NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7166/2013

In the matter between:

PAUL ANDREW WILLIAMS	**PLAINTIFF**
and	
THE MINISTER OF POLICE	**1ST DEFENDANT**
THE PROVINCIAL COMMISSIONER OF POLICE, KZN	**2ND DEFENDANT**
MLUNGISI WILFRED MDLADLA	**3RD DEFENDANT**

J U D G M E N T

Delivered on : Monday, 07 December 2015

OLSEN J

[1] The plaintiff sues the third defendant, a Captain in the South African Police Service and The Minister of Police (the first defendant) in his representative capacity as an employer vicariously liable, for damages for wrongful arrest and assault. (The second defendant, the Provincial Commissioner of Police, KwaZulu-Natal, was unnecessarily cited.) Actions instituted against the police for wrongful arrest and associated assault are unfortunately a not uncommon feature of our trial rolls. What sets this case apart from the norm is the fact that the plaintiff himself is a member of the

South African Police Service, and indeed also holds the rank of Captain. The plaintiff serves in the Crime Intelligence Unit and the third defendant in the Public Order Policing Unit, the latter being based at the Oribi Police Station, Pietermaritzburg. The plaintiff is a white male. The third defendant is a black (Zulu) male. As will be seen, race unfortunately features in this case.

[2] The events which gave rise to this action took place during the night of 2 September 2011, and spilt over into the early hours of the morning on 3 September 2011. According to the defendants the plaintiff was arrested on charges of drunken driving and crimen injuria. The arrest was made without a warrant. The defendants plead that the arrest without a warrant was justified in terms of s 40 (1) (a) of the Criminal Procedure Act. The parties agreed that the onus was on the defendants to establish that fact. Despite the fact that the onus rested on the plaintiff to establish his claim of assault, the parties agreed that the defendants would begin; presumably because, as will be seen, the most substantial disputes of fact between the parties arise in the context of the claim for wrongful arrest.

[3] Section 40 (1) (a) of the Criminal Procedure Act, 1977 is to the effect that a peace officer may without warrant arrest any person "who commits or attempts to commit any offence in his presence". No prosecution followed the plaintiff's arrest. The defendants must prove upon a balance of probabilities that the offences of drunken driving (which was presumably intended as a label for a contravention of section 65 (1) (a) of the National Road Traffic Act, 1996) and crimen injuria were actually committed in the presence of the third defendant who is alleged to have arrested the plaintiff (*Rudolph v Minister of Safety and Security* 2009 (2) SACR 271 (SCA), paras 13 and 14; *Minister of Safety and Security v Tyulu* 2009 (2) SACR 282 (SCA), paras 21 and 22). The defendants did not plead that they relied upon the provisions of section 40 (1) (b) of the Criminal Procedure Act to justify the plaintiff's arrest. It was accordingly unnecessary during the trial to explore the reasonableness of any suspicion which the third defendant may have harboured when the plaintiff was arrested.

[4] Although, as I have already stated, the defendants' evidence was led first, I find it convenient to commence a consideration of the facts of this matter with an account of the evidence led for the plaintiff.

[5] Although he is stationed in the Crime Intelligence Centre in Durban the plaintiff resides in Pietermaritzburg. He has held the rank of captain for some 15 years. On the evening of 2 September 2011, a little after 6pm, he and a family friend, Mr Mondli Mkhize, arrived at a Spur restaurant for dinner. The plaintiff was off duty. They had a meal in the course of which the plaintiff drank two Hansa beers and two glasses of wine. They left the restaurant at about 8:15pm. The plaintiff gave Mr Mkhize a lift home. Mr Mkhize lives in Globe Road, Scottsville, Pietermaritzburg. (Although it was not known to either of the plaintiff or Mr Mkhize at the time, the third defendant, who neither of them knew, lived a little up the road from Mr Mkhize at 83 Globe Road.) The plaintiff dropped off Mr Mkhize at about 8:45pm. The plaintiff left travelling up Globe Road in the direction of number 83. Mr Mkhize, who gave evidence for the plaintiff, stated that as he was opening his gate he noticed that there were car lights shining at a point some distance from him in Globe Road. As the plaintiff left he was travelling in the direction of the lights. Mr Mkhize thought nothing of it and entered his premises.

