

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

CASE NO: 22176/2015

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED |

06 August 2021

DATE

A handwritten signature in black ink, appearing to be "M. M. M.", is written over a horizontal line.

SIGNATURE

In the matter between:

SELAELO RENIUS PHUKUBJE

PLAINTIFF

and

**THE MINISTER OF SAFETY
& SECURITY**

DEFENDANT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal

representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 6 August 2021.

JUDGMENT

COLLIS J

INTRODUCTION

[1] In the present matter the plaintiff has instituted action proceedings against the defendant for delictual damages arising from his unlawful arrest and assault by members of the South African Police Services. The alleged incident occurred on 05 October 2014, and it is alleged that at the time of the incident that the members in question were all acting within the course and scope of their employment with the defendant. ¹

[2] As per the Particulars of Claim, it is further alleged that, the Defendant's members on the day in question, unlawfully assaulted him at his place of residence and at the Satellite Police Station.

¹ Particulars of Claim par 3. p 7.

[3] The Defendant defended the Plaintiff's claim and denied that its members arrested the Plaintiff. It is the Defendant's case, that its members only responded to a domestic violence call between the Plaintiff and his then girlfriend called Mavis and proceeded to their residence situated in an informal settlement.

[4] As per the Amended Plea and in amplification of its denial of having arrested the Defendant, its defence was pleaded as follows:²

4.1 The Defendant avers that in the morning of 5 October 2014, members of the Defendant attended to a complaint of domestic violence in Squatter Camps in Manamela Park, Marapong in Lephalale;³

4.2 The Defendant specifically avers that his members never arrested the Plaintiff, but that the Plaintiff was removed from the shack by members of the Defendant for his safety because community members were threatening to kill him if the Police Officers left him there;⁴

4.3 The Defendant further avers that his members never assaulted the Plaintiff. The Plaintiff was found to be in pain by the Defendant's members when they arrived at the place as mentioned above;⁵

² Amended Plea Index 007-3

³ Amended Plea Index 007-4 par 3.1

⁴ Amended Plea Index 007-4 par 3.2

⁵ Amended Plea Index 007-4 par 3.3

4.4 The Defendant avers that it was the Plaintiff who was rude to the members of the Defendant.⁶

4.5 The Police Officers who attended to the complaint were Constable Given Njuyo Hlongwane and Constable Thuso Stoffel Letsika, members of the South African Police Services stationed at Lephalale Police Station.⁷

4.6 The Defendant avers that the Plaintiff was never taken to SAPS satellite office or SAPS Lephalale by members of the Defendant. Plaintiff was instead dropped off at the robots of corner Nelson Mandela and Rupert Streets as he requested.⁸

[5] As such it was the Defendants' case that because Mavis did not want to open a case of assault against the Plaintiff they consequently, did not have a reason to arrest him and that they merely had escorted the Plaintiff away from the scene to secure his own safety.

[6] This then in essence, the Defendants' pleaded case.

[7] At the commencement of the trial, the issues of *liability* (merits) and *quantum* were separated by Court on application by the parties in terms of

⁶ Amended Plea Index 007-5 par 5

⁷ Amended Plea Index 007-5 par 4

⁸ Amended Plea Index 007-5 par 6

Rule 33(4). The trial as such proceeded on merits only. This Court was further requested that in the event of the Plaintiff succeeding in his claim on the issue of liability that the trial on quantum be postponed *sine die* by the Court.

ISSUES TO BE DECIDED

[8] In as far as the merits are concerned the parties were *ad idem* that what this court was to determine, was firstly whether the plaintiff was indeed arrested by the policemen attending the scene and secondly whether any assault was perpetrated on the Plaintiff by these police officers.

ONUS

[9] In this regard, the Plaintiff carried both the *onus* of proof and the *duty* to begin.

