of the defendant's witness. It is on this basis that I come to a conclusion that the issue of an offence of defeating the ends of justice or obstructing the course of justice was fully canvassed in evidence. For that reason, I will consider and deal with this piece of evidence.

[35] It is common cause that the plaintiffs ran away from the police twice on that day. Firstly, at Chris Hani Village, Section B when they were confronted by the police for allegedly stopping their taxi on the road. Secondly, when they were chased by the police from Dosi Junction (Next to Cicira College) up until when they were caught at Central Police Station. It is highly probable that the plaintiffs were afraid of the police who were chasing them. What is highly improbable is the fact that they could have had a courage, as it had been explained by Sergeant Mputa, to stand up to the same police officers they were afraid of and were running

¹⁵ *South British insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708A at 714G.

¹⁶ *Minister of Safety and Security v Slabbert* 2010 (2) ALL SA 474 (SCA) Para 22 per Harms DP.

away from. It is not clear how the plaintiff could have amassed the courage to block and or prevent the same police officers they were afraid of from searching the taxi and their bodies.

[36] The two plaintiffs corroborated themselves to make a point that they were handcuffed by the police. Sergeant Mputa, in his unsupported evidence denied that. He testified that the plaintiffs were at no stage handcuffed. That is hard to believe. The common cause evidence reveals that the plaintiffs were running away from the police until when they were caught at Central Police Station. It is not only logical that a reasonable police officer, when catching up a suspect who has been running away would believe that the suspects would attempt to flee and therefore make some safeguards for such eventually not to occur. One of the normal and usual safeguards to curb such an eventuality is handcuffing to restrict and limit chances of fleeing or running away. Sergeant Mputa's evidence is not reliable and it is untrustworthy and therefore cannot be believed. It deserves only one fate, a fate of rejection. Plaintiffs' version in this regard is possibly true.

[37] Flowing from the above, it is not explained to this court how the plaintiffs would block the police when they were on handcuffs. Another thing that is not clear from Sergeant Mputa's evidence relates to their quest to search the persons of the plaintiffs. He clearly did not testify about what happened in relation to that kind of search. Plaintiffs who were afraid of the mighty police officers who were at that stage handcuffed could, on a balance of probabilities, not refuse those police officers an opportunity to search. No opportunity to search was refused, and therefore no offence of

defeating the ends of justice or obstructing the course of justice was committed.

[38] In any event, a very much confusing evidence of Sergeant Mputa was tendered. According to him, unmentioned police officers searched the taxi in which the plaintiffs were passengers as he and other unmentioned officers took the plaintiffs inside the Police Station to be processed as arrestees and detainees. In those circumstances, who was actually refused opportunity to search if the unmentioned police officers searched the taxi concerned. Sergeant Mputa's evidence leaves much to be desired.

[39] Even if it can be said I am wrong with the discrepancies aforementioned above in the defendant's evidence, I would still find against the defendant. Assuming or accepting that there was a search requested to be conducted and same was refused; would that be sufficient to constitute an offence of defeating the ends of justice or obstructing the course of justice? The answer is in the negative. The Criminal Procedure Act provides for a search in circumstances where there is no warrant.

[40] Section 22 of CPA provides 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 grounds 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 warrant would defeat the object of the search."

Section 22(a) of the CPA confers a right to consent to the search without a warrant. The inverse of the right to consent to the search aforesaid is the right to refuse to the search without a warrant. These rights exists *pari passu*. They should be considered side by side. A right to consent entails and is accompanied by a right to refuse. A right exists for the bearer thereof to exercise.

[41] This court was told by Sergeant Mputa that an offence of defeating the ends of justice or obstructing the course of justice was committed because the plaintiff refused to consent or grant permission when police sought to search them and the taxi. Refusing to consent is a right available to the person sought to be searched to exercised. When that right to refuse is exercised, that can hardly translate to a crime. All what is patent is that refusal to consent renders the search unlawful; whilst consent renders the same search lawful. I therefore come to conclusion that refusing to consent to search is not unlawful. Defeating the ends of justice is defined as any unlawful and intentional act that obstructs or hinders the proper administration of justice. Proper administration of justice required that consent or permission to search must be granted for a search to be lawful. The default position is that search is unlawful if no consent or permission to search is granted. Therefore, there was no offence committed in the presence of the police as contemplated in section 40(1)(a) of CPA. Accordingly, reliance on the provisions of section 40(1) (a) of CPA is misplaced. The main jurisdictional fact of section 40(1) A of CPA was or is clearly not satisfied. The arrest was therefore unlawful.

