



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the appeal of

Appeal Case No: A110/15
Court a quo Case No 23186/07

**THE MINISTER OF POLICE
SE MULLER**

**FIRST APPELLANT
SECOND APPELLANT**

and

PAUL J DANIELS

RESPONDENT

Coram: DLODLO & ROGERS JJ

Heard: 27 MAY 2016

Delivered: 1 JUNE 2016

JUDGMENT

ROGERS J (DLODLO J conc):

[1] The respondent sued the appellants in the court a quo for damages for assault and unlawful arrest and detention. I shall refer to the respondent as the plaintiff and the second appellant, who is a captain in the South African Police Service, as Muller. The first appellant is the Minister of Safety and Security. Mr Nel and Mr Salie SC appeared for the plaintiff and defendants respectively at the trial and on appeal.

[2] In his summons the plaintiff alleged that as a result of the assault he had to undergo medical treatment, had lost past and future income and experienced pain and suffering. He claimed a generalised amount of R100 000.

[3] The defendants denied that Muller acted unlawfully. They pleaded that Muller lawfully arrested the plaintiff for committing violations of the National Road Traffic Act 93 of 1996 in Muller's presence and that Muller only used such force as was necessary for this purpose.

[4] There was a criminal prosecution against Muller. The outcome does not appear from the record. However documents from the docket and parts of the oral evidence were referred to during the civil trial.

[5] The onus rested on the plaintiff to prove unlawful assault. The onus rested on the defendants to prove that the arrest and detention were lawful in terms of s 40(1)(a) of the Criminal Procedure Act 51 of 1977.

[6] The incident occurred shortly after 07h00 on 20 November 2006 in Voortrekker Road, Maitland. The plaintiff was the driver of a taxi. Muller was returning to the Woodstock Police Station from nightshift.

[7] The plaintiff's case was in summary the following. He dropped off some passengers near the traffic lights at 16th Avenue. Muller, who was in a police van, stopped and told him it was a no-stopping zone. The plaintiff explained that the traffic light was red. Muller said that the plaintiff should not mess around with him so

early. They went on their way, with the plaintiff behind Muller. The plaintiff wanted to get past Muller but the latter switched from lane to lane to prevent this. This continued until the traffic lights at 5th Avenue. There the plaintiff got out and went to Muller's van, asking him why he was driving like a road hog. As he turned, Muller grabbed him from behind and hit him. The plaintiff pushed him away, returned to his taxi and proceeded on his way. At the traffic lights near ShopRite the plaintiff's path was blocked by several other police vans, Muller having radioed assistance. Muller and other policemen punched and kicked him and bundled him into Muller's van. He was taken to Maitland police station and placed in a holding cell where he was further assaulted and lost consciousness.

[8] It is common cause that not long afterwards the plaintiff was released into the care of his friends after Muller had issued fines for the no-stopping offence, for the use of abusive language in public and for the lapsing of the plaintiff's taxi permit. According to the plaintiff's friends, they had to carry him out. They took him to a doctor who recommended they take him to Tygerberg Hospital. He was examined there by a Dr Smith and discharged the next morning.

[9] The defendants' version was that at 16th Avenue the plaintiff nearly caused an accident by stopping suddenly to offload passengers. In warning him Muller introduced himself as a police captain. Muller denied having zigzagged in front of the plaintiff. At the traffic lights at 5th Avenue the plaintiff swore at him for driving like a pig. Muller warned him about swearing at a police officer. The plaintiff was undaunted and threatened to beat him up. Muller got out of his van and placed him under arrest for swearing in public, for threatening him and for the no-stopping offence. The plaintiff grabbed him and said that Muller was not going to arrest him. He again threatened Muller. The latter managed to manoeuvre the plaintiff towards the back of the police van but as he tried to open the door Edward Du Plooy, the plaintiff's taxi assistant, pushed Muller away. The plaintiff and Du Plooy drove off. Muller radioed for backup. Several other vans arrived and Muller arrested the plaintiff near ShopRite. The plaintiff accompanied him to the back of the van. It was not necessary to use force. At the police station the plaintiff was placed in a holding cell while Muller wrote up the docket. While he was doing so the plaintiff grabbed his stomach in pain, knocked over a chair and then appeared to suffer an epileptic fit,

foaming at the mouth. Muller summoned an ambulance. Before the ambulance could arrive he was persuaded to release the plaintiff into the care of his friends. He first issued the fines previously mentioned. By this stage the plaintiff was conscious and able to walk out of the police station.

