

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

CASE NO: 3220/12

In the matter between:

F

Plaintiff

and

THE MINISTER OF POLICE

Defendant

Key Words

Delict- Damages- Negligence- Rape of detainee in police custody- Duty of policemen.

JUDGMENT

MSIZI, AJ:

INTRODUCTION:

[1] This is an action for damages arising from the rape of the plaintiff by his cell-mates whilst he was incarcerated at the Walmer Police Station in October 2009.

[2] The plaintiff's claim is founded on a duty of care owed him by the defendant whilst he was in custody. For this, the plaintiff relied on the Preamble and section 14 of the South African Police Service Act, 68 of 1995 ("the SAPS Act"); the Police Standing Order (G361) and sections 7(2); 205(3) 1C; 2; 8(1); 41(1)(c), read together with sections 38, 39(1), 39(2) and section 173 of the Constitution.

[3] The plaintiff claims damages in the sum of R550 945.00.

[4] At the commencement of the trial, Mr Jooste, plaintiff's counsel, applied for the an order that the identity of the plaintiff should not be revealed to protect his minor son due to the nature of the incident in question. I granted that order. Plaintiff shall be referred to herein only as "F".

[5] The following facts are common cause or are facts that are not in dispute:

- (a) The plaintiff was arrested in the early hours of Saturday, 10 October 2009, by the members of the South African Police Service ("SAPS") at or near the intersection of Kempston and Stanford Roads, Korsten, Port Elizabeth;
- (b) After his arrest, the plaintiff was taken to Mount Road Police Station and eventually detained at the Walmer Police Station from 10 October 2009 to 12 October 2009;
- (c) The plaintiff was raped;
- (d) The members of the SAPS acted without within the scope and course of their employment by the defendant. The defendant had a duty of care and/or legal obligation to protect the plaintiff whilst in custody.

THE FACTS

[6] The version of the plaintiff was based on the evidence of his psychologist; the doctor who examined him after the alleged rape; his wife and himself.

[7] Ian Meyer a clinical psychologist testified. The plaintiff had been referred to him for assessment and treatment between June and November 2010. This was eight months after the alleged rape. He also treated the plaintiff such treatment still continued. He had then compiled a medico–legal report for purposes of the court. He re-assessed the plaintiff on 19 May 2012. After the re-assessment he supplemented the original report.

[8] In the medico-legal report he recorded the factual background of the circumstances in which the alleged rape occurred relying on information provided by the plaintiff and his wife during consultation. The large part of his evidence and his report was dedicated to the extent of the trauma occasioned by the rape of the plaintiff.

[9] The plaintiff's wife also testified. Her testimony was that at about 4h00 on Saturday 10 October 2009, she received a call from a person who identified himself as Capt. Singh of the Mount Road police station. Capt. Singh informed her that the plaintiff had been arrested, bail was set at R500; he would be transferred to the Walmer police station at 8h30 therefore she should bring the bail money to the police station before then.

[10] At the Mount Road police station at 8h00 with the R500, she was advised that the plaintiff had already been removed to the Walmer police station and there would be no bail for him. She then proceeded to Walmer police station, where a female officer accompanied her to the cells, to visit her husband. At the cells, she observed other cell-mates staring and sneering and she had a bad feeling about them.

[11] During this visit her husband had asked her to get him food and cigarettes which she quickly went to buy. She returned with these to him. Her husband pleaded with her not to visit again as he was uncomfortable with the sight of him behind bars.

[12] She did not return to the police station. She saw the plaintiff again in court on Monday the 12th where the plaintiff was released on bail. On his release she noticed that he was walking with his legs straddled apart in a strange manner. On quizzing him on how he walked, the plaintiff told her that he had been raped in the police cell in the early hours of that morning. They immediately went to Livingstone Hospital but were referred to the Thuthuzela Centre in Dora Nginza. He told her that whilst in the police cells he had been warned of a plan that was being hatched against him on Sunday and was raped in the early hours of Monday morning.

[13] They only went to Dora Nginza the next day, 13 October as they did not have transport. At Dora Nginza the plaintiff was examined by a medical practitioner then discharged.

