



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: 348/2019

In the matter between:

**ZIZIKAZI AMOAH
ASMANU AMOAH
AMOAH TRADING ENTERPRISE (PTY) LTD**

**FIRST PLAINTIFF
SECOND PLAINTIFF
THIRD PLAINTIFF**

and

KING SABATA DALINDYEBO MUNICIPALITY

DEFENDANT

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] The plaintiffs instituted a delictual claim against the defendant ('the KSD municipality') based on the allegations that the KSD municipality intentionally and/or negligently and unlawfully damaged the container in which the third plaintiff was conducting its business, the hair salon. The third plaintiff was the owner of and in possession and occupation of the container that was stationed at Plaza Shopping Centre. Inside the container was the stock which consisted of equipment and hair

products. It is alleged that the first and second plaintiffs were the employees of the third plaintiff.

[2] The claim is based on vicarious liability, in that the unknown employees of the KSD municipality allegedly committed the acts and omissions whilst within the course and scope of the municipality's employment.

The pleadings

[3] On 1 February 2021, the plaintiffs filed a combined summons in this Court and held the KSD municipality liable for:

(a) a payment of R200 000 which is made up of R10 000 per month, for loss of earnings from March 2017 to the date of the issue of the summons. An amount of R132 000 which is calculated at R11 000 per month for future loss of earnings, from November 2018 to the date of satisfaction of the judgment sought;

(b) a payment of R200 000 which is calculated at R10 000 per month for past loss of earnings from March 2017 to the date of the issue of the summons. The plaintiffs held the municipality liable for an amount of R132 000 which is calculated at R11 000 per month for future loss of earnings, from November 2018 to the date of the satisfaction of this judgment; and

(c) in the specificity of Claim C, it was asserted that as the consequence of the loss of the container, the third plaintiff could not trade, with the result that it could not make its profit of R30 000 per month from 21 March 2017 to the date of the issue of the summons. Allegedly, the past loss of earnings computed from April 2017 to date of issue of the summons is an amount of R720 000 and the future loss of earnings amount to R360 000.

[4] Consequently, the plaintiffs seek a:

(a) payment of R332 000 in favour of the first plaintiff;

(b) payment of R332 000 in favour of the second plaintiff; and

(c) payment of R1 080 000 in favour of the third plaintiff, plus interests and costs of suit.

[5] On 1 April 2019, the KSD municipality filed a notice of appearance to defend and a special plea. The KSD municipality averred that the plaintiffs' debt became due on 21 March 2017, however, the plaintiffs failed to serve a notice in terms of Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 ('the Act'). The KSD municipality further alleged that there was no consent in writing or in any manner whatsoever allowing the plaintiffs to institute the proceedings without serving a notice as stipulated in terms of the Act.

[6] The KSD municipality vehemently denied that the container was removed intentionally, negligently and unlawfully. They denied that the first and second plaintiff lost earnings as a result of the direct consequences of the municipality and its employees. The fact that the third plaintiff lost trade and profit as a result of the direct consequences of the KSD municipality was also denied. In amplification:

(a) the KSD municipality admitted that the container was stationed at Plaza Shopping Centre. All the street vendors were given notices including the plaintiffs that the containers would be removed from the prohibited or restricted municipal areas; and

(b) the second plaintiff's container was also removed in terms of the municipal by-laws under Local Authority Notice 137, on the basis that it was placed on the restricted or prohibited area. The KSD municipality's conduct of removing or impounding the container was lawful.

[7] On the date of the trial, the KSD municipality withdrew a special plea regarding the plaintiffs' compliance with the provisions of the Institution of Legal Proceedings against Certain Organs of the State, Act 40 of 2002. In terms of Uniform rule 33(4), I made an order that the merits be separated from quantum as agreed by the parties. The parties agreed further, that the plaintiffs would begin to lead evidence.

The evidence

[8] The plaintiffs first led the evidence of Mr Anele Gogozayo ('Gogozayo'), a security guard, who testified that he used to visit the plaintiffs' barber business, which is located in a shipping container next to Plaza Shopping Complex where he

was employed. He described the container as a hair salon that was located near other informal traders who were also conducting other businesses in the caravans and shipping containers. On 21 March 2017 at around 19h30, he noticed the KSD municipality vehicles next to the plaintiffs' hair salon. They were escorted by a truck loader bull dozer ('the TLB') and had some blue lamps. He immediately called the second plaintiff whom he affectionately called Ozi or ('Amoah) and alerted him of the presence of the TLB and the KSD municipal employees. Amoah arrived and immediately noticed the KSD municipal employees using the TLB to shatter the container.

