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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)**

Reportable

Case no.: 14100/2021

In the matter between:

L[...] B[...]

First Plaintiff

T[...] C[...]

Second Plaintiff

F[...] L[...] B[...]

Third Plaintiff

and

MINISTER OF POLICE

First Defendant

SOUTH AFRICAN POLICE SERVICES

Second Defendant

Coram: Pangarker J

Hearing dates: 29, 30 and 31 July 2024; 8 August 2024; 2 and 17 September 2024; 5 and 6 November 2024; 25 November 2024; 19 June 2025; 20 August 2025

Judgment delivered: 30 June 2026

Summary: *Unlawful arrest and detention* – Plaintiffs allege that they suffered damages suffered as result of their unlawful arrest and detention by the police in early May 2020 for breach of lockdown level 4 regulations during the national state of disaster (implemented as a result of the coronavirus pandemic) – Plaintiffs entered a beach to remove their minor daughter who, unknown to them, entered the beach - Beaches were prohibited areas in terms of the regulations to the Disaster Management Act 57 of 2002 – Defendants plead that in terms of regulation 24 read with Regulation 31(2), being on/in a prohibited area was an offence punishable by law – Defendants also rely on section 40(1)(a) of the Criminal Procedure Act 51 of 1977 in that the peace officer was entitled to arrest the plaintiffs without a warrant as the offence was committed in his presence – Consideration of regulations; whether defendants proved that the arrest and detention were lawful; discussion regarding commission of an offence versus guilt; and, whether the police officer acted irrationally when exercising the discretion to arrest.

Malicious and wrongful legal proceedings - Plaintiffs plead that the police unlawfully and maliciously charged and processed them, had no reasonable and probable cause for doing so and as a result of such actions, they were prosecuted – Plaintiffs were compelled to employ the services of an attorney for the criminal matter – Prosecutor withdrew the charges – Issue: whether, on the evidence, the plaintiffs discharged the onus of proving the elements of claims based on malicious and wrongful proceedings.

Breach of constitutional rights - In view of the lockdown regulations, were the arrests and detention of the plaintiffs necessary, and were their constitutional rights to dignity infringed because of the police's actions? – Defendants' view is that the police were constitutionally mandated in terms of section 205 of the Constitution to uphold and enforce the law – Police mandated to assist the Government to combat

the spread of the coronavirus – Whether the plaintiffs proved a breach of their constitutional rights to dignity as provided for in section 10 of the Constitution.

ORDER

The plaintiffs' claims (claims A and B) are dismissed with costs, including the costs of counsel on scale B.

JUDGMENT

PANGARKER J

Introduction

[1] In early May 2020, South Africa was in the midst of the COVID-19 pandemic¹. Severe restrictions were placed on citizens in respect of movement, contact, and social and economic interaction on a level never before experienced. The country faced a national lockdown to curb the spread of the coronavirus.

[2] Less than two months earlier, on 15 March 2020, the Minister for Co-operative Governance and Traditional Affairs (the Minister), had declared a national state of disaster in terms of the Disaster Management Act 57 of 2002 (the Act) following the declaration by the head of the National Disaster Management Centre (NDMC) that the pandemic was classified as a disaster. It is well documented that the Government's aim was to prevent and curtail the spread of the deadly coronavirus.

¹ Also referred to the coronavirus

[3] Consequently, the Minister issued regulations in terms of the Act with the aim of managing and reducing the risk of infection amongst all citizens. On 24 March 2020, President Cyril Ramaphosa announced that the National Coronavirus Command Council (NCCC) had decided upon a national lockdown for 21 days, commencing from 26 March to 16 April 2020. It is common knowledge that the lockdown was later extended to 30 April 2020 and historically, throughout the period of the state of disaster, there were extensions and adjustments to the lockdown or alert levels and the relevant regulations.

[4] On 1 May 2020, South Africa moved from alert level 5 to alert level 4, which had the effect that some hard lockdown restrictions were slightly relaxed. With this historical context in mind, I turn to the case at hand, which revolves around an incident which occurred on 4 May 2020, during alert level 4 restrictions, on Muizenberg Beach (the incident).

The parties

[5] The first and second plaintiffs, L[...] B[...] (B[...]) and T[...] C[...] (C[...]) are the biological parents of the third plaintiff, a minor girl F[...] L[...] B[...], hereafter referred to as “*the child*” or “*their daughter*”. She was one year and nine months old at the time of the incident which led to the institution of the plaintiffs’ civil action which forms the subject of this judgment. The defendants are the Minister of Police and the South African Police Services (SAPS) respectively, who defend the plaintiffs’ action. No relief is sought against the second defendant.

[6] B[...] and C[...] are collectively referred to as “*the plaintiffs*”. They were the only witnesses in respect of the action instituted under the above case number. Brigadier Colonel Vassie Naidoo (Naidoo) was the only witness for the defendants. C[...] testified via audio visual link from the Czech Republic, where she resides permanently. Similarly, Naidoo, who lives in KwaZulu Natal, also testified virtually during the trial. For ease and intending no disrespect to the witnesses and other role players who featured in the trial, they are referred to by their surnames. The trial proceeded on merits and quantum.

The plaintiffs' pleaded case: Particulars of Claim

[7] The Summons was issued on 19 August 2021 pursuant to the plaintiffs' notices in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. The plaintiffs plead that on 4 May 2020, at approximately 08h25, they were walking along the boardwalk of Muizenberg Beach in compliance with regulation 16(2)(f) issued in terms of section 27(2) of the Act. While walking, the third plaintiff, their 21-month-old daughter, unexpectedly ran from the boardwalk onto the beach. She had moved two metres onto the beach. The plaintiffs momentarily and as far as was strictly necessary, walked onto the beach to remove her, picked her up and then returned to the boardwalk immediately.

[8] The plaintiffs instituted two claims against the defendants which are summarised below. **Claim A** is for damages arising from their unlawful arrest and detention, and breach of their constitutional rights. The plaintiffs plead that police officers witnessed the incident but despite this, two police officers wrongfully and unlawfully arrested them for contravening the regulations. The arresting officers placed B[...] in the back of a police vehicle along with other detainees. The police did not wear suitable masks and did not ensure that the other detainees were wearing suitable masks. B[...] was transported to Muizenberg police station in the police van and C[...] and their daughter were transported in a separate police vehicle.

[9] The plaintiffs plead further that because of the above failures by the police officers, B[...] as well as C[...] and their daughter, were placed at high risk of contracting the coronavirus. On arrival at the police station, the plaintiffs were detained for six hours at the insistence of police officers, including Naidoo, and along with other members of the public, were all detained in a confined area in the police station. As a result of such detention and because these officers were not wearing suitable masks while interacting with and processing the plaintiffs, therefore the latter were placed at high risk of contracting the virus.

[10] The plaintiffs plead that the actions of the police officers and Naidoo amounted to a wrongful and unlawful violation of their constitutional rights to dignity as provided for in section 10 of the Constitution of South Africa, and that this constituted an unlawful and wrongful injury to them. Furthermore, they were humiliated, degraded and left fearful because of the police officers' conduct.

[11] As a consequence of the unlawful arrest and detention and breach of their constitutional rights, the plaintiffs plead that they suffered damages totalling **R537 300²**, which is calculated as follows:

Past medical expenses

Psychology sessions	R4 500
Psychiatry sessions	R3 800
Family counselling and mediation sessions	R2 600
Medication	R2 400

Future medical expenses

Medication (R400 p/m for 5 years)	R24 000
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General/constitutional damages

Pain and suffering, violation of constitutional rights	R500 000
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[12] **In respect of Claim B**, malicious and wrongful legal proceedings, the plaintiffs plead that Naidoo unlawfully and maliciously processed and charged them for contravening the lockdown regulations. When processing and charging the plaintiffs, the police officers had no reasonable or probable cause for doing so, nor a

² Claim A

reasonable belief in the truth of the information relied upon by them. The police officers, including Naidoo, were acting in the course and scope of their employment with the second defendant in processing and laying the charge against the plaintiffs.

[13] As a result, they were required to appear at the Muizenberg Magistrates' Court and were compelled to employ the services of an attorney to represent and defend them. The plaintiffs plead that on 26 May 2020, the State withdrew the charge(s) against them based on a lack of evidence of contravention of the regulations and/or that they had a valid defence to the charge.

[14] Furthermore, in April and May 2020, Naidoo and various police officers intimidated and harassed the plaintiffs by persistently driving their vehicles past the plaintiffs' and B[...]s parents' residences; parking their vehicles outside the aforementioned residences and visiting the plaintiffs and B[...]s parents' residences in order to question them despite being informed that the plaintiffs did not wish to speak to them.

[15] The actions of Naidoo and the other police officers constitute a wrongful and unlawful violation of the plaintiffs' constitutional rights to dignity, freedom and security of person, as well as privacy, as set out in sections 8, 10 and 12 of the Constitution. It thus amounts to an unlawful and wrongful injury to the plaintiffs. The plaintiffs felt intimidated, degraded and were fearful because of the conduct of the police.

[16] The plaintiffs plead that they suffered damages because of the malicious and wrongful proceedings and breach of constitutional rights in the sum of **R531 655, 64³** as follows:

Costs incurred in employing an attorney	R31 655,64
Breach of constitutional rights	R500 000

³ Claim B

The defence: the Plea

[17] The defendants admit the date, time and place of the incident. However, they plead that the plaintiffs were not walking along the boardwalk alongside the beach but were found seated on the beach 200 metres away, playing with their daughter. Despite their knowledge of regulation 16(2)(f) which prohibited anyone from being on a beach, the plaintiffs failed to comply with the regulation and level 4 lockdown restrictions.

[18] Furthermore, the defendants deny the plaintiffs' version that their daughter ran from the boardwalk onto the beach. They plead that as there was a half metre drop from the boardwalk onto the beach, it was unlikely that the 21-month-old child could have run approximately 2 metres from the boardwalk to the sand without injuring herself. They also question that she was able to unexpectedly run 2 metres without B[...] gaining control of her. The defendants plead that there was no justification why C[...] was on the beach when B[...] could easily have taken control of their daughter. They persist that the plaintiffs were playing in the sand.

[19] The defendants rely on regulation 16(2)(f) read with 24(2)(a) and 31 in that: citizens could leave their residences between 06h00 and 09h00 to run, walk or cycle within a 5 kilometre radius of their residence⁴; the use of beaches was prohibited⁵; and, a criminal sanction applied where these regulations were contravened⁶.

[20] The defendants plead further that on 4 May 2020, from 06h00, the police conducted a high-density visible patrol in the area after receiving several complaints from the public that people were running on the beach. During these patrols, Naidoo and his colleague, Captain Claassen (Claassen) noticed the plaintiffs sitting on the

⁴ Regulation 16(2)(f)

⁵ Regulation 24(1) and (2)

⁶ Regulation 31(2)

beach with the child who was playing in the sand. They were positioned approximately 200 metres away from the boardwalk.

[21] The police officers approached the plaintiffs and informed them that they were contravening the regulations and afforded them an opportunity to provide reasons for the contravention⁷. However, no reasons were forthcoming. B[...] became argumentative and was subsequently cautioned by Naidoo that his conduct was tantamount to resisting arrest and could lead to additional charges. B[...] and C[...] were arrested for contravening the regulations.

[22] The defendants also plead that section 205 of the Constitution imposes a duty on the police to prevent, combat and investigate crime; to maintain public order; to protect and secure the public in their property and to uphold and enforce the law. They deny that the plaintiffs' arrest and detention were wrongful and unlawful, and plead that the SAPS members had acted within the ambit of the regulations and in terms of their constitutional obligations.

[23] The defendants furthermore deny that B[...] was placed in the police van along with other members of the public. They plead that B[...] was the only person seated at the back of the police van and transported to Muizenberg police station while the second and third plaintiffs were transported in a marked police vehicle. The child was held by her mother while being breastfed.

[24] Furthermore, the defendants deny breaching the plaintiffs' constitutional rights. They plead that at all material times, SAPS members wore suitable masks while transporting the plaintiffs, processing them and interacting with them during their detention at the police station. They were kept in the boardroom with their child and not more than six people were in the boardroom at the same time. The defendants adhered to social distancing protocol and wore suitable masks when dealing with the public and the plaintiffs.

⁷ The evidence is that the police spoke to the plaintiffs from their position on the boardwalk and did not themselves enter the beach

[25] The plaintiffs were released on a warning approximately four hours later and issued with a SAPS 496 written notice to appear in Muizenberg Magistrates' Court on 6 August 2020⁸. The defendants deny that the charges were withdrawn on the basis of lack of evidence in law or fact.

[26] Furthermore, the defendants deny that the officers harassed or intimidated the plaintiffs as alleged and plead that after their arrest, the plaintiffs caused a newspaper article to be published where certain allegations were made against the police. As a result, an internal investigation was conducted which necessitated the plaintiffs to be interviewed but attempts to do so proved futile. The defendants deny that their conduct was wrongful and an unlawful violation of the plaintiffs' constitutional rights, and that the legal proceedings against the plaintiffs were wrongful and malicious.

[27] Lastly, the defendants also rely on section 40(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA) which empowers a peace officer to arrest a person who commits or attempts to commit an offence in his presence. It is pleaded that the SAPS members at all times acted lawfully and within the ambit of their constitutional powers, the CPA and the applicable regulations of the Disaster Management Act.

[28] The trial proceeded for several days, with witnesses extensively cross-examined by counsel for both parties. While I have attempted to summarise the important or material aspects of the witnesses' testimonies, the summary is nonetheless unavoidably lengthy. Photographs of the boardwalk, ablution block and Muizenberg Beach were handed in during the trial as well as various documents and a transcript of audio recordings taken by B[...] on the day of the incident.

The first plaintiff: L[...] B[...]

⁸ In terms of sections 39(3) and 40(2) of the Criminal Procedure Act 51 of 1977 (CPA)

[29] B[...] testified that the plaintiffs lived in an apartment in Muizenberg about 500 metres from the beach, thus, it was a 5-minute walk to the beach. On 4 May 2020, they left their home after 08h00 and approached the boardwalk at Surfer's Corner at approximately 08h25. B[...] was carrying a baby carrier on his back and their daughter was seated in the carrier. At the time she was slightly older than one and a half years and had started walking about six months prior.

[30] The plaintiffs walked down the boardwalk in the direction of Muizenberg's brightly coloured huts, which were on their left side. People were walking and running on the boardwalk and they maintained social distancing. He noticed police presence on the boardwalk, approximately 50 metres away. C[...] was walking 5 to 6 metres ahead of him and their daughter. Thus, they walked from the direction of the mountain-side along the boardwalk toward the ablution block area.⁹

[31] Their daughter was restless and moving quite a bit in her carrier. B[...] then removed the baby carrier from his back and placed it down on the boardwalk, in the vicinity of the huts on his left side. He knelt and removed her from the carrier and placed her down on the opposite side of the boardwalk¹⁰, and then turned his attention to the carrier near the green bin at the hut. When he turned around toward his daughter, it was then that he noticed that she was on the beach, a bit beyond the wooden pole railing of the steps which were slightly past the green and yellow hut¹¹. He then ran after her, onto the beach and grabbed her.