[14] She was referred to the particulars of claim where in paragraph 5 the rape was alleged to have taken place in the early hours of Sunday morning and not Monday morning. It was pointed out that this was also consistent with what was contained in the report by Meyer which stated that the rape took place on Sunday morning. She insisted that the plaintiff told her that he was raped in the early hours of Monday morning.

[15] It was after these contradictions on the dates that the Mr Jooste for the plaintiff applied for the amendment of the particulars to reflect that the rape occurred in the early hours of 12 October 2015, which I granted.

[16] The plaintiff also gave evidence. His testimony was that he was arrested in the early hours of the morning of Saturday, the 10th of October 2009. He was initially taken to Mount Road police station later transferred to the police cells at the Walmer Police station. He was placed in a cell where there were twelve (12) males, all African except for one white male who the police removed that same day between 11pm and 12pm. He was kept in that cell from that Saturday morning until early Monday the 12th when he was removed and conveyed to Court with the other inmates.

[17] On the morning of his arrival, the Saturday, his wife visited him in the cell in the company of a female police officer. His wife got him food which was grabbed from him by some of the inmates who were hostile to him.

[18] In the cell he was with African inmates and one white inmate. He had observed that the African inmates were hostile to him giving him dirty looks save for one who was friendly. These inmates spoke in isiXhosa, a language he did not understand. He had enquired from the friendly one what they were saying but this friendly inmate initially would not tell him. Later on, that day, the friendly cell-mate told him not to sleep as the other inmates were planning to do something bad to him. He was not sure what the plan was and when it would be carried out.

[19] During the whole time he was detained in that cell i.e. Saturday 10 October to 12 October in the morning, there were no police visits; inspections of the cells and the inmates were not given any food. Around sunset on Saturday, he saw a coloured policeman who was standing about a metre away from the cells, smoking. He asked this police officer to spare him a cigarette but this police officer refused. He left it at that and went back to sit in a corner in his cell. Later, on the same day, he saw another policeman in the yard who he approached and requested to be moved to another cell because of the warning by the friendly cell-mate. This policeman told him not to worry as there were no other cells for him. He urged him to stay strong. He did not know what this police officer meant by telling him to stay strong. He had not told this police man what the plan against him was.

[20] He remained in the cell that whole night. The cell was full and he did not really have a space on the mat where the others were sitting. He sat against the wall. He remained scared and worried throughout the night and gripped by fear, he was unable to sleep but dozed off at some point and woke up on Sunday morning. Nothing happened to him that night and the next day, Sunday the 11th. He did not approach any police officer after that. He did not see any point of complaining to the police as he had not receive any positive response from the police he requested a transfer to another cell from.

[21] On Sunday night, he did not sleep. He could hardly keep his eyes open though but was too afraid to sleep. Later during the night, over-powered by drowsiness and exhaustion, he fell asleep. He could not tell the time of the occurrence of the rape but it was in the dead of the night probably at midnight of the 11th or early morning of the 12th October.

[22] He was stirred awake from the tired sleep when he felt someone grabbing his arm; pushing his head down to the ground; felt his clothes being ripped-off whilst lying on his tummy on the bare floor. He was then raped. During the attack on him, he could not scream because his mouth was shut. After a while, he passed out. He did not know how many people raped him. When he came to, he could not get up. His anus was sore and there was blood on the floor. It was sore when he walked. The hostile inmates were laughing and the friendly cell-mate did and said nothing.

[23] He did not alert the police or call out for help as he was too afraid of the hostile inmates. The hostile cell-mates threatened him with reprisal if he reported the rape. He rode with the hostile cell-mates to court in the police van. They also warned him not to tell the magistrate as there would be repercussions for him. He complied with the order as he was too afraid for his life.

[24] The first time he spoke about the rape was after his release when walking out of the magistrate's Court. This is when his wife confronted him about how he was walking and he revealed to her what had befallen him in the police cells the previous night.