[9] Under cross-examination, Gogozayo testified that there were three municipal vehicles in the premises including the TLB. He informed the court that he came closer the KSD municipal employees who were smashing the properties but did not speak to them. When asked to describe the container, Gogozayo testified that the container had four corners; tiles on the floor; was mounted on the cement stand, and could easily be transported from one location to another. He went on to explain that it was built of quality and strong iron sheets. When he was informed that this was a shack, Gogozayo insisted that this was a normal container comparable to other containers that were located in the area.

[10] Gogozayo further testified that Amoah was terrified and panicking, so he negotiated with the KSD municipal employees to personally remove some merchandise from the container. When asked if he witnessed the negotiations, Gogozayo admitted that he had gone back to his job and did not observe whether the negotiations bore any fruits. When asked if there were no items inside the container, Gogozayo testified whenever he went to attend the hair salon, he would observe some hair equipment and products inside the container. Since the salon was closed on this particular day, he was unable to see if the products were inside the container because it had been destroyed and was scattered all over. When he was informed that the container was removed in an orderly manner, Gogozayo denied this and testified that the container was dismantled.

[11] Mr Osmanu Amoah (Amoah) testified that he and his wife Mrs Zizikazi Amoah were shareholders of Amoah Trading Enterprise (Pty) Ltd. During March

2017, he was the managing director of the company and his wife was a manager. They were employees of the third plaintiff. The hair salon was conducted in a container which was situated outside the retail centre. In his capacity as a managing director of the company, he applied for permission to put the structure on the land and operate the said business. Before the application was approved, he completed an application form. The application form was admitted as exhibit C before court. The application form is titled 'application for a container/caravan'. It comprises of the King Sabata Dalindyebo logo, the full names of the municipality, the full names of the applicant, his postal and physical address as well as his telephone number. Additionally, the form indicates the place where the container/caravan was to be placed and its purpose. The form demonstrates the particulars of the container, that it was made of metal and was a standard size. It also reveals that the land where the container was to be installed was vacant. According to exhibit C, the person whose particulars appear in the form is the second plaintiff. The application was approved on 19 June 2009.

[12] After the completion of the application form, Amoah was asked to apply for electricity services. Exhibit B demonstrates how this application form was completed. This exhibit also shows the KSD municipal logo as well as full particulars of the second plaintiff. According to the form, the names of the electrician are marked as 'Khanyisa Electric'. On 7 September 2009, the electrician endorsed his signature in the form. His contact number is also reflected in one of the columns in the document. The costs of the services were estimated at R2 243. On 8 September 2009, the application was approved by E. Naidoo of the KSD municipality. The documents professing to be the proof of payments for the monies paid by Amoah in pursuit of his application for a container were also admitted as exhibits. In respect of the application for a container/caravan, the second plaintiff paid a sum of R100. This receipt was admitted and marked exhibit A. Exhibits D and E prove that he paid some monies when water and electricity services were connected. It is noted that these are original documents.

[13] In his testimony, Amoah also unveiled a geographical map which determines the area where this container was to be fitted after it was approved by the KSD municipality. The document was marked exhibit F. He testified that he put the

container in the exact location that was designated to him by the KSD municipality. The exhibits A, B, C, D, E and F were submitted by consent between the parties. The contents of all the documents were never placed in dispute. Additionally, Amoah testified that he followed all the correct procedures until they started to operate the hair salon. The meter number that monitors the flow of water that was supplied by the municipality as well as the electricity box was installed by the KSD municipal employees.

[14] When asked to describe the structure, Amoah testified that he bought the container at Norwood. Although it was a mobile structure, he found that containers frequently went missing. He added a veranda as an extension to prevent it from being vulnerable to thieves. Additionally, he observed that the container was rusting due to human excrement being passed around it. To protect the container from damage, he filled the edges with cement. Amoah testified that even though the container and the veranda were walled off with cement, it could still be easily moved, if necessary.

