



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

Case no: 14903/2012

Magistrate's court case no: H62/2010

NOMAWONGA DEBRA DANTI

Plaintiff

v

THE MINISTER OF SAFETY AND SECURITY

First Defendant

VUSUMZI NDALA

Second Defendant

Court: Judge J I Cloete

Heard: 25, 26, 27 February 2013; 8, 9, 10, 11 April 2013 and 16 May 2013

Delivered: 7 June 2013

JUDGMENT

CLOETE J:

- [1] The plaintiff claims damages against the defendants jointly and severally in respect of her alleged unlawful assault, arrest and detention over the period 16 March 2007 to 19 March 2007. The merits and *quantum* of the claim have been separated and at this stage only the merits need be determined.

- [2] On the evening of Friday 16 March 2007 the plaintiff, who was the mother of a three-month old baby at the time, witnessed the aftermath of a brutal domestic assault in Cekiso Street in the Mossel Bay area. When she arrived at the scene (where bystanders had gathered), she saw a severely injured and apparently unconscious woman lying on the ground. She telephoned the emergency services call centre number for assistance and the police responded quickly, arriving in three to four police vehicles.
- [3] The plaintiff, being concerned about the severity of the woman's injuries, asked the police officers to telephone for an ambulance. She was told that there was no ambulance available, and the police proceeded to load the injured woman into the back of one of their vehicles in order to transport her to hospital. According to the plaintiff her pleas to the police to reconsider and to rather wait for an ambulance were dismissed. According to the second defendant, Officer Ndala ('Ndala') and his partner at the scene, Officer Sindelo ('Sindelo') the plaintiff became agitated and aggressive. Ndala's evidence was that the plaintiff was armed with a stick, was shouting and swearing at him and Sindelo, and was inciting the bystanders who had gathered to take the law into their own hands. Sindelo's evidence was that the plaintiff was insulting the police officers, using vulgar language, and was threatening to lay charges against the police. Importantly however, the evidence of both Ndala and Sindelo was that they simply ignored the plaintiff, and after loading the man who had assaulted the woman (and who was also injured) into the back of their police vehicle, they climbed into the vehicle to drive away from the scene to take the injured man to hospital. Neither testified that they felt threatened by the plaintiff or that she was

in any way obstructing them in the execution of their duties, although Ndala at least was clearly annoyed with her, as is confirmed by the events that followed.

- [4] The plaintiff's evidence was that she was walking away from the scene when she was called back to the vehicle in which Ndala and Sindelo were now seated. As she leant into the open window on the driver's side (where Sindelo was sitting) Ndala leant over from the passenger seat and sprayed her in the face with pepper spray from a canister that he was brandishing. The two police officers do not dispute that Ndala sprayed the plaintiff in the face with pepper spray while they were seated inside the vehicle. They deny however that they called the plaintiff back to their vehicle and gave various contradictory versions during the course of lengthy testimony about why Ndala had discharged the spray.
- [5] Ndala's various versions (there were five in all) were as follows. Initially he confirmed the one recorded in the statement that he had made later the same evening, namely that *'because she was so rude and we struggled against her I had to use a pepper spray to stop her'*. During his evidence in chief he stated that the plaintiff was standing very close to the vehicle; that he was unsure of what she intended to do with the stick that she was carrying; and that in order to protect Sindelo from her and to get her away from the vehicle he sprayed her. He did not mention that he himself had felt threatened. In cross-examination Ndala stated that the plaintiff was still shouting at him and Sindelo; that they wanted to leave, that she was leaning in through the open window and did not want to move away, and that this was why he had sprayed her. This

version then changed and his evidence was that he only pepper sprayed the plaintiff as a last resort after both he and Sindelo had pleaded with her to move away from the vehicle and that she had refused. Yet again his version thereafter changed, and he claimed that it was only he who had instructed the plaintiff to move away and that he had warned her that he would spray her if she did not do so. However the plaintiff thought that Ndala was joking with her and he then proceeded to spray her. The plaintiff had not knocked on the driver's side window. It had not been necessary because the window had been open before she approached the vehicle.

- [6] Sindelo's versions (there were four in all) were as follows. He also initially confirmed the one recorded in his statement of later that evening, namely that *'we decided to leave the scene but she kept swearing at us and [Ndala] subsequently [sprayed] her a little bit'*. During his evidence in chief Sindelo stated that the plaintiff had leant against the vehicle and threatened to have *'these police'* arrested. He pleaded with her, telling her that she was making matters worse, and when she did not stop Ndala warned her that he would spray her. Still she did not stop and it was at that stage that Ndala leant over and sprayed her. During cross-examination Sindelo stated that the plaintiff had come over to the vehicle and knocked on the driver's side window, which was closed. He was unable to say whether she had knocked on the window with her hand or with the stick, but he recalled that when he rolled down the window she was still holding the stick. After he had opened the window they *'spoke'*. The reason why Ndala had sprayed the plaintiff was to cause her to move away from the vehicle, because if she did not do so *'it might have dragged her and*

hurt her'. Sindelo had not simply rolled up the window because he might have hurt the plaintiff.

