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**IN THE NORTH GAUTENG HIGH COURT,
PRETORIA (REPUBLIC OF SOUTH AFRICA)**

Case No.: 50230/08

Case heard: 2010-09-10-2010-09-22

Date of Judgment: 2010-09-08

In the matter between:

APRIL TSANANA MAHLANGU

PLAINTIFF

and

MINISTER OF SAFETY & SECURITY

DEFENDANT

JUDGMENT

Hiemstra AJ

[1] The plaintiff claims damages from the defendant consequent upon injuries he sustained on 3 March 2008 in Kwamhlanga, Mpumalanga during an arrest by members of the South African Police Service (the policemen).

[2] I ruled at the commencement of the trial that the issue of liability be separated from the issue of the quantification of the plaintiff's damages and postponed the issue of damages *sine die*.

[3] The plaintiff contends that he had been assaulted during the arrest in consequence of which he sustained a serious spinal cord injury resulting in partial paralysis of his lower limbs.

[4] The defendant contends that the policemen arrested the plaintiff as a result of a complaint that the plaintiff had raped a deaf-mute woman, N S (the complainant) at gunpoint. The defendant further contends that the plaintiff, after the arrest, had attempted to escape as a result of which one of the policemen, Constable Msiza, tackled him from behind causing the plaintiff to fall on his face with Msiza on his back. It is alleged that whatever injuries the Plaintiff suffered were a result of the forceful arrest, which the defendant claims had been reasonable and proportional as envisaged by s 49(2) of the Criminal Procedure Act, 51 of 1977, after the Plaintiff had tried to escape.

[5] It is common cause that the policemen acted within the course and scope of their employment at all relevant times.

[6] The plaintiffs evidence was briefly the following:

[7] The complainant approached him after he had alighted from a taxi during the evening of 2 March 2008 in the Chris Hani settlement in Kwamhlanga. She was deaf and mute and made him to understand through hand-signs that she was lost and hungry.

[8] He felt sorry for her and took her to a nearby tavern where he bought her a Coke and Simba chips.

[9] The plaintiff was staying in the home of his sister, Poppy Mahlangu, a few hundred metres from the tavern. He agreed that the complainant could stay at the house for the night, and they walked to the house from the tavern.

[10] After arrival, the plaintiff went to his bedroom where he changed his trousers. Thereafter he went to the kitchen to prepare food. The complainant was in the dining room at the time. He went to the dining room but found that the complainant was no longer there. He went to look for her and found her in his bedroom. This led him to check his trouser pockets in which he had left R300 in three R100 notes. The money was gone.

[11] He confronted the complainant but she denied all knowledge of the money. He became angry and started searching her, whereupon she produced the money from the front of her pants. He ordered her to leave the house, but she pleaded with him not to make her go. She started to make advances on him by holding and kissing him and pulling down her pants. The plaintiff said they "reconciled" and they had intercourse.

[12] After the intercourse he went back to the kitchen to continue with the preparation of the food. When he returned with the food to the dining room he found that the complainant had again disappeared. He searched the house and outside area of the house, but she was nowhere. He returned to the house.

[13] Sometime later four armed policemen, in full uniform and bullet-proof vests arrived at the house. They accused the plaintiff of having raped the complainant, and claimed that he had used a firearm in the process. They thoroughly searched the house but

found no firearm. They assaulted him by kicking and pushing him around. He was adamant that he had not been handcuffed at any stage.

[14] The policemen escorted him to the police vehicles that were parked about 100 m down the road from the house. As I understand the plaintiff's evidence, something like the following happened: Upon reaching the back door of one of the vehicles, Constable Msiza grabbed him from behind, locking his arms behind his back. He lifted him off his feet and then pulled him down. In pulling him down, he dropped his body weight on him, forcing him onto his buttocks and his upper body forward so that his face touched the ground. It is common cause that Msiza weighed about 120 kg at the time and that the Plaintiff weighed about 65 kg. He was unable to breathe or to stand up. He asked Msiza to manipulate his neck, as I understand it, to open his airways. Msiza took hold of his head and pulled it upwards. This had the desired effect, but he could still not stand up. Msiza then picked him up and put him into the back of the vehicle. They drove to the police station.

[15] The plaintiff said that at the police station he was still unable to walk and he was pulled out of the police van by his feet and dragged into the station where he was left in a passage for the night. According to occurrence book, he was detained at 03:40 on 3 March 2008. At approximately 07:15 he was taken to the hospital.

[16] Poppie Mahlangu, the plaintiffs sister and the owner of the house, also testified, but her evidence concerns events after the alleged assault and I do not find it necessary to deal with her evidence.

[17] Maria Skhosana is the elder sister of the complainant. The complainant did not

testify, but Maria Skhosana conveyed the following to the legal representatives of the parties, which they accepted as common cause facts: The complainant was residing in the vicinity of the Chris Hani settlement while her sister, Maria, lived at Orange Farm.

- She is 24 years old.
- She was born deaf and mute, but family members have the impression that she can sometimes hear

She has not undergone any formal schooling.

She has the tendency to go walkabout.

- She is, and was at the time, sexually active.

[18] The version of the policemen, as testified by Constables Msiza and Makgalwa, was to the effect that they had received a report of a rape in the area. They proceeded to the address given to them, where they met the complainant and the woman who had reported the alleged rape. The complainant communicated with them through sign language from which they understood her to indicate that the plaintiff had raped her at gunpoint. She showed them where the plaintiff lived and they proceeded, together with the complainant, to the house.

