



Republic of South Africa

Stenographer

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

CASE No: A 259/09

In the matter between:

H KRUGER

APPELLANT

And

THE MINISTER OF SAFETY & SECURITY

FIRST RESPONDENT

GARTH DEAN MULHOLLAND

SECOND RESPONDENT

JUDGMENT DELIVERED ON : FRIDAY 12 NOVEMBER 2010

HENNEY, AJ:

Introduction

[1] The Appellant, a photo journalist with the Independent Newspapers, instituted an action for damages in the amount of R25 000 against the First and Second Respondents in the Magistrate's Court, Wynberg. The Second Respondent is a police reservist who at all times acted in the course and scope of his duties for the First Respondent.

[2] The Appellant alleges that this claim arose out of an assault committed by the Second Respondent on 8 November near Hout Bay. According to the pleadings, the Second Respondent assaulted him repeatedly by kicking him in his stomach. The Second Respondent further prevented him from taking photographs at the scene where there was a public protest. Finally, he also prevented him from performing his duties, by dispossessing him of his camera.

[3] The Second Respondent denied that he acted unlawfully. He further admits being involved in an altercation with the Appellant. He further stated that he had pushed the Appellant and when the Appellant hindered him in the execution of his duties of attempting to assist a person, he resisted an attempt by the Appellant to free a suspect by positioning his one foot in the Appellant's midriff and pushing him away.

[4] After evidence was lead in the court *a quo*, the Magistrate dismissed the Appellant's claim with costs. The Appellant now appeals against that decision. The main attack against the judgment of the court *a quo* is based on the overall findings of the court on the merits of the case of the Appellant.

[5] Counsel for the Appellant contends that the court *a quo* should have found that the Respondents had failed to discharge the onus placed on them. Moreover, that the court *a quo* was wrong in preferring the version of the Respondents above the version of the Appellant.

Facts which are common cause

[6] The following facts seem common cause or not in dispute:

a) the Appellant and one, Candice Bailey ("Bailey") were present at a protest scene on

8 November 2006 in Hout Bay;

- b) the Second Respondent and other members of the South African Police force were in attendance and were busy with official police duties;
- c) the Applicant and Bailey arrived on the scene as members of the media to report on the protest and take photographs of the scene;
- d) the Second Respondent at some stage, on the instructions of his commanding officer, was in the process of apprehending one of the protestors, Mr Plaaitjies, also known as Rasta;
- e) whilst this was taking place, the Appellant took photographs of the scene;
- f) the Second Respondent requested the Appellant not to take any photographs and to leave the scene;
- g) they were involved in an altercation.

Evidence for the Appellant

[7] Briefly stated, the evidence of the Appellant and his witness, Bailey, was as follows:-

(I) The Appellant

- (a) The Appellant accompanied Bailey to Hout Bay. On the day in question, they arrived at Imizamo Yethu Township, where members of the public were busy protesting. The police was already on the scene. He started to take photographs. The police were charging the protestors and he ran after them in order to take photographs.
- (b) He observed what was happening and saw the police manhandling the people. The police was busy with one specific person they apprehended. He was about two to three metres away from them. At that stage, the Respondent told him that he was not allowed to take photo's. He kept on taking photo's. He was again told not to

take photo's. The Respondent kicked him. After he took another photo, he was again kicked on his chest.

- (c) He cannot remember what the other police members were doing when this happened to him. He realised that the Respondent did not want him to take photo's as it may be sensitive to him and his colleagues. He turned around started to move away from the scene and took the memory card from his camera. Thereafter, they took his camera.
- (d) He can't exactly say where Bailey was at that stage. The next day someone from his office went to Hout Bay Police Station to get back his camera. He further testified that the police tried to keep the atmosphere calm, they were non-aggressive whilst the crowd was disorderly. The police officers ran after or tried to apprehend the leader of the crowd, but during this time they were also aware of his presence. He denies that he tried to come to the assistance of a person that the police had apprehended.
- (e) After the first kick, he felt no pain. He also states that he was kicked twice and not repeatedly as it appears in the Particulars of Claim when it was shown to him. He cannot exactly say where on his body he was kicked but he knows he was kicked in his stomach area. He felt pain in his chest, stomach and upper body. He also never went to see a doctor. He was never detained. At the time when this happened, the Appellant explains that he was shocked and he could not believe that the Second Respondent would resort to such action.

