IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL
HELD AT DURBAN

Case no:KZN/DBN/RC 2614/2018

In the matter between:

MUZIKHONA PATHWELL JIMMY NGCOBO
Plaintiff

and

ETHEKWININ MUNICIPALITY
1st Defendant

RIAAN DAHORTA
2nd Defendant

Judgment

Introduction

[1] The Plaintiff instituted action against the Defendants jointly and severally for unlawful arrest, assault and emotional shock in the amount of R350 000[1] together with interest and costs.

Factual Background

[1] Index to Pleadings, para 19, page 10; R150 000 for unlawful arrest, R100 000 for assault and R100 000 for emotional shock.

[2] On 23 December 2017, **Musikhona Pathwell Jimmy Ngcobo**, the Plaintiff, who was employed as a Project Executive for the EThekwini Municipality, was on duty and supervising the removal of billboards from the M4 freeway. **Riaan Dahorta**, the Second Defendant, employed at EThekwini Metro Police holding the rank of Inspector was deployed with Plaintiff to monitor traffic. Whilst the billboards were being dismantled, the erectors of the billboards, namely, Strawberry Worx, arrived on the scene. A dispute arose which ultimately resulted in the Plaintiff being placed in handcuffs and detained at the back of a police vehicle. The Plaintiff was later released after intervention. No charges were brought against the Plaintiff.

[3] The matter proceeded on liability and quantum.

Duty to begin and Legal Principles

[4] The standard of proof is well established in civil cases. It is trite that the party on whom the onus lies is required to satisfy the court that he is entitled to succeed on his claim or defence.[2] According to Voet (22.3.10) the legal position is: *"He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied and that the denial is absolute*." It therefore followed that the Plaintiff had the duty to begin and bears the onus in relation to the issues in dispute identified.[3]

[2] *Pillay v Krishna* 1946 AD 946 952- 953.

[3] *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at pages 662C-G
'The onus is on each plaintiff to prove on a preponderance of probability that her version is the truth. This onus is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demeanour and impression are measured against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted and that therefore the other version is false and may be rejected with safety (National Employer's General Insurance Co Ltd v Jagers...)'.

The Pleadings

[5] The salient averments contained in the Plaintiff's Amended Particulars of Claim, are that:

> *'…*
>
> *5. On or about 23 December 2017, at approximately 12h00, the Plaintiff, who was acting in his official capacity, proceeded to the M$ highway between Sibaya off ramp and the CBD to remove illegal advertising billboards.*
>
> *…*
>
> *7. Whilst at the scene the erectors of the billboards approached the Plaintiff and stated that they had a Court Order which forbids the eThekwini Municipality from removing the billboard. The Plaintiff disputed the correctness of the Court Order since had had received advice from the Legal Services.*
>
> *…*
>
> *12. …, the Second Defendant returned to the scene and without communicating with anyone, began to count to 10, advising all the members of eThekwini Municipality, including Plaintiff, that they will be arrested should they not leave the scene. The Plaintiff attempted to advise the Second Defendant that in his absence, he had spoken to his superior and Legal Services who advised that the billboard should be removed.*
>
> *13. The Second Defendant would not listen to Plaintiff and forcefully detained and arrested Plaintiff, placed handcuffs on him which were very tight and placed him at the back of his patrol van in full view of both his subordinates and members of the public.*
>
> *14. After the Plaintiff had been at the back of the police van for two hours, the City Manager as well at the Plaintiff's supervisor arrived at the scene and advised the second defendant to release Plaintiff because the arrest was unlawful because the plaintiff was acting in the course and scope of his duties, and under their instructions…'*[4]

[6] The relevant excerpts of the First and Second Defendants Amended Plea are restated as follows:

[4] Plaintiff's Amended Particulars of Claim, pages 5, 6, 8 and 9.

'…

4.1 The Defendant admits that:

a) On the 23rd December 2017 at approximately 12h00 the Plaintiff was at or near Sibaya whereat he attempted to have certain advertising billboards removed;

b) At the time of the incident the Plaintiff was acting in his official capacity as an employee of the First Defendant;

…

7.1 A confrontation ensued between the Plaintiff and certain persons who represented Strawberry Worx…

7.2 Plaintiff was determined to have the billboards removed on the basis that they were illegal and Strawberry Worx were adamant that they were granted an order of court preventing the First Defendant from removing the billboards;

7.3 the confrontation between the Strawberry Worx became physical and the Second Defendant requested for more members of the Metro Police to come to the scene to supervise and diffuse the volatile situation;

7.4 the head of the Road Traffic Inspectorate and a Colonel from Durban North Police Station took a decision that all work intended at removing the billboard should cease forthwith to enable the two parties to resolve the matter amongst themselves;

7.5 at no stage did the Second Defendant advise that he agreed with the interpretation of the court order espoused by the Strawberry Works (sic); and

7.6 at no stage did the Plaintiff or the Defendant produce the court order at the scene.

….

11.2 In amplification of such denial the Defendant aver that the Second Defendant instructed the Plaintiff, his colleagues and Strawberry Worx employees that they leave the scene after the decision of security the cluster (sic) that no removal of the billboards was to take place on the said day. The Second Defendant also left the scene at this point.

…

9.1.1 the Second Defendant returned to the scene after about fifteen (15) minutes only to find the Plaintiff and his colleagues still at the scene ant intent on removing billboards;

9.1.2 the Second Defendant requested the Plaintiff to leave the scene in accordance with the decision of the security cluster that no billboards were to be removed on the day

9.1.3 the Plaintiff refused to comply with and to obey the lawful order issued by the Second Defendant as a member of the Durban Metro Police;

9.1.4 the Plaintiff was recalcitrant; he was argumentative and confrontational towards Second Defendant and personnel from Strawberry Worx, who had by then returned to the scene, thus creating a volatile atmosphere; and

9.1.5 after several warnings to the Plaintiff to obey the lawful instructions not to remove the billboards, and to leave the scene the Second Defendant was compelled to the Plaintiff (sic) and placed him in custody in the back of his patrol van for approximately an hour and half (sic) until the arrival of the City Manager who advised that the Plaintiff be released.

…

10.2.1 the recalcitrant behaviour of the Plaintiff, his confrontational attitude towards the Second Defendant and Strawberry Worx employees created a threat to peace order and in particular, created a danger of a physical confrontation between Plaintiff and his colleagues and the Strawberry Worx employees.

10.2.2 in order to avert the ensuing threat and danger the Second Defendant removed the Plaintiff from the scene by placing hand-cuffs on his and thereafter placing him at the back of the police van.

10.2.3 the forced removal of the Plaintiff as stated above was reasonable in the circumstances for the maintenance of law, order and peace.

…'[5]

[7] For the sake of completeness, it would be apposite to record the noteworthy responses of the First and Second Defendants to the Plaintiff's notice in terms of Rule 16(2)(a) that:

(a) The Defendants had no instructions regarding whether further legal action in respect of the assault or physical altercation alleged between the Plaintiff and Strawberry Worx employees was instituted.[6]

[5] First and Second Defendants Amended Plea, Index to Pleadings, paras 4, 7, 8, 9 and 10, pages 13 – 17.

[6] Index to Notices, para 2, page 41.

(b) The lawful instruction to the Plaintiff by the Second Defendant was that all work and removal of any structures in the current dispute were to stop with immediate effect.[7]

(c) All parties, delegates and representatives were instructed to refrain from engaging the opposite party.[8]

(d) The Second Defendant acted in terms of Section 3(1)(a) read with Section 89 of the National Road Traffic Act[9].[10]

(e) The Second Defendant in his capacity as a Senior Police official exercised his powers conferred on him by the South African Police Act[11] when there was an altercation which led to a volatile situation. The said altercation ensued due to the issue about removal of advertising billboards.[12]

(f) The Second Defendant used the handcuffs as a measure of safety. The Plaintiff was placed at the back of the police van to remove him from a volatile situation since his presence was acting as a catalyst to ongoing tensions.[13]

(g) The Plaintiff was a threat to himself, an indirect threat to Strawberry Worx personnel and to the attending police officers. He was a danger to the public at large, meaning the motorists on the freeway as his aggressive and repulsive manner had the likelihood to cause rubber necking.[14]

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[7] Index to Notices, para 3.1, page 41.
[8] Index to Notices, para 3.2, page 41.
[9] Act 93 of 1996
[10] Index to Notices, para 4, page 42, *'failure to comply with an instruction given by the Municipal Police Officer is an offence, in which you may be found guilty of contravening section 3(1)(a) of National Road Traffic Act 93 of 1996 and, further the Second Defendant is empowered by South African Police Act of 68 of 1995, Section 64E (a and c)'.*
[11] Act 68 of 1995.
[12] Index to Notices, para 5.2, page 42.
[13] Index to Notices, para 5.3, page 42.
[14] Index to Notices, para 6, page 43.

