

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

Case No: 9332/2007

In the matter between:

JUAN REYNOL MALGAS

Plaintiff

and

THE MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT DELIVERED ON 25 MAY 2010

ALLIE, J

[1] At the commencement of the hearing the court ruled that the merits of the matter be separated from the determination of the quantum in term of Rule 33(4) of the Uniform Rules of the court.

[2] On the first day of the hearing, the plaintiff amended his particulars of claim by adding that members of the South African Police Services unlawfully assaulted him whilst he was in the bar area of the Camelot Restaurant, Mossel Bay by grabbing him and throwing him to the ground, pressing him down while on the ground, twisting his right ankle, spraying him with teargas and placing handcuffs on him.

[3] Plaintiff's claim is for damages arising out of an injury that he sustained to his right ankle when he was allegedly assaulted by the South African Police Services on 22 October 2006 inside the Camelot Restaurant and pub in Mossel Bay.

[4] The defendant pleads that members of the South African Police Services were justified in spraying teargas into the face and eyes of the plaintiff and in causing the plaintiff's injuries to his ankle, in as much as, he had resisted arrest and he had interfered with the arrest of his wife which the members of the SAPS were trying to effect. The defendant further pleads that members of the SAPS were acting in defence and in response to the plaintiff's attack and assault on them and alleged further that members of SAPS were lawful in their application of force to effect the arrest of the plaintiff in terms of Section 49 of the Criminal Procedure Act No. 51 of 1977.

[5] In the alternative, defendant pleads that should the court find that the members of the SAPS were wrongful and were negligent, the defendant is not liable for any proven loss and or damages in as much as the plaintiff attempted to prevent his wife from being arrested, resisted arrest and assaulted a member of the SAPS at a time when he knew that it was dangerous to do so, but nevertheless proceeded to do so. The defendant pleads further in the alternative, that the plaintiff's behaviour contributed to any proven loss and or

damages suffered by the plaintiff and the plaintiff should accordingly be held to be proportionally liable.

[6] The defendant pleads further that the SAPS arrested the plaintiff without a warrant, but denied that such arrest was unlawful in amplification thereof the defendant relies on the provisions of Sections 40(1)(a) and or Section 40(1)(j) of the Criminal Procedure Act.

[7] The defendant accepts that onus is on the defendant to prove that a crime was committed in his presence when it relies on Section 40(1) (a) of the Act. The defendant admits that the onus rests on it to prove that it used force in a justifiable manner in terms of Section 49 of the Criminal Procedure Act.

[8] Plaintiff's case is that the defendant was not entitled to arrest him as he was not resisting arrest. The defendant accepted that the onus rest on it to prove that the plaintiff was resisting arrest.

[9] It is common cause that on the evening of 22 October 2006 members of the SAPS stationed at Mossel Bay received a report that a woman at the Camelot restaurant and pub alleged that another woman had assaulted her. Constable Tshwale and student Constable Dearham went to investigate at Camelot. They then spoke with Janet Malgas, the wife of the plaintiff outside Camelot and she admitted that she had assaulted the complainant.

[10] Constable Tshwale then placed her in the back of his van and told the people standing nearby to inform her family that she was been taken to the police station.

Juan Reynol Malgas

[11] The plaintiff testified as follows: The plaintiff, who was a disc-jockey inside Camelot, received a message that his wife was in the police van outside. He then proceeded outside where he found his wife in the back of the police van. He tried to open the door of the van. Constable Tshwale told him that he could not open it. He asked Constable Tshwale what was the reason for his wife being kept in the van, but he did not give any reason. According to the plaintiff, Constable Tshwale then placed his hand on his firearm and the plaintiff asked him why he was doing that because the plaintiff had not done anything threatening.

[12] Plaintiff's version is further that student Constable Dearham handed his pepper spray to Constable Tshwale. He said Constable Tshwale then sprayed him with the pepper spray in his face while he was asking Constable Tshwale questions about his wife. At that stage plaintiff alleged that he lost his balance and he grabbed onto the front chest part of Tshwale's shirt. He said that Tshwale then moved backwards and some of his buttons broke.

[13] At this stage the plaintiff said that his friend, Shannon Kannemeyer, came to fetch him and sat with him on the pavement nearby. Plaintiff said that student Constable Dearham came to speak to them but he could not remember what Dearham had said. He said that his eyes were burning at that stage. He then saw that the police van drove off with the back door open and he jumped up to tell the police that his wife was in the back, but then the bystanders informed him that his wife was no longer in the back.

[14] He went back inside the Camelot Restaurant where he was sitting at a table. He had just ordered a beer, but before he could drink it, he heard that there were police entering Camelot and when he turned around he saw the police. He felt someone pull him by his right shoulder at the back of the stool on which he sat. He said that his feet were on the floor. He then landed on the ground with his right hand under his stomach and his left hand behind his back. He was lying with his stomach facing down on the floor. He alleged that the police then pushed him down against the ground and his left arm was then handcuffed.

[15] He felt a pain in his ankle and when he informed the police about it they sprayed pepper spray at him while he was lying on the ground. He said at that point Tshwale was busy turning his ankle to get him to turn around onto his back. He said that he shouted from the pain, but the police said that he must not speak

rubbish. He was lifted up by the police because his arms were handcuffed behind his back. He tried to walk but he could not because of the pain.