[6] The plaintiff could also see the car lights as he proceeded up Globe Road. When he got nearer he saw that the lights emanated from police vehicles, one of which (a kombi) was so placed in Globe Road that it was not possible for the plaintiff to drive around it. The blue lights of these vehicles were not on. There were a number of policemen standing around. The plaintiff drove up to the nearest of them and wound down his window and asked them if the kombi could be moved. According to the plaintiff these policemen simply looked down at him and then carried on their conversation, ignoring him. Then, reacting (as he described it) automatically, the plaintiff shouted out words to the effect "move the bloody car". This did not elicit the reaction he expected. His car door was immediately flung open and the policemen grabbed him to haul him out of the car; one entered the front passenger seat to shovel him out. The plaintiff was only wearing a t-shirt and

shorts, and the thongs which were his only footwear were left in the car as he was hauled out. He was grabbed around the neck and throat and pulled out of the car. During this fracas all he heard was loud talking in Zulu. (It is common cause that all the policemen on the scene, save for the plaintiff, were Zulu.) The plaintiff shouted out that he himself was a policeman from Crime Intelligence. Someone shouted back "I don't care who you are". He was handcuffed with his hands behind his back. He was pushed against his car and the handcuffs damaged his car, giving rise to a minor claim in this action. From there he was dragged and pulled along to the back of a police car which was a double-cab bakkie with an enclosing canopy. He was trying to walk. The distance was probably 8 or 9 metres. From his description one might say that he was hustled towards the bakkie faster than he could manage to walk with his hands cuffed behind his back. This process probably caused the abrasions and light injuries to his toes which were proved by way of the plaintiff's own evidence, and that of a Dr Smit who examined the plaintiff and took photographs of his injuries the next day.

[7] At the back of the bakkie the plaintiff was instructed to get in. He could not raise a foot high enough to step onto the platform. As he was trying he felt a hard shove in his back which flung him into the back of the van. He believes there was a wheel rim or a wheel rim and tyre in the van (which is denied by the defendants). Whether that be so or not, his head was struck as he was flung into the van leaving him dazed, lying face down with his hands cuffed behind his back. Perhaps because his head had been struck in this fashion, the plaintiff was unable to say how long he lay there before the van was driven off. All he can say is that it felt like a long time. (It must have been, given that it was firmly established that the plaintiff was only extracted from the bakkie at the Daymed Centre, Pietermaritzburg, where he was taken to have a blood sample drawn, a little before 23h42 on the night in question.)

[8] Eventually the plaintiff heard the doors of the police van being closed and it drove off. He was unable to avoid sliding from side to side, as the bakkie was driven in what the plaintiff regarded as a rough manner. According to the plaintiff the vehicle was not driven with care. It seemed to

him that it was being driven deliberately in a manner which would cause harm to someone lying face down on the floor with his hands handcuffed behind his back. The evidence of the defendants is that there were three police cars outside the third defendant's house at 83 Globe Road that evening; two kombis and the police bakkie in which the plaintiff had been placed. This convoy proceeded first to the Alexandra Police Station where a kit for the taking of a blood sample was obtained, whereafter the entire convoy proceeded to the Daymed Centre. The plaintiff cannot recall but does not dispute that this presumably brief interruption in the journey to the Daymed Centre occurred.

[9] The plaintiff was extracted from the police bakkie on arrival at the Daymed Centre, that being the first time that he had emerged from it since he had been put in the bakkie at Globe Road. According to the plaintiff the handcuffs were removed once he was inside the centre and after a short delay he was examined by a doctor of foreign extraction and a nurse who appears to have done all the talking. A form was filled in and it has been produced in the bundle of documents. Witnesses spoke to only a few passages in the form. The form reveals that the examination took ten minutes between 23h42 and 23h52. The third defendant and another police official who had been present at the scene in Globe Road (Warrant Officer Mbongwa, who gave evidence) were present in the consulting room whilst the examination was underway and the blood taken. The form resulting from this examination is unsatisfactory. It is plain that more than one person wrote on it. Under the heading "voluntary statement as to consumption of alcohol during the previous 24 hours" one sees written "1 sip of whisky when arrested". The plaintiff denied having said that. Indeed, the proposition that the plaintiff had a sip of whisky when he was arrested is preposterous on either version of the circumstances in which the plaintiff came to be arrested.

[10] Nevertheless, it is noted that as regards his speech, his gait on walking and his gait on turning, the plaintiff's condition was found to be "normal". That this was an accurate record of the condition of the plaintiff that night was not disputed by any of the defendants' witnesses.

[11] According to the plaintiff's evidence he was co-operative during the course of his examination at the Daymed Centre. But the third defendant suggested otherwise in his evidence. It is worth noting that the form to which I have referred records that the plaintiff was co-operative.

