**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 16662/2015

In the matter between:

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| **JAN JAKOBUS SMITH** | **Plaintiff** |
| **and** | |
| **MINISTER OF POLICE** | **Defendant** |

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| Coram: | Bishop, AJ |
| Dates of Hearing: | 11, 12, 16 and 17 October 2023, 9 November 2023 |
| Date of Judgment: | 2 January 2024 |

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**JUDGMENT**

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**BISHOP, AJ**

[1] It was the night before Easter in Tulbagh, when the Plaintiff was arrested and broke his knee. This much the parties agree on. They differ on whether he should have been arrested, and how he broke his knee.

[2] The Plaintiff's version is this. On 17 April 2014, he returned home after work at around 17:30. After *7de Laan* had finished,[1] he decided he wanted cigarettes, but he lacked the cash. He planned to walk to his daughter's house on Kasuur Straat to get some money to buy his cigarettes. On the way, he passed his friend Patrick's house. Patrick invited him in for a drink. The Plaintiff acquiesced and they shared a drink; just one drink, a quart of Castle. It took 15-20 minutes.

[3] He left Patrick's house at around 19:30. It was twilight, not yet dark. Patrick lived just a few houses away from the Plaintiff's daughter, but on the other side of Kasuur Straat. He crossed the road to walk in the sloot on the other side. Before he reached the sloot, he saw the police van, which then pulled up next to him. The police officer in the passenger seat – Sergeant Beukes – got out and said he wanted to search him for drugs. The Plaintiff testified that he knew Sergeant Beukes. He told Sergeant Beukes that he (Beukes) knows that he (the Plaintiff) does not use drugs.

[4] Sergeant Beukes then told the Plaintiff that he smelled like alcohol and ordered him to climb into the van. The Plaintiff – who was not drunk, having merely shared a quart – refused. Beukes tried to arrest him, and the Plaintiff resisted. The driver of the vehicle – Sergeant (then Constable) MacDonald – climbed out to assist. Together Beukes and MacDonald took the Plaintiff to the back of the van, and forced him in. First, they pushed his body inside, while his legs remained outside. Then one of the officers kicked him in the back (in Afrikaans, the officer "het my getrap") to force him into the van. In the process, his knee hit the hard corner of the opening at the back of the van, and broke.

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[1] The schedule of *7de Laan* was not originally led in evidence. I assume I was expected to take judicial notice. Unfortunately, I was not in 2014, and am still not, a regular viewer. After an enquiry from the bench it was established that *7de Laan* begins at 18:30 and finishes at 19:00.

[5] The Plaintiff claims he was the only person in the van. The van drove around for a short time before arriving at the police station. The Plaintiff was in immense pain and needed to be assisted out of the van. Because of the pain, he needed to defecate so badly that he could not wait. He pulled down his trousers, squatted, and defecated in a ditch just outside the police station. He then pulled up his trousers and had to be assisted into the cell because of his sore knee.

[6] He slept in the cell with a few other people. He did not ask for medical assistance. The next morning Beukes and MacDonald took him out of the cell. Because his knee was sore, MacDonald drove him (and only him) to a location close to his house. MacDonald helped him out of the van, but his knee was so painful he had to hop to his house on one leg.

[7] When he reached the house, he immediately told his wife he had been arrested and his knee was hurting. He wanted to lie down. His wife helped him to bed. His wife then went to church; it was Good Friday. While she was gone the Plaintiff tried to go the bathroom, but fell. His daughter was unable to help him up, and his wife was called back home from church. She helped him back to bed and asked if he was in pain. He said he was alright. She decided, nonetheless, to call an ambulance.

[8] At this point, his leg was considerably swollen. He was taken to Ceres hospital and put in a splint. He spent the weekend at home, and on 21 April 2014, was taken to Worcester hospital, where he had an operation to repair his knee. He stayed in hospital until 28 April 2014. Later in April – the precise day has been lost in the passage of time – the Plaintiff laid a criminal complaint of assault against Beukes and MacDonald.

[9] The Plaintiff's version was partially corroborated by his wife's evidence. Mrs Smith testified that she was busy making curried fish for Easter when her husband arrived home from work. *7de Laan* was already on. They watched *7de Laan*, then he wanted a cigarette, so he went to their daughter's house to get one. He did not come back that night.

