

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO.: 1115/08

In the matter between:

NKOLISEKO POSWA

PLAINTIFF

And

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

BESHE, J:

[1] On the 15th of April 2007, the plaintiff was arrested by South African Police Services (SAPS) members who were employed by the defendant, for possession of dagga.

[2] Plaintiff contends that after the arrest he was assaulted by SAPS members. He now claims compensation for damages suffered by him as a result of that assault.

[3] Damages are claimed under the following heads:

1.1 general damages in respect of unlawful and wrongful assault and the concomitant pain, shock, suffering, discomfort, loss of amenities of life and *contumelia* suffered by him. **R150-000, 00**

1.2 general damages in respect of shock and trauma as well as psychological dysfunction in the form of depression and post-traumatic stress. **R150-000, 00**

1.3 future medical expenses in respect of:

1. 15 sessions of psychological counselling for treatment of post-traumatic stress and depression at R750-00 per session.

R11, 250-00

2.

1. 15 sessions of psychiatric counselling for treatment of post-traumatic stress and depression at R750-00 per session.

R11, 250-00

2. psychopharmacotherapy for an estimated 24 months at R500-00 per month.

R12, 000-00

[4] In support of plaintiff's case, four witnesses testified. A summary of the evidence of the four witnesses now follows *albeit* not in the chronological order in

which the witnesses testified.

[5] Plaintiff's version is that at about 08h00 on 15 April 2007 whilst driving in his motor vehicle a Jetta at Motherwell, a hardbody Nissan double cab van as well as a Condor motor vehicle blocked his way, forcing him to bring his motor vehicle to a halt. Approximately 10 men alighted from the two motor vehicles. He was instructed to alight from his motor vehicle. The men told him they were looking for dagga and searched his motor vehicle. According to him nothing was found inside his vehicle. The men who, it became common cause, were members of SAPS, threatened the plaintiff saying they wanted the dagga and plaintiff was going to produce it.

[6] He was then taken to a secluded spot not far from Coega Road where he was assaulted. His hands were tightly handcuffed from behind his body, his legs bound together with his belt and caused to lie on his back. At that stage he was being kicked with booted feet, struck with fists and a plastic pipe on his back and choked with a tube that was placed over his head and pulled down his face and held down by one of the policemen who was behind his head.

[7] At the time he was kicking and screaming and fearing for his life. He felt the need to defecate and told the police but the assault continued and he ultimately soiled himself. He was then told to go and clean himself in the stream that was nearby which he did in the glare of the policemen. He said that in a bid to save

himself from the assault or being assaulted further he told them there was dagga in his house, whereupon all three motor vehicles drove to a house he shares with his wife Pinky Hulushe which is also at Motherwell.

[8] It is common cause that at that stage plaintiff was a passenger in the Condor and was handcuffed.

According to him, Ms Hulushe as well as other local people were outside their houses watching as the three cars arrived. The policemen got out of the motor vehicles. He called out to Ms Hulushe saying he was being killed and banged his handcuffed hands against the window of the Condor. Ms Hulushe proceeded towards the Condor but the policemen prevented her from going any where near the Condor and took her inside the house.

[9] He was thereafter taken to Motherwell police station where he was charged with possession of dagga and locked up. On the following day, a Monday he appeared in court and was released on his own recognisance. After his release from custody he went to see Dr Biyana who after examining him recorded his findings in a Medico Legal Examination Report (J88) which plaintiff took to the Motherwell police station with a view of laying a charge against the policemen who assaulted him. He however did not get any co-operation from the officer on duty at the police station and was instead advised to go and talk to a lawyer.

[10] Plaintiff testified that as a result of the assault he sustained injuries to his mouth, jaws, back, right leg and both wrists which was as a result of being tightly handcuffed. The marks of the wrists are still visible. He testified that he suffered pain as it was difficult for him to open his mouth or chew. He could not drive and stayed at home for a week during which he could not sleep because of pain. Since the incident he becomes nervous or anxious when he sees a police officer, suffers from insomnia, is depressed, irritable, short tempered and withdrawn as he prefers to keep to himself.