- [7] Significantly, Sindelo (who was seated closest to the plaintiff) testified that: (a) he had not regarded the words allegedly uttered by the plaintiff as a threat; and (b) he did not at any stage feel threatened by the plaintiff. While the plaintiff was consistent and cogent in her version, the same cannot be said of Ndala and Sindelo, who appeared to tailor their evidence each time a new version put forward by them was shown to be improbable. Again there was no evidence that after they were seated in the vehicle the plaintiff had somehow tried to stop them from leaving and had thus obstructed the pair in the execution of their duties. There was also no evidence that Ndala had resorted to using the spray in order to execute minimum force to subdue the plaintiff. In addition, Ndala eventually admitted that he had indeed assaulted the plaintiff when he discharged the pepper spray into her face, despite at no stage having felt threatened by her alleged behaviour from within the safety of the vehicle.
- [8] After Ndala had sprayed the plaintiff in the face the two officers drove off and took the injured man to hospital, leaving the plaintiff to fend for herself. She testified that her eyes and face were burning and that she was coughing. She called a Mrs Gungxa who lived close to the scene and the latter assisted the plaintiff to a nearby tap where she washed her face. Her face and eyes continued to burn and Mrs Gungxa took the plaintiff into her home where the plaintiff applied cooking oil to her face to try to stop the burning. The plaintiff's evidence was that she was compelled to reapply the oil to her face to try to get

the burn under control. This testimony was confirmed by Mrs Gungxa who gave evidence on the plaintiff's behalf. Mrs Gungxa also testified that she had witnessed the plaintiff's earlier presence at the scene although she had not witnessed Ndala assaulting the plaintiff as she had stepped into her house after the injured had been placed in the police vehicles. Mrs Gungxa's evidence was also that at no stage had the plaintiff wielded a stick or any other weapon, neither had the plaintiff behaved towards the police or any of the bystanders in the manner alleged by Ndala and Sindelo. Mrs Gungxa had also witnessed the two police officers calling the plaintiff over to their vehicle as she was leaving the scene. None of this evidence was challenged and it supports the plaintiff's version in all material respects.

- [9] The plaintiff, whose unchallenged testimony was that as a young girl she had been subjected to police brutality, gave evidence that following upon Ndala's assault '*...ek weet nie of ek kwaad was nie, of ek het deurmekaar gevoelens gehad, maar wat ek dan ook vir myself gesê het dat ek gaan polisiestasie toe gaan en – om vir die polisie gaan rapporteer*'. After about ten minutes she left Mrs Gungxa's home and walked to the local satellite police station (known as the 'CSC' in Kwanonqaba) which was a five-minute walk away. On her arrival at the CSC the plaintiff encountered the duty police officer (Inspector Robertson ('Robertson')) who later testified on the defendants' behalf. The plaintiff's evidence was that she asked Robertson (although at that stage she did not know his name) to call the captain on standby duty. She wished to report the assault but did not know the name of the police officer responsible. Robertson informed her that the captain would only be available on the following Monday,

19 March 2007, and that she should accordingly return on the Monday. The plaintiff was not prepared to wait until the following Monday since she wished the captain to observe the after effects of Ndala's assault on her face, eyes and chest when they were still evident.

- [10] While the plaintiff was explaining her concerns to Robertson, Ndala and Sindelo returned to the police station. It was the plaintiff's evidence that as they entered the charge office she pointed Ndala out. He responded '*ja, ek is Ndala*' and she testified that then '*hy sy hemp met sy naamtag uitgewys het en sê ja, hier is ek, wat gaan jy doen*'. Ndala moved quickly past the plaintiff behind the counter. The plaintiff was frightened by Ndala and moved away to sit down. By this stage there were a number of police officers in the charge office. Her evidence was that

'Ek het toe vir hulle almal so deurgekyk, hierdie beamptes, waar ek eintlik 'n beampte – ek het eintlik 'n beampte gesoek wat darem 'n oop en 'n vriendelike gesig het, want al hierdie polisie wat hier ingekom het, is die wat hulle mee saamgeloop het.'

- [11] The plaintiff testified that she got up and continued to plead with Robertson to call the captain; and it was at that point that Ndala moved back from behind the counter, sprayed her in the face again and hit her on her head with the canister behind her right eye. Some of the other police officers present called on Ndala to stop. He was holding onto the plaintiff and they pulled Ndala off her as she fell to her knees. Her evidence was that the assault with the canister caused swelling to the area on her head and that she has subsequently suffered from pain and discomfort in her right knee.

