NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case no: 51/2010
Date heard: 2010; 2013;
25 – 26 May 2015
Date delivered: 4 June 2015

In the matter between

ANDRE PIETER SMIT **Plaintiff**

vs

THE MINISTER OF SAFETY AND SECURITY FOR SOUTH AFRICA **Defendant**

JUDGMENT

PICKERING J:

[1] This is an action for damages arising out of an alleged wrongful and unlawful assault allegedly committed upon plaintiff by certain members of the South African Police Services, acting at the time in the course and scope of their duties.

[2] Plaintiff alleges in his particulars of claim that on or about 8 May 2008 and at or near the Bermuda night club, Jeffrey's Bay, he was assaulted by certain policemen, including Potgieter, Booyse, Ketteldas and Makeleni. He alleges that in the course of the assault he was "*grabbed, pulled, dragged, kicked, beaten, and pepper sprayed*" before being picked up and thrown into the back of a parked police motor vehicle. He alleges that in consequence thereof he sustained certain severe bodily injuries, including an injury to his right eye which resulted in compromised vision, as well as a perforation of the right eardrum. He accordingly claims an amount of R200 000,00 in respect of past and future loss of earnings as well as an amount of R300 000,00 in respect of general damages and R50 000,00 for contumelia.

[3] In the plea defendant avers that on the night in question police officers Potgieter and Makeleni attended on a complaint at the Bermuda night club ("*the night club*") made against plaintiff and his brother Riaan Smit for riotous behaviour. Plaintiff and his brother unlawfully resisted arrest and, accordingly, Potgieter and Makeleni, assisted by officers Booyse and Ketteldas, were obliged to use "*reasonable, necessary and proportional*" force to effect the arrest. Defendant avers further that in the course of resisting the arrest plaintiff damaged a police motor vehicle as well as various items of clothing worn by the police officers. Defendant accordingly denies that plaintiff was unlawfully assaulted as alleged and further denies that the officers inflicted serious injury upon plaintiff during the course of his arrest.

[4] After the close of the defendant's case defendant was granted leave to amend the plea as follows:

> "*3.4 In the alternative to the aforegoing, and in the event that it is held that the Defendant utilised more force than was necessary in order to effect the Plaintiff's arrest, the Defendant pleads that such force was used as a result of the provocation on the part of the Plaintiff who provoked the officers identified above in one or more of the following ways:*
>
> *3.4.1 the Plaintiff used foul, insulting and racially abusive language towards the officers Potgieter and Makeleni which included referring to them as* "hotnot" *and* "kaffir"*; and*
>
> *3.4.2 the Plaintiff threatened to assault officers Potgieter and Makeleni should they attempt to arrest him; and*
>
> *3.4.3 the aforegoing occurred in the presence of members of the public; and*
>
> *3.4.4 the plaintiff refused to submit to arrest; and*
>
> *3.4.5 the plaintiff actively resisted lawful arrest including* inter alia *attacking officer Booyse.*
>
> *3.5 In the circumstances and as a consequence of the aforesaid provocation, the Plaintiff is not entitled to any damages*

whatsoever, alternatively, there should be a diminution in any damages awarded having regard to the provocation."

[5] At the commencement of the trial the issues of the merits and of quantum were separated by agreement and the trial proceeded on the issue of the merits only. Certain photographs, depicting the injuries allegedly sustained by plaintiff, were handed into Court as Exhibits D and E respectively. During the course of the trial, and because of the somewhat confusing evidence as to the physical layout of the night club premises where the incident occurred, a further set of photographs was taken and handed into Court by consent as Exhibit B.

[6] It is common cause that by the time of the trial the night club was no longer in existence, but that the structure of the building where it had been housed remained unchanged, save for the fact that what used to be the open veranda of the night club was now enclosed with sliding doors in place. At the time of the incident the night club occupied the first floor of the building. A flight of stairs leads down from the veranda of the night club to a landing area. From the landing area steps lead on to the parking area in front of the building. There is, however, another flight of stairs leading off the landing area going in the opposite direction down to Spur restaurant on the ground floor.

[7] Plaintiff, a 53 year old man, testified that he was, during May 2008, a businessman in Jeffrey's Bay, having conducted a business known as Smitties Buyers and Sellers there for the previous eight years. Prior to that he had been a captain in the South African Police Service as well as the one-time head of the Port Elizabeth Municipal Police.

[8] He stated that at approximately 8pm on 7 May 2008 he was ensconced in the Jeffrey's Bay ski-boat club. He stated that whilst there he had consumed "*'n goeie paar drankies*" and had drunk too much. He attributed his excessive drinking to the fact that he had undergone the trauma of a divorce some months previously.

[9] At some time between 10 and 11 pm he made the fateful decision to visit the night club. He stated that his brother, Riaan Smit, was also at the night club although he had gone there independently of him. His brother was sitting at the bar some distance away from him and was being "*luidrugtig*".

[10] At some stage the owner of the night club, a certain Mr. Borman, approached plaintiff, requesting him to have a word with his brother who was being excessively noisy and belligerent. Plaintiff accordingly told his brother to desist from his behaviour and then returned to his own seat at the bar.