[10] Her husband returned the following morning between 6:30 and 7:00. He was in pain and his knee was swollen. He told her the police had hurt him. She helped him to bed, gave him some water and two pain pills, and then went to church. While she was at church, she was called to go home to help her husband. He was stuck on the floor, unable to get up. She helped him to the bathroom, then to the living room. She decided to call an ambulance, which took him to Ceres Hospital. Later he was taken to Worcester hospital for an operation.

[11] The Defendant's version is very different. It relied on the evidence of MacDonald, Beukes and Sergeant Samela, who was manning the charge desk on the night in question. There are some minor differences between MacDonald's and Beukes' versions. But in general terms, their story went like this.

[12] MacDonald and Beukes were conducting visible policing on 17 April 2014. At around 21:30, they were driving down Kasuur Straat. They saw the Plaintiff walking on the other side of the road. He then walked across the road, into their lane in a dangerous manner. He was swaying when he walked. He crossed so close to the vehicle that there was a risk they could have driven into him. Beukes asked MacDonald – who was driving – to stop next to the Plaintiff. Beukes thought he might be drunk and wanted to talk to him. Beukes did not know the Plaintiff. Beukes explained that sometimes, even if they conclude a person is drunk, they do not arrest

him, but will ensure he returns home safely. He wanted to assess what to do in this situation.

[13] Beukes rolled down the window to ask the Plaintiff his name and where he stays. He did not ask him about drugs, or say he wanted to search him. The Plaintiff did not answer. He was arrogant. His speech was slurred. He smelled of alcohol. Beukes determined that the Plaintiff was drunk. He opened the car door, and the Plaintiff ran away, still swaying. Beukes ran after him. The Plaintiff made it about 25 metres and then ran into an exposed gate pole of one of the nearby houses and fell. Beukes also tripped and fell in the sloot. Beukes hurt his own knee in the process.

[14] Beukes then arrested the Plaintiff for being drunk in public and took him back to the van. He did not handcuff him, but held him by his shorts and his arm. The Plaintiff complained that his knee was sore, but was able to walk himself. The Plaintiff climbed into the van himself, although he went backside first because of his sore leg.

[15] There were several other people in the van who had also been arrested for “dronkopstraat” or similar crimes that evening. The van was now full and they drove straight to the police station. MacDonald did not recall that the Plaintiff needed to defecate on arrival, but Beukes did. The Plaintiff climbed out and relieved himself in the police station’s car park. Beukes had to fetch a spade to pick up the results and dispose of them.

[16] Although the Plaintiff complained about his injury, he was able to walk to the cell by himself. His injury was recorded in the occurrence book. Despite being offered the Plaintiff did not ask for medical attention. He slept through the night in the cell.

[17] Early the next morning, MacDonald took the Plaintiff and some other persons who had been detained over night to a spot in town. He regularly transported people who had been held overnight instead of merely releasing them from the cells to avoid the risk they would be mugged while walking home through a dangerous area nearby.

[18] That was their version in evidence. As I expand on below, it did not perfectly align with evidence they had given earlier in affidavits. The affidavits were given in response to the Plaintiff's complaint to the Independent Police Investigative Directorate. There was also a criminal trial for the alleged assault. Both MacDonald and Beukes were acquitted.

[19] That brings us to the present action. The Plaintiff sued the Minister of Police, as Beukes' and MacDonald's employer, for: (a) the assault that caused the injury to his knee; and (b) his unlawful arrest and detention. He claimed R500 000 for the assault, and R100 000 for the arrest and detention.

[20] The plea, initially, was a bare denial of all the material allegations. The plea was amended at the outset of the hearing, with no objection by the Plaintiff. The new defence was that the Plaintiff was arrested because he was drunk in public, contrary to s 76 of the Western Cape Liquor Act 4 of 2008. The arrest and subsequent detention were therefore lawful. The Defendant denied the assault and claimed the Plaintiff injured himself in the manner I have set out.

[21] This case turns on which version of events I accept. To make that determination, I begin with some basic principles of onus and evidence. I then consider the case of unlawful arrest and, finally, the alleged assault.

**Onus and Evidence**

[22] There are three important questions on onus and evidence that set the stage for determining which party's version the Court should accept. The first question is on whom the onus lies. The second is the principles for resolving mutually destructive versions. And the third concerns the general principles for resolving disputes of fact.

[23] On onus: there are two distinct claims before me – a claim for unlawful arrest and a claim for assault.