(II) **Candice Bailey**

Her evidence in many respects is similar to that of the Appellant, except where she says that the Appellant was in front of her. She only remembers seeing the Second Respondent kicking the Appellant once. At that stage, she was right next to the Appellant.

The Appellant may have been kicked for a second time, she cannot after three years, remember all the details. She is adamant that she is not saying that she does not have any knowledge, she cannot remember whether he was kicked for a second time. She denies that the Appellant attempted to be of assistance to the person the police attempted to arrest.

[8] Evidence for the Respondents

(I) The Second Respondent

The Second Respondent, Mr Garth Dean Mulholland, was the first witness for the Respondents. A brief summary of his evidence is as follows:

- (a) That on 8 November 2002, he was on duty as a reservist for the South African Police Services at Imizamo Yethu, Hout Bay. He was part of a group of policemen who was on duty to monitor and control the crowd involved in a protest action. A person known as "Rasta" was inciting the crowd and he was instructed by his superior officer to reprimand him. He did this by grabbing hold of him, as he put it, in a "bear hug". Whilst holding him, the Appellant who had no press card was told to leave the scene because it was an illegal gathering.
- (b) The Appellant came towards him. He pushed the Appellant away with his foot because he felt that he was getting too close to him and was in his personal space. He denies kicking the Appellant and says that the Appellant's presence had incited the crowd.
- (c) He testified that he had to let the person by the name of "Rasta" go at the time the Appellant approached him. In cross-examination, he later explained that what he meant by "reprimanded", was to grab hold of this person with the name of "Rasta". He says that when saying the Appellant was inciting the crowd he did not mean he

was leading the crowd.

- (d) He also denies that he deliberately kicked the Appellant. The Appellant was not arrested, there was no attempt to arrest him and he was not charged with any criminal offence. He further states in his evidence that he felt threatened by the Appellant who had a camera and stood a metre away from him. He accordingly decided to push him away.

(II) **Christian Worrall**

- (a) Christian Worrall, a colleague of the Second Respondent, was on duty with him on the day in question. His evidence in chief corresponds with that of the Second Respondent. He further states that at the scene the Second Respondent held onto Mr Plaatjies alias "Rasta". The Appellant was not taking any photo's. He was too close to focus his camera.
- (b) The Appellant was in the close personal space of the Second Respondent. He heard the Second Respondent saying to the Appellant to move out of the way. The Appellant did not do anything in particular to interfere with the Second Respondent. Worrall further testified that while the Second Respondent had "Rasta" in a grip, other members of the police were trying to move his hand away.
- (c) The camera was taken away from the Appellant because he would not identify himself and the reason for this was, so that he could come to the police station to identify himself. The Appellant ran away from the scene and it was not a priority to run after him or apprehend him.

Evaluation

[9] The Appellant's main grounds of appeal are that the Magistrate erred in his finding of facts against the Appellant, and more particularly:

- (i) the Magistrate erred in finding that the Appellant interfered with members of the South African Police Services ("SAPS") in the execution of their duties.
- (ii) the Magistrate erred in finding that the Appellant and his witness, Bailey, were not credible witnesses.
- (iii) the Magistrate erred in not holding that the Appellant was assaulted by the Second Respondent and members of the SAPS by being kicked twice in the abdomen and having his camera forcibly removed from him.

[10] It is trite that a court of appeal will not generally interfere with the factual findings of a lower court unless, compelling reasons exists for it to do so. This is especially so where the credibility findings upon which its findings are based, are plainly wrong (**R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 700). In this regard, also see **Santam Bpk v Biddulph** 2004 (5) SA 586 (SCA) at page 589 para 5, where it was held;

"Whilst a Court of Appeal is generally reluctant to disturb findings which depend on credibility, it is trite that it will do so where such findings are plainly wrong."

The court also says further: *"This is especially so where the reasons given for the finding are seriously flawed"*.

[11] The Magistrate, in its assessment of the evidence, found discrepancies in the version of the Appellant. In the Particulars of Claim it is stated that he was kicked repeatedly. The Appellant testified he was kicked twice. On a close scrutiny of the Appellant's evidence, it would seem that he was consistent in his claim that he was kicked twice. A report to the Independent Complaints Directorate by his attorney soon after the incident, also support this version. In cross-examination, the Appellant was consistent in

his version that he was kicked twice. If one has regard to these factors, it is more probable that he was kicked twice.