[19] They knocked on the door, but nobody opened. They saw through a window that a television set was on. After knocking repeatedly, one of them shouted that if nobody opened, they would break down the door. The plaintiff then opened and they entered the house. They confronted the plaintiff with the rape and asked him where the firearm was. He denied that he had raped the complainant and that he had a firearm. They searched the house thoroughly but found no firearm. They told him that he was being arrested and handcuffed him. They say that he resisted being handcuffed to such an extent that some of them had to restrain him, while another put on the handcuffs. They

took him outside, found his keys in his pocket, and locked the door. The plaintiff resisted being taken to the police vehicles and they had to lift him from the ground in order to move him forward.

[20] Msiza testified that he was holding on to the plaintiff by his waist band while another policeman tried to open the backdoor of the police vehicle. The policeman who was opening the door struggled with one of the latches and he released the plaintiff for a moment in order to assist with the opening of the door. At that point the plaintiff turned around and ran away. He (Msiza) gave chase for about 2-3 metres and tackled the plaintiff from behind, landing on his back. The plaintiff said that he could not stand up, but Msiza thought that he was feigning injury in order to create another opportunity to run away. He then put the plaintiff into the back of the police vehicle.

[21] Msiza and Makgatwa contradicted each other as to the following:

- Where and by whom the plaintiff had been handcuffed;
 - Who was present when he had been handcuffed;
- Whether force was required to handcuff the plaintiff;
- Whether the plaintiff resisted arrest;
- Who locked the front door after the arrest;
 - Whether the plaintiff resisted being taken to the police vehicles;
 - Whether the back door of the vehicle they intended to put the plaintiff in, had been open or closed;
 - Precisely where the different policemen were when the plaintiff allegedly tried to flee;
 - The direction in which the plaintiff allegedly fled;
 - Where Msiza tackled the plaintiff.

[22] Mr Strydom, appearing for the plaintiff, criticised the defendant for not calling the complainant, a forensic nurse who had examined the plaintiff, and one of the other policemen. Constable Thokwane. He argued that I should draw an adverse inference against the defendant for failing to call these witnesses, I cannot draw any inference from the failure to call the complainant and the forensic nurse. Their evidence can shed no light on the alleged assault, or forceful arrest.

[23] I do, however, draw an adverse inference from the failure to call constable Thokwane, one of the four policemen. A disturbing aspect of the case is that it does not seem that the rape charge against the plaintiff had been pursued. It also does not seem that the police officers did anything to investigate the alleged rape, or took the particulars of the complainant. They simply decided to arrest the plaintiff on strength of the hand signs given to them by the deaf and mute complainant. They were called to investigate a charge of rape, but did nothing to investigate or even identify the room where it had allegedly taken place. When asked in cross-examination about the rape charges, both Msiza and Makgalwa said that they knew nothing about that since Thokwane had opened the docket. In addition, he was present at all relevant times and clearly played a prominent role. From the evidence of Msiza and Makgalwe it seems that Thokwane had played a leading role in the events of the night. He conversed with the complainant and gave instructions to the others. If the two witnesses for the defendant had been truthful, he would have been able to clear up the contradictions between them. The suspicion looms large that he was not called because his evidence would only have elicited more contradictions.

[24] I am mindful of the fact that it is difficult for witnesses to accurately describe an incident or a series of events that happen over a short period. They view the situation or

event from different angles and do not necessarily focus on the same aspects. Msiza and Makgalwa testified through an interpreter who often struggled to express himself clearly, and some of the contradictions can be ascribed to faulty interpretation. Based on the contradictions alone, I can therefore not categorically reject their evidence as false. It is therefore necessary to consider the inherent probabilities of the different versions.

[25] I can find nothing inherently improbable in the plaintiff's version. He described the events as best as he could. Admittedly, there was no corroborating witness, who might no doubt have contradicted him in certain details, due to the vagaries of memory and perception. Mr Joubert criticised his evidence in certain respects, and I take note thereof. However, whatever contradictions there may be, they are not serious and do not cast significant doubt as to his overall credibility.

[26] Apart from the serious contradictions and inconsistencies in the evidence of the defendant's witnesses, I find their version so improbable that I have no hesitation in rejecting it in all material respects. I find it impossible to believe that the plaintiff, surrounded by four heavily armed policemen, allegedly hand-cuffed with his hands behind his back, would have made an attempt to flee. The four policemen were so close to the plaintiff that any one of them could easily have stopped him. When this improbability was put to Msiza and Makgalwa, both responded by saying that it was dark and that the plaintiff could have disappeared into one of the stands along the road. This is facile. There was no evidence that it had been a particularly dark night. The policemen had no difficulty earlier seeing the complainant's hand signs and interpreting them, despite the fact that Thokwane was the one who conversed with her. They were mere onlookers. They had no difficulty finding the plaintiff's home and no difficulty

finding their way back to the vehicles. They described in detail where everyone walked in relation to the others when they returned to the vehicles.

[27] I further find it highly improbable that the plaintiff would have sustained the injuries that he did, had he been tackled from behind. I do not understand how Msiza could have landed on the plaintiffs back in the process of tackling him, and even if he did, how it could have caused the spinal injury, it could have winded him, or at worst broken some of his ribs.

[28] I therefore find that the plaintiff had sustained his injuries during an unlawful, intentional assault on him by Constable Msiza.

In the result, I make the following order:

1. The defendant is liable to the plaintiff for the damages the plaintiff sustained consequent upon the assault on him by constable Msiza on 3 August 2008;
2. The defendant is ordered to pay the costs in respect of the determination of the issue of liability.

J. Hiemstra AJ

Acting Judge of the High Court

Date heard: 2010-09-10

Date of judgment: 2010-10-06

Counsel for the plaintiff: G.J. Strydom

Attorneys for the plaintiff: Malcolm Loyns & Brivtk Inc

Counsel for the defendant: S. Joubert SC

Attorney for the defendant: The State Attorney