- [12] The plaintiff then crawled towards the entrance of the CSC and a woman police officer pointed her in the direction of an outside tap. Her eyes and face were again burning and she was coughing. She could hear that other officers who had been in the close vicinity of the scuffle were coughing as well. The plaintiff again washed her face at the tap and moved towards the entrance gate in the yard to leave. Sindelo grabbed her on her right shoulder and asked her where she was going. She told him that she was returning home but he forced her into the back of a nearby police van. She asked Sindelo where he was taking her and he replied that *'jy gaan sien waarheen ons na toe gaan'*.
- [13] Sindelo drove the plaintiff, locked in the back of the police van, to the Da Gamaskop police station where there are holding cells. On their arrival Sindelo took away her cell phone and informed her that he was arresting her although he did not explain why. She begged him not to arrest her and undertook that she would return whenever he wanted, since she had a young baby at home whom she was still breastfeeding. Sindelo refused and told her that she would only see her child again on the following Monday. The plaintiff was handed over to another police officer and later placed in a cell where she was incarcerated until the following Monday morning.
- [14] During cross-examination it was put to the plaintiff that Ndala and Sindelo returned to the CSC after taking the injured man to hospital, but were thereafter again called out to investigate another complaint. The plaintiff was adamant that the pair had not again left the CSC, and that if they had returned and left again it was before she had arrived. It was also put to her that they had been

called back to the CSC on a second occasion because she was causing a scene; and that when the two police officers were leaving it for a second time it was the plaintiff who had in fact confronted Ndala; that she had grabbed him and a struggle ensued, during the course of which Ndala sprayed the plaintiff again in order to subdue her. Sindelo had intervened and was also affected by the spray. The police then arrested the plaintiff in the charge office for assault on a police officer and took her outside to a police van. The plaintiff however stuck to her version and impressed as an honest and forthright witness. Unfortunately the same cannot be said of Ndala, and to a lesser extent, Sindelo.

- [15] Ndala's evidence was that he and Sindelo returned to the CSC after taking the injured man to hospital. On their arrival they encountered the plaintiff. She and another woman were the only two members of the public in the charge office at the time although a number of police officers were present, since they were changing shifts. Ndala confirmed that the plaintiff had identified him but tried to portray that he had co-operated, claiming that he had gone so far as to write down his name and give it to her. This had never been put to the plaintiff. Ndala's evidence was further that the plaintiff was all the while shouting at him and he accordingly suggested to Sindelo that they leave the CSC; but that *'luckily'* they were simultaneously called out again to attend to another complaint, apparently in Umtata Street. Ndala was not asked about the nature of the complaint, about what steps he and Sindelo had taken to deal with the complaint, or how long it had taken them to deal therewith. He was referred to his occurrence report book but was not asked to confirm the correctness of its

contents, nor was he asked to testify about any aspects thereof. Ndala's evidence was merely that straight after the complaint had been attended to he was called back to the charge office by Warrant Officer Minnies (*'Minnies'*) to *'come and sort out the problem of the lady who is complaining about us'*.

- [16] Ndala had seemingly forgotten his earlier testimony that on his previous arrival at the CSC a number of police officers were present since they were changing shifts, because he testified that upon their return to the CSC many officers were present as they were (i.e. only then) about to change shifts. His evidence was that upon their return to the CSC Minnies (who was in charge of special duties that weekend) asked Ndala what had happened with the plaintiff. As Ndala was explaining to Minnies the plaintiff was shouting at Ndala from the public side of the counter. Minnies then again excused Ndala and Sindelo so that they could *'go and attend to complaints outside'*. As they were leaving Ndala felt a slap to the right side of his face. As he looked back he saw that it was the plaintiff who had slapped him. She was also by that stage holding on to him. Sindelo, who was immediately behind Ndala, grabbed the plaintiff but she would not let go of Ndala whose evidence was that *'she was acting as if she was a person who is ill or sick, and I took out my pepper spray and I discharged it on her...Sindelo managed to hold her, helped by another police officer, and they took her out and they put her into the van outside.'* Ndala then laid a charge of assault against the plaintiff.

- [17] Ndala was asked whether he believed that if a person assaults a police officer they should be arrested, to which he replied *'yes, that person must be arrested'*

and sent to the courts of law, and the court must decide what [its] going to do about that person'.

[18] During cross-examination Ndala confirmed that, on his version, the plaintiff had been afforded three opportunities to assault him in the CSC before she allegedly did so. The first was when he initially entered the charge office; the second was when he left to attend to the complaint in Umtata Street; and the third was when he again passed her on his return. On his version, throughout this period, the plaintiff was shouting at him, and the CSC was full of police officers, almost all of whom carried firearms and pepper spray and wore bulletproof vests.

