



REPUBLIC OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 23008/09

In the matter between:

JOICE MDLANKOMO

Plaintiff

and

SERGEANT NONKQUBELA TANYANE

First Defendant

MINISTER OF POLICE

Second Defendant

JUDGMENT delivered on 08 May 2013

BOQWANA AJ

Introduction

- [1] The plaintiff issued summons against the defendants for damages allegedly suffered to her reputation and self esteem in the amount of R500 000.00 ('Claim A') and for deprivation of liberty in the amount of R100 000.00 ('Claim B'). The parties agreed to separate the merits from the quantum.
- [2] The witnesses who testified in support of the plaintiff's case were the plaintiff herself, Stanley Maxebengula ('Maxebengula'), her boyfriend, and Lulama Tonise ('Tonise'), her neighbour. The defendants' witnesses were the first defendant, Solomzi Landu ('Landu'), Constable Irfaan Jordan ('Jordan') and Constable Nontombi Tshomi ('Tshomi'), who are members of the police service.

The evidence

Plaintiff's case

- [3] The evidence in this case is the following. On 25 September 2008 at approximately 19:00, the first defendant, Jordan and Nonceba Sixubane ('Nonceba'), who is the plaintiff's neighbour, arrived at the plaintiff's house, which is situated at number 7, Sylvia Road, Tambo village to enquire about a gas cylinder and 2kg chicken following a complaint that was laid by Nonceba with the police at the charge office. Nonceba reported that she had lent her gas cylinder and 2kg chicken to the plaintiff who was now refusing to give those back to her.
- [4] It is common cause that when the police arrived at the plaintiff's house with Nonceba, the plaintiff was with Maxebengula and their seven year old child, Ntando. Maxebengula had bought a cake for the plaintiff and their child to celebrate his birthday which had recently passed. The plaintiff testified that at the time the police came with Nonceba she was not wearing anything at the bottom. When she heard the knock she went to open not knowing who was at the door. When she opened she realised that it was the police with Nonceba she quickly closed the door and asked Ntando to bring her a towel so that she could cover herself. The plaintiff's evidence is supported by Maxebengula who alleges that the knock by the police was very rough and rowdy.
- [5] When the plaintiff opened the door the second time, Nonceba and the first defendant started asking her about Nonceba's gas cylinder. At that point the first defendant made comments about her house being built with money stolen from Pick 'n Pay and about the plaintiff being known to be arrogant and too sure of herself.
- [6] Maxebengula then intervened and advised Nonceba that the gas cylinder still had gas in it. Maxebengula and Nonceba came to an agreement that Nonceba would wait for the gas cylinder and collect the 2kg chicken from Maxebengula who would buy it at Pick 'n Pay. According to Maxebengula

what the police had come for had been resolved. He therefore conveyed that to others who were in the house.

- [7] While Nonceba and Maxebengula were discussing arrangements about the gas cylinder, the first defendant said to her 'get dressed, *nondindwa*, or I'll call back-up'. The first defendant denies that she called the first defendant '*unondindwa*.' '*Unondindwa*' is a Xhosa word translated to mean 'a whore'. The plaintiff testified that she was shocked by this as she did not see a need for back-up because Nonceba and Maxebengula had come to an arrangement.
- [8] At that moment another police officer Landu entered the house. Landu also instructed the plaintiff to get dressed or the police would take her as half naked as she was. Maxebengula tried to explain to Landu that an arrangement had been made between him and Nonceba. The plaintiff testified that the first defendant grabbed and dragged her outside the house leading to her towel falling.
- [9] By the time the plaintiff got to the van she was not wearing anything at the bottom. Maxebengula testified that when he tried to tell the police that they could not arrest a half naked woman, Landu took out a spray gun and sprayed him on his face. Maxebengula alleges that he was blinded by this act. He alleges that Landu kicked and assaulted him after which he was put inside a police van and arrested. His own vehicle was then driven by another police officer. He did not see how the plaintiff was arrested due to the pepper spray.
- [10] The plaintiff and Maxebengula were apparently arrested in separate police vans not knowing what had happened to their child after they got arrested. The plaintiff testified that she saw the child crying whilst she was seated in the van and heard Jordan telling another police officer that he could not put a child in the van. Tonise testified that she found the child crying and took care of her until the parents came home the following day. She also looked after the plaintiff's house ensuring that the lights were switched off and doors were locked. She also arranged for the child to attend school the following day.