The Evidence

[8] The following evidentiary material were admitted into evidence by consent at the outset of the trial:

(a) Plaintiff's trial bundle, Exhibit "A";

(b) Defendants' index to trial bundle, Exhibit "B".

Summary of Evidence for the Plaintiff

[9] **Musikhona Pathwell Jimmy Ngcobo** (hereinafter referred to as the Plaintiff), testified that on or about 23 December 2023 he was tasked with the investigation of the billboards put up by Strawberry Worx without following the By-Laws. He stated that a Court Order was obtained on 7 December 2017 that prevented the First Defendant from removing the structures.[15] The First Defendant thereafter challenged the order and on 22 December 2017, the order granted on 7 December 2017 was set aside and the rule *nisi* was discharged.[16]

[10] The Plaintiff narrated that he was on the scene during the removal. He explained that they commenced the removal from 8 a.m. and started at Sibaya and thereafter proceeded to the Umhlanga off-ramp. At the M4, Ruth First site, a representative of Strawberry Worx arrived while they were in the process of removal and a brief discussion ensued. He explained that the officials from the Traffic Department and Durban SAPS also arrived on the scene. The Second Defendant, officials from the Department of Transport and Durban SAPS took the decision that they should not proceed with the removal, which decision was conveyed by the Second Defendant after interpreting the Court Order. The Plaintiff stated that he

[15] Plaintiff Bundle, pages 4 -5.
[16] Plaintiff Bundle, page 3.

tried to explain that he was under instructions from their management to continue, which was vetted by Legal Services.

[11] The reason provided by the Second Defendant to the Plaintiff as to why they had to stop was because, on his unsolicited interpretation, the Order was not clear. The Plaintiff stated that he telephoned his colleague from the legal department and asked him to explain the meaning of the court order to the Second Defendant. The Second Defendant was emphatic and said that the Court Order was to be disregarded. The Second Defendant then left and upon leaving stated that when he returned, he did not want to see anyone, and if he did, he would arrest anyone who is on the scene for unlawful destruction.

[12] The Plaintiff further orated that he then called his Principal, Sibu Ndebele, who advised him not to allow anyone to disrupt the operation as there was a Court Order. In the interim, the Second Defendant returned and starting counting to ten. As he was approaching the Second Defendant, the Second Defendant proceeded to physically handcuff him. The Second Defendant informed the Plaintiff that he was arresting him because he failed to obey a lawful instruction of a policeman. The Plaintiff explained that he was placed at the back of the police van.

[13] According to the Plaintiff, the Second Defendant did not quote any law when he indicated that the Plaintiff had failed to comply with instructions and neither did he read him his rights. The Plaintiff refuted the version of the Defendant and indicated that the representative from Strawberry Worx never spoke to him. He also denied that there was any physical altercation.

[14] During cross examination**,** the Plaintiff refuted the version of the Second Defendant in terms of the place of the incident. He also stated that he recognised the representative from Strawberry Worx, namely Ashville, as being the same person who produced the Order when they attempted to remove the billboards the first time. He was unable to comment on the discussion when the Strawberry Worx representative arrived as he was not part of it. He refuted that there was tension between the Plaintiff and his team members when Ashville arrived on site. He refuted that there was a call for backup as the officers were already on the scene.

[15] The Plaintiff confirmed what was contained in the pocket book.[17] He also confirmed that what is contained in the entry of the pocket book was said to them.[18] The Plaintiff also confirmed that he signed the pocket book after he was released.

[16] **Howard Martin Felix** (hereinafter referred to as Mr Felix), the principal attorney of Felix Attorneys placed on record that he is the instructing attorney in this matter with 21 years' experience. Mr Felix indicated that he tried to follow up on the averment alleged in the plea regarding the altercation. Mr Felix contacted Strawberry Worx telephonically and was informed that there was no altercation as such, there was no need to join them. He initially sent an email but that went unanswered. He stated that according to his research and knowledge there was no altercation on the day.

[17] Defendants' index to trial bundle, page 2, that "[a]ll work of structures in this current dispute to stop with immediate effect".
[18] Defendants' index to trial bundle, page 3, that "[a]ll parties, delegates & representatives are instructed to refrain from engaging the opposing party unless it is done through legal representation or in the High Court…".

[17] **Sagran Mr Naicker** (hereinafter referred to as Mr Naicker) testified that he is an Administration Manager at EThekwini Municipality and employed as such for more than 34 years. He was referred to the Court Order dated 7 December 2017 and indicated that he understood the Court Order to mean that it prevented the First Respondent mentioned in the Court Order from removing and dismantling billboards. He stated that it was handed to him by the owner of Strawberry Worx on the 8th of December 2017. In reference to the order dated 22 December 2017, Mr Naicker testified that he understood that this order rescinded the previous matter and allowed them to remove the billboards.

[18] Mr Naicker testified that he was on site on the 23rd of December 2017 at the Umhlanga off Ramp, M4 removing the illegal structures. On the day in question, he was the project manager responsible to ensure the illegal billboards are removed and stored on EThekwini premises. He explained that there were contractors, two security guards of the Municipality and the truck driver on the scene. Mr Naicker stated that he reported to the Plaintiff who was also on site to oversee that everything was going to plan.

[19] Initially they did not know who had installed the billboards and it was only after they had sight of the Court Order did they realise it was Strawberry Worx. He explained they removed the billboards because if it fell onto the traffic, then EThekwini would be sued.

[20] While they were removing the billboards the owner of Strawberry Worx came on site. They showed him the Court Order and he showed them the initial Order, stating that they could not remove it. Mr Naicker told him they could remove it

because the Order rescinded the other Order and showed it to him. The owner of Strawberry Worx disputed it. The Second Defendant, who was there to direct traffic, then came to them; looked at both the orders and informed them that they could not remove it. The Second Defendant proceeded to make notes in his book and told them to leave the site.

[21] According to Mr Naicker, the Plaintiff phoned to check with legal. He explained that the Plaintiff tried to talk to the Second Defendant who indicated that he would count to ten and if they did not leave he would arrest them. The owner of Strawberry Worx left but a representative of Strawberry Worx remained on site.

[22] Mr Naicker explained that the arresting officer was furious. When he started to count to ten, the Plaintiff tried to interrupt him. The Plaintiff raised his hand to explain that he was waiting for his colleague to arrive. According to Mr Naicker, the Plaintiff was arrested for not leaving the site. The Second Defendant handcuffed him. Mr Naicker explained that the Second Defendant grabbed the Plaintiff's hand and put it behind his back, cuffed him and shoved him into the van then proceeded to lock the door.

[23] Mr Naicker orated that he went to his vehicle and contacted the Deputy Head, who contacted the Head, who in turn contacted the Manager. They all arrived on site. The City Manager spoke and asked that they release the Plaintiff. The Police Officer retorted that he did not take instructions from civilians. The City Manager identified himself and instructed him to release the Plaintiff. The Officer indicated that he had arrested the Plaintiff and was taking him to the Police Station. The Officer also stated that he did not know who the City Manager was. The Acting Head of Metro Police was also on site. The Second Defendant responded that he would only

release the Plaintiff once he stands down. The Acting Head indicated to him that he needed to stand down. Another Captain took over the scene and the Plaintiff was released. Mr Naicker explicated that no-one displaying any recalcitrant, argumentative, aggressive or confrontational behaviour was at the scene. Neither was there a threat to peace. According to Mr Naicker, the Plaintiff should never have been arrested.

[24] During cross examination, it was illuminated that the Plaintiff was not initially on site and that the Strawberry Worx representative arrived about 10 to 15 minutes after the Plaintiff arrived. Mr Naicker reiterated that the Court Order was given to the Second Defendant who interpreted the Court Order. According to Mr Naicker, the Second Defendant did not consult with SAPS or RTI and took the decision on his own.

[25] According to Mr Naicker, the Plaintiff and the owner of Strawberry Worx signed the pocket book. He stated that SAPS arrived afterwards. Mr Naicker explained that there was no disagreement, it was merely a discussion and there was no tension. According to Mr Naicker, the Second Defendant chose to mediate. Mr Naicker disputed the version put that there was a consultation with the officials that arrived from Durban North SAPS. He disputed that the contractors elected to comply and left the site. Mr Naicker orated that no last opportunity was afforded for them to leave.

[26] He disagreed about the telephone interaction in relation to the telephone call received from the City Manager. According to Mr Naicker, the City

Manager was on site. Mr Naicker reiterated that there was no engagement and that there was instruction from the City Manager to continue with the removal of the billboards.

[27] Under re-examination it was clarified that according to Bundle “B” there is no recordal that the Second Defendant consulted with RTI and SAPS as per the version put to Mr Naicker. Neither is there any reference to mediate. Mr Naicker reiterated that it was a discussion to figure out the merits of the two documents.