[42] Therefore is yet another reason why plaintiffs' arrest and detention was unlawful. It is well established that the purpose of arrest is to bring the

suspect to court for trial¹⁷. It is not clear on the facts of this case that such purpose was fulfilled. It is not in dispute that the plaintiffs were conveyed from the police cells on 12th February 2018 to the Mthatha Magistrates court holding cells. However, they were never brought before court. They were released from the Magistrate's Court holding cells. Mr Zilani, Counsel for the defendant argued strongly that it must be inferred from the act conveying inmates to the court building that, the purpose of arrest was fulfilled or achieved. There is no merit to this argument. A clear purpose must be to bring the suspect to justice or court or trial, not to take him from one cell to the other, and afterwards release him without any explanation for that release¹⁸. Sergeant Mputa could not shed light on this aspect as he was not even involved in the bringing of the plaintiffs to the Magistrate's court holding cells. The purpose of arrest in this case was clearly not achieved. The plaintiffs were arrested for a purpose other than to bring them to trial or justice. Arrest for ulterior motives can never be lawful. I therefore find that plaintiffs arrest was unlawful.

[43] A detention following an unlawful arrest is, as a corollary, unlawful. Defendant's Counsel was constrained to concede that, as a consequence of an unlawful arrest, a subsequent detention is quintessentially unlawful. Plaintiffs arrest and detention from 10th February 2018 to 12th February 2018 is unlawful. I shall deal again with this aspect of this case when dealing with the quantum.

¹⁷ *De Klerk v Minister of police* 2018 (2) ALL SA 597 (SCA); 2018 (2) SACR 28 (SCA) Para 14.

¹⁸ *Kosi v Minister of Police (Appeal)* (CA17/2024) [2025] ZAECBHC 6 (4 March 2025) Para 32.

Assault

[44] He who alleges must prove¹⁹. In *Jagers*²⁰ Eksteen AJP held that:

“.....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 credibility of the witness will therefore be inexplicably 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’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false”.

[45] Sergeant Mputa vehemently testified that, upon seeing the taxi stopped on the road they only activated the siren and shouted to the driver to remove the taxi to the roadside. Upon seeing that there was no response, though there were occupants in the taxi, they alighted from theirs and approached the plaintiffs’ taxi. Before they could arrive thereat, the plaintiffs ran away, and they then proceeded with their patrol duties. What boggles one’s mind is a simple question: what caused the plaintiffs to come out of their motor vehicle and run away? The answer is in the account the plaintiffs gave in this court about what happened. The maxim “*Res Ipsa lequitor*” applies. Facts speak for themselves. The police came out of their motor vehicle shouting and asking the following; “*why are you boys stopping on the road?*” As they were asking this question, they opened both the drivers and passenger doors and started to assault and grab the plaintiffs out of the taxi. The plaintiffs managed to free themselves and ran to different directions.

¹⁹ *Pillay v Krishna and Another* 1946 AD 946 at 951-2.

²⁰ *National Employees General Insurance Co Ltd v Jagers* 1984 (4) SA 437 at 440 E-G.

[46] Plaintiffs' version is probably a true version and it aligns with the rules of logic. The only probable reason why the plaintiffs could run away from the police is that the police had assaulted them. They only came back to their taxi when and after the police had left. The police version is untenable, uncreditworthy and unreliable and stands to be rejected.

[47] Assault is a crime against bodily integrity. Section 12(2) of the Constitution provides thus:

"2. Everyone has the right to bodily and psychological integrity...."

CR Snyman²¹ defines Assault thus:

"Assault consist in any unlawful and intentional act or omission-

(a) which results in another person's bodily integrity, being directly or indirectly impaired, or

(b) Which inspired a belief in another person that such impairment of her bodily integrity is immediately to take place."

With regard to part (b) of the definition, for an assault to be committed when no physical impact takes place, there must be a threat of immediate personal violence in circumstances that lead the person threatened reasonably to believe that the other intends and has the power immediately to carry out threat²². Even if it can be held that there was no physical impact or application of force took place, the alternative definition of assault would still hold. This part only required that the perpetrator must have inspired fear that force would be applied²³. The common cause fact that the police shouted at the plaintiff, followed by them alighting from their

²¹ C.R Snyman: Criminal Law, Sixth Edition, Page 447.

