

SOUTH AFRICA / JUDGMENT

Jobe and Others v Minister of Police (2228/2016) [2020] ZANCHC 50 (24 July 2020)

[2020] ZANCHC 50

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

2228/2016

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IN

THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY.

Reportable/Not

reportable

Case

No: 2228/2016

In

the matter between:

MONNAPULE JOHN
JOBE
FIRST PLAINTIFF
GILBERT
TEBOGO MONCHO
SECOND PLAINTIFF
SEGOFATSANG
VICTOR GAOTSENWE
THIRD PLAINTIFF
DAVID BUTING
SEELE
FOURTH PLAINTIFF
MOGABE PATRICK
KGAMANE
FIFTH PLAINTIFF
OBUSITSE GEORGE
SMOCK
SIXTH PLAINTIFF
KABELO GIDEON
MAKAPE

SEVENTH PLAINTIFF
MASEGO
MAGDELINE BABUSI
EIGHTH PLAINTIFF
JOSEPH PUPA
TSHIAMO
NINTH PLAINTIFF
THEBEETSILE
PATRICK BOGODILE
TENTH PLAINTIFF
KABELO
MATITI
ELEVENTH PLAINTIFF
PULE JAMES
BORAKI
TWELFTH PLAINTIFF
AND
THE MINISTER OF
POLICE
DEFENDANT
Heard: 20- 24
May 2019; 27-28 May 2019.
24-28 February 2020; 02-06 March 2020.

Delivered: 24 July 2020

JUDGMENT

Phatshoane J

- [1] The twelve plaintiffs, whose names I shall refer to at the convenient stage in this judgment, instituted four separate actions against the Minister of Police, the defendant, in terms of which they claim damages for wrongful arrests and detention by members of the South African Police Services (SAPS). The plaintiffs also claimed to have been assaulted by the police. The separate actions were consolidated. As agreed between parties the trial proceeded on the question of liability only and the issue of quantum stood over for later determination. In the supplementary minutes of the pre-trial conference dated 21 August 2018 the claims for damages for the alleged assault of the plaintiffs, save in respect of Ms Masego Magdeline Babusi, the eighth plaintiff, were abandoned.
- [2] The controversies concerning issues of unemployment in the area of Kuruman sparked widespread violent protest action on 27 November 2013 as a consequence of which the plaintiffs, except Mr James Pule Boraki, the twelfth plaintiff, were arrested and detained by the police on 27 November 2013. It is the case of the Minister of the Police ("the Minister") that on the date in question the first to the twelfth plaintiffs committed one or more of the following offences in the presence of the police:

2.1 Public violence (a Schedule 1 offence), which is defined as the unlawful and intentional commission, together with a number of people, of an act/s which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others;

2.2 Contravention of the Regulation of Gatherings Act, 205 of 1993; and/or Contravention of the National Road Traffic Act, 93 of 1996, in terms of which it is an offence to fail to comply with any instruction or direction by a peace officer; and/or contravention of Regulation 319 of the National Road Traffic Regulations, 2000[1] which provides that "no person shall wilfully or unnecessarily prevent, hinder or interrupt the free and proper passage of traffic on a public road". And further "no person shall place or abandon or cause to be placed or abandoned on a public road any object that may endanger or cause damage to traffic on such road."

- [3] It is common cause that the police officers acted within the course and scope of their employment when they apprehended the plaintiffs. It is also not in dispute that following the arrest of the 11 plaintiffs on 27 November 2013 they appeared in Court on 29 November 2013, within 48 hours of their arrest. Thereafter, they were detained at the Kuruman Correctional Centre for further investigation and verification of their addresses. Their next court appearance was on 04 December 2013 following which they were released on warning. This does not apply to two of the plaintiffs to wit: Mr Gilbert Tebogo Moncho, the second plaintiff, because following his arrest on 27 November 2013 he was released by the police on 29 November 2013 at approximately 16h00 whereas Mr James Pule Boraki, the twelfth plaintiff, was arrested almost a year later, at 06h20 on the morning of 03 September 2014, pursuant to an alleged warrant.[2] He was released after his court appearance on the same date of his arrest because his bail was not opposed.
- [4] The plaintiffs were tried on a charge of public violence in the Regional Court, Kuruman, but successfully applied for their discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The State conceded that the witnesses had not identified the accused/ plaintiffs during the public violence. What is significant is that none of the police officers that effected the plaintiffs' arrests on 27 November 2013 testified in the plaintiffs' criminal trial. This defied logic.
- [5] In this case the plaintiffs pleaded, inter alia, that the police:
- 5.1 had no reasonable grounds to arrest them;
 - 5.2 did not consider that they had a discretion whether to arrest them or not;
 - 5.3 neglected or failed to exercise their discretion properly;
 - 5.4 failed to enquire from the plaintiffs or other persons if there were grounds to arrest them;
 - 5.6 arrested the plaintiffs in an arbitrary manner;

5.7 breached the plaintiffs' right not to be deprived of their freedom arbitrarily or without any just cause as set out in s 12(1) of the Constitution[3];

5.8 with further investigation, ought to have established that there was no justifiable reason for their subsequent detention;

5.9 failed to ensure that the plaintiffs were speedily released from detention; and

5.10 opposed the plaintiffs' application for bail and/or requested that their bail hearing be postponed when no justifiable reason existed for such a request.

[6] The police deny that the arrests and detention of the plaintiffs were unlawful and pleaded that the:

6.1 arrests of the first to eleventh plaintiffs were authorized in terms of section 40(1)(a) of the CPA, in that the plaintiffs committed or attempted to commit an offence or offences in the presence of the arresting officers;

6.2 detention of the first to eleventh plaintiffs, after their first appearance in court on 29 November 2013, was at the instance of the prosecutor who was in charge of the court processes;

6.3 arrest of the twelfth plaintiff was authorized in terms of a valid warrant of arrest. The arresting officer had a suspicion, based on reasonable grounds, that the twelfth plaintiff had committed an offence and thus the police were legally entitled to apprehend him.

