IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NOS: 3868/2014;
3869/2014 and 3870/2014

In the matter between:

PHILANI LUKHELE	First Plaintiff
MSIZI CELE	Second Plaintiff
WELCOME HLONGWA	Third Plaintiff
and	
ETHEKWINI MUNICIPALITY	Defendant

ORDER

(a) The defendant's arrest of the plaintiffs on 15 December 2012, and subsequent assault and detention are found to be unlawful;

(b) The defendant is liable to compensate the plaintiffs for such damages as may be agreed or proved in respect of their unlawful arrest, assault and detention;

(c) The defendant is liable to pay the plaintiffs' costs of suit.

JUDGMENT

Chetty J:

[1] Three plaintiffs instituted separate actions against the Minister of Safety and Security and the eThekwini Municipality for damages arising from their unlawful arrest and detention on 15 December 2012 in Chatsworth. It is alleged that the employees of the eThekwini Municipal Police, acting in the course and scope of their duty, assaulted the plaintiffs and subjected them to verbal and racial abuse, and attempted to lay false charges against them. As a result, the plaintiffs contend they were deprived of their dignity, suffered injury to their reputation and suffered *contumelia*. The first plaintiff, Mr Lukhele, was shot and sustained an injury to his leg during the course of his arrest. The second plaintiff, Mr Cele, was shot at, but fortunately was uninjured. All three plaintiffs contend that they were assaulted and unlawfully arrested and detained. All criminal charges were withdrawn against them without them having to make any formal appearance in court.

[2] By the time the matter came to trial, the plaintiffs had withdrawn their claim for damages against the Minister of Safety and Security. The eThekwini Municipality, referred to hereinafter as the defendant, denies that the arrest by its officers and the subsequent detention of the plaintiffs was in anyway unlawful or actionable. By agreement of the parties, an order was granted for the consolidation of the three actions and for the separation of the quantum from the merits. At the commencement, the parties were unable to agree as to whom bore the duty to start the trial. In light of the defendant admitting to the arrest of the plaintiffs, I ruled that the defendants were obliged to give their evidence first in order to prove the lawfulness of the arrest.

[3] I turn to the evidence before me, which I set out in summary form, dealing with the salient aspects of each witnesses' evidence. The defendant called Inspector S Pillay as its first witness. He testified that on 15 December 2012, he was doing patrol duties in the area of Welbedacht, Chatsworth and was responding to an incident relating to a bush fire. While proceeding on Road 751, at about 16h00, he came

across three men walking in the middle of the road with alcohol in their possession. It is common cause that the persons in question were the plaintiffs. They all disputed that Pillay was the officer who stopped them on the day in question.

[4] Pillay went on to describe all three men as having beer in their possession and that they were walking in the middle of the road. He got out of his patrol vehicle and ordered them to move off the road. He informed them that they should put their beer out of sight. According to him, they responded by saying that he could do nothing to them. They then surrounded him, trying to gang-up on him. At this stage, he says that he felt threatened and it *seemed* as if they wanted to get hold of his firearm which was in his holster, on his hip. Pillay conceded that the plaintiffs did not touch him in any way nor could he describe any actions on their part that gave him the reason to believe that they intended to disarm him. At best, he indicated that it 'seemed' to him that they wanted to take his firearm. Not knowing what to expect next from the three men, Pillay retreated slightly and took out his firearm which he cocked. He did this in order to protect himself. On seeing Pillay's response, the plaintiffs ran off to a nearby taxi about 10 to 15m away, which they boarded.

[5] Pillay jumped into his vehicle following the suspects, and at the same time radioed in to the Metro Control Centre informing them that he was following three suspects who had disobeyed his instructions. After a short pause in his evidence, the witness recalled that he also informed the Control Centre that the suspects had attempted to rob him of his firearm. I point out that one would have thought that this would have been foremost in the mind of the witness when he radioed in to the Control Centre as it would have represented the most serious of the transgressions by the suspects whom he was pursuing. This aspect of Pillay's evidence assumes importance in the trial as it goes to the issue of credibility of the defendant's witnesses.