Summary of Evidence for the Defendant

[28] **Riaan Dahorta**, the Second Defendant, testified that on 23 December 2017, he held the rank of Inspector, Durban Metro Police Specialised Unit, Freeway Service. He stated that he was assigned special duties that entailed escorting a team to remove illegal signage along the M4 highway. He explained that whilst at the third site, other people arrived. He noticed a conversation between the people that arrived and Mr Ngcobo, the Plaintiff. The body language led him to believe that a police presence may be required upon which he decided to approach the parties.

[29] The people who had arrived were representatives of Strawberry Worx. They claimed that the removal of the signage was unlawful because an interdict was acquired against the removal of the signage. According to the Second Defendant, the Plaintiff reported that the First Defendant received an Order to overturn the interdict. The Second Defendant stated that he requested the parties to provide document that they may have to indicate the decision of the High Court. Strawberry Worx produced a document, which was a poor copy of a facsimile of an original

document. The Second Defendant orated that he perused the document and did not find enough information that an interdict was granted or overturned and assessed that the matter had to go back to the High Court. He furthermore explained that his efforts to mediate ended up leaving both parties progressively more frustrated. According to the Second Defendant, it became clear to him that a higher level of intervention was required and requested the Station Commander responsible for that area to attend at the scene.

[30] Pursuant to a discussion amongst the key role-players with jurisdiction and relevance, a collective decision was made by the Cluster on site that the removal of the billboards seize, pending a decision in the High Court. The Second DEfendnat was referred to his pocket book containing a recordal of the incident which included *inter alia* that all work on the removal of structures were to stop with immediate effect. The Second Defendant stated that he laboured under the impression that the matter was resolved. Strawberry Worx representative had already left the scene. Mr Ngidi relieved the Second Defendant, who left the site to run an errand. According to the Second Defendant, Mr Ngidi called him to inform him that the First Defendant was continuing to dismantle signs contrary to his instructions. The Second Defendant narrated that he returned to the scene and found the construction team in the process of removing the sign board. The Second Defendant explicated that he approached the workers including the Plaintiff, made reference to the notices issued in his pocket book and impressed upon the Plaintiff that it was essential that he left the scene.

[31] The Plaintiff informed Second Defendant that he had been in communication with his Head and that his Head had secured Legal Counsel on the matter. The Plaintiff furthermore informed the Second Defendant that he was instructed to remain and continue with the removal of the sign. The Second Defendant stated that he explained to the Plaintiff that the matter was escalated to the police and that his instructions, which was reduced to writing in his pocket book, remained in force. The Second Defendant indicated that he made repeated efforts to instruct the Plaintiff to leave the scene, but without success. The Second Defendant testified that he warned the Plaintiff that he was at risk of being detained if he did not leave. The Plaintiff did not leave and continued to dismantle the billboards.

[32] The Second Defendant further testified that he removed the handcuffs from his pouch and wanted the Plaintiff that his failure to comply "may result in his detention". The Second Defendant stated that he formed the opinion that the Plaintiff's presence was inflammatory on the scene that was next to the freeway which posed a safety concern as a potential scuffle could result in people ending up in the street, being a potentially hazardous situation. Despite his attempts to persuade the Plaintiff to leave, he still refused. The Second Defendant then placed the Plaintiff in handcuffs and then placed him in the van.

[33] The scene was handed over to the Incident Commander Mr Spilsbury. The Second Defendant stated that his initial intention was to move the Plaintiff to Durban North Police Station where he would be released from custody on a warning, but after consultation, he decided to release the Plaintiff on an entry in his pocket book.

[34] During cross-examination the Second Defendant stated that in the absence of any documents the cluster decision was executed. The Second Defendant stated that the order dated 22 December 2017 was not presented to him on the day of the incident. The Second Defendant denied that he refused to look at the document. The Second Defendant, when asked what crime was being committed to warrant the Plaintiff's detention, indicated that he was preventing a crime from being committed. The Plaintiff was instructed to leave because his presence was inflammatory.

[35] **Shane Maurice Spilsbury** (hereinafter referred to as Mr Spilsbury), testified that he holds the rank of Acting Superintendent. He stated that he was called to assist at a scene on the M4. It was reported to him that there was an altercation with members dealing with signage. He was asked to take over the scene. The Plaintiff was released from the back of the van on the instruction of Director Dove.

[36] During cross-examination Spilsbury indicated that he did not observe a physical altercation.

Submissions on behalf of the parties

[37] Written submissions were compiled on behalf of the parties. To avoid prolixity of the record, reference to the parties' submissions will be dealt with during the judgment.

Common cause facts

[38] The following are common cause, namely, that:

(a) on 23 December 2017 at or near the M4, the Plaintiff was handcuffed by the Second Defendant and placed in a vehicle belonging to the First Defendant;

(b) a court order dated 22 December 2017 existed, which *inter alia*, set aside the order dated 7 December 2017;

(c) the Second Defendant was not in possession of a warrant of arrest at the time of the detention of the Plaintiff;

(d) the Plaintiff was released without being charged and

(e) the Plaintiff's constitutional rights were not explained to him.

Issues in dispute

[39] The following issues are in dispute:

(a) that the court order dated 22 December 2017 was in the possession of the Plaintiff and shown to the Second Defendant;

(b) whether the arrest was lawful;

(c) whether there was an arrest as the Defendant avers that the Plaintiff was not arrested, but rather "contained";

(d) whether the situation was volatile or potentially volatile and/or presented a public danger, and/or was there physical altercation on the scene;

(e) whether there was a lawful cause for the Second Defendant to handcuff the Plaintiff and place him at the back of the van and whether that amounted to an arrest; and

(f) if the court were to find that there was an arrest whether the assault in the circumstances of this matter should be treated as part of the wrongful arrest.

Issues for determination

[40] The crisp issue for determination is whether:

(a) there was an arrest; and if so

(b) the arrest and detention of the Plaintiff was lawful;

(c) whether both court orders were at the scene; and

(d) whether the Defendants plea discloses a defence for unlawful arrest, detention and assault.

Legal Principles

[41] The correct approach to be adopted when dealing with mutually destructive was briefly set out in ***National Employers General Insurance Company v Jagers***[19] wherein the following was said:

> *'Where there are two mutually destructive versions the party can on succeed if he satisfies the court on a balance of probabilities that his version is true and accurate and therefore acceptable, and the other version advanced is therefore false or mistaken and false to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of*

[19] 1984 (4) SA 437 (E) at 440E-G.

the case, and if the balance of probabilities favours the plaintiff, then the court will accept his version as probably true.'

[42] This approach was approved in ***Stellenbosch Famer's Winery Group Limited and Another v Martell and Others***[20]. The considerations articulated in this matter have been quoted with approval in plethora of subsequent judicial authorities.[21] The proper test is not whether the Plaintiff is truthful or indeed reliable in what has been said but whether on a balance of probabilities the essential features of his testimony are true.[22] In relation to the probabilities, this necessitates an analysis and evaluation if a probability or improbability on each party's version on each of the disputed issues.

Was the Plaintiff arrested?

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[20] 2003 (1) SA 11 (SCA) at 14I-15C, where Nienaber JA stated the following:

'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as –

(i)the witnesses; 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 caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on

(i) the opportunities he had to experience or observe the event in question; and
(ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the later. But when all factors are equipoised probabilities prevail'.

[21] *National Employers General Insurance v De Jagers* 1984 (4) SA 437 (E) at 440D-G; *Santam Beperk v Biddulph* 2004 (5) SA 586 (SCA) at para 5 and 20; *De Beer v Road Accident Fund* ZAGPJHC 124 (28 March 2019). *Ntsele v Road Accident Fund* (2017) ZAGPHC (1 March 2017) at paras 13-14.

[22] *Santam v Biddulph* 2004 (5) SA 586 (SCA).

[43] Defendants *in causu* denies the arrest. It is trite that Section 40 of the Criminal Procedure Act gives peace officers extraordinary powers of arrest. Section 39 of the Criminal Procedure Act[23] sets out the manner and the effect of an arrest.

[44] Hiemstra[24] states that *'[a]lthough arrest is a necessary weapon in the fight against crime, it is an infringement of personal liberty and often also of human dignity. The courts will carefully scrutinise whether the infringement is legally in order (Minister of Law and Order and Another v Dempsey 1988 (3) SA 19 (A) at 38C). At such an infringement of personal freedoms and rights it is important to bear in mind that one is here concerned with the exercise of state power which, according to the principle of legality, has its source in the Constitution'*[25]

[45] The matter of ***R v Mazima***[26] defines that a person is under arrest as soon as a police assume control over his movement and freedom. The present law regarding arrest without a warrant can be summarised as follows after the judgement

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[23] Act 51 of 1977.
'39 (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.
(2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.
(3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.'

[24] Criminal Procedure Commentary; Hiemstra referred to *Olivier v Minister of Safety and Security and Another* 2008 (2) SACR 387 (W) where Horn J reviewed the authorities on arrest without a warrant.