[32] He knew that at the time people were not allowed on the beach. The child did not want to listen to her father and, as he explained, "plonked" herself down and had a temper tantrum. C[...] ran toward them while their daughter was playing in the sand and he estimated that she reached them after about 20 seconds but admitted that it was a long time ago. C[...] went directly to their daughter, but the child refused to leave the beach. The parents tried to explain to her that she could not be on the beach, but to no avail.

⁹ Exhibit A, p97 and p99

¹⁰ The side closest to the beach; Point 2 on Exhibit A, p97

¹¹ Point 3 on Exhibit A, p97

[33] B[...] testified that she was crying and refused to leave the sand, so they tried to pacify her. B[...] tried to remove her from the beach but she was acting up. When he turned around, he saw police officers and waved at them, informing them not to worry. He thought that they were concerned about the crying child. He then picked her up and returned to the boardwalk. At that stage, she was still crying.

[34] Shortly after their return to the boardwalk, C[...] started breastfeeding their daughter to calm her down. B[...] approached the police and was then informed that he should follow them to have a chat. At this stage, the plaintiffs were moving toward the ablution block. B[...] was then ordered to enter the back of a police van and was informed by Claassens that he was stupid, and that their daughter could die because of the virus.

[35] Naidoo informed B[...] that he was in big trouble and should enter the van and he was arrested. C[...] was also arrested. B[...] requested a car seat to be collected from his apartment but this was refused. He also requested that C[...] be allowed to walk to the police station but this request was refused. B[...] explained that he sat at the back of the van, where he was alone. From his vantage point, he saw C[...] speak to someone whom he assumed was a police officer.

[36] While detained at the back of the police van, B[...] uploaded a photograph to Facebook, which he took from inside the van and described this action as a call for help¹². According to B [...], while the image depicted in the photograph is quite dark, his testimony is that Naidoo is shown not wearing a mask. Naidoo was transported in the van while C[...] and their daughter were transported in the police vehicle to the police station, a few minutes away. He testified that they were not on the beach for longer than a few minutes.

[37] During the trial, an audio recording taken at the police station was played to the Court. The recording was transcribed and submitted into evidence as Exhibit C. B[...] admitted that while at the police station and during the processing/interview

¹² Exhibit A, p47

which Naidoo conducted with the plaintiffs in a separate room, he used his cellphone to record Naidoo and a part of the processing/questioning.

[38] Naidoo is heard instructing colleagues that anyone still walking, running, or cycling after 09h00, should be picked up, meaning that they should be arrested. B[...] met up with C[...] and their daughter at the police station. He testified that C[...] was quite anxious. He noticed police officers and foot traffic in the passage at the police station. Naidoo was not wearing the mask over his mouth but across the chin, similarly a female officer (who took temperatures) did not wear a mask.

[39] The plaintiffs waited in the passage for a few minutes whereafter they were instructed to enter a boardroom, which is shown in the photographs. C[...] was breastfeeding the child all the while to comfort and pacify her. According to B [...], C[...] was extremely anxious and stressed and he remained close to her. Naidoo's conduct toward them changed when he became aware that he had uploaded photographs to social media.

[40] B[...]’s questions as to why they were being detained were never answered. He tried to inform Naidoo of the reasons why they were on the beach but the officer was not interested. Naidoo enquired about C[...] and was informed that she was a professional photographer and lived in South Africa for many years. She explained to Naidoo that her visa would be renewed and he then informed her that they were going to flag her visa and that it would not be renewed; that she would have a criminal charge pending as a result of the incident.

[41] Naidoo then left the boardroom for a short while and returned to confirm that C[...]’s visa was flagged and that their Court appearance would be the day after her visa was due to expire. B[...] explained to Naidoo that they were innocent but Naidoo stated that there were criminal charges against them. B[...] pleaded with Naidoo to allow his parents and sister to collect the toddler but this request was also refused, with Naidoo threatening to arrest the family members should they come to collect the child.

[42] According to B[...], Naidoo made it clear that they faced a conviction. He also stated that C[...] would never get a job and that their daughter would not be able to see her grandparents. B[...] testified that C[...] was reaching breaking point and was in a state of complete shock. They were in the room with Naidoo for approximately two hours.

[43] B[...] and C[...] were given a document, the SAPS 496 warning to appear in Court. They were also requested to sign the notice of section 35 rights, which they did. As for the charge(s), B[...] testified that Naidoo indicated that it was a failure to confine to residence, though Naidoo seemed confused about the charge.

[44] B[...] testified at length about the content of the audio recording. In summary, B[...] stated that Naidoo made it clear that he ran the police station, that his plan was to arrest more people and make an example of them and that he did not want any social media attention. There was mention of a fine of R1 000 but for Naidoo it was all about obtaining a conviction. According to B[...], Naidoo was clearly on a mission. The recording was done at the end of the plaintiff's time in the room with Naidoo.

[45] B[...] testified that he was at times confused, anxious, fearful and concerned about his family's welfare. In respect of their toddler, he explained that she was in discomfort and that they were not allowed to receive any nappies and supplies because his parents and family were not allowed to deliver it to the police station. The child was in her mother's arms for the duration of the questioning.

[46] After exiting the meeting room, the plaintiffs were led to another room where they waited a while. During this time, somebody came to sanitise the room. B[...] left the room a few times to inquire whether they could leave the police station but there was no response to his request. He estimated that they were in the second room for about half an hour.

[47] Eventually the plaintiffs left the police station and walked home. B[...] testified that they were at the police station for approximately 3 hours. They were very stressed and for more than two weeks following the incident, B[...] attended to responding to messages from family and the public, as well as social media and

local and national media interest in the matter. B[...] was not involved in any investigation into the Muizenberg SAPS conduct nor was he made aware of the outcome of the investigation regarding the enquiry into the Muizenberg SAPS.

[48] B[...] was referred to a Timeslive news article which told the plaintiffs' story, and he confirmed the accuracy thereof as well as that of similar articles which were discovered by the plaintiffs for purposes of the trial.¹³ He was satisfied as to how he was reflected in the various articles which formed part of the discovered documents.

[49] Attorney John Riley was appointed as the plaintiffs' attorney to defend them in the criminal matter, which included challenging the charges. The plaintiffs had deposed to affidavits and a few weeks after the incident, they were advised in an email from the attorney, that the State had withdrawn the charges against them. B[...] confirmed that he paid the attorney's fees for his services.¹⁴

[50] After the incident, B[...] attended counselling with Mark Emmerich, a therapist who had referred him to psychiatrist, Dr Stastny, whom B[...] saw for two months. In terms of B[...]’s testimony, Dr Stastny diagnosed him with post-traumatic stress disorder (PTSD). He paid the counsellor and psychiatrist in full. B[...] was asked about the medical expenses claimed in the action¹⁵ and payment for attending family counselling services.

[51] B[...] explained that his relationship with C[...] was never the same after the incident and that they were no longer in a relationship. The incident caused stress, anxiety, uncertainty about the future and changed the course of their family life. Prior to the incident, he was in the film industry and though his work was cut short due to the arrival of the pandemic, he was happy having time to spend with his family. After the incident he became withdrawn, and the fear and anxiety caused by the incident, affected their personal relationship.

¹³ P47-51

¹⁴ P34-36

¹⁵ Par 24, Particulars of Claim, p12

[52] Shortly after the incident, in June 2020, C[...] and their daughter took a repatriation flight to the Czech Republic. There were no flights leaving South Africa for a few months, so B[...] closed his local business, settled his affairs and assets and eventually joined them in the Czech Republic in November 2020. He explained that they separated as a couple shortly after his arrival in the Czech Republic, but they co-parent.

[53] Insofar as the claims for constitutional damages are concerned, B[...] testified that after the arrest, the police wished to speak with him, but he declined. There was police presence outside his and his parents' residences. B[...] elaborated that the incident ruined their lives; they were inconvenienced and he pursues the matter against the defendants to seek justice and to be compensated for financial loss. The plaintiffs decided to leave South Africa because of the damage caused to them. He was satisfied that the C & A Friedlander letter of demand and complaint¹⁶ was in accordance with his instructions to the attorneys.

[54] In cross-examination, B[...] testified that the Particulars of Claim were drafted in accordance with his instructions. The media articles¹⁷ about the incident leading to the plaintiffs' arrest, were correct.

[55] As for the incident, B[...] could not recall when he first noticed police presence as he was on the boardwalk. In further cross-examination, he testified that he saw police officers at point C as depicted on the photographs.¹⁸ The second plaintiff wanted some space and walked ahead of him. He confirmed that he placed their daughter, after removing her from the baby carrier, near the wooden railing, then turned around to the backpack/carrier placed near the huts, and when he turned back to her, she was already on the beach.

[56] Regarding the "drop" from points 2 to 3 (from the boardwalk to the beach), B[...] testified that it would have taken more than two steps to get down onto the

¹⁶ P5-14

¹⁷ Podcast, News 24, False Bay Echo and EWN live

¹⁸ Photograph p99

beach. He admitted that there was foot traffic on the boardwalk. When it was put to him that his intention was to stay in the area where he had put the baby carrier down, B[...]’s response was that he could not say what his intention was in leaving the carrier where he did. He explained that the child sat down in the sand and started screaming when he tried to grab her. Approximately 20 seconds later, C[...] arrived at the spot where B[...] and their daughter were situated on the sand and they tried to calm their daughter down and speak to her, but she was crying and screaming. There were about 4 or 5 police officers on the boardwalk at point 4.¹⁹

[57] B[...] was referred to a statement taken down by SAPS member, Major-General Dyantyi (Dyantyi) on 21 August 2020. In paragraph 1 of the statement, he stated that his daughter had strayed less than a metre onto the beach when he stopped her. When questioned about the distance he had reached from the boardwalk to the beach, he testified that the information in the statement seemed incorrect. His testimony is that Dyantyi was at his attorney’s offices where the statement was recorded. He had no explanation as to why the statement was taken.

[58] It was put to him that his testimony, the statement and the pleadings were not consistent as to how far onto the beach, their daughter had strayed. His response was that the incident occurred a long time ago, and that it was certainly not half a metre, but one to two metres from the boardwalk. He did not see how she managed to move from the boardwalk to the beach.

[59] He denied that Naidoo approached them and testified that he approached Naidoo. He had to follow Claassens to the police van and Naidoo was aggressive, ordering him into the van. He considered being placed in the police van as being arrested. As far as Claassens’ conduct goes, it was put to him that the letter of complaint by C & A Friedlander²⁰, does not indicate that Claassens swore at him, yet he testified that this was indeed so.

[60] Furthermore, and with reference to the audio recording in the boardroom and the complaint, the defendants’ counsel put to B[...] that nowhere in the complaint

¹⁹ Point 4, p100 is depicted as being on the boardwalk, near the wooden step down/railing

²⁰ P5-14

does it reflect that Naidoo intimidated or threatened him at the van. B[...]’s response was non-committal.²¹

[61] B[...]’s version on various aspects was tested extensively in cross examination. It was put to him that his Facebook post and pleadings stated that when he entered the police van, there were other detainees already seated in the van, yet during the trial he testified that he was alone in the van. Furthermore, in examination in chief he testified that he could not say that he saw C[...] being placed in a police vehicle, yet in cross-examination it was clear that in his Facebook post of 4 May 2020, he had stated that C[...] was pushed into the police vehicle while breastfeeding. When confronted with these discrepancies, B[...] stated that the incident was extremely traumatic and at times, he did not remember certain things.

[62] Insofar as his cell phone was concerned, he stated that it was not removed from him at the time of arrest and he could record the police at will. He also admits that in the audio recording, Claassen is not heard swearing, as he had initially alleged in examination in chief. In respect of the time spent at the police station in a meeting/board room, it was put to B[...] that he testified that they were at the police station for 3 hours, yet their pleaded case states 6 hours. When the contradiction was put to him, he admitted that the Particulars of Claim were incorrect regarding the time spent at the police station.

[63] B[...] was questioned about the audio recording at the police station. He testified that there were times where he simply said anything to Naidoo as he wanted to leave the police station; that Naidoo was set on a conviction and insisted that he would flag C[...]’s visa. There was no clarity on the fine to be paid. Counsel put to him that Naidoo would testify that he had no authority to flag a visa, but B[...] maintained his version on this aspect. It was also put to him that in his Facebook post on 14 May 2024²² he stated that he could have paid an admission of guilt fine for a crime he did not commit and that not paying “*a small fee to corrupt police*” cost

²¹ B[...] testified in 2024, being 4 years after the incident

²² Exhibit A, p140

him in many ways. Counsel stated that he implied that he could have “paid off” the police.

[64] While it was put to B[...] that Claassen would testify, it is common cause that the defendants did not call Claassen as a witness. When questioned about the plaintiffs’ claim for breach of constitutional rights²³ in respect of the averment that Naidoo and other officers intimidated and harassed them in April 2020, counsel put to him that the incident only occurred in May 2020. B[...] then admitted that Naidoo did not visit the plaintiffs nor his parents’ residences.

[65] In respect of the internal police investigation into the actions of Muizenberg SAPS, B[...] testified that Dyantyi came to his house and his handwritten affidavit was completed (by Dyantyi) in the presence of his attorney. In the C & A Friedlander letter to the SAPS Ombudsman dated 29 May 2020, it was recorded that on 14 May 2020, only one police visit to his home took place. He confirmed, albeit indirectly, that there were no other visits by SAPS members to his home.

[66] As for the claim for past medical expenses (psychology and psychiatry sessions) and with reference to Dr Stastny and Mr Emmerich (therapy), B[...] confirmed that no expert reports were filed. He also did not deny the defendants’ counsel’s statement that Dr Stastny’s letter dated 18 August 2022, did not conclude that his (B[...]’s) symptoms, mood and PTSD were as a result of the incident²⁴. B[...] also did not argue that there were no invoices provided in respect of his/their claim for past medical expenses, as set out in paragraph 24 of the Particulars of Claim²⁵

[67] In respect of C[...], B[...] denied the suggestion that she had planned to take the repatriation flight to the Czech Republic before the 4 May 2020 incident. At the time he testified, he did not feel fearful or traumatised because of the police. He explained that the financial loss because of the incident was that it cost him to be at Court.

²³ Claim B, par 30

²⁴ Exhibit A, p31-33

²⁵ Page A12

[68] In re-examination, B[...] clarified that his Facebook post of 14 May 2024 meant to explain or say that if there was a “softer option” to pay a fine, he would have done so. On the Court’s questions in clarification, B[...] testified that C[...] was on a working visa in South Africa and had lived here (at the time) for more than a decade.