[6] Two other officers, Captain Govender and Constable Yeggapan responded to the call for assistance and cut off the path of the taxi in which the suspects were travelling. Pillay, who was following the taxi, jumped out of his vehicle and opened the side panel door of the taxi, trying to pull out one of the suspects, who was seated in the last row of seats. The taxi was full of commuters, including women and

children. He entered the taxi and reached over the rows of seats to grab hold of the suspect, and to remove him from the vehicle. In the process of struggling with the suspect, whom he described as being very strong, Pillay testified that the suspect attempted to reach for his holster. He covered his holster with one hand and with the other hand managed to haul the suspect out of the taxi. At that stage, other members of the community had gathered around the vehicle. Two other police officers (Govender and Yeggapen) were present at the scene by this point. According to Pillay, about 20 other Metro police officers arrived at the scene, responding to the call which the witness had put out for assistance. The two other suspects were seated in the first row and in the front passenger seat of the taxi respectively. While Pillay was struggling with the one suspect outside the taxi, Govender came to the assistance of Pillay and in the process of the ensuing struggle, Govender shot the suspect in the leg. At the time when Govender shot the suspect, Pillay testified that the suspect was holding him around the waist trying to pull his gun out of its holster.

[7] The second suspect, who was seated in the row behind the taxi driver, then apparently came towards Pillay and also tried to grab his firearm. In the ensuing struggle, the suspect was shot at by Govender, but fortunately did not sustain any injuries. Pillay stated that two suspects were apprehended. He had no knowledge of what had happened to the person seated in the front row of the taxi. He conceded however, that the suspects were arrested and taken to the Chatsworth police station, after which the first plaintiff was taken to hospital for medical treatment.

[8] Under cross-examination, the witness conceded that when he initially came across the suspects, it was not his intention to reprimand them for anything. According to him, they were walking in the middle of the road and his intention for approaching them was to advise them to hide their beer out of sight as consumption of alcohol in public is an offence. It is clear that he did not intend to charge any of the suspects. It was put to the witness that the plaintiffs would deny that they were consuming beer in public and to demonstrate this, one of the plaintiffs turned his can of beer upside-down to illustrate that it was not open. Pillay denies this and insisted that the plaintiffs were drinking in public. Instead of obeying his ‘instruction’, which he was unable to articulate what it entailed, Pillay said that the suspects then became

aggressive. He conceded however that none of them touched him but it seemed as if they wanted his gun. When asked why it was obvious that this was their intention, Pillay said that he believed this was the only reason why they were approaching him. He testified that all three plaintiffs ran off after he had taken his gun out and cocked it. Despite this, he was unable to concede that the plaintiffs in all probability feared for their safety and therefore fled from the scene.

[9] Upon pursuing the taxi into which the plaintiffs boarded, Pillay said that he intended to charge them for disobeying his instruction (which he was not able to articulate); drinking in public (for which he had no intention to charge them initially); and for generally disrespecting the law, his 'marked police vehicle' and 'his uniform'. As to the latter list of charges, Pillay was unable to indicate what offences they constituted, other than to state that the suspects had disobeyed the by-laws. He was unable to articulate precisely what contravention of the by-laws he was referring to.

[10] When he was cross-examined about his initial interaction with the plaintiffs, he stated that they became aggressive when he spoke to them and threatened him, using vulgar language. None of this testimony emerged in his evidence in chief, despite it constituting a serious charge of *crimen injuria*. When examined on this aspect, the witness conceded that he did not know exactly what the offence of *crimen injuria* was and had no idea whether it was referred to in the by-laws.

[11] Pillay proved to be an unimpressive witness. His evidence seemed to be manufactured as the cross-examination continued. I accept, as the witness indicated, that the incident happened many years ago. However, he appears to have a good memory of some aspects of the incident and not of others. In particular, when he sought to arrest the plaintiffs after they had boarded the taxi, he did not state that he first called out to the suspects to alight from the taxi, before attempting to forcibly remove them. I find his version as to how he attempted to haul out the suspect that was seated at the rear of the taxi, to be implausible, particularly because he would have had to reached over two rows of seats and physically grab the suspect with one hand over a span of approximately two metres. At the same time, he would have been covering his holster with the other hand. It also seems to me to be inconceivable that he would not have asked the other two suspects that were seated

towards the front of the taxi to alight first in order to arrest them for the various offences which he alleges that they committed. His concern for not wanting to disrupt the women and children commuters who were also seated in the taxi is unconvincing, as he was prepared to engage in a physical pulling match with the suspect seated at the rear of the taxi.

