



**IN THE HIGH COURT OF SOUTH AFRICA GAUTENG
LOCAL DIVISION, JOHANNESBURG**

Case No: 34739/2016

1)REPORTABLE: Yes/No <i>no</i>	
(2)OF INTEREST TO OTHERS JUDGES: Yes/No <i>no</i>	
(3)REVISED	
14 January 2020	<i>Eurika</i>
DATE	SIGNATURE

In the matter between:

MR JOHANNES PHAKATHI

FIRST PLAINTIFF

MR THABISO MABOKE

SECOND PLAINTIFF

And

THE MINISTER OF POLICE

FIRST DEFENDANT

ACTING NATIONAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE SERVICES

SECOND DEFENDANT

JUDGMENT

Molahlehi J

Introduction

[1] The first and second plaintiffs, ("the plaintiffs"), instituted the joint civil claim against the first and second defendants premised on the assault they allegedly suffered at the hands of the members of the South African Police Service (the SAP) on 22, 23 and 24 April 2016.

[2] On the first day of the hearing, the respondents applied for the postponement of the matter. They sought a postponement to file another plea, the one filed earlier having gone missing. It was however undisputed that the missing plea was but a bare denial of the allegations made by the plaintiffs.

[3] In seeking the postponement, the defendants sought leave to submit a new plea wherein they would deal with the allegations made by the plaintiffs. They intended denying the claims made by the plaintiffs and substantiating such denials.

[4] Counsel for the defendants submitted that the instructions from Sgt Ramakatsa, the officer who led the investigating team, were that there was no basis for the bare denial contained in the missing plea. The suggestion is that a different plea would have been drafted after consulting with him.

[5] The application for a postponement was made from the bar. There was no explanation as to why a substantive application was not made. The defendant also made the application without indicating what defence would be made if the postponement was to be granted.

[6] The application was dismissed with costs for failure to comply with the basic requirements of an application for postponement. I, also having considered the submissions made, found that it was not in the interest of justice to postpone the matter on the day of the commencement of the trial.

[7] In the context of the application for absolution, it is apposite to quote in full the relevant parts of the particulars of claim. The plaintiffs made the following averments in their particulars of claim:

"6.4 The first and second plaintiffs were not charged with the commission of any arrestable offence at the time and date they were arrested in Kwa-Thema.

...

6.6 At the time of the arrest, the first and second plaintiffs were assaulted by the second defendant's employees including Sgt Ramakatsa, who acted within the course and scope of their employment with the first and second defendant in that:

- a. They were blindfolded and pushed around the room;
- b. Their hands were tied behind their backs;
- c. They were physically punched, kicked and sworn to;
- d. They were clobbered and butted on their bodies and heads with rifles.

6.7 After the assault, the first and second plaintiffs, were transported in a police vehicle to the Krugersdorp police station where they were detained in the holding cells. During the transportation, their hands were tied and they were placed in the back of a police van and were driven at high speed to the Krugersdorp Police Station which caused them to be thrown off the bench where they were sitting, so as to sustain further physical injuries to their bodies.

6.8 The first and second plaintiffs, upon their arrival at the Krugersdorp police station were:

- a. Handcuffed very tightly behind their backs, which reduced the flow of blood to skin tissue and caused nerve entrapment;
- b. Assaulted by way of bodily punches, being kicked and being hit with wooden sticks;

- c. Choked by means of a rubber tube secured around their necks;
- d. Were prevented from breathing, due to asphyxiation caused by the strangling;
- e. Were pushed and kicked down a stairwell thereby causing them to suffer bodily injuries.
- f. Were threatened with being shot by means of a cocked firearm being aimed at their heads.
- g. The second plaintiff in addition to being assaulted, as pleaded in paragraph 6.8 above was psychologically tortured which resulted in him defecating. The second defendant's said employees then physically forced the second plaintiff to clean up his own excrement and to wipe the excrement from his body.

