



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 22372/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

17/11/2023

DATE

SIGNATURE

In the matter between:

KAMOGELO BENNY KOPANG

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

MNISI AJ

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload onto Caselines. The date and time for hand-down is deemed to be **16:00** on **17 November 2023**.

INTRODUCTION

- [1] The plaintiff in this matter instituted a damages claim against the defendant based on unlawful arrest and detention by members of the South African Police (SAPS), acting within the cause and scope of their employment with the defendant.
- [2] At the commencement of the trial the parties agreed to separate the merits from quantum. In the premises, I made an order to that effect. In light thereof the only issue that falls to be determined by this Court was on the merits.
- [3] In the particulars of claim, the plaintiff particularised the events relating to the claim in some detail as set out below.

THE FACTS

- [4] It is common cause or not disputed in this matter that:-

- 4.1. The plaintiff was arrested on the 27th of March 2015, at Kuruman police station by one Sergeant Jan Harms Burger ("Sgt Burger") on allegations of assault on Constable Doctor Lazzarus Matong ("Cst Matong"). Both Sgt Burger and Cst Matong were at all material times

members of the South African Police Services (SAPS) stationed at Kuruman police station.

- 4.2. When Sgt Burger effected the said arrest, he did so without a warrant of arrest.
- 4.3. At all material times Sgt Burger acted within the course and scope of his employment with the defendant, therefore he is a peace officer as contemplated in the Criminal Procedure Act 51 of 1977 (*"the Act"*).
- 4.4. The plaintiff was charged and detained at the abovementioned police station under cas number 242/03/2015 for assault of a police officer, malicious injury to property and resisting arrest.
- 4.5. Pursuant to his arrest at around 11:40 on the 27th of March 2015, plaintiff was detained in custody until his release on warning the very same day at around 18:00.
- 4.6. The plaintiff and defendant agreed that though the latter bore the duty to begin and the onus of proof to show, on a balance of probabilities, that the arrest of the plaintiff was lawful in terms of subsection 40(1)(b) of the Act, the plaintiff elected to begin.

[5] At the commencement of the proceedings on 16 August 2023, the plaintiff brought an application for the amendment of the pleadings in terms of Rule 28(10) of the Uniform Rules of this Court. In essence the plaintiff sought to substitute paragraph 13 of its particulars of claim in the following respects:

"On or about 27 March 2015, the plaintiff was assaulted by one Sergeant Burger and/or his partner Constable Matong. The plaintiff was assaulted in that they hit him with open hands and/or fists."

- [7] After considering the application the amendment was so granted. Insofar as the admissibility of documents was concerned, I ruled that the documents can be used as per the pre-trial minutes in terms of Rule 37.
- [8] As set out later in this judgment the circumstances surrounding the arrest and subsequent detention of the plaintiff are largely common cause. The primary purpose of placing the plaintiff and defendant's evidence before me was in respect of the merits and not damages (if any) to be awarded to the plaintiff. In the premises, I will only consider his evidence pertaining to same.

EVIDENCE

The Plaintiff's Case

- [9] The plaintiff's case rested on the evidence of a single witness, namely, the plaintiff himself. He testified that on 27 March 2015 (the day of the incident) he went to Kuruman police station in order to make an application for a hunting rifle licence ("firearm licence") and he was assisted by Mrs Mmabatho Matong ("Mrs Matong"). Whilst he was being assisted by Mrs Matong, another Matong came into the office and informed Mrs Matong that her husband was trying to contact her telephonically and he alleged that she was not answering his calls.
- [10] Immediately thereafter, Mrs Matong's phone rang, and the plaintiff overheard her stating that she was assisting the plaintiff and she saw nothing wrong with that. When she hung up the phone he enquired if anything was wrong, and she told him that her husband (Constable/Cst Matong), who also worked at the same police station was having issues with her assisting him.
- [11] Upon leaving Mrs Matong's office he went to Brigadier Mnguni's office and reported that he did not appreciate the way Cst Matong was treating his wife. Brig Mnguni promised to intervene. He left the police station and visited

Kuruman mall, (which is nearby the police station) to buy a cellphone at Pep cell store. He was approached by a very aggressive and loud Cst Matong at the door of the store. He decided to go back to the police station to report the latest incident to Brig Mnguni, however along the way Cst Matong grabbed him from behind with his left hand and threw a punch with his right hand. He tried to grab him close to his chest so that Cst Matong could stop throwing more punches at him. Sgt Burger came in between them and grabbed the plaintiff and pushed him against the wall. Sgt Burger told the plaintiff that he was not allowed to assault a police officer.