[7] In the civil trial before me that was intermittently heard in a number of weeks, 12 police officers testified in the case of the Minister, 11 of whom were the arresting officers and/or had been present when the arrests were effected. On the opposite side only four plaintiffs testified viz: Mr Monnapule John Jobe, Mr Gilbert Tebogo Moncho, Mr Segofatsang Victor Gaotsenwe, the first to the third plaintiffs, and Ms Masego Magdeline Babusi, the eighth plaintiff. The remaining eight plaintiffs closed their respective cases without adducing any evidence.

[8] The factual milieu in the case presented by the police is as follows. Cpt Frans Matlhare arrived at the Seven Miles/Maruping intersection, near Kuruman, Scene One of the protest action, at approximately 06h20 on 27 November 2013. He found taxis, motor vehicles, and people wearing mine uniforms who could not go to their places of work because the road had been barricaded. The Captain also observed trucks parked in a disorderly fashion and manganese material tipped on the road. He saw a group of about 150 protesters singing in front of the tipped manganese heaps. One of this protesters was Mr Pule James Boraki, the twelfth plaintiff. Mr Boraki was addressing the crowd through a loudhailer saying that the road would remain blockaded until such time as the protestors were employed by the local mines. Cpt Matlhare says he warned Boraki that the gathering was illegal but Boraki gave him an "I don't care attitude".

[9] Cpt Matlhare left Scene One when Col Van Rensburg and Gen Phiwayinkosi Mguni, the Deputy Provincial Police Commissioner, arrived at approximately 10h00. Gen Mguni enquired who the leader of the gathering was. Mr Boraki and a certain Mr Mashilo, who are well known to the General, approached him. They informed the General that the disquiet concerned the employment of people who were not locals and overlooking the local community. They further informed the General that they wanted to engage the three mines: Kgalagadi

Mine, Hotazel Mine and the Black Rock Mine. The General agreed to facilitate the process on that eventful day. He would visit the mines and revert to the protestors.

[10] At Approximately 15h00 on the day in issue the General returned to the first scene and provided feedback that the mines had agreed to engage the protestors. At that stage, the General says, the crowd became agitated. Mr Boraki was also "wild" and appeared to have been under the influence of drugs. Mr Boraki demanded the names of the mine officials the General spoke to. Failure to do so ignited the ire of Mr Boraki who became aggressive and labelled the General a liar and insisted that the crowd would not clear the road. The mob surrounded the General who withdrew from the negotiations and retreated. He informed the Public Order Policing Unit's (POPs') commander to give an order to the protestors to clear the road seeing that the negotiations failed. This fuelled the anger of the protestors who started to pummel the police with stones. The General was evacuated from the scene and the crowd was dispersed with rubber bullets. In the course of this commotion the General observed a K9 Unit police vehicle engulfed in flames.

[11] Cst Mnikelo Mavuka of the Public Order Policing (POP) and 11 other police officers of the Kimberley POP were instructed by their Commander, Col January, to reinforce the POP Unit in Kuruman. On their arrival at Scene One, Seven Miles/Maruping intersection on R31 Road, they found the situation as described by Cpt Frans Matlhare. In addition, they observed vehicle tyres burning. Cst Mavuka says the police were informed that another protest action was underway at Vergenoeg near Kuruman, Scene Two. The 12 Kimberley

POP members were dispatched to the Vergenoeg scene, some 15 kilometres from the first scene, and arrived there at about 16h00.

Vergenoeg is approximately 800 meters from the R31 Road. The officers observed a traffic jam on the R31 which was barricaded with stones, tree branches/wood stumps, manganese heaps, burning tyres, old washing machines and kitchen cupboards. The protestors sang

revolutionary songs. A Scania truck that had been pelted with stones was seen at or near one of the scenes.

[12] W/O Mompoti and W/O Williams approached the crowd at Scene Two to negotiate. Later on W/O Mompoti commanded the police officers to "kit up" (wear their riot gear), because the mob was not willing to negotiate. The crowd started to throw stones at the police. W/O Mompoti instructed the police to disperse the crowd and effect arrests. Very importantly, Cst Mavuka intimated that from the POP crowd management training, when effecting an arrest, they are required to identify an individual to be arrested

by looking at what the person is engaged in such as participation in unlawful activities. W/O Mompoti fired a stun grenade to disorientate

the crowd. This did not deter the protesters as they kept advancing towards the officers. Cst Mavuka identified a man who wore a yellow trouser and an orange T-shirt, Mr Obusite George Smock, the sixth plaintiff, for purposes of effecting an arrest. He pelted the officers with stones. Cst Mavuka arrested him for the offences already highlighted and took him to the holding cells at the Kuruman Police Station.

[13] Cst Thatayaone Itumeleng of POP Kimberley was deployed to Kuruman a week before the eruption of the anarchy. On the morning of 27 November 2013 he attended both Scene One and Scene Two and in essence observed what the earlier witnesses testified to. At Scene One in the midst of the commotion and riotous behaviour Cst Itumeleng identified two assailants, who were violent, for purposes of apprehending them. One was wearing a red Orlando Pirates T-shirt and the other a brown T-shirt. He gave chase to them. They ran into an open field. He arrested one whereas the other assailant that took a different direction was redirected to him by Cst Setlhogo. Cst Itumeleng ordered the second gentleman to lie down and in that way he managed to apprehend the two for public violence

and put them in the police van.