[11] Some time later, after midnight, plaintiff noticed two or three uniformed coloured policemen entering the night club through the front door. He knew one was a Constable Potgieter and stated that the others were student constables. He identified them as such by virtue of their blue lapel badges. He conceded, however, that they might have been security guards. The policemen beckoned to him and he went to them. They told him that a complaint of disorderly behaviour had been laid against him and ordered him to leave the premises immediately. Plaintiff suspected that they had mistaken him for his brother but, despite this, he said nothing.

[12] According to him the policemen were extremely "*hardekwas*" and an argument then ensued between them and himself inside the club. He stated that he was angry because he had done nothing wrong and that he accordingly lost his temper. In the course of the altercation with them he regrettably hurled racial epithets at them, saying "*hotnot fok hier uit en los my uit.*" He conceded that he might also have used the word "*kaffir*." He conceded too that he had said to Potgieter "*fokof, ek gaan julle morsdood vee vanaand."* In this regard he said that he had used the pejorative words because he was extremely angry and wanted to humiliate them. He conceded also that he had been racist in his attitude when he had been employed in the Police.

[13] In reply to these insults Potgieter said "*boertjie jy moet hier uit.*" The policemen then turned around and walked out. Plaintiff returned to the bar, sat down and finished his drink. He was, however, concerned that the police would return for his brother and so, some 5 to 10 minutes later after finishing his drink, he walked over to his brother and persuaded him to leave with him and to go home. Plaintiff conceded that at that time there were sufficient grounds for him to have been arrested on a number of charges, including *crimen injuria.*

[14] His brother agreed to leave and they both left the night club, intending to go to their respective motor vehicles. Plaintiff stated that before going down the steps leading to the car park he stopped on the veranda of the night club in order to take a breath of fresh air. He stated, in his words, that the fresh air hit him. His brother had in the meantime proceeded down the steps before him. At that stage plaintiff had not noticed any police motor vehicle in the street in front of the night club.

[15] He stated that had a police motor vehicle been parked across the small road from where he exited the night club he would have seen it but reiterated that it was not there. He then stated that it was very possible that it could have been there but that he had not seen it. Had he seen it, so he said, he would have run away.

[16] He then followed his brother down the steps. According to him he walked down the flight of seven steps from the veranda to the landing where there was a pillar. Whilst he was on the landing he heard footsteps coming from his left hand side. He looked to his left and moved around the pillar whereupon someone whom he did not see in the dark sprayed teargas or pepper spray in his face. I should mention that it became common cause that the police were only in possession of pepper spray that night. Plaintiff then felt someone grabbing him by the front of his shirt. He was pulled down the flight of steps leading to the Spur restaurant on the ground floor. He landed on his stomach on the cement at the bottom. He was under the impression that there were a number of assailants but, because of the pepper spray, he

could not see. He was then assaulted with fists on the head and face. One of the assailants said "*hotnot nè, hotnot nè, hotnot nè?*" From this he deduced that his assailants were the policemen whom he had insulted earlier.

[17] He stated that he was then kicked in the eye with a booted foot. This kick was exceptionally hard and he described it as being a "*doodskop*". He shouted to his brother for help but heard his brother screaming "*wat maak julle met my broer*". He then heard the sound of his brother being assaulted.

[18] Plaintiff was then dragged on his back across the cement surface like a "*bok*" and thrown next to a motor vehicle, whereafter he was handcuffed. He was then picked up bodily and thrown into a police van. Once he was in the back he was again pepper sprayed.

[19] He was then taken to Jeffrey's Bay police station. Whilst he was lying in the back of the police van in front of the police station he heard one of the policemen saying "*ons het vannaand die boere mooi gewys* hoe." He was then pulled out of the police van by his feet. One policeman said "o, *jy het nog lewe in* jou" and struck him behind the head with a fist.

[20] Inside the police station, and because he was so angry, he swore at the police and in return received a few "*taai klappe*". He could not see who had hit him because he was still blinded by the pepper spray. Thereafter he was detained in the cells. Whilst there he received no medical attention. After his eventual release he proceeded to his general practitioner, Dr. Domingo, who treated him.

[21] Certain photographs, Exhibits D and E, depicting injuries, *inter alia*, to his right eye, face and body were handed into Court.

[22] Under cross-examination he stated that after he had spoken to his brother in the night club the latter had calmed down a little but was still being noisy. It was approximately half an hour later that the police had arrived. He conceded that if the owner had requested him to leave he would at that stage

have been unlawfully on the premises. He stated, however, that the owner did not ask him to do so and reiterated that he was not causing trouble. Asked why he had not informed the police that it was his brother who they were looking for he said that he did not want his brother to be detained. He denied that by not telling the police about his brother he had obstructed them in the course of their duties. He conceded, however, that, in retrospect, grounds existed for his arrest but that, at the time, he did not think so.