[25] He was cross- examined extensively on the contradictions between his evidence and that of Meyer. In particular regarding the service of food; police visits and inspection of the cells at the cells during that weekend. In his report 5 Meyer had referred to lunch being brought to the cells on Saturday; supper being served that that same day and to a check of the cells later that Saturday.

[26] He could not explain why Meyer would refer to the service of food at the cells and cell visits. if he never told Meyer that; he admitted that Meyer could not have

received this information from any body other than himself. Initially, the plaintiff would not respond and was pressed, his response was that police never served the inmates food. When pressed further for where Meyer would have received such his response he repeated that they were never served food.

[27] He was pressed further that he was Meyer's source of this information, he responded that sometimes he forgets things; sometimes he remembers things but he remembers that he never had breakfast lunch or supper whilst in the cells.

[28] When asked if Meyer thumb-sucked the information the plaintiff shrugged his shoulders.

[29] He also could not remember whether he was warned of the plot against him on Saturday or Sunday.

[30] He confirmed that he did not tell the first police officer he saw smoking about the threat to him. He told this to the second one he saw even then he did not detail the threat as he also did not know what it was that was planned against him.

[31] He also denied that he called his wife whilst in police custody to ask her to bring R500 bail money. He could not explain why Meyer had written that.

[32] The plaintiff was also cross-examined on the entries in the cell register reflecting that there had been visits to; inspection of the cells and service of food by the police during his detention. He denied that the entries were true. To stress this he testified that if there had been searches of the cells the police could have found his cigarette lighter as he had this with him during his incarceration.

[33] He was referred to a number of entries in the police cells the correctness of which he denied vehemently except for one, a cell visit by Colonel van Zyl, the senior superintendent. His response was that this was the first time he saw a police officer since the Saturday . On being pressed about this visit, he replied that he remembered the visit as van Zyl had given his name but he could not remember what Van Zyl said.

When pressed to explain why he never mentioned the visit by van Zyl his explanation was that people do forget, he could not think of everything that happened at the time he was incarcerated. He confirmed that he never complained to van Zyl.

[34] The defence also cross – examined the plaintiff at length on peripheral evidence to test his credibility. This related to the events leading to his arrest largely highlighting the contradictions between what was contained in Meyer’s report and what he told the Court.

[35] The defence called the evidence of Captain Singh who was on duty at Mount Road Community Service Centre on the morning of 10 October 2009 when the plaintiff was brought in after his arrest. He could not remember speaking to the plaintiff’s wife that morning but conceded that possibility as it was standard procedure for the police to inform the next of kin about an arrest immediately. He denied that he would have brought up the issue of R500.00 bail in that conversation as he lacked the authority to.

[36] On cross-examination he confirmed that, in terms of the Criminal Procedure Act, 51 of 1977, as a captain he was entitled to set bail. He was then referred to the contents of the docket. The docket recorded that the investigating officer was Inspector Van Huyssteen, the time of the offence was 10 October 2009 at about 12.30 (after midnight), the arrest took place at 2.30 and the docket was handed to Superintendent Brand on 11 October 2009 at 9h35. By 8 o’clock in the morning the plaintiff had been interviewed, warned, the bail form completed, finger-prints taken and he had been charged.

[37] Singh conceded that, according to this form, there was no reason objectively that precluded the release of the plaintiff.

[38] The next witness called by the defence was Deon George Richardson. He confirmed that on the weekend of 10 to 12 October 2009 he was on stand by on this weekend which included site visits. He particularly remembered this weekend as there was a detainee known to him, as he was at the same school as his son. This detainee

had received a lot of food from his family and there were empty plates and food that had not been eaten in the cells and the cells were dirty with food and plastic bags lying around. The inmates had not eaten the police food. The families brought food for the inmates.

[39] He confirmed the recordal in the cell register of cell visits by him: item 1133 a visit at 22h00 on Saturday the 10th; item 1200, a visit at 10h50; on Sunday and another entry 1277 at 05h16 on Monday the 12th.

[40] He explained the routine that he would follow when he visited the cells. The station-commander would open the cells for him. He would ask the detainees if there were any complaints, would count the detainees; check outstanding complaints; urgent complaints etc.