> [23.1] The Defendant admits the arrest and detention occurred, but claims it was lawful because Beukes believed the Plaintiff was committing an offence. The onus is on the Defendant to establish that the detention was lawful.[2]
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> [23.2] The Defendant denies that Beukes or MacDonald assaulted the Plaintiff. They claim he injured himself. The onus is on the Plaintiff to establish that the assault occurred.

[24] The onus matters because, when a Court is confronted with two mutually destructive versions, the party that bears the onus "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 [other party] is therefore false or mistaken and falls to be rejected."[3] So the Defendant must show

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[2] *Zealand v Minister for Justice and Constitutional Development* [2008] ZACC 3; 2008 (2) SACR 1 (CC); 2008 (6) BCLR 601 (CC) at para 25.

[3] *National Employers' General v Jagers* 1984 (4) SA 437 (E) at 440D – 441A, recently quoted with approval in *City of Cape Town v Mtyido* [2023] ZASCA 163 at para 29.

that Beukes had sufficient evidence to believe the Plaintiff was drunk, while the Plaintiff must show that he was assaulted.

[25] That principle must be read with the ordinary principles about resolving disputed facts in action proceedings.[4] Courts must make findings on witnesses' credibility and reliability, and on the probabilities. Credibility turns on the court's "impression about the veracity of the witness", which is based on a range of factors, including: "(i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events."[5] Reliability here is affected for all witnesses by the passage of time; but it is affected equally. It may also be affected by whether the witness was drunk or sober at the time the events occurred. Finally, a court must consider "the probability or improbability of each party's version".[6]

[26] Against that background, I first consider the arrest, and then the assault.

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[4] See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

[5] Ibid.

[6] Ibid.

**The Arrest**

[27] Arresting and detaining a person is unlawful unless there is a legal basis for it. Section 40(1)(a) of the Criminal Procedure Act 51 of 1977 permits a peace officer to arrest a person without a warrant if he "commits or attempts to commit any offence" in the peace officer's presence. It is an offence under s 76(a)(ii) of the Western Cape Liquor Act to be "drunk in any place to which the public has access". That is the offence the Defendant claims the Plaintiff was committing when Beukes arrested him. One of the reasons for the offence "is that a drunk person may present a danger to road users and to himself when being in the proximity of traffic or pedestrians."[7]

[28] To succeed in justifying the arrest, the Defendant does not need to establish that the Plaintiff in fact committed the crime. Rather, he must establish that Beukes, who carried out the arrest, "had direct personal knowledge of sufficient facts at the time of the arrest, on the strength of which it can be concluded that the [Plaintiff] had prima facie committed an offence in his presence."[8] The focus is on "what was directly observed or heard by the arresting officer that must, in and of itself, be sufficient to sustain a conclusion that an offence has been committed."[9] The question is not whether the arresting officer formed a reasonable belief that the crime was committed but whether, objectively, the facts he observed justified a prima facie conclusion the crime was committed.[10]

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[7] *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 521F.

[8] *Scheepers v Minister of Safety and Security* 2015 (1) SACR 284 (ECG) at para 18. See also the cases quoted in *Scheepers* at para 17, and in particular *Minister of Safety and Security and Another v Mhlana* [2010] ZAWCHC 23; 2011 (1) SACR 63 (WCC) at para 15.

[9] *Scheepers* (n 8 above) at para 17.

[10] Ibid at para 21.

[29] Kasuur Straat is a place to which the public has access. The other element of the offence is being drunk. To assess if Beukes had knowledge of sufficient facts to believe the Plaintiff was drunk, we must answer another question: How intoxicated must a person be to qualify as "drunk" for purposes of a provision like s 76(a)(ii)? Put shortly, a person is drunk if he "is incapable of comporting himself, or 'of performing any act in which he is engaged, with safety to himself or with regard to the rights of others which the law commands'."[11] This has two consequences:

> [29.1] The physical manifestations of intoxication provide evidence of whether the person is able to comport himself as the law demands.[12] But the standard is not one of physical capacity to speak or to walk, but the ability to meet the applicable legal standard. As the Court put it in *Scheepers*: "the enquiry is not aimed at determining the extent of the physical manifestations of intoxication, but rather the extent of the effect of intoxication on the ability to act in accordance with the required legal standard".[13]
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> [29.2] The level of intoxication "is to be determined in the context of the activity in which the person is engaged."[14] The standard the law requires of a person at a bar or restaurant is different from that required of a pedestrian. A person may be too drunk to safely walk along the road, yet not so drunk that they cannot lawfully sit on a bench.