[23] It was put to him that apart from the insult directed at the police he had also told the police that "*ek gaan julle morsdood vee en jy moet f-off*." He stated that that was "*seker moontlik.*" He denied, however, that this was a threat but agreed that it was not a joke. He stated that the police were arrogant and he wanted them to leave him alone. He conceded that he was guilty of crimen injuria; of threatening the police; and of not co-operating with them.

[24] He stated that when the police left the night club he had thought that that was the end of the matter and he did not think that they had left to get reinforcements. He was not sure of the time that he himself left but thought it was past midnight.

[25] Dr. Domingo, a medical practitioner practising at Jeffrey's Bay, testified that plaintiff had been a patient of his since 2000. He described plaintiff as "*a prime specimen*" who at that time had a mass of 115 kilograms and a height of 188 centimetres.

[26] On 8 May 2008 he consulted with plaintiff concerning injuries sustained by plaintiff in the course of the alleged assault. Having examined plaintiff he completed a Form J88 (Exhibit C). His clinical findings as recorded therein were as follows:

> "*Peri-orbital haematoma of right eye (total closure of eye)*
> *Abrasions to nose bridge and dried blood from right nostril*
> *2x2cm painful swelling behind right ear*

Bleeding perforation of right eardrum
Linear bruises to both upper arms
Linear bruises (±6cm) left clavicular area
4x5cm abrasion left hyopchondrial area
5x6cm abrasion right side of back
Linear bruises left flank posterior with multiple scratch marks."

[27] With regard to the eye injury he stated that it was impossible to physically open the eyelid in order to evaluate the nature of the injury because the peri-orbital area was severely swollen and painful with what he described as being a "*total red blue discolouration around the eye.*"

[28] Dr. Domingo also furnished a report (Exhibit F), dated 6 June 2012, with specific reference to plaintiff's eye injury. This report reads, *inter alia*, as follows:

"*I examined Mr. A.P. Smit at my rooms on the 08/05/2008 at 16h00.*
I found the following injuries to the right eye:
A) Peri orbital haematoma of R eye (total closure of eye)
B) 2x2 cm painfull swelling behind R eye. (sic)

The injuries are consistent with a kick on the eye and not a blow from a flat surface like a motor vehicle fender or the ground. On the day of the examination, Mr. Smit was fully orientated and there was no evidence of alcohol usage.
Prior to this attack/assault, he had 20/20 vision (normal) in both eyes. I also referred Mr. Smit to the ophthalmologist, Mr. Grant Carelse, to evaluate the decreased vision and visual field loss of his right eye. He was then referred to specialist eye surgeon, Dr. Deon Doubell, for surgical intervention. Mr. Smit had numerous surgical procedures performed in order to improve his sight, but to no avail. Currently he can only distinguish between light and dark with his right eye."

[29] He expressed the opinion that the injury to the eye could not have been sustained by plaintiff having struck his face on a flat surface. In his opinion, having regard to the nature of the peri-orbital injury, a much sharper or narrower object than a flat surface would have been required to do so. Had the injury to plaintiff's eye been inflicted by blunt force he would have expected external injuries because of the eyeball being protected by the peri-orbital bones. It appeared to him that the injury must have been inflicted by an object such as a boot as it was consistent with plaintiff having been kicked. With regard to the burst eardrum he stated that a "*very severe*" punch or kick would have been required to cause it to burst. The abrasions on plaintiff's back were consistent with him having been dragged across the tarred surface.

[30] For his part defendant adduced the evidence of Dr. Gardiner, an ophthalmic surgeon, who submitted a report dated 8 March 2013. In his report he stated as follows:

> "*Firstly with regards to the history. During the alleged arrest of Mr. Smit injuries are sustained. The history from the patient is that he was kicked over the right eye. Two there is a report from Dr. Domingo, and I will not enlarge upon the other injuries, but on the examination of the right peri-orbital Area which showed extensive swelling and bruising, and no sign of a deep skin laceration, and no Orbital fracture was noted. The swelling was so severe that he was unable to examine the eye at that time, but on subsequent examination he was able to examine the right eye and decreased vision was noted and he was referred to Dr. D Doubell. A Retinal Detachment was noted, and 7 surgical procedures were done, including one in Johannesburg, but unfortunately with no success and the right eye is now permanently and totally blind as a direct result of the trauma. Three, probable causes of the Retinal Detachment are direct trauma to the right Peri-orbital Area such as a boot, secondly falling directly onto the Peri-orbital Area, for example onto a curb or a rounded vendor. (sic) Clinically it is difficult to determine which is most probable.*"

[31] I should mention that the reference to a "*rounded vendor*" was not to a well-nourished hawker but, more prosaically, to the fender of a motor vehicle.

[32] Dr. Gardiner took issue with Dr. Domingo's opinion that plaintiff's retinal detachment must have been occasioned by a sharp object such as a boot. He was of the opinion that retinal detachment could be caused by indirect trauma such as falling against an object without any orbital fractures occurring.