[19] Ndala then claimed that when the plaintiff assaulted him she had torn the buttons off his shirt. This had not been put to the plaintiff in her testimony and had not been mentioned by Ndala either in his police statement or his evidence in chief. His version changed, again and again. He then claimed that he had succeeded in pushing the plaintiff away from him and that it was as she approached him for a second time that he sprayed her. It was as he was spraying the plaintiff that Sindelo moved between the two. Ndala had sprayed the plaintiff because if he had tried to run *'then she would have followed me'*. His evidence was that he could not simply have retreated behind the counter since she would have followed him. He was unable to explain why he had not anticipated that some of the other armed officers would have come to his assistance if the plaintiff had indeed pursued him. When it was put to Ndala that the plaintiff had not in fact assaulted him he replied that *'I sprayed her the time*

when she was acting like a crazy person and she came towards me ... when somebody is acting crazy, then you have to use the spray so that you will be able to control the situation'.

[20] Ndala was referred to his police statement which he had already confirmed to be correct. The statement makes no mention of an earlier return to the CSC that evening. In his statement Ndala had claimed that the plaintiff had not shouted at him but at Sindelo; that Minnies had asked Sindelo what had happened and that Sindelo had furnished an explanation to Minnies; that Minnies had then tried to calm the plaintiff but that she had lost control; that Ndala had then decided to leave the CSC; that as he was approaching the exit the plaintiff slapped him; that police officers attempted to stop her but were unsuccessful as she was out of control; that the plaintiff then approached Ndala again *'with an intention to assault'* him and that he had then used minimum force (i.e. discharging the pepper spray) and arrested her for assault on a police official.

[21] Ndala's evidence however was that he had not arrested the plaintiff; he had remained behind in the CSC and it was Sindelo who had taken the plaintiff to the police van. Accordingly *'he [i.e. Sindelo] was the arresting officer'*. Ndala tried to explain this material contradiction away by claiming that he had meant in his statement that he was the one who had laid a charge of assault against the plaintiff; and that he had also meant that she had been arrested for assault on a police officer. It should be mentioned that at the time Ndala had been a

police officer for more than three years and could thus reasonably have been expected to be able to distinguish between an arrest and the laying of a charge.

[22] When Ndala was pressed to explain how the police officers in the CSC had tried to stop the plaintiff from assaulting him he replied *'the people in the CSC would not just sit there and just watch what was happening. Some of them intervened by saying something to her, like asking her to stop what she was doing'*. When asked why he had not mentioned the important detail concerning the buttons on his shirt in both his statement and his evidence in chief Ndala sought to excuse this by stating that *'that's why I say that if I had written down everything that had happened by detail on that day, then I would have written up to ten pages'*. Having testified a few minutes earlier that he had remained behind in the CSC and that it was Sindelo who had taken the plaintiff to the police van, Ndala then claimed that he had in fact followed Sindelo and another officer who was apparently assisting him so that *'if she should give them further problems, I should assist them. I opened the bakkie, so they put her into the bakkie'*.

[23] Ndala's evidence was also that a police officer is obliged to arrest a person without a warrant if that person commits or attempts to commit an offence in his or her presence. In his words *'if an offence has been committed, I have to arrest the person'*. He again changed his evidence, claiming that it was indeed him who had taken the decision to arrest the plaintiff that night. He was asked *'You did not consider any other possibilities, except that she must be arrested there and then?'* and he replied *'When somebody has committed a crime in*

front of me and assaulted a police officer, what other circumstances are there to think of? When he was asked whether or not he had considered any possibilities or options other than arresting the plaintiff, he replied that *‘there were no other possibilities... a police officer is a person that is supposed to keep order; he belongs to the state. So the assault was a threat to the state.’*

- [24] Ndala was referred to s 40(1)(a) of the Criminal Procedure Act 51 of 1977 (*‘the Act’*) which provides that:

‘40 Arrest by peace officer without warrant

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

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

(emphasis supplied)

- [25] Ndala confirmed that he understood the difference between the words *‘may’* and *‘must’*. He eventually conceded that s 40(1)(a) of the Act confers a discretion on a peace officer to arrest a person without a warrant but a consideration of his evidence on this aspect leads to the conclusion that at the time of the incident in the CSC Ndala was not aware of the existence of any such discretion. Again Ndala’s evidence thereafter changed and he testified that Sindelo, when arresting the plaintiff, had told her that he was arresting her *‘for assaulting a police official, and by committing the offence in front of him’*. He then claimed that Sindelo had informed the plaintiff of this as he was wrestling her towards the police vehicle. This had not been put to the plaintiff and it had not been mentioned by Ndala in either his statement or his earlier testimony.