[41] He emphasised that what he registered in the cell register was the truth of what had occurred as it would serve no purpose if he registered a lie in the register.

[42] Under cross-examination he confirmed that there were no permanent guards outside the police cells at the Walmer police station. The only mechanism utilised to check upon the inmates was the regular hourly visits of the cells. He also confirmed that one could not determine by merely looking at the cell register the type of crime a detainee was in for. He explained that detainees arrested for being under the influence of alcohol were put together separated from the other detained on other crimes. Also those that detained for murder or rape or violent crimes were kept together.

[43] He could not comment on his recordal that the cells were neat and tidy whereas when Colonel van Zyl visited on Monday at 7h35 , van Zyl recorded that the cells were in a terrible state. He could attribute what was found by van Zyl to the fact that when he visited the detainees were all up preparing to go to court in which case all the empty containers of food and food consumed over the week-end were strewn all around the cells. When he visited the cells the detainees were still asleep.

[44] He denied any knowledge of a standard for bail of drunken driving. He explained that he would not know this as the granting or refusal of bail was the responsibility of the detective service. His unit did not have access to the dockets. He would not comment on the allegation put to him that, in not granting the plaintiff bail, the police had been reckless.

[45] The next witness was Colonel Van Zyl who was the Station Commander at the Walmer Police Station at the time of the detention of the plaintiff. He confirmed that the plaintiff had been kept in what is now called "*The Steve Biko Cell*" which is behind a solid door with an iron gate inside the cell. He explained that, during cell visits, one may enter the cell or stand outside the iron gate from where the entire cell is visible. To see the far left-hand corner of the cell clearly, one had to lean on the iron gate. He explained that one police officer would be accompanied by another member on cell visits.

[46] During the cell visit, the detainees would be asked if they had any complaints. The complainant would be taken aside so that the complaint could be registered. During his visit, no complaint was relayed to him by any of the detainees. He explained that, in his experience, members of the police would not make false entries that the cell was visited when it was not. Before he visited the cells, he would enquire from the members on the number of inmates per cell and during his visits he would verify that information, the purpose being to test the veracity of what he would have been advised of by the members. In his experience the members would not make false entries in the occurrence book as they could be caught out.

[47] He confirmed that he had found the cell in a terrible state. He explained that there were no cleaners on week ends, the detained cleaned themselves; they also received a lot of food and thus one would find empty packets strewn all over the yard. The detainees were not obliged to clean.

[48] Under cross-examination, he agreed that when the plaintiff's wife came to enquire about the plaintiff, the police could have checked with the investigating officer what the

position with regards to bail was and, if that had happened and as shown in the docket that the investigating officer had no objection to bail, then they could have released plaintiff on bail and the rape would not have happened. It was put to him that a glance at the occurrence book showed that the plaintiff was detained for drunken driving and was not a flight risk. Therefore there was no risk that he would not stand trial. He could have been released on bail of R500.00. He explained though that the occurrence book was not always an accurate reflection of the truth and thus could not be relied to establish the nature of the crime the detainee is in for.

[49] He was referred to the standing orders of the police regarding what the responsibilities of an investing officer regarding the setting of bail. His response was that even with the standing orders the determination of bail depends on the merits of each case. In this case he would have been concerned because there was an indication that the plaintiff had fled the scene of accident that would have impacted on the plaintiff's honesty and prospects of bail.

[50] He disputed that the toilets in the cells were dirty and if the toilets were out of order, somebody would have complained. The entries did not record that. He denied that there were thirteen detainees in one cell and, if there had been, he would have queried it. He stated that it was unnecessary to record the food brought to the cells by family members.

[51] He conceded that if the plaintiff had been released on bail by the police he would not have been raped in the cell.

[52] The next witness of the defence was Ayanda Sokolo. He testified that he was on duty on 10 October 2009 at Walmer Police Station and confirmed the recordal of his cell visits and what he had noted during those visits.

[53] On cross-examination he insisted that what he recorded is the truth and confirmed that the cells were visited; the detainees were served food and no complaints were received from the detainees.