[15] With regards to the events of the 21 March 2017, Amoah testified that he was at Mbuqe extension when he received a call from Gogozayo. He started to panic when Gogozayo informed him of the TLB and the KSD municipal cars that had parked on his business premises. It took him less than five minutes to reach the hair salon and on arrival he stopped in front of the KSD municipal cars. He rushed next to the container but was prevented from doing so by the KSD municipal employees. At that stage, the TLB had started to dismantle the container. He moved to the direction of the container pleading with the KSD municipal employees to allow him to remove the items that were inside the container. The KSD municipal employees shouted and asked him to leave the area.

[16] When the container was disassembled, so he testified, an electric spark occurred. The KSD municipal employees became terrified and shouted. One of the employees went to the box to switch the electricity off. After that, the TLB continued to demolish the structure. Amoah testified that the container got shattered to the extent that it could not be repaired.

[17] He further testified that he could not work after his container was demolished and had to hire another container at some stage. He could only secure a small container to run a business to make a living. Since there was no electricity installed in the new container, he renounced that particular business and opened a salon at Southernwood. He informed the court that had it not been the conduct of KSD municipal employees he would be operating his business from 2017 to date. When asked to clarify if he ever received a notice to remove the container, he testified that he received no notice to that effect.

[18] In cross-examination, he was informed that he fitted his container in a site belonging to Vela Cash Loan CC. Amoah informed the court that he was only guided by the KSD municipal employees and one of them completed the form and approved the fitting of the container in a spot that was agreed upon. He informed the court that according to his knowledge, the site where his container was, belonged to the municipality hence they assisted him in processing the application to fit the container.

[19] When asked if he ever lodged a complaint with the KSD municipality after the event, Amoah testified that he only went to St Johns College where other traders' containers were moved to the previous day. When he lodged a complaint, the person at the gate informed him that his job was only to guard the premises and the items that were inside the yard. When asked why he had not sought permission to extend his container, Amoah testified that the extension was only for security purposes. With this evidence the plaintiffs closed their case.

[20] The KSD municipality presented the evidence of Mr Zithulele Maqokolo ('Maqokolo'). In 2017, Maqokolo was employed by the KSD municipality as a law enforcement officer. During that month there was an order issued by the KSD municipality that all containers in town must be removed. The message that speaks to the removal of containers was conveyed to the Street Committees. The Committees were to convey the message to all the container owners. This was not a written notice; it was to be conveyed verbally. A second notice was verbally communicated to the street vendors and container owners but they failed to adhere to the notice.

[21] Because there was non-compliance with the KSD municipal order, the KSD municipality ordered that all containers be removed, so he testified. The members of various departments in the KSD municipality were tasked to assist in the process. The role of his department was to monitor the process so that its members were not subjected to the attacks by community members. Before the day preceding 21 March 2017, some containers in the area were removed. The plaintiffs' structure which was a shack could not be removed because it was mounted to the ground. A TLB driver was called to lift it up. After it was removed, it was no longer in its intact state and hence the zinc iron sheets were placed in a van and conveyed to kwa-fleet for safe keeping.

[22] When asked to explain the process of the permission to trade on the street, he explained that an application form is completed. The applicant would only be allowed to put a structure that could easily be removed. He explained that any structure that was fixed to the ground was prohibited. Maqokolo informed the court that on this day, their focus was on other trades' structures and not only on the plaintiffs'.

[23] In cross-examination, Maqokolo explained that the plaintiffs' container was attached to a structure which was made of corrugated iron sheets. The structure that was attached to the container got damaged and the container remained intact and was taken back to its owner. Maqokolo informed the court that he started working for the KSD municipality in 2014 and was not familiar with the application form marked exhibit C.

[24] Counsel for the plaintiffs unveiled the KSD municipal by-laws and challenged Maqokolo to comment on whether the plaintiffs contravened any of the KSD municipal by-laws. Maqokolo conceded that the plaintiffs contravened no by-laws except that the area where they were trading was a restricted or prohibited area. When asked if Amoah or any of the plaintiffs were given a notice to remove the container as stipulated by the KSD municipal by-laws, Maqokolo maintained that the notice was verbally conveyed to the Street Committees to inform its communities. When asked if the container owners were issued with receipts as proof that their

containers were stored, Maqokolo testified that he bore no knowledge of who the container owners were hence no receipts were issued. With this evidence, the defendant closed its case.