[12] Pillay's testimony as to whether the firearm had been removed from his holster or whether the plaintiffs had attempted to remove it, or touch it, is riddled with contradictions. It is equally of concern as to why he ventured alone into the vehicle to pull out the suspect seated at the rear when there were approximately 20 other officers on standby outside. His evidence as to why he felt threatened when he initially confronted the suspects is unconvincing as a reason for him to take out his firearm and cock it. In any event, the suspects must have been clearly afraid as they ran off to a taxi. On his own version, Pillay followed the taxi as he intended to 'discipline' the suspects. At this stage, he made no mention of the suspects having sworn at him, or having attempted to disarm him of his weapon. It should be noted that Pillay made no mention of any intervention by Govender in physically overcoming the first suspect while the suspect was inside the taxi.

[13] Captain LG Govender, an officer of several years' experience with the metropolitan police service, was the second witness for the defendant. On 15 December 2012, he was on patrol in a police vehicle with Constable Yegappen, when they received a call on the radio from Inspector Pillay indicating that three African males had attempted to disarm him and that he needed backup. Pillay informed them that the suspects had boarded a purple minibus taxi on Road 751, Chatsworth.

[14] Govender and his colleague responded to the call and within 2 minutes they saw the taxi approaching and intercepted it. According to Govender, he jumped out of his vehicle and saw Pillay also alighting and approaching the taxi from the rear left side. Govender decided to approach the taxi from the front. Pillay opened the sliding door of the taxi and climbed in, and headed towards one of the suspects seated towards the rear. He tried to haul him out of the taxi. At this stage, Govender was outside the taxi. He observed that the suspect refused to submit himself to be

arrested and put up a fight with Pillay. According to him, the suspect used both his arms to push Pillay away and to fight him off. In the process, the witness stated that the suspect attempted to grab Pillay's firearm. He then went to assist Pillay by grabbing the suspect's arm. Once outside, Govender observed that the suspect was extremely strong and was using his arms and legs to push Pillay away, and demonstrated how Pillay and the suspect were pulling and tugging at each other. According to him, as this episode was unfolding, he saw the suspect forcefully pulling on Pillay's holster in order to disarm him. Govender could see that his colleague was tiring and unable to fend off the suspect any longer. In light of the urgency of the situation, and seeing that the firearm had come 'half the way' out of its holster, Govender decided to take out his firearm and fired a shot at the leg of the suspect. The suspect was then subdued and came to a rest on the ground.

[15] Immediately once the first suspect had been rendered defenceless, according to Govender, a second suspect then came out from the first row of the taxi where he had been seated, charging towards Pillay. According to the witness, it seemed as if the second suspect wanted to assist his friend who had been shot. The second suspect also, according to Govender, made an attempt to disarm Pillay. The suspect grabbed the firearm and was pulling at it when Govender fired a shot between the legs of the suspect, missing him. He stated that the firing of the shot had 'worked' inasmuch as the suspect then surrendered himself to being arrested.

[16] At this stage, Govender stated that the passengers and residents in the area began threatening the officers at the scene. In light of the situation becoming volatile, he decided to withdraw from the scene. The suspects were put into a police vehicle and taken to the Chatsworth police station where they were processed.

[17] In so far as the third suspect is concerned, he confirmed that the suspect was arrested by his colleague Yegappen. The witness was unable to recall exactly the circumstances of the arrest of the third suspect. He was adamant that the suspects were not assaulted nor were they sprayed with pepper spray, as alleged by their counsel. In so far as the altercation between Pillay and the first suspect, Govender was adamant that although the first suspect was much smaller in stature compared to him, he was extremely strong and put up great resistance to being arrested.

[18] Under cross-examination, Govender confirmed that he had no information as to the first interaction between the suspects and Pillay, or of the latter's testimony that his intention when he initially came across the three males walking on Road 751, Chatsworth, was to admonish them for carrying liquor in public, and that they should 'hide' the liquor. Inspector Pillay's version was that the three suspects were drinking in public, however notwithstanding this, he had no intention to arrest them for the commission of any offence or contravention of the by-laws at the time when he approached them. Govender however, had no idea of what had transpired prior to him arriving at the scene where the taxi had been intercepted.