The second plaintiff: T[...] C[...]

[69] C[...] confirmed B[...]’s testimony regarding her personal relationship with him at the time of the incident; that she was living in South Africa for 15 years, first on a student visa and thereafter, on a working/special skills visa, which would expire on 7 August 2020; that she was a professional photographer; and, that she was due to apply for a new visa in order to continue her work as a photographer.

[70] She further confirmed B[...]’s version of leaving their home shortly after 08h00 on the day of the incident with the intention of walking on the Muizenberg Beach promenade. Her description of the direction of their walk, with reference to photographs, and that B[...] carried their daughter in a baby carrier on his back, also corroborates his version. They had agreed to remove the child from the carrier and as he testified, this occurred next to/alongside the coloured huts.²⁶ She stood next to B[...] as he removed the child, and she informed him that she would walk ahead. This also confirms his version on the point. She did not see where he placed the child.

[71] As she walked on, she heard her daughter scream and she turned around. C[...] saw that the child was on the beach, about one and a half metres from the wooden steps leading from the boardwalk onto the beach. She saw her daughter moving around in the sand and refusing to leave, and B[...] was leaning toward their daughter. C[...] then went toward them and tried to calm the child down. She testified that she tried to pick her up, but she (their daughter) resisted and screamed. She then leaned in toward the child and lowered herself to calm her down and it was at

²⁶ C[...] indicated that their daughter was removed from the carrier at/in the vicinity of the green and yellow hut – Exhibit A, p97

that stage that police officers instructed the plaintiffs to accompany them. She did not notice the police officers prior to that moment.

[72] Two male and one female officer approached them and aggressively demanded that the plaintiffs accompany them. One of the officers was Naidoo. C[...] was focused on her daughter and was breastfeeding her as the plaintiffs followed the police from the boardwalk to police vehicles. She knew that the child would calm down and eventually fall asleep. The two male officers took B[...] and aggressively pushed him into a police van.

[73] C[...]’s request for a car seat was refused. She then requested whether she could walk with the child to the police station, but was ignored, and simply ordered to enter the vehicle. She testified that the officer started pushing her. She entered the vehicle while breastfeeding and found other officers seated in the vehicle. She was not informed about the reason why she should get into the vehicle and accompany the police, and she testified that one of the officers was not wearing a mask.

[74] On arrival at the police station, she met up with B[...]. She testified that she did not see what had happened to him. She noticed that half of the officers in the police station were not wearing masks and no hand sanitizer was offered to them as they entered the station. Their temperatures were taken and they were ushered into a larger room with tables and chairs. She testified that she was still unaware of the reason why they were at the police station and any wrongdoing which they may have committed. However, she testified that she knew that you could not camp nor play on the beach.

[75] In the interview room²⁷, Naidoo sat opposite the plaintiffs while interrogating them. He did not wear mask, nor the female officer who had driven her to the station. C[...] confirmed that B[...] took a photograph of Naidoo in the interview room on the day without a mask²⁸.

²⁷ Exhibit A, p81

²⁸ Exhibit A, p124a – the photograph depicts Naidoo writing, wearing no mask - a light blue mask is on the desk/table.

[76] C[...] testified that during the interview with Naidoo she felt as if she were inside a nightmare and that a panic attack was imminent. Naidoo informed them that their situation was so bad/serious that she would be deported from South Africa and would have a criminal record. She testified that she was not given an opportunity to explain herself and that Naidoo made her feel as if she were a criminal. He stated that they would have to attend Court. He had a certified copy of her visa and explained that if she had a criminal record, it would be difficult to obtain a visa in future.

[77] She was scared and enquired whether B[...]’s mother could collect their daughter, but Naidoo refused this request and stated that if the family arrived at the police station, they would also be arrested. She was of the view that the police station was not a good place for her daughter because of the COVID-19 pandemic. C[...] was stressed and testified that they had neither food nor water available and there was no indication as to how long they would be detained.

[78] C[...] testified that that they were at the police station for over an hour and a half, yet nobody explained what the procedure was. Naidoo instructed her to sign the warning to appear in Court and the notice of section 35 rights²⁹ and she complied. She assumed that the reason why they were brought to the police station was because they were on the beach. C[...] testified that she knew her daughter was terrified because of the way she clung to her and thus she breastfed her daughter often to calm her down.

[79] The questioning in the interrogation room ended when they were told to sign the notices and attend Court on 6 August 2020, which was a day before her visa was due to expire. She confirmed B[...]’s version that after the interview room, they were taken to another room where they spent another thirty to forty minutes³⁰.

[80] C[...] testified that while they were at the police station, B[...] posted a picture of their plight on social media. After the incident, she realised that there was social media interest in their matter and she was terrified that Naidoo would take revenge

²⁹ Exhibit A, p41, 43

³⁰ Exhibit A, p75

on them. She explained that her psychological problems started after the incident and became progressively worse as she feared being deported from the country.

[81] At some stage after the incident, C[...] contacted the Consulate of the Czech Republic as she was terrified about the Court case and that something would happen to them. The advice received was that she could return to the Czech Republic because it was a publicised case, that it would be best for her to return to her country of birth and that remaining in South Africa could be dangerous for her. However, she did not wish to return and split up the family, knowing that B[...] could not join them on the repatriation flight. She testified that they decided to sell everything to cover the costs of flights. On 6 June 2020, she and her daughter flew out on a KLM flight to the Czech Republic, which is where she resides permanently. B[...] arrived in the Czech Republic about 6 months later.

[82] C[...] testified that she received online psychological help, though she found that it was not helpful. She also testified that it would have been better for her to have received medication, but she did not receive any at the time. She felt that the Czech Embassy/Consulate had pushed them to leave so that they could be safe, but she also wanted to leave South Africa as she was scared that she would have a criminal record and due to the media attention regarding the case.

[83] Naidoo appeared to do whatever he liked, and she feared that he would seek revenge against her. She maintained in examination in chief that throughout the incident and at the police station, she was not afforded an opportunity to provide her point of view and to explain what had happened on the beach.

[84] She testified that she and B[...] eventually split as partners. They had shared care of their daughter, and he settled in the Czech Republic to be close to his daughter. She did not return to South Africa other than to visit B[...] 's father when he was ill. She believed that she had not fully processed the incident internally.

[85] With reference to the photograph of Naidoo in the interview room, C[...] testified that he removed the mask during the interrogation and would intermittently leave it on the desk in front of him. She and B[...] wore their masks throughout.

[86] C[...] was referred to the transcript of the recording taken during the interview³¹. She testified that she indicated to Naidoo that their daughter only ran onto the beach for two seconds. She tried to explain to him that they respect the procedure and that she had never with the police in the past. She denied that she and B[...] played in the sand. She confirmed the correctness of the transcript of the conversation with Naidoo.

[87] C[...] also confirmed B[...]’s testimony that Mr. Riley was appointed to assist them with the criminal matter and that the charges were eventually withdrawn. She understood that B[...] had paid Mr. Riley ‘s fee, but they had a joint account at that time and had paid jointly. She testified that the incident had affected her psychologically.

[88] At the time of the incident, she was residing in South Africa for 16 years and believed that police would protect her, however, the plaintiffs were treated like criminals. As a result of the incident, she and her daughter had to leave South Africa at very short notice, and in circumstances where she had fought to build a life, career and a relationship in South Africa. She testified furthermore, that B[...] is only living in the Czech Republic so that he could be near their daughter. He did not want to leave South Africa, but the incident changed their lives.

[89] C[...] became emotional during the trial, stating that it brought back feelings related to the arrest incident. She had lost all trust in the police and elaborated that she was prone to panic attacks. The worst part for her was that the incident ended the relationship between her and B[...] and that even though they still communicate, they are no longer fully functional as a family as they were prior to the incident.

[90] In cross examination, C[...] testified that the Particulars of Claim, and the detail upon which their claims are based, were correct. She was also privy to the C &

³¹ Exhibit C

A Friedlander letter³² and confirms that the content was correct as per their instructions.

[91] In respect of the incident, C[...] stated that she may have assisted B[...] in placing the child carrier down on the ground. The remainder of her testimony regarding her approach to her daughter and actions on the beach accord largely with B[...]’s version. Her evidence was also that she explained to her daughter that she had to get off the beach and that it took some time to calm her down.

[92] On counsel’s pressing questions, C[...] explained that it was not a case of them simply grabbing the child and taking her off the beach immediately. At the time that she reached her daughter, the latter was having a tantrum, and she chose firstly to explain to her what was happening. She knew that if she grabbed her and put her down elsewhere, she would run back to the beach.

[93] Insofar as it was put to her that the defendants’ witnesses would testify that the drop from the boardwalk to the beach as depicted on pages 96 and 97 of Exhibit A was higher on the date of the incident than as depicted in the photographs, she testified that the drop down (on 4 May 2020) was as per the photos, because if it was not, then her daughter would not have been able to get down onto the beach. However, she conceded that she did not see how the child got onto the beach.

[94] As for the police presence, she testified that she saw them on the boardwalk and saw that there were two males and one female officer, who joined them later. She could not answer whether it was the first time she had seen them as she did not concentrate on the police presence at that stage.

[95] C[...] testified that as she was not in the police van with B[...] she could not say whether there were other suspects in the vehicle with him. It was put to her that B[...] had eventually admitted to being mistaken about his statement that there were other persons in the police van with him on the day of the incident. She confirmed

³² P5

that at the time, people were not allowed to be on the beach. In her affidavit³³, she stated that she did not interpret the lockdown regulations to mean that she could not go to the Muizenberg beachfront or the boardwalk. She testified that she did not consider it a breach of the regulations and at the time she was confused. Counsel put to her that there was no confusion and that she knew, at the time, that she could not be on the beach.

[96] It was also put to her that Naidoo would testify that he had informed her on the day of the incident about the reason for her arrest, more specifically, that she was on the beach and therefore transgressing the regulations. To this, C[...] responded that she did not consider that she had breached any regulations and she was simply not on/at the beach to indulge in a picnic, swimming or surfing but had entered upon the beach to remove her daughter.

[97] C[...]’s testimony as to waiting in the passage and that they were with Naidoo in the boardroom, and thereafter being taken to another room, accords with B[...]’s account of events. Counsel put to her that paragraph 17 of the Particulars of Claim which pleads that they were in a confined area of the police station with other members of the public was thus incorrect. C[...]’s response was that she and B[...] and the child had to wait and walk through the corridors at the police station and pass the public.

[98] It was put to her that that the pleaded period of detention, being 6 hours, was incorrect, and that B[...] testified that they were at the police station for approximately 3 hours, and she agreed with the estimated 3 hours. As to why there was an error in the pleadings regarding 6 hours, C[...] responded that in respect of certain aspects, she gave instructions to legal representatives in accordance with her emotions.

[99] Insofar as the processing by Naidoo was concerned, C[...] maintained that he never provided her with an opportunity to present her side of the story and that it was one-sided and all about him. She was made to feel that she was a criminal and that she would be deported from South Africa.

³³ Exhibit A, p119

[100] C[...] was questioned about the transcription of B[...]’s recording in the boardroom³⁴. She confirmed her understanding at the time that she would have to attend Court for the criminal matter, but that her visa would expire the day after they were required to be in Court. She explained that she was preparing for her visa application, and Naidoo had indicated that she would have a criminal record because of the incident on the beach. She required a clear criminal record for purposes of the visa application.

[101] Counsel put to her under cross-examination that Naidoo would testify that he never told her that she would be deported from South Africa. However, she disagreed with this version. Insofar as their daughter was concerned, C[...] is adamant that the police station was not a place for a toddler and that she did not belong there particularly during the Covid pandemic.

[102] It was put to her that the transcript and the recordings indicate that her daughter was not crying during the time at the police station. Furthermore, that Naidoo and Claasen would say that they never saw the child in any discomfort. C[...], however, was firm that her daughter was not fine at the time and that had she been, she would not have requested from the police that B[...]’s family be allowed to collect her and take her home. She reiterated that this was during the height of the Covid-19 pandemic and it was clear that people in the police station were not adhering to safety protocols.

[103] C[...] elaborated that while at the police station, she breastfed her daughter to keep her quiet and peaceful. It was also put to her that while they complained that there was no food or water at the police station, they had never requested it. She had no comment to this statement.

[104] C[...] testified that neither she nor her daughter contracted the virus after the incident and their time at the police station. She explained that she stayed at home with her daughter for a week and a half, thereafter, had access to an attorney and

³⁴ Exhibit C

approximately 3 weeks later, they received news that the criminal charges were withdrawn.

[105] C[...], however, testified that the matter was in the media, she feared the retaliation and revenge by the police, and she was damaged emotionally and hence, she opted for a repatriation flight to the Czech Republic. Counsel put to her that there were approximately 11 articles which were discovered by their (plaintiffs') legal representatives in the matter and that while the incident received extensive media attention, it was clear that B[...]'s view was requested.

[106] Counsel furthermore put to C[...] that had he wished to do so, B[...] could have responded that he had no comment to the media enquiries, but this was not the case. C[...] agreed. It was furthermore put to her that the defendants would argue that the media/news articles were written with B[...]'s input. C[...]'s response was that B[...] spoke on behalf of the plaintiffs.

[107] Counsel further put to C[...], with reference to the Eyewitness News article plus B[...]'s social media post showing a photo of C[...] breastfeeding their daughter in one of the police station rooms³⁵, that B[...] was the author of the media sensation/interest in the matter and that her alleged fear of Naidoo and the police, was as a result of such media interest in the matter. C[...]'s response was simply that she was grateful that B[...] had represented all of them.

[108] In addition, she was also questioned about the alleged harassment by the police after the incident (as pleaded). C[...] denies having any video footage of any alleged harassment by the police in the form of them (the police) ringing the doorbell at their residence in Muizenberg. Furthermore, she also could not testify as to how often the harassment is alleged to have occurred.

[109] It was put to her that aside from their attorney's correspondence, there was no other indication on record and from the discovered documents, that there were other police visits to their residence or police harassment. C[...] replied that they saw a

³⁵ Exhibit A, pages 66-67

police vehicle in front of their house, but they had no record of it. She also conceded that Naidoo did not visit their residence.

[110] C[...] elaborated that after the incident, she was in a very bad state and hid in the apartment, afraid of the police.

[111] In re-examination, C[...] testified that the entire incident caused her distress. She was offered psychological assistance but declined it and rather stayed home. She also testified that she did not know that B[...] was communicating with the media. As to the incident, she testified that they were on the beach when the police approached them and she was aware that the lockdown regulations at the time, did not allow for her to be on the beach.

[112] She clarified that she did not consider that she was in breach of the regulations because she only entered the beach to retrieve her daughter who had run onto the beach: it was a natural reaction of a mother to retrieve her young child.