²² **R v Gondo** 1970 (2) SA 306 (R) at 307 D-E.

²³ C.R Snyman: Criminal Law, Sixth Edition, Page 450.

vehicle approaching the plaintiffs is sufficient to inspire fear or a belief that interference with plaintiffs' bodily integrity would immediately take place and that qualifies to be an assault. Infact I had already found that more had been done than inspiring a belief that force would be applied into the plaintiffs' personal bodies.

- [48] Another interference with plaintiffs' bodily integrity occurred at central police station when plaintiffs were confronted with the police. A little background to that is this: plaintiffs were being chased and were running away trying to escape or avoid the catch of the police, but were only apprehended in the premises of central police station. It is highly probable for every reasonable police officer to handcuff or cuff the person who was trying to flee or run away from a police officer. I therefore find that the plaintiffs were handcuffed when they were finally caught trying to escape or avoid the catch of the police. There is no merit in Sergeant Mputa's testimony that the plaintiffs were not handcuffed. It goes without saying that handcuffing occurred with the application of force and interference with plaintiffs' bodily integrity. That interference was not justified. In the circumstances I find that the plaintiffs were assaulted by the members of the South African Police service.

Third Plaintiff's absence and failure to give evidence

- [49] A crucial aspect that has a bearing on the relief this court will grant is the fact that only two plaintiffs testified in this court. They were represented by their Counsel Mr Gwele, who indicated that his instructing attorneys are unaware of the third plaintiff's (Lwanele Ngebulana) whereabouts. As they were on record representing him as well, he informed the court that

instructing attorneys tried to locate or get hold of him in every possibly way, but to no avail. Mr Gwele indicated that in the light of the fact that no appearance has been shown by the third plaintiff and that no evidence had been be tendered or adduced by him, he will make no submissions on his behalf and even suggested that his claim may be dismissed. No submission was made in this regard by Mr Zilani, Counsel for the defendant.

[50] In the interests of justice I am inclined to reconsider the ruling consolidating the three matters and grant a ruling that is unconsolidating third plaintiff's matter (Case No: 5251/2018) and separate it from these two consolidated matters under Case No: 2882/2018. The third plaintiff has not withdrawn his claim. The fact that his legal representatives are unable to get hold of him is insufficient to found a basis for the adverse disposal of his matter. Had he been found by his legal representatives he would probably have availed himself to give his evidence. The fact that the evidence led herein is overwhelmingly against the defendant weighs heavily.

[51] Accordingly, a court order dismissing third plaintiffs claim, on a mere say so of plaintiff's Counsel cannot be just. It bears repetition that this matter raises issues of Constitutional importance namely, dignity²⁴, Liberty²⁵ and bodily integrity²⁶. A just and equitable relief this court may make in terms of section 172(1)(b) of the Constitution is to separate and postpone third plaintiff's matter under case no 5251/2018. I say this in the context of the provision of section 34 of the Constitution which provides that:

²⁴ Section 10 of the Constitution.

²⁵ Section 12(1)(a) of the Constitution.

²⁶ Section 12(2) of the Constitution.

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum

[52] Fair public hearing is unimaginable and inconceivable if a party's case is adversely decided in his absence when it is clear to the court that he is unaware that he should have been in court. Equally, it would be unfair to decide a party's case against him when it is clear to all and sundry that his legal representatives are not at fault. He is not at court through no fault of his or his legal representatives. Therefore, it is plain that the defendant will suffer no prejudice if third plaintiff's matter is postponed as it will still be available to him to settle it without incurring any further costs, if so advised; whereas on the other hand the third plaintiff will suffer severe prejudice if his matter can be dismissed or adversely disposed of. It will therefore be incumbent upon the defendant to endeavour to settle third plaintiffs' claim without incurring further costs, if so advised.

[53] Parties were invited to submit written submissions to deal specifically with this aspect. Both Counsel complied and heeded the request, for that I am thankful. In response to a request for written submissions, Mr Gwele helpfully referred to Rule 10(5) of the URC which reads as follows:

“(5) Where there has been a joinder of causes of action or of parties, the court may on the application of any party at any time order that separate trials be held either in respect of some or all of the causes of action or some or all of the parties; and the court may on such application make such order as to it seems meet”.