[19] Govender was adamant that when Pillay called for backup, he clearly stated that three African males had attempted to disarm him of his firearm. Govender went further to state that it was standard procedure that if an officer was calling for backup, he or she would be required to state the reason for the request for assistance. Govender conceded under cross-examination that the manner in which an officer would respond to a call for assistance would be determined largely by the nature of the offence which is alleged to have been committed. However, when cross-examined in relation to his conduct of shooting the first suspect in his leg, Govender stated that his response had nothing to do with the prior interaction which Pillay had with the suspects. He responded on the basis of the situation which unfolded in front of him and was of the view that he could not wait for the suspect to disarm Inspector Pillay, before reacting.

[20] He was further cross-examined on Pillay's conduct in jumping into the taxi to haul the first suspect out of the vehicle. Pillay's earlier testimony was that his purpose in following the suspects, after they fled when he initially cocked his firearm, was in order to 'discipline' them. After much ambivalence, Govender conceded that Pillay's conduct in jumping into the taxi and physically hauling out the suspect was not the reasonable conduct expected of a police officer in the circumstances. He also confirmed that when he made a statement, he recorded that he found a sealed can of beer. He stated that if there was an open can at the scene, this would have been recorded in the statement. This version favours the plaintiffs and is consistent with their version that they were not drinking at the time when they were arrested. They

readily concede that they had beer in their possession. One of the plaintiffs even went so far as to state that he intended drinking once he boarded the taxi towards Durban. Whatever their eventual intentions, at the time when they first encountered Inspector Pillay, the suspects was not drinking in public. He had committed no offence warranting his arrest. Govender also accepted that the mere possession of liquor in public is not an offence.

[21] Govender was questioned in relation to his statement which he made shortly after the incident, in which it was recorded that the suspect had grabbed Inspector Pillay's firearm and took it out of the holster. In his evidence however, he differed and said that the firearm was 'half' taken out of its holster. He also accepted that if a person was drinking in public, an officer would not be permitted to shoot such person for the commission of that offence.

[22] He also did not wait for backup before taking the step to shoot the first suspect in the leg and also to fire several shots directed at the second suspect, as according to him, the events unfolding outside the taxi required him to act instantaneously. He was adamant that he could not wait as he deals with such situations on a 'daily basis'. In so far as the tussle between the first suspect and Pillay inside the taxi, he stated that Pillay was directly upfront and close to the suspect, who was fending off Pillay's attempts to subdue him by using both his hands. At the same time, Govender states that, while fending off Pillay, the suspect used his one hand to try and disarm Pillay.

[23] Govender's evidence of an attempt by the suspect to disarm Pillay, in my view, appears to be implausible and contrived. This is particularly so in light of Pillay's evidence that he was approximately 1.5m to 2m away from the suspect when he was struggling with him in the taxi, and that he had to reach over to grab him out of the taxi. However, according to Govender, the two protagonists were directly against each other, grappling. This appears to be in direct contrast to the evidence given by Pillay.

[24] In so far as the third suspect is concerned, Govender stated that he neither saw nor heard anything in relation to the suspect, who was seated at the front of the

taxi, but confirmed that his colleague Yeggappen arrested him. Later, it was put to Govender in cross-examination that in his statement, he mentioned that the third suspect swore at him (Govender) and Pillay. When confronted with the statement, he stated that he had forgotten about that incident, despite earlier testifying that the third suspect did nothing untoward at the scene. It is noteworthy that Pillay also offered no explanation for the conduct of the third suspect which lead to his arrest.

[25] Captain Govender was questioned by the court and was adamant that the reason advanced by Pillay for requesting backup was that three males had attempted to disarm him of his service firearm. When asked why he did not first attempt to subdue the first suspect, even though Pillay was at the scene to assist him, by handcuffing the suspect, Govender replied that there was not enough time for this option as the suspect attempted to lay his hands on the firearm of Inspector Pillay. As he put it, 'time was of the essence' and it did not permit him to try to handcuff the suspect.

[26] The third witness for the defence was Constable Yegappen. He confirmed that he was in the company of Govender on the day when the suspects were arrested. Although he heard two shots being fired at the scene, he had no direct knowledge of what had led to this, save that after the second shot, he arrived at the scene where both Govender and Pillay were together with the first two suspects. While standing outside the taxi, the witness testified that a passenger in the front seat jumped out of the taxi and charged towards Govender. Yegappen grabbed at the suspect and wrestled him to the ground. In the process, the suspect kicked his ankle. He nonetheless twisted the suspect's arm and handcuffed him, informing him that he had been placed under arrest. When he was questioned as to what the offence was, he stated that the suspect was arrested for drinking in public (although there was no evidence of this by any of the witnesses); resisting arrest and aiding and abetting. Insofar as the charge of resisting arrest, Yegappen appeared to manufacture his evidence as he testified. His evidence was that the suspect ran past him, at which stage he grabbed hold of the suspect. The high watermark of his attempts to saddle the third suspect with an offence of resisting arrest is that the suspect tried to 'slide out' of his grasp while on the floor. One wonders why Yegappen did not charge the suspect with *crimen injuria* if, as he says, the suspect swore at him and Govender.