[16] Student Constable Dearham and another policeman picked him up and carried him down the stairs to the police van. He was taken to the Mossel Bay Police Station. At the police station he had to sit in a corner in a room. He said he was taken to hospital after his wife arrived and told the police that he needed medical attention. Before the police stopped at the hospital, they drove around for a while and then stopped.

[17] At the hospital, the doctor looked at him and sent him back to the police station. Later he was taken back to the hospital where x-rays were taken. He was admitted to hospital and transferred to George hospital where they operated on him. He remained in hospital for 5 days before he was discharged. He said that his foot was in a cast and he had to use crutches. He experienced the incident as humiliating as Camelot was full of people and it happened in the presence of his employer.

[18] He denied that he beat Constable Tshwale against his chest. He also denied that he resisted arrest. He said that after he returned from hospital the first time, the police formally told him that being charged for assault and resisting arrest.

[19] He said that the officer that arrested him at Camelot was Constable Alberts and he denied that Constable Alberts had read him his rights inside of Camelot. He said that Constable Alberts assaulted him while he was being arrested inside of Camelot. He said that the criminal charges brought against him were withdrawn at Mossel Bay's Magistrates Court.

[20] During cross examination he admitted that it could have been illegal to have tried to open the door of the van in which his wife was sitting had she been arrested. He however said that Constable Tshwale did not give a reason why his wife was being kept in the van and he believed that she was not arrested. He said that he did not believe that he could have been arrested for attempting to speak to his wife in the van.

[21] He admitted that there were a lot of bystanders by the time he tried to open the door of the van in which his wife was sitting. He said that the bystanders were merely curious and were not threatening. He denied that there was any scuffle or argument that caused Constable Tshwale to use the pepper spray. He denied that his friends encircled the police. He said approximately 15 minutes after the incident outside Camelot, the police came inside to arrest him. He said at that stage he did not know why the police were there.

[22] He denied that he told Dr Perry Van Rooyen that during the fall he twisted his ankle. He persisted with his allegation that in fact it was the members of the SAPS that had twisted his ankle.

Dr Theo Le Roux

[23] He is an orthopaedic surgeon who examined the plaintiff and compiled a medical report of his injuries testified. He found a bimalleolar fracture of the right ankle in a bilateral and lateral direction. He said that two screws were placed in the bilateral malleolus and in the lateral malleolus. He said that he could see the two screws that were inserted in bilateral malleolus and in the lateral malleolus.

[24] The doctor said further that there was a horizontal fracture of the bilateral malleolus and a skew fracture of the lateral malleolus. He said that the skew fracture is usually caused by an external rotation movement of the ankle. For example, when the foot is turned in an outward direction. He said it could either be that the body was kept stationary while the foot was turned or the foot was kept stationary and the body was turned. He said that only a rotational movement could cause that injury. He said that that type of injury occurs very often in the soccer and rugby games because very often the foot becomes stuck in the field while the body moves in a rotation direction.

[25] He said if it happens in a fall, the foot has to be caught in something like a hole. He believed that you do not usually have ligament injuries by merely falling. He said that if the foot was turned as alleged by plaintiff a reasonable amount of force would have had to be exerted on it to have resulted in that injury. He said it was actually the skew or diagonal fracture at the ankle which could not occur without a rotation movement.

Mrs Janet Malgas

[26] She said at the time of the incident she had been married to the plaintiff for 7 years. She was at the Camelot restaurant and pub from the evening of the 21 October 2006 going over to the early hours of the 22 October 2006. She admitted that an incident occurred where the police came and placed her in the van. She had slapped a woman in the club. The woman then left and returned with the police officers. Constable Tshwale said she had to climb into the back of the van which she then did. There was another police official with him.

[27] She was not told that she was being arrested. There were a lot of people around the van at the time. Later, the van door was opened and she then climbed out. She saw the plaintiff sitting on the pavement with his friend. She and a friend just walked away after she climbed out of the van. As she was walking she noticed that other police vans were approaching the Camelot, but

she did not turn back. The police station was about 100 metres away from Camelot.

[28] She did not see the plaintiff being brought out of Camelot by police. She heard from other people that he was taken to the police station and that he was injured. When she arrived at the police station, she asked the police to have the plaintiff seen by a doctor. She accompanied him to the hospital. When she walked away after the police van had been opened for her, she saw police standing around but nobody tried to stop her. She did not see or hear her husband try to open the door of the van as she was sitting with her back to the door.

[29] Before the police took her husband to hospital they drove around for approximately 20 minutes because they alleged that there was an unruly crowd at the hospital. They then asked her to phone somebody in the crowd and tell them to disperse. When she arrived at the hospital she only found her cousin and his girlfriend.

[30] At this stage the plaintiff made an application to be recalled. He was then cross examined about the allegation that would be made on behalf of the defendant that when a member of the South African Police Services touched him on his shoulder to arrest him inside Camelot, he resisted.