The common cause facts

[25] The following facts are found to have been proven, that:

25.1 On 24 December 2010, the KSD Municipal Manager published the by-laws relating to Street trading, Local Authority notice 137 ('the KSD municipal by-laws'). As defined in clause 1 of the KSD municipal by-laws,¹ the plaintiffs were street traders² offering services for the reward in a public area. They were operating a hair salon.

25.2 On 19 June 2009, the KSD municipality approved the plaintiffs' application to fit a container next to Plaza Shopping complex, an area that was designated to the plaintiffs and approved by the KSD municipality for that purpose.

25.3 The plaintiffs had been trading in the area for approximately eight years.

25.4 During March 2017, the KSD municipality removed the informal traders from their trading places and confiscated their containers and other goods. The properties would be conveyed to kwa-fleet for safe keeping. As a matter of practice and in terms of clause 9 of the KSD municipal by-laws, it was expected of the authorised official to issue a receipt for any property so removed and impounded, which receipt would itemise the property to be removed and impounded.³

¹ King Sabata Dalindyebo Municipality, local Authority 137, gazetted in a 'PROVINCIAL GAZZETTE EXTRAORDINARY', dated 24 December 2010.

² By-laws relating to street trading-CLAUSE 1: definitions . . . 'A street trade' means a person who carries on the business of the street trading and includes any employee of such person; 'Street trading' means the selling of any goods or the supplying or offering to supply *any service* for reward, in a public road or public place, by a street trader.

³ Clause 9(3) of the KSD municipal by-laws provides: 'Any authorised official acting in terms of subsection (1) [subsection 1 authorises removal and impoundment] must, except where goods have been left or abandoned, issue to the person carrying on business of a street trader, a receipt for any property so removed and impounded, which receipt must:-
(a) itemise the property to be removed and impounded; . . .'

25.5 Unlike other containers, the plaintiffs' container could not be detached on the same day as the removal of other traders' products and containers because it was attached to an immovable structure.

25.6 When the plaintiffs' container was detached, a TLB was used, and the removal was conducted in the presence of the second plaintiff. It was not seriously disputed that the container was removed with its contents.

The issues

[26] The issues up for debate are whether:

- (a) the plaintiffs' container was built in a restricted or prohibited area;
- (b) the container was removed in an orderly manner or dismantled;
- (c) whether it was finally returned to its original position; and
- (d) the rules governing the KSD municipal by-laws were adhered to when the container was so detached.

[27] The broader issue is whether KSD municipality through its employees acted intentionally, alternatively negligently and unlawfully by damaging the plaintiffs' container.

Legal submissions by the parties

[28] The parties filed written heads of arguments and launched very significant points which assisted the court in preparation of this judgment. On behalf of the plaintiffs, Mr *Hobbs* argued briefly, that the second plaintiff was a good witness and there was corroboration in his testimony. He argued that I should find mendacity, obfuscation and or unreliability in the defendant's evidence. He pointed some external and internal contradictions.

[29] The municipal by-laws relevant to this matter are those appearing in the Provincial Gazette Extraordinary of 24 December 2010 number 2489. On the established facts, the municipality failed to abide by its own by-laws, so the argument continued. In a nutshell, counsel submitted that the plaintiffs have discharged the overall onus to prove that the defendant's employees acting within the scope of their

employment unlawfully and intentionally or at least negligently demolished and or damaged the third plaintiff's container.

[30] The first point of criticism that Mr Pangwa, for the defendant, labelled against the plaintiffs is the manner in which the evidence was presented. He argued that the plaintiffs led evidence that contradicts what they formulated in their pleadings. Referring to *Minister of Safety and Security v Slabbert*,⁴ Mr Pangwa argued that the documents that the plaintiffs submitted before the court tend to prove the existence of the contract between the third plaintiff and the defendant and such evidence should be discarded because it is irrelevant. Mr Hobbs was adamant that he presented no irrelevant evidence and further all the material issues were stated in the pleadings.

[31] Mr Pangwa criticized Gogozayo and Amoah's testimonies. He contended that Gogozayo was biased and evasive when giving evidence. The container was damaged due to human excretion being passed on it hence it fell apart, so he argued. Gogozayo could not even tell that the merchandise was still inside the container when it was destroyed. He could not tell how the TLB dismantled the container, so the argument continued.

[32] Mr Pangwa further argued that the plaintiffs failed to discharge the onus of proof on the basis that there was no preponderance of evidence adduced on a balance of probabilities.