[113] Her concern regarding her visa was that she would be illegally in the country once it expired, which was a day after the Court date. In addition, her visa application would require no criminal record, and she would need to apply for police clearance for the visa application. She therefore could not have a criminal charge hanging over her head.

The context within which the incident occurred

[114] Prior to Naidoo's testimony, the defendants' counsel made a brief statement, impressing upon the Court that the context as to how the police was required to act at the time of the incident, 4 May 2020, was significant³⁶. She emphasised that alert level 4 had recently come into effect and the country and its citizens were faced with

³⁶ There was no objection to the defendant's counsel making a brief statement prior to commencing the testimony of Naidoo

new legislation. Police were faced with new crimes. It was a time of much uncertainty about the virus and its effects, with thousands of people dying worldwide.

[115] The implementation of these new regulations was the responsibility of the police services. Counsel emphasised that the offence was committed by the plaintiffs in the presence of police officers and as a result, the members of SAPS were entitled to arrest the plaintiffs. The detention was only insofar as the processing of the charges were concerned and accordingly the actions of the police were justified and reasonable in the circumstances.

The arresting officer: Brigadier Colonel Vassie Naidoo

[116] As with the plaintiffs, Naidoo testified at length. In 2020, he was a Brigadier in the SAPS and had been in service for 41 years. The incident occurred while he was the station commander at Muizenberg police station and held the rank of Colonel. He testified that section 205(3) of the Constitution mandates the responsibility of the police to uphold and enforce the law, to provide a safe environment for all citizens and to prevent crime and this entailed vast obligations and duties.

[117] He explained that the number of people succumbing to the virus in May 2020 was scary and SAPS was required to implement the regulations and the Act. He testified that he and Classen did foot patrols at Muizenberg Beach and that people were allowed to exercise between 06h00 to 09h00. The police received complaints about people breaking the regulations and exercising on the beach, which was a restricted area.

[118] On the day of the incident involving the plaintiffs, the police were near the ablution facility. He observed B[...] sitting on the beach and C[...] was on her knees. Both were playing with the child in the sand, facing toward the beach. From his observation, they seemed like they were relaxing on the beach. He estimated that they were probably 200 metres from the boardwalk.

[119] The police approached the plaintiffs to direct them to leave the beach, accompanied them to their vehicles, arrested them and informed them of their rights and the charges. There was no reason for the police to arrest them in public and embarrass them. The child seemed relaxed and they seemed to be having a family outing. He denies that the child was screaming or shouting at the time.

[120] Naidoo was questioned about the drop from the boardwalk the beach³⁷ and he estimated it to be a 1,5-metre drop. According to him, there was no way the child could run onto the beach on her own because the drop is too steep/high for a child of that age. He denies that the police were in any way aggressive as they approached the plaintiffs. However, he explained that when they arrived at the police van, B[...] wanted C[...] to enter the van with him and he became argumentative.

[121] Naidoo then explained to him that he should not resist and that C[...] had to enter the police vehicle. He denies that there were other people in the police van at the time that B[...] entered it. He and Claasen then drove B[...] to the police station while his female colleague, Colonel Rossouw, drove and escorted C[...] and the child to the police station.

[122] At the police station the plaintiffs were taken inside, sanitised and their temperatures were taken and thereafter they were escorted to the boardroom. According to Naidoo, the plaintiffs were not going to be locked up and kept in police holding cells. They were provided with a Court date and there was never any indication that they would be kept in the holding cells.

[123] Naidoo explained that he processed the section 35 notice and confirmed his signature on both documents. The plaintiffs were arrested at 08h30 and the notices were completed at 09h30. They were released at 12h00. Insofar as the boardroom is concerned, he testified that it was very large, much larger than an office.

³⁷ Exhibit A, p96

[124] Naidoo was questioned at length about the conversation he had with both plaintiffs. He testified that they asked many questions, and he explained the consequences of their actions. He also 'schooled' them in a 'fatherly' tone.³⁸ He did not enjoy arresting them, but they broke the law. Naidoo referred to his factual report regarding the arrest of the plaintiffs³⁹.

[125] He was required to submit a report to the SAPS Provincial Commissioner and at the time, he did not know that there was a formal complaint and article in the media regarding the arrest of the plaintiffs. According to his report, on the date of the incident, all the police officers wore masks and complied, as far as possible, with social distancing requirements. He explained that if people were 1,5 metres apart then there was no legal requirement to wear a mask. Naidoo elaborated that sat 1,5 metres from the plaintiffs in the boardroom. There was thus social distancing, they were in a large room with ventilation and therefore there was no requirement to wear a mask.

[126] Naidoo had no idea where exactly the plaintiffs lived and denied ever visiting them at their residence. According to him, the offence was serious and he could have detained both plaintiffs, but they were never going to be detained in the holding cells.

[127] He explained that the purpose of the plaintiffs' arrests was to secure their attendance at Court. The SAPS 496 release was regarded as a 'free bail'.⁴⁰ They were not given a fine for the offences as there was no fines stipulated at the time.

[128] The cross examination of Naidoo was extensive. Naidoo agreed with the plaintiffs' Counsel's statements that the Covid-19 pandemic was a momentous event worldwide, that many citizens died from the virus and that people were suffering in many ways. The police had to enforce the law and would assist the Government in trying to save lives. He was asked whether he was aware of the President's speeches and testified that he had heard most of the President's addresses to the

³⁸ Naidoo used these words during his testimony

³⁹ Exhibit A, p29-130

⁴⁰ Generally, the person is released on warning in terms of section 72(1)(a) of the CPA

nation. A portion of one of the President's speeches was read out and it was emphasised that people were required to co-operate, work together and be compassionate.

[129] Naidoo testified that according to his understanding, the President was talking to the citizens of the country and that when he was off duty, he was a normal citizen but when on duty he had the rank of a police officer. He was mandated in terms of section 205 of the Constitution and had a duty to comply with the Act. He disagreed with counsel's statement that the police were required to be compassionate and that the statement of the President regarding compassion applied to the police as well.

[130] Naidoo's testimony was to the effect that when he encountered someone who broke the law, he could not be compassionate as he was wearing a different hat. It was put to him that he had arrested the plaintiffs on suspicion of committing offences, but Naidoo pertinently pointed out that there was a difference between a suspicion of commission of a crime and an offence committed in his presence, which is what occurred at Muizenberg Beach

[131] He was adamant that the plaintiffs committed an offence in his presence and it was not up to him or his colleagues to state that they were guilty, but that the law was required to take its course. The plaintiffs' counsel put to him that he/the police stated that his clients were guilty in that they had committed an offence in his presence. However, Naidoo persisted that that he did not state that the plaintiffs were guilty of the offence: he stated that the offence of being on the beach was committed in his presence. He explained further that the purpose of the arrest was to bring the plaintiffs to Court and that it was not up to the police to determine that the person was guilty. He elaborated that after an arrest there followed a prosecution and that the SAPS role was part of the justice process.

[132] It was put to him that there was never a Court appearance, that the plaintiffs were legally represented and that the charges were withdrawn. Naidoo's response was that the plaintiffs could have reached an agreement with the National Prosecuting Authority (NPA) but it was up to the NPA to decide how to deal with the

prosecution. As far as he was concerned, he performed his duty. He could not comment on the basis on which the charges were withdrawn.

[133] Naidoo was questioned about the offences or charges as described on the Notice of rights and the SAPS 496. He admitted that on C[...]’s section 35 Notice, the reason for detention refers only to being found on the beach, while B[...]’s Notice refers to being on the beach and failure to confine to residence.

[134] Naidoo admitted that Regulations 16(2)(a) to (e) did not apply to the plaintiffs; that the incident and arrests occurred at 08h30 and that Regulation 16(2) allowed people to leave their residences between 06h00 and 09h00. He conceded that the plaintiffs thus had the right to leave their home at that time. Furthermore, he also admitted that the Muizenberg Promenade/boardwalk was within 5 kilometres of the plaintiffs’ residence.

[135] He accepted that the prosecutor could add charges and decide on which charges to proceed with against the plaintiffs. He denied writing out the SAPS 496 Notices, stating that they were completed by the detective assigned to the matter. He was not prepared to concede that the SAPS 496/Warning to appear in Court were incorrect. Naidoo knew the SAPS Code of Conduct and as a police officer, he was required to read it every day.

[136] He could not dispute the route which the plaintiffs took from their home to the boardwalk nor how they walked along the boardwalk and ended up on the beach. According to Naidoo, it was impossible for a 21-month-old child to have jumped from the boardwalk onto the sand, and he disputed that she managed to get onto the beach on her own. He estimated the drop from the boardwalk to the beach to be 1, 5 metres.

[137] He testified that when he and Claasen saw the plaintiffs and child, they were at least 5 to 6 metres from the boardwalk. It was put to Naidoo that the third plaintiff grew up on the beach and used it as a “playground” since she could walk. Naidoo’s

response to this statement was to conclude that it thus meant that the plaintiffs intended to place their child on the beach on the day of the incident.

[138] Despite lengthy and persistent cross examination, Naidoo repeated that he did not “buy” the plaintiffs’ versions, emphasising that he saw B[...] seated on his buttocks on the beach. He also stated that he ordered them to leave the beach and informed them that they breached the regulations by being on the beach and advised them of their rights. He did not dispute that the plaintiffs were shocked at the arrest and surmised that they took a chance to relax on the beach and were caught out. He arrested them because they had entered a prohibited area: the beach. He also stated that had the child been throwing a tantrum, he might have approached the situation differently and assisted them in removing her from the beach.

[139] On the issue of whether the plaintiffs were given an opportunity to give reasons as to why they were on the beach, it was put to him that no opportunity was given to the plaintiffs to explain why they were on the beach, contrary to what was pleaded (that they were afforded such an opportunity).⁴¹ When pressed, Naidoo explained that he did not give them an opportunity to provide reasons, but that the detective did so.

[140] Counsel put to Naidoo that it was highly improbable that the two adults would play on the beach with their daughter knowing that the lockdown regulations prohibited them from doing so. Naidoo insisted that they were on the beach on purpose: to relax and/or to play with their daughter. He did not agree with their version, as put by the plaintiffs’ counsel, that the only reason they were on the beach, was to remove their daughter and return her to the boardwalk area.

[141] Naidoo also disputed that the child kicked up a fuss and had a tantrum when her parents wished to remove her from the beach. He testified that she was never agitated, nor screaming when he and Claassen approached them. His view was that B[...] could easily have picked her up and removed her from the beach rather than having to wait for C[...] to get to the scene. He eventually conceded that

⁴¹ Plea, par 17.5

he did not see B[...] put the baby carrier down near the coloured huts and remove his daughter and place her on the boardwalk.

[142] At the time that he was arrested and placed in the van, B[...] wanted C[...] and their daughter to travel with him, which Naidoo refused. He stated that the law did not allow a car seat and C[...] was placed in the other vehicle with their daughter. He confirms that she was breastfeeding and that the vehicle was driven by a female colleague. At some stage at the police van, B[...] became argumentative and he cautioned him to co-operate, but he denies threatening B[...].

[143] Naidoo also re-affirmed that the factual report was meant for the Provincial Commissioner pursuant to an internal investigation⁴². In lieu of the audio recording, it was put to Naidoo that he was heard saying to Claassen that it was after 09h00 and that there were still people running and walking and that they should be arrested. Naidoo admitted making the statement and explained that as it was after 09h00, the regulations required people to be in their residences ⁴³.

[144] It was put to Naidoo that his tone and attitude in wanting people arrested (as heard on the audio recording) was punitive. Naidoo held firm that he had to follow process and where people were outside after 09h00, they were contravening the lockdown regulations and could be arrested. He emphasised that the police would arrest but not punish. He was extensively cross examined on this aspect and the police's attitude and approach at the time.

[145] Naidoo explained that in terms of regulation 16(2), the time allowed for exercise was from 06h00 to 09h00, and anyone who was still outside was breaching the regulations. The police were thus entitled to arrest those people who failed to comply with the law. While he understood that there was an internal enquiry, he was ultimately not found to have flouted the police code of conduct.

[146] Naidoo persisted that it was not the police's role to conclude that people were guilty but in respect of the plaintiffs, the offence was committed in his presence, and

⁴² Exhibit A, p129-130

⁴³ Exhibit C, p1

his role was to arrest them in order to bring them before Court through the SAPS 496.

[147] Naidoo questioned the legality of B[...]’s recording of the conversation and processing in the boardroom. He testified that the charge and alternative charge were explained and that he informed them that an admission of guilt did not apply. He also felt that the lockdown regulations were excessive. He agreed with the view that it was daunting times. However, he emphasized that there were citizens who were intentionally breaking the law and challenging the police.

[148] As for the boardroom, he could not confirm whether he sat at the longer or smaller table but does confirm that he was questioning them after 09h00. As for not wearing a mask throughout his interaction with the police, he explained that if there was social distancing of 1, 5 metres between people, wearing a mask was not required. He confirmed that temperatures were taken on entry to the police station and hand sanitising occurred.

[149] With reference to regulation 5, counsel put to Naidoo that he was required to wear a mask in the police station as it was a public space. Naidoo was of the view that the police station was not a public space but, in any event, it was sanitised, all protocol was followed and the plaintiffs sat at other tables in the boardroom.

[150] In respect of the transcript of the conversation in the boardroom, Naidoo stated that he explained to the plaintiffs that the offence was serious in that they were on a prohibited area, the beach. It was put to Naidoo that he intimidated the plaintiffs by informing them that they were in trouble and that they would receive a conviction. This caused them to be fearful.

[151] Naidoo disagreed with the accusation. He referred to the transcript of the audio recording in the boardroom and remarked that B[...] was clearly relaxed and understanding. Where the plaintiffs required clarity, he then provided it. They wished to know what the consequences would be and what could happen and he had then

explained this to them. He denied that he had intimidated them and it was not his fault that the plaintiffs misunderstood him. He denied intending to bully them.

[152] Naidoo was of the view that the plaintiffs had no right to record him and had an ulterior motive. He was innocently explaining the charges and what would happen as far as the process and consequences were concerned. He also apologised in Court if it were seen that he had exceeded the bounds. He was questioned about what he meant when he stated that "*it will stick*"⁴⁴. His response was that there was a *prima facie* case against the plaintiffs, but it was up to the prosecutor to decide on the charge to proceed with. He could not comment on the issue related to C[...]’s visa.

[153] Naidoo elaborated that the plaintiffs knew that a Court would have to decide about their guilt. His view was that B[...] fully understood what the due process was. As for C[...], she asked about the Court date and what would happen if she were out of the country at the time she was required to appear in Court, and he explained the procedure about an appearance in Court. According to Naidoo, the plaintiffs were over-exaggerating. He strongly questioned why B[...] would record only part of the session in the boardroom and not the rest. He furthermore testified that at no stage was it indicated that he was intimidating them.