[31] The version of defendant that was put to him was that he resisted by attempting to hit an officer but he was unsuccessful and he was brought under control by Sergeant Alberts who held him down before he fell, he denied this version. The version that was further put to him was he and Alberts then both fell to the ground but he denied this version too. He said that he was lying behind a chair and somebody was holding him down and after he said that his ankle was sore, pepper spray was sprayed at him. At this stage plaintiff then closed his case.

Constable Dearham

[32] At the time in October 2006, he was a student constable but he is now a truck driver. He confirmed that he and Tshwale approached the Camelot after receiving a complaint that the plaintiff's wife had assaulted a woman in the parking area. He confirmed that Tshwale asked her to climb into the back of the van. He did not hear whether Tshwale had arrested her. He saw the plaintiff come down the steps into the parking area where the van was, followed by a few people. At the time they were closing the door of the van.

[33] Plaintiff wanted to open the door of the van straight away and asked why they had his wife. Tshwale tried to explain the reason but the plaintiff kept approaching the van. Dearham and Tshwale tried to block anyone from opening the door of the van. Dearham felt the situation was getting out of control because quite a big crowd had gathered. He gave Tshwale his pepper spray and

he used it. He said that the police can use it if they are in direct danger and to bring people under control. There was nothing else that they could have done because they had used the minimum force. The plaintiff grabbed Tshwale by his shirt, they moved away from the van, the shirt tore and he tried to help Tshwale. He tried to get Tshwale away and they moved away. Thereafter he and Tshwale got into the van and drove not very far in an alley behind the shopping centre just to calm down and decide what to do. They could not just leave the situation as it was, because they did use his pepper spray and so they called for backup to prevent what happened outside from happening inside when they decided to go and arrest the plaintiff for assault and obstructing justice.

[34] The backup police vehicles arrived approximately 10 minutes later. They had a short briefing. There was a female, Constable Louw in the parking area outside the Camelot. Dearham and Tshwale walked in front inside Camelot with 10 to 15 police officers following. They pointed the plaintiff out to the other officers. Plaintiff was sitting by the bar.

[35] The officers moved closer to arrest him and the others formed a shield around him. Constable Alberts effected the arrest. He could not say if Alberts was alone in effecting the arrest. He did not see what happened during the arrest. Tshwale was part of the shield of policemen formed around the plaintiff. It took approximately 10 minutes to arrest him. While he was taking the plaintiff out of the pub, the plaintiff complained that his foot was sore then they picked

him up because he was handcuffed and could not stand up by himself. Alberts and Dearham carried him out of the club.

[36] The situation was explosive and could have got out of hand if they did not deal with it fast. At the police station they heard a lot of loud voices coming from the station. They discovered that there was a crowd of people at the police station. He understood that the crowd was becoming riotous at the charge office. When everything calmed down at the station, they took the plaintiff to hospital but sent a motor vehicle ahead of them to check if the crowd was at the hospital. They asked the plaintiff's wife, Mrs Malgas to call the people and tell them to move away from the hospital because they were only two officers taking the plaintiff to hospital. They drove around the hospital for a while.

[37] Mrs Malgas confirmed that it was okay and they then went inside. The doctor attended to plaintiff and said he was free to go. They helped him down the steps to the charge office back at the police station and took him to the cells.

[38] During cross examination he was asked whether he was aware that common assault was not a Schedule One offence in terms of the Criminal Procedure Act and did not require that a suspect be arrested without a warrant. He said that he did not know if it was a Schedule One offence or not. He believed that the offence was of a serious nature and that if the complainant wanted to open a case it was better that they take the suspect namely, Mrs

Malgas away. It was put to this witness that assault will only be a schedule one offence when a dangerous wound is inflicted and the witness accepted this.

[39] The witness also accepted that they could only arrest a suspect without a warrant if the offence was committed in their presence. He could not say whether Mrs Malgas was under arrest at the time when the plaintiff found her in the back of the police van. He did not concede that her arrest was unlawful. He confirmed that Tshwale did not manage to explain to the plaintiff why his wife was in the back of the police van.

[40] He felt threatened by the crowd and that is what prompted Tshwale to use the pepper spray. If the crowd had not gathered, they would still have used the pepper spray because the plaintiff refused to move away from the van when he was asked more than twice to do so.

[41] This witness agreed with plaintiff's version that when plaintiff grabbed Tshwale's shirt, Tshwale moved away and therefore the shirt buttons tore in that process. He also recalls that Tshwale put his hand on his firearm and plaintiff asked him do you want to shoot me. He admitted that the only time that the plaintiff grabbed Tshwale was when he pulled the shirt after the pepper spray was used.

[42] He did not see the plaintiff hit Tshwale on the chest as stated in Tshwale's statement to the police. He also did not see plaintiff grab Tshwale from behind his neck as Tshwale stated in his statement to the police. His evidence largely conforms with plaintiff's evidence. He accepted plaintiff's version that he lost his balance and he was confused and that is why he grabbed Tshwale by the shirt. He denied that pepper spray was used inside Camelot to overcome plaintiff's alleged resistance to arrest.