- [12] The plaintiff further testified that Sgt Burger also grabbed both his hands from behind and that is when Cst Matong kicked him on his groin with his booted feet and also punched him on his face. Sgt Burger instructed Cst Matong to go to Brig Mnguni's office and the plaintiff followed them. The plaintiff's cellphone and spectacles were broken during the scuffle.
- [13] Sgt Burger placed him under arrest and read his (constitutional) rights thereafter. After his release, he consulted a private Doctor who examined him and recorded his findings on the J88 form. The plaintiff further testified that he attended court proceedings on several occasions until he was informed that the charges against him were withdrawn.
- [14] When cross-examined by the defendant's counsel, the plaintiff disputed that he used any threatening words against Cst Matong when he approached Brig Mnguni to request for his intervention. He disputed that he was incarcerated for three days as alleged in the particulars of claim. Not surprisingly, due to the nature of the plaintiff's evidence, there was no other significant cross-examination of the plaintiff before me.

The Defendant's Case

The Defendant elected to rely on the oral evidence of three witnesses. The first witness, ***Mrs Mmabatho Patricia Matong*** ("Mrs Matong") testified that:

- [15] On 27 March 2015 she assisted the plaintiff to register his application for a firearm licence. After the plaintiff left her office, she was joined by Sgt Burger who was compiling some documents when she overheard noise coming from the right-hand side of the passage. She did not go to investigate but she could identify one of the voices as her husband's voice. Sgt Burger went to the direction of the noise and she continued to conduct her duties until she knocked off later that day at around 15:00.
- [16] Under cross-examination by counsel for plaintiff she disputed ever telling Kopang that her husband had issues when she assisted him. She also disputed that she cried in front of the plaintiff. There was no other significant cross-examination of Mrs Matong before me.

The second witness was **Sgt Burger** who testified that:

- [17] On 27 March 2015 he was in Mrs Matong's office busy compiling a docket when he overheard two loud voices coming from the passage. He went to investigate and found the plaintiff and Cst Matong pushing each other against the wall. He tried to separate them by holding the plaintiff against the wall and that the plaintiff hit Cst Matong on the face, and the two of them continued to hit and kick each other.
- [18] He struggled to separate them until he finally managed to grab Cst Matong and took him to Brig Mnguni's office. Cst Matong's nose was bleeding and his shirt was torn. He placed the plaintiff under arrest in terms of Section 40 of the Act after reporting the incident to Brig Mnguni.

[19] I do not intend to summarise the contents of the contradictions between Burger's testimony in court and what he wrote in his statement at this stage. To do so would only burden the judgment unnecessarily. I only do so in my discussion below. However, at this stage I point out that Sgt Burger conceded that there were material contradictions between what he wrote in his statement, his testimony in court and the statement of Cst Matong which was admitted into the record in terms of the provisions of Section 3 of the Law of Evidence Act 45 of 1988 (as amended).

The last witness to testify on behalf of the defendant was **BRIGADIER PHIWAINKOSI MNGUNI** (Brig Mnguni):

[20] He testified that on 27 March 2015, he was in his office when he was visited by an aggressive Kopang who asked about the whereabouts of Cst Matong. However, he did not witness the fight between the plaintiff and Cst Matong. Brig Mnguni also testified that he did not accompany Sgt Burger when the latter went to arrest the plaintiff.

[21] Under cross-examination, Brig Mnguni testified that he never asked the plaintiff what happened and that he never instructed Sgt Burger to arrest him. Before me, there was no other significant cross-examination of Brig Mnguni.

APPLICABLE LEGAL PRINCIPLES

[22] Section 40(1)(b) of the Criminal Procedure Act¹ ("the Act") reads as follows:-

"A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from custody."

