

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, PORT ELIZABETH

PARTIES:

- Case Number: **739/2007**
- High Court: **Port Elizabeth**
- DATE HEARD: **5 June 2009; 8 June 2009 – 11 June 2009**

DATE DELIVERED: **26 June 2009**

JUDGE(S): **D. Chetty**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant(s): **Adv Mouton/Adv Ayerst**
2. for the Respondent(s): **Adv Gqamana**

Instructing attorneys:

- Applicant(s): **Mr Swanepoel(C/O Ungerer Struwig
Minnaar & Peo)**
- Respondent(s): **Mr Swart (State Attorneys)**

CASE INFORMATION -

Nature of proceedings: **Action for Damages**

Topic:

Key Words: *Delict – Action for damages for assault, arrest and detention.*

Two mutually destructive versions – Plaintiff's version consistent with objectively established facts – Quantum of damages – Unprovoked, senseless attack on defenceless person – Quantum assessed at R307 039, 60, inclusive of psychological counselling

OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No: 739/2007

In the matter between:

APPOLINAIRE NGAMEKAM

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

Coram : **Chetty, J**

Dates Heard : **5 June 2009; 8 June 2009 – 11 June 2009**

Date Delivered : **26 June 2009**

Summary : *Delict – Action for damages for assault, arrest and detention. Two mutually destructive versions – Plaintiff's version consistent with objectively established facts – Quantum of damages – Unprovoked, senseless attack on defenceless person – Quantum assessed at R307 039, 60, inclusive of psychological counselling*

JUDGMENT

CHETTY, J

[1] The plaintiff, a former resident of Cameroon, sought refuge in this country in 1999 as a result of political turmoil in his country of origin. An electrician by profession and imbued with an entrepreneurial spirit he soon ventured into the television and electrical goods business. His business

prospered and in due course he diversified acquiring a restaurant and real estate in Cape Town and Port Elizabeth as part of his business portfolio.

[2] During 2005 he acquired South African citizenship and was issued with an identity document and a passport. Although French speaking he had learnt to speak English albeit not very well. With the effluxion of time his property interests expanded to the extent that he owns various fixed residential properties in Cape Town and Port Elizabeth. He is by all accounts a relatively successful businessman frequently commuting between Cape Town and Port Elizabeth and it is his sojourn in this city during January 2007 which has given rise to this delictual action.

[3] He claims damages for an assault committed upon him by members of the South African Police Services, acting in the course and scope of their employment and for being wrongfully and unlawfully arrested and subsequently detained at the holding cells at the Mount Road police station. The defendant has defended the action placing both the merits and quantum in dispute. At the commencement of the hearing, two bundles, received in evidence as exhibits "A" and "B", comprising documents relating to the merits and quantum respectively, were handed up from the bar, the parties being in agreement that it be admitted without formal proof.

[4] The plaintiff's cause of action is, as adumbrated hereinbefore, founded in delict. In his particulars of claim the plaintiff alleges that at approximately 21h30 on Saturday, 20 January 2007 and the boarding point of a bus

company, SA Roadlink, at the Greenacres shopping area, members of the South African Police Services wrongfully and unlawfully assaulted him, arrested him and thereafter detained him in the holding cells of the Mount road police station. In its plea the defendant, whilst admitting the arrest and subsequent detention, denied not only the assault but moreover the unlawfulness of the plaintiff's arrest and detention. It pleaded that Inspector *Westraadt* (*Westraadt*), whom, it is common case was the arresting officer, sprayed the plaintiff with pepper spray to thwart an impending assault upon him by the plaintiff and another male person after the latter persons had been informed that they were being arrested on reasonable suspicion of being illegal immigrants and the plaintiff, moreover, for being drunk and disorderly in a public place. It will be gleaned from the foregoing that the parties' versions are irreconcilable. The testimony adduced during the trial followed suit but there is however a large body of evidence which stands uncontroverted and which has a decisive bearing not only upon the assessment of the two conflicting versions but moreover on the probabilities.