Alternatively, if as Govender testified, the suspect also jumped out of the vehicle and charged towards the police, he could have been charged for interfering with the police from carrying out their duties. Similarly, there is nothing to support a contention that the suspect aided and abetted any of his colleagues.

[27] Critically, however, Yegappen testified that while he was in the patrol vehicle with Captain Govender, he recalled the call for back-up made by Inspector Pillay. He testified that all he recalled was that Pillay requested assistance, advising them that three African males were in a taxi and had been drinking in public. No mention whatsoever was made of them having attempted to disarm him of his firearm. This was only revealed to him once he was at the scene where the suspects had been apprehended and taken out of the minibus taxi. In this regard, his evidence stands in direct contrast with that of Captain Govender who was with him at the time when the call came in from Inspector Pillay. It furthermore reinforces the initial testimony given by Inspector Pillay that his request for backup was because the suspects had disobeyed his instructions. It must be stressed that when he testified, Pillay's version that he informed his colleagues over the police radio that the suspects attempted to rob him of his firearm, only emerged as an afterthought. If this was indeed the reason why he called for backup, there would be no reason for him not to mention this at the outset. In terms of the order of the gravity of the conduct, the attempted disarming of an officer towers over disobeying an instruction.

[28] After the lunch adjournment, Yegappen attempted to change his testimony and stated that when he testified earlier regarding the call for backup from Pillay, he may not have heard certain parts of the message on account of him having his window of the patrol vehicle open, or that he may have had his siren on. If this was the case, it does not explain why Captain Govender, who was in the vehicle at the same time and exposed to the same noise surroundings, was able to hear a different message from Pillay. In my view, this turnabout casts doubt over the veracity of his evidence and his credibility as a witness.

[29] Lastly, in so far as the third suspect was concerned, Yegappen stated that he charged the suspect for drinking in public and aiding and abetting. When asked to explain the basis for him doing so, he indicated that the drinking in public charge

stemmed from what inspector Pillay had said earlier. When probed further, he was unable to explain why he did not charge the suspect for attempting to disarm Inspector Pillay, if this was Pillay's version to the police as to the earlier events.

[30] Yegappen also testified that when the third suspect alighted the taxi, he charged towards Inspector Pillay and Captain Govender, as if he was going to assist his friends, who had already been subdued. On the other hand, when Govender testified, he could not recall anything which the third suspect did at the scene. When asked to explain this contradiction, Yegappen suggested that Govender was perhaps facing the opposite direction. It was also put to him that Pillay's version was consistent with that of Govender's as regards the third suspect. He also denied having pepper sprayed the suspects while they were in the police vehicle or that he assaulted and racially abused them. In particular, he denied having kicked one of the suspects, Mr Cele (the second plaintiff), in the groin. This concluded the evidence for the defendant.

[31] All three plaintiffs testified in respect of their individual claims against the defendant. Mr Philani Lukhele, who had been referred to in the evidence of the police witnesses as the 'first suspect' was the first of the plaintiffs to give evidence, followed by Mr Msizi Cecil Cele, the 'second suspect' and lastly Mr Mluleki Welcome Hlongwa, the 'third suspect'. I do not intend setting out the evidence of the plaintiffs in detail in as much as the versions of all three plaintiffs largely corresponded with each other in their material respects. It bears noting that prior to the first plaintiff giving evidence, an objection was raised by counsel for the defendant as to the presence of the remaining plaintiffs in court whilst the first plaintiff gave his evidence. I ruled that the other plaintiffs remain outside the court while their co-plaintiffs testified. In so doing, it would not diminish the weight to be attached to their evidence.