[33] Sergeant Potgieter, a 34 year old policeman with eleven years experience, testified that he was on duty as the shift commander at Jeffrey's Bay Police station on the night of 7/8 May 2008. At that time he was still a constable. He and Constable Makeleni were on patrol duty in a police van whilst Constable Ketteldas was the charge office commander with Constable Booyse as the charge office reserve. It is common cause that Makeleni passed away during 2013.

[34] Potgieter and Makeleni were in full uniform, carrying handcuffs, weapons and pepper spray. Whilst on patrol Potgieter received a radio call at 23h50 from Booyse who reported that a complaint had been received concerning certain rowdy patrons at the night club. He later ascertained that it was the security personnel who had called the charge office.

[35] Potgieter, who was driving the police van, proceeded with Makeleni to the night club. With reference to the photographs, Exhibit B, Potgieter stated that at the time the stair railings which appear thereon had not been in place. He stated also that at the time there had been two or three steps leading from the parking area directly onto the landing area in the vicinity of the John Dory advertisement board which is depicted in the photographs. I shall refer to those as "*the small steps*." He parked the police van on the side of the road directly across from the front of the night club, with its left wheels on the tarred surface of the road and the right wheels thereof off the road on the open space to the right of the road. He stated that it was parked in precisely the

same place and manner as was the Polo motor vehicle depicted on photograph B12.

[36] He and Makeleni then climbed out of the police van, went up the small steps onto the landing and then proceeded up the flight of seven steps into the night club.

[37] Mr. Borman approached them and introduced himself as the owner of the club. He told them that two persons in the club were being rowdy and were disrupting his business. He wanted them removed. He pointed out these persons, namely plaintiff and his brother, Riaan.

[38] Potgieter then moved towards plaintiff and plaintiff, in turn, came towards him in what Potgieter described as being an arrogant and aggressive manner. According to Potgieter he knew who plaintiff was, having previously been to his shop in Jeffrey's Bay, but they had not actually met. Potgieter tried to introduce himself to plaintiff but, according to him, plaintiff did not afford him an opportunity to do so. Instead, plaintiff immediately spoke to him roughly, asking what he and Makeleni were doing there and whether they had come to evict him from the premises. Plaintiff then said "*Julle hotnots, kaffers, het hier gekom om vir my uit te sit.*" At this stage he was standing very close to Potgieter and his whole attitude made it clear that he would resist any attempt to evict him. He used the words "*hotnot*" and "*kaffer*" a number of times, something which, Potgieter said, was obviously totally unacceptable both to him and to Makeleni. This was all the more so as the club was full of mainly white patrons and plaintiff was not only insulting him but also completely undermining his authority as a policeman. He denied, however, that he would necessarily have taken action because of this. He stated that in the course of his duties he was often sworn at in racist terms.

[39] He was asked, under cross-examination,:

> "*Q So dit het glad nie aan u saak gemaak dat hy vir u n poes genoem het of 'n hotnot genoem en vir Makeleni 'n kaffer*

genoem het nie? Daardie woorde gebruik het in die konteks van die aanmerking wat hy gemaak het nie?

A Dit is korrek so.

Q So dit het glad nie aan u saak gemaak nie?

A Ek was ongelukkig daaroor maar dit het nie saak gemaak nie."

[40] He reiterated, however, that these remarks indicated a complete lack of respect for him whilst also undermining his authority.

[41] Potgieter tried to calm plaintiff down but Riaan had by now joined plaintiff and was swearing at the police in foul language. Potgieter stated that neither he nor Makeleni had given plaintiff or Riaan any reason to react as they did and denied that he had used the word "*boertjie*" in referring to plaintiff.

[42] Potgieter then decided that he would arrest plaintiff and Riaan. Under cross-examination he stated that whilst in the club he had formed the intention to arrest them for being drunk and disorderly after he had spoken to plaintiff and had been sworn at. This was the only charge he would have preferred against them at that stage and he conceded that in respect thereof a fine of only R50 would have been payable. He conceded, however, that he had never told plaintiff or Riaan that he intended to arrest them. He conceded further that at the time they left the club they would have had no idea that they were going to be arrested.

[43] Instead of arresting them there and then Potgieter went to the owner and told him that he was going to call for reinforcements and would return. He did not want to arrest plaintiff in the club because of the possibility that plaintiff would resist and it would then have been extremely difficult to take him from the club premises to the police van across the street.

[44] Potgieter and Makeleni then went out to the police van and radioed Booyse and Ketteldas. He told them to lock up everything and to come to the night club to assist them. He and Makeleni waited in the police van for them

to arrive. Before their arrival, however, he saw plaintiff and Riaan emerge from the club onto its stoep area. Whilst they were standing there Riaan was pointing his finger inside the door of the club and swearing in foul language.

[45] Potgieter accordingly again called Ketteldas on the radio and told him to come immediately. Ketteldas replied that they were "*sterk oppad*".