6.9 On 22 April 2016 and during the day time, the first and second plaintiffs were then transported by the second defendant's employees, under the control of Sergeant Ramakatsa from the Krugersdorp police station to the Germiston police station where they were:

- a. Tortured by being prevented from breathing by the application of a rubber pipe being tied on their necks;
- b. Assaulted by being hit and kicked on their bodies and heads;
- c. Strangled by means of noosing rubber tubing around their necks;
- d. Told to confess to the murder of one Ndyawe, who was killed in August 2015.
- e. Handcuffed tightly.
- f. Butted with a rifle;
- g. Hit with wooden sticks on their bodies.

6.10 The first and second plaintiffs having been tortured and assaulted aforesaid, refused to confess to the murder."

6.11 As a result of the first and second plaintiffs refusal to confess to the murder, they were again assaulted, as set out in paragraph 6.9 (a), (b), (c), (d), (e) and (f) above.

[8] The three witnesses who testified in support of the claims were the two plaintiffs and the girlfriend of the second plaintiff, Ms Mgidi. After the closure of the plaintiffs' case, the defendant applied for absolution from the instances without leading any witness.

[9] The first witness to testify was Mr Phakathi, a businessman in the taxi business sector and a former security guard at a local Pick n Pay store owned by Mr Ntshangase. He testified about his arrest on 22 April 2016 in the early hours of the morning including what happened as he opened the door to his house. He also testified about what happened at the Krugersdorp police station. His testimony can be summarized as follows: The police knocked on his door while he was sleeping with his girlfriend. Soon after opening the bugler door, he was assaulted by being hit with a rifle on his shoulder.

[10] Some of the police officials were in plain clothes and others in military uniform. They inquired from him about the gun he used, allegedly, to kill another person.

[11] The police team was led by Sgt. Ramakatsa, who ordered that he be arrested and handcuffed with his hands at his back. He told him that his gun was in the safe and directed them to where it was. He was at that stage naked. One of the police dressed him and after that told his girlfriend to go to another room.

[12] The police then escorted him to their cars which were parked about 500m away from his house. They pushed him into a white car and asked him if he knew where Mr Mabote stays. He took them to where Mr Mabote resides, which is about a five minutes' drive from where he was.

[13] On arrival at Mr Mabote's place, the police took him out of the car and said he should point the house of Mr Mabote. After directing them to the house, they left him behind and proceeded to the house. They jumped over the gate to enter the premises where Mabote stays.

[14] The police returned to where Mr Phakathi was with Mr Mabote. They then drove up to the gate where one of them told him that they expected him to speak the truth. After that, they blindfolded him with a black plastic then drove very fast until they reached the building which he later came to know as the Krugersdorp police station.

[15] The plastic object which was placed on his head and blindfolded him was removed upon entering the Krugersdorp building. He observed that there are staircases going to the lower floor as you enter that building. There is also a handrail that slopes down the stairs.

[16] Mr Phakathi testified further that he stood next to a handrail with his back resting on it and his hands hanging down. In other words, he was made to balance his body on the handrail. His hands were hanging on the other side of it. One of the police officers kicked his feet forward while the other pressed the handcuffs with his foot, resulting in the handcuff tightening upon his wrist and resulting in excruciating pain. The other police squeezed his private parts. He was during the assault accused of being a hit man for Mr Ntshangase.

[17] After removing him from the handrail, they fastened his feet with a rope, took a plank, put it between his handcuffed hands and his feet and lifted him up and down. At some stage, during that process, he told them that he needed to go to the toilet to relieve himself. They refused to let him go, resulting in him, defecating on

himself. They then led him to the toilet but took him out before he could clean himself.

[18] Mr Phakathi testified that during the assault, he could hear Mr Mabote screening.

[19] After the assault, he was placed in a white car, blindfolded and then taken to Germiston police station. There he was told that the charge against him was negligent handling of a gun.

[20] Mr Phakathi further testified that at the Germiston police station they requested to be taken to a doctor because they were in pains. The police ignored their request.

[21] On 23 April 2016, Sgt Ramakatsa arrived with another policeman at Kwa-Thema in a white BMW. The policeman who drank alcohol while driving dropped him at the Nigel magistrate court where he was later released. After that, Mr Ntshangase picked them and took them to N17 hospital.

[22] About the injuries he suffered, he stated that they all related to the assault by Sgt Ramakatsa including those inflicted on 22 April 2016 at the time he opened the door for the police to come into his house.