[154] In addition, he stated that the second plaintiff did not come across as shocked, distraught and fearful. He merely processed them, yet he was maliciously recorded. It was put to him that they were intimidated, threatened and that he made comments on C[...]’s deportation, that she would not be eligible to apply for another visa and would face a criminal conviction. As a result, they were not treated with dignity.

[155] Naidoo denied this version and stated that when one has regard to the transcript, it is not reflected that he did not treat them with dignity. He had a normal, informative conversation with them and he/the defendants could not be held responsible for how the plaintiffs felt.

⁴⁴ Exhibit C, p5

[156] In respect of the fact that C[...] and their daughter took a repatriation flight, Naidoo's response was that it was her choice to do so, that he had no control over that, that she had legal representatives, and how the plaintiffs felt (at the time) could not be seen to be the responsibility or fault of the police. To the extent that the charges were withdrawn, he testified that it was good luck to them. It was furthermore put to him that the family was split up because of the incident and that they all left the country after the incident⁴⁵. Naidoo's response was that neither he nor the defendants could be held responsible for those actions and decisions.

[157] It was put to him that the plaintiffs were never given the opportunity at the promenade to provide an explanation to the police as to why they were on the beach and that the reasonable person would not have followed the protocol in the circumstances. Naidoo's view was that in terms of his constitutional obligation, the police are mandated to enforce the law, that it was a state of disaster, that section 205 of the Constitution and section 40(1)(a) of the CPA gave the police the authority to apply the law and arrest the plaintiffs: they were on the beach, which was an offence and it was committed in his presence. He furthermore testified that the police was not a form of alternative dispute resolution. It was furthermore put to him that it was unprecedented times, that there was immense fear among citizens, and that he had arrested two people together with their daughter and thus acted unreasonably.

[158] Naidoo was unmoved and persisted that there was a blatant contravention by the plaintiffs of regulations in that they were on the beach. His view was that the police acted quickly in arresting them and that they were entitled to explain to a Court why they were on the beach. Their rights were not violated.

[159] It was also put to him that because of the pandemic and the health crisis, the plaintiffs and the child were exposed to the coronavirus in the police station and in the SAPS motor vehicles. He testified that the police vehicles and police station were sanitised, temperatures were taken on entrance to the station, social distancing

⁴⁵ B[...] left for the Czech Republic several months after C[...]

occurred and masks were worn. In Naidoo's view, the plaintiffs exposed themselves and their child to the risk of the virus when they left the house.

[160] He furthermore testified that they were within three hours after they were arrested and that nothing had happened to them. He explained that he refused permission for B[...]s parents because they did not have a permit to enter the police station. He pointed out that none of the plaintiffs contracted the virus.

[161] It was furthermore put to him that C[...] was breastfeeding her daughter in the charge office and *en route* to the police station and that this was degrading. Naidoo vehemently denied that the police caused her embarrassment, and testified that in the police station, C[...] was escorted to a private room by a female officer to breastfeed, and that it was her decision to breastfeed the child. In addition, there is no evidence that the child was distressed and crying or hysterical.

[162] Naidoo took great issue that he was surreptitiously recorded and held the view that B[...] was deceitful in doing so, and that the recording was used to bolster a claim against the police. He made it clear that he had nothing to gain and that his intention was to uphold the law. Finally, it was put to Naidoo that the three plaintiffs were treated in an undignified manner, but Naidoo dismissed this in totality. He testified that he treated them with respect and explained their constitutional rights. He was accused of wrongful arrest but denied this accusation.

[163] In re-examination, he confirmed that the police are not required to provide car seats. The mother was with the child when they entered the police vehicle and that the distance from the vehicle to the police station was not more than 400 metres. He furthermore explained that the protocol at the police station was that they were required to make their own masks. The police station and motor vehicles were sanitised, and the police station/building was regarded as a safe zone. The rooms were physically demarcated in 1,5 metre zones and that they had internal protocols in that persons were not allowed to be less than 1,5 metres of the next person.

[164] In respect of the reference to a fine, as evident from the transcript, he indicated that he stated that he would find out from the prosecutor if a fine of R1 000

could be issued but they were not sure at the time about the/a fine. Counsel put to him that no finding was made that the plaintiffs committed a crime as the matter never made it to Court. Naidoo's response was that it is for the police to arrest when a crime is committed in their presence and it was not for them (SAPS) to determine the plaintiffs' guilt. This was up to a Court.

[165] According to Naidoo, he did his job as a police officer. It came to his attention that the charges were withdrawn on 26 May 2020, but he did not follow the process of the proceedings involving the prosecution. Naidoo reiterated that when the plaintiffs were released on the SAPS 496, all the charges were indicated in respect of both plaintiffs. When questioned at length on the issue regarding the charges and the reasons for arrest under the regulations, Naidoo testified that the plaintiffs were arrested for leaving their house and sitting on the beach. Furthermore, he testified that he informed both plaintiffs of their rights on the scene. This concluded the evidence in the matter.

Common cause, admitted and/or undisputed facts

[166] The Disaster Management Act and its regulations as published in the Government Gazette No. 43258 of 29 April 2020 applied to all citizens on the date of the incident, 4 May 2020. The country was under alert level 4.

[167] **Regulation 16(2)(f)** applied in that people were allowed to leave their residences to walk, run or cycle between 06h00 and 09h00 within a 5-kilometre radius of their place of residence, provided that it was not done in organised groups. In terms of **regulation 24(2)(a)**, beaches normally open to the public or where people gather, were prohibited, meaning that beaches were closed to the public.

[168] **Regulation 31(2)** made it an offence for any person to fail to comply with, *inter alia*, regulation 16(2) and 24(1) and (2). On conviction of failure to comply with the provisions of these regulations, a person was liable to a fine or to imprisonment for a period not exceeding 6 months, or to both such fine and imprisonment.

[169] The three plaintiffs were on the boardwalk/promenade at Muizenberg Beach at 08h30 on 4 May 2020. They lived approximately 400 to 500 metres from the beach. At the time that the police officers approached them, all three plaintiffs were on the beach. At the very least, Naidoo and his colleague Claassen approached them.

[170] Neither B[...], C[...] or Naidoo saw the third plaintiff leave the boardwalk and enter the beach. Put differently, B[...] and C[...], and so too Naidoo, do not know how the minor child got from the boardwalk onto the beach. The child was seated in the sand.

[171] The plaintiffs were told to leave the beach and follow the police, who escorted them to two police vehicles behind the ablution area. The plaintiffs were arrested for being on the beach and their rights were explained to them. B[...] entered a police van and C[...] and their child entered a police vehicle, driven by a female police officer. During the course of the mother and child entering the vehicle, C[...] breastfed their daughter.

[172] The plaintiffs wore face masks during the incident and at the police station. They waited in the passage for a brief period and encountered police officials and members of the public before being escorted to the station's boardroom, which was large, ventilated and contained tables and chairs.

[173] Naidoo processed the plaintiffs in the boardroom, informed them of the charges, the seriousness of the offence(s), completed the section 35 notices and informed them of their Court date. At times during the processing, Naidoo did not wear a mask. The plaintiffs were sitting at a distance from Naidoo while in the boardroom.

[174] At the time of arrest and while in the police station, B[...] used his cell phone to take photos and post about the incident on social media. He also recorded

Naidoo's instructions to junior colleagues in the station and the plaintiffs' processing in the boardroom, without Naidoo's knowledge.⁴⁶

[175] At 09h05, Naidoo informed colleagues at the station that they should pick up/arrest anyone still found running or walking as they were contravening lockdown regulations.

[176] The plaintiffs were issued with warnings to appear in Muizenberg Magistrates' Court on 6 August 2020.⁴⁷ The plaintiffs were not kept in holding cells, nor handcuffed and were allowed to leave the police station at approximately 12h00. They were thus at the police station for three and a half hours at most.

[177] The plaintiffs appointed legal representatives for the criminal matter and for their civil claims. They also lodged a complaint against the Muizenberg SAPS which was addressed to the Ombudsman, and an internal enquiry was held.

[178] The incident and the plaintiffs' arrests received media and social media interest and attention.⁴⁸

[179] While Naidoo had no personal knowledge hereof, it was not disputed that on 26 May 2020, three weeks after the incident, the prosecutor withdrew the charge against the plaintiffs. Thus, the matter was not placed on the Court roll and there was no Court appearance.

[180] It was also undisputed that on 6 June 2020, C[...] and the plaintiffs' daughter took a repatriation flight from Cape Town to the Czech Republic, and six months later, B[...] joined them.

[181] Neither Naidoo nor Claassen visited the residences of B[...] and his parents.

⁴⁶ Exhibit C

⁴⁷ Exhibit A, p40-43

⁴⁸ Exhibit A, p44-73

[182] B[...] and C[...] were aware that being on the beach was against the lockdown regulations. The arrests and detention are admitted.

The reason why the plaintiffs left their residence on 4 May 2020

[183] At the close of the evidence, the defendant's counsel argued that the plaintiffs, as they were seen on the beach, were outside their residence, but not for the prescribed physical activities – walking, running and cycling - referred to in regulation 16(2)(f). She submitted that in view of the evidence, the Court should find that the plaintiffs were outside their residence for the purpose of/intending to relax and play on the beach.

[184] To motivate these submissions, counsel referred to Naidoo's testimony that when he first saw the plaintiffs from his vantage point on the boardwalk, B[...] was seated in the sand and C[...] was leaning toward their daughter. It is not disputed that all three plaintiffs were on the beach shortly before and at the time the police approached them. It was submitted that because they were on the beach, it thus followed that they were (therefore) not outside their residence as allowed by regulation 16(2)(f), but for the sole purpose of relaxing and socialising on the beach.

[185] In respect of this submission, it must be remembered that Naidoo was the only witness for the defendant. It is the defendants' defence that the arrests of the plaintiffs were lawful. It is undisputed that Claassen was patrolling with Naidoo along the boardwalk and in the Muizenberg promenade. Claassen was present when Naidoo approached while on the boardwalk and spoke to the plaintiffs. Yet, Claassen was not called to corroborate Naidoo's version that B[...] was seen seated on the beach.

[186] C[...] admitted that when she was at her daughter's side (this was after she turned around and realised that the child was on the beach) she bent or knelt to speak to her. In the ordinary course of life and a family's outing at the beach, this would not be an unusual interaction between a parent and her toddler. While some

criticism levelled against the inconsistent versions of the plaintiffs on certain aspects is warranted, I must emphasise that they were steadfast on the fact that they left their residence a bit late on that morning as they had first made food for people in the area. Furthermore, the evidence throughout is that B[...] and C[...] were aware that being on the beach was prohibited and that they had until 09h00, to walk outside. This version was not broken down in cross examination.

[187] If I am to believe that by them being on the beach, it should thus be concluded that the plaintiffs breached regulation 16(2)(f) as they were therefore not walking, running or cycling, but rather relaxing, socialising and playing on the beach, then it begs the following question: why would the adult plaintiffs wait until they reached the area of the yellow-green hut⁴⁹ and the wooden steps (opposite the huts), to enter the beach to relax and play in the sand with their daughter? The uncontested evidence is that the plaintiffs walked from B[...]’s apartment, a short distance from the beach, and entered the promenade.

[188] As shown on the photographs, they entered the boardwalk from the mountain side and walked toward the huts, where the baby carrier was placed down. B[...] removed the child from the baby carrier and placed her on the boardwalk. Significantly, in the area where this occurred, B[...] saw police presence. The indication is also that the police were closer to the ablution area which was near to the huts and they were visible to B[...].

[189] If the plaintiffs, on leaving their home, and knowing that being on a beach was off limits to the public, nonetheless intended to socialise and relax on the beach with their daughter, I have to ask why they did not do so as they entered the boardwalk, on the “mountain side” of the beach?⁵⁰ Surely, it would have made sense, if their sole intention upon leaving home was to relax on the beach, to then rather sit down and play shortly after entering the boardwalk which was an area less visible to the police, who were enforcing lockdown regulations. In that way, they would in all

⁴⁹ Exhibit A, p97

⁵⁰ Exhibit A, p97

probability have had more time to play and relax before they were detected or confronted by the police.

[190] It simply makes no sense, given the facts of this case, that the plaintiffs, up until the incident both law abiding citizens, and with a toddler along, would rather seek to enter upon the beach in an area close and visible to police patrols, when they knew that being on the beach is prohibited. Given the surfeit of evidence in this trial, my view is that it would be illogical and highly improbable for the plaintiffs to have decided to relax on the beach yet only do so when they were almost at the end of the boardwalk and close to police officers. It would make more sense that, if the object or purpose of leaving their home on that morning, was to relax on the beach, knowing that it was prohibited to do so, that they would have acted upon that and entered the beach shortly after arriving on the boardwalk and away from police presence.

[191] I thus do not agree with the defendant's counsel's submission in this regard. I find, on the probabilities, that the plaintiffs left their residence with the intention to make the most of the walk and the time available to them before the 09h00 curfew. It was never put to them that their version that they left the house late, was a fabrication. Naidoo could also not dispute that they left their home and entered the boardwalk along the beach from the mountain side, furthest from the coloured huts. He also did not dispute that they lived within the 5-kilometre radius. The plaintiffs' version that they walked from their home to the boardwalk, was not broken down in cross examination.

[192] Furthermore, if the defendants' submissions are to be accepted to be correct, it would also mean that anyone who was outside on the boardwalk, and who, for example, stopped walking, running or cycling for however long, would be in breach of regulation 16(2)(f). This would have created an illogical scenario, with the police arresting anyone who, for example, stopped walking. This could not have been the intention of the legislature when enacting regulation 16(2).

[193] Accordingly, I thus disagree with the defendants' view that the plaintiffs did not comply with regulation 16(2)(f) in that by being on the beach, they were not walking, running or cycling. I find, rather, that the evidence shows that the plaintiffs in all probability complied with regulation 16(2)(f) as they left their residence a short distance away, to walk along the boardwalk of Muizenberg Beach, and were outside within the 06h00 to 09h00 time-frame.

[194] Having regard to the above discussion and findings, I do not find that the plaintiffs were outside their residence on 4 May 2020, for reasons other than the physical exercise allowed by regulation 16(2)(f); in their case, walking. The argument that they contravened or failed to comply with regulation 16(2)(f) is therefore rejected.

The plaintiffs on the beach

[195] I do not intend to repeat the plaintiff's explanation as to how they came to be on the beach. Aspects as to where exactly B[...] placed the baby carrier at the huts, how many police officers were in the vicinity, the distance from the ablution block, are, in my view, not material. B[...]’s version that he put the carrier down, removed their daughter, placed her opposite him and returned his attention to the carrier, was not materially gainsaid. Furthermore, while C[...] stated that she was next to him when he placed the carrier down, she then walked ahead and did not see where he put the child when he removed her from the carrier. There is nothing strange about this version.