[12] According to the plaintiff at the Daymed Centre he informed the nurse that he wished to be examined by a doctor because he had been injured. The nurse replied that he either had to produce a deposit of R300,00 or his medical aid card, something which he was unable to do as the police had charge of his possessions, including his wallet.

[13] According to the third defendant's evidence the fact that the plaintiff was a member of the South African Police Service was first revealed to him during the course of the medical examination at the Daymed Centre. It is surprising to find, therefore, that there is no dispute about the fact that after the medical examination the plaintiff's hands were once more handcuffed behind his back. He was then again thrust into the back of the police bakkie, but, according to the plaintiff, with less force than had been used on the first occasion. This time he found himself lying on his back with his handcuffed hands underneath him. Something to the effect of "Oh, you are trying to be clever" was said to him, the plaintiff assumes because he had asked to be medically examined. The police convoy then proceeded from the Daymed Centre to the Alexandra Police Station. The plaintiff's evidence is to the effect that during the course of this trip the bakkie travelled fast at times and slow at others, went too fast over humps, and so on. He suffered excruciating pain as when he was elevated his body would land firmly on his handcuffed hands. To try and alleviate this he lifted his legs so as to place his feet against the two upper rear corners of the canopy, to thereby lift his body off his wrists, but he was unable to maintain that position because of the movements of the vehicle.

[14] When the convoy arrived at the Alexandra Police Station the plaintiff was taken in and the handcuffs were removed. He was then placed in a

holding cell. There was a considerable delay whilst the third defendant and other members wrote out statements explaining the events of the evening. At about 2 o'clock or little thereafter on the morning of 3 September 2011 a lieutenant stationed at the police station handed the plaintiff an envelope containing his cell phone and wallet. The plaintiff was able to telephone a colleague who served with him in the same unit, who arrived a little after 3 o'clock in the morning. This colleague withdrew the money (R1000,00) necessary to pay the plaintiff's police bail, and he was released at about 4 o'clock in the morning.

[15] The plaintiff decided not to wash or change until he had been examined by a doctor. This examination was conducted by Dr Smit at about 10:15am on 3 September 2011. Each of the plaintiff's injuries (comprising multiple abrasions, circumferential abrasions on his wrists and multiple bruises were described, and the doctor took photographs of the injuries which he identified in evidence). There is no need to say any more about the injuries and the photographs of them, than that they appear consistent with the plaintiff's description of the events of that night. Dr Smit was not asked to express any opinion, no notice in that regard having been given. The question of the quantum of any damages to which the plaintiff may be entitled has been left over for later consideration.

[16] Three witnesses were called for the defendants: the third defendant, Warrant Officer Mbongwa and Constable Makhulu. According to the third defendant, after inspecting the members of his squad at the Oribi Police Station and briefing them on their duties for the night (which, according to Warrant Officer Mbongwa, was to be public order policing at Mpumalanga necessary as a result of taxi violence), at 8:45pm on 2 September 2011 the third defendant went home to Globe Road in Scottsville, which is about four and a half kilometres away. He had to fetch something there. When he arrived he parked his police bakkie at the side of the road. Before he could get out another vehicle (a BMW) approached from the front and stopped next to his (the third defendant's) vehicle in a way which prevented the third defendant from opening his door. He noticed that the person was light

skinned. (I will call the person in the BMW the plaintiff, because it is the third defendant's evidence that it was the plaintiff. The plaintiff was not known to the third defendant at that time.)

[17] Windows were wound down. According to the third defendant the plaintiff asked what he (the third defendant) was doing there during working hours. The third defendant asked the plaintiff more than once who he was and to explain himself to the third defendant, but this was not done. The plaintiff said that there was no crime at Scottsville and that he did not know what the third defendant was doing there. He began swearing at the third defendant – he told the third defendant that "we black people, if we are on duty, will go to our homes and sleep if we are working night shifts". He continued to swear at the third defendant. The plaintiff called the third defendant a "useless k….r" (a derogatory racist term for a black person). The plaintiff continued, calling the third defendant a "c..t" (a derogatory reference to female genitals) and a "donkey". This language was repeated.

[18] Confronted with these circumstances the third defendant radioed his station to ask others to come and assist him. At about this time the BMW moved a little forward as a result of which the third defendant could get out of his vehicle. The plaintiff then reversed back again and said that he wanted to take the number plate of the third defendant's vehicle (which was the bakkie in which the plaintiff was later transported). The third defendant invited him to take it down whereafter the plaintiff drove off.