EVIDENCE

[10] Mr Selealo Phukubje, the Plaintiff's evidence can be summarised as follows. On the day of the incident, he was at his residence situated at in informal settlement. At around 05h00 on the said morning, he had an argument with his wife, called Mavis. This soon subsided and they

continued to sleep. Almost immediately thereafter there was a knock on their door. His wife opened the door and outside, he noticed his neighbour and two police officers dressed in uniform. They enquired as to who was fighting inside the room and his neighbour pointed at him. The police officers then ordered him outside his room and started to assault him, by hitting him with batons and kicking him. He was then handcuffed and placed inside a police van. The officers who assaulted him, were both known to him. He identified them as Constable Hlongwane and Constable Letsita. The Plaintiff testified that the assault outside his room lasted for approximately ten minutes and it continued at the Satellite Police Station. He testified, that he was not informed as to the reason that he was being locked up and placed inside a police van and that prior to the police arriving at his room that morning, that he was free from any injuries. At this Satellite Police Station, he was placed inside a wooden room and the assault continued on him. It was then, that he was also sprayed with water and ordered by these officers to lay on the ground where a video was taken of him. Thereafter, he was given a bucket and instructed to wash the police van and he was told that he thereafter could return to his room. Some officers nearby then came to his rescue, and eventually an ambulance was called and he was taken to the Lepalale Hospital. From this hospital he was the next day transferred to the Polokwane Hospital where an operation was performed on his stomach. Eventually upon his discharged, he then opened a criminal

case against the police officials. He was in hospital from 06 October 2014 until his discharge on 13 October 2014.⁹

During cross-examination, the plaintiff confirmed that he was unable to dispute that the police officers arrived at his room that morning after having received a call for domestic violence. He also confirmed that when the police arrived at his room, that Mavis, informed the police that they did not want police involvement, albeit that they had been screaming at each other earlier during their argument. Mr Phukubje further denied that when the officers arrived at his room that they were met by members of the community. He was however unable to deny that these members had informed the police that he should be escorted by the police as if not, that he would be killed by the community members. He was however adamant that the assault perpetrated on him occurred outside his room and also at the Satellite Police Station. During cross-examination, he was also unable to confirm who called an ambulance to collect him from the parking lot of the police station nor was he certain as to the time that he was picked up by the ambulance. As such he was not able to dispute the version of the police, that the ambulance had picked him up at around 08h25 that morning. During cross-examination, the plaintiff also agreed with the version put to him by counsel for the defendant that the police could not have arrested him that morning as no case had been opened against him. He further agreed that the police officers never informed him that morning

⁹ Index to Merits Bundle 002 p 62

that they were arresting him, but instead had informed him that they were taking him to the police station to wash their police van and for him then to go home. The plaintiff further denied, that he was left by the police at a street corner of Robert Street and was adamant that he was left by the police at the parking lot of the police station. During cross-examination he also conceded that he was drunk and that his breath was smelling of alcohol as he had consumed alcohol, the night before. He likewise confirmed that although he was injured that he did not display any visible injuries on the morning in question. As to his reasons for having sued the defendant, he testified that the police had wronged him and that they must pay for having assaulted him. He once again denied that he was arrested and reiterated that he was only assaulted by the police, in respect of which he had laid criminal charge against the officers in question.

[11] The next witness to testify on behalf of the plaintiff was Ms Catherine Baloyi. Her evidence can be summarised as follows. On the 5th October 2014 she testified, that she was asleep in her yard when she was woken up by a knocking on the door of the plaintiff's residence. The door of the plaintiff's house and her door are facing each other. As she woke up, she observed two police officers dressed in uniform outside the plaintiff's residence with one of them enquiring who was fighting with his wife. From the inside the plaintiff responded that no one was fighting. One of the officers then went inside the residence of the plaintiff and started assaulting

him, using a baton and by kicking him as he was lying on the ground. The assault lasted for approximately 10 minutes. Both officers assaulted the plaintiff. Thereafter they picked him up from the ground where he was lying and he was taken away. During cross-examination, the witness was adamant that the police officers had batons that morning, which they had used to assault the plaintiff. She further could not dispute that the officers attended the plaintiff's residence pursuant to a domestic violence complaint which was made to the police station. Ms Baloyi also denied that other community members had gathered outside the residence of the Plaintiff.

[12] This then the evidence presented on behalf of the Plaintiff.

[13] On behalf of the defendant a number of witnesses testified.