[43] He confirmed that he and Tshwale made no attempt to arrest the plaintiff while he was sitting on the pavement. He agreed that the primary reason for arresting a suspect was to have the person brought before the court. He agreed that there were other means of bringing a suspect to court such as issuing a criminal summons or a warning. He and Tshwale saw it as an assault on a police officer and that is why they called for backup and why they used 10 to 15 policemen to arrest the plaintiff in the nightclub. He remained of the view that that was what they were entitled to do even if the assault was only the grabbing of Tshwale's shirt.

[44] He was not near enough to hear Constable Alberts affect the arrest by explaining the plaintiff's rights to him. He agreed that the alleged offence of assaulting Tshwale was committed in the parking area when Alberts was not present and that Alberts therefore could not arrest the plaintiff without a warrant. He could not dispute that inside of Camelot plaintiff was pulled back off the chair

by members of the South African Police Service. At some stage plaintiff was on the ground. He did not see what happened to plaintiff on the ground. He confirmed that if his attention was focused on patrons inside the club, Tshwale could have turned the plaintiff's foot and he would not have been aware of it.

[45] When he saw the plaintiff on the ground he was lying on his stomach with handcuffs on. He confirmed the contents of his statement to the police but said in court that he could not remember seeing plaintiff resisting arrest and he did not remember seeing Alberts use pepper spray inside of Camelot. He agreed that considering the number of police officers present, any other officer could have grabbed plaintiff's arm to bring him under control and that the use of pepper spray inside Camelot at the time of the arrest of plaintiff was not reasonable. He did not agree with the proposition that the police made many assumptions and over reacted.

[46] It was put to this witness during cross examination that at no stage did the defendant raise in its plea as a justification for its conduct, that the crowd had been threatening. He also confirmed that neither his statement nor that of Tshwale referred to a threatening crowd.

Sergeant Riaan Alberts

[47] The next witness to testify on behalf of the defendant was Sergeant Riaan Alberts who was a reservist and a bodyguard at the time. He received a call to render backup at Camelot and he responded.

[48] Tshwale explained that they were at Camelot to arrest a woman and that her husband had an altercation with him. Tshwale was in an upset condition. His uniform was open and his buttons were broken. Several other police also came to render backup assistance. The police then jointly decided to arrest the plaintiff for assaulting a police officer and obstructing the police in the conduct of their duties.

[49] He confirmed that approximately 15 policemen entered the Camelot pub and restaurant. The owner tried to stop them from entering. According to this witness, Tshwale pointed out the plaintiff inside Camelot. The music was loud, there were lots of people who were dancing and the place was chaotic. They split up into two groups and approached the plaintiff from two sides. A black sergeant was the first to reach the plaintiff and the plaintiff sat with his back to the police.

[50] The sergeant touched the plaintiff on his shoulder and the plaintiff turned around and tried to land a fist blow on the sergeant. Alberts then grabbed the

plaintiff from behind and held him to get him under control. Plaintiff struggled with Alberts, broke loose, gave Alberts one or two blows and jumped forward. He then grabbed the plaintiff from the front and they struggled further but he could not say how it happened that both of them fell and landed on the ground where they continued to struggle. He did not let go of the plaintiff on the ground. He fell backwards and they both landed on their sides. They lay next to each other on the ground. He could not say which police officer then handcuffed the plaintiff. The crowd was curious.

[51] He denied that Tshwale was involved with the arrest inside Camelot. He asked one of the policemen to spray pepper spray at the plaintiff. He only realised that the plaintiff's ankle was injured when they were moving outside. It was possible that the plaintiff was injured in the fall. Everything happened within 5 minutes. He did not read the plaintiff his rights inside Camelot because it was noisy and only did so outside when he told him that he was under arrest.

[52] He confirmed that the crowd had moved to the police station and later to the hospital. The plaintiff did not want to stop struggling in resisting and that was why he asked for the pepper spray. He confirmed that the plaintiff was not handcuffed when he used the pepper spray. He said that the plaintiff had assaulted the sergeant that arrived by him first, inside Camelot and that he accordingly arrested the plaintiff because he had assaulted a police officer in his presence.

[53] He confirmed that the plaintiff was never charged with assaulting the black sergeant in inside Camelot. He confirmed that in fact the plaintiff was charged with assaulting Tshwale earlier outside Camelot. He admitted that initially they entered Camelot to arrest the plaintiff for the altercation between him and Tshwale earlier. He later said that it was not the intention of the 15 policemen that went inside Camelot to arrest the plaintiff but merely to bring him outside. They wanted to bring him outside so that Tshwale could arrest him. He then further said that when the black sergeant inside Camelot put his hand on the shoulder of the plaintiff, the plaintiff turned his head and gave the sergeant a blow which caused him to fall onto the ground.

[54] It was put during cross examination to him that it is unlikely that plaintiff was in a sitting position with the bottom half of his body bent forward who could have landed such a blow to the sergeant that he would have fallen onto the ground. The witness responded by saying that by that stage, the plaintiff had stood up. This information was mentioned for the first time during cross examination.

[55] He said that while they were struggling with each other, plaintiff attempted to land a few blows at him but he was unsuccessful. It was put to him that it was unlikely that the plaintiff would have attempted to attack Alberts and the black policeman when he was being encircled by 13 other police officers. He denied that when they were struggling on the ground the plaintiff was lying on his

stomach. He first said that if another police officer was twisting the foot of the plaintiff he would have seen it. He then later admitted that he would not necessarily have seen it because he would not have been looking at the feet.