¹ Act 51 of 1977.

[23] The jurisdictional facts in terms of Section 40(1)(b) defence are that:-

- (i) The arrestor must be a peace officer;
- (ii) The arrestor must entertain a suspicion;
- (iii) The suspicion must be that the suspect committed an offence referred to in Schedule 1; and
- (iv) The suspicion must rest on reasonable grounds.²

[24] In Heimstra's *Criminal Procedure*,³ the learned author, with reference to the *Sekhoto* case (*supra*) summarises the law pertaining to arrest without warrant as follows:-

- (i) The jurisdictional prerequisites for subsection 40(1)(b) must be present;
- (ii) The arrestor must be aware that he or she has a discretion to arrest;
- (iii) The arrestor must exercise that discretion with reference to the facts;
- (iv) There is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[25] It is fairly trite that these grounds are interpreted objectively and must be of such a nature that a reasonable person would have had a suspicion.⁴ It is also

² *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 467 (SCA).

³ Page 5-8.

a well-established legal principle that the arrestor's grounds must be reasonable from an objective point of view. When a peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests. Authority for this proposition is to be found in the matter of *Nkambule v Minister of Law and Order*.⁵

[26] In the matter of *Olivier v Minister of Safety and Security and Another*,⁶ the court held as follows:

"When deciding if an arrestor's decision to arrest was reasonable, each case must be decided on its own facts."

[27] Further, the court stated,⁷ the following, namely:-

"This entails that the adjudicator of facts should look at the prevailing circumstances at the time when the arrest was made and ask himself the question, was the arrest of the plaintiff in the circumstances of the case, having regard to flight risk, permanence of employer, and then residence, co-operation on the part of the plaintiff, his standing in the community or amongst his peers, the strength or the weakness of the case and such other factors which the court may find relevant, unavoidable, justified or the only reasonable means to obtain the objectives of the police investigation."

⁴ *R v Van Heerden* 1958 (3) SA 150 (TPD); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 814D.

⁵ 1993 (1) SACR 434 (TPD); *Heimstra (supra)* at 5-8.

⁶ 2009 (3) SA 434 (WLD).

⁷ at 445D to F.

The interests of justice may also be a factor. Once the court has considered these and such other factors, which in the court's view may have a bearing on the question, there should be no reason why the court should not exercise its discretion in favour of the liberty of the individual. Arrest should after all be the last resort."

- [28] There is no doubt that the discretion to arrest must be properly exercised, therefore, the test for the legality of the exercise of discretion to arrest should be an objective one. In order to avoid abuse, the exercise of public power by the executive and other functionaries should not be arbitrary. Such decisions must be rationally related for the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement. The question of whether a decision is rationally related to the purpose for which the power was given, calls for an objective enquiry.⁸
- [29] It is trite that in order to objectively determine whether an arrestor has acted arbitrarily the court is obliged consider whether or not he (1) applied his mind to the matter or exercised his discretion at all; and/or (2) disregarded the express provisions of the statute. The authority for this has long been held.⁹ The courts have always maintained that the onus rests upon the arrestor to prove that the arrest was objectively lawful.¹⁰

⁸ *Pharmaceutical Manufacturers Association of SA and Another v Imray Ex Parte President of the Republic of South Africa and Others* **2000 (2) SA 678** (CC) paragraphs 85-86, at page 708D-F.

⁹ *Shidiack v Union Government (Minister of the Interior)* 1912 (AD) 642 at 651-652.

¹⁰ *Minister of Law and Order and Others v Hurley and Another* **1986 (3) SA 568** (AD) at 589 E-F, *Mabasa v Felix* 1981 (3) SA 865 (AD) and *Minister of Law and Order v Matshoba* **1990 (1) SA 280** (AD) at 284.

[30] A number of decided cases support the proposition that if the arrest is unlawful, it follows that the subsequent detention must also be unlawful.¹¹ The principles applicable to the delictual liability of the Minister of Police for detention were laid out in the recent Constitutional Court decision of *Mahlangu and Another v Minister of Police*.¹² It is my view that little purpose would be served by simply repeating those principles as set out so clearly by the Court in *Mahlangu (supra)* in this judgment. Rather, it will be far more beneficial to highlight those principles as dealt with by the Constitutional Court that are relevant to the present matter.