[23] He testified during cross-examination that members of his family visited him at the Germiston police station. His wife delivered food, drinks, a jacket, trousers and tablets for his pains.

[24] He further denied, the alleged assault at the point when the police escorted him from his house to their vehicles. The vehicles were about 500m from his house. He disputed the averment that he was in a police van from his home to the Krugersdorp police station. He insisted that he was driven in a white sedan car. He

conceded the contradiction between his testimony in Court, and that recorded by the J88 form.

[25] Mr Phakathi testified that Mr Ntshangase is the one who instructed the attorneys to institute these proceedings. He is also responsible for financing the litigation.

[26] The second witness, the girlfriend of Mr Mabote, Ms Mgidi, testified about what happened when the police arrived at their house on the night in question. She woke up consequent the sound of the footsteps and the barking dogs in the yard. She awoke her boyfriend, who immediately took his gun out of the safe.

[27] After the arrest, Ms Mgidi visited her boyfriend, Mr Mabote on a Sunday at the police station. During the visit, the boyfriend told her that he was in pains from the assault by the police. She further confirmed that after their release on bail, both plaintiffs went to a private hospital. She denied having smelt any human faeces from the clothes of her boyfriend when she collected them from him at the police station.

[28] The last witness to testify in the case of the plaintiff was the second plaintiff, Mr Mabote, an employee of Pick n Pay. He stays in an estate not very far from where Mr Phakathi.

[29] He confirmed the testimony of Ms Mgidi that they were wakened in the early hours of the morning by footsteps in their yard. He took his gun out of the safe and approached the door. He immediately went back to his bedroom when he realized that the people outside were police officers. He placed the gun under the mattress because he was concerned that the police might shoot if they saw him with a gun. He was then arrested and handcuffed with his hands at his back.

[30] After arresting him, the police walked him to their cars where he found Mr Phakathi. He was, after that driven to a place which he came to know as the

Krugersdorp police station. He was, upon describing the area to members of the Independent Police Investigation Department (IPID), informed that the building belonged to the Krugersdorp police.

[31] On arrival at the Krugersdorp police station, he went into an office where one of the police accused him of being a hit man who killed a person and was assigned to do so by Mr Ntshangase. While in that office he had Mr Phakathi screaming. The police told him that he would scream even more if he did not say where he had hidden the guns.

[32] Mr Mabote, described the process, the police used in assaulting him. According to him, they placed his handcuffed hands and back between the handrails. The one police put his foot between his hands and pressed the handcuffs, which resulted in them (the handcuffs) tightening upon his wrists. The police pulled his feet forward, resulting in his body suspended on the rail. The assault took place in the presence of Sgt. Ramakhatsa.

[33] The process of assaulting him involved placing a smelly plastic object on his face and after that pulling another black rubber-like object on his face. They pulled it to cover him from his head up to his chest. He struggled breathing during that process. At some stage, they pulled the cover just above his nose. One of the police then hit him with a rifle on the stomach and asked him about the alleged gun used to kill another person.

[34] During the assault, Mr Mabote informed the police that he had undergone a hernia operation, and if they continued assaulting him, it might rupture.

[35] According to Mr Mabote during the assault, he pretended to have fainted. The police then took him off the handrail and performed some first aid on him. They then took him to the car which was parked in front of the police station after he told them

that he was asthmatic. While seated in the car, one of the policemen pointed a gun on his stomach and threatened to shoot him. He said he would kill him because he was refusing to tell them where the guns were. After that, he was taken back to the room and assaulted further. Before entering the room, he observed Mr Phakathi seated on a carpet. The area was smelling human faeces.

[36] On 25 April 2016 both the plaintiffs appeared in the Nigel Magistrate Court. They were both released on bail. The plaintiffs proceeded straight from there to the N17 hospital. At the hospital, Dr Maphosa attended them. Mr Mabote testified that at that stage he, had swollen hands with marks where the handcuffs were on his wrist. After examining him, the doctor advised him to go to Chris Hani Baragwaneth hospital for the repair of his hernia. He is booked to undergo that treatment next year- 2020.