[19] According to the third defendant whilst the vehicles were parked close together he had noticed that the plaintiff's breath smelt of alcohol. He said that it came to him that he should "call other police members so that they could come and try to prove that he had been drinking or he had not".

[20] Thereafter the third defendant's colleagues arrived.

[21] According to W/o Mbongwa he was busy booking out rifles to the unit members when he received a message that the third defendant was asking

for back-up at his home. Then the message was that back-up was no longer required. Then it was required again. (It is not possible to reconcile this evidence of uncertainty with the third defendant's evidence.) According to Const. Makhulu the urgency of the call-out meant that the issue of rifles had to be stopped before it was complete. The entire unit (8 or 9 men, some armed with rifles) then went off to the third defendant's house in Globe Road in two police kombi vans which the witnesses called "Quantums". (I will call them "vans" to distinguish them from the police bakkie already mentioned.) According to each of the defence witnesses the vans were parked on the side of the road in front of the third defendant's bakkie, leaving the road clear.

[22] According to the defence witnesses, whilst the third defendant was explaining to W/o Mbongwa and the other police present why they had been called, the plaintiff returned, driving up to them in his BMW. The plaintiff wound down his window and called out "foolish captain" or "stupid captain". W/o Mbongwa went up to the plaintiff to ask him what his problem was. The plaintiff said that he did not want to talk to the warrant officer, but wanted to talk to the "useless c..t captain". (The phrase "stupid captain" was also mentioned in evidence.) According to W/o Mbongwa the third defendant then approached closer and informed the plaintiff that he (the third defendant) was arresting the plaintiff as the plaintiff had been swearing at him. The third defendant's version is slightly different, it being that W/o Mbongwa told him that he intended to arrest the plaintiff upon the basis that he was suspected of having been drinking and on the basis of his behaviour. Be that as it may the two witnesses agree that it is the third defendant who announced the plaintiff's arrest although it was only W/o Mbongwa who claimed that in the process the third defendant had read the plaintiff his rights. All the defence witnesses state that when told to get out of his car the plaintiff refused to do so, clinging onto the steering wheel despite being implored to obey the instruction; as a result of which the plaintiff had to be forcefully removed. Each of the defence witnesses states that as he emerged from the car the plaintiff fell onto his back on the edge of the road and had to be turned over in order to have his hands cuffed behind his back. It is difficult to resist the conclusion that this description of the event, as well as other features of the evidence of the

defence witnesses, was rehearsed. The plaintiff denies that he fell to the ground (on his back or otherwise) after he was extracted from the car. As I understood his evidence he was not given an opportunity to get out the car on his own. He was not informed of his rights. According to the plaintiff he was simply hustled along, faster than he could walk, to the bakkie and thrown in the back.

[23] The third defendant and W/o Mbongwa were asked to explain why, at least when (as they say) the plaintiff was formally arrested, and when, according to W/o Mbongwa, the plaintiff was read his rights, there was no query as to the identity of the plaintiff. Neither offered an explanation for this omission. (Of course on the plaintiff's version the question was unnecessary as he had already disclosed his identity.) In my view it is improbable that police officers of the standing of the third defendant and W/o Mbongwa would not have asked the plaintiff to disclose his identity. There was a peculiar occurrence, according to the defence, whilst the plaintiff was lying in the back of the police bakkie outside the third defendant's house. According to the defence witnesses, a Colonel Spalding of the South African Police Service came on the scene and asked what had happened. The third defendant briefed him. Colonel Spalding went to the back of the bakkie, opened it and "greeted the suspect". According to the third defendant Colonel Spalding then said that he (the third defendant) must "do the necessary". The plaintiff has no memory for this occurrence. No explanation was furnished in evidence for the arrival of Colonel Spalding. Perhaps it was fortuitous. But if Colonel Spalding bothered to go to the back of the vehicle and "greet" the plaintiff, it seems improbable that he would not have asked the plaintiff who he was. (Although the plaintiff used words such as "concussed" and "dazed" when describing the result of him striking his head when he was thrown into the bakkie, and confessed to have lost track of time, he does not claim to have been rendered unconscious. It is not the defendants' case, certainly, that the plaintiff was lying unconscious in the back of the bakkie.) According to the evidence of W/o Mbongwa, the colonel who arrived on the scene wanted to see if he knew who the person was in the back of the bakkie. He looked at him and said that he did not know him. It is not at all clear why Colonel

Spalding would have wanted to do that if he had not been told that the white man lying handcuffed in shorts and a t-shirt in the back of the bakkie either was or claimed to be a police captain. I say "white man" because this case undoubtedly has a most unfortunate racial element. If the defence version is true then the plaintiff's behaviour cannot be described as anything other than that of a racist. If the defence version is not true then the police who were at the scene, or at least those who gave evidence, conspired to accuse the plaintiff of racist behaviour and conduct in order to explain the predicament in which they found themselves. One way or the other, and bearing in mind that the senior players in this are two commissioned officers, the evidence led at trial reflects most poorly on the South African Police Service.