[14] At Scene Two Cst Itumeleng testified that at 18h45 the members of the community started gathering and moving towards the road. He observed one gentleman wearing an orange overall written "RIP" pushing a tyre towards R31 where other tyres were burning. Cst Itumeleng ordered him to leave the tyre. He ignored the officer and swore at him. The mob threw stones at the police officers and so is the gentleman who pushed a tyre. Cst Itumeleng arrested him and put him in the same van in which he had locked the other two suspects. He completed this three suspects' Notice of Rights in terms of the Constitution (SAP 14) Forms at the Police Station[4]. They were Mr Segofatsang Victor Gaotsenwe, the third plaintiff, Mr David Seele, the fourth plaintiff, and Mr Joseph Pupa Tshiamo, the ninth plaintiff.

[15] Cst Dineo Veronica Setlhogo's evidence corroborated that of other police officers in material respects with regard to the incidents at both Scene One and Scene Two. She arrested Mr Kabelo Daniel Matiti, the eleventh plaintiff, at Scene Two for public violence and contravention of the Road Traffic Act. Mr Matiti wore black track pants and a brown T-shirt with stripes. Cst Setlhogo had fixed her eyes on him during the protest action and saw him throwing stones at the police and barricading the road. She put him

in the police armoured vehicle (Nyala). At the Police Station Cst Setlhogo completed SAPS 14A which she and Mr Matiti signed[5]. She confirmed having assisted Cst Itumeleng in arresting one of his suspects.

- [16] Cst Lebogang Moitse, also a Kimberley POP deployee, arrested Mr Gilbert Tebogo Moncho, the second plaintiff, near Scene Two having identified him by the clothes he wore, that is, a black T-shirt, brown pants, and white sneakers. Mr Moncho was in the front line of people who threw stones at the officers and blockaded the road. Mr Moncho ran to a bottle store nearby where he was apprehended by Cst Moitse. At 23h07 on that evening Cst Moitse completed the SAPS 14A Form which he signed with Mr Moncho.[6] He intimated that it was already dark when he observed a civilian's bakkie losing control and overturning when it collided with a heap of manganese that had been tipped on the road. The occupants were a gentleman, a pregnant lady, and their dog.
- [17] Cst Kgosietsile Gasekoma, a member of the Kimberley POP Unit, also attended Scene Two. He had identified Mr Kabelo Gideon Makape, seventh plaintiff, who wore a red T-shirt and blue pants. He was amongst the crowd that burned tyres on the road and threw stones at the police. Cst Gasekoma says that when he arrested Mr Makape he explained to him his constitutional rights. The SAPS 14 was completed and signed by Mr Makape but Cst Gasekoma made a mistake by not attaching his signature as well.
- [18] Cst Kelebogile Eunice Mooki's eyes were on Ms Masego Magdeline Babusi, the eighth plaintiff, at Scene Two. The Constable says that Ms Babusi threw stones at the police. She apprehended her for engaging in public violence and barricading the road. However, Cst Matolo completed the Notice of Rights (SAPS 14A[7]) in Cst Mooki's presence at the Police Station because she was drafting her statement and completing other official documents. Cst Mooki says that she had no idea that Ms Babusi had been shot with a rubber bullet. She had enquired from Ms Babusi if she had any injuries. She responded negatively and none were visible. Cst Mooki intimated that she had no firearm in her possession.
- [19] At Scene Two W/O Williams and other officers noticed a yellow bakkie with men being driven into Vergenoeg. They followed this bakkie on the road leading to Batlharos to what came to be referred to during the trial as the yellow bakkie scene, Scene Three. The yellow bakkie stopped; the men alighted and piled stones on the road. W/O Williams cautioned them to desist from carrying on with their unlawful activities. Amongst these men was Mr Thebeetsile Patrick Bogodile, the tenth plaintiff, whom W/O Williams addressed. The men continued with their criminal acts. W/O Williams instructed the officers to effect arrests because the men denied other road users passage in contravention of the road traffic legislation. About seven men were arrested including the tenth plaintiff whose arrest was executed by W/O Williams.
- [20] Cst Johannes Molapo, a Kimberley POP deployee, noted a yellow bakkie arrive at Scene Two loaded with tyres. Its passengers were mostly the instigators. This bakkie conveniently stopped at an area which had many rocks. Cst Molapo's testimony corroborated that of W/O

Williams regarding the events at Scene Three. He added that the men were also burning tyres; they swore at W/O Williams when he negotiated with them; and threw stones at the police. Cst Molapo identified a man who wore a blue overall top, brown pair of trousers, and white sneakers. This man, Mr Mogabe Patrick Kgamane, the fifth plaintiff, actively

participated in burning tyres and piling rocks on the road. Cst Molapo said: "I saw him doing that ..throwing stones at us..and I arrested him".

[21] W/O Tshepo Neo August of POP Kimberley was also at Scene Three. He paid attention to a man who wore a brown golf T-shirt, Mr Monnapule John Jobe, the first plaintiff. Mr Jobe hurled stones at the police and barricaded the road with stones. W/O August intimated that he ran towards Mr Jobe and grabbed his arm. Mr Jobe tried to reach for the W/O's service pistol. The two fell and wrestled. He sprayed Mr Jobe with a pepper spray to prevent Jobe from disarming him but Jobe still held

on to the pistol. The pistol's holster got damaged. Some officers assisted August who in the end overcame Mr Jobe and arrested him.

[22] Cpt Glendall Hendricks was one of the Investigating Officers ("I/Os") in the criminal case against the plaintiffs. He received information that Mr James Boraki, the twelfth plaintiff, was the leader of the people who rioted on 27 November 2013, which unrest resulted in damages to two trucks and one vehicle which belonged to the police. Armed with this information Cpt Hendricks applied for a warrant of his arrest which the magistrate authorised on 02 September 2014. He intimated that he could not have secured the attendance of Mr Boraki to Court through in any other means, such as a warning, because the charges against him were very serious in nature.