The undisputed evidence

[5] At approximately 09h30, Sunday, 21 January 2007, the plaintiff was escorted from the Mount Road police cells in Port Elizabeth by two police officials to the Provincial hospital. He had to be assisted to walk for he could not do so of his own accord. He was placed in the rear of the police van and at the hospital once more physically assisted to alight before a wheelchair was found and provided to him. Initial radiographs taken of his right leg

revealed a fracture of the right ankle and the plaintiff was then transported to the Livingstone hospital for treatment. Further radiographic examination of the right ankle revealed an undisplaced fracture of the distal fibula without talar shift necessitating the application of a below the knee plaster of paris cast. Clinical examination revealed bilateral bruising of his hips, a bloodstained mouth, bilateral subconjunctival haemorrhages and moderate swelling of the right ankle. According to the hospital records the plaintiff complained of severe pain in the right leg, right elbow and wrist. Analgesics to alleviate his pain were supplied and eye drops administered to control the irritation in his eyes. Upon discharge from the hospital later the afternoon he was provided with crutches and escorted back to the police cells where he arrived at approximately 3:00 p.m.

[6] During the course of the plaintiff's incarceration that Sunday afternoon a policeman arrived and asked the plaintiff to produce his identity document. The plaintiff complied and handed over his identity document. A few hours later the same police officer returned and took the plaintiff to an office where he informed him that he was free to go but that his identity document would be retained in order that its authenticity be verified. At approximately 17h45 the plaintiff was released from custody together with his co-arrestee, Mr *Alain Kameni (Alain)*, who, it would now be convenient to introduce to the narrative. He was, as recounted herein, detained together with the plaintiff in the police cells at Mount road police station. He is a young man presently in his second year of study pursuing a degree in information technology at Damelin College in Port Elizabeth. He is a Cameroonian national, lawfully resident in this

country having entered our borders with a valid passport. His evidence concerning the events in the cell is not in dispute. He recounted that the plaintiff, on admission to the cell, remained unconscious until the early hours of the next day when he regained consciousness. The plaintiff was disorientated, totally oblivious of his surrounds and with no recollection of the circumstances relating to his incarceration. He complained of cold and *Alain* covered him with what passed for a blanket and provided him with succour until he finally became orientated as to time and place. He recounted how the plaintiff was taken to hospital, his return therefrom and their subsequent release from custody.

[7] As adumbrated earlier, the circumstances under which the plaintiff and *Alain* came to be incarcerated is in issue and the versions of the plaintiff and the defendant mutually destructive as regards those events which occurred after the arrival of *Westraadt* at what I shall, for the sake of convenience, refer to as the bus station. In order to place those events in proper perspective however it is apposite to narrate what occurred prior to *Westraadt's* arrival. In this respect there is only one account, viz. that of the plaintiff, *Alain* and *Alain's* older brother, *Andre Djomjoue (Andre)*.

[8] *Andre* is resident in Port Elizabeth having acquired South African citizenship. He and the plaintiff were well acquainted and the plaintiff had spent the week with him and *Alain* at his residence in Port Elizabeth. On the evening of 20 January 2007 he and *Alain* transported the plaintiff to the bus station at Greenacres to enable the latter to board the 9:30 p.m. bus to Cape

Town. The plaintiff had two (2) items of luggage, a small bag which he described as a document bag and a box containing a moulinex food mixer. Although there is some discrepancy between the plaintiff and his witnesses concerning the exact size and description of his bag I accept the plaintiff's evidence that he had a conventional laptop bag which contained a few items of clothing, personal documents and his passport. Nothing however turns on these discrepancies. What is clear is that the bus driver refused to allow the plaintiff to board the bus with the moulinex box. An exchange of words ensued, the driver demanding that the plaintiff pay an additional amount of R50, 00 for the box and the plaintiff insisting that in that eventuality he be provided with a receipt. The bus driver's intractable attitude led the plaintiff to the company's ticket office to resolve the impasse but to no avail. The office was locked and unmanned and the plaintiff returned to the bus.