[14] The first to testify was Dr. Maila who confirmed that Plaintiff sustained blunt abdominal trauma, consistent with an assault. He testified that the plaintiff was transferred from Ellisras Hospital to Polokwane Hospital where on 6 October 2014 he underwent surgery, namely a laparotomy, performed by him and an assistant. Furthermore, it was his evidence that accept, for these injuries which he observed, that the plaintiff presented with no other injuries which he could observe and document. The hospital records of the

Plaintiff confirm that Plaintiff was treated at the Ellisras and Polokwane Hospitals until 20 October 2014.¹⁰

[15] The next witness to testify was Mr Erik Dyssel. It was his testimony that he was employed by a company called C-Track Fleet Management Service and also worked as a consultant for the South African Police Service as a Technical controller and Communications Control Supervisor. In essence his company provided satellite tracking devices to the vehicles used by the police and to track the movements of these vehicles. In respect of the matter at hand, he provided this court with his print-out and his plotting of the co-ordinates on a map in relation to the movements of the Police van BTN 347 B on the morning of 5 October 2014. In relation to this vehicle, he testified that the vehicle was stationary but with its engine running at Marapong informal settlement, from 05:05 until 05:25 when there was a slight movement.¹¹ From about 05:28 the ignition was switched off and immediately started again and then at 05:29 switched off again, all without moving,¹² and at 05:33 it started up again.¹³ Thereafter, the vehicle then drove to the SAPS Satellite Office at Marapong, and the ignition switch off at 05:36.¹⁴ At around 05:44 the engine was started again and the vehicle drove off again. As such it was stationary at the Satellite Police

¹⁰ Particulars of Claim par 8

¹¹ Index to AVL report: BTB 927 B Case Lines 009-2 entries 15-19

¹² Index to AVL report: BTB 927 B Case Lines 009-2 entries 20-21

¹³ Index to AVL report: BTB 927 B Case Lines 009-3 entry 1

¹⁴ Index to AVL report: BTB 927 B Case Lines 009-3 entries 2-3

Station for approximately 8 minutes. From 05:49 the vehicle was driving to the Police Station, SAPS Lephalale¹⁵ and at 06:07 stopped at the Police Station, SAPS Lephalale. Mr Dyssel, did not testify, that at any point that this vehicle was ever stationary at either Nelson Mandela or Ruper Street between the SAPS Satellite Office and the Police Station, SAPS Lephalale.

[16] Ms Maboli Chokwe was also called by the Defendant. She testified that at the time of the incident that she was employed at the Lepalale Police Station as an Administrative Clerk. She testified that on the morning of the incident that she had found the Plaintiff lying in the parking area of the said Police Station. She approached the Plaintiff and she found him vomiting and smelling of alcohol. She asked what is wrong with him, and whether he was drunk. The Plaintiff responded that he was not drunk but assaulted by Letshita. She enquired from him as to whether she should call an ambulance for him. This she did. She further testified, that she did not observe the clothes of the Plaintiff being wet, nor did she observe any visible injuries on the person of the Plaintiff.

[17] Mr Mphere Lekalakala, was the next witness called to testify on behalf of the Defendant. He testified, he was employed as an Emergency Care Officer working at the ambulance services in Lepalala. On the 5th October 2014 he attended a call at the Lepalala Police Station together with his

¹⁵ Index to AVL report: BTB 927 B Case Lines 009-3 entries 5-8

colleague. They arrived by ambulance at around 08h35 and upon arrival had found the Plaintiff lying in the parking area. Upon approaching the Plaintiff, he observed no visible injuries on the Plaintiff. Upon approaching the Plaintiff, he enquired as to whether the Plaintiff could walk to the ambulance and the Plaintiff indicated to him, that he could do so. He further confirmed that the Plaintiff's clothes were not wet when he had found him lying in the parking lot.