Applicable legal principles

[32] In civil proceedings, the plaintiff must, in order to succeed, prove his case on a balance of probabilities. In *National Employers General Insurance Limited v Jagers*,⁵ a case that I was referred to by Mr Pangwa, the court held:

'[I]t seems to me with respect, that in any civil case, as in criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case,

⁴ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11.

⁵ *National Employers General Insurance Limited v Jagers* 1984 (4) SA 437 (E) at 440 D-G.

and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the court will weigh up and test the plaintiff's allegations against general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

[33] There are two irreconcilable versions presented and the question of credibility comes into play. In *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others*,⁶ a case that was cited by Mr Hobbs, the court held:

'The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the 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 of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in 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 extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and 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 more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

⁶ *Stellenbosch Famer's Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 para 5.

[34] At the heart of this action is the question of negligence. This was the emphasis of the parties' oral submissions. The test for negligence was eloquently put in the case of *Kruger v Coetzee*.⁷ At 430E-G Holmes J described the test as follows:

'For purposes of liability culpa arise if-

(a) A *diligens paterfamilias* in the position of the defendant-

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence.

(b) the defendant failed to take such steps. This has been constantly stated by the court for some 50 years. Requirement (a) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all, and if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.'

[35] Clause 9(1)(b) of the KSD municipal by-laws provides that an authorised official may remove and impound any property of a street trader that is found at a place where street trading is restricted or prohibited and that constitutes an infringement of any such restriction or prohibition, regardless of whether or not such property is in possession or under the control of any person at the time of such removal or impoundment. In terms of the KSD municipal by-laws, the municipality cannot be held liable for any damage or loss caused to any such property that is removed and impounded unless such damage or loss is caused as a result of the negligence of the municipality.

[36] In terms of the KSD municipal by-laws, if an authorised official reasonably believes that a provision of the KSD municipal by-laws is being contravened, he may serve a compliance notice on an offender or the owner or occupier of the premises or any person apparently in charge of undertaking the aforesaid use on the premises.⁸

Evaluation of evidence

[37] I am tasked to evaluate the evidence presented holistically,⁹ objectively and finally decide whether the plaintiffs have passed the necessary threshold of proving

⁷ *Kruger v Coetzee* 1966 (2) SA 428 (A).

⁸ See clause 12(1) of the KSD municipal by-laws.

their case on a balance of probabilities. Before I traverse on the merits of the case, I pause to deal with a preliminary issue that was raised by Mr Pangwa on behalf of the defendant.

Did the plaintiffs present a case different from the one pleaded?

[38] I am in agreement with the principles encapsulated to the *Slabbert* matter. It is well settled that in the pleadings, a party has a duty to allege the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to the issues falling outside the pleadings when deciding a case.¹⁰

[39] In the case under consideration, the defendant pleaded that the container was fitted in a prohibited or restricted area. In my considered opinion and considering the issues that were presented before me, the submission of the documents was intended to substantiate the plaintiffs' contention, that they contravened no KSD municipal ordinances, and were permitted to trade in the area. I therefore find that the defendant suffered no prejudice as a result of the submission of the documents. All these documents were discovered. The documents unveiled the application processes as well as the consequential outcome that led to the plaintiffs being permitted to trade in the area. It is discernable that there was consistency in the plaintiffs' particulars of claim and the evidence presented. In my view, no different case was pleaded.

The merits

[40] Applying *Stellenbosch' Farmers Winery Group* case above, the question is whether the plaintiffs' evidence was credible, reliable and probable. Moving on to the probabilities of this case, the presence of the KSD municipal officials, the KSD municipal cars and the TLB at the plaintiffs' site, which triggered Gogozayo and Amoah's anxieties, analytically display that something amiss was taking place at the plaintiffs' business premises.

⁹ *Santam Insurance v Biddulph* [2004] 2 All SA 23 (SCA). At para 5, the court held, 'it is equally true that findings of credibility cannot be judged in isolation but require to be considered in the light of proven facts and the probabilities of the matter under consideration'.

¹⁰ *Minister of Safety and Security v Slabbert* above n 4.

[41] I had the benefit of observing the demeanour of all the witnesses when adducing their testimonies. Gogozayo appeared to be an independent witness who had no interest in the matter. His task was to do his daily duties as a security guard. When he observed that Amoah's business premises was surrounded by municipal cars and a TLB he phoned him to come to the site. This was a mere reasonable human reaction.