[25] (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) pars [56]– [59] ; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) par [148] ; and *Pharmaceutical Manufacturers Association of South Africa and Another in re: Ex parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC) par [20]. See also Plasket "Controlling the discretion to arrest without warrant through the Constitution" 1998 2 *SACJ* 173).

[26] 1948 (2) SA 152B at 154.

of the Supreme Court of Appeal in ***Minister of Safety and Security v Sekhoto and Another***[27]:

(a) the jurisdictional prerequisites for section 40(1)(*b*) must be present;

(b) the arrester must be aware that he or she has a discretion to arrest;

(c) the arrester must exercise that discretion with reference to the facts;

(d) there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court.

[46] In ***Minister of Law and Order v Hurley***,[28] the court as per Rabie CJ, as he then was, stated as follows:

> *'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'*

[47] The object of an arrest has been succinctly enunciated in the case of ***MacDonald v Khumalo***[29]. Schreiner JA in ***Tsose V Minister of Justice & Others***[30]**,** , observed with approval what was held in ***MacDonald*** that:

> *'If the object of the arrest, though professedly to bring the arrested person before court, is really not such, but is to frighten or harass him and so induce him to act in a way desired by the arrestor, without his appearing in court, the arrest is, no doubt unlawful.*

[48] It is common cause that the Second Defendant did not have a warrant of arrest. The Commentary in Hiemstra is instructive on the issue of when an arrest is necessary:

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[27] 2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10 (19 November 2010).

[28] 1986 (3) SA 568 (A) at 589E-F.

[29] 1927 EDL 293 at 301. where Graham JP stated that:

> *'The object of an arrest of an accused person is to ensure his attendance in Court to answer to the charge and not to "punish/intimidate" him for an offence he has not been convicted.'*

[30] 1951 (3) SA 10 (A) at 17C-D.

'Police officials should bear in mind that arrest may be effected only when it is authorised by law. The defiant conduct of a suspect against a police officer is not sufficient reason. The police official should not, even under provocation, act unlawfully (De Villiers v Van Greunen 1967 1 PH J12 (D)). In Birch v Johannesburg City Council 1949 (1) SA 231 (T) at 239 the court says that it is a serious matter to arrest someone and that in the case of minor offences a summons or warning should be used. The police may not detain a person on a petty charge with the intention to investigate a much more serious charge against that person (R v Sambo 1965 (1) SA 640 (RA) at 644A).'[31]

[49] An arrest involves the restriction of an individual's freedom in terms of Section 12(1)(a) of the Constitution[32].I am therefore satisfied, based on the legal principals and authorities cited above, that the Second Defendant, acting in the course and scope and capacity as a Metro Police Officer, placed the Plaintiff under arrest when he placed restraints in the form of handcuffs on the Plaintiff and confined him to the back of the vehicle, which act interfered with his liberty. The Second Defendant, by doing so assumed control over the Plaintiff's movement and freedom. This action in my view constituted an arrest as defined in Section 39 of the Criminal Procedure Act. The next consideration is whether the arrest was lawful.

Lawfulness of the arrest

[31] Hiemstra, page 60.
[32] The Constitution of the Republic of South Africa, 1996.

[50] It is trite law that the onus rests on a Defendant to justify an arrest. In ***Minister of Law and Order v Hurley***,[33] the court as per Rabie CJ, as he then was, stated as follows:

> *'An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.'*

[51] As a starting point the question that immediately arises is whether the arrest was authorised by law. In this regard, the Second Defendant was unable to state what crime was being committed by the Plaintiff. The Plaintiff stated that he had no reason to decline the instruction from the Second Defendant. The Plaintiff remained steadfast that he never failed to comply with an instruction and never disobeyed an instruction.

[52] The Second Defendant did not provide any law that sanctioned the detention of the Plaintiff, save that he indicated that the Plaintiff was detained *inter alia* for not obeying a lawful instruction. The Defendants reply to the request for further particulars is suggestive that reliance was being place on Section 3(1)(a) read with section 89 of the National Road Traffic Act 93 of 1996, and Sections 64E (a and c) of the South African Police Act 68 of 1995.[34] Upon scrutiny of these legislations, it is evident that neither legislation grants the Defendants the authority to lawfully arrest the Plaintiff in circumstances where the Plaintiff was neither committing an offence as contemplated in the relevant legislations. I find that these legislations referenced do not come to the Defendants assistance

[33] 1986 (3) SA 568 (A) at 589E-F.

[34] Index to Notices, para 4 page 42.

[53] The evidence on record is that the Second Defendant, when he became aware of the confrontation between the Plaintiff and the Strawberry Worx Official, intervened to diffuse the situation. It was contended that after the Second Defendant realised that the dispute was in relation to the disagreement with the Court Orders, he had to act promptly. Instructions were issued to the parties by the Security Cluster to leave the site. In this regard it was argued that such instruction was lawful and binding on all the parties as it was read to the Plaintiff and the Strawberry Worx representative, which was duly signed by them. It was furthermore mooted that the Plaintiff was given ample opportunity to comply with the instructions.

[54] The question arises whether the act of the Plaintiff having found to be dismantling billboards after being instructed to leave amounted to a failure to comply with a lawful instruction. Even if it can be argued that the Second Defendant could have charged him for disobeying a lawful instruction, it remains unclear whether the instruction was in fact lawful.

[55] The Plaintiff refuted that there was a dispute. He also disputed that there was a physical altercation. According to the Plaintiff there was no conflict or volatile situation; no argument and no assault. He retorted that if there was a volatile situation, it should have been recorded in the pocket book and there was no such inscription made. According to Mr Felix, he did a follow-up and established that there was no altercation. up on the issue. In fact, the Defendants own witness Mr Spilsbury did not observe a physical altercation.

[56] It is also manifest that the Second Defendant, notwithstanding the plea that mentioned a volatile situation and a physical altercation and the Plaintiff being a danger to himself the Second Defendant, during cross-examination conceded that there was no physical altercation which is not consistent with the pleaded case of the Defendants. It is also noteworthy that the Second Defendant was unable to describe the volatile situation. Ultimately the Second Defendant introduced new evidence by stating that his actions were directed at preventing the volatile situation.

[57] I am in agreement with Counsel for the Plaintiff that the legislations upon which reliance is placed cannot even upon a liberal interpretation be considered to justify the arrest of the Plaintiff.[35] Even if reliance is placed on the safety concerns expressed by the Second Defendant, then in my view, the reasoning expressed by Plaintiff's Counsel appears plausible when submitting that the 2nd Defendant's actions would be more reasonable in the circumstances if he had removed Mr Ashveer Dwarikpersad, from Strawberry Worx in the circumstances where the Second Defendant had been instructed to provide scene safety from a traffic management perspective to the Plaintiff and other eThekwini employees and contractors.[36]

[58] I am not persuaded that the Second Defendant had no other option, as argued by Counsel for the Defendants, but to remove the Plaintiff and put him into containment to diffuse the situation to prevent a potential confrontation and to ensure that the Plaintiff does not continue with violating a lawful instruction.[37] There is no authority referenced to support the contention by Counsel for the Defendants that a

[35] Plaintiff's Heads of Argument, para 61, page 35.
[36] Pleadings para 6 page 19; Plaintiff's Heads of Argument, para 62, pages 35 – 36.
[37] First and Second Defendants' Heads of Argument, para 11.7, page 22.

lawful police instruction is binding on everyone until set aside by SAPS or Metro Police Service formal circular or Court Order.[38]

[59] The reference by Counsel for the Defendants to the case of ***National Commissioner of Police and Another v Coetzee***[39] is distinguishable from the facts and issues *in causu* and finds no application as the Defendants defence is that the Plaintiff was not arrested. It is evident that Counsel for the Defendant grapples with this as he attempted to persuade the court that the jurisdictional requirement to effect an arrest without a warrant and places the word "containment" in brackets.[40] This is not what was envisaged by the legislation if regard is had to Section 40 of the Criminal Procedure Act where reference is specifically made to an arrest. Therefore, any suggestion that the Second Defendant was lawfully or justifiably "contained" is rejected. I am not persuaded on the evidence before me, that the Plaintiff displayed recalcitrant, argumentative, aggressive or confrontational behaviour on the scene. I cannot find on a balance of probabilities that there was any threat to peace.

[60] Even if the Plaintiff acknowledged that he was informed, it is clear from the trite legal position quoted above that defiant conduct **is not sufficient reason** to place anyone under arrest. Moreover, the Defendants deviated from their pleaded case as follows:

(a) The Second Defendant conceded that there was no physical altercation;

(b) The Second Defendant's version changed from the Plaintiff was detained in consequence of a volatile situation and/or physical altercation and /or public safety to the prevention of a physical altercation and the prevention of a

[38] First and Second Defendants' Heads of Argument, para 11.8, page 22.

[39] 2013 (1) SACR 358 (SCA).

[40] First and Second Defendants' Heads of Argument, para 20, page 31.

volatile situation to his detention for two hours was to give him a warning at the Durban North Police Station.