[24] There is a convergence in the evidence of the plaintiff and the defendants, more or less from when the plaintiff was first locked in the back of the police bakkie outside the third defendant's house, in so far as the order of events is concerned. There are differences of detail which must be canvassed and considered in order to approach the matter holistically and reach a conclusion on the issues of fact which have been raised in this action. It is convenient when doing this to deal with topics.

TIMING AND DELAY

[25] The cross-examination of the third defendant commenced with the subject of timing and delay. The plaintiff's version is that he came upon the scene where he was arrested at about 8:45pm. As already stated it is clear that the medical examination of the plaintiff at the Daymed Centre only commenced a few minutes before 11:45pm. The third defendant was asked whether he agreed that the arrest took place at some stage between 8:30pm and 9:00pm. He denied that and said that it occurred after 10pm. The third defendant became most evasive when answering further questions about time. He complained that he could not remember what time the kit was fetched from the Alexandra Police Station en route to the Daymed Centre. He claimed to be unsure as to the time at which the convoy arrived at the Daymed Centre, saying that he was not sure but that it was after 10pm. He

then said that he could not remember what time he had gone home to fetch his things. His written statement (which he confirmed) was then put to him and there he had stated that he had gone home at 8:45pm.

[26] The third defendant said that he was aware of the two hour rule applicable when blood specimens are taken with a view to proving a concentration of alcohol in the blood of a person who is driving. When it was put to him that he was strangely indifferent to the time delay which occurred in this case his answer was that no delay had been caused by him and that the delay was mostly because of the plaintiff, who was uncooperative from the beginning. He then added that the argument he had had with the plaintiff took time, and that the response to his call for assistance was somewhat delayed (an allegation which was not supported by the evidence of W/o Mbongwa and Const Makhulu.)

[27] On either version the time which elapsed from when the plaintiff was forcibly removed from his vehicle to when he came to be lying down in the back of the police bakkie would have only been a few minutes. According to W/o Mbongwa's statement (which he confirmed in evidence) the call out to which he responded was made at about 9pm. If one were to accept that, he and his colleagues only had four and a half kilometres to travel to the third defendant's house; and the third defendant was, on the defendant's version, still explaining to W/o Mbongwa and the others what had happened when the plaintiff returned to the scene. The arrest, on that version, had to have occurred substantially earlier than 10pm.

[28] The plaintiff's warning statement records that he was arrested at 9pm. The medical form filled in at Daymed Centre records that the information given to the doctor was that the "occurrence" had occurred at 9pm. This information would have been given by one of the plaintiff, the third defendant or W/o Mbongwa, all of who were present during the ten minute consultation with the doctor and the nurse.

[29] I have come to the conclusion that it is safe to say that there was a delay of at least two hours between the time of the plaintiff's arrest and his arrival at the Daymed Centre. In my view the contention of the third defendant that most of this delay could be laid at the door of uncooperativeness on the part of the plaintiff is improbable. The plaintiff cannot be expected to explain the delay as matters were obviously out of his hands.

[30] It is disturbing that an acceptable explanation for the delay was not forthcoming from the third defendant or his witnesses. One is left to speculate. Was it a strange indifference to delay notwithstanding that the third defendant denied that he had such an attitude? Was it the fact that, contrary to their evidence, the third defendant and W/o Mbongwa knew that they had a police captain handcuffed in the back of the van, and did not know quite what to do about it? The failure of the defence witnesses properly to explain what happened that evening to cause this inordinate delay does nothing to support a conclusion that they should be regarded as credible and reliable. It is significant that the third defendant's unit never got to perform its duties at Mpumalanga that night. The entire unit was instead dedicated to dealing with a single unarmed allegedly drunk and foul-mouthed person for the whole night. He posed no danger to anyone.