[54] The last witness was Mbogeni Bangilizwe Ntini, the other police officer who was on duty at Walmer Police Station on the weekend of 10 October 2009. He confirmed that he was on duty on that weekend and that he had visited the cells as reflected in the Occurrence Book and, during those visits, he had never received any complaints or requests. He confirmed that he had searched the detainees as recorded in entry 1265 and had not found any cigarette lighter on the plaintiff.

[55] On his visit at 3h00 on Monday the 12th he did not see the plaintiff's pants had been pulled down. He would have noticed that if the pants were down on that visit as all the detainees were asleep.

[56] The issue for determination is whether the members of the SAPS had negligently breached their duty of care.

THE ISSUES

[57] Did the police, as a result of negligence, fail to exercise their legal duty to protect the plaintiff whilst he was in their custody? Put differently, did the police fail to exercise reasonable care to prevent the deceased being assaulted when there was a legal duty to do so?

[58] Mr Jooste for the plaintiff argued that:

- (a) Had the plaintiff been released on bail he would not have been raped in the cells;
- (b) The plaintiff was indiscriminately placed in a cell with people detained for serious violent crimes when he had been arrested and detained for drunken driving and failure to stop after an accident;
- (c) His rape or other harm was foreseeable as he had made a report to a police officer on Saturday afternoon.

[59] He argued further that that the plaintiff had made out a case of negligence in that there were triggers for the defendant. Such negligence is evidenced in the following :

- (a) Singh admitted that the plaintiff could have been released on bail on Saturday morning;
- (b) the evidence of the plaintiff that he reported the warning of an imminent plan against him to a police officer on Saturday was not challenged in the evidence of the defence;
- (c) the charge against the plaintiff was drunken driving therefore he should not have been placed with criminals detained for serious crimes. An examination of the occurrence book by Capt Richards and Col. van Zyl would have triggered the removal of the plaintiff to another cell with people facing a similar charge to him. In support of this Mr Jooste referred to the case of **Noel Botha v Minister of Safety and Security**¹ In that matter, the court found that hourly visit when there were signs of an imminent danger to an inmate were inadequate. In this case Botha had been arrested and detained for being drunk and disorderly. He was raped whilst in custody.
- (d) there were warning signs which should have triggered positive steps the defendant is enjoined to take in terms of section 12(1) (c) of the Constitution. The cell visits registered in the cell register and testified on by the defence witnesses are disputable. The accuracy of the recordal in these records was questionable. The recording of information in the cell register appeared mechanical. This is evidenced by the difference in what was recorded regarding the cleanliness of the cells. Van Zyl recorded cells found in a terrible state to the extent that a report has to

¹ Case 6688/2006 unreported case in the Cape Town High Court per Traverso DJP, judgment delivered on 13 May 2008

be filed by the SAPS members to explain the condition of the cell. This is in acute contrast with that is recorded by all the other officers who visited the cells earlier.;

- (e) The defence did not bring a witness who could testify satisfactorily that reasonable steps were taken to prevent the harm to the plaintiff. No witness was brought to challenge that the plaintiff approached a police man on Saturday regarding the warning of harm to him. The hourly visits to cells, which are disputed, are in any way inadequate in the circumstances as there was a warning to the police. The placement of detainees was also haphazard with no regard for the kind of crime a detainee was in detention for.

[60] Mr Gqamana for the defendant, addressed the Court on the plaintiff's submission that had the plaintiff been released on bail on Saturday morning, he would not have been detained in the police cells thus would not have been raped. He submitted that the mere fact of detention does not naturally give rise to harm. Besides, even if it did, it would not add anything to the case of the plaintiff as the duty of care is owed to everyone in the police custody.