[10] The plaintiff's version was corroborated in material respects by Alphonso Jantjes, who was a guard in the taxi behind the plaintiff's taxi, and by Du Plooy. Both testified about the way Muller zigzagged in front of the plaintiff's taxi, as if he were taunting him. They also portrayed Muller as the person who initiated physical aggression at the 5th Avenue intersection. Du Plooy, though not Jantjes, also witnessed the assault near ShopRite. Both of them saw at the police station that the plaintiff's face, arms and stomach was swollen and bruised. To this may be added the consideration that it is inherently unlikely that the plaintiff would have confronted Muller at 5th Avenue and remonstrated about his driving unless Muller had been driving provocatively.

[11] The plaintiff and his witnesses formed a favourable impression on the magistrate. I should observe that Jantjes' credibility was impugned in one material respect. In his docket statement he claimed to have observed the assault which took place near ShopRite. In his oral evidence in the court a quo he claimed not to have seen the assault because his taxi had driven past and parked. Docket statements are not always taken down accurately. It was not shown that he had given inconsistent evidence under oath at the criminal trial. If he had wanted to lie on behalf of the plaintiff in the civil trial, he could easily have testified that he saw the assault.

[12] Muller did not impress the trial court. In regard to the incident at 5th Avenue, Muller's version derived some support from William Matheze, a co-parishioner of Muller's who happened to be outside a nearby shop. Although Matheze's impression was that the plaintiff was the aggressor, he was not close enough to hear what passed between them. It seems not to have been sufficiently dramatic to detain him because he went into the shop and when he came out a few minutes later both Muller and the plaintiff were gone. The defendants also called Sgt Petersen who was one of the policemen in the backup vans. He testified that there was no assault

during the plaintiff's arrest. At one stage he said he (Petersen) had taken the plaintiff out of his taxi; later he said Muller had done so. Initially he said that the plaintiff had got into the back of Muller's van on his own; later he said Muller loaded him into the van.

[13] The defendants called two police officers who were on duty at the Maitland police station. Their evidence did not add much. Insp Steenkamp saw the plaintiff lying on the floor of the cell apparently suffering a fit but did not see the build-up to this incident. Capt Thiart testified that the plaintiff was very rowdy as he came into the police station, wanting to know why he had been arrested (that he should have so complained is consistent with his version that he was not told why he was being arrested). No assault took place in Thiart's presence but he does not claim to have been in the vicinity of the holding cell when, according to the plaintiff, he was punched and kicked.

[14] On 9 April 2008, ie about 17 months after the incident, the plaintiff was examined by Dr Vlok, the head of orthopaedic surgery at Tygerberg Hospital, apparently for the purpose of preparing an expert report on the plaintiff's behalf. The plaintiff did not call Dr Vlok as a witness and the defendants then chose to do so. Dr Vlok did not observe any lasting injuries. Without objection Dr Vlok in chief referred to an affidavit by Dr Smith which recorded the latter's observations at Tygerberg Hospital on 20 November 2007. According to that affidavit the plaintiff sustained blunt trauma to his head, neck and abdomen. The hospital notes show that the medical staff were sufficiently concerned that they performed a chest x-ray, a brain scan and an ultrasound. In cross-examination Dr Vlok was referred to Dr Smith's evidence at the criminal trial to the effect that the plaintiff's stomach looked distended. Dr Vlok said there was no doubt that the plaintiff had suffered blunt-force trauma.

[15] In the court a quo Mr Salie put Muller's version to Dr Vlok and invited him to say whether the injuries observed by Dr Smith might have been caused during the tussle at 5th Avenue as described by Muller. Dr Vlok replied that this could well be the case. Before us Mr Salie submitted that this important evidence had been ignored by the magistrate. It is unfortunate that the magistrate did not deal with Dr

Vlok's evidence. Nevertheless, I do not believe it assists the defendants. His opinion that the plaintiff's injuries were consistent with Muller's version was highly speculative and not properly motivated. I think it most improbable that the blunt force trauma suffered by the plaintiff could have come about as Muller described. According to Muller the physical tussle at 5th Avenue constituted 'minor' or 'light contact', a 'wrestling' or 'pushing and pulling', not a fight. There were no punches (though according to Muller the plaintiff wanted to hit him). On Muller's version the plaintiff must have suffered the blunt force trauma at 5th Avenue because no force was required when the plaintiff was arrested at ShopRite and no violence took place at the police station. This means that the plaintiff, having suffered blunt force trauma, got into his taxi and continue driving, which seems implausible.

[16] I have taken into account the possibility that at least some trauma may have been suffered during the fit which the plaintiff suffered in the holding cell. According to Muller the side of the plaintiff's head hit against the floor several times as he was convulsing. There is nothing to gainsay the evidence of the plaintiff and his mother that he has never previously or subsequently had a fit. He must have suffered some significant violence to induce a fit on this particular occasion. I find contrived the notion that the fit could have accounted for any significant part of the blunt force trauma which Dr Smith subsequently observed.

[17] In the circumstances, I do not think we have grounds to interfere with the magistrate's factual findings in favour of the plaintiff and against the defendants.