[61] Furthermore, the Second Defendant did not apply the provisions of Section 50 of the Criminal Procedure Act which clearly states that a person who is arrested with or without a warrant for allegedly committing an offence **shall as soon as possible be brought to a Police Station.** The fact that the Plaintiff was detained at the back of the police vehicle with handcuff for a period of two hours is clearly a flagrant disregard and breach of the provisions of Section 50 (1) *supra*. It became manifest that the Second Defendant on his own version had no intention to bring the Plaintiff to Court which is the fundamental purpose of an arrest; bearing in mind that there are various methods of securing a person's attendance in court. That being said, it is still unclear that there was a triable offence with which to charge the Plaintiff in any event, and of seminal importance is the trite legal position that the police may not detain a person on a petty charge. The authority is clear that it is a serious matter to arrest someone on a minor offence.

[62] In the circumstances, I find that the Plaintiff's arrest was unlawful.

Was the court order on the scene?

[63] There are diametrically opposed versions and a material dispute of fact concerning a number of issues, one of which is whether the Court Order was on the scene. In this regard, it was contended that Strawberry Worx was adamant that there was a court order preventing the First Defendant officials from removing the billboards. It is therefore prudent for the court to apply the considerations of

Stellenbosch Farmer's Winery *(supra)* in order to make a determination on the conflicting versions.

[64] It was contended that the Plaintiff's evidence was fraught with inconsistencies and improbabilities which included *inter alia*:

(a) That the Plaintiff unsuccessfully tried to evade the question when asked whether he was removing billboards at the Sibaya off-ramp.[41]

(b) That the Plaintiff's version was contradicted by Mr Naicker who was present at the Sibaya site; his version being that the Plaintiff only joined them later at the Umhlanga site.[42]

(c) That the Plaintiff changed his version with regards to when SAPS arrived on site; which version was not corroborated by Mr Naicker who testified that the RTI official arrived after the Plaintiff had arrived at Umhlanga.[43]

(d) That the Plaintiff indicated that he cannot recall who the Strawberry Worx representative spoke to on site, yet the Particulars of Claim averred that the Strawberry Worx representative approached him and informed him about the Court Order who disputed the correctness of the Court Order since he received advice from Legal Services.[44]

(e) Mr Naicker contradicted the Plaintiff's version where he stated that when he spoke to the Strawberry Worx representative, the Plaintiff was in earshot and would have heard their conversation.[45]

[41] First and Second Defendant's Heads of Argument, para 13.1, page 23.
[42] First and Second Defendant's Heads of Argument, para 13.2, page 24.
[43] First and Second Defendant's Heads of Argument, para 13.3, page 24.
[44] First and Second Defendant's Heads of Argument, paras 13. 4 – 13.5, pages 24 - 25.
[45] First and Second Defendant's Heads of Argument, para 13.7, page 25.

(f) Plaintiff disputed his signature that appeared on page 55 of the Second Defendant's pocket book yet Mr Naicker confirmed that it was the Plaintiff's signature and that the contents were read to them by the Second Defendant.[46]

(g) The Plaintiff and Mr Naicker's versions contradicted each other insofar as whether SAPS was present when the instruction was issued by the Second Defendant. In this regard, Mr Naicker testified that SAPS was not present and when probed changed his version and testified that SAPS came on site when the Second Defendant was writing down information in his pocket book. This further contradicted the Plaintiff who testified that there were discussions between the Second Defendant and RTI and SAPS but it was only the Second Defendant who spoke to him.[47]

(h) Mr Naicker testified that the Second Defendant did not consult with the RTI official and that SAPS was not involved in the discussion which was inconsistent with the version of the Plaintiff.[48]

(i) Mr Naicker conceded that there was a disagreement between himself and Strawberry Worx representative.[49]

[65] It was argued on behalf of the Defendants that the Plaintiff was not an honest witness, if regard is to be had to the contradictions and improbabilities highlighted during argument and as set out above. It was furthermore mooted that the contradictions with regards to the RTI official arriving after the Plaintiff is material especially as the Plaintiff changed his version to say that the RTI official was on site

[46] First and Second Defendant's Heads of Argument, para 13.9, page 26.
[47] First and Second Defendant's Heads of Argument, para 13.12, page 27.
[48] First and Second Defendant's Heads of Argument, para 13.13, page 27.
[49] First and Second Defendant's Heads of Argument, para 13.14, page 28.

before his arrival at the Umhlanga site and that SAPS official was not there upon his arrival. Counsel for the Defendants illuminated that the Plaintiff when confronted about certain contradictions, attempted to evade certain questions and then went on to concede what the Particulars of Claim reflected but stated that certain averments made in the Particulars of Claim were incorrect.[50] In augmentation of the argument raised on behalf of Counsel for the Defendants that the Plaintiff was dishonest, it was mooted that even though the Plaintiff disputed his signature that appeared in the pocket book, he conceded that the contents at pages 54 and 55 were read back to them by the Second Defendant.[51] It was contended that it is improbable that the Plaintiff did not sign the pocket book if regard is to be had to the details such as his names, force number and cell number as it appeared in the pocket book. In addition, it was argued that the Plaintiff was an evasive witness, more particularly when challenged in relation to the Court Orders, pointing out further that the Plaintiff's version was inconsistent.

[66] It is incumbent on the court to consider whether the inconsistencies and improbabilities highlighted on behalf of the Defendants are material. In contemplating the aforementioned, I am of the view that;

(a) nothing turns on whether the Plaintiff was able to hear what was being said between Mr Naicker and the Strawberry Worx representative or
(b) whether SAPS was present when the instruction was issued by the Second Defendant or
(c) whether it was only the Second Defendant who had spoken to the Plaintiff;

[50] First and Second Defendant's Heads of Argument, para 13.6, page 25.
[51] First and Second Defendant's Heads of Argument, para 13.9, page 26.

(d) Neither is the issue of whether the Plaintiff disputed his signature. In this regard the Plaintiff's evidence was that it did not look like his signature and stated that he could not remember signing it. This in my view cannot be seen as a contradiction that the Plaintiff did not sign.

[67] I am also mindful of what is stated in the matter of ***S v Mkohle***[52] concerning contradictions where Nestadt JA held *that '[c]contradictions per se do not lead to the rejection of a witness' evidence…They may simply be indicative of an error (**S v Oosthuizen** 1982 (3) SA 571 (T) quoting from 576G-H)…it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction". One could add that, if anything, the contradictions points away from the conspiracy relied on'.* [53]

[68] Taking the aforegoing into account, I am not persuaded that the Plaintiff was not an honest witness if regard is to be had to the nature of the inconsistencies illuminated on behalf of the Defendants. In considering the conspectus of the evidence, it is my view that the contradictions are not material as it related to aspects ancillary to the common cause facts and the issues that the court is called upon to determine.

[52] 1990 (1) SACR 95 (A).
[53] 98f-g.

[69] On the contrary and although it was submitted that the evidence of the Second Defendant was not tainted or contradicted, I find that that Second Defendant was not a good witness. He was not forthright with answers that required a simple yes or no answer. It also became manifest that not everything was recorded in the Second Defendant's pocket book such as the cluster decision. He also introduced new evidence and conceded that that there was no physical altercation as earlier illuminated in this judgement.

[70] Therefore, in considering the probabilities, it behoves the court takes the following into account:

(a) That the court order was obtained on 22 December 2017, a day before the incident;

(b) The Plaintiff and his witness, Mr Naicker testified that the court order was on the scene and perused by the Second Defendant;

(c) None of the witnesses who were mentioned by the Second Defendant who could allegedly corroborate that the Court Order was not on site were called to confirm the version of the Second Defendant in this regard; neither was an explanation offered.

[71] It was also mooted that despite various persons being mentioned in the plea they were not called to testify. The matter of ***Pexmart CC and Others v H.***

Mocke Construction (Pty) Ltd and Another[54] is instructive on the aspect of a litigant's failure to call available witnesses.

> *'It is true that this court in Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 624B-F, enunciated that its earlier decision in Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A), did not lay down a general and inflexible rule to be applied without more in every case, that an adverse inference is to be drawn where a party fails to call as a witness one who is available and able to elucidate the facts. Whether such an inference is to be drawn will depend on the facts peculiar to the case in which the question arises. In Munster this court had regard to the circumstances which justified the adverse inference. During the course of the plaintiff's case it was indicated that the witness would be called. This court held that to say that the witness was 'equally' available, was to ignore the realities, particularly if the association was taken into account. The witness not called was also clearly able to elucidate the facts. He was the most knowledgeable of the plaintiff's representatives on a material aspect. This court also took into account that, during the course of the plaintiff's case, contradictory evidence had been led which could have been clarified had the witness been called. It held that the probable reason for not calling him as a witness was that it was feared that his evidence would expose facts unfavourable to the plaintiff's case.'*

[72] It is not clear whether the witnesses were not available and in the absence of any submissions the court may infer that the witness(es) were available. Even if it is accepted that the witnesses were not called because they would not have been able to advance the Plaintiff's case, there is two diametrically opposed versions before this court especially insofar as the allegation that there was a volatile situation as set out in the plea. It is clear from the aforementioned case authority that a court is enjoined to draw an adverse inference in respect of a parties' failure to call material witnesses who are available to elucidate the facts of a case.