[61] He proceeded to address the submission that the plaintiff had warned the police of imminent danger thus reasonable steps should have been taken to avert the danger. He argued that the allegation that the plaintiff had reported the threat on him should be rejected as untrue because the plaintiff's case contains contradictions and the plaintiff was not a credible witness. His story changed along the way. The statement he gave to the police; contents of pleadings; report by Meyer; evidence of his wife; his evidence in-chief and in cross-examination all contain material differences. He submitted that these contradictions were fundamental and have a direct impact on the question of whether the harm was foreseeable. This makes the plaintiff's case unreliable. With these contradictions Gqamana submitted, this court cannot find that the harm was foreseeable.

[62] According to the evidence of the defendant, there was no complaint forwarded to the police during the cell visits. This is in accordance with the records of cell visits by various and different police officers on their visits to an inspection of the cells. The plaintiff also confirmed that he made a complaint once to one officer on Saturday afternoon only.

[63] Gqamana contended the Court should reject the reliance on the **Botha**² case that the hourly visits were inadequate. The conclusion of inadequacy of the measures taken by the defendant in the present circumstances can only be reached once this Court accepts that the defendant was alerted to the prevailing danger upon the plaintiff. This is not the case.

[64] As regards where the plaintiff was kept in light of the charge he was facing according to the occurrence book, the plaintiff Gqamana pointed out that van Zyl had stressed that one could not rely on the contents of the occurrence book in determining the charge facing a detainee. Even then there was no evidence that where he had been kept there were warning signs that he could come to harm.

THE LAW APPLICABLE TO THE FACTS

[65] I come now to consider whether the plaintiff has established the liability of the defendant. First of all, the legal principles which are relevant. In **Peri – Urban Areas Health Board v Munarin**³ dealing with negligence, Holmes JA said:

“Negligence is the breach of a duty of care.....Sometimes the law requires me to be my brother’s keeper. This happens, for example, when the circumstances are that I owe a duty of care; and I am negligent if I breach it. I owe him such duty if a diligens paterfamilias, that notional epitome of reasonable prudence, in the position in which I am in would:

² Footnote 5 supra

³ 1965(3) SA 637(A) at 373E-H

- (a) *Foresee the possibility of harm occurring to him; and*
- (b) *Take steps to guard against its occurrence.*

Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case, and it is neither necessary nor desirable to attempt a formulation which would cover all cases. For the purposes of the present case it is sufficient to say, by way of general approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot reasonably shrug my shoulders in unconcern but have certain responsibilities in the matter—the duty of care.”

[66] Later In **Kruger v Coetzee**⁴ Holmes JA articulated the classic case of negligence:

“For the purposes of liability culpa arises if — *(a) a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and* [LSEP] (ii) would
and [LSEP] (b) the defendant has failed to take such
..... Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down.

[67] It is trite that the question whether the precautions taken to guard against foreseeable harm were reasonable or not is a factual one. This was explained by Scott

⁴ Footnote 2 supra at 430E -H

JA in **Cape Metropolitan Council v Graham**⁵ as follows: “..., it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be:“(a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm’.

. . . If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence.”

[68] In **S v BoChris Investments (Pty) Ltd & Another**⁶ Nicholas AJA sounded a caution on how to determine negligence: “In considering this question [reasonable foreseeability], one must guard against what Williamson JA called “insidious subconscious influence of ex post facto knowledge”Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The diligens paterfamilias does not have “prophetic foresight”.After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine liability

[69] In *casu*, the plaintiff's counsel argued that the plaintiff should have been released on bail early on Saturday morning, as the bail could be set at that point. His release at that point would have prevented the rape as he would not have been kept in police custody where the rape took place.

⁵ 2001 (1) SA 1197 (SCA) at paragraph 7

⁶ 1988(1) SA 861(A) at 866i-867C

[70] I am not convinced that the failure of the police to release the plaintiff on bail early Saturday morning can on its own this gives rise to negligence. The point is that whether the plaintiff was in lawful or unlawful custody he was still owed the duty of care. It cannot be correct as I understand to be the stance taken by Mr Jooste, that without more, the defendant is liable for the rape of the plaintiff solely because he had been kept in detention when he could have been released. The question that has to be answered is whether the rape foreseeable? As long as there is no evidence to support this submission it must be dismissed.