[37] During cross-examination, Mr Mabote disputed the contents of paragraph (g) in the particulars of claim. He also disputed having been assaulted at the time of his arrest. He insisted that he informed the doctor who attended him that the police assaulted him and at the time he had marks on his wrists, and his leg was swollen.

Absolution from the instances

[38] An application for absolution from the instances is governed by rule 39 (6) of the Uniform Rules of the High Courts (the Rules) which provides as follows:

"(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or an advocate on his behalf may address the Court, and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of plaintiff or his advocate."

[39] The test to apply in considering whether or not to grant absolution from the instances was formulated in *Claude Neon Lights (SA) Ltd v Daniel*,¹ as follows:

"When absolution from the instances is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

[40] The above test was quoted with approval in *Gordon Page & Associates v Rivera & Another*,² where the said :

"This implies that a plaintiff has to make out a prima facie case –in the sense that there is evidence relating to all the elements of the claim –to survive absolution because without such evidence no court could find for the plaintiff. *As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one.*"

[41] However, the Court cautioned that the above notwithstanding:

". . . absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

[42] In *Ex parte v Minister of Justice: in re R v Jacobson and Levy*,³ the Court held:

"If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence" calls for an answer" then, in such case he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof ..."

The grounds for absolution

¹ 1976 (4) SA 403 (A) at 409G-H.

² 2001 (1) SA 88 (SCA) at 92H-93A.

³ 1931 AD 466 at 478.

[43] The main grounds upon which the respondents based their application for absolution from the instances are briefly the following:

- a. There is a contradiction between what is alleged in paragraph 6.7 and evidence-in-chief. It is alleged in paragraph 6.7 that the plaintiffs were transported in a police van to the Krugersdorp police station. They denied this in both evidence in chief and cross-examination.
- b. The second plaintiff emphatically denied that the police ever assaulted him at the time of the arrest at his house, and his girlfriend, Ms Mgidi corroborated the said version.
- c. The first and second plaintiff further denied that the police blindfolded them at the time of the arrest at their houses.
- d. The second plaintiff denied during cross-examination that he defecated on himself as alleged in paragraph 6.8 (g) of the particulars of claim.
- e. The evidence of Ms Mgidi does not support the version of the second plaintiff that he defecated on himself. In this respect, Ms Mgidi testified that she did not smell any excrement or signs of excrement when she collected the clothes from the second plaintiff on 24 April 2016.

[44] The respondents contended that for the above reasons, they were placed in an awkward position in that they do not know which case based on whose version they should meet in these proceedings. They, further in this respect, contended that they were constrained to defend themselves because no proper version of the facts obtained from the plaintiffs had been pleaded.

The issues

[45] The first issue raised by the defendants is that the particulars of claim were defective because they were based on hearsay evidence of Mr Ntshangase.

[46] In my view, the contention that the particulars of the claim are defective because they are based on hearsay evidence of Mr Ntshangase bears no merits. There is nothing in principle that I could find that pleadings must be drafted on the basis of evidence of witnesses who experienced an incident or observed an act complained of in the particulars of claim.

[47] The purpose of the particulars of claim is to identify issues in dispute. The essential requirement is that the particulars of claim must consist of material facts on which the plaintiff relies, but not evidence by which those facts are to be proven. The further requirement is that the particulars of claim must be framed in the manner in which it enables the other party to plead in response. The material facts to be pleaded in the particulars of claim are those necessary to establish the essential elements of the cause of action. It was in this regard stated in *Trope v South African Reserve Bank and Another*,⁴ that:

"It is trite that a party has to plead - with sufficient clarity and particularity - the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts (*Mabaso v Felix* 1981 (3) SA 865 (A) at 875A-H; Rule 18(4)). It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. (*Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 792J-793G.)"

[48] In *Jowell v Bramwell-Jones and Others*,⁵ the Court explained:

". . . (T)he plaintiff is required to furnish an outline of its case. This does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by

⁴ [1993] ZASCA 54; 1993 (3) SA 264 (A) at 273A-B.

⁵ 1998 (1) SA 836 (W) at 913B-G.

evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements."