- [26] Sindelo's evidence was that upon their return to the CSC the plaintiff demanded Ndala's name which he willingly provided. He did not mention that the plaintiff had been shouting at either him or Ndala; and said that after Ndala had given the plaintiff his name *'we attended to other complaints and we left that lady at the police station'*. They were subsequently called back to the CSC by Minnies *'to get clarification on the incident of the lady'*. As Ndala (and not Sindelo as Ndala had claimed) was explaining to Minnies the plaintiff *'interfered'*. She was *'using very strong words, unacceptable words, and she smelt like alcohol'*. This had never been put to the plaintiff and was also not Ndala's testimony.
- [27] Sindelo testified that Ndala suggested that they leave. As they were walking towards the exit the plaintiff grabbed Ndala and hit him with her right hand. The two then wrestled with each other and Sindelo tried to intervene by getting between them. It was at that point that Ndala discharged the spray. Sindelo confirmed that there were a number of other officers in the CSC at that stage but did not mention that any of them had attempted to quieten the plaintiff or to intervene in the scuffle. He said *'as this lady was fighting, I thought that there was nothing else that I can do now, this person is fighting with a police official, I have to arrest her. I then pulled her outside because at the – inside the station there is pepper spray that was used. When I got outside I told her that I was arresting her for assaulting a police officer inside the police station, as well as in front of me'*.
- [28] During cross-examination Sindelo's evidence was that it was Minnies who had told them to leave and not Ndala who suggested that they leave the CSC. He

was asked whether it seemed to him that Ndala was provoked by the plaintiff and he replied that it did not. He was again referred to his statement, which he himself had written, where he had said that *'most police officials shouted her to leave or else she's gonna be arrested for riotous behaviour, but she kept on shouting at Ndala whom I saw/thought that, she was provoking Ndala and also undermining the police... [she] blocked Ndala and started to push Ndala and Ndala retaliated and she fought with Ndala at the CSC. I stopped Ndala and also arrested the lady immediately for beating the police within the station. She told me... her name... she also tried to apologise but I told her that it was late for [an] apology because she was underestimating us...'*

- [29] Sindelo also testified that it was only after Ndala had sprayed the plaintiff that he managed to get between her and Ndala. When challenged about the inconsistencies between his statement and his testimony, Sindelo proffered varying and equally unconvincing explanations. First, his evidence was that he had not had the opportunity to read through his statement before testifying. He was then forced to concede that he had been given the opportunity to read his statement but claimed that because he was being asked a lot of questions he could not remember everything that he had read in the statement. When it became clear that this explanation was also not going to hold water, Sindelo resorted to saying that *'I'm not so conversant in English, so I cannot be accurate in every word that I use'*. However he conceded that he had prepared his statement unassisted and that (apart from using words such as *'conversant'* and *'accurate'* in his testimony) he himself had used the words *'retaliate'*, *'underestimating'* and *'provoking'* in the statement. When he was asked to

explain what he had meant by it having been late for an apology and that the plaintiff was underestimating the police, he replied '*.... by the assault that she committed in the charge office, assaulting a police officer... she came to the police station... she was given a chance. The chance she was given, she didn't use it, she became aggressive. She was shouting at Ndala and he was not responding. Me and Ndala were about to leave; she then attacked Ndala. That is my view of "underestimating"*'.

- [30] Sindelo testified that Ndala had not asked him to arrest the plaintiff but that he had made that decision himself. His evidence was that there is a particular form, which he referred to as a '*Form 14A*', which the arresting officer is obliged to complete and which contains all of the relevant information concerning an arrested person's rights under the Constitution. Sindelo maintained that he had completed that form '*as it was the procedure. You read the person their rights and you fill out that form.*' He also claimed that the plaintiff had signed the form once her rights had been explained to her. His evidence was further that once the form is completed and signed, one copy is placed in the docket, another is given to the arrested person, and the remaining copy is kept in the register book. None of this had been put to the plaintiff and it was common cause that the docket, which had been discovered, did not contain any such form. The best that Sindelo could offer was that it must still be at the Da Gamaskop Police Station. Sindelo denied that the plaintiff had ever informed him about her baby and had only apologised to him (why the plaintiff was apologising to Sindelo is not entirely clear) at which stage he had informed her that '*helping people was my right, but also if you have done something wrong, I must also detain*

you'. His evidence was that *'any crime that is committed in the presence of a police officer, that person must be arrested'*. As is the case with Ndala, a consideration of Sindelo's evidence on this aspect leads to the conclusion that he is not aware of the existence of the discretion conferred upon a police officer in terms of s 40(1) of the Act.