[56] He admitted that in his statement to the police, he did not mention that the black sergeant had first approached the plaintiff and that the plaintiff had assaulted him. He could give no explanation as to why his arresting statement for the plaintiff refers to the assault on the police officer as being the assault on Tshwale. He also admitted that in his statement, no mention is made of the allegation that he made in court, that the plaintiff freed himself from the grip of Alberts and attempted to assault him.

[57] It was put to this witness that the advocate for the defendant had indicated that Alberts sat on top of the plaintiff, but now this witness had said that they fell on the ground next to each other. He could give no explanation for that discrepancy. He could not establish who the black sergeant was and that is why he was not called in as a witness in this case. He agreed that the explosive situation inside the club could have been caused by the 10 to 15 policemen being present inside the club.

[58] It was pointed out to this witness, that during cross examination it was not put to Mrs Malgas that she telephoned people who were allegedly in the hospital and asked them to leave the hospital.

Mr N T Tshwale

[59] He testified on behalf of the defendant. Mr Tshwale was a police constable in October 2006. He confirmed his statement to the police.

[60] Mr N T Tshwale testified that on Sunday, 21 October 2006 while on duty, he received a complaint on the police radio that there was fighting at the Camelot club. He went to the club with student Constable Dearham. He met Mrs Hector, the complainant who said that she was assaulted by Mrs Malgas, the plaintiff's wife Mrs Malgas who confirmed that she had assaulted Mrs Hector.

[61] He said that he was going to arrest her for assault. He took her to the patrol van and while putting her in the back of the van, the plaintiff came from behind and grabbed him by his police shirt and pulled him back. He turned and saw that the plaintiff was drunk. He sprayed the plaintiff with pepper spray to calm him down because he was aggressive towards Tshwale. When he pulled his shirt, the plaintiff tore his buttons. He said the plaintiff further hit him on the chest with his fist. He said that he did not wish to fight with the plaintiff and so he left everything and went away to call for backup. He said that the plaintiff did ask him why he was arresting his wife after he had been sprayed with pepper spray.

[62] After the altercation between him and the plaintiff, Mr Tshwale realised that Mrs Malgas was no longer in the back of the van. He did not take any

further steps against Mrs Malgas because he said she was already gone. He decided to call for police backup because he wanted to arrest the plaintiff for assaulting him. He did see the plaintiff going up into the pub after the altercation and there were lots of people with him. When he went into the club with the police backup, he did so because he wanted to arrest the plaintiff for assaulting him. Once he was inside the club, he saw Constable Alberts approach the plaintiff, but at that stage people in the club stood up and he felt threatened so he went to stand outside. When the scuffle occurred between Constable Alberts and the plaintiff inside the club, he was no longer there.

[63] He denied the plaintiff's allegations that he was physically involved in the plaintiff's arrest. He denied twisting the plaintiff's leg. At the time when he and the rest of the police backup approached the club, he told them that he did not want to be involved in the arrest because he would be a complainant.

[64] When Alberts approached the plaintiff inside the club, this witness said that he did not have a clear view so he was not sure if Alberts grabbed the plaintiff from behind or from the side.

[65] During cross examination this witness retracted some of his evidence in chief. He said that he may have put his words incorrectly in chief when he said that he saw Alberts grab the plaintiff when the people stood up. He now said that once he pointed out the plaintiff, the people stood up. He was not sure whether

Constable Dearham was inside at the time. He denied Constable Dearham's evidence that he, Tshwale, was part of the shield of policemen surrounding the plaintiff.

[66] When he was questioned about why he thought it was necessary to arrest Mrs Malgas for assaulting Mrs Hector, he said that he was still studying and if he was not sure of the charge, he generally arrested a suspect.

[67] During cross examination he was asked why he thought that the plaintiff was drunk when he grabbed him allegedly from behind. His response was that because the plaintiff came from the club, he thought he was drunk. He also said that because the plaintiff was with his wife who was drunk, he assumed that the plaintiff was drunk. He further said that when the plaintiff grabbed him, the plaintiff was not moving nicely and therefore he thought he was drunk.

[68] It was then put in cross examination to this witness that his advocate did not put it to plaintiff when he cross examined him, that he was not sober. He confirmed that he did not mention in his statement to the police that the plaintiff was drunk. He explained during cross examination, that he used pepper spray on the plaintiff as a means of self-defence because the plaintiff approached him from behind and fought with him. He denied that Constable Dearham gave him his pepper spray as alleged. He denied that the plaintiff tried to open the back of

the van. He denied that the plaintiff grabbed him by his shirt in front and that he moved back and his buttons broke.

[69] He was then further questioned about why in his statement to the police he alleged that the plaintiff was resisting arrest when Alberts was trying to arrest him yet in court he said that he did not see Alberts effect the arrest as he walked outside of the club. His response was that Alberts told him after the arrest that the plaintiff was resisting arrest and that is why he wrote that in his statement. He said that the same answer applied to the question about why he said in his statement that Alberts used pepper spray. It was then put to him that he was in the club at the time when the plaintiff was arrested and he therefore saw the use of pepper spray, but he denied this allegation.

