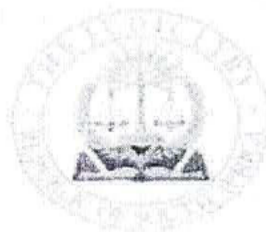


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES	
(2) OF INTEREST TO OTHER JUDGES: NO/YES	X
(3) REVISED: NO/YES	
14 FEBRUARY	
DATE 2022	SIGNATURE

CASE NUMBER: 81020/2015

In the matter between -

MABUZA BAFANA AMOS

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

BEFORE: MEERSINGH AJ.

(The matter was heard via Teams in accordance with the Directives regarding the arrangements during the National State of Disaster; the Judgment will be uploaded onto Case Lines to the electronic file of this matter and will be electronically submitted to the parties/their representatives by Email).

[1] The Plaintiff instituted an action against the Defendant for damages arising out of his having been allegedly assaulted on the 20th June 2013 by unknown members of the South African Police Services the SAPS members, acting in the course and scope of their employment with the Defendant in terms of the *Actio Iniuriarum*.

[2] Plaintiff filed particulars of claim in support of the damages claimed. In amplification thereof it was averred in the particulars of claim as follows:-

1. They kicked the Plaintiff on his buttocks;
2. They repeatedly hit the Plaintiff on his back and both legs.

[3] The Plaintiff subsequently amended his particulars of claim to reflect that the Plaintiff assaulted by members of SAPS as follows:-

1. Assaulted the Plaintiff by kicking the Plaintiff on the back, buttock and legs.

[4] The Plaintiff testified and also called a witness one Mr. Mamba.

[5] The Plaintiff testified that on the 20 June 2013 he was part of a group of mine employees who were on strike. They were outside of the premises of the mine. They were scattered in different groups and he was in a group that was playing a game of cards called Morabaraba. At about 16h00 the police started to throw and shoot teargas at them. Three teargas canisters were thrown at his back whilst he was running away. He also testified that he was shot three times on his back towards his buttocks with rubber bullet. As he was running away he collided with the fence and fell down. Whilst on the ground a policeman stood directly over him and fired three rubber bullets towards his head/face. He managed to block all three bullets with his hands. Thereafter a policeman kicked him in his ribs and on his upper left chest area for no apparent reason. He further testified that he was also kicked by the security personnel

working at the mine. He was thereafter told by some mine security personnel to stand up and leave. His evidence is that it was a peaceful gathering and that he was surprised when the police charged at them with shields. He thereafter called his brother who came with his son at around 19h00 on 20 June 2013.

[6] He was taken to Dr De Jager on the 21st June 2013 because he was injured as a result of the assault. Dr De Jager put him on sick leave until 24 June 2013. On the 24 June 2013 he once again consulted with Dr De Jager who then referred him to the hospital where he stayed overnight. On the 21st June 2013 he was advised by some of his friends that three people were found dead including one Mabilo, at the place where the police had allegedly assaulted him.

[7] Under cross examination the Plaintiff was asked to give an explanation as to why his testimony differed in every aspect from the allegations in his particulars of claim as amended. His response was that he did not tell his attorney he was assaulted as alleged in the initial or the amended particulars of claim. He was asked to explain why the report of his Industrial Psychologist, one Ms. Cilliers, states that he was beaten until he lost consciousness. He denied that he had so advised MS Cilliers, his own expert.

[8] The Plaintiff called a witness, one Mr. Mamba, a work colleague and friend of some 14 years. He testified that plaintiff was a member of a group which was seated outside the mine premises. He confirmed the version of the plaintiff that the mine workers who were on strike were charged at by unknown members of SAPS. He further testified that as he was running away he hid behind a tree. His evidence is that he saw members of SAPS firing rubber bullets directly at the Plaintiff's face which Plaintiff warded off with his hands. He did not see the security personnel of the company assaulting the Plaintiff. He further testified that three people were found dead a day after at the scene of the alleged incident.