- [11] The plaintiff testified that when they reached the charge office she was assaulted by the first defendant by kicking her with her boots in full view of the public and other members of the police. She alleges that she was denied a telephone by the first defendant when she asked to call her attorney. The plaintiff was kept in custody for the whole night until 07:00 the following morning. She was then taken to Fezeka Court, after which she was released (without appearing in court) and not having made any statements. She learnt that there was no docket and was instructed go home. When she got back she asked about her keys and child and was told they were with Tonise.

Defendants' case

- [12] The defendant's version of what happened at the plaintiff's house is materially different. According to the first defendant when she, Jordan and Nonceba arrived at the plaintiff's house, they knocked and found that she was not dressed properly. The plaintiff closed the door and they waited for about 5 to 10 minutes for her to re-open. Whilst they were waiting outside she could hear the plaintiff shouting and swearing inside the house saying that Nonceba will get her gas cylinder in 2020.
- [13] According to the first defendant the plaintiff would not give them any chance to talk. She was unruly, hitting on the fridge, tying and untying the towel. The first defendant testified that Maxebengula intervened and asked Nonceba about a gas cylinder. He made an arrangement with Nonceba about the gas cylinder and that Nonceba should go and fetch the 2kg chicken from him at Pick 'n Pay. Nonceba was not interested in that arrangement but wanted her things there and then. Nonceba was crying because the plaintiff was swearing at her, still very unruly and telling Nonceba that she will get her gas cylinder in 2020.
- [14] The first defendant testified that while all this was happening she just stood there and started moving backwards. She then asked Jordan to call for back-up. The reason for that was she did not know what the plaintiff was prepared to do. Jordan went to make a call outside because there was no network inside the house. Back-up arrived immediately but by this time they had moved outside the house. The plaintiff started banging on the police vehicle.

It was at that point that the first defendant told the plaintiff that: *'Sisi, I will arrest you now because you are uncontrollable. According to the first defendant: 'She then said she's not going to get into the police van. I said I am going to arrest you Joice.'* By this time the community had come out. The first defendant arrested the plaintiff with the help of Warrant Officer Mosia because of her riotous behaviour. She wanted to get the plaintiff away from the crowd, i.e. from the area itself because the crowd could have acted on them. The first defendant denies that the plaintiff's towel had fallen at any stage. She testified that when she grabbed the plaintiff to put her in the van she grabbed her with the towel.

- [15] As regards the child the first defendant alleges that a certain lady her age who said she lived three houses from the plaintiff's house volunteered to take care of the child. This lady apparently brought a pair of jeans and a top for the plaintiff which the first defendant gave to the plaintiff to put on while she was already inside the police van.

- [16] The plaintiff and Maxebengula were taken to the charge office. The first defendant denies that she refused to give the plaintiff the phone. She testified that when the plaintiff was given a phone to call her lawyer she threw it away and banged it. She said that normally people that are arrested for riotous behaviour are kept for a few hours (approximately for six hours) and released when they have cooled off. She testified that the plaintiff was uncontrollable for the whole night and she deserved to be kept overnight and she deserved to go to Court because she was rude.

- [17] Landu testified that Maxebengula was arrested for assaulting him and for obstructing justice by interfering with the plaintiff's arrest. Landu denies that he had used a pepper spray.

Discussion

- [18] The issues to be determined by this Court are:

16.1 whether the plaintiff was lawfully arrested and if so whether her detention was warranted in the circumstances of this case and;

16.2 whether the plaintiff's self-esteem and reputation were injured as a result of the first defendant's actions.