[31] The Court cited, with approval, the matter of *Relyant Trading (Pty) LTD v Shongwe*¹³ where the Supreme Court of Appeal held, *inter alia*, the following:-

“to succeed in an action based on wrongful arrest the plaintiff must show that the defendant himself, or someone acting as his agent or employee deprived him of his liberty”.

[32] Writing for the court in *Mahlangu (supra)*, Tshiqi J¹⁴ was compelled to include in the judgment a fairly lengthy excerpt from the decision of *Botha v Minister of Safety and Security, January v Minister of Safety and Security*.¹⁵ It can only be presumed, with the greatest of respect, that the learned Judge did so in light of the importance thereof. In the premises, that excerpt is repeated hereunder:-

¹¹ *Minister of Safety and Security v Tyokwana* **2015 (1) SACR 597** (SCA) at 600G.

¹² *Supra* [2021] ZACC 10.

¹³ [2007] 1 ALL SA 375 (SCA) at paragraph 6; at paragraph [29] of *Mahlangu (supra)*.

¹⁴ At paragraph [40].

¹⁵ 2012 (1) SACR 305 (ECP).

"It is also trite law that in a case where the Minister of Safety and Security (as defendant) is being sued for unlawful arrest and detention and does not deny the arrest and detention, the onus to justify the lawfulness of the detention rests on the defendant and the burden of proof shifts to the defendant on the basis of the provisions of s 12(1) of the Constitution These provisions, therefore, place an obligation on police officials, who are bestowed with duties to arrest and detain persons charged with and/or suspected of the commission of criminal offences, to establish, before detaining the person, the justification and lawfulness of such arrest and detention.

*This, in my view, includes any further detention for as long as the facts which justify the detention are within the knowledge of the police official. Such police official has a legal duty to inform the public prosecutor of the existence of information which would justify the further detention. Where there are no facts which justify the further detention of a person, this should be placed by the investigator before the prosecutor of the case, and the law casts an obligation on the police official to do so. In *Mvu v Minister of Safety and Security and Another* Willis J held as follows:-*

"It seems to me that, if a police officer must apply his or her mind to the circumstances relating to a person's detention, this includes applying his or her mind to the question of whether detention is necessary at all."

It goes without saying that the police officer's duty to apply his or her mind to the circumstances relating to a person's detention includes applying his or her mind to the question whether the detention is necessary at all. This information, which must have been established by the police officer, will enable the public prosecutor and eventually the magistrate to make an informed decision whether or not there is

any legal justification for the further detention of the person. [Footnotes omitted.]”

Submissions on behalf of the parties

- [33] According to the defendant’s counsel, the defendant had discharged the onus of proving, on a balance of probabilities, that the arrest of the plaintiff was lawful in terms of the Act. He further submitted that the arrest of the plaintiff by Sgt Burger, was justified and that he had correctly exercised his discretion when deciding to arrest the plaintiff.
- [34] Defendant’s counsel argued that there is factual causation between the striking of the fist to the face of Cst Matong by the plaintiff and the subsequent bleeding. Counsel for the defendant further argued that the retaliation of Cst Matong on the plaintiff cannot be treated as a separate incident constituting a second independent assault.
- [35] Adv Dube for the defendant argued *inter alia*, that there exist two conflicting versions as to the circumstances that led to the arrest and detention of the plaintiff on 27 March 2015. He further submitted that I should dismiss the plaintiff’s case on the basis the defendant has complied with the provisions of Section 40 of the Act.
- [36] Adv Mtsweni, on behalf of the plaintiff, submitted that the defendant had failed to prove, on a balance of probabilities, that the defendant had satisfied the necessary jurisdictional requirements to bring the arrest of the plaintiff without a warrant in terms of the Act.
- [37] He also referred me to the case of *Moya Moses v Passenger Rail Agency of South Africa*¹⁶ and argued that ‘(i), In drawing an inference, the court should
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not rely on conjecture and/or speculation;(ii) the inference sought to be drawn, must be drawn from proven facts; and (iii), the inference sought to be drawn, must be the only inference that can be drawn from the proven facts.'