[23] W/O Alfred Jabulani Zibaya, one of the I/Os, saw Mr Boraki's warrant of arrest being executed on the morning 03 September 2014 at 06h20. He testified that Cpt Hendricks read to Mr Boraki his rights; explained to him why he was arrested; and exhibited to him the warrant of arrest (J50). Mr Boraki was taken to the Police Station where further documents (SAPS 14) were completed. W/O Zibaya took the docket which also contained the J50 to Court. Mr Boraki appeared in court on the same date of his arrest, 03 September

2014. W/O Zibaya says after Mr Boraki's court appearance he received back the docket but the J50 was missing. The JS0 in issue was not discovered in this trial. W/O Zibaya says he was requested by Col Zuma to look for it at the Kuruman Magistrate Court which he did but could not locate it.

[24] The above is a sum total of the evidence presented in respect of the case of the Minister of the Police after which the case was closed.

[25] As already discussed, four plaintiffs testified. It is to be remembered that W/O August explained that when he arrested Mr Jobe, the first plaintiff, at Scene Three, he attempted to rob him of his service pistol. When he took the stand Mr Jobe confirmed that he was arrested by August but denied that it happened at Scene Three. He intimated that he was at

Scene Two but did not take part in any protest action. He did not witness anyone throwing stones at the police. Neither did he pelt any stone at them. When Gen Mguni returned to the scene to give feedback to the crowd Mr Jobe says he specifically requested the General to give out the names

of the people he spoke to at the mines. The General replied that Mr Jobe and others did not trust him. The General returned to his vehicle and ordered the police to remove the protestors from the road. The police opened fire with rubber bullets. The crowd

dispersed. Mr Jobe says he also fled. The police gave chase and upon being caught W/O August threw him to the ground. About two police officers then kicked him with booted feet. He was arrested at approximately 14h00 and taken to the Police Station where he was informed of the charges against him.

[26] Mr Gilbert Tebego Moncho, the second plaintiff, testified that on 27 November 2013 at approximately 13h00 he left home accompanied by his wife and a friend for a tavern which is situated about 400 meters from Scene Two. He observed people chanting and burning tyres. Around 15h00 he noticed a police vehicle approaching the tavern. He ran inside the tavern. The police opened fire and three of the officers followed him inside the tavern. One officer grabbed him. He fell. The other officers kicked him with booted feet and hit him with fists. They put him inside a Nyala and took him to the R31 road. While he was inside the Nyala the police punched him with fists. He was drunk when arrested. He went on to say that his mind was clouded about the events of 27 November 2013.

[27] Mr Segofatsang Gaotsenwe, the third plaintiff, says that on the day in issue he was called by a taxi driver who informed him that the road was open. The taxi driver usually transports him and his co-workers to Black Rock Mine. Mr Gaotsenwe proceeded to the R31 road to catch his ride to the mine. He noticed many people on Scene Two. When he was approximately 100 metres from this scene he saw the police vehicles arriving at the scene. The police dispersed the crowd with rubber bullets. The mob ran in his direction. Three police officials approached him, one of whom, a female officer, pointed a firearm at him. The female officer took his backpack and ordered him to open up his arms to check if he had washed them because, she said, she suspected that Gaotsenwe hurled stones at the police. The police did not listen to him when he told them that he was waiting for his transport. Instead, the female officer arrested him and put him in a police van. He denied that he was arrested by W/O Itumeleng. According to Mr Gaotsenwe he first saw

W/O Itumeleng at the Police Station when he informed Gaotsenwe that he was under arrest for public violence.

- [28] Ms Masego Magdeline Babusi, the eighth plaintiff, says that on 27 November 2013 she witnessed an unrest in progress 100 meters away from where she crossed the R31 at Scene Two on her way to tend to her livestock. She heard some gunshots and ran back into the village. At that stage the protestors were 15 meters from her. A rubber bullet hit her just above her waist. She fell on her knees. A male police officer swore at her and grabbed her right upper arm and arrested her despite her protestation that she was not part of the unrest.
- [29] On 28 November 2013, a day following her arrest, she was interviewed by Cst Pogisho Faro who completed the SAPS 3M (Statement Regarding Interview with Suspect)[8]. At para 7 of the statement the constable recorded that after having enquired from the suspect whether she had any injuries she showed him a round bruised wound on her back. He recorded that the suspect informed him that she sustained the injury because she was shot by the police. The police did not immediately take her for medical examination. She received medical treatment on 03 December
2013. Dr Van der Byl completed the J88 medical report recording that she sustained a soft tissue injury on the lumbar area and a 2cm superficial wound.[9] The doctor made the observation on the J88 that the evidence is in keeping with assault.
- [30] Ms Babusi signed a confirmatory affidavit to Mr Smock's, the sixth plaintiff's, application for condonation of the late delivery of the Notice as contemplated in s 3 of the Institution of Legal Proceedings against certain organs of State Act, 40 of 2002.[10] Quite extraordinary, in her confirmatory affidavit, Babusi states at para 5 thereof that the facts leading to her arrest and detention as well as what transpired thereafter were the same as those that related to Mr Smock.[11] In his founding affidavit Mr Smock, inter alia, sets out details of the meetings between John Taolo Gaetsewe District Municipality and the Kuruman Unemployment Community Forum ("KUCF"), which he is a member of. The meetings preceded the protest action of 27 November 2013.
- [31] Mr Smock states that they were informed a day prior to the protest that KUCF had obtained permission from the Municipality and SAPS to approach the mines directly with their complaints; and that on 27 November 2013 they gathered again for purposes of approaching the mines. He confirmed that Gen Mguni approached the mines to discuss the KUCF's complaints with the mine management. Mr Smock says while they were waiting for the General to return with feedback, several police officers arrived at the scene and took up position in the vicinity. The General reported to the twelfth plaintiff, Mr James Boraki, that he discussed the issues with four mine managers who agreed to hold a meeting with them the next day. Mr Boraki requested the General to give the names of the mine managers he held talks with. The General accused Boraki of not trusting him and went to his bakkie. The officers who were at the scene started shooting at the crowd with rubber bullets dispersing it.