[19] I first deal with the unlawful arrest and detention claim.

Unlawful arrest and detention

[20] Once the arrest or detention has been established the onus to justify the arrest rests with the defendants.¹ In *Minister of Law & Order v Hurley*² the court made the following remarks:

'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.'

[21] The defendants allege that the plaintiff was arrested for riotous behaviour in terms of Section 40 (1) (a) of the Criminal Procedure Act³ ('the CPA'). Section 40(1)(a) provides as follows:

'A peace officer may without warrant arrest any person who commits or attempts to commit any offence in his presence.'

[22] The first defendant alleges she arrested the plaintiff for riotous behaviour allegedly committed in her presence. It is submitted on behalf of the defendants that the arrest was made pursuant to the by-laws promulgated in the Government Gazette dated 28 September 2007 which, *inter alia*, stated as follows:

' 2.

.....

(3) No person shall in a public place –

¹ See *Minister of Law & Order v Hurley* 1986 (3) SA 568 A at 589 E-F

² 1986 (3) SA 568 A.

³ Act No. 51 of 1977

fight or act in a riotous or physically threatening manner'

[23] Public place is defined as, *inter alia*, 'a public road...' '...the verge of any such road, street or through fare...'

[24] The first defendant was adamant that the plaintiff was arrested for riotous behaviour and that this decision was taken outside her house (on the street) when she was banging the police vehicle, and acting in an aggressive, abusive and unruly manner.

[25] In my view it is important to put the whole issue into perspective by looking at whether the police should have gone to the plaintiff's house in the first place. Police visited the plaintiff at her house not because there was any reasonable suspicion that she had committed any crime but to resolve 'a complaint' laid by a neighbour about a gas cylinder and a 2kg chicken at the charge office. This was basically a dispute between two civilians. It is important to look at whether the police visit in a private house to 'resolve Nonceba's complaint' was justifiable. I am aware of the fact that the defendants' defence is that the first defendant did not arrest the plaintiff for the gas cylinder complaint but for riotous behaviour outside her house which elicited a crowd that could pose great danger to the police. It is important in my view to deal with this issue before one even gets to the commotion outside the plaintiff's house.

[26] The starting point is the Constitution⁴. Section 205 (3) of the Constitution states as follows:

'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.' (Own emphasis)

[27] From the reading of this provision the objects are quite clear. In my view when the police went to the plaintiff's house with Nonceba they did not go there to prevent, combat and investigate crime, maintain public order or protect and

⁴ Act No. 108 of 1996

secure the inhabitants of the Republic and their property and to uphold and enforce the law. If their intention was to do so, it certainly is not supported by any evidence. Furthermore, there is no evidence that a criminal charge was laid by Nonceba which necessitated a visit at the plaintiff's home. Even if a criminal charge had been laid, the police had a duty to ensure that correct procedures including the observance of a person's constitutional rights when a criminal charge (if any) has been laid against them. We know that that was not the case here. Police were interfering in a civil matter between Nonceba and the plaintiff.

- [28] Section 13 of the South African Police Service Act⁵ ,*inter alia*, sets out the powers and duties of members of the police service which include performing duties and functions as are by law conferred on or assigned to a police official, to perform such duty in a manner that is reasonable in the circumstances, and to use only minimum force which is reasonable in the circumstances.⁶

- [29] At the outset I question the police presence in the plaintiff's house if their intention was not to perform their duties as conferred on them by law. As I have already stated, if their presence was justified certainly not much evidence was led in that regard.

- [30] I am not satisfied that the police played any meaningful role in trying to resolve the complaint when they reached the plaintiff's home, in any event. It is quite apparent that Maxebengula is the one who managed to make an arrangement with Nonceba whilst the first defendant and the plaintiff were engaged in an altercation.