[32] Lukhele stated that he and the two other plaintiffs had left his home in the vicinity of Road 741, Chatsworth and were walking along Road 745 in order to board a taxi heading towards central Durban, where they intended to do some shopping as the following day was a holiday. Lukhele and Hlongwa left the former's house, each carrying a can of beer. According to Lukhele, they intended to drink the beer once

they boarded the taxi, heading towards Durban. On their way, they walked past a bottle store where a number of expensive cars parked. As they walked past, they heard a knock against a window by the occupant of an Opel Corsa, which was a marked municipal police vehicle. The officer inside the vehicle put his window down and enquired from Lukhele and his colleagues why they were drinking in public. In response, Lukhele pointed out that they were not drinking in public and in order to demonstrate his point, turned the can of beer upside down. It appears that this may have infuriated the officer who may have regarded their particular conduct as being impertinent and disrespectful to him as a police officer. The officer alighted from his vehicle and told the plaintiffs that if they spoke in that manner to him, he could shoot them. According to Lukhele, the officer took out his firearm and pointed it at them. On this particular aspect, there is a slight discrepancy in the version between that of Lukhele and the two other plaintiffs as to whether the officer actually pointed his firearm at them or whether he motioned as if he was taking his firearm out of its holster. In my view, nothing turns on this discrepancy and it does not materially affect the weight of the evidence.

[33] According to the plaintiffs, as they had not done anything wrong, they informed the officer that he could do whatever he wanted even suggesting that if he wanted to shoot them, he should go ahead. They were probably emboldened in their response because they were in their own neighbourhood. Their behaviour in explaining that they were not drinking in public, in my view, was cheeky and insolent. Notwithstanding the above, they committed no offence. They then left the scene and walked towards the taxi rank where they boarded a taxi heading to Durban. After travelling for a short time, they noticed the Opel Corsa pursuing their taxi. This was the same vehicle driven by the officer who questioned them concerning their drinking in public. Shortly thereafter, the taxi was intercepted by other vehicles. Once the taxi came to a stop, the officer in the Opel Corsa approached the taxi and opened the sliding door. The plaintiffs deny that Inspector Pillay, who testified in court, was the same officer driving the Opel Corsa. This officer was joined by Captain Govender, who by that stage had arrived at the scene, accompanied by Yeggapen. The driver of the Opel pointed out to Govender the presence of the plaintiffs in the taxi and asked them to alight. According to the plaintiffs, they refused and asked the officer what they had done wrong.

[34] According to Lukhele, he and his colleagues alighted the taxi voluntarily. He denied the version of Inspector Pillay and Captain Govender of the pulling and tugging duel that took place inside the taxi. According to the plaintiffs, they all alighted the taxi and were standing outside when the officer from the Opel confronted them about the manner in which they had earlier dismissed his attempt to discipline them. The plaintiffs were becoming agitated and wanted to know the reason why they had been taken out of the taxi, as they were of the view that they had done nothing wrong. It is common cause from the evidence of the plaintiffs that none of them were informed that they had committed any particular offence. It would appear that this was the reason for the plaintiffs resisting any attempt by the defendant's officers to place them under arrest.

[35] According to Lukhele, there was an attempt by the officer at the scene, together with Govender, to restrain him and to place him in handcuffs. A scuffle ensued in terms of which Lukhele refused to allow the officers to handcuff him.

[36] This triggered a series of events leading to the actions which form the basis of the damages claims against the defendant. Captain Govender then fired several shots, one of which struck Lukhele in the left leg, causing him to fall to the ground. This spelt the end of his resistance to arrest. According to the second witness, Cele, several shots were fired by Govender but missed hitting him, even though Govender fired them from close range and aimed at the ground.

[37] All three plaintiffs were then handcuffed and put into a police vehicle. At the scene where they had been arrested, the plaintiffs testified that an officer proceeded to spray pepper spray into the vehicle where they had been placed. The vehicle then headed off towards Chatsworth police station. When the vehicle reached the police station, it came to a standstill in a rear parking lot. According to the plaintiffs, they were again sprayed with pepper spray, although one of the plaintiffs was adamant that this was teargas. Nothing turns on this discrepancy. The second plaintiff, Cele, was asthmatic and when the van was sprayed with pepper gas, this caused breathing difficulties for Cele. He shouted out to the officers that he was asthmatic and that he had an inhaler in his back pocket. This illness caused the police to take

Cele and Hlongwa out of the police van, leaving Lukhele, who was injured, alone in the van.