- [31] The evidence of Robertson (whom the plaintiff had encountered on her arrival at the CSC) corroborated that of the plaintiff's in all material respects, save that he supported the versions of both Ndala and Sindelo that they had left and returned to the CSC and that the plaintiff had instigated the scuffle by smacking Ndala. His evidence was however that after the plaintiff had smacked him, Ndala pushed her away; that she came at him again and Ndala again pushed her away; and that it was only as the plaintiff was approaching Ndala for the third time that he first warned her that he would spray her *'and then he sprayed her'*. This had never been put to the plaintiff and was also not consistent with any of the versions given by Ndala and Sindelo. Robertson then changed his evidence and said that it was as the plaintiff approached Ndala for the second time that he warned her; and that it was only after he had again pushed her away and she came at him for the third time that Ndala sprayed her. Robertson's evidence also differed from that of the two other police officers as to what transpired after Ndala had sprayed the plaintiff. He said that *'and then both of them, Sindelo, Ndala and the lady, they went out... there [were] other policemen also, assisting taking that lady outside'*. His evidence was also that during the scuffle the other police officers in the CSC had not intervened. Robertson's evidence differed from that of Sindelo, namely that he had moved

between the plaintiff and Ndala. Robertson's testimony was that Sindelo had grabbed the plaintiff from behind as she was approaching Ndala.

[32] Robertson also testified that pepper spray is used where the threat to a police officer is minimal and that police officers are required to issue a warning before dispensing pepper spray.

[33] Minnies testified that on the evening in question he was called out of his office to the charge office in order to speak to the plaintiff. In his words:

'Daardie stadium was die dame baie ontevrede, die dame was ongelukkig, en die dame het 'n baie harde stemtoon gehad. Ek het vir die dame gevra wat die probleem is. Sy het aan my genoem dat twee polisiekonstabels, ene konstabel Ndala, haar ge-pepper-spray het in Cekisostraat waar hulle 'n klagte bygewoon het. Ek het gevra vir die dame of sy 'n kriminele klagte wil lê as gevolg van die voorval, het die dame aan my gerapporteer nee, sy verlang dat die probleem opgelos moet word.'

[34] His evidence was further that he informed the plaintiff that he would call Ndala and Sindelo back to the charge office on one condition, namely that the plaintiff would promise him that *'sy haar gaan gedra, en dat sy – dat ons – dit op 'n professionele manier kan uitsorteer'*. The plaintiff agreed and he accordingly contacted the two police officers who arrived a short while later. The plaintiff pointed out Ndala, and Minnies spoke to him. At that stage the plaintiff was calm. However as Ndala began explaining himself to Minnies the plaintiff started to interfere. She spoke loudly; and she and Ndala began a heated exchange. Minnies testified that he could see that the situation was about to get out of hand and excused Ndala. Minnies encouraged the plaintiff to lay a

charge against Ndala, and as Ndala was leaving *'het die dame na hom geklap. Sy het hom vasgegryp'*.

- [35] Minnies' evidence was that he was shocked; as he stood there the plaintiff was pushing Ndala around. Ndala took out his pepper spray and sprayed her. Sindelo pushed between them and moved the plaintiff towards the exit. He was assisted by another police officer (Warrant Officer Plato, who has since passed away). After Minnies had spoken to Robertson he returned to his office and had no more involvement with the matter. Minnies confirmed that at the time the CSC was full of police officers as they were changing shifts.
- [36] Minnies impressed me as an honest and forthright witness who did not attempt to embellish his version. Robertson contradicted himself during his testimony and gave a version about the scuffle that seemed to me to be an attempt to portray Ndala in as favourable a light as possible. The evidence of both Minnies and Robertson indicates that by the time the altercation between the plaintiff and Ndala took place, the plaintiff had become distraught. The plaintiff's evidence was that by that stage she had already been assaulted by Ndala in Cekiso Street; was deeply distressed since in her perception she was being met with the same disdain in the charge office that she had experienced in Cekiso Street; and that it seemed to her that no-one was prepared to listen to her properly and come to her assistance. These factors, taken together with the plaintiff's undisputed testimony concerning her previous experience of police brutality, show that on the probabilities the role that the plaintiff played in the scuffle between herself and Ndala was not as passive as she claimed.

[37] However, that is not the end of the enquiry. The question that must nonetheless be answered is whether Ndala was justified in pepper-spraying the plaintiff for the second time. To my mind the answer to this must be no. First, there was no evidence that the plaintiff was still wielding the stick which Ndala and Sindelo claimed she had in her hand in Cekiso Street. Second, on Ndala's version it was open to him to have simply retreated behind the counter and it is a poor excuse for him to claim that he did not do so because the plaintiff would have pursued him. On the version of all of the police officers who testified the CSC was full of other armed officers at the time. The evidence of both Minnies and Robertson was that none of the other officers present had taken any steps to quieten or subdue the plaintiff before she slapped Ndala, which leads me to accept that, whatever it was that the plaintiff was doing, it could not have been particularly serious or threatening. Third, it is highly probable that by that stage Ndala's level of irritation with the plaintiff had increased even further. Not only had the plaintiff reported him at the CSC; he had also been called back by Minnies to explain himself.