- [31] Turning to the reason for the arrest. The first defendant requested Jordan to call for back-up while they were still inside the plaintiff's house. It makes no sense to me that back-up would be called because the plaintiff was banging her fridge, shouting and making noises inside her house. If the reason was not

⁵ Act No.68 of 1995

⁶ See section 13(1), (3)(a) and (b)

to arrest the plaintiff for her rowdy behaviour in her house why was back-up called.

- [32] Counsel for the defendants referred to an entry made by Landu in the occurrence book. In this report Landu states the following: *'I was assisting Sgt Tanyane at No.26 Sylvia Road, Tambo village for back-up to arrest someone. On my arrival by the time Sgt Tanyane was busy arresting her suspect, she was a lady suspect.'* (Own emphasis) This to me seems to be consistent with the view that back-up was called to arrest the plaintiff for her conduct inside her house.
- [33] Even if the decision to arrest was made when the plaintiff was banging the police vehicle in street as alleged. I am not persuaded she posed danger to the community and needed to be removed. An option of the police leaving her house without arresting her could have been considered. Especially because the real issue that they had come for did not seem to be central anymore. There is no evidence to suggest that if the police had left the plaintiff at her house the community would act violently because of her presence in the neighbourhood. The argument that the best thing to do was to remove her from the crowd by arresting her is in my view not reasonable. I am also concerned that the plaintiff's child was left with some neighbour whose particulars were not taken by the police. In my view this was not a reasonable thing to do.
- [34] This brings me to the issue of detention. Having been removed from the public the question that arises is whether it was still justifiable for the plaintiff to be kept in a cell for the whole night, away from her child. The first defendant testified that people who are arrested for riotous behaviour are normally kept in custody for a few hours and released when they cool off and generally they are kept for approximately 6 hours. There is no evidence to suggest that if released after 6 hours the plaintiff would pose danger to the community apart from an allegation that she was uncontrollable for the whole night. It is not clear whether she was checked to see if she could be released after a few

hours. The key question though is whether she posed any danger to the public necessitating her being kept in custody for the whole night.

[35] This brings me to the issue of her being released in the morning at 07:00 before proceedings could commence at Fezeka Court. Whatever the reasons for releasing her were, my view is that, as an arrested person she had a right to understand the reason for her arrest not just by signing the notice that she understood her constitutional rights, but by being brought to justice and accounting for her actions. In this instance apart from the notice about her constitutional rights, no statements were ever taken from her or those involved in the incident. Furthermore, the first defendant's assertion that, being arrested for riotous behaviour is not a serious matter warranting formal procedures is not consistent with her statement that the plaintiff deserved to go to court because she was rude.

[36] Based on all these factors, I am not satisfied that the plaintiff was lawfully arrested and even if I am wrong on that, there was no justification for the plaintiff to have been kept in custody for the whole night and simply be released without having been brought to justice. I accordingly find that the plaintiff's rights to bodily integrity and liberty were violated.

Defamation and injury to personality claim

[37] I now turn to deal with the defamation and injury to personality claim. Under this claim the plaintiff alleges that her self-esteem, personality (*dignitas*)⁷ and reputation (*fama*) have been injured due to the actions of the first defendant.

[38] Neethling, Potgieter and Visser say:⁸

'A person's dignity embraces his subjective feelings of dignity or self-respect. Infringement of a person's dignity accordingly consists in *insulting* that person. There are an infinite number of ways in which a person may be insulted. Any insulting

⁷ The right to dignity is recognised in our law as an independent personality right within the concept of dignitas. See *Law of Delict* (5 ed) Durban, Butterworths: 2006, 321.

⁸ *Law of Delict* (5 ed) Durban, Butterworths: 2006, 321.

words or belittling or contemptuous behaviour may be included here. Since one is concerned with a person's opinion of himself and not with the opinion of others, as in the case with defamation, publication of the insulting behaviour to third persons is unnecessary to constitute an *iniuria*: publication to the plaintiff alone is sufficient.'