[42] It must be remembered that on this particular day, Gogozayo was on duty. It could not be expected of him to watch the occurrence from the beginning to the end. The undisputed evidence is that he was in the site for a short period and had to leave for his job. In the normal course of events, it was expected of him to present evidence of what he personally observed and omit the rest. This is the impression I received of him as a witness. The fact that he could not tell what happened to the items that were inside the container, strengthens his credibility and the reliability of his evidence as a witness, amongst others. Had he had interest in the matter, he would have presented untruths and informed the court that the merchandise inside the container was also destroyed. His testimony which was to the effect that he last saw the equipment and hair products in the container when he visited the salon for professional services, and not on the day of the incident, validates his impartiality in the proceedings.

[43] On the material issue, Gogozayo and Amoah corroborated each other that the municipal employees dismantled the plaintiffs' container. Both witnesses presented a good picture of how the container was dismantled. The container was smashed by the TLB driver. Both testified that the container was never removed in an orderly manner. The cross-examination of Gogozayo and Amoah bore no fruits as they both stuck to their versions especially on the material issues.

[44] Maqokolo's evidence was tainted with improbabilities and contradictions especially on material facts. In his evidence in chief he testified that the plaintiffs' structure was a shack that was mounted on the ground. In light of this, the structure was prohibited in the area because it was not a mobile structure as regulated by the KSD municipal by-laws. Because it was fixed on the ground, the TLB removed the

structure, and its iron sheets were placed in a van and conveyed to kwa-fleet. This evidence was never put to the plaintiffs' witnesses for them to comment.

[45] Under cross-examination, he contradicted himself further and presented new evidence. He testified that the only part that could not be saved during the 'so called impoundment' was the structure that was motionless only. He revealed a different picture, namely, that the container was removed orderly and fitted back on the same spot the following day. This evidence is again regarded as an afterthought because it was never put to the plaintiffs' witnesses for them to comment.

[46] When asked to explain if the properties were itemised and whether the owners were given receipts during the impoundment, he testified that the owners of the containers were unknown to them. Clearly, if the owners of the containers were unknown, the plaintiffs' container could not have been brought back because the owner was not known, and the property was not itemised and no receipt was issued during the removal.

[47] In his written submissions, Mr Pangwa contended that the likelihood exists that the container was damaged owing to it being decayed and damaged as a result of the human waste that was excreted on it. This assertion is not supported by what is contained in the pleadings and the evidence tendered by the parties before the court. The plaintiffs never suggested that container was destroyed by human waste. The defendant pleaded that the container was removed in an orderly manner and never suggested that it was destroyed. Maqokolo's evidence was that part of the container was shattered, the other part was conveyed to kwa-fleet and returned the following day. I have already discredited this piece of evidence. In my view, the mishmash of material contradictions in Maqokolo's evidence is indicative of the fact that he was a bad witness and his evidence cannot be reliable. Mr Pangwa's later concession that Maqokolo was not a good witness is appropriate in the circumstances. In my considered view, the plaintiffs' evidence is credible on the basis that it is consistent with the proved facts. Additionally, the plaintiffs' evidence that the container was dismantled including the hair products is found to be reliable.

[48] The defendant averred that the area where the plaintiffs were trading was a prohibited area. Although this was not substantiated through oral testimony, the plaintiffs, as onus bearers gave a background on how they obtained a permission to trade in the area. Gathering from the facts, it has been proved on a balance of probabilities through exhibits A, B, C, D, E and F that the plaintiffs were permitted to trade next to Plaza Shopping complex where their container was fitted.

Was the KSD municipality negligent?

[49] Before I deal with what I believe is an answer to this question, I pause to cave in the role of the municipality in informal trading. The municipality plays a critical role in creating a favourable and enabling regulatory policy environment for informal trade. Our Constitution confirms that local government has an obligation to facilitate economic development at municipal level.¹¹ The Business Act 72 of 1991 which must be interpreted through the prism of the Bill of Rights also grants local government considerable authority to regulate informal trade. This authority cannot be abused. Any action to be taken by the municipal officials must be reasonable and lawful. This means that their actions must be rationally or logically linked to the purpose they intend to achieve. Section 6A(2)(c) of the Business Act provides that before a municipality can consider restricting or prohibiting trading in an area it must investigate how its decision to prohibit or restrict informal trade will affect informal traders. Section 6A(2) of the Act reads as follows:

‘(a) A local Authority may, subject to the provisions of paragraphs (b) up to and including (j), by resolution declare any place in its area of jurisdiction to be an area in which the carrying on of the business of street vendor, pedlar or hawker may be restricted or prohibited.