[9] Under cross examination Mr. Mamba denied that he and the Plaintiff entered into a discussion regarding the alleged assault by SAPS, on any occasion since the alleged incident. He contradicted the evidence of the plaintiff in that he denied that the group in which Plaintiff was a member was playing a game of cards immediately prior to being charged at by SAPS. He was only able to corroborate the version of the plaintiff in respect of the police firing rubber bullets directly at the plaintiff's face.

[10] At the close of the Plaintiff's case, the Defendant applied for Absolution from the Instance in terms of Rule 39(6) of the Uniform Rules of Court. The application for Absolution from the Instance was dismissed

[11] In *Gascoyne v Paul and Hunter* it was held :-

"At the close of the case for the Plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the Plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the Court would be: "Is there such evidence upon which the Court ought to give judgment in favour of the Plaintiff?"

[12] Applications of this nature are very sparingly granted. The test to be applied is whether there is evidence upon which the court, applying its mind reasonably to such evidence, could or might find for the Plaintiff.

[13] In *Claude Neon Lights (SA) Ltd v Daniel*, the Appellate Division formulated the test for Absolution at the close of the Plaintiff's case as follows:

"When Absolution from the instance is sought at the close of Plaintiff's case, the test to be applied is not whether the evidence led by the 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, or ought to) find for the Plaintiff."

[14] In light of the evidence this court could or might very well have found for the Plaintiff. The defendant closed its case at the end of the Plaintiff's case. The test now is whether this court should or ought to find for the Plaintiff.

[15] The first question before this court is whether the case of the Plaintiff has been correctly pleaded. The Plaintiff's particulars of claim were not as explicit as they ought to have been. The Plaintiff's particulars of claim as amended, alleged that the Plaintiff was assaulted by "kicking on the buttocks and the leg".

[16] The object of pleading is to define the issues."

[21] In the much relied upon judgement as summarized in **Stellenbosch Farmers' Winery Group Limited and another v Martell & CIE SA and Others**, it was held as follows by Nienaber JA:

"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 extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. 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.

[22] In evaluation of the evidence of the Plaintiff and the witness this court finds as follows:-

The Plaintiff sought to convince this court that he had been assaulted by members of SAPS whilst peacefully sitting outside the mine premises at which he was employed pursuant to a strike. In doing so the Plaintiff tendered a version in his

1. Oral testimony before this court;
2. A version in his pleading as amended and;
3. A version as per the report of his Industrial Psychologist Ms. Cilliers.

[23] The versions of the alleged assault differ from each other. The Plaintiff's explanation for the differences in these inconsistent versions are improbable. The Plaintiffs own versions are not only fanciful but are also conflicting in themselves. His explanations are that the fault lies with his attorney and expert.

[24] Mr. Mamba failed to take this court into his confidence and as a display of his honesty to admit that at least he would have discussed the matter with the Plaintiff and or the attorney of the Plaintiff at the time when he was called to be a witness in the matter. He contradicts the evidence in the chief of the Plaintiff. His evidence does not corroborate the evidence of the Plaintiff in material respects. His attempted corroboration by way of description of the Plaintiff's version of the rubber bullets being fired at the Plaintiff head/face is incredible. The evidence of Mr. Mamba can only be described as improbable and biased given his long standing relationship with the Plaintiff.

[25] On a preponderance of probabilities of the version of the plaintiff and the witness this court finds that version to be highly improbable.

[26] This court finds both the plaintiff's evidence and that of his witness to be inconsistent, unreliable and not credible and accordingly rejects same.

[27] Whilst the court's take a dim view of police brutality this view cannot be imposed on the police where the evidentiary burden of proof is lightened and or shifted.

[28] The Plaintiff has failed to discharge the onus of proof, which rest squarely upon him.

ORDER:

[29] The Plaintiff claim is dismissed with costs.



S. MEERSINGH

ACTING JUDGE OF THE HIGH COURT

CASE NUMBER: 81020/2015

HEARD ON: 22 October 2021

DATE OF JUDGEMENT: 14 February 2022

FOR THE PLAINTIFF: ADV T TSHIVHASE

(Instructed by: Makapan Attorneys)

FOR THE DEFENDANT: MR NEL

(Instructed by: State Attorney)