- [39] Liability for this form of delict arises when the plaintiff proves the wrongful and intentional infringement of his or her *dignitas*'.⁹
- [40] Defamation on the other hand is the intentional infringement of another's right to his good name.¹⁰
- [41] In the Constitutional Court case of **Le Roux and Others v Dey**¹¹ there was a lot of debate about the distinction between the tests involved in defamation claims and right to dignity.
- [42] One of the issues discussed at length in the respective judgment was whether *fama* and *dignitas* brought under the same facts can give rise to different actions. The majority decision recognised that traditionally these concepts are categorised separately, it however agreed with the majority decision of the Supreme Court of Appeal on the same matter that these interests often overlap, in that an infringement of the plaintiff's reputation will almost always be accompanied by an affront to dignity. In view of that these should be treated as one claim. The Court held that impairment to dignity comprises both a subjective and an objective element. The subjective part is that the person must feel insulted but the objective element must be satisfied as well. In order to satisfy the objective element our law requires that the reasonable person must feel insulted as well.¹² It follows therefore that the right to dignity claim cannot only focus on the subjective experience of the plaintiff and ignore the objective element. In the *Le Roux* judgment, Brand AJ stated the following:

⁹ Van Der Walt and Midgley *Principles of Delict* (3 ed) Durban, LexisNexis Butterworths: 2005, para 80.

¹⁰ Neethling et al, *Law of Delict supra* at 307

¹¹ [2011 (6) BCLR 577 (CC)

¹² See *Minister of Police v Mbilini* 1983 3 SA 705 (A) at 716

'In short, if a reasonable observer would agree with Dr Dey that he had been humiliated, infringement of dignity has been established. But by the same token Dr Dey would have been humiliated in the eyes of a reasonable observer to whom the statement had been communicated, which means that defamation had been established as well. If, on the other hand, the reasonable observer did not find the picture humiliating of Dr Dey, defamation would not have been established, but neither would infringement of dignity. And so I believe that we land ourselves in the same never-ending circle of logic.'¹³

- [43] I intend to follow this approach in assessing whether the plaintiff has satisfied her claim of injury to self-esteem, personality and reputation. Fortunately, the particulars of claim also brought these allegations under one claim. The conduct complained of consists of essentially three alleged 'wrongful actions'. The first one is an allegation that the first defendant 'insulted the plaintiff by calling her *'unondindwa'*'. The same statement was also attributed to Landu. The statement to Landu was however not pleaded. I will therefore not focus on it. The second alleged action relates to the plaintiff being loaded in a police van half naked and the third is the allegation that the plaintiff was kicked by the first defendant with her boots. The plaintiff alleges that all these took place in full view of other members of the public and other members of the South African Police Service.

Statement of 'unondindwa'

- [44] In *Khumalo and Others v Holomisa*¹⁴ the Constitutional Court stated that the elements of defamation are: (a) the wrongful and (b) intentional (c) publication of (d) a defamatory statement (e) concerning the plaintiff.
- [45] Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional. A defendant wishing to avoid liability for defamation

¹³ At para [149].

¹⁴ 2002 (5) SA 401 (CC) at para 18;

must then raise a defence which rebuts unlawfulness or intention.¹⁵ The onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities.¹⁶ A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence.¹⁷

[46] 'Publication' means the communication or making known to at least one person other than the plaintiff.¹⁸

[47] Proof of defamation follows a two stage approach the first being to establish the ordinary meaning of the statement. The second is whether that meaning is defamatory.¹⁹ The test to be applied is an objective one. In accordance with this objective test the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test it is accepted that the reasonable reader would understand the statement in its context and that he or she would have had regard not only to what is expressly stated but also to what is implied.²⁰

[48] The second stage is whether the meaning thus established is defamatory. Our courts accept that a statement is defamatory of a plaintiff if it is likely to injure the good esteem in which he or she is held by the reasonable or average person to whom it had been published.

¹⁵ *Borgin v De Villiers* 1980 (3) SA 556 (A).