The disputed evidence

[9] The plaintiff's version is that en route from the bus he noticed a police vehicle with two occupants and a dog. As he approached the bus, he saw the driver pointing to him remarking "*that's the guy*". Suspecting nothing untoward and of the mindset that the police "*had come to put things right*" he proceeded nonchalantly towards them. *Westraadt* however grabbed him on the front of his shirt, slapped him on the left cheek, uttered an obscenity relating to his perceived status as a Nigerian and kicked him on both legs. When the plaintiff remonstrated, *Westraadt* produced a canister of pepper spray from his side which he sprayed onto the plaintiff's face blinding him. Further kicks felled him

and whilst prone on his stomach felt himself being handcuffed, his arms behind his back. He was then lifted and manhandled towards the police car and forced therein. This proved impossible for two reasons, his size and the manner in which he had been handcuffed. He was then pulled out of the vehicle and thrown to the ground where he lost consciousness only regaining same in the early hours of the following morning.

[10] The plaintiff's travails at the hands of *Westraadt* was corroborated by both Alain and Andre and although there are discrepancies between themselves on the one hand and the plaintiff on the other concerning the sequence of events, I am satisfied that these discrepancies do not in any way deleteriously impact upon the reliability of their evidence. More than two and a half years have elapsed since the incident and the effluxion of time is no doubt the cause of these non-material inconsistencies. I found them to be honest witnesses, who could, had they so wished, embellished their evidence. It is a testament to their honesty that they refrained from so doing.

[11] In evaluating the evidence adduced their version is the only one, objectively considered, which can account for the plaintiff's hospitalisation and is consistent with the injuries sustained by him. *Westraadt*, save for admitting having sprayed pepper spray onto the plaintiff's face, denied the assault. During cross-examination by Mr *Mouton*, *Westraadt* was referred to the injuries sustained by the plaintiff and invited to proffer an explanation. He opined that by falling to the ground after being sprayed with the pepper spray the plaintiff could presumably have fractured his ankle. When asked to explain

the bruising on both hips, he ventured the explanation that after falling the plaintiff could conceivably have risen and fallen again. This explanation is contrived and false. *Westraadt* was an unimpressive witness whose evidence differed markedly from that put to the plaintiff, *Andre* and *Alain*. During *Westraadt's* cross-examination it emerged that there were a number of police vehicles and police officers on the scene and this lends support for *Alain's* evidence that prior to *Westraadt's* arrival on the scene he saw the bus driver talking on his cellular telephone and overheard him saying that “*Nigerians were hijacking the bus*”. This false and inflammable report precipitated the veritable avalanche of police to the scene and explains *Westraadt's* conduct. That of course does not excuse his abusive and aggressive treatment of the plaintiff and *Alain*. The assault upon him was unprovoked, unnecessary and symptomatic of the malaise affecting portions of our society in relation to refugees. This xenophobic violence is to be deprecated. But, this did not end with *Westraadt*.

[12] *Andre* and *Alain* both adverted to the fact that shortly after *Westraadt* and his colleague's arrival on the scene a large contingent of police vehicles and police officials arrived. Both corroborated the plaintiff's version that *Westraadt* initially tried to force the plaintiff into his vehicle but that this proved impossible. They testified that the plaintiff was thrown to the ground and remained prone until a police van arrived whereupon *Westraadt* forced the plaintiff into the rear compartment. *Westraadt's* evidence that the plaintiff and *Alain* boarded the vehicle of their own accord is in conflict with the evidence of both *Andre* and *Alain*. I have no hesitation in rejecting his evidence on this

score as well. In fact on the overall assessment of the evidence the entire body of his testimony is contrived and devoid of any truth. The only acceptable version is that proffered by *Andre* and *Alain*.