[38] All three plaintiffs testified that they had been verbally and racially abused by the officers at the time when they were brought to the Chatsworth police station. It is common cause that the plaintiffs were not detained at Chatsworth police station due to their holding cells being renovated. Instead, Cele and Hlongwa were taken to the Bellair police station where they were processed and kept in the holding cells until Tuesday, when they were taken to court to make their first appearance. Lukhele, in the meanwhile, had been transported to the hospital, where he remained, handcuffed to his bed, while he received treatment for his gunshot wound.

[39] On Tuesday, 19 December 2012, the charges against Cele and Hlongwa were withdrawn and the plaintiffs were simply advised at the magistrate's court that they could go home. The same applied to Lukhele, who was eventually discharged from hospital without any charges being brought against him.

[40] When considering the evidence, the versions of the plaintiffs are diametrically opposed to those of the defendant insofar as the circumstances leading to the shooting of Lukhele, and the physical and verbal assault on Cele and Hlongwa at the hands of the defendant's officers. Cele testified that he had been kicked and sworn at by Constable Yeggapen, while Hlongwa stated that he had been slapped around the ears, affecting his hearing.

[41] For reasons which are not quite apparent to me, all three plaintiffs were adamant that Inspector Pillay was not the person whom they encountered driving the Opel Corsa on 15 December 2012 in the vicinity of the bottle store. It seems to me that the officer in the Opel Corsa could be no one other than Inspector Pillay, as only he would know the extent of the facts which were subsequently disclosed in his evidence.

[42] The plaintiffs were consistent in their version as to what transpired on the day, and to the extent that there were discrepancies in the testimonies which they gave, I am of the view that such inconsistencies were inconsequential. Considering the evidence in its totality, it would appear that the issue which triggered the incident in

which Govender shot Lukhele was that the plaintiffs refused to succumb to an arrest in circumstances where they had not been informed of what offence they were alleged to have committed. They were adamant that they had not been drinking in public and therefore refused to succumb to the attempts by the defendant's officers to handcuff and arrest them.

[43] In analysing the evidence, there are two diametrically opposed versions regarding the circumstances of the offence. In *Stellenbosch Farmers' Winery Group Limited & another v Martell Et Cie &others* 2003 (1) SA 11 (SCA) para 5, the court set out the test to be followed where the evidence reveals two competing versions. The court held that:

'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[44] The defendant's witnesses made a poor impression on the court. In my view, the credibility findings which I make of the defendant's witnesses are crucial to determining whether the defendant discharged the burden resting on it to prove that the arrest of the plaintiffs was lawful. The court must determine whether police officers were truthful and whether their version must be preferred over that of the plaintiffs. In assessing credibility of witness, Mohamed J in *Hees v Nel* 1994 (1) PH F.11 (T) 32 said the following:

'Included in the factors which a Court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony, (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses), his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is the relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version, against the background of the pleadings.'

[45] The *locus classicus* on the burden of proof is *Pillay v Krishna & another* 1946 AD 946 at 951-952 where Davis AJA said:

'The first principle in regard to the burden of proof is thus stated in the *Corpus* Juris. . . If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it. . . Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it. . . But there is a third rule, which *Voet* states in the next section as follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute."'

[46] The defendant bears the onus to prove the lawfulness of the arrest of the plaintiffs, while the plaintiffs bear the onus of proof in respect of the allegations of assault and racist abuse by the defendant's officers. It is trite that in terms of section 40(1)*(a)* and *(b)* of the Criminal Procedure Act 51 of 1977 ('the CPA'), an arrest without a warrant is lawful if an offence had been committed in the presence of an

officer or if there was a reasonable belief that a Schedule 1 offence had been committed. The evidence before the court does not meet that standard by any yardstick. The evidence of Pillay is that when he first encountered the plaintiffs, his intention was to 'educate' them that drinking in public was not socially acceptable. He had no intention of arresting them and certainly did not consider them to be committing any offence. When the plaintiffs were taken out of their taxi by the police officers, they asked for an explanation, and importantly, enquired what they had done wrong. At that point, Pillay was still unable to explain what offence they had committed. Section 39(2) of the CPA provides that at the time of arrest, the arresting officer must inform the person arrested of the reason for his arrest. The section requires that a reason must exist at the time when the arrest is made. In this case, Pillay had no idea what offence the plaintiffs are alleged to have committed. The defendant has plainly failed to show that the arresting officer had a reasonable belief that the plaintiff had committed a Schedule 1 offence, or any offence for that matter. (See *Mhaga v Minister of Safety and Security* [2001] All SA 534 (Tk)).