[46] In the meantime he and Makeleni disembarked from the police vehicle and walked across the road towards the club. As plaintiff and Riaan started to walk down the flight of stairs from the club to the landing Potgieter and Makeleni reached the small set of steps at the side of the landing area. They then moved across the landing around the pillar towards the stairs leading up to the club from the landing. They met plaintiff and Riaan at the foot of the stairs on the landing. Pogtieter denied that he and Makeleni had been waiting for plaintiff behind the pillar. He stated that he intended to arrest plaintiff and Riaan for their conduct in the club. Nothing else had happened thereafter to justify their arrest. He conceded that at that stage he did not know where plaintiff and Riaan were going to, whether they had driven to the club; or whether they were intending to walk home. Even though Booyse and Ketteldas had not yet arrived at the scene he wished to proceed with the arrest.

[47] Potgieter then took hold of plaintiff's arm and told him that he was arresting him. He wanted to add that he was arresting him on a charge of being drunk and disorderly in a public place but, before he could do so, plaintiff pulled himself free of his grip and said "*hotnot jy sal nie vir my arresteer nie*."

[48] Potgieter grabbed plaintiff's arm again but plaintiff again pulled himself free. At this stage Riaan had also approached them and he pulled Potgieter away from plaintiff. Makeleni then grabbed hold of Riaan. Potgieter grabbed hold of plaintiff a third time, wanting to force his hands behind his back so that he could handcuff him and place him in the police van. He struggled to do so, however, because of plaintiff's size and strength. Plaintiff again ripped his

arms free but fell to the ground. On standing up he grabbed Potgieter. Makeleni then left Riaan and came to Potgieter's assistance. In the course of this struggle both of their uniforms were torn.

[49] Potgieter stated that whilst he and Makeleni were in the vicinity of the small steps leading to the landing area Ketteldas and Booyse arrived at the scene in their police vehicle. He denied that they had only arrived on the scene when he, Makeleni, plaintiff and Riaan were already across the road at the police van as had been stated by Booyse in the course of his testimony at plaintiff's criminal trial.

[50] He stated that Booyse and Ketteldas climbed out of their van at the stage that plaintiff and Makeleni were at the small steps. They came running to assist Potgieter and Makeleni at the landing area. On their arrival, plaintiff, referring to Booyse who was small of stature, said "*bring julle dié klein kak hiernatoe om my te arresteer*?" This remark was made on the landing while Booyse was assisting them.

[51] At some stage, at the landing, Potgieter smelled pepper spray. He did not know which policeman had used pepper spray but denied that he had done so himself.

[52] He stated that the police eventually succeeded in getting plaintiff across the road to the police van. At that stage he smelled pepper spray again. The struggle and wrestling between them all was still continuing. Whilst the police were wrestling with plaintiff and Riaan and trying to get them into the back of the police vehicle plaintiff broke loose and, in Potgieter's words, "*het vir Booyse probeer storm loop. Toe het Booyse pad gegee en toe is hy [eiser] met sy kop eerste in die fender in van die bakkie.*" He described this fender as being above the left front wheel of the police vehicle.

[53] He stated further that the police were unable to handcuff either plaintiff or Riaan but that, despite this, they succeeded in getting them into the back of Potgieter's police van. However, just as soon as plaintiff and Riaan were

inside and the police tried to close the door, they kicked it open and jumped out.

[54] Eventually the police succeeded in getting both of them inside the back of the vehicle and closed the door. He stated that plaintiff's evidence that he had been handcuffed had been false although he conceded that he could think of no reason why plaintiff should have lied in this regard.

[55] He then drove immediately to the charge office which was approximately five hundred metres away and proceeded directly to the cells. On their arrival at the cells a few minutes later plaintiff and Riaan were "*rustig*" and calm. They had by now clearly come to their senses. He denied that plaintiff had been assaulted on his arrival at the police station. There was, he said, no reason to do so because he was calm.

[56] When plaintiff and Riaan disembarked from the van Potgieter informed them that he was arresting them for being drunk and disorderly, resisting arrest and for malicious injury to property, the latter charge being in respect of the tearing of their police uniforms and a dent occasioned to the police van. Plaintiff and Riaan were then taken directly to the cells and not to the charge office so that they could wash the pepper spray from their faces.

[57] According to Potgieter they arrived at the police station at approximately 01h30. With regard to the formalities of the arrest Potgieter stated that the property register, SAP22, was not completed because plaintiff's son was given permission to take plaintiff and Riaan's property home. He stated further that the forms, SAP14A, setting out plaintiff and Riaan's rights respectively were taken to them to sign in the cells approximately an hour later at 02h30. Both forms, Exhibit J1 and J2 in respect of plaintiff and Riaan respectively, indicated that they were completed at 01h30. Asked how it was possible to have explained their rights to each of them at the same time when they were being held in different cells his evidence became somewhat confused. He stated, for the first time, that their rights had already in fact been explained to them when they disembarked

from the police van at the police cells and that they therefore only needed to sign the SAP14A forms. Asked why plaintiff had not been taken to the charge office after having washed his face, in order to complete the formalities, Potgieter stated that at that stage he did not know whether plaintiff might not suddenly become "*oproerig*". He also stated that the form SAP14A was not taken to plaintiff and Riaan immediately on their arrival at the cells because he was busy writing out his statement in order to open the docket against them. He then said that he had also first gone home in order to change his clothing. It was after his return that plaintiff's rights had been explained to him. He confirmed that according to the forms they had both been completed at 01h20 but stated that this was the time that their rights had been explained to them when they were taken out of the bakkie.