¹⁶ See *Mohamed and Another v Jassiem* [1995] ZASCA 115; 1996 (1) SA 673 (A) at 709H-I and *Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 14.

¹⁷ *National Media Ltd and Others v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA) at 1202H and *Hardaker* id.

¹⁸ See Neethling et al, *Law of delict* supra at 307 and 308

¹⁹ *SA Associated Newspapers Ltd en 'n Ander v Samuels* 1980 (1) SA 24 (A) at 30F-G and *Sindani v Van der Merwe and Others* 2002 (2) SA 32 (SCA) at paras 10-1.

²⁰ *Demmers* above n 13 at 842A-C; *Sindani* above n 15 at para 11; *Mthembu-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at paras 25-6; and *Burchell* above n 9 at 84.

- [49] I now turn to the facts of this case. The word '*unondindwa*' is a Xhosa word translated to 'a *whore*'.
- [50] The first defendant denied that she used those words. The plaintiff's version that those words were indeed used was supported by Maxebengula. Mr Salie who appeared for the defendants argues that Maxebengula cannot be viewed as an independent witness because he is the plaintiff's boyfriend and was involved in the incident of 25 September 2008 and also arrested. He does not suggest however that Maxebengula was lying. Jordan could not dispute whether or not such words were used because he did not understand Xhosa. He however confirmed that a conversation occurred between the first defendant and the plaintiff. Nonceba was not called to verify whether such words were ever uttered by any of the parties. I disagree with Mr Salie that an adverse inference must be drawn from the plaintiff's failure to call Nonceba. It seems to me the duty to call Nonceba was more on the defendants' side. This is because Nonceba had gone with the first defendant and Jordan to try and resolve the gas cylinder and chicken issue, and according to the first defendant Nonceba said she did not want any arrangements. I am also not in agreement with Mr Salie when he argues that Maxebengula demonstrated that he had a vengeful attitude against the police because he had alleged that they came with an agenda and by making reference to the Marikana incident. Maxebengula made these statements, in my view, based on his own observations on the day in question and not because of any vengeance against the police. Whether those observations were right or wrong is not the issue. I see no reason why I should reject Maxebengula's evidence on these bases.
- [51] I observed the manner in which the plaintiff and the first defendant conducted themselves in Court coupled with the use of language. Based on my observations it is probable that a commotion happened on the day in question. Both tended to be argumentative at times during cross examination. I however took particular notice of the tone of words used by the first defendant during cross examination when she referred to the plaintiff as '*imenemene*' when a version was put to her. The first defendant did not seem to think there was

anything wrong with that word. '*Imenemene*' is a Xhosa word translated as '*habitual liar*'. This is not everyday parlance. Although it may not be categorised as an insult people who use the language will take offence at being called '*imenemene*'. That is however not the expression that is before me. I am highlighting it as a factor, amongst others, that becomes important in determining whether the word '*unondindwa*' might have been used.

- [52] Based on the factors above, it is highly probable that the words '*unondidwa*' were used.

- [53] The context in which those words were used becomes important as it goes to the questions of whether they were defamatory. According to Neethling²¹, the only relevant question is whether in the opinion of the reasonable man (person) with normal intelligence and development, the reputation of the person concerned has been injured (thus an objective approach). If so the words or behaviour are defamatory and *prima facie* wrongful as against that person.

- [54] The plaintiff did not allege in her particulars of claim or during the course of her evidence how that statement affected her good name and how the use of such a word in front of her boyfriend and Nonceba would affect her reputation in the eyes of the society. Mr Nobathana on behalf of the plaintiff advanced an argument that the plaintiff's boyfriend would look at her differently by thinking that she sleeps around. Her boyfriend clearly did show that, whilst he found use of those words offensive, they did not change his perceptions about the plaintiff. It also did not seem to change Nonceba's views about the plaintiff either. Apparently Nonceba and the plaintiff are currently on very good terms as alleged by the plaintiff.