[47] It is now entrenched in our law that everyone, in terms of section 12(1) of the Constitution, is guaranteed the right to freedom and security of the person, including 'the right not to be deprived of freedom arbitrarily or without just cause' (section 12(1)*(a)* of the Constitution). Further, it is trite that the deprivation of personal liberty is prima facie unlawful. Therefore, once a claimant establishes that his rights to freedom and to liberty have been interfered with, the burden falls upon the person causing that interference to establish a ground of justification. No such justification has been established on the facts before me. The evidence before me has shown the defendant's witnesses to be unsatisfactory, contradictory and in some instances they manufactured a version as the trial developed. I am satisfied that the defendant has failed to show that the arrest and subsequent detention of the plaintiffs was lawful (See *Brand v Minister of Justice & another* 1959 (4) SA 712 (A)).

[48] As regards the use of force in effecting the arrest, Captain Govender shot the first plaintiff in the leg and fired several shots in the direction of the second plaintiff. Lukhele sustained an injury from the gunshot wound. The plaintiffs were man-handled out of the taxi in which they were travelling before being placed under arrest. On Govender's version, even though he was aware that other police officers

had also responded to the call for assistance, and that he was in the company of two other officers, he decided to discharge his firearm in effecting the arrest. His justification for doing so is that time was of the essence and that he could not wait as the situation was spiralling out of control. He spoke of Pillay 'tiring out' in his struggle with Lukhele. Pillay did not testify to this. Govender appeared to justify the use of force, and the discharging of his firearm, because he deals with such matters on a 'daily basis'.

[49] It is now trite that in order to effect an arrest, the arrestor may only use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing (section 49(2) of the CPA). The first two plaintiffs are not large in statute or muscular in built that would serve to intimidate the officer at the scene. They were young and unarmed. There is no evidence that they attempted to escape from the scene. What is more telling in assessing the conduct of the officers is that the offence for which the plaintiffs were arrested was at best trivial, taking into account that Pillay said his purpose in pursuing the plaintiffs was to discipline them and that they should have respect for police officers. His testimony that he wanted to arrest them for attempting to disarm an officer, as I have already concluded, was an after-thought, to which I attach no weight. In those circumstances, the high degree of force used by the officers, in particular Govender, I find to be disproportionate to the seriousness of the offences allegedly committed.

[50] The arrest, if for reasonable grounds, could have come about with no force at all, alternatively possibly restricted only to the handcuffing of the suspects if they had attempted to resist arrest. The discharging of a firearm in close proximity to a taxi full of commuters was reckless and unwarranted. Moreover, Govender failed to indicate why he deemed it necessary to fire several shots in the direction of the second plaintiff. Govender's use of force was an improper mechanism to bring about the arrest of the suspects. There was no evidence that any of the suspects threw a punch at any of the officers that arrested them or directed any threat of physical endangerment to the officers. He was overzealous in resorting to the use of his firearm to effect the arrest. I therefore conclude that the use of force in bringing out the arrest of the plaintiffs was unreasonable, unwarranted, and disproportionate and

had the effect of rendering the arrest unlawful (See *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA)).

[51] The plaintiffs also testified that the officers at the scene physically assaulted them, and after they had been placed in the back of the police vehicle, one of the officers sprayed pepper gas or spray into the rear of the van, causing the plaintiffs severe discomfort, in particular to Cele, who was asthmatic. He also testified to being kicked, and Hlongwa related how he had been assaulted by being slapped on the ears. I have no reason to disbelieve the evidence of the plaintiffs in this regard, in the face of a bare denial by the police officers. As stated earlier, I found the officers not to be credible witnesses.

[52] In the result I make the following orders:

(a) The defendant's arrest of the plaintiffs on 15 December 2012, and subsequent assault and detention are found to be unlawful;
(b) The defendant is liable to compensate the plaintiffs for such damages as may be agreed or proved in respect of their unlawful arrest, assault and detention;
(c) The defendant is liable to pay the plaintiffs' costs of suit.

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CHETTY J

Appearances:

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Date of hearing:	10 – 13 February 2020
Date judgment reserved:	13 February 2020

Date of delivery of Judgment: 4 March 2020