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[54] (159/2018) [2018] ZASCA 175; [2019] 1 All SA 335 (SCA); 2019 (3) SA 117 (SCA) (3 December 2018) at para 69.

[73] In applying the legal principals enunciated in the case authorities referred to earlier in this judgment an adverse inference is to be drawn.[55] Furthermore, the Second Defendant's evidence was by and large contradicted by the Defendants own pleadings as indicated earlier in this judgment.

[74] The evidence on record was that an email was sent by Mr Musa Mbhele, Head of Development Planning Management on 15 December 2017 wherein all parties concerned were advised to proceed with the removal of all the illegal billboards.[56] Steve Middleton, the Head of Metro Police was then emailed thereafter, also on the 15th of December 2017, wherein support was requested from Metro Police to assist with traffic control during the removal of the illegal Bill Boards on the M4 and M41.[57] This, the Plaintiff stated was sent in preparation of obtaining a Court Order. In response, on the same day, Steve Middleton confirmed that they would assist and requested further details such as dates, times and meeting points.[58]

[75] The Plaintiff denied that he was the one who produced the Court Order to Strawberry Worx. Strawberry Worx did not interact with him. The Plaintiff remained steadfast that the Second Defendant physically had the court order with him, which was corroborated by Mr Naicker who testified that both Court Orders were on the scene.

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[55] See also *Tshishonga v Minister of Justice & Constitutional Development and Another* (2007) 28 ILJ 195 (LC) at para 112C-D, where the court held *'But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.'*

[56] Plaintiff Bundle, pages 1C – 2-A.

[57] Plaintiff Bundle, page 1B.

[58] Plaintiff Bundle, page 1A.

[76] I am satisfied that, that the Plaintiff and Mr Naicker were *ad idem* on material issues. If regard is had to the entirety of the evidence, the probabilities compel this court to accept the version of the Plaintiff, whose evidence remains undisturbed and is corroborated in all material respects by the Plaintiff's witnesses, which was further corroborated by independent evidence, including the court order and email correspondence. On the Second Defendant's own version, the order was illegible. In any event, based on the unrefuted evidence of the Plaintiff and Mr Naicker, supported by the email correspondence, I come to the inescapable conclusion that the court order dated 22 December 2023 was on the scene.

Lawfulness of the detention

[77] It was argued on behalf of the Defendants that there is no claim for unlawful detention in the Plaintiff's particulars of claim and even if the court were to find that the Plaintiff was detained unlawfully, the court is precluded from awarding any amount not claimed for.

[78] The Second Defendant's evidence is telling as he stated that he warned the Plaintiff that his failure to comply "**may result in his detention**". On this basis alone, the Second Defendant understood that placing the handcuffs on the Plaintiff would amount to a detention of the Plaintiff.

[79] The Defendants attempts to justify the detention of the Plaintiff without a preceding arrest. In order for the Defendants to place reliance on the common law same had to be advanced in the plea, which was not done and ought to be rejected on this basis alone.

[80] It is noteworthy that the Plaintiff's particulars of claim avers that the Plaintiff was *"forcefully **detained**…"*[59] (my emphasis)

[81] In the circumstances I find that the Plaintiff was indeed detained and which cannot be masked by suggesting that it was not a detention but a containment. There is no disputing that the Plaintiff was placed in the back of the van in handcuffs for a period of 2 hours.

Assault and Emotional Shock

[82] It was submitted that the Second Defendant applied only the necessary force to place the Plaintiff at the back of the van.[60] It was further argued that the Plaintiff had failed to prove that he was assaulted except for the evidence pointing to the fact that he was handcuffed and placed inside a police van. In amplification it was argued that no one who was at the scene saw the blood that Plaintiff claims. The Plaintiff's evidence is that he only noticed the blood when he arrived at home and did not consult a doctor because it was minor scratches according to him.

[83] The uncontroverted evidence of the Plaintiff is that the Second Defendant used force to restrain him with handcuffs and detained him in the police van. The Plaintiff testified that he was placed in handcuffs that was very tight which caused him agonising pain. This has resulted in him suffering from insomnia, short temperedness, stress and lack of concentration. Counsel for the Plaintiff submitted that in defending the assault, one would have expected evidence from the Second Defendant about his training in the used of handcuffs and that he manner that he

[59] Plaintiff's amended Particulars of Claim, para 13, page 8.
[60] First and Second Defendants' Heads of Argument, para 22, page 31.

had placed the handcuffs on the Plaintiff were in line with his training. In addition, it was contended that there was no explanation why the handcuffs were left on the Plaintiff while he was at the back of the police van. It was furthermore argued that the absence of a rebuttal imputes conclusive proof. In amplification reference was made to ***Ex Parte Minister of Justice: In re R v Jacobson and Levy***[61] and ***R v Ciglar***[62] .

[84] In the seminal decision pertaining to unchallenged evidence it was held in ***President of the Republic of South Africa and Other v South Africa Rugby Football Union and Others***[63] that:

> *'The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness and opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.'*

[85] In ***S v Boesak***[64] Langa DP held that:

> *'This rule, which is part of the practice of our courts, is followed to ensure that trials are conducted fairly, that witnesses have the opportunity to answer challenges to their evidence and that parties to the suit know that it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised.*

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[61] 1931 AD 474 *'Prima facie proof in the absence of rebuttal, therefore, means clear proof leaving no doubt.'*
[62] 1946 OPD 185, *'Where the Crown as produced evidence amounting to prima facie proof – calling for an answer from the accused – then on failure to make an answer the prima facie becomes conclusive proof.'*
[63] 2000 (1) SA 1 (CC) at para 61.
[64] 2001 (1) SA 912 (CC).

The SCA held that this rule applies to the challenging of all evidence adduced by the other party, whether on the basis of hearsay, inadmissibility, lack of proof of authenticity, or accuracy....'

[86] In *causu*, the only evidence regarding the assault and emotional shock is the evidence of the Plaintiff which was not rebutted by the Second Defendant in cross-examination. The assertions were not denied by the Second Defendant. There is nothing on record to gainsay the testimony of the Plaintiff. In any event, if the Plaintiff was, on the version of the Second Defendant placed at the back of the van seemingly for his own safety or because he was a threat to the public, no explanation is on record as to why he had to be in handcuffs for the full duration of his detention as the back of the police van.

[87] Consequently, I am satisfied that the Plaintiff's unchallenged evidence pertaining to his assault and emotional shock is to be accepted.

Conclusion

[88] The purpose of pleadings was aptly dealt with in ***Imprefed (Pty) Ltd v National Transport Commissioner***[65] where it was stated that:

'At the outset it need hardly be stressed that: the whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. This fundamental principle is similarly stressed in Odgers' Principles of Pleadings and Practice in Civil Action in the High Court of Justice 22nt Ed at 113: The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision,'[66]

[65] 1993 (3) SA 94 (A) at 107C - E.

[66] See also *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A. *'…a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvas another.'*

[89] I therefore find that the Defendants plea does not disclose a defence to the claim for unlawful arrest, detention and assault for the reasons mentioned earlier in this judgment. Furthermore, I am satisfied, based on the objective evidence together with the evidence of Mr Naicker and Mr Felix, demonstrates the version of the Plaintiff. It is undisputed that the Plaintiff's right of freedom was curtailed as a consequence of the actions of the Second Defendant.

[90] In my view, the arrest of the Plaintiff under these circumstances was not justified. This is furthermore concretised by the undisputed fact that the Plaintiff was detained at the back of the van and released without being charged. Therefore, the Defendants version is rejected on the probabilities and the law and the version of the Plaintiff stands to be upheld. Consequently, based on the uncontested evidence, of the Plaintiff, I am satisfied that on a balance of probabilities that of the Plaintiff was unlawfully and wrongfully arrested and consequently detained, and assaulted I am furthermore satisfied that the Plaintiff suffered emotional shock which has resulted in him suffering from insomnia, irritability, stress, anxiety, and contumelia as pleaded, which constituted a delictual liability.

QUANTUM

[91] The evidence of the Plaintiff was that he was arrested "Hollywood Style". The Plaintiff explicated that he was put in a quad position and thrown into the van unprovoked. He stated that his rights at that particular moment was restricted. The Plaintiff orated that he did not resist, and put his hands behind his back so that the handcuffs could be placed on him. The Plaintiff testified that the manner in which it was done was indicative of the Second Defendant wanting him to feel pain. He was

detained at the back of the police van for more than 2 hours and was unable to move. The Plaintiff stated that he was not a threat to anyone when he was placed in the police van.