[30] Rather than going through all the evidence at the outset, I think it is useful to go straight to what is, to my mind, the decisive fact: when the arrest occurred. The

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[11] Ibid at para 14.

[12] Ibid.

[13] Ibid.

[14] Ibid at para 15.

Plaintiff's version is that he could not be drunk because he had only shared a single beer with Patrick. He therefore claims that Beukes' and MacDonald's evidence about his behaviour must be fabricated – someone who had only shared a single beer would not be stumbling or slurring his words, and could certainly meet the legal standard required of a pedestrian.

[31] There is very little objective evidence in this case that does not depend on the credibility of witnesses. But there are three facts not open to dispute that undermine the Plaintiff's version about his conduct between leaving the house, and being arrest. First, *7de Laan* ended at 19:00. This was common cause. Second, the Plaintiff left his house just after *7de Laan* ended. This was his version and was confirmed by his wife.

[32] Third, the Plaintiff was arrested at around 21:30. This was the version of Beukes and MacDonald. The Plaintiff denied this. He insisted he was arrested at approximately 19:30, just after finishing his single beer with Patrick. But the objective and contemporaneous evidence is overwhelmingly against him:

[32.1] The arrest register records that the Plaintiff was arrested at 21:30.

[32.2] The occurrence book reflects that he was brought to the police station by Beukes and MacDonald at 22:05. He was part of a group of people that the two police officers brough to the police station at that time.

[32.3] In an affidavit the Plaintiff deposed to sometime in 2014 – the date is not clear – he said: "*Op Donderdag 2014-04-17 om ongeveer **22:30** was ek te*

*Kassierstraat besig om te loop. Skielik het die polisie van langs my kom stilhou.*"[15]

[32.4] In affidavits both Beukes and MacDonald deposed to in 2014 in response to the Plaintiff's complaint, they stated that the arrest occurred at around 21:30.

[32.5] In a letter the Plaintiff's attorneys sent to the Defendant on 9 May 2014, they stated: "Ons instruksies is dat op Donderdag 17 April 2014 en te Tulbagh, ongeveer 21h00 ons klient onregmatig gearresteer is".[16]

[33] Until evidence was led at the trial, there seemed to be agreement on when the arrest occurred. Moreover, there would have been no reason for Beukes and MacDonald, in 2014, to have lied about when they arrested the Plaintiff – they had no reason to think the issue mattered.

[34] The inevitable conclusion is that the arrest did not occur at 19:30 as the Plaintiff testified. It occurred, at the earliest, at 21:00, and probably at around 21:30.

[35] What does this mean for the Plaintiff's version? It means that there are approximately two hours – from 19:30 to 21:30 – that he does not account for. He may have spent the time drinking further quarts of Castle with Patrick. He may have spent it elsewhere, without consuming any more alcohol. But his testimony that he went directly to Patrick's house, spent only 20 minutes there, and was arrested shortly thereafter is a fabrication.

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[15] "On Thursday 2014-04-1 at around 22:30 I was busy walking in Kasuur Straat. Suddenly, the police van stopped next to me." (my translation)

[16] "Our instructions are that on Thursday 17 April 2014, and at Tulbagh, at about 21h00 our client was unlawfully arrested." (my translation)

[36] This has three consequences.

[37] First, his claim that he could not have been drunk when he was arrested because he was sober when he left home and did not have enough time to become drunk must fail. Accepting that he was sober when he left the house at 19:00, two and a half hours is enough time to become drunk.

[38] Second, whatever the Plaintiff was doing during those two unaccounted for hours, he was willing to lie to the Court about what occurred. This was not an unimportant detail. It was a central fact in the timeline. He either lied to conceal that he was drinking for two additional hours, or he attempted to mislead the court on a central detail for some other unknown reason. It seems to me that the former is more likely. But even if it is the latter, his willingness to lie on such an important fact affects the Court's assessment of his credibility.

[39] Third, he has not provided a plausible explanation for where he was going. His version was that he was going to get money for cigarettes from his daughter. But that was at 19:00. Where was he going at 21:30? Still on his way to get money for cigarettes? That seems unlikely. While the Plaintiff's ultimate destination does not directly determine whether he was drunk, his failure to provide a coherent explanation again reduces his credibility.