[49] In the present matter, the pleadings were closed without the defendants ever complaining or evoking procedures set out in the Rules to challenge any defect that might have been in the pleadings. They, in fact, filed a plea based on a bare denial which is not supported by the concessions made in the pre-trial minutes and version of the plaintiffs' witnesses.

The J 88 form paragraph

[50] The defendants admitted that the plaintiffs were examined by Dr Maphosa on 25 April 2016. They also acknowledged the truth of the contents of the report by the doctor contained in the J88. It is recorded in paragraph 8.18 the pre-trial minutes that the "the first and second plaintiffs had been assaulted."

[51] In my view, the contradiction relied upon by the defendants in support of the application for absolution is unsustainable, considering that there are questions still to be answered relating to the main cause of action. The main cause of action is that the plaintiffs were assaulted after their arrest by members of the SAPS.

[52] In my view, the facts presented by the plaintiffs call for answers to the issue of assault. This is based more, particularly on the admission made in paragraph 8.23 the pre-trial minutes wherein the following is recorded:

"That the first and second plaintiffs were assaulted but no admission is made as to whom assaulted the first and second plaintiffs and that the first and second defendants' employees cause the assault."

[53] And of importance is that it is undisputed that the plaintiffs were arrested by members of the SAPS. In my view the contention that the

particulars of claim are unsustainable as contended by the defendants, bears no merit.

[54] The other ground upon which the defendants' application for absolution is based on is the averment that the diagram made by Dr Maphosa in the J88 form does not support the versions of both the first and second plaintiff. In this respect, reference is made in the heads of argument to *Sibulali v Minister of Police*,⁶ where the plaintiff failed to call the doctor who attended her and completed the J88 form. The doctor had not recorded the injuries attested to by the plaintiff. The plaintiff had failed to call the doctor, who was available to testify.

[55] The facts in *Sibulali* are, in my view, distinguishable to those in the present case. In that case, the defendant, in its plea, disputed the assault and provided further evidence to support the plea that the assault never took place.

[56] The plaintiff in that case did not call the young man who accompanied the police to where she was at the time the assault is alleged to have occurred. She further did not call her husband who she testified, she had called and informed him of the assault.

[57] It is clear from the reading of the judgment that the Court did not consider the J88 documentary evidence in isolation. The evidence was considered in the context of the totality of the body of evidence before the Court.

[58] It is trite that the J88 form is a legal document wherein the injuries sustained by a complainant are recorded. It is an aspect of the evidence that assist the Court to determine whether a complainant sustained injuries consequent the alleged assault. As stated in *Makhetha v Minister of Police*,⁷ in some instances, the J88 may be the only objective evidence available for a court to decide whether or not an assault

⁶ (1551/13) [2016] ZAECHMC 31 (21 June 2016).

⁷ (59521/2012) [2015] ZAGPPHC 871 (17 December 2015).

occurred. It may also form part of the corroborating evidence that the plaintiff was assaulted. And thus the Court in evaluating the evidence of an assault has to look at the circumstances of the case beyond the J88 form.

[59] In the present matter, the pleaded case is that the plaintiffs were arrested on 22 April 2016. The cause of action upon which the plaintiffs' case is based on is that they were assaulted subsequent their arrest. Thus the material facts pleaded together with the admitted facts by the defendant is that the plaintiffs' cause of action –namely assault arose on 22 April 2016. The facts upon which the plaintiffs rely on in support of their claim and from which the conclusions of law is drawn is set out in the particulars of claim.

[60] In the J88 form, Dr Maposa records, in respect of each of the plaintiffs, that they were "assaulted by the police this past Friday." The doctor saw both plaintiffs on 25 April 2016.

[61] For the reasons stated above, I am of the view that the defendants have a case to answer to the plaintiffs' version. In other words, there is evidence upon which a reasonable man might find for the plaintiffs. The application for absolution thus stands to fail.

Order

[62] In the premises, the application for absolution from the instances is dismissed with costs.



E Molahlehi J

Judge of the High Court;
Johannesburg.

Representation:

For the Plaintiff: Adv. R G Cohen

Instructed by: Glynnis Cohen Attorneys

For the Respondent: Adv. Smanga Sethene

Instructed by: State Attorney

Heard: 2019

Delivered: 14 January 2020