- [55] In any event, that is not the test. The test is more objective than that, it focuses on the reasonable man who is a member of the society in general. In my view a reasonable person would not find the use of '*unondindwa*' in that context defamatory. He or she would interpret the words to have been used

²¹ Neethling et al, Law of Delict, Fifth edition at page 399

between the four walls of the plaintiff's house, 'not in full view of the public' as alleged by the plaintiff during an altercation between the plaintiff and the police and have not harmed her good name in the eyes of the members of the society. The defamation claim on this aspect must therefore fail.

- [56] I now turn to the claim of injury to the plaintiff's self-esteem allegedly caused by the use of those words. A claim of injury to dignity does not only focus on how the plaintiff subjectively experienced those words as Brand AJ observed in the *Le Roux* case I have referred to above, an objective element of a reasonable observer is also introduced. Accordingly, if a reasonable observer would have found the words '*unondindwa*' not to be defamatory because they were said inside the plaintiff's house, during an altercation with the police then the reasonable person would not change his mind and feel insulted, having regard to the context in which those words were said. In any event, the plaintiff has not really spelt out how those words made her feel. The claim of injury to her self esteem and personality must also fail.

Allegation of being loaded in a van half naked

- [57] In her own version as supported by Maxebengula, the plaintiff confirms that she was instructed whilst inside her house by both the first defendant and Landu to get dressed because they were going to arrest her but she did not do so. When the commotion went outside the Plaintiff she had her towel on. Whilst the police could be blamed for not having ensured that the plaintiff was properly dressed before being loaded in a police van, it does not appear that she had at any point asked to be given an opportunity to get dressed before she could get arrested. I am alive to the fact that the commotion might have gathered momentum to the point that none of the parties paid attention to the fact that the plaintiff had to get dressed. It seems to me that had the plaintiff put on proper clothes when the police had allegedly instructed her to do so, she would not find herself in the degrading and humiliating state she found herself in when she got arrested outside her house. I therefore cannot find that her right to dignity was impaired due to her failure to take active action by

ensuring that her body was properly covered. Defamation claim must therefore fail on this action too.

Assault at the police station

[58] Insofar as the assault claim is concerned, I am not persuaded that the plaintiff has been able to show on the balance of probabilities that the assault took place. Maxebengula did not see it, neither was it seen by Tshomi who had heard the noise when the plaintiff and first defendant had arrived at the charge office. I am not satisfied that the evidence presented bears out that the assault occurred. I therefore do not find any basis for both defamation and personality infringement claim on this front either.

[59] In conclusion the plaintiff succeeds on her claim of deprivation of liberty (i.e. unlawful arrest and detention) but fails on the defamation, self esteem and personality claim.

[60] On the issue of costs, Mr Salie pointed out during argument that the defendants would ask for payment of the costs that were occasioned by the failure of the plaintiff to file a practise note on 06 February 2013. The matter had been set down for that day and the defendants were ready to proceed. I see no reason why the defendants should not be awarded costs in their favour for that day.

[61] Apart from the cost order in relation to the postponement occasioned by the plaintiff on 06 February 2013, costs shall follow the result.

[62] I therefore make an order in the following terms:

1. Plaintiff's claim for damages to her reputation and self-esteem (i.e. Claim A) is dismissed.
2. Plaintiff's claim for damages in relation to Claim B, succeeds on the merits and the defendants are held liable for such damages as the plaintiff can prove arising from her unlawful arrest and detention on 25 September 2008;

3. Defendants are ordered to pay plaintiff's costs, save for the costs occasioned by the postponement of 06 February 2013 in respect of which the plaintiff must pay the defendant's costs.



NP BOQWANA

Acting Judge of the High Court

APPEARANCES

FOR THE PLAINTIFF: Adv M W Nobatana

Instructed by: Mfazi Kose Inc., Cape Town

FOR THE DEFENDANTS: Adv M Salie

Instructed by: State Attorney, Cape Town