[11] Plaintiff's evidence was confirmed by his wife Pinky Hulushe in so far as plaintiff having left home at around 08h00 and returning at about 12h00 as part of a contingent travelling in three motor vehicles including his Jetta. That he was a passenger in the Condor. She testified that after the three motor vehicles had stopped in an open space in front of their house, she saw plaintiff knocking on the window or banging against the window of the Condor with the back of his handcuffed hands screaming that they are killing him. At this stage the policemen were talking to her questioning her about dagga that plaintiff told them was in the house. She suggested that they should let the plaintiff out of the Condor so that he could point out where the dagga was.

[12] The police refused and insisted she opened the house so that they could search for dagga. They then searched the house, in the process took clothes out of the wardrobe and threw them on the floor. In one room they found six bags of cement, tore open the one on top and spilled the cement on the floor. As the

police were proceeding back to the motor vehicles, she tried to force her way to the Condor but was prevented from reaching the Condor by one of the officers, who also sprayed her face with pepper spray. Thereafter the officers left with the plaintiff still in the Condor where he had remained throughout their stay at the witnesses' premises. They however left plaintiff's Jetta behind.

[13] She testified that she followed the two police vehicles to the police station but did not get any answers. It was later that evening that she received a telephone call from the police advising her that the plaintiff had been detained in connection with possession of dagga and will be appearing in court the following day.

[14] After the release of the plaintiff on his own recognisance the following day, she observed that his mouth was swollen, had scratches and abrasions on his neck, weals on his back, his wrists had lacerations, abrasion on the elbow. Plaintiff complained of painful jaws and he chewed and spoke with difficulty.

[15] After the incident she noticed that plaintiff was withdrawn, less talkative, suffers from insomnia and becomes fearful and nervous upon seeing the police.

[16] Dr Ngubengcuka Biyana examined the plaintiff on the day he was released from detention and noted the following: laceration on his lower lip, marks on his back, bruises on his right knee, laceration on his right knee, tenderness on the neck, and bruises on both his wrists. Dr Biyana also observed that the plaintiff

was withdrawn and agitated. He also testified that he foresaw that assault could lead to major depression and asocial behaviour on the part of the plaintiff.

[17] Dr Tuviah Zabow, a psychiatrist testified that he consulted with the plaintiff some three years after the incident on 31 August 2010. His clinical diagnosis was:

1. Depression (mild residual)
2. Generalised anxiety with situational component.
3. Post-traumatic stress reaction – moderate residual features with partial recovery.

According to Dr Zabow, there is a clear causal connection between the assault and plaintiff's psychological reaction. Adding that, the depression and anxiety are persistent and should be addressed to improve overall functioning capacity of the plaintiff.

[18] In a supplementary report as well as his evidence in court Dr Zabow stated that he is of the opinion that plaintiff requires treatment and counselling consisting in his view of:

- (1) 15 sessions of psychiatric counselling for treatment of post-traumatic stress and depression at the rate of R550-00 per session.
- (2) psychopharmacotherapy for an estimated period of 24 months at an estimated rate of R500-00 per month.

[19] Dr Zabow however conceded that 12 months of psychopharmacotherapy would be reasonable, although it is difficult to predict what will happen in future but that plaintiff will require the treatment due to stress associated with re-living the incident.

[20] As indicated earlier the only witness to testify on behalf of the defendant was warrant officer Collins Lundi Boyce.

[21] His evidence was briefly to the effect that as members of the defendant they received information relating to the plaintiff and possession of dagga. Armed with the description of plaintiff and his motor vehicle they spotted him whilst they were driving around Motherwell. They stopped him and searched his motor vehicle. The search yielded a plastic bag that contained small parcels of dagga. They then questioned him about the origin of the dagga as a result of that questioning plaintiff took them to approximately 5 houses that they searched but did not find any dagga. Thereafter they took the plaintiff to his house where they met Ms Hulushe. They alighted from the motor vehicles in which they were travelling together with the plaintiff. After obtaining permission to search the house they proceeded to do so but did not find any dagga. At the time of the search plaintiff was also inside the house. On leaving the house when an attempt was made to place the plaintiff inside one of the motor vehicles he refused to get in protesting that the dagga did not belong to him that he bought it in Motherwell.

[22] However they managed to place him in the Condor by forcefully pushing him into the Condor when he was digging his heels and refusing to get into the motor vehicle. Warrant Officer Boyce was at pains to describe how plaintiff managed to resist getting into the Condor with his hands handcuffed together.