[13] I accept that when the fracas started *Alain* sought refuge in *Andre's* vehicle because he had no documents with him. Both *Andre* and *Alain* were arrested, the former on suspicion that he was driving a stolen vehicle. *Andre's* evidence as to what transpired thereafter stands uncontradicted. He was transported to the police station by an unknown policeman who had, at least, some modicum of respect for him for when *Andre* informed him that he had documents to prove his ownership of the vehicle and his status the policeman escorted him to his home where he verified *Andre's* assertions. *Andre's* vehicle had in the meantime been driven to the police station by another policeman and to enable *Andre* to retrieve it, the policeman drove him to the Mount road police station. Before leaving however, *Andre* took *Alain's* passport with him. On arrival at the police station, *Andre* retrieved the plaintiff's passport from the bag which he had left in his vehicle and exhibited both the plaintiff's and *Alain's* passports to the personnel at the charge office. The latter were however unmoved compelling *Andre* to leave the police station in order to enlist the aid of an attorney to secure their release. He furthermore testified that throughout this period the plaintiff was laying unconscious in the passage at the charge office and this once more proves the falsity of *Westraadt's* evidence.

[14] *Alain* was required to carry the unconscious plaintiff on his back to the cell. On the acceptable evidence, there were other police officials on the scene and at the charge office who could not only have intervened but have sought medical assistance for the plaintiff. *Alain's* evidence furthermore that *Westraadt* left the charge office to wash the blood from his hands has the ring of truth given the uncontroverted medical evidence. On a conspectus of the evidence I have no doubt that the plaintiff was assaulted in the manner described by him and his witnesses and its unlawfulness, is beyond question.

[15] That the subsequent arrest and detention were likewise unlawful admits of no doubt. It is obvious that the charge that the plaintiff was drunk and disorderly and, a fortiori, the arrest and detention justified, was a spurious one. The plaintiff, *Andre* and *Alain* all testified to the plaintiff's state of sobriety. The charge of being drunk and disorderly was clearly an afterthought to justify the arrest when it became evident later that evening following the arrival of *Andre* with their passports which proved that neither the plaintiff nor *Alain* were illegal immigrants. *Alain* corroborated the plaintiff's version that early the Sunday morning he produced his identity document to a person who, given his civilian dress, the plaintiff considered to be an advocate. When *Westraadt* was asked to explain the curious anomaly in the handwritten words "*illegal immigrants*" and "*drunkenness and disorderly*" on the document styled, notice of rights, (exhibits "A1" and "A19") which he alleged the plaintiff was too drunk to sign, his only response, nonsensical at that, was that there did not appear to be any discrepancy. It is furthermore obvious that the plaintiff could not have supplied the information recorded thereon. *Alain's* evidence that he

supplied the information recorded on both his and the plaintiff's notices is readily apparent from the documents. Save for the plaintiff's first name (incorrectly spelt), the other particulars refer to Alain. These documents in fact attest to collusion between Westraadt and the other police officers at the Mount road police station to justify the plaintiff's arrest and detention.

The quantum of plaintiff's damages

[16] The plaintiff initially claimed the sum of R1 383 661,60, particularised as –

“14.1	<i>unlawful arrest and detention</i>	<i>R100 000.00</i>
14.2	<i>unlawful assault and concomitant pain, shock, suffering, discomfort, loss of amenities and contumelia</i>	<i>R100 000.00</i>
14.3	<i>psychological sequelae including general damages</i>	<i>R100 000.00</i>
14.4	<i>past and future loss of earnings</i>	<i>R759 137.00</i>
14.5	<i>past medical expenses</i>	<i>R 4 539.60</i>
14.6	<i>future orthopaedic medical treatment</i>	<i>R194 250.00</i>
14.7	<i>future psychiatric and psychopharmacotherapy</i>	<i>R125 735.00”</i>