[40] There is another issue on which the documentary evidence aligns with the Defendant's version, and contradicts the Plaintiff's. The Plaintiff claimed that, when he was arrested, he was the only person in the police van. Beukes and MacDonald claimed that there were four or five people in the van whom they had already arrested. The arrest register and the occurrence book support the police's version.

They show that the Plaintiff was brought to the police station in a group of six people who had been arrested by Beukes or MacDonald.

[41] The number of people in the van is not a particularly important fact. But the Plaintiff was adamant he was the only person in the van. His version on that score cannot be believed. Unlike his claim concerning the timing of the arrest, there was no advantage for the Plaintiff to lie about this issue. But the fact that his evidence is incorrect on this score does cast some additional doubt on his reliability as a witness. The Plaintiff's counsel argued firmly that his ability to remember small details of his arrest supported his reliability. But he was wrong on this issue. He could not have failed to notice there were other people in the van. He either failed to recall this fact, or he chose to lie about it. In either event, it does his credibility and reliability as a witness no good.

[42] I began my assessment of the evidence by considering these parts of the Plaintiff's version because his evidence is falsifiable. It also disposes of his argument that he could not have been drunk.

[43] But a conclusion that the Plaintiff lied about what happened between the end of *7de Laan* and his arrest is not enough to satisfy the Defendant's onus to show the arrest and detention was lawful. It does not show the Plaintiff was drunk or, more accurately, that there was sufficient evidence in Beukes' knowledge at the time to objectively justify a prima facie conclusion he was drunk. The Defendant must still put up that evidence.

[44] The evidence of Beukes and MacDonald, taken at face value, contained sufficient evidence to establish that fact. They both testified that the Plaintiff appeared drunk. That conclusion was based on the following observations:

[44.1] The Plaintiff crossed the road when it was unsafe to do so given the proximity of their van. The Plaintiff agreed that he crossed the road in front of the vehicle, but contended he did so at a safe distance.

[44.2] The Plaintiff was swaying and was unsteady on his feet. Beukes described his gait as “wagger wagger”.

[44.3] Beukes testified that the Plaintiff had slurred speech, smelled of alcohol and was combative when questioned.

[45] I leave aside for now the claim that the Plaintiff ran away and injured himself by running into a post. Those facts would naturally support a conclusion that the Plaintiff was too drunk to safely walk next to the street. But whether that occurred is the key fact for deciding whether the Plaintiff was assaulted. I prefer to address it under that heading.

[46] The remaining evidence of Beukes contained enough observations to justify a prima facie conclusion that the Plaintiff may walk into the road when it was unsafe to do so, and therefore was not able to comport himself safely as a pedestrian. That meets the standard of “drunk” for purposes of s 76(a)(ii).

[47] As Mr Engelbrecht pointed out, a finding that he was drunk is also consistent with certain elements of the Plaintiff’s version.

[47.1] He defecated in a public place despite being close to a toilet.

[47.2] He did not ask for medical assistance at the police station, despite being injured.

[47.3] He slept for several hours in a police cell while seriously injured, without painkillers.

[48] Those facts do not prove that the Plaintiff was drunk. While they are consistent with a person who was under the influence, they may also have other explanations. He may have defecated because of the pain. He may have not trusted the police. He may have been so tired he could sleep despite the pain. But they certainly do not discount a conclusion that he was drunk.

[49] The issue ultimately depends on whether Beukes' (and to a lesser extent MacDonald's) testimony should be believed. The Plaintiff advanced four reasons to reject the officers' testimony on their observations about the Plaintiff's state when he was arrested.

[50] First, Mr McLachlan argued that Beukes and MacDonald were "unpersuasive" witnesses whose testimony was riddled with contradictions, and who refused to make concessions.

[51] MacDonald did not impress me as a witness. He was particularly poor at estimating distances. But his estimates were so patently unrealistic that they could not have been designed to advance his employer's case. They seemed, rather, to be a result of a poor grasp of distance. I also found that MacDonald was unable or unwilling to elaborate on his observations. He had a script to which he stuck, offering monosyllabic or repetitive answers. However, his reticence was not necessarily a mask for, or symptom of, dishonesty. It could also be explained by the passage of time's effect on his memory (and an unwillingness to stray beyond the limits of his recollections), his experience testifying (which would caution that elaborating on events can be a trap), or simply his natural demeanour. I conclude I can place little

weight on MacDonald's testimony. But it also did not undermine the Defendant's case which rested primarily on the testimony of the arresting officer – Beukes.

