



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5524/2019

In the matter between:

THABISO ANDRIES RAPUDUNGWANE

Plaintiff

and

MINISTER OF POLICE

Defendant

HEARD ON:

11, 12 & 14 APRIL 2023
WRITTEN HEADS OF ARGUMENT DELIVERED
ON 19, 26 & 28 APRIL 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 04 August 2023 at 17h00.

- [1] In this matter, plaintiff claims damages in the amount of R5 500 000.00 arising from an alleged unlawful shooting and unlawful arrest and detention perpetrated by the members of the South African Police Service (the police) there and then acting within their course and scope of their employment with the defendant.

- [2] The plaintiff alleges that on 29 December 2017 he was shot in the left eye by the police with the result that he sustained an injury which rendered him blind. He was thereafter arrested without a warrant on a charge of public violence and subsequently detained at Mafube police station. He was released from custody on the next day upon admission at Universitas hospital where he underwent an eye operation and only discharged on 5 January 2018. The charge was ultimately withdrawn on 27 June 2018.
- [3] In the defendant's amended plea, the arrest and detention is admitted. Liability is denied on the grounds that the arrest was lawful as it was carried out in terms of section 40(1)(a) of the Criminal Procedure Act (the CPA)¹ in that, the plaintiff was arrested for committing the offence of public violence in the presence of the police for that reason, his subsequent detention was also lawful. With regard to the shooting, the defendant has pleaded a bare denial of the plaintiff's allegations.
- [4] The evidence in support of the plaintiff's claim was relayed by the plaintiff and Mr Petrus Pheello Mokoena who was arrested together with the plaintiff. Sergeant Ongama Theo Phuthuma and Mampe Mokhananyane respectively arrested the plaintiff and Mokoena. They testified for the defendant's case.
- [5] The plaintiff testified that it was shortly after 5pm when a group of seven police officers travelling in a minibus arrived at the tavern known as Freddie's where the plaintiff and at least a hundred of other patrons were playing dice and a game of Ludo. As soon as the police approached the tavern, some of the patrons ran away those who remained were bodily searched. The police were walking back to their minibus when Mokoena who was also playing a game of Ludo at the tavern jokingly remarked that he was happy to see the police working they should also arrest Zuma. Mokoena's utterances infuriated the police. Phuthuma and his

¹ Act No, 51 of 1977.

other colleague, sergeant Paseka Mokoro assaulted Mokoena. They hit with fists, kicked him and left him lying on the ground down crying out in pain.

- [6] The plaintiff stated that he followed the police to their minibus demanding an explanation why they left Mokoena behind when he was clearly in pain and why they did not arrest him if he had committed a crime instead of assaulting him. Phuthuma alighted from the minibus holding a long gun and shot him in the left eye. When he realized that he was bleeding he confronted Phuthuma asking him whether he (Phuthuma) could see that he had shot him. Phuthuma then grabbed him and threw him inside the minibus.
- [7] The plaintiff was seated on the floor of the minibus bleeding when Mokoena was also thrown inside. The police accused him of having started the trouble. Soon thereafter he heard a sound of stones being thrown at the minibus prompting the police to drive off to the police station without telling them the reason for their arrest. On the way to the police station, the police continued to assault him and Mokoena. Insults were also hurled at them by Mokhananyane. The assault continued even after they arrived at the police station where he was later detained in a cell despite the fact that he was bleeding and in extreme pain. His request for medical attention was ignored. Colonel Mangelani saw the injury and ordered the police to take him to hospital. It was around 20h00 when the plaintiff was ultimately taken to Dreamland hospital.
- [8] At the hospital he was examined by Dr Jackson who concluded that the injury was extensive and referred him to a specialist. The police took him back to the cells. On the next morning at about 8h00 Colonel Mangelani was conducting a "roll call." The plaintiff reported again that he was in pain and that the doctor had referred him to a specialist but nothing was done. Two hours later the police took him to Dihlabeng Hospital in Bethlehem where he was examined and transferred to Universitas hospital by an ambulance where he was admitted and underwent an eye operation. He was ultimately discharged on 5 January 2018.