[196] It must be remembered that at the time the plaintiffs testified, more than four years had passed, and it is natural that witnesses do not remember every detail of an event. It is important to also note that Naidoo did not see B[...] place the carrier down, nor remove the child from the carrier. While Naidoo sought to suggest – in fact, insist – that the toddler could not jump from the boardwalk to the beach (a height he estimated at 1,5 metres), this amounted to mere speculation.

[197] It must be remembered that it was put to C[...] that according to Naidoo, the height from the boardwalk to the beach, on the date of the incident, was greater than that depicted on the photographs. Thus, while the photographs are useful to show the direction they walked, the boardwalk, the beach and overall assistance as to the area of the incident, if the height from the boardwalk to the beach was different on 4 May 2020, then the photographs serve little purpose on the issue of the child's movement and ability.

[198] Furthermore, Naidoo's view that the child could not have jumped from the boardwalk, nor manage to enter the boardwalk on her own (thus implying that the plaintiffs deliberately entered the beach with her rather than their version that she must have run onto the beach) was largely based on the fact that he was a grandfather of young grandchildren and knew how children would react.

[199] With respect to Naidoo, there was no evidence led in the trial as to the third plaintiff's physical build, how she would react if she were on the boardwalk, whether the height from boardwalk to the beach was lower/varied in certain areas in the vicinity in which she was placed, whether she was able to clamber down the wooden steps unaided, and more. Importantly, there is absolutely no evidence that she was hurt from a fall or received scrapes on her body due to climbing or jumping down to the sand. Had that been the case, I would have been more convinced by Naidoo's views regarding the child's ability or inability to move from the boardwalk to the beach.

[200] Furthermore, aside from all the above issues, there is no indication of actual height measurements from the boardwalk to the beach, and the Court was not requested to conduct an inspection in loco of the boardwalk and beach area.

[201] Importantly, the uncontested evidence is that neither the plaintiffs nor Naidoo saw or observed the third plaintiff's movements. In fact, Naidoo only saw her when she was already seated in the sand, and the plaintiffs, too. The plaintiffs' evidence that she started walking 6 months prior to the incident, spent practically every day at the beach and regarded it as her playground, was not gainsaid and must be accepted. The evidence that it was not high tide at the time is accepted. Having

regard to the above facts, I find that the plaintiffs' version as to how events unfolded from the time B[...] put down the baby carrier, to the moment the police ordered them to leave the beach, to be the more probable.

[202] Furthermore, I do not accept Naidoo's version that it was impossible for the child to get to the sand because of the high drop to the sand. There is also no reason to doubt B[...]s version that when he turned to his daughter, she was already in the sand. It means that she – in whichever way – managed to get herself from the boardwalk onto the beach, unaided. C[...]s testimony on the material aspect supports or corroborates B[...]s in that when she looked back from her position on the boardwalk, her daughter was already seated in the sand.

[203] Ultimately, whether B[...] sat in the sand to try to remove the child and C[...] bent down to speak and rationalise with her, it must be remembered that she was a toddler at the time and may very well have resisted being removed from the beach. To the extent that Naidoo seemed to want to comment on the parental skills of the first and second plaintiffs in that B[...] did not simply grab his daughter and take control of her, this is unhelpful, amounts to personal opinion which is not relevant and does not persuade me that the plaintiffs' versions as to how they came to be on the beach, should be rejected as a fabrication.

[204] Considered holistically, the plaintiffs' (particularly B[...]s) version that they saw their child on the beach and went to her to remove her from the beach, is accepted. It therefore matters not whether he sat down or C[...] bent or knelt to calm their daughter and explain why she could not be on the beach. This does not detract from the common cause fact that the plaintiffs were on the beach, which was a prohibited area in terms of lockdown regulation 24(2)(a).

[205] In all probability, their daughter clambered down from the boardwalk or jumped onto the sand and ran a short distance before B[...] and then C[...], realised what had happened.

The commission of an offence/s

[206] The plaintiffs' counsel submitted that his clients did not contravene regulation 24(2), as read with 24(1) and 31(2). He argued that regulation 24(2) does not say that it is an offence to be on the beach. The submission is based on the view that regulation 24 (1) and (2) cannot be interpreted to impose strict liability and that there is no basis for the Court to find that the Legislature intended that culpability/intention should not be an element of the offence in relation to being on a prohibited area, the beach.

[207] The submission is that the Legislature could never have intended to punish a person for simply being on a beach, which was a prohibited or closed area/space, and that the plaintiffs could only be guilty of contravening regulation 24(1) and 24(2)(a) if they had intended to be on the beach. In this regard, counsel for the plaintiffs relies on the view held by author CR Snyman in *Criminal Law*⁵¹ on the topic of strict liability.

[208] I have considered Snyman's view on the topic. He explains that strict liability equates with liability where culpability is excluded. This is the case with statutory crimes and not common law crimes⁵². The author discusses the principles for determining strict liability, the applicable rules and the criticism of strict liability.

[209] While Snyman's views on strict liability may be correct – and I express no opinion on it – there is a fundamental difficulty with the plaintiffs' submission that the Legislature did not intend to impose strict liability (that is, no culpability) when it enacted regulation 24. According to the plaintiffs, the regulation should be interpreted as if strict liability is not an element of regulation 24(2)(a). The flaw in the argument is this: the plaintiffs conflate their arrest by a peace officer in terms of section 40(1)(a)

⁵¹ 7th Edition, 2020, Lexis Nexis Online Publication, p574-576

⁵² Criminal Law supra, p573

for breaching the regulation by being on a prohibited area, with their **guilt** in relation to the offence created by regulation 24(2)(a) read with regulation 31(2).

[210] Simply stated, the entire argument on strict liability is focussed on how nonsensical⁵³ it is to suggest that the Legislature intended that parents of a child who walk onto a beach to remove her because she unexpectedly ran onto the beach, would be guilty of an offence. In my view, this is an incorrect approach to the question as to whether an offence was committed in the presence of Naidoo, the peace officer, which is the pertinent question to determine whether the arrest was lawful, or not.

[211] Thus, the issue on which the damages for unlawful arrest and detention is based is not the guilt or innocence of the plaintiffs. For the determination of their guilt on such statutory offence, the issue of strict liability may (or may not) arise, but importantly, that question and determination would fall solely within the purview of the Magistrates' Court had the plaintiffs been prosecuted and the matter proceeded to trial. My view, therefore, on the strict liability argument, is that it has no relevance to the question of the lawfulness of the arrest and detention.

[212] Furthermore, the question of the Legislature's intention and whether it should have expressly or otherwise included strict liability as an element of regulation 24(1) and/or 24(2)(a), would have been best suited in an action or application against the Minister of Co-operative Governance and Traditional Affairs, alternatively, in this action with the Minister joined as the third defendant, which is not the case. The attack on regulation 24 and/or the regulations applicable has also not been pleaded in any way. Accordingly, the submission is misconceived and thus rejected.

[213] Regulation 24(1) and (2) deals with places and premises closed to the public. It states that (*inter alia*), beaches, a place normally open to the public, or where

⁵³ Plaintiffs' heads of argument, par 274-278

people gather, are closed and prohibited. It was submitted on behalf of the plaintiffs that these two sub-regulations do not create an offence. Viewed in isolation, I would agree that regulation 24(1) and (2)(a) do not create an offence.

[214] However, the submission fails to consider the provisions of regulation 31(2) which reads as follows:

Offences and penalties

31. (1)...

(2) *For the purposes of this Chapter, any person who fails to comply with or contravenes the provisions of regulations 16(1), 16(2), 16(3) and 16(4), 19, 24(1) and 24(2), 26(1) and 26(2), 27 and 28(3) of these Regulations commits an offence and is, on conviction, liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.*⁵⁴

[215] Regulation 31(2) makes non-compliance with regulation 24(1) and (2), a criminal offence, punishable on conviction to a fine or imprisonment. Thus, contrary to the plaintiff's counsel's submission, one cannot and should not read regulation 24(1) and (2) in isolation. The submission that the Legislature could never have intended to punish someone for simply being on a beach, which was closed or prohibited, would be convincing if the incident occurred in "normal times". However, as is commonly accepted, and emphasised by both parties during the trial, these were "unprecedented times", which were anything but normal.

[216] In May 2020, the Act and its regulations applied, and strict measures were imposed through legislation to curb the spread of the Covid-19 virus. On reading

⁵⁴ My emphasis

regulation 24(1) and (2), with regulation 31(2), there is no doubt at all that being on a beach was prohibited under alert level 4 and any person found contravening these regulations, could be charged with an offence and punished by law.

[217] Simply put, a previously normal or everyday activity such as entering or being on a beach, was prohibited and punishable as an offence/crime. As the defendants' counsel correctly submitted, new offences were created and the police had a constitutional duty and obligation to enforce law and order.

[218] Having regard to the legislative prohibition and the wording of regulation 24(1) and (2) read with regulation 31(2), my view is that the plaintiffs' submission that intent to enter the beach is necessary, is incorrect. More specifically, all that these regulations require, is for a person to be on a beach, being a prohibited area, to be considered to have committed the offence/breached the regulations. Whether the person sits, stands or lies on the beach is immaterial, and so too, why and how they came to be on the beach, and what their intention was, if any at all, on entering the beach. Plainly stated, at the time, under alert level 4, the mere fact that a person was on a beach, for whatever reason, was punishable as an offence.

[219] As Naidoo was the officer who saw the plaintiffs on the beach, he was entitled in terms of the aforesaid regulations, read with section 40(1)(a) of the CPA and section 205(3) of the Constitution, to arrest the plaintiffs, which he did. Section 40(1)(a) of the CPA, which is part of the defence relied upon in the Plea, allows a peace officer to arrest a person without a warrant, where the person commits or attempts to commit any offence in the officer's presence. An offence is defined in section 1 of the CPA as "an act or omission punishable by law". It is trite that there are common law and statutory offences and this matter deals with a statutory offence.

[220] There is no doubt therefore, that being on the beach, a prohibited area, is a statutory offence in terms of the regulation 31(2). Thus, Naidoo, who was a peace officer on 4 May 2020, and who observed the plaintiffs on the beach, was entitled to

arrest them without a warrant as they committed the offence of being on the prohibited area, in his presence. The action amounts to a breach of the regulations.

[221] The cross examination about Naidoo deciding that they were guilty and the lengthy questioning about the plaintiffs' guilt was consistently met with Naidoo stating that it was not up to him to determine their guilt, but up to the Court. He was correct on this aspect and maintained that he was entitled to arrest the plaintiffs who were in breach of the regulations as aforesaid. My discussion and findings earlier on the issue of strict liability and the guilt of the plaintiffs, refer.

[222] It is important to also emphasise that the offence created by regulation 24(1) and (2) as read with regulation 31(2) - being on a beach, which is a prohibited area - constitutes an offence, as it is *an act punishable by law*. The next question is whether the defendants have proved that the arrest and detention of the plaintiffs were lawful.

Arrest and detention of the plaintiffs (Claim A)

[223] In *Minister of Law and Order v Hurley*⁵⁵, the Supreme Court of Appeal (SCA) stated that:

“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.”

[224] An arrest and/or detention is/are thus regarded as being *prima facie* unlawful as the wrongfulness consists in the wrongful deprivation of a person's liberty⁵⁶.

⁵⁵ 1986 (3) SA 568 (A) at 589E-F

Having regard to ***Minister of Safety and Security v Sekhoto***⁵⁷, it is evident that where the arrest and detention are admitted, or established, the onus of proving or justifying the lawfulness of the arrest rests on the State, in this instance, the defendants. In this matter, the arrests and detention of the plaintiffs are indeed admitted, thus the onus rests with the defendants to prove that such arrests and detention are justified and therefore lawful.

[225] Turning to the CPA, section 40(1)(a) reads as follows:

40 Arrest by peace officer without warrant

(1) A peace officer may without warrant arrest any person –

(a) who commits or attempts to commit any offence in his presence.

[226] With reference to ***Sekhoto***⁵⁸ and ***Duncan v Minister of Law and Order***⁵⁹, the jurisdictional facts for a section 40(1)(a) defence are:

- (i) the arrestor must be a peace officer;
- (ii) an offence must have been committed or there must have been an attempt to commit an offence; and,
- (iii) the offence or attempted offence must be committed in the presence of the peace officer.

[227] I am satisfied, from the evidence, the discussion and findings above, that the defendants have indeed proved that: (i) on the date of the incident, Naidoo was a

⁵⁶ See Amler's Precedents of Pleadings Tenth Edition, LTC Harms and MR Townsend, P50

⁵⁷ [2010] ZASCA 141 para [7] and [8]

⁵⁸ Supra

⁵⁹ 1986 (2) SA 805 (A) at 818G-H

peace officer⁶⁰; (ii) the plaintiffs, by being on the beach, committed an offence; and (iii) the offence was committed in Naidoo's presence. Accordingly, I thus find that the defendants have discharged the onus of proving the jurisdictional facts necessary for a section 40(1)(a) arrest.

[228] This does not signal the end of the enquiry. Harms DP, writing for the SCA in ***Sekhoto***⁶¹, reminds us that once the jurisdictional facts are present, a discretion as to whether to arrest or not to arrest, arises in favour of the peace officer. Significantly, while lengthy cross examination ensued on whether Naidoo could and should have acted differently, had acted irrationally and unreasonably, and should not have arrested the plaintiffs, the Particulars of Claim are silent on the issue of the exercise of Naidoo's discretion to arrest; alternatively, it is not pleaded that Naidoo exercised his discretion to arrest, irrationally or incorrectly.

[229] To be clear, on my reading of paragraph [57] of ***Sekhoto***⁶², the SCA holds the view that the question of the proper exercise of the peace officer's discretion should be raised on the pleadings. Similarly, in the more recent decision of ***Minister of Police v Gqamane***⁶³, the SCA confirmed the approach in ***Sekhoto*** and held that:

“[17] The high court similarly conflated the onus to prove the jurisdictional requirements to arrest (which rested on the appellant) and the overall onus to prove other elements of the claim, including improper exercise of discretion to arrest (which rested on the respondent). Once the high court found that the jurisdictional requirements to arrest the respondent were met, the appellant discharged the onus, which rested on it to justify the arrest. This was dispositive of the case pleaded by the respondent. The high court,

⁶⁰ In terms of section 1 of the CPA, 'peace officer' includes any magistrate, justice, police official, correctional official as defined in Section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section.