[52] Beukes impressed me as a witness. His version was clear, and largely consistent. He was able to provide more detail when asked to do so. He gave the impression of having a clear recollection of events, despite the passage of time. At one point he was challenged in cross-examination for having too good a memory of the events to be believed. He explained that there were two facts that made the events stick out in his mind, nine years later: it was the only time he had been required to clean up after an arrestee had defecated in the street, and he had been the subject of an IPID inquiry and a criminal trial. He had, therefore, had occasion over the years to recall those events before his testimony in this trial. This seems plausible.

[53] The contradiction in Beukes' evidence which Mr McLachlan pressed with most vigour concerned the order in which Beukes decided to search and arrest the Plaintiff. In his affidavit of 25 April 2014, Beukes said that, after observing the Plaintiff walk towards the van he told MacDonald to "stop the police van so that I can search him and arrest him because I could see he was dunk." His testimony was different. He asked MacDonald to stop the van because he suspected that the Plaintiff was drunk, and he wanted to talk to him, and perhaps to take him home. He had not yet decided to search him. He only searched him after the arrest to check if he had any dangerous objects. In cross-examination, Beukes said that he got the order wrong in his affidavit. The version in his affidavit, Mr McLachlan argued, aligns with the Plaintiff's version that Beukes said at the outset that he wanted to search him for drugs and therefore casts doubt on the rest of Beukes' version.

[54] There is a contradiction between the two versions. But, to my mind, it is not particularly material. In both the affidavit, and in his testimony, Beukes said he formed an initial impression that the Plaintiff was drunk when he observed him crossing the road before he asked MacDonald to stop the van. That view was bolstered by the Defendant's conduct after he stopped and engaged him. Whether Beukes formed the intention to search him before or after does not seem to take the matter much further.

[55] Whichever version is true, it would not significantly advance the Defendant's case. That is, it does not seem to have been a lie designed to prop up the case. Even if Beukes had already decided to search and arrest the Plaintiff before speaking to him (as he said in his affidavit), he only arrested him after conversing with him (that much is common cause). At that stage, he had made all the observations he relied on to justify the conclusion the Plaintiff was drunk. And Beukes' version was consistent in both his affidavit and his testimony that it was the Plaintiff's dangerous swerve over the road that prompted his initial decision to ask MacDonald to stop the van.

[56] As a result, I do not think this inconsistency demonstrates – in light of all the other evidence – that Beukes did not have reason to believe that the Plaintiff was drunk, or that Beukes was not a credible witness.

[57] Second, Mr McLachlan put it to Beukes and MacDonald that the police often repeat a "rympie" when describing why a person was drunk. They always say the person was unsteady on their feet, slurring their words, and smelled of alcohol. Beukes accepted that is so. But the existence of a "standard form" description of drunk people is not, on its own, evidence that Beukes lied about his impression that

the Plaintiff was drunk. Drunk people tend to exhibit similar behaviours; they are often unsteady on their feet, smell of alcohol and slur their words. It is not surprising that police officers regularly observe that same set of behaviours in people they then conclude are drunk. That does not mean that the "rympie" may not sometimes be trotted out by police officers to justify an arrest when the person was not drunk. But the mere use of those common observations, does not aid a court to determine whether this is a case where the person in truth exhibited the common pointers of drunkenness, or a case where the police lied about observing them.

[58] Third, Mr McLachlan argued that, if the Plaintiff really was as drunk as Beukes and MacDonald contended, he would not have been able to recall the events with such detail. I do not accept that is correct. While alcohol can certainly affect one's memory, a person may be so drunk he cannot safely walk along a road, yet remember what he was doing. Especially in a situation such as the present where (on both versions) it was a traumatic evening for the Plaintiff, he may remember the details despite having been too drunk to walk steadily.

[59] Fourth, the Plaintiff argued that the specific observations that Beukes and MacDonald made – staggering, slurring speech – were not put to the Plaintiff during cross-examination. The conclusion Beukes and MacDonald drew from those observations – that the Plaintiff was strongly under the influence – was put to him in cross examination. So too were their observations that he smelled of alcohol and that he was walking in the road in a manner that was dangerous. And the Plaintiff admitted that he responded rudely to Beukes' questions.

[60] What is the consequence of the failure to specifically put the claims of staggering and slurring speech? It helps to start with the general rule: it is

"elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness".[17] The rule exists to give the witness "fair warning and an opportunity of explaining the contradiction and defending his own character."[18] That is why it is generally considered "grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."[19] The rule applies in both civil and criminal proceedings.