- [32] What is set out in the affidavit by Mr Smock above is in stark contrast with the case presented by Ms Babusi. When confronted under cross-examination on her confirmatory affidavit she refuted the contents of Mr Smock's statement. With that each plaintiff closed his /her case.
- [33] Properly condensed the issues that fall for determination are whether the arrest of the 10 plaintiffs on 27 November 2013 and their subsequent detention from 29 November 2013 to 04 December 2013 were lawful. In respect of Mr Moncho, the second plaintiff, whether his arrest and detention on 27 November to 29 November 2013 was lawful. In the case of Mr James Boraki, the twelfth plaintiff, whether his arrest on 03 September 2014 was lawful. In the case of Ms Babusi (the eighth plaintiff) in addition to the lawfulness or otherwise her arrest on 27 November 2013 and her subsequent detention from 29 November to 04 December 2013, it should further be considered whether she was assaulted by the police on 27 November 2013 and sustained injuries as a consequence of the assault.
- [34] The objects of the police service as set out in s 205(3) of the Constitution are to prevent, combat and investigate crime; maintain public order; protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law.
- [35] The plaintiffs, save the twelfth plaintiff whose arrest was effected pursuant to an alleged warrant in terms of s 43 of the CPA, were arrested without warrants in terms of s 40(1)(a) of the CPA Section 40 (1) of the CPA provides in part:
- '40 Arrest by peace officer without warrant
- (1) A peace officer may without warrant arrest any person-
- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
- [36] The police officials are peace officers as defined in s 1 of the CPA and are authorised in terms of s 40(1)(a) to effect an arrest without a warrant of persons who commit or attempt to commit any offence in their presence. 'In the presence of has been held to entail that "the peace officer must be there on the scene, close enough to see, hear, feel or smell enough to lead him to the reasonable conclusion that an offence is being committed or has just been committed."[12]
- [37] Where a reliance is placed on s 40(1)(a), as in this case, the onus is on a peace officer to prove that a crime was committed in his/her presence[13] and that the arrest was lawful.

- [38] As it can be gathered from their evidence the plaintiffs' dispute that they took part in the protest action or committed any offence in the presence of the police. In light of this, they submit that they were wrongfully arrested. Their evidence must be evaluated against that of the police officers having regard to the probabilities of the respective versions, the credibility and reliability of the evidence adduced.
- [39] In the absence of a prior agreement or plan to commit public violence the trial Court is required to conduct an investigation on each of the plaintiffs' conduct at the scene so as to determine whether that plaintiff associated himself or herself with the acts of public violence.[14]
- [40] The plaintiffs were allegedly identified by the respective arresting officers as having being participants in the riotous acts and therefore contravened the road traffic legislation on their watch. It then remained for the plaintiffs to rebut this evidence. They did not fare well on this score.
- [41] Proverbially Mr Jobe saw nothing untoward, heard nothing untoward and, more relevantly, did nothing untoward. He was blind, deaf and passive. On his version, he was with Boraki, who is said to have been at the epicentre of the protest action and riotous. Mr Boraki was accused No 1 in the criminal trial during which Mr Strydom, his counsel, put to Cpt Matlhare that: "They [the accused which includes Jobe and Boraki] intended to march to these manganese mines to talk to the managers.."[15] Furthermore Mr Jobe, on his version, was also part of the crowd that was addressed by Gen Mguni upon his return from the mines. His evidence that he was never at Scene One was similarly untruthful because he could not explain the photos that were handed in evidence which showed Mr Boraki interacting with the protesters through loudhailer at Scene One where Jobe said he was also present.
- [42] Mr Jobe was also not honest when he intimated that the mob and himself did not throw any stones at the police. He was unable to explain why on the photos of the scene shown to him the protesters were on the road before a dark cloud of smoke and not standing beside the trucks as he testified. There is overwhelming evidence demonstrating that the protest action was characterised by acts of violence. He gave various conflicting versions of how he was assaulted by the police on the scene. When confronted on various discrepancies his excuse was that he remembered the incident "here and there". It is to be borne in mind that W/O August, the arresting officer, testified that upon his arrest Mr Jobe attempted to rob him of his service pistol. There is no merit in the argument that W/O Williams and Cst Molapo must have witnessed this tussle, if it occurred. It is to be remembered this was a moving scene. They too were involved in arresting other protestors and were at different vantage points.

[43] Mr Mancho, the second plaintiff, failed dismally in his account. The contradictions in his version abounded. He could not recall many of the events of 27 November 2013 and said this was so because he was drunk and when police interviewed him on the next day his mind was befuddled. It makes no sense that the police would leave the troublemakers on the road and pounce on him relaxing at the tavern. Even more extraordinary is his claim that he ran inside the tavern on seeing the police approached the tavern. Why

flee away from the cauldron if he was an innocent observer. It is also remarkable that none of the patrons of the tavern were arrested

but him.

[44] It is to be remembered that Cst Moitse intimated that Mr Moncho was in the front line of people who threw stones at the officers and also blockaded the road. He ran into the bottle store yard where he arrested him. Mr Maree, counsel for Mr Moncho, devoted much attention to the time at which Mr Moncho was arrested. He argued that the police's case is that the arrest was at 16h00 whereas on SAPS 14, Notice of Rights, the time is reflected as 23h07. In his evidence before Court Cst Moitse said he arrested the suspect at 19h00 but the Notice of Rights was completed at 23h07 when he detained him. This is really a non-issue.