Factors that may be taken into consideration in the exercise of the court's discretion includes²⁷:

- (i) The interests of the applicant in seeking to enforce his remedy.
- (ii) the prejudice to the opposite party if a separation of trials is ordered;
- (iii) the possibility of lengthy delay if the separation is refused, compared with the probable minimum delay of a separation is ordered;
- (iv) the question of costs, including the salvage costs already incurred in the matter, as well as the additional costs that may be occasioned by a separation of trials;
- (v) the conduct of parties, including the *bona fide* of the applicant;
- (vi) the balance of convenience (although this may already be covered by other items in the preceding catalogue. I have sufficiently dealt with those considerations in the preceding paragraphs.

[54] Rule 11 of URC provides for consolidation of actions and also provides that:

“(b) the provision of rule 10 shall mutatis mutandis apply with regard to the action so consolidated;”

This succinctly means that separation of consolidated trials in terms of Rule 11 is a discretion reposed of the court in terms of Rule 10(5) of URC. It is unequivocal from Mr Gwele's written submissions that he is applying

²⁷*De Polo v Freyer* 1990 (2) SA 290 (W) at 295 H-296 B; *Caltex Oil (SA) (Pty) Ltd v Govender's Fuel Distributors (Pty) Ltd* 1996 (2) SA 552 (N) at 556H- 557D

for separation of third plaintiff's trial, hence reference to Rule 10(5) of URC. Reference to application in the subrule does not mean formal application on notice of motion. Section 172(1)(b) of the Constitution and a prayer in the amended particulars of claim for further and alternative relief have an overarching effect. They afford this court a discretion to grant further and or alternative relief that is just and equitable.

Conclusion on Liability

[55] In the amalgam of all this, I have found that the defendant is liable to the first and second plaintiffs for all the damages arising from their unlawful arrest and detention from 10th February 2018 to 12th February 2018. Plaintiffs arrest and detention aforesaid was unlawful. Similarly, the defendant is liable for the damages arising from their assault by members of South African Police Service on 10th February 2018. In what follows I deal with the quantum.

Quantum

[56] Plaintiffs' deprivation of liberty at the instance of the Police occurred from 10th February 2018 until 12th February 2018. When the plaintiffs were released from custody on 12th February 2018 they had been in custody for two (2) days. Alternatively, they spent two (2) nights in the cells. Plaintiffs' rights to freedom or liberty and human dignity were unjustifiably violated. The detention constitutes an in-road into the

freedom and the right to human dignity of an individual²⁸. The right to liberty is inextricably linked to human dignity²⁹.

[57] In *Du Plessis*³⁰ the SCA remarked as follows:

“15. Our new Constitutional Order, conscious of our oppressive past, was designed to curb intrusions upon personal liberty which has always, even during the dark days of apartheid, been judicially valued, and to ensure that the excesses of the past would not recur.³ The right to liberty is inextricably linked to human dignity. Section 1 of the Constitution proclaims as founding values, human dignity, the achievement of equality and the advancement of human rights and freedoms. Put simply, we as a society place a premium on the right to liberty.

[58] Section 12 deals with freedom and security of the person. Importantly it provides as follows in relevant parts:

“Everyone has the right to freedom and security of the person, which includes the right-

- (a) not to be deprived of freedom arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) to be free from all forms of violence from either public or private sources;*
- (d) not to be tortured in any way; and*

.....

(2) Everyone has the right to bodily and psychological integrity.....”

Section 10 deals with dignity as follows:

“Everyone has inherent dignity and the right to have their dignity respected and protected”.

²⁸ *Thandani v Minister of Law and Order* 1991 (4) SA 904 (A).

²⁹ *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA); *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (SCA) Para 25.

³⁰ *Minister of Police and another v Du Plessis* 2014 (1) SACR 217 SCA Para 15.

[59] In *Diljan*³¹ Makaula AJA had the following to say:

“[18] *The acceptable method of assessing damages includes the evaluation of the plaintiff’s personal circumstances; the manner of the arrest; the duration of the detention; the degree of humiliation which encompasses the aggrieved party’s reputation and standing in the community; deprivation of liberty; and other relevant factors peculiar to the case under consideration.*

[19] *Whilst, as a general rule, regard may be had to previous awards, sight should, however, not be lost of the fact that previous awards only serve as a guide and nothing more. As Potgieter JA cautioned in Protea Assurance Co. Ltd v Lamb:*

‘It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court’s general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.’