[61] While it is a general rule, it is not "inflexible".[20] The Constitutional Court has held that the rule "must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case."[21] That is why, where "prior notice has been given to the witness that his or her honesty is being impeached … it is not necessary to cross-examine on the point".[22]

[62] On the facts of this case, the failure to put two of the specific observations to the Plaintiff is not decisive. Several observations were put, as was the conclusion Beukes and MacDonald drew from their observations. The claim he walked unsafely across the road is linked to the observation that he was staggering when he walked. The Plaintiff had an opportunity to rebut the conclusion, which is what ultimately mattered. If the observations had been put to him, the Plaintiff no doubt would have

[17] *Small v Smith* 1954 (3) SA 434 (SWA) at 438E-F. The principle was endorsed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras 61-2.

[18] Ibid.

[19] Ibid.

[20] *S v Scott-Crossley* [2007] ZASCA 127; 2008 (1) SA 404 (SCA); 2008 (1) SACR 223 (SCA) at para 26, quoting *S v Van As* 1991 (2) SACR 74 (W)

[21] *SARFU* (n 17 above) at para 65.

[22] Ibid at para 64.

denied them. But by their nature, he would nave have been able to lead any further evidence to support that denial.

[63] In conclusion, I found Beukes a largely credible witness. There were no significant contradictions between his version and MacDonald's.

[64] What of the Plaintiff's credibility? His demeanour was generally earnest. He was not evasive and did not exhibit other temperamental indications of dishonesty. I found him generally believable. But his untruthful version about when he was arrested taints his testimony. His insistence that he was in the van alone, when he was not, somewhat reduces his reliability, although his recall of other events seemed good.

[65] That leaves the probabilities. What is more likely – that Beukes arrested the Plaintiff without an objective basis to conclude he was drunk, or that he had an objective basis to believe the Plaintiff was drunk?

[66] Beukes and MacDonald testified that arrests for public drunkenness were common around Easter. The arrest register bears that out. But that is not enough to conclude that the Plaintiff was drunk. That would confuse correlation with causation.

[67] The Plaintiff's counsel suggested that Beukes may have arrested the Plaintiff to fill arrest quotas, rather than because they observed he was drunk. But no evidence was led to substantiate this claim – there was no evidence that there were quotas for arrests in place, or (if there were) that Beukes and MacDonald had not met theirs prior to arresting the Plaintiff.

[68] The closest the Plaintiff came was to suggest in cross-examining Beukes that it was strange that the arrest register reflected arrests for drunkenness until about

23:00, and no arrests thereafter. That is unusual. Beukes' explanation that by that stage most drunk people have staggered home seems overly optimistic. But the Plaintiff's argument rests on too much speculation about the police's motives for me to weigh it heavily in the balance.

[69] Ultimately, the probabilities to me tilt in favour of the Defendant. No acceptable reason was put forward for why Beukes and MacDonald would arrest the Plaintiff if they did not believe he was drunk. It would cause them only additional work and risk. Absent some other motive, they would do it only because they considered it their duty, because they believed he was drunk. Considering, in addition, that the Plaintiff had been away from home for two and a half hours by the time he was arrested and was unable or unwilling to account for his whereabouts for two of those hours, it seems more probable that he was drunk, than that he was not.

[70] In summary, I consider that the following factors lead to the conclusion that Beukes had sufficient evidence at the time of the arrest to prima facie conclude that the Plaintiff was drunk:

> [70.1] The Plaintiff lied about when he was arrested, and what he did after leaving his house. This failure affects my overall assessment of the Plaintiff's credibility as a witness. While it is not the only explanation, I think the most likely reason the Plaintiff attempted to fudge the timeline is because he shared more than just one beer with Patrick.
>
> [70.2] The Plaintiff's version on the number of people in the van was also false and affects my assessment of his reliability.

[70.3] A conclusion that the Plaintiff was drunk is not inconsistent with any of the accepted facts.

[70.4] MacDonald was an unpersuasive witness, but Beukes was impressive. None of the arguments advanced to attack his testimony significantly undermine it. Beukes' evidence set out enough facts to justify the arrest.

[70.5] Considering all the evidence, the probabilities favour arrest for cause, rather than for no cause.

[71] I therefore conclude that the Defendant has done enough to meet the onus to show that the arrest was lawful. The Plaintiff's case for unlawful arrest must be dismissed.