- [9] Exhibit “B13-17” are copies of the medical records confirming the admission from 30 December 2017 to 05 January 2018, the diagnosis: “*blunt ocular trauma with a corneal laceration*” on the left eye caused by a rubber bullet and the prognosis: loss of vision.
- [10] It was the plaintiff’s testimony that upon discharge he went home. A summons was thereafter issued for his attendance at court on 27 June 2018. The charge was withdrawn on that day.
- [11] He cried when he explained that as a result of the injury, he is no longer able to drive due to the loss of vision and as a labour relations officer his responsibilities require him to travel extensively. He is constantly in pain which is exacerbated by a cloudy or cold weather. He is permanently disfigured, he wears spectacle glasses to conceal the defective eye. His self-esteem has also been adversely affected due to the fact that at work they now identify him with this defective eye, they refer to him as “*Thabiso with an eye.*” He has and continues to incur expenses relating to medical treatment and for hiring a driver. He will also require medical treatment for the uninjured eye as it has also been affected.
- [12] The plaintiff’s version with regard to the circumstances under which he was arrested was corroborated by Mokoena who confirmed that the plaintiff was shot by Phuthuma with a “big gun”. He told the court that there was more than one of these big guns in the minibus, he saw them when he was also thrown into the minibus. Despite the fact that the plaintiff was already bleeding and crying out in pain, they were both assaulted and insulted until they reached the police station where the assault continued.
- [13] Mokoena testified that although he was also in severe pain, the plaintiff was in a worse condition. They were ultimately taken to hospital. He did not see the plaintiff until he (Mokoena) was released. Nothing came out of the complaint that he lodged with the Independent Police Investigative Directorate (IPID), he was

also acquitted of the charge. He concluded his evidence by stating that there was no reason for the police to arrest them let alone to assault them so viciously.

[14] The plaintiff and Mokoena were extensively cross-examined on fact that they were arrested for public violence because they were part of the group that was hurling stones and bottles at the police and their minibus. They were adamant that stones were thrown by members of the community in retaliation for their arrest. It was their testimony that their arrest was simply a smokescreen to cover the assault and nothing more.

[15] On the other side, Phuthuma testified that he is a sergeant attached to Public Order Police Unit in Welkom. On the day of the incident him and his colleagues, sergeants Mokhonanyane, Lebothe, Paseka Mokoro and their commander sergeant Moeketsi Mokhoene arrived in Frankfort to attend to crowd management duties after they were informed that there were protests due to take place in that area but nothing happened. They then decided to respond to a rape complaint instead of returning to Welkom. Based on the information they received, they went to the tavern to look for the suspect. They found a group of men playing dice on the veranda, when Mokhoene reprimanded them for gambling they became unruly and started throwing stones and bottles at the police forcing them to retreat to their minibus. In order to disperse the group Mokhoene instructed Mokhonanyane to discharge a stun grenade.

[16] He told the court that the unruly group dispersed except for the plaintiff. He saw him throwing a bottle towards Lebothe and when he tried to arrest him he resisted. He was ultimately assisted by a colleague to subdue and handcuff the plaintiff.

[17] He confirmed that the plaintiff was placed in the minibus together with another male who was arrested by Mokhonanyane and they were driven to the police

station where they were detained.² He denied assaulting them let alone shooting the plaintiff with a big gun. He told the court that he was only armed with a 9mm pistol and a pepper spray. The “big guns” are shotguns and they were in the minibus together with the rubber bullets and other weapons used for crowd management but they were never utilized on that day.

[18] It was his testimony that he does not know how or when the plaintiff was injured because at the time that he arrested the plaintiff he had no visible injuries and he also did not mention that he was injured. What he observed at the police station was a red eye, he informed his colleague at the police station about it and left. He does not know what became of the case he opened against the plaintiff.

[19] The next witness called by the defendant was Mokhonanyane. She corroborated Phuthuma’s version that they were attacked with stones and bottles at the tavern and that she responded by discharging a stun gun to disperse the crowd. She arrested Mokoena for malicious damage to property after she saw him hurling stones hitting their minibus. At no stage was the plaintiff including Mokoena assaulted or insulted. At the time they were arrested they had no visible injuries.

[20] Under cross-examination Phuthuma stated that Lebothe was actually injured by the bottle thrown by the plaintiff. He sustained a laceration on the hand, the minibus was also damaged. He also said after the stun grenade was discharged he did not see the plaintiff or what he was doing whilst Mokhonanyane said she did not see how and when the plaintiff was arrested.