[23] He denied that the plaintiff was taken to a secluded area where he was assaulted and suffocated by having a tube pulled down his face and that his legs were bound with his belt. He denied that plaintiff was tightly or violently handcuffed.

[24] He confirmed that there were about 11 policemen when they stopped the plaintiff. Under cross-examination he confirmed that plaintiff complained that handcuffs were eating into his flesh and that he then loosened them slightly. He does not recall whether plaintiff complained again or that his wrists were injured. Although he took part in the searching of plaintiff's house he does not recall how many officers entered the house or seeing the six (6) bags of cement inside the house or that one of the bags was torn and cement spread on the floor. But said he could not dispute that it happened or that clothing was thrown on the floor by his companions. He did not hear plaintiff shout that he was being killed calling out to his wife, did not recall Ms Pinky Hulushe's face being sprayed with pepper spray.

[25] It is noteworthy that the defendant does not dispute that plaintiff sustained the injuries that were described by plaintiff and the witnesses who testified on his behalf. Defendant however denies that the injuries were sustained or inflicted during the course of an assault by its members. There is no suggestion that plaintiff had already been injured at the time he was arrested by members of the defendant and no explanation from the defendant as to how the plaintiff sustained those injuries.

[26] Counsel for the defendant *Mr Simoyi* did not assail plaintiff's evidence in any significant way except on two aspects – He argued that the injury to his jaw was an afterthought on the part of the plaintiff because no mention of such injuries was made by the doctor who examined him on the day following the one of the alleged assault – so, *Mr Simoyi* argues is the allegation that he soiled himself during the course of the assault. Because this emerged for the first time during consultation between plaintiff and Dr Zabow some three years after the incident and did not appear on his amended particulars of claim.

[27] Counsel for the plaintiff, *Mr Mouton* countered this argument by submitting that the particulars of claim detailed the manner of assault and not the result of the assault. It is indeed so in paragraph 5.2 plaintiff sets out the manner in which he was assaulted including at 5.2.2 choking and 5.2.5 suffocating with a rubber tube.

The consequences of the assault as detailed in paragraph 6 are said to be bodily injuries including:

6.1.1 an injury to his neck

6.1.2 extensive bruising

6.1.3 contusions and abrasions

6.1.4 psychological trauma and dysfunction in the form of depression and post-traumatic stress and disorder.

6.1.5 emotional shock and trauma

[28] Details of consequences of the assault are not given, such as pain, the degree thereof, anxiety, fear, inability to control bowel movement as a result of choking and suffocation.

[29] In my view the fact that plaintiff's particulars of claim do not contain an allegation that he soiled himself during the course of the assault does not affect his credibility.

[30] *Mr Simoyi* drew the court's attention to very useful authorities as to the approach to be taken by a court when confronted with divergent versions.

[31] The bulk of his submissions however concentrated on what he suggested would be a just and reasonable award for damages and gave the court examples of awards that were given by courts in circumstances similar to the ones that obtained in the present matter.

[32] As was rightly pointed out by *Mr Simoyi* the proper approach to be taken by court when confronted with divergent versions was determined in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 SCA at 14 paragraph 5*** to the following:

“The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows:

To come to a conclusion on 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' 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' 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[33] As indicated earlier in this judgment, not much criticism was levelled at the manner in which the plaintiff and his witness gave evidence. I also could not find any flaws in their evidence. Plaintiff and Ms Hulushe both gave evidence in a clear and cogent manner. They did not contradict themselves or each other. They were both impressive as witnesses. Their evidence regarding the injuries that plaintiff sustained and the effect thereof was to a large extent corroborated by medical evidence that was placed before court. I can find no reason why I should not accept plaintiff's evidence.

[34] The same however cannot be said for defendant's evidence. Warrant officer Boyce who testified in support of the defendant's case did not impress as a witness. His version did not sound probable at all. According to him, they stopped plaintiff's motor vehicle between 11h00 and 12h00, searched his motor vehicle, questioned him, as a result of questioning he led them to approximately 5 houses, each of those houses were searched. They thereafter proceeded to his house where they conducted a search.