[71] I now deal with whether the defendant was warned about the looming danger on the plaintiff or whether it complied with its duty of care. I start with whether the defendant was warned.

[72] The versions of the plaintiff and the defendant regarding the warning by the plaintiff are mutually destructive and cannot be reconciled by any amount of ingenuity. In the present case the onus rests upon the plaintiff to prove that the defendant was warned. The standard of proof is a balance of probabilities. It is trite law that to hold that an onus resting upon a plaintiff has been discharged, where there are two stories mutually destructive, the court must be satisfied upon adequate sound and substantial grounds that the story of the litigant upon whom the onus rests is true and the other is false⁷. This means that it is not enough to say the story told by the one is not satisfactory in every respect. It must be clear to the trial Court that the version of the litigant upon whom the onus rests is the true version, and that absolute reliance can be placed upon the story as told by that litigant notwithstanding its inherent improbabilities.

[73] To succeed the litigant who bears the onus of proof should satisfy the Court on a preponderance of probabilities that his or her version is true and accurate and therefore is acceptable, and that the other version advanced by the defendant is false or mistaken

⁷ National Employers Mutual General Insurance Association v Gany 1931 AD 187 at page 199

and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities⁸.

[74] The approach to be adopted in the assessment of such versions was explained in the dictum of **National Employers' General Insurance Co Ltd v Jagers**⁹ where Eksteen AJP (as he then was) said: *"Where there are two mutually destructive stories the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and the defendant's version is false"*.

[75] Eksteen AJP expanded to explain how a Court reaches the conclusion that a plaintiff has discharged his onus. *"one talks of about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to mean to be desirable of a Court to first consider the question of the credibility of the witness as the trial judge did in the present case, and then, having concluded that enquiry, to*

⁸ Baring Eiendomme Bpk v Roux All SALR 399

⁹ 1984(4) SA 437 (E) AT 440E-441A; Koster Ko – Operatiewe Landboumaatskappy Bpk v Suid – Afrikaanse Spoorwee en Hawens 1974(4) SA 420 (W); African Eagle Assurance Co Ltd v Cainer 1980 (2) SA 234 (W)

consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, the recourse is had to an estimate relative credibility apart from the probabilities.”

[76] In the case of **Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et cie and Others**¹⁰ the Supreme Court of Appeal neatly unpacked the approach to be followed where a Court is confronted by irreconcilable versions as follows: It should make its finding on (a) the credibility of factual witnesses;(b) their reliability;(c) probabilities as to their credibility depending on its impression of veracity of witnesses- that in turn depending on variety of subsidiary factors such as (i) witness’ candour and demeanour in the witness box; bias, latent and blatant; internal contradictions in his/her evidence; external contradictions with what was pleaded or put on his behalf or with established fact with his own extracurial statements and action; probability or improbability of particular aspects of his version, the caliber and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to the witness’ reliability, opportunity to experience and observe the event in question and quality, integrity and independence of his recall thereof. As to probabilities this necessitates analysis, assessment and evaluation of probability or improbability of each party’s version on each of the disputed facts. As a final the court will determine whether party burdened with onus of proof succeeded in discharging it – hard case occurring where credibility findings compel the court in one direction and its evaluation

¹⁰ 2003(1) SA 11

of general improbabilities in another – latter becoming less convincing where former more so. Probabilities prevail where all factors equipoised.

[77] In **National Employers General Insurance Association v Gany**¹¹ the court laid down the test to be as follows: *“where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false.”*

[78] In **Santam Bpk v Biddulphs**¹² the Supreme Court of Appeal stated:

“It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of the proven facts and the probabilities of the matter under consideration.”

[79] In presenting his evidence the plaintiff was not an epitome of an honest witness. He was quizzed on a lot of things regarding his credibility e.g. the time he finished work; his movements after knocking off from work; why he had been arrested; why he had left the scene of where he had knocked down a fence wall. I found the plaintiff evasive and just unable to explain a lot of contradictions in his case.