[58] Constable Ketteldas testified that he had been in the employ of the Police Service since 2005. He confirmed that on the night of 8 May 2008 he had been on duty as charge office commander with Booyse as his reserve. He confirmed that Booyse had received a telephone call from the night club concerning certain rowdy patrons and that in consequence thereof he had radioed Potgieter and Makeleni. Potgieter in due course radioed back to say that he was at the scene and was disembarking from the police vehicle. He then again radioed to say that he required assistance. Some time later he radioed for help again. On this occasion his voice, according to Ketteldas, was higher and Ketteldas could hear that he was "*benoud*". He described Potgieter as sounding "*panicky".* Potgieter told them to lock up the charge office and to come and assist him and Makeleni immediately.

[59] He stated that it had never before occurred in his experience that an entire charge office had been locked and, in effect, abandoned, with the result that there was no one left to look after the prisoners or to attend to any emergency.

[60] Ketteldas assumed in the circumstances that something very serious and important must have happened and stated that it appeared to him that Potgieter was "*in nood*". He stated further that "*ek het gedink daar is groot*

moeilikheid soos 'n moord of iets soos dit vir my geklink het." He stated that at the time he had not thought that it was necessary to find out why such drastic measures had to be taken. He therefore did not ask Potgieter what the problem was but had merely used his discretion to obey him. Asked how he could have exercised his discretion without knowing the nature of the problem he replied that he had worked with Potgieter for a long time and that this was the first time that he had given such instructions and had sounded so "*benoud*".

[61] He had also merely assumed that Potgieter was at the night club and did not ask him. He stated that approximately five minutes had elapsed between the first and second radio calls from Potgieter and approximately two to three minutes between the second and third such calls. He did not attempt to contact Potgieter again after Potgieter's last call.

[62] He and Booyse accordingly locked up the charge office including the doors and gates and, leaving the prisoners in the cells to their own devices, proceeded in a police van to the scene. He stated that on arrival at the night club he parked the motor vehicle next to that of Potgieter. He saw at that time that Potgieter and Makeleni were involved in what he described as being a "*gewoel*" with plaintiff and Riaan. At that time they were at the small steps leading to the pavement.

[63] He climbed out of the police van and went towards them. Asked what he thought was going on he stated that "*my suspisies was niks anders as wat die hel gaan hier aan, dit is 'n gestoeiery hier.*" Asked whether he thought it was a fight he said *"nie noodsaaklik 'n bakleiery of 'n geveg nie, net 'n gestoeiery. 'n Gewoel*." Asked whether he had wondered why Potgieter had ordered them to close up the charge office in these circumstances he said that things looked "*'n bietjie woes*" inasmuch as the shirts of Potgieter and Makeleni had been torn and Riaan was swinging his arms around.

[64] He could see that Potgieter was attempting to hold plaintiff by the arm but plaintiff kept pulling himself free. He stated that when he first saw the

struggle they were still on the landing area. By the time he stopped the police van they were at the small steps leading down to the pavement. At the time that he disembarked from his vehicle they were on the pavement in the vicinity of the person depicted on photograph B10. This, so he said, was a distance of approximately ten metres from where Potgieter's motor vehicle was parked.

[65] It was put to him that according to the record of plaintiff's criminal trial (Exhibit M) Booyse had testified that on their arrival at the scene plaintiff and Riaan had been in the parking area in front of the building. He stated that Booyse was definitely mistaken in that regard.

[66] It was further put to him that according to Booyse Potgieter's vehicle had been parked in the parking area and that on their arrival plaintiff and Potgieter were already at the vehicle. He denied that this was so.

[67] He stated that he could not remember ever having proceeded to the landing area but then said he would have remembered this had he done so. He could also not remember having seen Booyse on the landing. He stated in this regard that Potgieter's evidence that he, Ketteldas, and Booyse had joined them on the landing area was completely mistaken.

[68] He confirmed that shortly after their arrival on the scene plaintiff, with reference to Booyse, had said "*het julle hierdie klein kak gebring om my te arresteer?"*

[69] He stated that he had no idea how plaintiff sustained his injuries. He conceded that the injuries to plaintiff's back depicted on photograph E4 appeared to be consistent with plaintiff having been dragged on his back but stated that he did not see this. Neither did he see plaintiff being kicked. Plaintiff had, however, fallen a few times during the commotion and, at one stage, lost his balance and fell against the police vehicle, striking it with his forehead area.

[70] Although Mr. Frost, who appeared for plaintiff, commenced his address to the Court with an attack on the lawfulness of plaintiff's arrest and detention this was, as submitted by Mr. Nepgen, who appeared for the defendant, never put in issue on the pleadings and, moreover, as set out above, plaintiff himself conceded that there were a number of grounds that would have justified his arrest. No more be said in this regard.