⁶¹ Supra, para [28]

⁶² Supra

⁶³ 2023 (2) SACR 427 at par [16] – [17]

however, despite finding that the trial court was correct regarding the jurisdictional facts, held that it ought to have considered whether the discretion was properly exercised. The implication of the decision by the high court is that the onus to prove the proper exercise of the discretion to arrest rested with the appellant rather than the respondent. This is contrary to the decision in Sekhoto. The high court erred on this score.⁶⁴

[230] Thus, in **Gqamane**, the issue of discretion to arrest was not canvassed on the pleadings, there was a conflation between the onus to prove the jurisdictional requirements to arrest and the onus to prove an irrational exercise of the police's discretion to arrest. It follows therefore from the SCA judgments that where a plaintiff does not attack the discretion to arrest in their pleadings, and the defendant (State) proves the jurisdictional requirements to justify the arrest, that is dispositive of the claim for unlawful arrest and detention. Essentially it means that the Court is not required to then embark on an enquiry as to whether the police exercised their discretion to arrest, correctly and/or rationally. To do so, would imply that the onus to prove the proper exercise of the police officer's discretion to arrest, rests with the State defendant, and not the plaintiff.

[231] This is the general principle on how to approach the discretion to arrest issue in an unlawful arrest claim. In my view, where **Sekhoto** goes further, is that in paragraph [57] of the judgment, the SCA nonetheless takes cognisance of the fact that even though the discretion to arrest issue was not raised on the pleadings, it was also not ventilated in the trial. In **Gqamane**, the discretion issue was similarly not pleaded and the appeal centred on the jurisdictional facts, which was not an issue in the trial and it seems that a new case was argued on appeal.

⁶⁴ My emphasis

[232] In view of the above discussion, while the exercise of Naidoo's discretion to arrest was not pleaded (not unlike in **Sekhoto** and **Gqamane**) the alleged irrationality of Naidoo's decision to arrest and the exercise of his discretion was fully canvassed and ventilated at length during the trial⁶⁵. Thus, while mindful of the general principle established by the SCA judgments, because the discretion to arrest was dealt with in the trial, I address it below, and certainly for completeness' sake. I am mindful, however, that the onus to prove that Naidoo improperly exercised his discretion to arrest, remains with the plaintiffs, should have been pleaded, and forms part of their overall onus to prove the elements of their claim for unlawful arrest.

[233] Much was made during Naidoo's cross examination as well as the questioning of the plaintiffs, that they should not have been arrested because they are the parents of a child who had entered the beach and they shortly thereafter, followed her to remove her from the beach.

[234] It is evident from **Sekhoto**⁶⁶, that when one considers the discretion of the peace officer to effect an arrest or not to arrest, such decision must be informed by his intention to bring the person(s) to justice. If, on the other hand, the decision to arrest the person is informed or based on any other intention – for example, whether to punish or frighten the person – then the peace officer has used his power to arrest for an ulterior purpose. It cannot then be said that he had the intention to bring the person to justice or to bring the person before Court.

[235] Counsel for the plaintiffs submitted that Naidoo was required to have exercised his discretion rationally, and by arresting the plaintiffs for merely being on the beach when they wished to remove their child, he had acted unreasonably and irrationally. Furthermore, it must be recalled that it was put to Naidoo during cross examination that a reasonable person would not have followed his protocol in the

⁶⁵ Pleadings, A9 – A10

⁶⁶ Supra, para [30] – [44]

circumstances, as it was unprecedented times and the arrests of the plaintiffs was unreasonable.

[236] Naidoo stood firm on his decision to arrest the plaintiffs. He saw the plaintiffs on the beach, observed that they were on a prohibited area according to the regulations, and arrested them. He repeated that it was not up to him to state or determine that they were guilty of the offence, and that the object or purpose of the arrest was to bring them before a Court, where they would be entitled to explain their story or reason why they were on the beach.

[237] He testified that it would be for the Court before whom they appeared, to decide on the issue of their guilt. More than once, Naidoo emphasised the difference between his role as the arresting (peace) officer, who observed the commission of an offence which occurred in his presence, and the role of the Court, as the arbiter of the plaintiffs' guilt or innocence. In my consideration of this aspect, I agree with the defendants that Naidoo is correct: the determination of guilt in relation to the breach of regulations, lay with the Magistrate, not the police who observed the commission of the breach/offence.

[238] In my view, while Naidoo was at times long-winded, irritable, had very strong opinions on certain topics, assumed that the child could not by herself have left the boardwalk and entered the beach, he remained steadfast on the reason for the arrest, as well as his purpose or intention: that is, to bring the plaintiffs before Court. He emphasised that as a police officer, he was obliged to act in terms of section 205(3) of the Constitution and cannot be faulted on this obligation.

[239] Returning to the plaintiffs' view, can it be said that Naidoo, because of the pandemic and the general fear and uncertainty which gripped citizens during this time, acted unreasonably by arresting the parents of a minor child for simply being on a beach? To answer the question, I refer to ***Sekhoto***, which is once again a

guiding light⁶⁷. The peace officer is required to exercise his discretion as he sees fit, as long as he stays within the parameters of rationality. He may have a number of choices available to him to bring the person to justice, all of which fall within the parameter of rationality.

[240] While **Groves NO v Minister of Police**⁶⁸ dealt with an arrest with a warrant in terms of section 43 of the CPA, the Constitutional Court visited the issue of an arresting officer's discretion in the judgment, as follows:

“[60] Applying the principle of rationality, there may be circumstances where the arresting officer will have to make a value judgment. Police officers exercise public powers in the execution of their duties and “[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries”.⁶⁹ An arresting officer only has the power to make a value judgement where the prevailing exigencies at the time of arrest may require him to exercise same; a discretion as to how the arrest should be affected and mostly if it must be done there and then. To illustrate, a suspect may at the time of the arrest be too ill to be arrested or may be the only caregiver of minor children and the removal of the suspect would leave the children vulnerable. In those circumstances, the arresting officer may revert to the investigating or applying officer before finalising the arrest.”⁷⁰

(footnote retained)

⁶⁷ Supra, para [39] – [44]

⁶⁸ [2023] ZACC 36 par [60]

⁶⁹ Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

⁷⁰ My emphasis

[241] It is evident from the abovementioned authorities, therefore, that the exercise of a discretion by the arresting/peace officer must be guided by the normative standard of rationality, which is seen as a “*minimum threshold*”. The *dicta* in **Groves NO** as considered with **Sekhoto**, would therefore mean that Naidoo was required to act rationally when exercising his discretionary power to arrest the plaintiffs, and should have exercised the discretion “*within the limits of the authorising statute read in the light of the Bill of Rights*”.⁷¹

[242] Considered objectively, the prevailing exigencies at the time included the following: (i) the police were empowered in terms of section 205(3) of the Constitution to combat, uphold and enforce the law; (ii) alert/lockdown level 4 had recently come into effect, along with new statutory offences created by the regulations; and, (iii) the regulations were required to be enforced in order to assist the Government to combat the spread of the coronavirus.

[243] Added to the above prevailing factors, Naidoo was also faced, from his vantage point on the boardwalk, with a couple and a young child, on the beach. While I have found that it is irrelevant whether B[...] was seated on the beach or not, from Naidoo’s perspective at the time, they were not leaving the beach and were committing an offence.

[244] In my view, and having regard to **Groves NO**⁷², the circumstances and situation required of Naidoo to make a judgment call. In that respect, and as he testified, the legislation prohibited anyone from entering a beach as beaches were closed to the public during alert level 4. He did not arrest the plaintiffs there and then while on the beach or on the boardwalk, as he did not want to embarrass them in public. On this aspect, it must be remembered that according to all the witnesses, there was a lot of foot traffic on the boardwalk, so the area was busy. This was

⁷¹ Sekhoto supra, par [40]

⁷² Supra

understandable because it was within the window period wherein people were allowed to be outside for the purposes of exercising.

[245] The plaintiffs were told to accompany him and Claasen to the back of the ablution block, and he arrested them at the vehicles for being on the beach, having also explained their rights to them. Thus, in the exercise of his discretion, and having regard to their dignity and the fact that they were with a young child, Naidoo decided not to effect the arrest in full view of other members of the public but to wait and do so at the official vehicles.

[246] Naidoo thus exercised a discretion not only in deciding to arrest but also deciding where to effect the arrest. It must be remembered that on the pleadings and the evidence, it was not denied that the plaintiffs were on the beach. In their testimonies, they also admitted knowing at the time, that being on the beach was prohibited under the regulations. Given the prevailing circumstances and because the plaintiffs had their child with them, the arrest was affected away from the public eye.

[247] The plaintiffs plead that despite the police witnessing them enter the beach for the sole purpose of removing their daughter who had entered the beach, they were wrongfully and unlawfully arrested for breaching the regulations. This is the sole basis upon which it is pleaded that their arrest was unlawful.

[248] However, the evidence considered holistically, does not support their pleading. On their version, neither of the plaintiffs could say that Naidoo saw their daughter enter the beach or move from the boardwalk onto the beach from his vantage point. The distances testified to were not conclusive and Naidoo maintained that when he first witnessed or saw the plaintiffs, they were already on the beach with their child. At best, the plaintiffs assume that Naidoo and the other police officer saw them enter the beach to remove their daughter. The more probable version is

Naidoo's, particularly as the plaintiffs could not testify conclusively where the police were when they, separately, entered the beach to remove their daughter. Given the pleadings and the evidence led in the plaintiffs' case, I do not draw any negative inference in respect of the failure to call Claassen as a witness for the defendants.

[249] It is understandable that the parents would focus solely on their child, and I appreciate that at the time they testified, more than 4 years had passed since the occurrence of the incident. On the evidence considered as a whole, I conclude that the averment in the pleadings that the police witnessed them entering the beach is not supported by the probabilities. As already indicated earlier, it must be emphasised that the plaintiffs do not plead that Naidoo exercised his discretion to arrest, irrationally.

[250] Interestingly, the plaintiffs attach "POC1", the section 3 notice⁷³ sent to SAPS and the Provincial Commissioner in October 2020. The legal representatives at length set out the basis on which they claim their clients were unlawfully arrested and detained. The only reference to "POC1" is found at paragraph 35 of the Particulars of Claim in that they briefly refer to the fact that the notice was sent in October 2020 and served. There is no indication in the Particulars of Claim that the plaintiffs plead that the content of the notice is to be read or considered as if incorporated in the pleading.

[251] In the notice, the plaintiffs allege that there was no need to arrest both plaintiffs and that Naidoo could have issued either or both with a written notice to appear in Court in terms of section 56 of the CPA, which it is alleged, the Act and Regulations make provision for. In this regard, section 56 of the CPA requires the arresting officer to believe on reasonable grounds that the Magistrate, on convicting the person, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Government Gazette and the peace officer may, whether the person is in custody or not, issue a written notice to appear in Court.

⁷³ Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002

[252] For purposes of this judgment, I do not address what the Gazetted fine was in May 2020. The point is that to suggest that it was not necessary to arrest both plaintiffs, when the evidence is that both had transgressed the regulation, makes no sense. Secondly, a section 56 written notice includes an endorsement that the person may admit their guilt in terms of section 57 by paying an admission of guilt fine. Had this occurred, the result would have been that both plaintiffs would have had criminal records, a situation far worse than that which ultimately transpired when Naidoo issued the section 72 warning to appear in Court⁷⁴.

[253] The plaintiffs' attorney's view in "POC1", that Naidoo should have acted in terms of section 56, also ignores the fact that it would have required of Naidoo to have had a reasonable belief that on convicting the plaintiffs, the Magistrate would not impose a fine exceeding the amount fixed by the Minister in the Government Gazette. On this score, even if a section 56 notice was applicable, no evidence was led by the plaintiffs as to the applicable fine as on 4 May 2020, and what Naidoo's reasonable belief was regarding the Magistrate's imposition of a fine. Either way, the suggestion regarding a notice in terms of section 56, did not preclude Naidoo from acting in terms of section 40(1)(a) of the CPA.

[254] It is also stated that had Naidoo been empathetic and pragmatic, he would have realised that there were insufficient grounds to arrest and charge the plaintiffs in the first place. I do not agree with this statement. In the above discussion, the offence of being on a prohibited area was committed in Naidoo's presence and he was therefore entitled to act in terms of section 40(1)(a) of the CPA. Once the jurisdictional facts were present, Naidoo was entitled to exercise his discretion to arrest. This was not a case, in my view, where there was no "*just cause*"⁷⁵, as the attorney states, for arresting the plaintiffs.

⁷⁴ See *Mong v Director of Public Prosecutions and Another* [2019] 4 All SA 447 (WCC) generally on admission of guilt fines, procedure and the consequences of payment

⁷⁵ POC1, par 13.1, A25

[255] Having regard to the views of the plaintiffs, the impression created is that the police should simply have looked the other way or let them off the hook. While I appreciate that the regulations brought about severe restrictions upon everyone, the police were still required to act in terms of section 205(3) of the Constitution. Had this incident occurred before or after the national state of disaster, there would have been no action for unlawful arrest and detention.

[256] However, the incident occurred during the level 4 lockdown, which made being on a beach, one of the prohibited areas according to regulation 24(2)(a) to (k), a criminal offence, punishable by law. To the extent that Naidoo may not have asked for an explanation as to why the plaintiffs were on the beach, a failure to do so does not render his decision to arrest, irrational, nor does it make the arrest unlawful. I have been referred to ***Syce and Another v Minister of Police***⁷⁶, a recent SCA judgment which dealt with the discretion to arrest in terms of section 40(1)(b).

[257] The reference to ***Syce***⁷⁷ is to support the plaintiffs' view that Naidoo was required to enquire as to the reason why the plaintiffs entered the beach as this could amount to an exculpatory explanation to be investigated by the police officer⁷⁸. I do not understand ***Groves NO***⁷⁹, which is referred to in ***Syce***, to mean that the arresting officer is obliged to embark on an enquiry or explanation for the plaintiffs' conduct. The officer has a discretion, and an explanation is but one of the facts upon which he may base his decision to arrest. The fact that Naidoo may not, at the beach, have enquired as to the plaintiffs' reason for entering the beach, does not make his decision to arrest, irrational.

[258] In ***Syce***, the plaintiff wished to walk to his girlfriend, which the officer refused. His pleadings were amended and this formed the attack on the lawfulness of his

⁷⁶ [2024] ZASCA 30 para [22]-[23]

⁷⁷ Supra

⁷⁸ Supra, par [22] which refers to Groves NO, par [35]

⁷⁹ Supra

arrest.⁸⁰ In this matter, the plaintiffs made much about the fact that C[...] could not travel with B[...] in the police van; that her request to walk to the police station was refused; that a car seat was not provided, and that his parents could not collect their daughter. None of these factors render the arrest unlawful, nor form the basis of a finding that Naidoo exercised his discretion irrationally.

[259] It must be remembered that regulation 16 controlled the movement of people, and in terms of regulation 16(2)(e), children could only be moved, as allowed by the provisions of regulation 17, which largely speaks of a child's movement in the context of parental rights and responsibilities in terms of the Children's Act 38 of 2005. Unless the grandparents or B[...]’s sister were caregivers within the prescripts of the Children's Act, they were not allowed to collect the child from the police station. Perhaps more importantly, aside from the limited window to be outdoors between 06h00 to 09h00, it is important to note that regulation 16(1) made it compulsory at the time, *that everyone was confined to their place of residence*⁸¹. The refusal to allow family members at the police station was thus a rational decision, based on the regulations and the police cannot be faulted for such refusal.