ASSAULT : THE DRIVING OF THE POLICE BAKKIE

[31] I have already furnished an account of the plaintiff's perception of how the police bakkie was being driven whilst he was handcuffed in the back. The bakkie was being driven by Constable Makhulu. The third defendant sat in the front passenger seat. When challenged with the plaintiff's complaints as to the manner in which the bakkie was driven the answer given by them was that it was driven "normally". Counsel for the defendants correctly accepted the proposition that if a suspect who has been handcuffed with his hands behind his back is transported in the back of a bakkie which has no restraints to ensure that the suspect is not to get thrown around, then it is the duty of the driver of such a vehicle to ensure that he drives not "normally", but with

sufficient care and restraint so as to ensure that the suspect does not get thrown around and thereby suffer pain and injury.

[32] Insofar as what was meant by driving "normally" is concerned, it appears that the three police vehicles were driving in convoy, with one of the vans in front and the other behind the bakkie. If that was the case the pace of the drive was probably dictated by the driver of the front van, who had no particular responsibility of being concerned for the welfare of the plaintiff in another vehicle.

[33] During the course of cross-examination of both the third defendant and Constable Makhulu, counsel for the plaintiff produced a document entitled "movement report" which relates to the bakkie in which the plaintiff was transported. This document was supplied by the defendants' attorneys to the plaintiff's attorneys, presumably at the request of the latter. It appears to be the product of a monitoring device fixed in the police bakkie which is able to monitor the manner in which the vehicle is driven and the speed at which it is driven, as well as to track its whereabouts, presumably by some sort of satellite navigation feature. No evidence was led to prove the level of accuracy which can be attributed to the information contained in the document, nor to prove the authenticity of the document (to the extent that it might have required authentication despite the fact that it was produced by the defendants' attorneys). Plaintiff's counsel did not rely on the accuracy of this document in argument. But he did use it in cross-examination, without objection from defendants' counsel. The two defence witnesses were asked to explain certain entries such as "harsh braking", "incident", and fluctuating speeds which were, on the face of it, inappropriately high at times. These generated concessions that there might have been harsh braking in a certain road in Pietermaritzburg where there are always a number of prostitutes in the road at night, who have to be avoided; and an explanation that along another road avoiding action had to be taken because there were three BMWs racing. Constable Makhulu went further and agreed that there were in fact speed humps on certain of the roads which he had to traverse.

[34] The explanation given on behalf of the defendants for why the plaintiff was placed in the back of the bakkie lying with his hands handcuffed behind his back during the course of both trips (i.e. even after, on their own versions, the third defendant and W/o Mbongwa were aware of the fact that the plaintiff was a police captain), instead of being placed, handcuffed if necessary, in the back seat of the double cab, was that police regulations required it. Those regulations were not produced in evidence. I reject W/o Mbongwa's additional explanation that the plaintiff was in such a state of agitation that the third defendant and Constable Makhulu would not have been able to handle him inside the cab. I do not see what threat the plaintiff could have posed to the driver and the front seat passenger whilst he (the plaintiff) sat in the back seat of the cab with his hands cuffed behind his back. Furthermore, this suggestion by W/o Mbongwa is contradicted by his evidence to the effect that the plaintiff ceased to be uncooperative once his hands had been cuffed outside the third defendant's house.

[35] In my view the plaintiff has established upon a balance of probabilities that he was assaulted to the extent that his claim for assault rests on the infliction of injury and pain during the course of the journey from the third defendant's house to the Alexandra Police Station, from there to the Daymed Centre, and on the return journey to the Alexandra Police Station. Given that they knew throughout these journeys that the plaintiff was lying unrestrained in the back of the vehicle, quite unable to protect himself against being thrown around because he was handcuffed, both the third defendant and Constable Makhulu had to know that anything other than most careful driving would result in pain being inflicted on the plaintiff, and very probably in injury. It is correct that at least the injuries to one side of the plaintiff's face were, on his own version, caused when he was thrown into the vehicle in the first instance, and that the injuries to his toes were caused when he was being dragged faster than he could walk from his car (where he had been handcuffed) to the bakkie. But the scope of the visible injuries to the plaintiff cannot be explained, or certainly cannot be explained in full, by the defendants' contention that they might have been caused when he was forcibly removed from his car.

THE EVENTS AT THE DAYMED CENTRE

[36] I see no reason to deal at any length with the evidence relating to what happened at the Daymed Centre except to the extent that it is material to issues of credibility. Besides the contention of the third defendant that the plaintiff uttered threats to "get him" at the Daymed Centre in the presence of the third defendant's subordinates (which was disputed by the plaintiff), and the fact that it was only at the Daymed Centre that the plaintiff learned of the identity of the third defendant, two disputes about what happened there appear to me to be material. The one relates to the defendants' contention that in the matter of submitting to the blood test and examination, the plaintiff was uncooperative; and the other relates to the denial of the plaintiff's evidence to the effect that he had asked to be medically examined whilst at the Daymed Centre.

