

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

CASE NO: 870/09

Heard on: 24 & 25 November 2011

Delivered on: 13 December 2011

In the matter between:

XOLANI SIDWELL HOBONGWANA

PLAINTIFF

and

THE MINISTER OF SAFETY & SECURITY

DEFENDANT

JUDGMENT

Makaula J:

[1] The plaintiff issued summons against the defendant for a delictual claim arising from an unlawful assault on him by the members of the South African Police Service while in custody at **Kirkwood Police Station**.

[2] The parties applied for an order that the issue of merits be separated

from *quantum* which I granted.

[3] It is common cause that the plaintiff was arrested and detained on 20 August 2005 for drunkenness. Plaintiff was so drunk that he could not even walk to the police cells. During his incarceration, he was loaded on a wheelbarrow and wheeled to the cells by a policeman only identified as **Klaasen**. In the cells **Klaasen** then tipped him from the wheelbarrow and plaintiff fell on the cement floor. He tipped him with such force that **Mr Xolani Sunshine Jonas**, who was also detained for drunkenness, went to check what was happening. He testified that the plaintiff fell hard on his head hence there was a loud bang which prompted him to go and investigate. He found the plaintiff groaning in pains. He tried to lift him up but in vain. Plaintiff remained in that position until he (*Jonas*) was released at about 5h30 the following day.

[4] The plaintiff stated that before his arrest he had no pain in his neck area. During the day on 20 August 2005 he attended a ceremony where he drank liquor. On realising that he was drunk, he decided to go to his home to sleep. On his way home he was arrested and detained for drunkenness. He passed out at the back of the police van. He did not recall what followed thereafter until the following morning. When he woke up, he felt that his head and neck were very painful. He was released and went to the taxi rank where he boarded a taxi and went home. He took pain tablets from his mother and slept the whole day. The following morning he was taken to **Dr Mncedisi Patrick Tsetswa** who immediately took him, in his motor vehicle, to **Valley**

Hospital for X-rays. Because of the seriousness of the injuries, he was then transferred in an ambulance to **Livingstone Hospital** where he was put on tractions because he had sustained a fracture in his neck.

[5] **Dr Mncedisi Patrick Tsetswa** confirmed the evidence of the plaintiff in so far as it related to him. He examined the plaintiff and discovered that he needed urgent attention hence he used his own vehicle to take him to hospital for X-rays. His diagnosis was that he had an injury on his spine. He referred him to **Livingstone Hospital** for **servical spine X-rays**. Though the quality of the X-rays was poor, he noticed a dislocation on **C2** and **C3** on the spine. He further noticed a subluxation at **C5** on **C6** and decided that he should be seen by an Orthopaedic Surgeon. He opined that the dislocation was caused by extreme pressure/force in the injured area of the neck. He further confirmed that the injury could have been caused by being tipped from a wheelbarrow and more so if the plaintiff fell on his head.

[6] **Dr Basil Louis McKenzie** who is an orthopaedic surgeon testified that he examined the plaintiff on 1 July 2009 and concluded that the plaintiff sustained a severe neck injury associated with transient left-sided upper limb neuromuscular deficit. The specific musculoskeletal injury was a subluxation of **C5** on **C6** with unilateral locked facets. He opined that the injury was consistent with a fall landing with the head on the floor as a result of being tipped off a wheelbarrow. He further opined that was possible if the plaintiff was drunk and not trying to resist the fall.

[7] **Warrant Officer Swanepoel** testified that he was with **Klaasen** when

they arrested the plaintiff. He is the one who locked him up at the back of the van. At that time the plaintiff was not injured and could move his head freely without showing any signs of injury or pains. They took him to the charge office.

[8] The evidence of **Warrant officer Boniswa Majomani** is not relevant for purposes hereof and I shall not deal with it.

[9] The plaintiff's case was closed and so did the defendant without calling witnesses.

[10] **Mr Mullins**, counsel for the defendant submitted heads of argument wherein he restated the law applicable to this matter. It is worth mentioning that having stated the principles applicable he failed to apply them to the facts at hand. Therefore, the heads filed by him are not of assistance to me.

[11] The test for liability has been stated as follows by **Holmes JA in *Kruger v Coetzee***.¹

“For purposes of liability *culpa* arises if –

- (a) *a diligens paterfamilias* in the position of the defendant -
 - i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - ii) would take reasonable steps to guard against such occurrence; and

¹ 1966 (2) SA 428 (A) at 430 E-F

(b) the defendant failed to take such steps.”

[12] The test applicable is an objective one.² The criterion adopted by our courts to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person, the *bonus paterfamilias*.³

[13] The facts of this case clearly show that **Klaasen** by conveying the plaintiff who had passed out and tipping him from a wheelbarrow was really careless in the extreme. It is even worse to do so “*head first*.” The undisputed evidence of **Mr Jonas** is to the effect that when **Klaasen** tipped the plaintiff from the wheelbarrow, the latter fell on his head on the cement floor. **Mr Jonas** even demonstrated by lifting both his hands shoulder high in a tipping manner. Surely by so doing, **Klaasen** should have foreseen the reasonable possibility that the plaintiff could be injured by his actions/conduct. The extent of injuries is not relevant to the enquiry as intimated by **Mr Mullins** that **Klaasen** could not have foreseen that the plaintiff would have sustained the injuries pleaded. What is relevant is whether he should have foreseen that his conduct would result in the plaintiff sustaining an injury. It is mind boggling why **Klaasen** did not solicit assistance from his fellow police officers to lift the plaintiff and place him in the cell on the floor rather than what he did. That is the only reasonable thing he should have done in the circumstances. It is worth observing further that the defendant in his plea pleaded that the plaintiff was not tipped from the wheelbarrow but lifted up and placed on a mat which was on the cement floor. However, no evidence was led to prove this

² *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 SCA

³ Law of Delict: Neethling . Potgieter . Visser: Fifth Edition page 116-117 and the authorities cited therein

allegation. It is clear that **Klaasen** was negligent in his conduct hence an attempt was even made to suggest that the plaintiff was placed on a mat.

[14] The evidence given by **Mr Jonas** was clear and reliable. He testified as to what actually happened as he saw it. He never contradicted himself and never showed any biasness towards the defendant. I accept his evidence. Even the plaintiff testified clearly and was honest enough to say he did not know how he got injured because he was too drunk to know what was happening. He even testified that he was still drunk when he woke up in the morning before his release.

[15] The defendant owed the plaintiff a duty of care whilst he was under arrest and that the unlawful conduct of **Klaasen** caused the injuries plaintiff suffered.

Consequently, I make the following order:

1. The defendant is liable for such damages as the plaintiff may prove as a result of the injuries which he sustained when he was tipped from a wheelbarrow at Kirkwood Police Station on 20 August 2005 and the *sequelae* thereof, those injuries being:

- 1.1 A subluxation of C5 on C6 with unilateral locked facets; and**
- 1.2 Damage to the C6 nerve root on the left with transient left-sided upper limb neuromuscular deficit;**

2. The defendant is ordered to pay the plaintiff's taxed party and party costs in respect of the merits, such costs to include the reasonable and necessary qualifying, travelling and appearance expenses of the following expert witnesses:

2.1 Dr Mncedisi Patrick Tsetswa; and

2.2 Dr Basil L MacKenzie.

3. The defendant shall be liable for interest on the taxed costs at the rate of 15.5% per annum from date of taxation to date of payment.

M MAKAULA

JUDGE OF THE HIGH COURT

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