[18] The police officers who attended the scene both testified before this Court. In essence their evidence corroborated each other in material respects, in that Constable Letsita and Constable Hlongwane denied the arrest and assault and testified that they had merely attended a complaint of domestic violence at the Plaintiff's residence. Upon such attendance, they removed the Plaintiff for his own safety to save him from the angry members of the community. The witnesses both testified that they initially received a complaint over the radio for domestic violence and as they were close by they attended the scene. Upon arrival, they were met by members of the community, of around 10 to 15 people, who pointed out to them the residence where the noise was coming from. They proceeded to the residence, and from the outside they could hear noises from the inside. They could hear a woman crying. They knocked on the door and it was eventually opened by the Plaintiff. This man was fully dressed and intoxicated. He could also not walk straight and he was holding his stomach. They also found a pregnant lying on the floor and that the floor surface was

wet. She was only dressed in her underwear. She reported to them, that the Plaintiff, had not long returned from a tavern and that they had an argument and that he had assaulted her. She also informed them that it also seems as if he had been assaulted as he had just returned from the tavern. She further reported that her body was in pain but that she did not want to lay a complaint and she also refused that the police should call an ambulance for her. The members of the community then threatened to take the law into their hands, if they did not remove the Plaintiff. The police officers then decided in order to defuse the situation to remove the Plaintiff and to take him away and he was transported in their vehicle away from the scene. As they left the scene the Plaintiff was seated in front of their vehicle and as they still had to do some patrols, they first proceeded to the Satellite Police Station doing patrols on the outside as the gates as the gates were locked. They spent approximately 10 minutes doing patrols whereafter they left and dropped off the Plaintiff in town.

ANALYSIS OF EVIDENCE

[19] On the issues this Court was called upon to determine, two versions have been placed before this Court. These versions are mutually destructive and they cannot be reconciled.

[20] In determining which version is to be accepted by this Court, this Court will apply the legal principles espoused in the decision *National Employers'*

General Insurance v Jagers 1984 (4) 437 ECD at 440, wherein it was held that that when courts are confronted with two mutually destructive irreconcilable version, the Court should turn to the reliability, credibility and probability of the opposing versions.

[21] In STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS 2003 (1) SA 11 (SCA) par [5] at 14-5 the SCA held that:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. 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 witness's 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 extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

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 latter. But when all factors are equipoised probabilities prevail."

FIRST ISSUE: WHETHER THE PLAINTIFF WAS ARRESTED BY THE POLICE OFFICERS WHO ATTENDED THE SCENE?

[22] On the first question that this Court was called upon to determine, the evidence placed before the Court and specifically the evidence tendered by the Plaintiff, was contradictory in this regard. The Plaintiff initially testified that he was arrested by the police officers on the morning in question and later during cross-examination he conceded that he was not arrested. This is supported by the objective facts that no criminal charges were ever brought against him by the police officers, coupled with the fact, that no complaint was made to the police by his common law wife Mavis at the time when they attended the scene. She in fact refused to pursue a complaint.

[23] If indeed as per the testimony of the Plaintiff, he was arrested that faithful morning, it begs to reason as to why no criminal docket was opened by the police officers nor does he fail to explain as to why no warning statement was ever taken of him. On the evidence placed before this Court by the officers in question, I therefore must conclude that their testimony could be relied upon and that their testimony was credible.

[24] Furthermore, on the objective facts, no arrested person is further left in a parking lot of a police station and not processed at the charge office when arrested. If indeed the Plaintiff was arrested that morning, he would not have been left in a parking lot, but instead he would have been charged

and processed with a Notice of Rights being read out to him. The Plaintiff presented no evidence that he was ever charged, locked up or processed that morning.

[25] As such it follows, that on the two versions placed before this Court, that the probabilities rather dictate, that the police officers attended the premises of the Plaintiff after having received a call for domestic violence. That upon arrival at the said premises, they found a confrontational Plaintiff, in a room with a heavily pregnant woman dressed in only her underwear and a floor surface covered in water.

[26] These premises as it turns out they also previously had attended to for a domestic violent complaint. In addition to this, they were confronted by community members who had threatened that they would harm the Plaintiff, if they were not to remove him from his premises.

[27] The officers clearly assessed the situation and in executing their duties cast upon them, deemed it prudent to remove the Plaintiff in order to secure his own safety.

[28] Therefore, on the first issue that this Court was called upon to determine, I conclude that Mr Phukubje was not arrested by the police, but

rather removed from a potentially volatile situation and that for his own safety.

THE SECOND ISSUE: WAS AN ASSAULT PERPETRATED ON THE PLAINTIFF BY THE POLICE OFFICERS WHO ATTENDED THE SCENE?