[45] Mr Gaotsenwe, the third plaintiff, was also an unsatisfactory witness who denied the incidents that were glaringly obvious. For example, he said that the protestors were not chanting but merely stood passive at the scene. Even Mr Moncho, who claimed to have been drunk, saw the burning tyres and chanting at Scene Two. Mr Strydom and Mr Maree, representing the plaintiffs, put to Cst ltumeleng who arrested third, fourth and ninth plaintiffs (Messrs Gaotsenwe, Seele, and Tshiamo) that he was not the arresting officer and that these plaintiffs saw him for the very first time at the Police Station following their arrests. This was categorically denied by Cst ltumeleng who, I must add, was impressive as a witness. He was not discredited under cross-examination.

[46] Ms Babusi, the eighth plaintiff, was also not frank in her account. She claimed not to have known of the KUCF until five years later in 2018. Strangely, as already discussed, Ms Babusi attested to a confirmatory affidavit in support of the application for condonation by Mr Smock on 21 September 2015 which set out details of the meetings which preceded the protest action between the KUCF and the local municipality. Cst Mooki testified having seen Ms Babusi throwing stones at the police. She gave chase and arrested her for public violence and barricading the road. Ms Babusi says she was arrested by a male police officer not Cst Mooki. It is probable that Babusi may be mistaken on the identity of her arrestor because the police vehicle that conveyed her to the Police Station was driven by a male officer. The SAPS 14 was also completed by a male officer, Cst Matolo.

[47] It is significant to note that Mr David Buting Seele, the fourth plaintiff, Mr Mogabe Patrick Kgamane, the fifth plaintiff, Mr Obusitse George Smock, the sixth plaintiff, Mr Kabelo Gedion Makape, the seventh plaintiff, Mr Joseph Pupa Tshiamo, the ninth plaintiff, Mr Thebeetsile Paterick Bogodile, the tenth plaintiff, Mr Kabelo Daniel Matiti, the eleventh

plaintiff and Mr Pule James Boraki, the twelfth plaintiff, closed their respective cases without tendering any evidence. Failure to call a witness who is available and able to give relevant evidence has consequences and may lead to an adverse inference being drawn by the Court.[16] In *S v Boesak*[17] the Constitutional Court made the following pronouncement on this aspect:

The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence"

- [48] Failure of the above seven plaintiffs to testify in the face of a prima facie case against them that they committed public violence, in full view of the arresting officers, when they are parties to the proceedings and clearly available to give evidence, is problematic to their cause. These plaintiffs' respective versions as put to the police, that they did not participate in the protest and were on their way elsewhere when they were arrested, is simply not sufficient. In light that the evidence that they had not participated in the protest action was peculiarly within their knowledge the evidential duty of rebuttal reposed on them. Insofar as they failed to testify the prima facie case against them is fortified and morphs into conclusive proof that they engaged in unlawful activities which warranted their arrest by the officers.
- [49] In respect of these plaintiffs that did not testify the case of Mr Boraki should be looked at separately because he was arrested with a warrant of arrest issued by a magistrate. The arrest is governed by s 43 of the CPA. Mr Boraki, the twelfth plaintiff, was arrested almost a year later following the unrest of 27 November 2013 by Cpt Hendrieks, one of the I/Os. The police did not produce the copy of the warrant because it had been mislaid
- [50] Mr Maree, for Mr Boraki, contended that the police failed to justify the lawfulness of Mr Boraki's arrest because they failed to produce the warrant of arrest. To buttress his argument he relied on *Baasden v Minister of Safety and Security*. [18] In that case Baqwa J pronounced: "A warrant must exist in real terms as a document that can be exhibited when necessary hence the need to reapply for one when the original goes missing". The learned Judge held that while there was evidence about the existence of a warrant of arrest, it had not been included in the documents that served before the Court. He therefore could not infer its existence or to assume that it existed. He found that no explanation had been proffered why the assistance of the Local Criminal Record Centre (LCRC) was not sought to furnish even a copy for the defendant to prove its case. He concluded that proof on a balance of probabilities by the defendant could not be achieved by drawing inferences in favour of its case. It had to be done on the weight of evidence it presented which it failed to do. Therefore, the defendant failed to prove the lawfulness of the arrest.

[51] It cannot be correct that in all circumstances where the warrant cannot be produced the arrest will be unlawful. In my view each case must be determined on its own merits. The facts in Baasden are distinguishable from the present because in that case the plaintiff had testified that he was neither informed of the reason for his arrest nor shown the warrant of arrest in terms of which he was detained. One of the police officers also admitted that he did not show plaintiff any warrant but merely informed him of its existence.

[52] In this case Cpt Hendricks's evidence was corroborated by W/O Zibaya who was present when the warrant in question was executed. They both testified that the warrant was exhibited to Mr Boraki on his arrest; his rights were explained to him including the charge of incitement to commit public violence. This evidence was not controverted. Capt Hendricks made an

entry on the Investigation Diary, SAPS 5, which reflects that the warrant of arrest (J50) was executed on 03 September 2014[19]. Save to challenge the existence of the warrant the veracity of the information as set out in the investigation diary was never disputed. In the normal course of events documents are lost and cannot be traced even after diligent search. In my view, adequate proof ought to be place before Court to show that the warrant had been issued as contemplated in s 43; it had properly been executed following its issue; that it has since been mislaid; and that despite diligent search cannot be traced. I am satisfied that the police did exactly that in this case.

[53] There was in this case sufficient evidence that showed that Mr Boraki, the twelfth plaintiff, was the leader of the protest action and happened to have displayed an obstreperous behaviour in full view of the police. He is depicted in the photo bundle, handed in evidence by consent, addressing several persons with a megaphone on the date of the riot. He did not rebut this incriminating evidence. The arresting officer's decision to arrest must be based on the intention to bring the arrested person to justice.[20] He was arrested and brought before Court on same date of the arrest and released on that day.