[12] If one has to have regard to the quality and weight of his evidence in court, these discrepancies, if it can be called that, cannot be regarded as so material to negate his evidence in court. Therefore, despite this, in my view it does not affect the veracity of his *viva voce* evidence.

[13] I am further of the view that the court *a quo* was wrong in finding that there were contradictions between the evidence of the Appellant and the witness, Bailey, as to the number of times that he was kicked. The Appellant says he was kicked twice by the Second Respondent, whilst Bailey testifies that she can only recall that the Appellant was kicked once.

[14] A further aspect that the Magistrate failed to consider is the fact that this was not a static scene. It was a scene of public unrest, where people were running around and the recollection of witnesses to such a scene almost three years thereafter in precise detail, is almost impossible. It is also clear that the Appellant and Bailey had observed the scene from different vantage points. Bailey was behind the Appellant who ran in front of her.

[15] In my view, the Magistrate was unduly harsh and critical in his assessment of the evidence of the Appellant, but the same cannot be said of his assessment of the evidence of the Respondents. The version of the Respondents' changed during the course of the trial. It was initially put in cross-examination to the Appellant that he tried to release "Rasta" by pulling at the policeman's arms.

[16] In the evidence of the Second Respondent and the witness Worral, both of them testified that the Appellant never actually interfered by trying to assist "Rasta" by pulling at the Second Respondent's arm as it was put in cross-examination. The evidence of both the Second Respondent and Worral was that the Appellant was merely in the personal space of the Second Respondent, at the stage when the Second Respondent pushed him away with his foot. Whilst Worral said in his evidence that members of the public were breaking "Rasta's" hand away from Mullholland's grip.

[17] From the record it is also clear that the Second Respondent, Mullholland, was not an impressive witness. He was argumentative and evasive at times. An impression was created in his evidence that throughout the incident he had held "Rasta", and because of the interference of the Appellant, "Rasta" then managed to escape. Later, during cross-examination of both Mullholland and Worral, it would seem that this was not the case. According to photographs that were shown, it was someone else, an Inspector Greeff, who had held "Rasta". This is another aspect of the Respondents' evidence that was critical that the court *a quo* failed to consider.

[18] In my view the evidence of the Appellant is consistent and is corroborated by the evidence of Bailey and should have been accepted. There is an overwhelming probability in favour of the acceptance of the evidence of the Appellant.

[19] The Respondent's, on their own version, contend that the Second Respondent had pushed the Appellant away with his foot, because of him being in his personal space. This can hardly be regarded as sufficient ground of justification for his actions and even on this version, his actions are unlawful. The version of the Appellant, however, for the reasons stated above are more acceptable and probable.

Finding

[20] On the evidence that is common cause and undisputed, the objective facts and probabilities, I am of the view that the Magistrate erred in not holding that the Appellant was unlawfully assaulted by the Second Respondent.

Damages

[21] As regards the damages suffered, it is clear that there was an unjustified and unwarranted assault on the Appellant. The Appellant was a photo journalist who had a legitimate reason to report in the public interest about the protest action on this specific day. What I find aggravating is the fact that the perpetrator was a police officer who thought it more important at that stage to confront these two journalists than to execute his duties.

[22] In addition to this, the camera of the Appellant was without good enough reason confiscated and Bailey's notes were destroyed.

[23] The Appellant did not suffer any physical injuries. He suffered from delayed pain. The pain appears to have been negligible as he did not require medical treatment. The unlawful assault took place during the course of his work as a photographer for a newspaper, in the presence of members of the public. The trauma of the incident must have affected his feelings, his dignity and his reputation. He accordingly, suffered *contumelia* and is entitled to damages. I am of the view that an award of R10 000 is just and equitable.

The Order

[24] In the result, I will propose the following order:

- (a) The appeal succeeds with costs.
- (b) The order of the trial court is set aside and substituted by the following:

"Judgment is granted in favour of the Plaintiff in the sum of R10 000 (ten thousand rand) in respect of general damages and contumelia, together with interest at the rate of 15,5% (fifteen and a half per cent) per annum from 30 October 2007 to date of payment and costs."



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RCA HENNEY

I AGREE AND IT IS SO ORDERED.



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