[70] He mentioned in his statement that the plaintiff was handcuffed when Alberts was trying to arrest him inside Camelot because that is what Alberts told him. He was then questioned about why he did not say in his statement to the police that he had left the club and did not see the major events unfolding inside the club. He could give no reasonable explanation for this.

Evaluation

[71] Based on the evidence adduced at court it is clear that members of SAPS made no attempt to arrest Mrs Malgas after she left the back of the police van

and made no attempt to arrest the plaintiff after he was sprayed with pepper and went to sit on the pavement outside Camelot. To the extent that the defendant's version as to the need to use pepper spray outside the Camelot club varies, I am of the view that the defendant has not discharged the onus of proving that it was reasonable to use pepper spray outside the Camelot club.

[72] It is common cause that the police used pepper spray inside the Camelot club when the plaintiff was being arrested. The reason for using pepper spray then was because the plaintiff allegedly resisted arrest while lying on the ground with Constable Alberts restraining him and while encircled by some 14 other police officers. The reason advanced by Constable Alberts for using pepper spray at that stage does not accord with the probabilities.

[73] Constable Alberts evidence also includes the allegation that while the plaintiff was lying on the ground with Constable Alberts, he was handcuffed. He also confirmed the plaintiff's allegation that his foot was injured while he was lying on the ground.

[74] In circumstances such as those, other means could have been used to restrain the plaintiff. Clearly the plaintiff was eventually restrained by the use of handcuffs. The plaintiff's mobility must have been hampered by the injury he sustained to his right ankle at the time. Given the number of police officers available to assist and in close proximity, it is more probable than not, that

sufficient police officers could have restrained the plaintiff. I accordingly find that the use of pepper spray both inside and outside the Camelot club was not reasonable and justifiable in the circumstances.

[75] In the light of the fact that Constable Alberts testified in court only about the allegation that the plaintiff assaulted an unidentified black sergeant immediately prior to Alberts reaching the plaintiff to arrest him and in the light of the fact that the charges preferred against the plaintiff initially before they were withdrawn related to an allegation that the plaintiff assaulted Constable Tshwale and not that he assaulted an unidentified policeman, Constable Alberts was clearly not entitled to arrest the plaintiff in terms of Section 40(1)(a). This is because Section 40(1)(a) provides that a police officer may arrest a suspect without a warrant if that person commits or attempts to commit an offence in his presence. Clearly the alleged assault on Constable Tshwale did not happen in the presence of Alberts.

[76] To the extent that the defendant also relies on the provision of Section 40(1)(j) which provides that a police officer may arrest a suspect who wilfully obstruct him in the execution his duties, I will deal with that allegation as follows: The authorities make it clear that the obstruction of a police officer in the execution of his duties must be a wilful obstruction which effectively renders a police officer unable to execute the particular duty that he was about to execute

or that he was in the process of executing. [See: **Morapedi v Springs Municipality 1946 TPD 105 at 109**].

[77] The evidence advanced by the defendant is that outside the Camelot club the plaintiff approached the back of the van with the intention of freeing his wife from the van. The evidence is further that Constable Tshwale held the plaintiff's wife for common assault. The evidence of Constable Tshwale is that the plaintiff effectively grabbed him from behind thereby preventing him from keeping Mrs Malgas in the van.

[78] Neither Dearham nor Tshwale testified that Mrs Malgas left the police van as a result of the conduct of the plaintiff. Neither pursued Mrs Malgas as one would expect police officers to pursue a suspect who had escaped arrest.

[79] Tshwale did not allege that as a result of the plaintiff allegedly grabbing him from behind, Mrs Malgas was able to escape. Tshwale did also not allege that as a result of plaintiff grabbing him from behind, he could not continue with the arrest of Mrs Malgas or that he was obstructed in the arrest of Mrs Malgas. As the allegation concerning the plaintiff's alleged obstructing Tshwale and Dearham in the execution of their duties relate to them allegedly being obstructed from arresting and removing Mrs Malgas, the defendant has led no evidence to explain how the "obstruction" prevented the arrest and removal of Mrs Malgas.

[80] The evidence advanced on behalf of the defendant suggests that after the plaintiff was sprayed with pepper spray his alleged obstruction stopped. I can accordingly find no basis for concluding that plaintiff was arrested because he obstructed Tshwale and Dearham from arresting Mrs Malgas. Section 40(1)(j) can accordingly not be raised as a justification by the defendant for the arrest of plaintiff.

[81] If anything, based on the evidence of Dearham and Tshwale, it would seem that the existence of the curious crowd that had gathered around the van in which Mrs Malgas was held was the reason for Mrs Malgas being able to climb out of the police van and walk away. The actions of the crowd can hardly be attributed to the plaintiff.

[82] The police docket handed in as an exhibit at the trial reflect two charges brought against the plaintiff which were subsequently withdrawn namely: charge 1, that of assaulting a police officer and the particulars there relate to the alleged assault on Constable Tshwale and charge 2, resisting arrest. Although the defendant in its plea, states as a justification for arresting the plaintiff, the charge of obstructing a police officer in the execution of his duties, the docket refers to the charge of resisting arrest. The statement of Constable Alberts in the police docket refers to the charge of resisting arrest as follows:

“Met my aankoms het ek verneem dat Konstabel Tshwale en Konstabel Dearham gepoog het om ’n mans persoon te arresteer waarop hy verset het en vir Konstabel Tshwale aangerand het.”