[71] It is clear that the versions of plaintiff and defendant are irreconcilable and mutually destructive in material respects. In this regard plaintiff alleges that the policemen lay in wait (ingewag) for him and, in effect, ambushed him once he reached the landing area, their motive being to exact revenge for his crude, racial slurs. Defendant, on the other hand, alleges that whatever injuries plaintiff suffered were sustained by him during the course of his arrest and that such force as was utilised by the policemen was, in the circumstances, reasonable, necessary and proportionate to plaintiff's resistance thereto.

[72] The well known case of National Employers General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) is applicable. It is not necessary to burden this judgment with the particular citation but I bear it in mind in assessing the evidence.

[73] In Santam Bpk v Biddulph 2004 (5) SA 586 (SCA) the approach to such disputes was stated as follows at 589G:

> "*It is equally true that findings of credibility cannot be judged in isolation, but are required to be considered in the light of the proven facts and the probabilities of the matter."*

[74] I should mention that, in my view, despite the submissions of Mr. Frost to the contrary, the medical evidence does not assist plaintiff. It is clear that Dr. Domingo is not a specialist in respect of eye injuries and, it seems to me, his evidence as to the probable cause of plaintiff's eye injury is, at best, speculative. Dr. Gardiner, on the other hand, is an experienced ophthalmic

surgeon. His evidence, based on his past experience, that a retinal detachment can occur in consequence of blunt trauma must, in my view, be accepted. As was submitted by Mr. Nepgen, if the history provided to the medical practitioners by plaintiff as to the mechanism of the injury to the eye is excluded, it is not possible to draw any conclusion from the nature of the injury itself as to the most probable cause thereof.

[75] Mr. Nepgen submitted further that plaintiff's evidence that he was ambushed was highly improbable. I do not agree.

[76] In my view the probabilities clearly favour the plaintiff's version of events.

[77] By Potgieter's own admission, his intention was to arrest plaintiff for being drunk and disorderly in a public place, an offence in respect of which an admission of guilt fine of only R50,00 was payable. In this regard his evidence was as follows:

> "*Q* *Wat was die misdryf?*
> *A* *Die dronk en oproerig.*
> *Q* *Watse boete sou hulle gekry het?*
> *A* *R50,00.*
> *Q* *Jy was nie van plan om hulle aan te hou op daardie klagte nie?*
> *A* *Dit is korrek*."

[78] He could not explain why, in the circumstances , it was necessary to confront plaintiff whom he knew by sight from his shop and that how instead of the following day when plaintiff would have sobered up.

[79] He confirmed that the only reason for his call for reinforcements was in order to effect the eviction of plaintiff from the nightclub. On that version, once plaintiff had emerged therefrom of his own accord the necessity for the reinforcements fell away yet it was precisely because of plaintiff's appearance on the veranda that Potgieter hysterically yelled instructions over the radio for

Ketteldas and Booyse to hurry up and get to the scene. So "*benoud*" and "*in nood*" did Potgieter sound that according to Ketteldas, he thought Potgieter was "*in groot moeilikheid soos n moord of iets.*"

[80] Indeed, said Ketteldas, Potgieter was in such a state that he and Booyse did not hesitate to take the hitherto unheard of action of closing down the entire Police Community Service Centre and, leaving the prisoners in the cells to their own devices, set out to rescue Potgieter without even stopping to ask where exactly he was, what the problem was, and why both he and Booyse had to come.

[81] In my view this evidence is not only improbable but is so fanciful that it can be rejected as false and as an attempt to explain the presence of both Ketteldas and Booyse at the scene.

[82] Furthermore, it was, on the defence case, a mystery as to how plaintiff came to sustain all his bodily injuries. Both Potgieter and Ketteldas stated that they could not enlighten the court in this regard. Their evidence in this regard was, in my view, clearly evasive in nature. It is clear from the medical evidence, for instance, that plaintiff must at some stage have been dragged across the tar on his back. It would have been impossible for Potgieter and Ketteldas not to have seen this. Their evidence that they did not do so is obviously false.

[83] As to the plaintiff's eye injury this, according to Potgieter, must have been sustained when the enraged plaintiff broke loose and charged at Booyse who, with matador-like dexterity, neatly side-stepped, causing plaintiff to hurtle head first into the police vehicle. Improbable as this evidence was it was in any event not corroborated by Ketteldas who stated, rather more prosaically, that plaintiff lost his balance and fell against the vehicle. The one man who on Potgieter's evidence was best placed to testify in this regard namely Booyse, was never called by the defence despite being available to testify.

[84] In Elgin Fireclays Limited v Webb 1947 (4) SA 744 (AD) the following was stated at 749 – 750:

> "*If a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. But this inference is only a proper one if the evidence is available and if it would elucidate the facts.*"

[85] Booyse was available to testify and his evidence would obviously have elucidated the facts relating particularly to plaintiff's eye injury. In these circumstances, in my view, an inference unfavourable to defendant can properly be drawn from the failure to call him as a witness.