[60] In *Tyulu*³² the Supreme Court of Appeal held:

“[26] *In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede*

³¹ *Diljan v Minister of Police* (746/2021) [2022] ZSCA 103 (24 June 2022) 22 JDR 1759 SCA Para 18-19.

³² *Minister of Safety and Security v Tyulu* 2009 (5) SA 58 (SCA); 2009 (2) SCAR 282 (SCA); 2009 (4) ALL SA 38 Para 26.

that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts (Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) 325 para 17; Rudolph & others v Minister of Safety and Security & others (380/2008) [2009] ZASCA 39 (31 March 2009) (paras 26-29)."

[61] The first and second plaintiffs are major unemployed males³³ respectively born on 27th July 1991 and 02nd September 1992. They describe the conditions in Prison where they were detained as appalling and unhygienic. They were detained without trial and that is reminiscent of the dark days of apartheid, a past a modern society is not proud of. Practises under apartheid like detention without trial, were crimes against humanity.

[62] In *Diljan* the Supreme Court of Appeal awarded **R120 000.00** as fair and reasonable amount for appellant's deprivation of liberty for three (3) days. When dividing that amount by three (3) days, one gets **R40 000.00**. In *Madyibi*³⁴ an amount of **R35 000.00** was awarded for twenty (20) hours detention. In *Ncume*³⁵ this court awarded **R45 000.00** as fair and reasonable compensation for arrest and detention for approximately eighteen (18) hours. Taking into account the circumstances and conditions of plaintiff's detention or deprivation of liberty, I am satisfied that the defendant is liable to the plaintiff in the amount of **R80 000.00** as fair and reasonable compensation for deprivation of liberty for approximately two (2) days.

³³ At the time of institution of these proceedings the second plaintiff was self-employed.

³⁴ *Nel v Minister of Police* (Case No CA 62/2017) [2028] ZAECGHC.

³⁵ *Andile Ncume v Minister of Police (Case No 3219/2021) Eastern Cape, Mthatha*.

[63] Assault without justifiable basis by the police invariably amounts to torture³⁶ and abuse of power. The police in our societies hold an honourable position clothed with fiduciary duties. They should be trusted and not be feared for. They have a higher duty to protect the society³⁷ and not to abuse. With regard to assault, infringement of one's bodily integrity is inextricably linked to one's dignity. Humiliation and embarrassment are incidences and consequential upon the incident of assault. I am therefore satisfied that each plaintiff is entitled to a fair and reasonable compensation of **R40 000.00** for a claim of assault. No injuries were sustained by the plaintiff.

Costs

[64] The general rule is that costs must follow the result. I have not been persuaded that there should be deviation from the general rule that costs should follow the event. Accordingly, the plaintiffs are entitled to their costs. With regard to third plaintiff's matter no further and separate costs were incurred as a result of its postponement.

Order

[65] In the result I make the following order:

- 1. The defendant is liable to pay first and second plaintiffs an amount of R80 000.00 each for their arrest and detention from 10th February 2018 to 12th February 2018.**

³⁶ Section 12(1) (d) of the Constitution.

³⁷ Section 203 of the Constitution.

2. The defendant shall pay interest on the amount referred to in paragraph 65.1 above (R80 000.00) at a prescribed legal rate calculated from the date of this judgment to the date of final payment.
3. The defendant is liable to pay first and second plaintiffs an amount of R40 000.00 each in respect of their assault by the members of the defendant on 10th February 2018.
4. The defendant shall pay interest on the amount referred to in paragraph 65.3 above (R40 000.00) at a prescribed rate calculated from the date of this judgment to the date of final payment.
5. The defendant shall pay first and second plaintiff's costs of suit.
6. Third plaintiff's action under case number 5251/2018 is hereby separated and postponed *sine die*.

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

For the Plaintiff

Instructed by

:Adv Gwele

:L.MTHAMBO ATTORNEYS

66 Stanford Terrace

Mthatha

Tel: 060 528 2775

Ref: SMS/LM/18/C

Email:mthambol@yahoo.com

For the Defendants

Instructed by

:Mr Zilani

: M ZILANI ATTORNEYS

No 19, 5th Floor, Sanlam Building

Mthatha

Tel: 083 505 6400

Ref: 1619/18-A2K

Email:zilaniattorneys@gmail.com

Matter heard on

: 18, 19 and 20 November 2025

Delivered on

: 09th December 2025