DISCUSSION

- [38] From the onset, I point out that it is not clear what evidence, (if any) the defendant relies upon to support its allegation that the arrest was lawful in terms of Section 40(10(b) of the Act.
- [39] In any event, even if such evidence was presented, I am still obliged to have a look at the evidence presented before me holistically and apply my mind objectively.
- [40] I have taken note of the number of material contradictions in the defendant's case. A factor which should have been of some concern to Sgt Burger was the fact that Cst Matong remained at the very same police station which was the scene of the alleged crime, and he could have waited until the latter has at least opened a case against the plaintiff. In my view, Sgt Burger's reliance on the provisions of Section 40(1)(b) was ill-conceived and misdirected. Even more strange, he conceded that the arrest of the plaintiff was not due to instructions from Brig Mnguni as it was alleged in his statement.
- [41] In the case of *Raduvha v Minister of Safety and Security and Another*,¹⁷ relied upon by the plaintiff, the Constitutional Court held as follows, as to how the discretion ought to be exercised:

¹⁶ (104605) [2012] ZAGPPHAC 22 (8 March 2012) at para 73.

¹⁷ 2016 ZACC 24.

"[42]. Section 40(1) of the CPA states that a police officer "may" and not "must" or "shall" arrest without a warrant any person who commits or is reasonably suspected of having committed any of the offences specified therein. In its ordinary and grammatical use, the word "may" suggests that police officers have a discretion whether to arrest or not. It is permissive and not peremptory or mandatory. This requires police officers to weigh and consider the prevailing circumstances and decide whether an arrest is necessary. No doubt this is a fact-specific enquiry."

"[44]. In other words the courts should enquire whether in effecting an arrest, the police officers exercised their discretion at all. And if they did, whether they exercised it properly as propounded in *Duncan*[29] or as per *Sekhoto* where the court, cognisant of the importance which the Constitution attaches to the right to liberty and one's own dignity in our constitutional democracy, held that the discretion conferred in section 40(1) must be exercised "in light of the Bill of Rights".

[42] However, it should also be borne in mind that in *Minister of Safety and Security v Tyokwana*¹⁸

"(T)he duty of a policeman, who has arrested a person for the purpose of having him or her prosecuted, is to give a fair and honest statement of the relevant facts to the prosecutor, leaving it to the latter to decide whether to prosecute or not."

[43] The comments by the SCA in *Biyela v Minister of Police*¹⁹ in relation to the standard of a reasonable suspicion to be applied when a court is called upon

¹⁸ [2014] ZASCA 130; 2015 (1) SACR 597 (SCA) at paragraph 40.

¹⁹ (1017/2020) [2022](1 April 2022) ZASCA 36.

to decide whether or not the defendant has discharged the onus of proving a lawful arrest in terms of Section 40(1)(b) of the Act, requires further attention.

[44] The relevant paragraph of that judgment²⁰ reads as follows:-

"The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively."

[45] There is no doubt that the fundamental principles of individual liberty as entrenched in our Constitution, together with the important responsibility that the police have in protecting that liberty, particularly having regard to the unfortunate history of our country, can continue to receive protection from our courts.

[46] It is imperative that the police be able to effectively carry out their duties and, in this regard, the proper interpretation of the standard to be applied when considering a lawful arrest in terms of Section 40(1)(b) of the Act plays a pivotal role. In this judgment, I have considered all the relevant facts objectively that existed at the time when Sgt Burger elected to arrest the plaintiff.