**The Assault**

[72] What of the assault? Unlike the lawfulness of the arrest, it does not turn on the timing of the arrest, or the Plaintiff's activities after watching *7de Laan*. The assault, if it occurred, was unlawful whether the Plaintiff was drunk or sober. The question is whether the Plaintiff has met his onus to show that his version is "true and accurate" and the Defendant's is "false or mistaken".

[73] I start with credibility:

[73.1] The witnesses' testimony on how the Plaintiff was injured stood up to cross-examination. Neither the Plaintiff nor the two officers retreated from or were forced to qualify their versions on this issue.

[73.2] I have set out my views on the general credibility of the witnesses above. The Plaintiff lied about the time of his arrest and was wrong about the presence of other people in the van. The first lie may have been designed to support his claim the arrest was unlawful. I found MacDonald an unpersuasive, but not dishonest witness. I found Beukes credible.

[74] On reliability, all the witnesses are obviously disadvantaged by the passage of time. But on the core issue, it seems unlikely that the passing of nine years would affect their ability to recall whether the Plaintiff was injured by running into a pole. Or by being pushed into the van.

[75] Mr McLachlan claimed that the Plaintiff had no reason to lie, whereas the officers did – the threat of discipline and prosecution. That incentive exists in every claim of police assault. I am not aware of any principle that requires that police testimony always be treated with suspicion for that reason. Moreover, the Plaintiff also had an incentive to lie – the prospect of damages. I do not believe this is a situation where the position in which the witnesses found themselves should make me more suspicious of one version than the other.

[76] What of the probabilities?

[76.1] Both versions for how the Plaintiff injured his knee are mechanically plausible. There was no evidence before me to show that his injury was more likely to have been suffered from being pushed into the van, than by running into a pole. Beukes testified that it would not be possible for the Plaintiff to be injured in the way he described. But it does not seem so implausible to me if force was applied at the wrong angle while someone was being pushed into a van that he could have hit his knee on a metal edge and broken it. It is not,

therefore, possible to reverse engineer how the Plaintiff was injured from the nature of the injury.

[76.2] Nor is either version inherently unlikely or implausible. It is possible that the police may have forced a reluctant Plaintiff into the van. But it is also possible that a drunk Plaintiff would try to escape from the police and run into a pole in the dark.

[76.3] The Plaintiff's conduct after the incident does lend some plausibility to his version. The fact that he told his wife and the hospital that the police had assaulted him, and laid charges against Beukes and MacDonald certainly supports his version. But it cannot on its own be proof the assault occurred. The Plaintiff could have lied to conceal his own embarrassment, to distract from the fact he was drunk, or for some other reason.

[77] Ultimately, I cannot find that either version is inherently more likely. This is a case where the probabilities and the evidence are closely balanced.

[78] That leaves two ways to resolve the dispute – the inherent credibility of the witnesses, and the onus. Both point in the same direction.

[79] I have already found that the Plaintiff was not truthful on at least one core issue. That does not mean that his evidence on every other issue must be rejected. But "where a witness has been shown to be deliberately lying on one point, the trier of fact *may* (not *must*) conclude that his evidence on another point cannot safely be relied upon".[23] Given that vital falsehood, in assessing the evidence of the Plaintiff compared to that of Beukes, I find Beukes the more credible witness.

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[23] *S v Oosthuizen* 1982 (3) SA 571 (T) at 577A-B.

[80] The onus was on the Plaintiff to satisfy the court that “his version is true and accurate and therefore acceptable, and that the other version advanced by the [Defendant is] false or mistaken and falls to be rejected”. To my mind the Plaintiff has failed to satisfy that onus. While I cannot conclude with absolute conviction the Plaintiff was not assaulted, I am equally unable to conclude he was. When the scales of evidence are evenly balanced, the case must be decided against the party that bears the onus.

[81] Accordingly, the Plaintiff’s claim for assault must also be dismissed.

**Conclusion and Costs**

[82] It is impossible to know with certainty what occurred the night before Easter nearly 10 years ago. But I conclude that the Defendant has done enough to show that the Beukes had an objective basis to conclude the Plaintiff was drunk, and the Plaintiff has not done enough to show that his knee was injured by the police forcing him in the van.

[83] There is no reason that costs should not follow the result.

[84] I make the following order:

1. The action is dismissed.

2. The Plaintiff shall pay the Defendant’s costs.

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M J BISHOP
Acting Judge of the High Court

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