[92] In terms of the handcuffs the Plaintiff expounded under cross-examination and indicated that the Second Defendant told him that he was hurting or injuring him. He was handcuffed for 2 hours. The Plaintiff testified that the Second Defendant placed the handcuffs very tight, which left scars on his wrists, but did not get medical treatment for it. He stated that he only noticed the blood when he got home because he was in a state of shock. He described that he felt pain on his wrists.

[93] It is the Defendants' contention that the claim for damages would amount to a duplication as the assault is embedded in the arrest. The Plaintiff's contention in this regard is that different causes of action arose and were pleaded. The handcuffs ought not to have caused any injuries if it was placed correctly. Ordinarily there exists the possibility of a duplication of compensation, however in this instance, the manner in which the handcuffs were applied, on a balance of probabilities, appears to been with the intent to cause the Plaintiff the pain which ultimately amounted to an assault which finding was made earlier in this judgment. I am mindful that the injuries appeared relatively minor as no medical attention was needed. I pause here to state that there can be no disputing that the Plaintiff had to endure the pain and discomfort of being handcuffed for the duration of 2 hours in the confined space of the back the police van.

[94] The Second Defendant, according to Mr Naicker was furious and his actions clearly demonstrated such emotion as the unrefuted evidence was that he shoved the Plaintiff at the back of the van. It must be borne in mind that the Second Defendant's core function on the day in question was to monitor traffic while the billboards were being dismantled.

[95] In my view, the Second Defendant, who is not legally qualified, abused his position of authority as a police officer and executed his powers that infringed the rights of the Plaintiff. There was no lawful instruction and neither was there a crime committed. He had no warrant of arrest and even challenged the authority of the City Manager.

[96] Even when the Plaintiff's principal, Mr Mbele arrived at the scene and attempted to explain to the Second Defendant, but he refused to listen to him. Mr Mbele then called the City Manager, Mr Sipho Muzuzo. When the City Manager arrived, the Second Defendant stated that he did not take instructions from him as he initially did not know that he was the City Manager. The City Manager was obliged to call the Deputy, Mr Mchunu, whereafter the Second Defendant said that he would be releasing the Plaintiff on warning. The Second Defendant's attitude at the scene was telling as per Mr Naicker's evidence that the Second Defendant remarked that he did not take instructions from civilians; which is indicative of the heavy handed approach as was demonstrated by him counting to ten. This heavy handed approach must be discouraged and is clearly deserving of censure.

[97] The evidence on record is that the situation could not have gotten out of hand as described by the Second Defendant because of the presence of the Metro Police, Department of Transport and SAPS. Reinforcements were called in where in my view, none was needed. It is evident that there was no need for a higher level of intervention by calling the Station Commander to the scene. In any event, the Second Defendant conceded that there was no physical altercation and neither did the danger that he was supposedly trying to avoid, manifest. Even more aggravating was the fact that the Plaintiff was never charged for any offence, neither were his Constitutional Rights explained to him.

[98] At the time of Plaintiff's arrest and detention, he was an executive manager in the employ of eThekwini, holing a LLB degree as well as a Master's degree in Town Planning. Furthermore, the Plaintiff stated that he has children, aged 11, 15, 21 and 22 years respectively.

[99] According to the Plaintiff, the colleagues that were on the scene when he was placed in handcuffs were his subordinates. It was done in full view of the members of the public. He explained that he felt degraded and could not sleep and suffered insomnia. He testified that his behaviour changed. In addition, it came to his knowledge that photos were circulated amongst his colleagues of him in handcuffs behind the back of the police van and this was conclusive for him that it was circulated on social media. He described the experience as was very degrading. People thought of him as a criminal.

Legal Principles on Quantum

[100] In ***Minister of Safety and Security v Sekhoto & Another***[67] it was held that *'…in most cases the lawfulness of the arrest and subsequent detention are intertwined and that the lawfulness of the detention ultimately depends on the lawfulness of the arrest.'*

[101] The factors that can play a role in the assessment of damages has been succinctly enunciated by the authors of Visser & Potgieter *Law of Damages*:[68]

> *'In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bono. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the actio iniuriarum also has a punitive function.'*

[102] Section 12(1) of the Constitution entrenches a person's right to freedom and security and states that:

> *'(1) Everyone has the right to freedom and security of the person, which includes the right: -*
>
> *(a) not to be deprived of freedom arbitrarily or without just cause;*

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[67] 2010 (1) SACR 388 at para 18.

[68] Visser & Potgieter *Law of Damages* Third Edition, pages 545–548. This list of factors has been referred to with approval in *Ntshingana v Minister of Safety and Security* (unreported judgment dated 14 October 2003 under Eastern Cape Division case number 2001/1639) and *Phasha v Minister of Police* (unreported judgment by Epstein AJ dated 23 November 2012 under South Gauteng High Court case number 2011/25524).

(b) not to be detained without trial;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way'[69]

[103] A detainee's rights are firmly entrenched in Section 35(2)(e) of the Constitution[70] which states that:

> *'(2) Everyone who is detained, including every sentenced prisoner, has the right-*
>
> *… (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'*

[104] The considerations for compensation was aptly summarised in ***Minister of Safety & Security v Tyulu***[71] it was stated that:

> *'In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some such solatium for his or her feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our Courts should astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be*

[69] See *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC).
[70] Constitution of the Republic of South Africa, 1996.
[71] At 289-290.

treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.'[72]

[105] It is trite that a particular case is to be assessed in totality and on its own merits; thus, previous awards, as encapsulated in a plethora of case law, serve as a useful guide to what other courts have considered appropriate. Additionally, the discretion which the court has in when considering an appropriate award for non-pecuniary damages should be exercised fairly and objectively.[73]

[106] Counsel for the Plaintiff, referred the court to ***Minister of Safety and Security v Sekhoto***[74] and submitted that a reasonable award for quantum, taking into account that the Plaintiff is a senior Executive in the employ of the of the eThekwini Municipality's Development Planning, Environmental and Management Unit to give the Plaintiff much needed solatium of his injured feelings would be R150 000 for unlawful arrest.

[107] In respect of the assault, it was argued that the court is to have regard to the case authorities of ***Funde v Minister of Police***[75] and ***Nomboniso Plaatjies v Minister of Police***[76] , more especially the court's remark in ***Plaatjies*** that the sum of R50 000 was low where physical injuries coupled with shock and insult have been suffered.

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[72] See also *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ); *Syed v Metaf Ltd Metro Cash and Carry* [2016] 2A ECGHC 38 (31 May 2016).
[73] *Minister of Police v Diwathi* 20604/14 2016 ZSA SCA; *Protea Insurance Ltd v Lamb* 1971 (1) SA 63.
[74] [2010] ZASCA 141; 2011 (5) SA 367 (SCA).
[75] (905/2010) ZAE CPRHC 92 (11 December 2012).
[76] Plaintiff's Heads of Argument para's 74 – 76 pages 41 - 42.

[108] In relation to emotional shock, it was submitted that a reasonable award would be in the amount of R100 000.[77]

[109] Counsel for the Defendants argued that an amount of R30 000 would be sufficient compensation.

Case Law Considered

[110] It is trite that a particular case is to be assessed in totality and on its own merits; thus, previous awards, as encapsulated in a plethora of case law, serve as a useful guide to what other courts have considered appropriate.

[111] In ***L and Another v Minister of Police and Others***[78] the following cases and factors were considered:

> *'61.4 In Khumalo v The Minister of Safety and Security,*[79] *the plaintiff was charged inter alia, with obstruction of justice and detained overnight at the Berea Police station he was released on the following morning on bail. The court (per Gorven J) awarded the plaintiff the sum of R50 000.00 (**R59,556.00**) for his unlawful detention…*
>
> > *The following was stated by the court (per Mbenenge JP) at paragraphs 17 to 20 of the judgment (footnotes omitted):*
> >
> > *'[17] Courts have been warned to be wary of the primary purpose in the assessment of damages for unlawful arrest and detention which is not to enrich the aggrieved party but to offer him or her some much needed solatium for his or her injured feelings, but at the same time to be astute in ensuring that the awards they make reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law.*

[77] Plaintiff's Heads of Argument para's 78 – 80 pages 43 - 44.
[78] (2143/16) [2018] ZAKZPHC 33; 2019 (1) SACR 328 (KZP) (15 August 2018).
[79] [2015] ZAKZDHC 48 (unreported0 Case No. 458/2010, KwaZulu Natal Division, Durban, dated 4 June 2015.