[38] The impression that I gained is that Ndala is not a person who reflects before he acts, as is borne out by the events of earlier that evening in Cekiso Street. It seems to me that Ndala only requires the minimum of provocation to haul out his pepper-spray in order to silence the source of his irritation. The fact of the matter is that there were indeed other avenues open to Ndala, but instead he elected to employ the most easily available, and most intrusive, means in order to subdue the very same woman whom he had assaulted earlier that evening. Cut to their bare bones, the facts show that, on the probabilities, Ndala indeed

again assaulted the plaintiff when he discharged his pepper-spray for a second time in the charge office that evening.

[39] In addition, even if the jurisdictional facts referred to in s 40(1)(a) of the Act had been present, the onus nonetheless rested on the defendants to show that Ndala and/or Sindelo properly exercised the discretion conferred upon them in terms of the aforementioned statutory provision before carrying out the plaintiff's arrest without a warrant: see *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA) at paragraph[7]. At paragraphs [28] and [29] the Supreme Court of Appeal dealt with the discretion which an arresting peace officer is obliged to exercise as follows:

[28] Once the jurisdictional facts for an arrest, whether in terms of any paragraph of s 40(1) or in terms of s 43, are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present the discretion whether or not to arrest arises. The officer, it should be emphasised, is not obliged to effect an arrest. This was made clear by this court in relation to s 43 in Groenewald v Minister of Justice.

[29] As far as s 40(1)(b) is concerned, Van Heerden JA said the following in Duncan (at 818H-J):

'If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will

render an arrest unlawful, need not be considered because it does not arise in this case.'

- [40] The evidence of both Ndala and Sindelo was that they were not even aware of the existence of such a discretion. This was correctly conceded by the defendants' counsel during argument. In *Ulde v Minister of Home Affairs and Another* 2009 (4) SA 522 (SCA) at paragraph [10] the Supreme Court of Appeal said that

'By assuming that he had an obligation to detain the appellant, Madia was not exercising any discretion – he was carrying out what he believed to be a “blanket policy” which by definition precludes the exercise of a discretion.'

That being the case the defendants have been unable to place any facts before me to indicate whether or not the discretion was properly exercised. Accordingly the enquiry whether there was an improper application of the discretion does not even arise, notwithstanding that, as was said in *Duncan (supra)*, the grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed. Put differently, on the defendants' own version, they are unable to discharge the onus that rests upon them in this regard and it follows that there is insufficient evidence to indicate that the arrest of the plaintiff was lawful.

- [41] During argument the plaintiff's counsel submitted, correctly in my view, that if the plaintiff's arrest was found to be unlawful then it followed that her subsequent detention was also unlawful. But even if this is not the case, there

are nonetheless sufficient facts before me to enable me to find that the plaintiff's detention was unlawful.

[42] The only evidence on this aspect was that of the plaintiff's as well as certain documentary evidence to which I will refer below. It is common cause that after the plaintiff had been incarcerated in the cells at the Da Gamaskop Police Station her fate was placed in the hands of another unknown officer or officers and thereafter the investigating officer, Constable Kakaza ('Kakaza') until her appearance in court on the following Monday morning (just over 48 hours later) when she was released on warning by the presiding magistrate. Although it was the evidence of Robertson that Kakaza is still employed as a police officer in the area, and there were no indications as to why Kakaza was unable to testify, he was not called to give evidence on the defendants' behalf.

[43] The plaintiff's testimony was that after she was handed over by Sindelo, she was not asked about her personal circumstances by any of the officers that she encountered at the Da Gamaskop Police Station. She was asked by her counsel whether she had attempted to ascertain the reasons for her arrest and detention and she replied that *'Ek het nie die beampte gevra nie, want ek was mos nou al bang gewees. Ek het toe by die hof eers die Maandag kom hoor laat ek vir aanranding dan gearresteer was'*.

[44] The plaintiff testified that on the following morning, Saturday 17 March 2007, she was interviewed by Kakaza. She was referred to the form that Kakaza had completed during the interview and which he had signed. The form reflects that

Kakaza was made aware that the plaintiff: (a) had a fixed address; (b) was married; (c) had children; (d) was easily traceable; (e) had no previous convictions; (f) was not a suspect in any other criminal case; and (g) had not resisted arrest. It also reflects that Kakaza was satisfied that the plaintiff: (a) had co-operated with the police; (b) was not a danger to the community; (c) would not interfere with state witnesses; (d) should not be held in custody; and (e) could be released on bail without any conditions being imposed.

- [45] The plaintiff was asked what her response had been to Kakaza's question concerning her children. Her evidence was as follows:

'Ek het hom gesê ja ek het kinders, toe het ek sommer vir hom vertel van hierdie baba wat nog drink. Toe het ek ook gevra en gesoebat om my vry te laat, want ek wil net die kind – die kind drink nog aan my.

Wat was sy reaksie toe u vir hom vra hy moet tog vir u asseblief vrylaat, want die kind drink nog aan u? --- Hy het vir my gesê nee hy sal my nie kan vrylaat nie, ek gaan by die hof gaan hoor Maandag of die hof my dan gaan vrylaat.'