[29] On the second issue to be determined by the court, not only did the plaintiff testify as the fact that he was assaulted, and did he describe the assault at the hands of the police officers, but corroboration was given of this assault by the testimony of Ms Baloyi, his neighbour at the time. Albeit that the evidence tendered by Ms Baloyi, was of an independent and objective nature, this court cannot find that her evidence could be relied upon. In the present matter Ms Baloyi denied that members of the community were gathered around the scene. It would also seem that she tendered her evidence in a selective fashion. She testified that she did not observe as to what had transpired inside the residence of the Plaintiff and his 'wife' Mavis. As such she could not refute what the police officers had testified to what Mavis had told them about an assault on her. Her evidence is also improbable, with regards to the community members present outside the premises of the Plaintiff. If there were no members present, why would the police officers fabricate their presence as this could only worsen the case for the police officers, as it would mean that they assaulted the Plaintiff in full view of onlookers. In the circumstances, I cannot place reliance on her evidence.

[30] In addition to the evidence of Ms Baloyi, the Plaintiff also wishes to place reliance on the evidence tendered before the court by both Ms Chokwe and Mr Lekalakala, the witnesses called to testify on behalf of the Defendant. These witnesses both testified that on them both first approaching the Plaintiff that he had made a report to them that he was injured and to Ms Chokwe specifically, the Plaintiff reported, that Letsita had assaulted him albeit that both of them did not observe any visible injuries on the person of the Plaintiff.

[31] Furthermore, the Hospital records completed on the Plaintiff on the morning when he was taken to hospital, also indicate that when he was seen at the Ellisras Hospital, that he was complaining of body pains and of an assault.¹⁶ This reporting made of an assault to both Ms Chokwe and Mr Lekalakala, at best remains just that. It by no means is proof that the police officers in question had perpetrated an assault on the plaintiff, nor does not exclude that he could have been assaulted prior to returning home that early morning by someone other than the Police.

[32] The same can be said of the evidence presented by Dr. Maila, who testified on behalf of the Defendant. In this regard, the doctor testified that the injuries observed by him during his examination of the Plaintiff, the day

¹⁶ Index to Merits Bundle Ellisras Hospital Records Case Lines 002-14.

following the incident, that of a perforated viscus and blunt abdominal trauma, were consistent with that of an assault. This evidence by no means prove that it was indeed the police officers in question, who perpetrated an assault on the Plaintiff.

[33] It is further common cause between the parties, that the Plaintiff had opened an assault case at the Lephalale SAPS (CAS 337/10/14) against both the Hlongwane and Letsitsa,¹⁷ and that this criminal case was finalised at the Lephalale Magistrate's Court when the two members of the Defendant were acquitted of the charge of assault with intent to do grievous bodily harm.¹⁸

[34] On the conspectus of evidence presented before this Court, I conclude that the probabilities rather dictate, that the Plaintiff may have been assaulted, but that this assault does not point to the fact that, the police officers in question were the perpetrators of this assault. It also therefore does exclude the Plaintiff may have been assaulted by someone else earlier that evening. An assault earlier that evening, would further explain, why the Plaintiff was found holding his stomach when the police officers arrived on the scene.

¹⁷ Index to Pleadings: Particulars of Claim par 9 Case Lines 004-9

¹⁸ Supplementary Index to Pleadings: Amended Plea par 9 Case Lines 007-6

[35] Given the totality of the evidence presented, I cannot find that the Plaintiff has discharged his *onus* to prove an assault by the police officers in question. As such, and on the second issue to be determined by this Court, I therefore cannot determine this issue in favour of the Plaintiff.

COSTS

[36] The defendant being the successful party in these proceedings, will as a consequence be awarded costs in its favour.

ORDER

[37] In the result the Plaintiff's claim on the merits, is dismissed with costs, including costs of counsel.



C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff

: Adv. B.P. Geach SC &
Adv. F.H.H. Kehrhahn

Attorney for the Plaintiff	: Chueu Incorporated
For the Defendant	: Adv. M.N. Kgare
Attorney for the Defendant	: Office of the State Attorneys (Pretoria)
Date of Hearing	: 01, 02, 03 & 18 February 2021
Date of Judgment	: 06 August 2021

Judgment transmitted electronically.