[17] The parties agreed that the plaintiff's past medical expenses amounted to R4 539.60 and that the plaintiff was entitled to be compensated therefor. During argument however plaintiff's counsel properly abandoned the claim for past and future loss of income, limited the claim for future orthopaedic and psychological treatment to R6 600.00 and R23 345.00 respectively but persisted with the claim for R300 000.00 in respect of the unlawful assault, arrest and detention and general damages. As adverted to earlier the plaintiff formulated his claim by claiming specific amounts in respect of the assault, the arrest and detention. I can discern no valid basis for the compartmentalisation of the claim in the manner postulated. The evidence adduced demonstrates a continuous course of unlawful conduct on the part of the police officials commencing with the arrest and terminating with the plaintiff's release and for which a globular amount would, in the circumstances, be appropriate.

[18] The assault was unprovoked and the manner of its infliction sustained and brutal. It is unnecessary to repeat its exact parameters save to state that Westraadt's conduct was reprehensible in the extreme. When the plaintiff cried out exclaiming that his leg was broken no-one paid the slightest heed. At the police station it must have been obvious that the plaintiff's comatose condition raised serious concerns. This however went unheeded. Alain had to carry the unconscious plaintiff to the cell where he lay supine until the next day. When the plaintiff showed his identity document to the police the next morning, this should have dispelled any doubt that the plaintiff was not an

illegal immigrant. Notwithstanding, upon his return from the hospital he was once more locked in the cells. This cell was by all accounts filthy and unhygienic.

[19] I have been referred to various cases concerning awards in matters of similar ilk but whilst these are useful for comparative purposes, each award is influenced by its own peculiar facts and circumstances. That the plaintiff suffered excruciating pain admits of no doubt. The medical evidence attests to this. The ordeal he was subjected to raises grave concern and is deserving of the strictest censure. I am satisfied that the invasion of his rights to bodily integrity and personal liberty are sufficiently serious to warrant an award in the amount sought.

[20] The plaintiff's claim for future medical expenses in relation to his orthopaedic injury was based primarily on the evidence of Dr *Mackenzie*. Influenced no doubt by the contrary opinion expressed by Professor *Vlok*, Mr *Mouton* felt constrained to suggest that an 80% contingency factor be applied to Dr *Mackenzie's* estimate for future medical expenses. In my view the evidence adduced is inconclusive to show that the plaintiff will require any further orthopaedic surgical interventions. As regards the claim for future psychotherapy, Mr *Gqamana* did not suggest that the plaintiff's claim thereanent be disallowed. He however suggested that it be limited to 2 or 3 sessions of counselling. Although Prof. *Zabow* has opined that the plaintiff has reached a position of stability and is coping reasonably well, I must defer to the opinion of Mr *Meyer* who recently consulted with the plaintiff and who

expressed the view that further counselling is necessitated. In my view five (5) counselling sessions should however suffice.

[21] As regards costs, Mr *Gqamana* fairly conceded that the defendant was liable to be mulcted with the costs of the French interpreter and liable for the qualifying expenses of Drs *Crafford* and *Mackenzie* and Mr *Meyer*. Mr *Mouton's* plea that the costs of 2 counsel be allowed can however not be sustained. This is clearly not the type of case which warranted the employment of two (2) counsel. In the result therefor I conclude that the plaintiff is entitled to the following award:-

Special damages: R4 539.60 + R2 500.00	=	R 7 039.60
General damages:	=	<u>R300 000.00</u>
	=	<u>R307 039.60</u>

[18] In the result the following order will issue:-

3. There will be judgment in favour of the plaintiff in the sum of **R307 039.60** with interest thereon at the prescribed rate from a date 14 days from the date of this judgment to date of payment, together with costs on the scale as between party and party and interest thereon at the prescribed rate from the date of the taxing master's allocatur to the date of payment.

4. The costs will include the qualifying expenses, if any, of Drs *Mackenzie* and *Crafford* and Mr *Meyer* and the costs attendant upon the services of the French interpreter.

D. CHETTY
JUDGE OF THE HIGH COURT

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