[54] Much was made that the statements made by the police, when the plaintiffs were charged, differed materially with the evidence they adduced in court. I am unpersuaded that this is the case. In my view, having examined the submissions closely I found the discrepancies to be inconsequential. There is also nothing untoward that the officers made supplementary statements providing details on the arrests. It is also of no moment that the observations made by them at the three scenes were not the same. This may be ascribed to the fluid nature of the scenes and the belligerent crowd that wreaked havoc. How realistic can it be that none of the officers

were injured, it was argued for the plaintiffs. Cst Itumeleng testified that the police were dressed in their armadillo riot gear.

They wore helmets, body armours; leg and hand protectors.

[55] On the whole, the officers were impressive in their account and stuck to their version. In addition, Cst Molapo, W/O August and Cst Gasekoma gave splendid accounts of their observations. I could find no evidence that the officers colluded to implicate the plaintiffs falsely as Mr Strydom sought to argue. Neither was there any motive shown that would lead to such a

conclusion.

[56] In the result, I am unpersuaded that the police's version ought to be rejected as false. On the basis of the foregoing analysis, the police discharged the onus that the arrests of the first to the twelfth plaintiffs fell within the ambit of the statutory provisions and therefore justified in law.

[57] I now turn to the question of the detention of the plaintiffs after their first court appearance on 29 November 2013 which endured until 04 December 2013. At issue in *De Klerk v Minister of Police*[21] was whether the applicant could claim against the Minister of Police for his detention after his first court appearance. The majority held at para 47:

'[47]... (T)he liability of the police for detention after court appearance should not be determined solely on the basis of whether the further detention was lawful, although that is a relevant consideration. Instead, liability should be determined in accordance with the principles of legal causation, including constitutionally infused considerations of public policy.'

At para 60 the Court proceeded:

'[60]...In establishing a delictual claim, a plaintiff needs to prove that the unlawful, wrongful conduct of the police (ie the arrestor) factually and legally caused the harm (post-court-hearing deprivation of liberty). The plaintiff does not need to establish, necessarily, the unlawfulness of the harm (ie that the detention after remand was itself unlawful). The plaintiff need only establish that the harm was not too remote from the unlawful arrest. This is not to say that the unlawfulness of the post-court- hearing detention is irrelevant. It is crucial if a plaintiff aims to hold the Minister of Justice liable. Furthermore, importantly, it is a relevant consideration in establishing legal causation.'

At para 62-63 the Court went on to hold that:

'[62].....Since *Zealand* [*Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3; 2008

(2) SACR 1 (CC)J, a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

- [63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public- policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts - there is no general rule that can be applied dogmatically in order to determine liability.' (My own emphasis)
- [58] It was argued for the plaintiffs that on 29 November 2013 their case was postponed for further investigation and verification of their addresses thus their subsequent detention from 29 November until 04 December 2013 was at the behest of the police for which they should be held liable. The evidence is quite sparse on this score. The averment in the particulars of claim, "that the police opposed the plaintiffs' application for bail and/or requested that the bail hearing be postponed when no justifiable reason existed for such a request", was also not supported by any evidence.
- [59] The record placed before this Court relates to the proceedings at the Magistrates' Court from 23 May 2016 when the plaintiffs were asked to plead. It does not shed any light on what transpired during the initial stages of the plaintiffs' criminal trial, that is, whether they applied for bail; whether the bail was unreasonably opposed; and how the presiding magistrate dealt with that application. It is important to mention that Mr Gaotsenwe, the third plaintiff, was confronted with a document headed "Prosecutor information form for accused aged 18 years or older"[22] that showed that the police had before his appearance in court recommended that he be released on bail. He conceded that this was

the position. Nothing was placed before this Court to show that the conduct of the police rendered the plaintiffs subsequent detention,

following their lawful unrest, unlawful. In light of this the plaintiffs' claim for unlawful detention must also fail.

- [60] On the claim of alleged assault by Ms Babusi, at the hands of the police on 27 November 2013, the following commentary in the South African Criminal Law & Procedure by Prof Jonathan Burchell[23] is apposite:

'The powers of public officers and private citizens to arrest, either with or without warrant, are set out in the Criminal Procedure Act 1977. Provided arresters act within the limits of these powers, they are not liable for any assault or other crime necessarily committed in order to effect, or attempt to effect, the arrest.'

If, however, an arrester exceeds the limits of his or her authority the arrest will be unlawful and liability for any crime committed in effecting the arrest will follow. If the arrester mistakenly but genuinely believed that his or her conduct fell within the scope of statutory authority then, in terms of the general principles regarding mistake or ignorance of the law, he or she would escape liability for any crime committed in the course of effecting the arrest. Of course, in the light of the public office that he or she occupies, the unreasonableness of the arrester's belief would also hold some evidentiary value in drawing an inference regarding his or her state of mind at the time of the arrest.' (footnotes omitted)

[61] Section 49(2) of the CPA as substituted by s 1 of Act, 9 of 2012 provides:

'(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

[62] As observed in the Commentary on Criminal Procedure Act[24] s 49 regulates an unusually sensitive subject, to wit the force which the police and private persons may employ in order to arrest suspects

who offer resistance or flee. The law relating to the arrest of a suspect was laid down by the Constitutional Court in *Ex Parte Minister of Safety and Security and others: In re S v Walters*[25] as follows: (a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences; (b) arrest is not the only means of achieving this purpose, nor always the best;

- (c) arrest may never be used to punish a suspect; (d) where arrest is called for, force may be used only where it is necessary in order to carry out the arrest; (e) where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used; (f) in deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed: the force being proportional in all these circumstances;

- (g) shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only: (h) ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
- (i) These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence

or in defence of any other person. (My emphasis)

[63] Ms SL Erasmus, for the police, submitted that Ms Babusi was unable to explain why no one else observed blood on her clothes after her arrest as she alleged to have been bleeding. In addition, Ms Babusi's counsel put to Cst Mooki, the arresting officer, that she was limping whereas Ms Babusi disavowed this in her evidence. It was curious, Ms Erasmus argued, that Babusi did not mention that she was shot and injured during her first court appearance. In any event, the photo of Ms Babusi which depicts a small circular scar on her back was taken sometime in 2015, almost two years following her arrest. Ms SL Erasmus contended that, even if it were to be accepted that she was shot by the police which is not conceded, Ms Babusi failed to prove on the balance of probabilities

the animus iniuriandi required to sustain a claim for assault.