[47] It is not necessary to analyse Burger's evidence in any great detail to illustrate his unreliability, but the following instances may be highlighted:

- (i) In his police statement he stated that when the plaintiff punched Matong, he was facing the plaintiff but still saw the fist landing on

²⁰ *Biyela at [34].*

- (ii) Matong's nose, however under cross-examination he conceded that he did not witness contact between the fist and Matong's face.
- (iii) He further alleged that the assault took place when he was trying to separate them however, according to Cst Matong's statement, the assault happened immediately after Sgt Burger arrived on the scene. In particular, he stated "*that whilst he was trying to walk away, the plaintiff pulled him and when he turned, he punched him*". This version is however denied by Burger.
- (iv) In his evidence in court, Burger testified that the blow by the plaintiff landed on Cst Matong's nose. He later changed and testified that he did not see where it landed. According to Cst Matong's statement, the blow landed on his mouth.
- (v) Burger stated in his statement that the only injury that was visible on Cst Matong on the day of the incident was the bleeding nose and nothing else. On the other hand, according to Cst Matong's statement, he was only assaulted on his mouth. This also contradict Mrs Matong and Brigadier Mnguni's statements that Matong also had other injuries on his face, which injuries were never seen or referred to by both Matong and Burger.
- (vi) Burger also contradicted his own statement that he arrested the plaintiff on the instructions of Mnguni only to change later and stated that it was his own decision.

[48] It is trite that the Constitution has placed a high premium on the right to freedom which includes the right not to be deprived of freedom without just cause as envisaged under section 12(1)(a) of the Constitution. It is my considered view therefore, that there were various factors present when viewed objectively, that should have raised concern in the mind of Sgt

Burger, caused him to investigate the matter further and, ultimately, in the exercise of his discretion, have militated against him electing to arrest the plaintiff without a warrant. Most importantly, it is clear that at the time when he arrested the plaintiff, Sgt Burger did not know the exact circumstances which led to the fight except what transpired in his presence, this for me is fatal to the defendant's case.

EVALUATION

- [49] I am mindful that there is no onus upon the police to carry out a thorough investigation in each and every case before an arresting officer exercises his/her discretion whether or not to effect an arrest without a warrant in terms of subsection 40 of the Act. However, the necessity or otherwise for the police to carry out further investigations before exercising this discretion (just one of the objective facts to consider) must depend on the facts of each particular case. In this case it is clear that further investigations were necessary.
- [50] As held in the matter of *Mabona and Another v Minister of Law and Order*²¹ the suspicion must be based on solid grounds. I have no doubt in my mind that had Sgt Burger taken simple steps following the incident, such as obtaining a written statement of Cst Matong, it would have been abundantly clear to him (and if he had any doubt about his own observations) that the contents of his own statement were false and/or based on speculation.
- [51] The defendant on the other hand, placed no evidence before this Court at the trial as to why the defendant should not be held liable for the unlawful arrest of the plaintiff and his subsequent detention until he was released from

²¹ **1988 (2) SA 654** (SE) at 658 E-H.

custody later that day. This was despite Sgt Burger having had ample opportunity to do so.

- [52] Nienaber JA stated as follows²² regarding the assessment of disputes between factual witnesses:

"[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the courts finding on the credibility of a particular witness will depend upon its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as, - (i) the witness's candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf or with established facts or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party

²² In *Stellenbosch Farmers' Winery Group Ltd And Another v Martell Et Cie And Others* **2003 (1) SA 11** (SCA).

burdened with the onus of proof has succeeded in discharging it. The hard case, which will

doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

CONCLUSION

[53] The plaintiff's evidence was cogent and sufficient to leave me with no hesitation but to conclude that he has succeeded on the balance of probability in proving his case. As a result, I conclude that he was assaulted; his property was damaged and his arrest and detention was equally unlawful.

[54] In light of the foregoing, this Court finds that the defendant has failed to discharge the onus incumbent upon the Defendant to prove, on a balance of probabilities, that the arrest of the plaintiff was lawful in terms of section 40(1)(b) of the Act.

[55] Accordingly, I make the following order:

- (i) The arrest and detention of the plaintiff is declared wrongful and unlawful.
- (ii) The defendant is ordered to pay the plaintiff's proven damages for unlawful arrest and detention limited to six hours.
- (iii) Costs will be costs in the action.



MNISI AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

FOR THE PLAINTIFF: ADV. D MTSWENI

Instructed by GMI Attorneys

FOR THE DEFENDANT: ADV. GDM DUBE

Instructed by State Attorney, Pretoria