[37] The third defendant was cross-examined on both these issues. In the course of that cross-examination he was referred to certain entries in the investigation diary and a related affidavit delivered as a statement by the person who appears to have been the attending nurse. The first entry in the diary records the need to interview the doctor and the nurse because of a contention already made, apparently, that in fact the plaintiff was cooperative with the doctor and the nurse.

[38] A subsequent entry on the investigation diary reads as follows.

> "Contacted Mrs Shelley at Daymed. She said the accused was not uncooperative but he wanted to explain to the doctor what happened to him when he was arrested, not that he was giving them resistance. She promised me a statement on Monday, 2011/09/19".

The statement from the nurse (attested to on 19 September 2011) was also put to the third defendant, and it records that the accused was cooperative.

[39] The third defendant was unable to offer any explanation for these entries which coincide with the plaintiff's evidence, and not his. I can best describe his reaction to these questions as embarrassed discomfort.

ASSESSING THE EVIDENCE

[40] The plaintiff is English-speaking. He speaks eloquently. He was polite throughout his evidence. His evidence was entirely untouched by cross-examination. By the time he gave evidence he had heard the evidence of the defendants' witnesses and was well aware of the fact that the court was confronted with the difficulty that one or the other side was not telling the truth concerning not only details, but also substantial elements of the accounts given of the events of that night. Nevertheless the plaintiff made no attempt to dramatise or exaggerate his account of events, perhaps with a view to influence the court to his side. His tone was measured and matter-of-fact. If it were permissible to consider the plaintiff's evidence in isolation (which it plainly is not) one would conclude that he was a credible and reliable witness whose version had to be accepted.

[41] Comparisons of demeanour in this case are difficult. The defence witnesses did not have the advantage of giving evidence directly in their own language; nor, I suspect, of the plaintiff's eloquence. Having said that I must nevertheless observe that I gained the impression in the case of all three witnesses called for the defendants that much of what they said was rehearsed. It was especially noticeable in the case of the third defendant that he became evasive and uncomfortable when, under cross-examination, the questioning traversed ground (such as the explanation for delay, a topic I have already dealt with) for which the third defendant appeared not to have prepared himself. There were times when he was giving evidence that W/o Mbongwa looked down, averting his gaze from anyone in the court, and spoke more softly with a distinctly embarrassed smile on his face. I could not say whether that was because he was not telling the truth or whether it was because he realised just how poorly the events of that night reflected on the institution which he served. I find it difficult to believe Constable Makhulu's assertion that he had never discussed this matter with the third defendant who is still his commanding officer.

[42] In general terms the three witnesses called by the defendants corroborate each other. The corroboration of the third defendant's version of his first meeting with the plaintiff that night is however circumstantial, in the sense that it is said to have generated the arrival at his home of the other two witnesses in the company of the entire unit under the third defendant's command that night. In the case of the plaintiff it is only with respect to that first crucial encounter that his evidence (that it did not occur) is corroborated by Mr Mkhize, who saw the lights of a number of vehicles in Globe Road when he was dropped off there by the plaintiff. In relation to the other disputes which I have already discussed, it is the plaintiff's evidence, and not that of the witnesses called by the defendants, which is supported by undisputed facts such as the medical form filled in at the Daymed Centre, the affidavit by the nurse as well as the associated occurrence book entries, and the injuries proved to have been suffered by the plaintiff.

[43] As already mentioned the plaintiff is a man who has held the rank of Captain in the South African Police Service for 15 years. In my view it is inherently improbable that such a man would have behaved as the third defendant said he did during the alleged first encounter between those two men. It is not impossible, but certainly improbable, that a man capable of the appalling behaviour attributed to him by the third defendant could have survived in the South African Police Service as long as the plaintiff has, and what is more at the rank of Captain for 15 years. I do not overlook that the plaintiff had to concede that he made a fundamental mistake that night when, making his second request for one of the vans to be moved, he shouted out "move that bloody car". Whilst what followed, on the plaintiff's version, cannot be excused, one understands that the police officers who heard that would be singularly unimpressed with that show of arrogance from a white man sitting in his BMW dressed in a t-shirt and shorts. How were they to know that they had just received an instruction from a commissioned police officer.