[83] Further in his statement he says the following:

“Toe ek hom wou arresteer het hy homself erg verset en ook ’n hou na my geslaan. Ek het gekoes en die man se hande agter sy rug vas gedruk. Met ons gestoeiery het ons op die dansbaan geval maar waar ek hom geboei het”

[84] By contrast neither the statements of Tshwale nor that of Dearham referred to the plaintiff as resisting arrest outside Camelot club at the time when he allegedly grabbed Tshwale’s shirt.

[85] The plaintiff denied that he resisted arrest inside Camelot. It is clear from the evidence of Tshwale that he was extremely angry at the fact that the plaintiff had earlier grabbed him by the shirt causing his buttons to break. The evidence of Dearham that he and Tshwale decided to call for backup because Tshwale regarded the grabbing of his shirt and breaking of his buttons as an assault on him differs from Dearham’s further evidence in court that the buttons broke as a result of plaintiff grabbing Tshwale by the shirt after Tshwale had sprayed pepper spray into his face. Dearham also admitted that plaintiff grabbed Tshwale’s shirt because he was clearly disorientated by the pepper spray.

[86] Dearham further gave evidence that he and Tshwale decided to call for backup and have the plaintiff arrested because they could not simply leave the issue as they had used pepper spray. This evidence is interesting in as much as it is not clear whether they decided to proceed to arrest plaintiff because they believed he had assaulted Tshwale at the time or because they had used pepper spray and had to account for the use of the pepper spray. Dearham's evidence in court that he does not believe that Tshwale was being assaulted does not explain why they decided to arrest the plaintiff.

[87] Tshwale's evidence that he intended to have the plaintiff arrested but did not wish to do it himself is not supported by Alberts who said that he intended to merely bring the plaintiff outside Camelot so that Tshwale could arrest him. Both these witnesses lose sight of the fact that if Tshwale was indeed assaulted by the plaintiff earlier, Dearham who was present could have arrested the plaintiff in terms of Section 40(1)(a) of the Criminal Procedure Act. This was however not the evidence of Tshwale, Dearham or Alberts.

[88] What is clear from the evidence of all the police officers that testified, is that clearly the police intended to punish the plaintiff for the fact that Tshwale was grabbed by his shirt and his buttons were broken. In so doing, they embarked on a cause of action which was excessive and unjustifiable in the circumstances. It was excessive to enlist the aid of some 15 police officers merely to bring the plaintiff outside the club.

[89] There was no evidence that the crowd that had formed outside the club when Mrs Malgas was in the van and the crowd that was inside the club was threatening in any physical or verbal manner. The only evidence is the unsupported and unjustified perception of Tshwale that he felt unsafe inside the club. There is also no evidence to suggest that the plaintiff enlisted the aid of the crowd outside the club nor any evidence to suggest that police were reasonable in their anticipation that the crowd might assist the plaintiff in resisting arrest inside the club.

[90] The police officers that testified were clearly untruthful in their explanation about how the plaintiff's right ankle could have made a rotational movement that caused the injuries that he sustained. They merely seek to justify their aggressive conduct in arresting the plaintiff in terms of Section 40(1)(a) or Section 40(1)(j) when Alberts who effected the arrest had no authority to arrest the plaintiff for either offence. I accordingly find that the arrest of the plaintiff was unlawful.

[91] It follows that if the arrest of the plaintiff was unlawful his alleged resisting of such arrest was lawful. To the extent that he may have resisted arrest, the plaintiff was accordingly justified in so doing. [See **Morapedi v Springs Municipality supra**].

[92] In paragraph 3.1.2 of the particulars of claim the plaintiff alleged that he was unlawfully assaulted by members of the South African Police Services whilst he was in the bar area of the Camelot restaurant by being grabbed and thrown to the ground. In paragraph 3.1.1 he says that he was unlawfully assaulted whilst he was in the parking area adjacent to the Camelot restaurant by being sprayed in the face and eyes with teargas. Neither of these allegations relate to the plaintiff being unlawfully assaulted by being sprayed with teargas or pepper spray inside Camelot at the time when he was arrested.

[93] The court can however find that the members of the South African Police Services had assaulted the plaintiff outside Camelot restaurant by spraying pepper spray on him as this was the allegation made by plaintiff and acknowledged by the witnesses for the defendant.

[94] The plaintiff's conduct in approaching the van in which his wife was being held was not of a nature where he ought to have anticipated that he would have been arrested and assaulted by the police later inside Camelot restaurant. Neither Tshwale nor Dearham testified that the plaintiff grabbed hold of the handles of the back of the police van and tugged at it or used any physical force to have his wife released from the van. Such conduct may well have justified the use of pepper spray. A mere approach to the police officer and a request for information as to the arrest of his wife could not lead to the plaintiff anticipating the use of pepper spray or his subsequent assault inside the restaurant. Once

the plaintiff went on to argue with Tshwale about why the latter was touching his firearm, the exchanges between Tshwale and the plaintiff clearly became more hostile. Such hostile exchanges would not necessarily result in a reasonable police officer spraying pepper spray in the face of a person such as the plaintiff.