[260] The argument that a reasonable person would not have followed Naidoo's protocol is unconvincing. In my view, Naidoo made a judgment call, as **Groves NO**⁸², put it. He considered various factors, the circumstances prevailing at the time, the law, his role as an enforcement officer, the dignity of the plaintiffs, the regulations, the need to combat the spread of the virus, and ultimately exercised a discretion to arrest. I am of the view that, given the statutory offence created by regulation 31(2), of which Naidoo was aware because he regarded being on the beach as a serious offence, that in the circumstances, the exercise of Naidoo's discretion, was indeed objectively and properly informed. The nature of the offence attracts a fine or imprisonment not exceeding 6 months, so Naidoo was not incorrect to regard it as a serious offence.

⁸⁰ Supra, par [21]

⁸¹ My emphasis

⁸² Supra

[261] The reference by the plaintiffs' counsel to regulation 23 does not assist the plaintiffs' case as this regulation refers to the banning of gatherings at funerals, a workplace and the like, that an enforcement officer must order the gathering to disperse and if there is a refusal, the officer must act in terms of the CPA by arresting and detaining the persons. Regulation 23 does not have a bearing on the circumstances in this matter which involved two private individuals and their minor child, and not a gathering. To the extent that counsel for the plaintiffs referred to schedule 1 offences as being more serious, again my view is that this is not relevant as the arrest occurred in terms of section 40(1)(a) and not 40(1)(b).

[262] Having regard to the evidence, the applicable authorities and probabilities, I am satisfied that Naidoo exercised his discretion to arrest rationally, and, in the circumstances, I thus find that the plaintiffs have failed to discharge the onus on them to prove that Naidoo exercised his discretion to arrest, improperly or irrationally. The evidence indicates that Naidoo informed the plaintiffs that he was arresting them for breaching the lockdown regulations in that they were on a beach. Both plaintiffs understood this, though it took some time for these admissions to be made in the trial.

[263] It is common cause that the section 35 notice and the warning to appear in Court only partially had the description of the offence correct. In my view, this error or oversight did not render the arrest and detention unlawful. Accordingly, I find that the plaintiffs have failed to prove that their arrest was unlawful.

[264] As for the detention, the plaintiffs' correspondence and Particulars of Claim indicate that they were detained for about 6 hours at the police station. This is clearly untrue, as the Occurrence Register indicates that they were released at 12h00⁸³ and

⁸³ Exhibit A, p89-90

they admitted during the trial that they were at the police station for about 3 to 3 and a half hours before being released on a warning in terms of section 72 of the CPA (SAPS 496).

[265] It is also untrue and incorrect that B[...] was at the back of the police van with other persons already in the van, as he alleged. During the trial he admitted that he was alone in the van, thus the averment that he was at risk of contracting the virus as he was confined with other persons at the back of the van, is not sustained. Furthermore, B[...] had not seen C[...] enter the police vehicle, thus the statement in his contemporaneous social media post made while seated in the van, that she was pushed into the police vehicle while breastfeeding, is also untrue.

[266] Similarly, the averments that the plaintiffs were “*detained, along with other members of the public, in a confined area of the Police Station*”⁸⁴, is not only a fabrication but quite an exaggeration. The undisputed evidence is that the plaintiffs were seated in a large boardroom with Naidoo at some distance from them, while he processed them and answered their questions. The boardroom as shown in the photographs, contains several tables and chairs and certainly appears very spacious. Aside from one or two officers entering at odd occasions, briefly, no one else was with them and Naidoo for the duration of the time spent in the boardroom. The only time they encountered other members of the public was when they stood in the passage, and that can surely not be construed as being detained in a confined space with other people.

[267] It is also undisputed that the plaintiffs’ constitutional rights were explained to them. While not making light of Naidoo’s failure to wear a mask, he maintained that social distancing protocols were enforced in the boardroom and he was 1, 5 metres from the plaintiffs during the processing. The evidence also indicates that the plaintiffs wore masks during their interaction at the police station, so for all intents,

⁸⁴ POC, par 17

they were suitably protected against the public and any officers who were not observing the PPE protocol. The evidence from the plaintiffs is that C[...] breastfed her daughter to calm her. Naidoo confirms that she breastfed the child throughout the period at the station. There is no evidence to indicate that they did not have access to restrooms.

[268] From the transcript of B[...]’s audio recording in the boardroom, there is no indication from any of the parties that the child was in distress or discomfort. Aside from a concern about the consequences of a Court appearance, the outcome of the incident as it relates to C[...]’s visa, and the risk of contracting the virus, there is no evidence that the plaintiffs endured any hardship, brutality or infringement of their rights. Accordingly, from the accepted evidence, I find that the detention of the plaintiffs in the boardroom and smaller room for a period of 3 to 3 and a half hours, was lawful.⁸⁵

Breach of constitutional rights (Claim A)

[269] The plaintiffs submit that the matter concerns their cruel, inhumane and degrading treatment at the hands of the Muizenberg SAPS, specifically Naidoo⁸⁶. In their heads of argument, they abandon the claim for constitutional damages based on the averments that the police harassed them after they left the police station (Claim B).

[270] The breach of constitutional rights claim thus only applies to Claim A⁸⁷ and relates to their constitutional right to dignity in that the police’s actions in arresting

⁸⁵ Exhibit A, p79-82

⁸⁶ Plaintiffs’ heads of argument, par 2

⁸⁷ POC, A11, para 21-23

them, placing them in vehicles, not wearing masks, and detaining the plaintiffs with other members of the public in a confined space, allegedly infringed such right. I have already addressed the evidence regarding being arrested, placed in vehicles and exposure to the virus.

[271] Both plaintiffs wore masks and because the police station was a public building, the version of the defendants that it was a safe zone, that social distancing in the boardroom was maintained and the building was sanitized, is the more probable version. On this aspect, the plaintiffs confirmed that they did not contract the virus after being released from the police station.

[272] To the extent that evidence was led that C[...] was forced to breastfeed in public, with respect, it must be remembered that she testified that she started breastfeeding the child from the time they left the beach and entered the boardwalk again and continued to breastfeed her throughout the processing. The photographs taken by B[...] of C[...] breastfeeding in the police station, depict her wearing a mask and standing at the entrance to the boardroom and seated at a table, in a room at the police station. On the evidence, there is no basis to find that the police somehow forced C[...] to breastfeed her daughter in full view of other people. I appreciate that she was concerned for her daughter's wellbeing, but there is simply no evidence which warrants a finding that the police's actions imposed on her dignity in any way in this regard.

[273] I state respectfully that having arrested the plaintiffs, the police could not, in view of the regulations, allow the child to be handed over to family, so it followed that the mother and child were together. As for C[...]’s privacy and dignity while breastfeeding, the transcript of the first recording indicates that B[...] handed over his jersey or jacket to C[...].

[274] The plaintiffs seem to fail to appreciate that they were at a police station and had been arrested. They were not placed in any holding cells, and were free to move around the large boardroom, and were eventually shown to another room before being allowed to leave the station. In my view, any indignity would potentially have arisen if they were placed in holding cells, where conditions are often unsanitary. In a holding cell, all three plaintiffs would have been exposed to any other person already in the cell. As it was, they were in a large room which was sanitised, and where no other members of the public were present.

[275] The plaintiffs also testified that they were fearful and that there was police brutality. On the latter aspect, the oral and documentary evidence does not in any way suggest police brutality. On my reading of the first part of the transcript of B[...]’s recording on arrival at the police station, Naidoo is heard calling for joggers and anyone else outside after 09h00, to be arrested and be made an example of. These statements, objectively considered, had no bearing on the plaintiffs, who were already arrested by then. The statement did not apply to them.

[276] The issue of the flagging of C[...]’s visa was consistently denied by Naidoo. Naidoo persisted that he had no authority to make endorsements on her visa and in all probability, as a police officer, he may not have had that authority, but the second part of the transcript is insightful. It is evident that there was engagement between Naidoo and the plaintiffs. C[...] asked what would occur if she were out of the country on her Court date and Naidoo explains that a warrant of arrest would be issued for her, that it is a serious thing and that she would be flagged that there is a pending case. He then attempts to enlist B[...]’s assistance to impress upon C[...] how serious the situation was.

[277] Naidoo’s statements were generally correct. Procedurally, had C[...] not attended Court, the prosecutor would have requested that the Magistrate authorise a warrant for her arrest as she was issued with a section 72 notice to appear and failed to appear. The reality would have been that on arrival in South Africa, with a warrant of arrest circulating, she would or could have been arrested at the airport. Thus,

Naidoo's emphasis on the seriousness of the situation in no way amounts to police brutality or an attack on the plaintiffs' dignity. While he was perhaps not subtle, the information which he presented to the plaintiffs was correct.

[278] As for the discussion in the boardroom regarding the uncertainty about an alternative charge and fine, these aspects in no way breached any constitutional rights to dignity. I agree with the defendants' counsel's submission that either the plaintiffs misunderstood Naidoo or they feared the worst-case scenario. Nowhere in the transcript of B[...]s recording does Naidoo make any reference to C[...] being deported and in fact she enquires about what would happen if she was out of the country when she was due to appear in Court. As stated, Naidoo, perhaps brusquely and inelegantly, explains the consequences to her, as any police officer should.

[279] Lastly, the plaintiffs also take issue with Naidoo for stating that he was sure the breach of regulations (being on a beach) charge would "*stick*". I do not consider this to amount to a threat; more a matter-of-fact comment by an arresting officer faced with a barrage of questions by people he had arrested.

[280] In my view, while I appreciate that the plaintiffs were fearful and anxious, the evidence does not support a finding that their right to dignity was infringed in the way pleaded and expanded on in the trial. Nor was there any basis whatsoever to believe that Naidoo would seek revenge, somehow or the other. As things turned out, the charges were withdrawn about three weeks after the incident. The plaintiffs were notified thereof yet decided to leave South Africa. This decision, as well as the break-up of their relationship, cannot be attributed to any conduct by the police in arresting them for breaching the lockdown regulations nor any conduct by the defendants. In conclusion, I thus find that the plaintiffs have not discharged the onus of proving a breach of their constitutional right to dignity.

Malicious and wrongful legal proceedings (Claim B)

[281] The plaintiffs plead that Naidoo unlawfully and maliciously processed and charged the plaintiffs for contravening the regulations and when doing so, he had no reasonable and probable cause for doing so, no reasonable belief in the truth of the information relied on by him, and as a result, the plaintiffs were required to appear in the Muizenberg Magistrates' Court, employ the services of an attorney to represent and defend them, and on 26 May 2020, the State withdrew the charges on the basis that there was no evidence in law or in fact that either of them contravened the regulations and/or that they had valid defence to the contravention of the regulations.

[282] It is evident from ***Minister of Justice and Constitutional Development and others v Moleko***⁸⁸ and ***Rudolph and Others v Minister of Safety and Security and Others***⁸⁹, that the malicious proceedings refer to a malicious prosecution of the plaintiffs. While the defendants argue that the National Prosecution Authority should have been joined for such a claim, I disagree. It is evident from ***Rudolph***⁹⁰ that a police officer who arrests and charges a person is regarded as having initiated the criminal proceedings against the arrested person.

[283] The requirements to successfully prove such claim are: (i) the defendants set the law in motion; (ii) the defendants acted without reasonable and probable cause; (iii) the defendants acted with malice, and (iv) the prosecution failed⁹¹. I need not follow a detailed discussion of these requirements or elements of the claim. I have no difficulty in finding that the plaintiffs have proved the first element. The problem lies with the remaining three elements.

[284] In respect of the second element, that the defendants acted without reasonable and probable cause, there must be an honest belief, founded on reasonable grounds that the institution of the proceedings is justified, and the officer's conduct must have been objectively reasonable⁹². In this regard, Naidoo

⁸⁸ 2009 (2) SACR 585 (SCA) para [10], [17]

⁸⁹ 2009 (5) SA 94 (SCA) par [16]

⁹⁰ Supra, par [19]

⁹¹ Moleko supra, par [8]

⁹² Prinsloo and Another v Newman 1975 (1) SA 481 (A) 495H

made it clear that he was of the view that the main charge, breaching the regulations by being on the beach, would “stick”. His arrest was based on his observations that the plaintiffs were on the beach and exercising a discretion to arrest. In this regard, reasonable probable cause existed for the arrest and charge (thus, for putting the legal criminal proceedings in motion). In this regard, I find that the plaintiffs failed to prove the second element.

[285] The requirement that Naidoo acted with malice has not been proved on the objective evidence. Naidoo did not know the plaintiffs and was on the boardwalk with colleagues to do foot patrols. The plaintiffs’ complaint that he was out to arrest joggers after 09h00, and that there were incidents at the police station, in no way convinces me that he had deliberately set out to injure the plaintiffs, or wrongly arrest them, or set about to maliciously charge them. Issues related to the Muizenberg police station, as relayed in the media articles, do not support the plaintiffs’ case in the malicious prosecution claim.

[286] As for proving that the prosecution failed, it bears mentioning that there was no failure of prosecution. In other words, there was no trial and subsequent acquittal of the plaintiffs on the criminal charge. Nor was any evidence presented that the State withdrew the charge because, as pleaded, there was no evidence in law or fact that they contravened the regulations and that they had a valid defence to the charge. The email from the prosecutor to Mr Riley certainly does not indicate the basis upon which the charge(s) was withdrawn. It may have been for humanitarian grounds or for any other reason which informed the prosecutor’s decision. Hence, there was no failure of the prosecution: there was no prosecution and the matter was never placed on the Court roll.

[287] In view of my findings, I conclude that the plaintiffs have failed to prove that the defendants set in motion a malicious prosecution against them.

[288] As for wrongful legal proceedings, no such case is pleaded even though the heading under Claim B reads Malicious and Wrongful Proceedings. There is no averment that the charge(s) were false or fabricated.⁹³

Conclusion and costs

[289] In view of the evidence and above findings, I conclude that the plaintiffs have failed to make out their claims for damages based on unlawful arrest and detention, a breach of constitutional rights, and malicious and wrongful legal proceedings, as set out in their Particulars of Claim. Accordingly, the discussion on quantum is thus not necessary, and the plaintiffs' claims shall be dismissed. Costs shall follow the result.

Order

[290] In the result, the following is granted:

The plaintiffs' claims (claims A and B) are dismissed with costs including the costs of counsel on scale B.

M PANGARKER
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiffs: Adv K Felix

⁹³ Amler's supra, p261-261

Instructed by: C & A Friedlander
Cape Town
Per: Ms A Stucke

For Respondent: Adv T Steyn

Instructed by: State Attorney
Cape Town
Per: Mr L Mtshemla