The plaintiff's evidence was also that, despite request, she was not permitted to make any telephone calls nor were the police prepared to notify her family as to her whereabouts. None of this evidence was challenged.

- [46] As was the case with the plaintiff's arrest, the defendants bore the onus to show that her subsequent detention was lawful. However they failed to adduce any evidence at all about: (a) what had led Kakaza to conclude that the plaintiff should not be released on warning in accordance with s 72(1)(a) of the Act; or (b) why Kakaza, having concluded that the plaintiff could be released on bail

(as contemplated by s 59(1)(a) of the Act) not only failed to fix bail but refused to release the plaintiff.

[47] The evidence of all of the police officers who testified was that it is the investigating officer, and not the arresting officer, who exercises the discretion whether or not to grant bail. It was common cause that Kakaza was the investigating officer; that he had taken the trouble to interview the plaintiff; and that he had recorded the information obtained as well as his conclusions in respect thereof. The form signed by Kakaza shows that he had exercised his discretion and had concluded that he could release the plaintiff on bail. This notwithstanding, it is common cause that the plaintiff was not in fact released on bail and remained incarcerated until her release on warning by the presiding magistrate on the following Monday morning. In these circumstances the only conclusion that can reasonably be drawn is that the plaintiff's detention was also unlawful.

[48] Evidence was also lead about the subsequent criminal proceedings in the magistrate's court relating both to the plaintiff and Ndala. There was also the evidence of the two expert witnesses, namely Ms Els (a clinical psychologist who testified on behalf of the plaintiff) and Dr Kritzinger (a clinical psychologist who testified on behalf of the defendants). Their expert testimony related predominantly to the psychological trauma suffered by the plaintiff as well as its effects. I do not intend to deal with this evidence since I am of the view that none of it is directly relevant to the determination of the merits of the plaintiff's civil claim. However because the plaintiff has been successful and the evidence

already given by Ms Els will be relevant to the determination of the *quantum* of the plaintiff's claim, it seems appropriate to take this into account in respect of costs at this stage.

- [49] During argument the defendants' counsel submitted that, were I to find in the plaintiff's favour, costs should be reserved since the *quantum* of the plaintiff's damages, once determined, might fall within the jurisdiction of the magistrate's court. I do not agree that it would be appropriate to order that costs be reserved for three reasons. First, as recorded in the minute of the rule 37 meeting held on 25 February 2013 (i.e. on the morning that the trial commenced) it was still the defendants' stance that the matter should not be transferred to another court. Second, and as was said in *Faiga v Body Corporate of Dumbarton Oaks and Another* 1997 (2) SA 651 (W) at 669G-J:

A separation of issues in terms of the provisions of Rule 33(4), by its very nature, fragments a hearing. This undesirable feature is counterbalanced by the prospective advantage of a saving in costs. One of the great advantages of the Rule is that in matters of delict, depending on the outcome of the hearing on the merits, the issue of quantum might never arise. Also, in those instances where the plaintiff succeeds on the merits, the matter of quantum is often settled. Reserved costs orders cannot bolster this advantage, but might detract from it. Evidence and argument in this matter lasted eight days. It is in my judgment time to bring the curtain down on this part of the proceedings and not to have decisions on costs left in abeyance.'

- [50] Third, I must also take into account that the plaintiff is not a person of means. She is employed as a cleaner at a local hospital. In *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (ECD) at 381H-382C the court, having cited *Faiga* (*supra*) with approval, also took into account the financial position of the

plaintiff; and said *'indubitably, the plaintiff can ill afford to await the finalisation of the matter. I accordingly find myself compelled to make an award of costs at this stage'*.

[51] The *quantum* of the plaintiff's claim, as it currently stands, is R447 900. It is of course open to the court adjudicating on *quantum* to make a determination on the costs relating thereto, including an order that the plaintiff may only recover costs on the lower scale in respect of those proceedings if it is ultimately found that the *quantum* of her claim falls within the jurisdictional limit of the magistrate's court. That however is a different issue and does not detract from the plaintiff's success against the defendants on the merits. There are also no indications that the plaintiff has conducted her case on the merits in anything other than a responsible manner.

[52] **I accordingly make the following order:**

- 1. The plaintiff succeeds on the merits of her claim against the defendants.**
- 2. The matter is postponed for trial on the issue of *quantum* on a date to be arranged with the Registrar.**
- 3. The defendants are ordered to pay the plaintiff's costs incurred in the determination of the merits on the High Court tariff as between party and party, including the following:**
 - 3.1 The qualifying fees of the plaintiff's expert, Ms C. Els; and**

3.2 The travel and accommodation costs of the plaintiff's legal representatives for attending the trial in Cape Town from 8 to 11 April 2013 and on 16 May 2013.

J I CLOETE