[80] On the warning and when the rape occurred there were unexplained contradictions in his evidence; that of Meyer, his psychologist; and his wife. Of course in dealing with these contradictions I am mindful of the fact that the consultation with Meyer and the subsequent report provide cannot be expected to report with preciseness what Meyer had been told by the plaintiff. Therefore I accept that the report shall not relate everything accurately. However, there is crucial information that was discussed

¹¹ 1931 AD 187 AT 199

¹² 2004(5) SA 586 (SCA) at 589G

which was relevant for purposes of determining the psychological trauma suffered by the plaintiff. With regards to this category of information it is difficult to explain the contradiction.

[81] By way of example I shall refer to a sample of information. In his report Meyer refers:

(a) to lunch being brought to the cells on Saturday and supper being served on Saturday; According to the plaintiff there had been no service of food the whole time he incarcerated.

(b) the inmates had grabbed the food his wife brought for him. This and the fact that he was with 13 strangers feel weird and he experienced great anxiety and apprehension which made him to keep to himself. Later, he approached the policeman who served lunch at the cells for transfer to another cell. This is contrary to what the plaintiff alleged that he had approached a police officer about his transfer after being warned that the other inmates were plotting to harm him.

(d) he was warned about the plot after supper on Saturday and had asked for transfer to another cell from a police officer who had come to check the cells later that night. Against this is different from the version of the plaintiff.

[82] In dealing with these contradictions I have considered that when the plaintiff consulted with Meyer, the memory of what had happened was still relatively fresh in his mind having occurred at least 8 months prior to the consultation. He had consulted with Meyer more than once. The purpose of the consultation was to determine the extent of his trauma. The plaintiff had also been referred to Meyer by his attorney so the plaintiff would have realised the importance of this consultation. In addition to this, Meyer, as a psychologist with extensive experience in attending court as an expert on matters of this nature understood the importance of ensuring that the facts of the case are as accurate and correct. It would have been important to Meyer to establish with certainty when the rape on the accused had occurred. Under cross- examination Meyer was adamant his

report based on the facts as were related to him by the plaintiff. This date of when the rape took place was also significant. According to the Meyer report the plaintiff had been raped on the Saturday night or early hours of Sunday. This would have meant that plaintiff remained in the cell at least 1 and half nights unattended. This would increase his trauma, a factor relevant for Meyer.

[83] So this Court is dealing with a case of the plaintiff whose version contains inherent contradictions which is challenged by the police who substantiate their case with documentary evidence. This documentary evidence records regular visits to the cells and feeding of prisoners. Meyer's report refers to some police visits and service of food. Even Capt van Zyl found the cells dirty when he visited them on Monday morning. The uncontroverted evidence of the police in this regard is that this was empty containers of food and some left over food. I have not had any reason to reject the version of the police.

[84] Owing to the above, I cannot accept the truthfulness of what the plaintiff alleged regarding warning the police of the threat to him. Even if I could accept that he has warned the police, I am not satisfied that such warning would have triggered taking measures beyond those the police took in this case as according to the plaintiff he did not indicate the nature of the threat to him. That being the case, this Court is unable to find that the measures taken by the police were inadequate.

[85] Unless I come to the conclusion that the evidence of the police was unacceptable, then I cannot accept the plaintiff's version that he alerted the police about the imminent danger to him.

[86] I have no reasons to doubt the credibility of the police officers that the cells were visited at regular intervals and at those intervals the detainees were requested to indicate if they had any complaints.

[87] On the conspectus of the whole evidence before me, I am satisfied that the police were not aware of the threat looming against the plaintiff, if they did they were not aware

of its nature therefore, in these circumstances they adopted the usual and standard precautionary measures. I am therefore satisfied that that they discharged the duty owed by them adequately.

[88] I have accepted that the entries in the occurrence book reflect that the cells were visited and the detainees were asked for complaints. I do not have any reasons to doubt the truthfulness of these entries. I also accept that these visits were reasonable at hourly intervals therefore.

[89] I have found that there is nothing that could have alerted the members of the defendant to this rape.

[90] Therefore, in the circumstances of this case, I dismiss the action of the plaintiff. Each party to pay its own costs.

N MSIZI, AJ

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