[18] It is also incumbent on me to give heed to the principle recently enunciated by the Supreme Court of Appeal that the amount of the award is not susceptible to a precise calculation; it is arrived at in the exercise of a broad discretion. In Phillip v Minister of Police and Another it was observed, in relation whether the court should calculate the award on a daily tariff or a single all-inclusive award, that the nature of the compensation and the inherent variables applicable in each case would be minimised by trying to place an average daily tariff on such determination. The court went on to state that "[t]he fact that each case must be considered on its own merits militates against a so-called average flat rate per day" and that a "single all-inclusive award would appropriately address and express all the factors to be considered." …'

61.7 In Syed v Metaf Limited t/a Metro Cash and Carry and another,[80] … In assessing the plaintiff's damages, the Court stated that whilst no two cases are alike, guidance in the assessment of an appropriate award for general damages can be obtained by comparison of factors in different cases and referred to the various volumes of Corbett and Honey (The Quantum of Damages in Bodily and Fatal Injury Cases (Juta)) …'

[112] In ***Masisi v Minister of Safety and Security***[81] where the Plaintiff was detained for approximately 41 hours, Makgoba J held that:

'The right to liberty is an individual's most cherished right, and one of the fundamental values giving inspiration to an ethos premised on freedom, dignity, honour and security. Its unlawful invasion therefore strikes at the very fundamental of such ethos. Those with authority to curtail that right must do so with the greatest of circumspection and sparingly. In Solomon Visser and Another 1972 (2) SA 327 (C) at 345 C-E, it was remarked that where members of the police transgress in that regard, the victim of abuse is entitled to be compensated in full measure for any humiliation and indignity which result. To this, I add that where an arrest is malicious the Plaintiff is entitled to a higher amount of damages than would be awarded absent malice.'

[80] [2016] ZAECGHC 38 (unreported) Case No. 4095/2009, Eastern Cape High Court, Grahamstown, dated 31 May 2016.
[81] 2011 (2) SACR 262 (GNP) para 18 at page 267.

[113] The arrest and detention was found to be malicious which lasted for 4 hours and damages were awarded in the amount of R65 000.

[114] In ***EA and Others v Minister of Police***[82] the Plaintiff was arrested at 20h00 on 14 August 2014 and released on 15 August at 12h00, being 16 hours, were awarded an amount of R250 000.[83]

[115] In ***Matsietsi v Minister of Police***[84] the court awarded an amount of R40 000 for a plaintiff who was an academically qualified and trained geologist working in the line of geological evaluations and geo-technical evaluations and who had been detained for 21 hours and 45 minutes.

[116] In the matter of ***Minister of Police v Page***[85], the Plaintiff was awarded R30 000 for a period of 1 hour.

Conclusion

[117] It is common cause that no charges were laid against the Plaintiff and neither did he appear in court. It is uncontroverted that the Plaintiff was deprived of his right to freedom. It is furthermore unrefuted that the handcuffs were tight for the full duration that he was detained in the van which resulted in him suffering physical pain.

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[82] (14/41567) [2019] ZAGPJHC 9 (12 February 2019).

[83] See also *Minster of Safety and Security v Seymour* 2006 (6) SA 320 (SCA); *Minister of Safety and Security v Scott and Another* 2014 (6) SA 1 (SCA); *Phungula v Minister of Police* (AR 342/2017) (2018) ZAKZPHC 21 (8 June 2018).

[84] (A3103/2015) (2017) ZAGPJHC 29.

[85] (CA 231/2019) [2021] ZAECGHC 22 (23 February 2021); See also *Minister of Police v Loyiso Mahleza*, where the Plaintiff was in detention for 1 day and received a sum of R50 000

[118] It is trite that the assessment of general damages is within the discretion of the trial court.[86] The discretion which the court has in when considering an appropriate award for non-pecuniary damages should be exercised fairly and objectively.[87] Although there is an averment that the arrest was both malicious and wrongful, the award made *in causu* is not based on the purported malicious actions of the Defendants, which in my view was not proven. Although the detention of the Plaintiff in the back of the police van and manner in which the handcuffs were placed could be regarded as malicious, I make no findings pertaining to the allegations of malicious actions by the Second Defendant in particular, save to state that the entire arrest and detention could have been avoided and resolved in an amicable fashion.

[119] In determining a fair award, I have considered established guidelines, the circumstances and status of the Plaintiff, the unique merits of this case, the applicable legal principles and previous awards made in similar matters. Consequently, I am of the view, flowing from the factual matrix of this matter, that an all-inclusive award for damages would be fair and reasonable compensation for the Plaintiffs wrongful arrest and detention, pain, assault, emotional shock which has resulted in him suffering from insomnia, irritability, stress, anxiety, and contumelia for the period of 2 hours, in full view of public, in the presence of his subordinates in handcuffs.

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[86] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at para 17 *'It is trite that the assessment of general damages is a matter within the discretion of the trial court and depending upon the unique circumstances of each particular case…fraught with difficulty the facts of a particular case need to be looked at as a whole and few cases are directly comparable…they are a useful guide to what other courts have considered by they have no higher value than that…'*

[87] *Minister of Police v Diwathi* 20604/14 2016 ZSA SCA; *Protea Insurance Ltd v Lamb* 1971 (1) SA 63.

[120] I am mindful that the purpose of an award is not to enrich the Plaintiff but to offer *solatium* for his feelings. I am therefore of the view that an award of R100 000 would be a fair and objective exercise of my judicial discretion.

Costs

[121] The general rule is that costs follow the event, which is a starting point.[88]

It is also an accepted legal principle that costs are in the discretion of the court.[89] The guiding principle is that *'…costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'*[90] It is also an accepted legal principle that costs are in the discretion of the court.[91]

[122] In ***Gani v Singh***[92] Lopes J recognised that the matter was one of some considerable importance for the Plaintiff and that it would be *'…somewhat unusual for a litigant not to have elected to be represented by counsel, albeit in the magistrates' court.'*[93] The taxed costs of counsel was awarded.

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[88] Cilliers AC '*Law of Costs*' The guiding principle is that *'…costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.'*

[89] *Fusion Hotel and Entertainment Centre CC v eThekwini Municipality and Another* [2015] JOL 32690 (KZD)

[90] Cilliers AC '*Law of Costs*' Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; In re: *Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2; *Thusi v Minister of Home Affairs and Another and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

[91] *Fusion Hotel and Entertainment Centre CC v eThekwini Municipality and Another* [2015] JOL 32690 (KZD)

[92] (AR348/16 [2017] ZAKZPHC 39 (3 March 2017).

[93] *Ibid* para [14].

[123] It is apposite to mention that the cost award which will ultimate be made in this matter is not intended to be a cost award on an attorney and own client scale cost. The court has considered the evidence in totality and on its own merits. The court has furthermore taken into account that this matter was one of importance to the Plaintiff and is entitled to elect to brief Counsel to represent him in this matter. Consequently, the court finds that the matter was sufficiently complex to warrant that Counsel be briefed and as such, the Plaintiff should not be deprived from being awarded Counsel's fees. The Plaintiff was successful and as such nothing precludes this court from applying the general rule that costs follow the event.

Prescribed Rate of Interest

[124] Counsel for the Plaintiff argued that interest should run from date of demand and that it was the Defendant who has forced the matter to be delayed. The Defendant's legal representative argued that damages are assessed as at the date of judgment and ought to run from the date of judgment as set out in Section 2A (3) of the Prescribed Rate of Interest Act 55 of 1975.

[125] Section 2A (5) of the Prescribed Rate of Interest Act 55 of 1975 states that:

> *'Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law…may make such an order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date which interest shall run.'*

[126] In terms of Section 2(A) of the Prescribed Rate of Interest Act 55 of 1975 as amended in 1997, interest on illiquid claims runs from the date of service

of demand or summons whichever is the earlier. This legal principle was approved in various cases.[94]

ORDER:

[105] Judgment is granted in favour of the Plaintiff against the First and Second Defendants jointly and severally the one paying the other to be absolved for:

1. Payment in the sum of R100 000 (One Hundred Thousand Rand);

2. Interest thereon at the rate per annum as determined in terms of the Prescribed Rate of Interest Act, 55 of 1975 as amended by the Prescribed Rate of Interest Amendment Act 7 of 1997 calculated from date of service of summons to date of final payment;

3. Costs of suit which costs are to include all reserved costs as well as the costs of Counsel's reasonable fee on brief, to be taxed.

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P ANDREWS
Regional Magistrate: Durban

[94] *Khulani Springbok Patrol (Pty) Ltd v Marine Schoon* (unreported) case AR 789/2005 delivered on 29 September 2006; *Nel v Minister of Safety and Security* (A1009/2010) [2012] ZAGPPHC 188 delivered on 22 August 2012.

APPEARANCES:

FOR THE PLAINTIFF:	Advocate W.A.J Nicholson
Assisted by:	Advocate R Naidoo
Instructed by:	Felix Attorneys
FORTHE DEFENDANTS:	Advocate E.S Cele
On behalf of:	State Attorney (KwaZulu-Natal)
DATES OF HEARING:	29/03/2022; 26 – 17/05/2022; 1/12/22; 31/1/23 and 27/3/23
DATE OF JUDGEMENT:	24 April 2023