[64] Ms Babusi testified that she was shot with a rubber bullet immediately before her arrest. As already alluded to, Cst Mookie, the arresting officer had no firearm in her possession and did not observe any injuries on Ms Babusi when arresting her. On 03 December 2013, approximately seven days following her arrest, while she was still in detention, Ms Babusi was seen by Dr Van der Byl who recorded that she sustained soft tissue injury on the lumbar area and an about 2cm superficial wound. In my view, there is sufficient evidence which demonstrates that Ms Babusi was shot and injured by a rubber bullet which had been fired by one of the officers during the Vergenoeg (Scene Two) riot of 27 November 2013.

[65] The onus is on Ms Babusi to establish the animus iniuriandi on the part of the police. However, on the view I take of this matter, it is not necessary to dwell on that aspect. The issue can be resolved with relative ease. It is to be borne in mind that Cst Mavuka testified that W/O Mompoti fired a stun grenade at Scene Two to disorientate the crowd but this did not deter the protestors as they kept advancing towards the officers and hurling missiles.

Apparent from the evidence the volatile situation necessitated the use of some force. The police fired rubber bullets to ward off the attack and disperse the riotous crowd which Ms Babusi was part of and participated in stoning the officers. It is difficult to conceive of any other alternative which the police could have employed to avert the danger. There is nothing to suggest that the police overstepped the permissible degree of force. I am satisfied that the police acted within the parameters of s 49 of the CPA. The upshot of this is that Ms Babusi's claim for unlawful assault

ought to fail.

[66] Freedom of association as entrenched in s 18 of the Constitution is an important civil right and so is a right to freely assemble, demonstrate, picket and present a petition as contained in s 17 of the Constitution.[26] However, it goes against the grain of our constitutional democracy for a group of people, as in this case, to violently take the law into their own hands, in a quest of making their grievance known, disturbing the public peace and invading the rights of other

citizens. The rights in s 17 must be exercised peacefully and unarmed. It is only when those convening and participating in a gathering

harbour intentions of acting violently that will they forfeit their right.[27] The violent conduct that was displayed during the protest action in this case is deserving of deprecation.

[67] It follows that the plaintiffs' claims cannot be sustained. In the result I make the following order.

Order

1. The plaintiffs' claims are dismissed with costs.

MV Phatshoane J

For the first to fifth and twelfth plaintiff: Adv G V Maree

Instructed by: Engelsman Magabane Inc.

For the sixth to eleventh plaintiff: Adv WA F Strydom

For the defendant:

Adv S L Erasmus

Instructed by:

The State Attorney, Northern Cape.

[1] The Regulations are published under GN R225 in GG 20963 of 17 March 2000.

[2] The Notice of Rights, on page 37 of bundle "A", was signed by Mr Boraki and W/O Zibaya, one of the I/Os in the criminal case. It reflects the time of Mr Boraki's arrest.

[3] The Constitution of the Republic of South Africa Act, 108 of 1996.

[4] The SAPS 14A Forms are to be found at pages 370 to 372 of Bundle "A".

[5] The SAPS 14A is at 380 of bundle "A"

[6] The SAPS 14A Notice appear at page 383 of the record- Bundle "A" .

[7] SAPS 14A- page 377 of Bundle "A"

- [8] The statement is to be found at pages 299-311 of bundle "A".
- [9] The J88- Notices Bundle page 85.
- [10] Mr Smock's founding affidavit appears at pages 56-64 of applications for condonation bundle.
- [11] Ms Babusi's confirmatory affidavit is at pages 96-98 of applications for condonation bundle.
- [12] Gulyas v Minister of Law and Order 1986 (3) SA 934 (C) 95 9A-B
- [13] Brand v Minister of Justice & another 1959 (4) SA 712 (A).
- [14] See S v Le Roux and others 2010 (2) SACR 11 (SCA) at 20c-d para 19
- [15] Transcript of the criminal trial at pages 84 line 10-15
- [16] Gleneagles Farm Dairy v Schoombee 1949 (1) SA 830 (A).
- [17]
- [2000] ZACC 25; 2001 (1) SA 912 (CC) at 923E-G para 24.
- [18] 2014 (2) SACR 163 (GP).
- [19] The entry in the Investigation Diary appears on page 403 of Bundle "A" under reference "A86".
- [20] Barnard v Minister of Police & another 2019 (2) SACR 362 (ECG) para39
- [21] 2020 (1) SACR 1 (CC).
- [22] Page 246 of bundle "A".
- [23] (Juastats e-publications) - 4th Ed, 2011Chapter 13 page 197 para D under "Lawful Arrest".
- [24] See Commentary on Criminal Procedure
- [25] 2002 (2) SACR 105 (CC) at 134e - 135c para 54
- [26] See s 17 and 18 of the Constitution of the Republic of South Africa Act, 1996.
- [27] S v Mlungwana and others 2019 (1) SACR 429 (CC).

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Prepared on 10 October 2026 · Esheria