[35] What are the probabilities of all this having taken place in approximately one hour. In my view this is an attempt by Warrant Officer Boyce to shorten the time that they spent with the plaintiff so that it would appear that they could not have had the time to take plaintiff to a secluded spot and assault him in the manner he described. He initially denied that plaintiff was handcuffed tightly or violently. But under cross-examination confirmed that at some stage plaintiff complained that the handcuffs were eating into his flesh and that he then loosened them slightly. In a bid presumably to explain plaintiff's injuries, it emerged for the first time when he was cross-examined that plaintiff refused to get into the police vehicle (Condor) after his house was searched. The manner in which plaintiff resisted getting into the Condor seems improbable given the fact that his hands were bound together in handcuffs.

[36] The conclusion that plaintiff's version is more probable is inescapable. Accordingly plaintiff's version is accepted as being true. That being so I am satisfied that the plaintiff has succeeded in showing that he was wrongfully and unlawfully assaulted by employees of the defendant. And that the defendant is liable to the plaintiff for the damages he has suffered.

[37] As regards the quantum of damages to be awarded counsel have referred me to a number of cases as examples of sums that were awarded as compensation for damages suffered in circumstances similar to this matter. I will have regard to those examples as guidelines in the exercise of my discretion as

to what would be a fair and reasonable amount to award and to the extent that the examples may be comparable to the injuries sustained by the plaintiff.

[38] As indicated in paragraph 3 *supra* an amount of R150 000.00 is claimed for general damages in respect of the assault, and R150 000.00 in respect of shock and trauma, depression and post-traumatic stress.

[39] *Mr Simoyi* for the defendant argued that the two heads should be taken together and that an amount of R80 000.00 would be a reasonable and fair amount to be awarded and referred the court to several cases as examples of amounts that were awarded as compensation for damages following assaults. The parties agree that the award for future medical expenses should be subject to a 10% contingency deduction.

[40] In ***Khuselo Sixam v The Minister of Safety and Security Case no. CA 112/2009*** an unreported decision of this division, the appellant had sustained multiple lacerated wounds, five of which were above the knee, three below the left knee, two around the ankle, one on the right thumb, three on the dorsal aspect of the left wrist and two on the palmer aspect of the right wrist and many of the lacerations being deep and having required stitching. The appellant in that case was said to have been traumatised by the attack, but according to the doctor such trauma would not be permanent or long term. An amount of R40 000.00 was awarded for general damages in respect of the assault.

[41] There is no doubt that plaintiff in this matter was subjected to a brutal assault which resulted in a lot of pain, suffering, humiliation, shock, trauma and depression. In my view the plaintiff is entitled to the following award: with the two heads under which general damages are claimed being combined:

General damages: **R170 000.00**

Future medical expenses:

The parties are *ad idem* that a contingency deduction of 10% from future medical expenses will be appropriate in view of the time that has elapsed since the time of the assault and the chances that plaintiff may have recovered to some extent.

The parties also agree that nine (9) months of psychopharmacotherapy at R500.00 per month is reasonable and fair.

In respect of the psychological counselling for treatment of post-traumatic stress and depression, Dr Zabow expressed the view that plaintiff's recovery was impressive and he seems to be coping with what happened to him, he was however of the view that he would benefit from counselling. I am of the view that 12 sessions of psychological counselling for the treatment of post-traumatic stress and depression at R750.00 per session will be sufficient.

In the result the following order will issue:

- a) Judgment is entered in favour of the plaintiff.**
- b) The defendant is ordered to pay the plaintiff:**
 - i) R170-000.00 in respect of damages for assault upon him.**
 - ii) R13 500-00 in respect of future medical expenses**
Less 10% contingencies R12 150-00
 - (iii) Interest in the amount of R172 150.00, calculated thereon at a rate of 15,5% per annum *tempore morae* until date of payment.**
 - (iv) Costs of suite with interest calculated thereon at 15,5% per annum from 14 days from date of taxation until payment, such cost to include qualifying expenses if any, of :**
 - 1. Dr Biyana**
 - 2. Dr Zabow**
 - (v) Costs of an interpreter.**

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For Plaintiff	ADV: P H Mouton
Instructed by	UNGERER STRUWIG HATTINGH POE 28 th – 7 th Avenue Newton Park PORT ELIZABETH
For Defendant	ADV: M Simoyi
Instructed by	THE STATE ATTORNEY 29 Western Road Central PORT ELIZABETH
Date Heard	29 to 31 August 2011
Date Reserved	31 August 2011
Date Delivered	29 September 2011