[18] On this basis, the defendants did not in my view prove on a balance of probability that the plaintiff committed an offence justifying his arrest. Despite there being some dispute about the no-stopping offence, I am prepared to accept that the plaintiff contravened the law. However Muller chose to warn the plaintiff, not charge him, far less arrest him. The plaintiff's subsequent behaviour could not justify an arrest for the no-stopping offence.

[19] In regard to what happened at the 5th Avenue intersection, it was not shown that the plaintiff was not entitled to remonstrate with Muller, given his deliberate zigzagging in front of the plaintiff's taxi (though it was foolish for the plaintiff to have

done so). On the plaintiff's version he did not use foul language. However, and even if (as Muller claims) the plaintiff enlivened his remarks with an expletive starting with the sixth letter of the alphabet, this display of annoyance could not in our modern society be typified as conduct constituting a criminal offence or justifying arrest. The legal source of the offence was not pleaded or identified in argument.

[20] On the plaintiff's version he also did not threaten Muller with violence. Even on Muller's own version, the plaintiff's supposed threat to beat him up (expressed in colourful vernacular) was not a real threat. The plaintiff was standing in the road and Muller was behind the wheel of his police van. Muller did not say that the plaintiff showed any signs of attacking him in his van. It must have been obvious to Muller that the supposed threat was simply a further expression of the plaintiff's anger at Muller's driving and that the plaintiff would return to his taxi since the traffic light would shortly turned green.

[21] When we asked Mr Salie in argument what offence the plaintiff committed in making the supposed threat, he replied that it amounted to an assault. It is true that assault may be committed by conduct which inspires fear that force will be applied (Snyman *Criminal Law* 6th Ed at 450-451). We were not addressed on the requirements for assault in this form. According to the author just cited, there must be a threat of immediate violence and the victim must subjectively believe that the perpetrator intends to carry out the threat, the essence of this form of assault being the intentional inculcation of fear of bodily harm. Assault was not pleaded as one of the offences committed in Muller's presence. Since both sides' versions were fully canvassed in evidence, I would not be inclined to be technical about the pleadings. However Muller's evidence falls well short of establishing that the plaintiff's words engendered in him a belief that he was in imminent danger of attack. There was only physical contact because Muller chose to get out of his van and confront the plaintiff.

[22] The defendants thus did not discharge the burden of proving that an offence was committed in Muller's presence. Even if technically some offence was committed, Muller could not in all the circumstances properly have exercised his discretion to effect an arrest. I am satisfied on this latter point even if the onus was on the plaintiff to establish that the arrest discretion was improperly exercised. I think

Mr Nel's submission is probably correct that the incident escalated into a personal affair between Muller and the plaintiff and that the former eventually abused his authority as a policeman in order to assert his ascendancy over the plaintiff.

[23] The plaintiff discharged the burden of proving that he was assaulted. Since the arrest was unlawful, any physical force used in effecting it was unlawful. I should add that even if the arrest was justified, it is perfectly clear that excessive force amounting to an assault was employed. The plaintiff's injuries are not explicable on any other basis.

[24] In regard to damages, the magistrate awarded R25 000 in respect of the assault and R25 000 in respect of the unlawful arrest and detention. Mr Salie submitted that no more than R10 000 should have been awarded under each head. Both awards appear to have been made as general damages although there was evidence that the plaintiff had been off work for about two months. We cannot interfere with these awards in the absence of material misdirection. The authorities cited by Mr Salie do not persuade me that we are entitled to intervene. I think I might have been inclined to award somewhat more in respect of the assault (which was serious even though it did not result in permanent injury) and somewhat less in respect of the arrest and detention (which was no more than an hour or so) but that is not the question.

[25] The magistrate ordered costs on the attorney and client scale. He did not give reasons for so doing. The unlawfulness of Muller's conduct is reflected in the award of damages. There was nothing improper about the way the defendants conducted the litigation. I am not aware of a general practice of ordering defendants in these types of cases to pay costs on a special scale. I thus consider that we should amend the magistrate's cost order. Mr Salie did not submit that success of this limited kind should affect the cost of the appeal.

[26] The following order is made: (i) Para 4 of the court a quo's order of 14 September 2012 is amended by deleting the words "on attorney/client scale". (ii) Save as aforesaid the appeal is dismissed. (iii) The appellants shall pay the respondent's costs of appeal, the one paying the other to be absolved.

ROGERS J

DLODLO (conc)

APPEARANCES

For Appellants

Mr M Salie SC

Instructed by

The State Attorney

4th Floor, Liberty Life Centre

22 Long Street

Cape Town

For Respondent

Mr JAB Nel

Instructed by

Laubscher & Hattingh

c/o Smith Tabata Buchanan Boyes

8th Floor, 5 St George's Mall

Cape Town