...

(c) Before such a motion is adopted, the local authority shall have regard to the effect of the presence of a large number of street vendors, pedlars or hawkers in that area and shall consider whether–

...

(ii) the intended restriction or prohibition will drive out of business a substantive number of street vendors, pedlars or hawkers.’

¹¹ Section 152 (2) of the Constitution of the Republic of South Africa Act 108 of 1996, the Constitution

[50] In the present matter, I have already discredited the evidence of the KSD municipality and found that the plaintiffs' container and its contents were dismantled. The KSD municipality's decision to dismantle the plaintiffs' properties and haphazardly evict the plaintiffs from the area that was designated by it for purposes of informal trading remains obscured. Even if it were to be assumed that there was a contravention of the KSD municipal by-laws, the reasons why the plaintiffs were not personally served with a notice notifying them of such a contravention, if any, remain inscrutable.

[51] The probabilities are that the plaintiffs practiced their informal trading in accordance with the regulated prescripts that were applicable since 2009. It is discernable from the evidence presented, that the plaintiffs were never notified of the contravention of any of the KSD municipal by-laws.

[52] Against this background and most importantly, applying the test for negligence in *Kruger v Coetzee*, it is clear that the incident was foreseeable if proper procedures were not followed by the KSD municipality before the removal which led to the subsequent obliteration of the plaintiffs' container. It is apparent that the KSD municipality contravened its own by-laws, in that:

52.1 Had the plaintiffs contravened the KSD municipal by-laws, they ought to have been personally served with a notice notifying them of such a contravention and the proper procedures to remedy it. The fact that the notice to vacate the site due to contravention of the by-laws, was verbally conveyed through the Street Committees is in breach of clause 12(1) of the KSD municipal by-laws.

52.2 It is common cause that the plaintiffs built a veranda which was walled off with a cement to protect the container from being stolen. This means that the container was partially mobile. Clause 9 of the KSD municipal by-laws deals with removal and impoundment. Clause 9(4) reads:

'if any property about to be impounded is attached to any immovable property or a structure, and such property is under the apparent control of a person present thereat, any authorised official of the Municipality may order such person to remove the property, and any such person who refuses or fails to comply is guilty of an offence.'

[53] Gleaning from the facts of this particular case, it remains undoubted that the second plaintiff was present at the site pleading with the municipal officials to personally remove the goods. Instead of the pandemonium they created, shouting and ordering him to leave the premises, the KSD municipal officials ought to have authorised the second plaintiff to personally remove the properties in compliance with clause 9(4) of the KSD municipal by-laws. This would have been a reasonable precaution to take, to prevent the damage to the plaintiffs' properties. Clause 9(7) of the KSD municipal by-laws entails that in the event that an authorised official removes and impounds any property, all reasonable steps must be taken to ensure that such property is not damaged or lost. No such reasonable steps were followed by the KSD municipality.

[54] Considering the above, I conclude that in this particular case, the municipal officials were remiss in the implementation of their systems and procedures. Applying the principle of reasonableness, the KSD municipality could have followed all these procedures and taken steps to prevent the occurrence, by ensuring that its systems and procedures as indicated above, are properly enforced. The KSD municipality failed to take reasonable steps to prevent the harm to the plaintiffs' property and patrimonial loss. Unlike other affected traders whose containers were positioned back after the occurrence, the plaintiffs lost their container as well as its contents and the business was adversely affected. The manner in which the plaintiffs were treated even after the event shows that the situation was never remedied.

[55] I am satisfied that on the facts presented, the plaintiffs have proved the requirement of *culpa*. The plaintiffs have proved on a balance of probabilities that the KSD municipality employees were acting within the scope and course of employment of the municipality's employment. Undoubtedly, the first and second plaintiffs were the employees of the third plaintiff. Consequently, the plaintiffs' action stands to succeed.

Order

1. The defendant is liable to pay the plaintiff such damages caused by the incident of the 21 March 2017 as the parties may agree or the plaintiff may prove.
2. The defendant is ordered to pay costs of the trial.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

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Date heard : 19 June 2023

Date delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 15 August 2023 at 10h00.