[44] Reverting to the defendants' version, it is perhaps even more improbable, if there was a first encounter, that the plaintiff would return to the scene, now occupied by two more police vehicles and eight or nine more

policemen, some of whom were armed with rifles, and continue as he had done during the first encounter.

[45] On the defendants' version all of this is explained by the fact that the plaintiff was drunk. But that is in my view an exercise in circular reasoning. There is no evidence before the court that the plaintiff was drunk. The defendants' witnesses say that his gait and speech were normal. They offer no other reason for why they thought the plaintiff was drunk except for the outrageous behaviour they attribute to him. The doctor who examined him at Daymed was not called. There is no evidence that the results of the plaintiff's blood test ever emerged. Nothing was produced in evidence. Mr Mkhize was asked in cross-examination about the plaintiff's state of sobriety that night. His answer was that the plaintiff was fine. There was no evidence that when the plaintiff drove his car up to the defendant's house on the occasion of the disputed first encounter, or on the occasion of the second encounter, that he was driving erratically or abnormally in any way. The third defendant's own evidence was that when he smelt alcohol during the first (disputed) encounter, one of the reasons why he wanted his men to join him there was to see what they thought about the state of the plaintiff's sobriety. (As to what is ordinarily necessary to establish driving in contravention s65 (1) (a) of the National Road Traffic Act, 1996, see *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) and *S v Mzimba* 2012 (2) SACR 233 (KZP).)

[46] In my view one has to conclude that if the plaintiff harboured the sort of racist attitudes and resentments which the defendants' witnesses attribute to him, then, given his long career in the South African Police Service in modern times, he would have had to be very intoxicated indeed before he would reveal these inner feelings by behaving as the defendants say he did on the night in question. I accordingly reject the propositions that, on the one hand, drunkenness explains what is otherwise wholly improbable conduct on the plaintiff's part; and on the other hand that the conduct attributed by the defendants' witnesses to the plaintiff proves that he had to have been drunk when he was behind the wheel of his car.

CONCLUSION

[47] I conclude that this case must be decided on the plaintiff's version. The defendants have failed to prove that either of the offences for which they arrested the plaintiff without a warrant occurred in their presence or at all. The plaintiff's claim for unlawful arrest must accordingly be sustained.

[48] It is a consequence of this finding that all the force exerted on the plaintiff that night falls within the scope of his claim for assault, and that all the injuries he sustained are the product of those assaults, perpetrated by members of the South African Police Service in the course and scope of their employment as such. The same goes for the minor claim for damage to the plaintiff's vehicle which occurred when he was pushed against it in the course of his arrest.

[49] In his particulars of claim the plaintiff sought judgment against the first defendant, and only in the alternative against the third defendant. The first defendant's vicarious liability has been established, and there is accordingly no need to consider the scope of the third defendant's liability.

[50] Counsel agreed in argument that if I should find for the plaintiff at this stage, I should simply record (as I do) that the plaintiff is entitled to an award of costs to date in his favour, but that I should not now make such an order. The reason for this is that the quantum of the plaintiff's claims may prove to be such as opens the door to an argument on the first defendant's part that the costs should be taxed on a Magistrates' Court scale.

I accordingly make the following orders.

1. It is declared that the first defendant is liable to pay damages in such amounts as the plaintiff may be able to prove arising from the assaults on the plaintiff, the arrest and detention of the plaintiff, and the damage to the plaintiff's motor vehicle which

occurred on the 2nd and 3rd September 2011, and which are pleaded in paragraph 6 of the plaintiff's particulars of claim dated 24 June 2013.

2. The trial is adjourned to a date to be arranged for the determination of the quantum of the plaintiff's claims.

OLSEN J

Date of Hearing:	WEDNESDAY, 11 NOVEMBER 2015 to FRIDAY, 13 NOVEMBER 2015
Date of Judgment: :	MONDAY, 07 DECEMBER 2015
For the Plaintiff :	MR HATTINGH
Instructed by:	STOWELL & CO. PLAINTIFF'S ATTORNEYS 295 PIETERMARITZ STREET PIETERMARITZBURG (Ref.: A R IRONS/WIL342/0001) (Tel No.: 033 – 845 0500)
For the State:	Ms KHUMALO
Instructed by:	STATE ATTORNEY (KZN) DEFENDANTS' ATTORNEYS (REF.: MR E K SHEZI – 32/1862/12/W/P19) c/o CAJEE SETSUBI CHETTY INC 180 BOSHOFF STREET PIETERMARITZBURG (Tel.: 033 – 345 6719)