[86] On the other hand, plaintiff's evidence that he was accosted at the landing area, pepper sprayed; dragged down the steps leading to the Spur and assaulted is, in my view, especially in the light of his injuries, the more probable version, more especially, as was conceded by Potgieter, he did indeed confront plaintiff at the landing area.

[87] Despite Potgieter's protestations that as a policeman he bore with fortitude the slings and arrows of outrageous fortune it was abundantly clear from his evidence that he was in fact deeply humiliated and angered, as is only natural, by the gross racial slurs directed at him. In these circumstances he subjectively had every reason to want to exact revenge and to teach plaintiff a well-deserved lesson and the probabilities are that Ketteldas and Booyse were called up to do exactly that. Plaintiff's evidence that, whilst he was being assaulted, one of his assailants said "*hotnot nè, hotnot nè*" is in accordance with the probabilities.

[88] Plaintiff was, in my view, a good witness who was basically honest, however distasteful his conduct on the night may have been. He candidly admitted to having used foul, abusive and racist language and, impliedly, conceded that he had got much of what he deserved in return save that, with

the loss of his eye, he had been punished, as he said, more severely than any court might have done.

[89] Mr. Nepgen launched a spirited attack on plaintiff's credibility especially with regard to his evidence as to the commencement of the physical confrontation on the landing. I have had careful regard to this criticism but do not intend to burden this judgment with a recital thereof. It is so that his evidence was confusing and contradictory in certain respects but in its general terms it was largely consistent. In my view, such inconsistencies as there may be were attributable rather to plaintiff's inebriated state in the early hours of the morning than to any dishonesty.

[90] I was not impressed by either Potgieter or Ketteldas as witnesses. They contradicted each other completely as to where Potgieter was when Ketteldas arrived on the scene. Ketteldas appeared to be distancing himself as much as possible from the initial confrontation with plaintiff. They were also extremely evasive as to how plaintiff could have sustained his injuries and neither of them on their versions could explain these injuries. In my view, as stated above, their evidence in this regard was also clearly false. Furthermore, as stated above, I am satisfied that their evidence as to why Ketteldas and Booyse closed up the charge office was false.

[91] In my view, on a conspectus of the evidence as a whole, taking into account the probabilities and the merits and demerits of the witnesses, plaintiff has discharged the onus upon him of proving that he was assaulted by the policemen acting in the course and scope of their duties with the defendant.

[92] Even were I to be wrong in coming to the conclusion that the policemen intentionally assaulted plaintiff then, bearing in mind that defendant bears the evidentiary onus of proving that the force utilised by the policemen to effect plaintiff's arrest was reasonable, necessary and proportional, defendant has failed to discharge that onus, having regard especially to the serious nature of the injuries sustained by plaintiff.

[93] Mr. Nepgen submitted further, however, that in the event of the Court finding against defendant as to the assault it should find that because of plaintiff's provocative conduct which elicited the assault he was not entitled to any damages and that his action should therefore be dismissed.

[94] This submission cannot be upheld. A similar submission was rejected 101 years ago in Blou v Rose Innes 1914 TPD 102 where, at 104, de Villiers JP stated succinctly:

> "*But none of the authorities, except one to which Mr. Tindall has referred, in Cons. 183, vol.5, go so far as to say that a verbal injury can be set off by an assault. All the authorities are clear, I think, that it cannot be done. I think the reason is perfectly clear. We may differ upon the advisability of extending the rule allowing a man to repel force by force. But we cannot doubt that it is entirely illegal ... although perhaps under the circumstances perfectly natural ... for a man to give another a slap in the face because the other has called him a thief. It is natural, but it is against the law.*"

[95] More recently in Winterbach v Masters 1989 (1) SA 922 (ECD) the same conclusion was reached by Zietsman JP, the headnote of which reads as follows:

> "*In a case where self-defence is not involved, to hold that provocation which does not affect the defendant's mental capacity may render lawful an otherwise unlawful assault is tantamount to accepting the principle of an eye for an eye and a tooth for a tooth, and is contrary to our legal principles. Provocation on the part of the plaintiff will, however, mitigate his damages, and in a proper case it may be held that his provocation was such as to reduce to nothing the damages recoverable by him, or that it was such as to justify an award to him of nominal damages only coupled perhaps with an order that he be deprived of his costs, or even that he pay the defendant's costs.*"

[96] The quantum of the damages to which plaintiff may be entitled in consequence of his injuries is a matter to be considered in the trial on quantum and it will be open at that stage for the parties to advance such submissions as they may wish on this issue.

[97] Whatever the outcome of the trial on quantum may be there is, in my view, no reason to deprive plaintiff of his costs of suit to date.

[98] The following order will issue:

1. The defendant is liable to plaintiff for such damages as he may be able to prove or as may be agreed upon, arising out of the assault upon him on 8 May 2008.

2. Defendant is ordered to pay plaintiff's costs of suit to date including such costs as were previously reserved for decision.

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. A. Frost
Instructed by: Friedman Scheckter Attorneys, Mr. Scheckter

Appearing on behalf of Respondent: Adv. Nepgen
Instructed by: State Attorney, Mr. Potgieter