[95] Tshwale merely testified that the pepper spray was necessary to calm the plaintiff. Tshwale did not explain in which way the plaintiff behaved that he required too be calmed. What Tshwale did say was that the plaintiff grabbed him from behind and then hit him on his chest with his fist. That evidence is not supported by Dearham who was clearly present and observing the exchanges between Tshwale and the plaintiff. Given the use of pepper spray and the subsequent injury to the plaintiff, it is not inconceivable that Tshwale embellished and exaggerated plaintiff's conduct to justify his subsequent conduct.

[96] Tshwale remains a single witness on the plaintiff's alleged assault on him. In those circumstances, there is no basis for concluding that the plaintiff ought to have foreseen the injuries that he would later have sustained and acted negligently or recklessly despite that knowledge or foresight. I can accordingly find no contributory negligence on the part of plaintiff.

[97] Alberts is a single witness about plaintiff allegedly assaulting an unidentified police officer inside Camelot, plaintiff was not charged with such

assault and Alberts' statement does not contain particulars of such an assault. This court cannot conclude that such an assault took place.

[98] In the light of the fact that plaintiff had earlier been sprayed with pepper spray in the face and that he believed such conduct to be unjustifiable, the presence of 15 policemen approaching him in the club would certainly have raised his anticipation of further harm. As none of the 15 policemen tried to speak into plaintiff's ear, given the noise in the club, and to explain that he was being confronted for the earlier events that transpired outside, plaintiff would clearly have had no idea why he was being approached by 15 policemen.

[99] Alberts did not explain why more than one policeman could not have approached plaintiff and asked him to accompany them outside. This court can find no explanation for Alberts' high handed approach of physically grabbing plaintiff and scuffling with him to the point where they both fell to the ground. In those circumstances it cannot be that plaintiff voluntarily assumed the risk at the time when he was approached by Alberts who grabbed him physically.

[100] Section 49(1) of the Criminal Procedure Act provides as follows:

"If any person authorised to arrest or assist in arresting another attempts to arrest such person and such person (a) resists the attempt and cannot be arrested without the use of force or (b) flees when it is clear that the attempt to arrest him is being made or resist such attempt and flees the person so

authorised may in order to effect the arrest use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.”

[101] In the case of **Motswana v MEC for Safety and Security 2008 (1) SACR 404 (NC)** a police officer had been accused of using a police dog to arrest a suspect while he could effectively have apprehended the suspect by asking his colleagues who were on the scene to assist him. The court held in that case that the risk of injury by using the police dog far exceeded the risk of injury from the physical overpowering of a person by a number of police officers. The court found the policemen had not used that method of apprehending the suspect which would have involved the least risk of injury to the suspect.

[102] In the case of **Govender v Minister of Safety and Security 2001 (2) SACR 197 (SCA) at 204j to 205a** the court found that the criterion which questions whether the suspect posed a threat or danger of serious physical harm was a sound approach. The court also held that the proportionality of the force to be allowed in arresting a suspect had to be determined not only by the seriousness of the offence but also by the threat or danger posed by the suspect to the person arresting him, to others or to society at large. In that case the court decided to apply the constitutional test where the question was asked when is a statutory provision allowing the wounding of a fleeing suspect under certain circumstances reasonable and justifiable in an open and democratic society based on freedom and equality.

[103] In applying that test the court therefore increased the test of proportionality to include not only the seriousness of the offence and the force used but also to look at the nature and degree of the force used and the threat posed by the suspect to the safety of the police officers and other people as well as society at large. As the reasonableness of the arresting officer's actions must be considered objectively, his view of how much force was necessary cannot be relevant.

[104] The court will approach each case on its own merits. If one looks at the provisions of Section 40(1) it is clear that *in casu* Alberts was not the person authorised under the Act to arrest the plaintiff. When one views Section 49(1), the question arises whether the plaintiff could not have been arrested without the use of force. It is by no means clear from the evidence of Alberts that the plaintiff could have been arrested without the use of force. Alberts is not only a single witness but his credibility concerning the events that unfolded inside Camelot are seriously in question as he contrived a version that the plaintiff had assaulted an unidentified black police sergeant prior to Alberts arresting him.

[105] The nature and the circumstances surrounding the alleged assault on Tshwale clearly would have made the alleged offence of plaintiff not a particularly serious one. Alberts gave no evidence to suggest that it was not possible for several police officers to hold plaintiff while explaining to him that he should accompany them outside. I am accordingly not convinced that it was reasonable

and necessary in the circumstances for Alberts to grab plaintiff and wrestle with him until they both fell to the ground.

[106] I accordingly order that the defendant is liable to the plaintiff for the injuries that he sustained in the Camelot restaurant and pub as alleged by plaintiff. I also order that the defendant shall pay plaintiff's costs including the qualifying cost of the expert witness, Dr Theo Le Roux and that plaintiff and his wife Janet Malgas are declared necessary witnesses.



ALLIE, J