² Exhibit “B5” is a copy of the section 35 notification of rights signed by the plaintiff at 19h35.

[21] Thus was in short the summary of the evidence adduced by the parties in addition to the parties' *viva voce* evidence, documents marked as *Exhibit "B5" and "B13-17"* were also handed in as evidence.

[22] After all the evidence was led, the issues which remain contested between the parties is whether the police shot the plaintiff on that day and the lawfulness of the arrest and detention. In the event that I find in favour of the plaintiff in respect of those issues, the quantum of the damages to be awarded to the plaintiff must also be assessed. The onus is on the defendant to allege and prove justification for the arrest on a balance of probabilities.³

[23] The parties presented mutually destructive versions regarding the circumstances under which the plaintiff was arrested. The principles governing the evaluation of evidence of this nature are trite:

"...the 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 of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in 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 extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and 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

³*Zealand v Minister of Justice and Constitutional Development and Another* **2008 (2) SACR** 1 (CC) page 11, para 25.

a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”⁴

- [24] The plaintiff gave a good account of the events leading to his arrest. His evidence was corroborated by Mokoena on every material respect. Their evidence was concise and their version remained intact even after cross-examination. The plaintiff’s version that immediately before he was arrested he was shot and injured by Phuthuma was only met with a bare denial from the defendant’s witnesses and this is despite the fact that his assertion that approximately two hours after he was detained, the injury was observed by Colonel Manqelane who promptly arranged for the plaintiff to be taken for medical treatment is uncontroverted. The injury is also corroborated by the medical evidence, exhibit “B13-17.” I have found no reason to doubt the veracity of the evidence proffered in support of the plaintiff’s case.
- [25] On the other side, the evidence proffered by the arresting officer, Phuthuma is circumspect. His direct evidence materially contradicts the evidence he proffered under cross-examination when his version was tested under cross-examination to determine its veracity. Despite having testified that he arrested the plaintiff after he had seen him pelting Lebothe with a bottle and this occurred after the stun grenade was discharged. During cross-examination, he said after the stun grenade was discharged he did not see the plaintiff or what he was doing. His allegations regarding the reason for the plaintiff’ arrest are also not corroborated by Mokhononyane as she conceded that she had no knowledge of the circumstances under which the plaintiff was arrested.

⁴ *Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie & Others* **2003 (1) SA11 SCA** para 5 at 14I - 15E.

[26] It does not end there. The plaintiff's account of the events was also countered by new evidence. Phuthuma's allegations that Lebothe was injured by the bottle that was hurled by the plaintiff was not put to the plaintiff and his witness during their cross-examination so as to give them an opportunity to respond thereto and this is despite the fact that Phuthuma was seated in court when the plaintiff and his witness testified. In my view, this is indicative of fabricated evidence taking into consideration that Phuthuma changed his version again and said he did not see where the bottle landed or whether it injured anyone.

[27] These shortcomings are exacerbated by the fact that Lebothe who was supposedly injured by the plaintiff, Phuthuma's colleague who assisted him to handcuff the plaintiff and their commander Mokhoene were not called as a witnesses. It was pointed out in *Shishonga v Minister of Justice and Constitutional Development and Another*:⁵

"The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify."

[28] Having regard to the defendant's own version that the plaintiff had no injuries when he was arrested it is highly improbable that the plaintiff would have been shot by someone else other than the police between the time he was detained and released from custody for hospitalization. It is also important to note that the plaintiff's testimony that the injury was observed by Colonel Manqelane after the plaintiff was detained was not disputed.

⁵ **2007 (4) SA 135** (LC) at para 112.

- [29] Based on the evasive and divergent versions in the evidence proffered for the defendant's case I am not persuaded that truth has been told regarding the circumstances under which the plaintiff was arrested and injured.
- [30] On the available evidence, I am satisfied that plaintiff has succeeded in adducing evidence which establishes on a preponderance of probabilities that he was shot by the police. Assault (in this case by shooting) is *prima facie* unlawful. The onus is on the defendant to allege and prove justification.⁶ In this matter the defendant has merely denied the allegations without raising any grounds of justification for that reason, I hold that the shooting was unlawful.
- [31] With regard to the arrest, I likewise accept the plaintiff's version that the charge that he was subsequently arrested for was merely fabricated to suit the circumstances of this case for that reason the defendant has failed to prove that the arrest was justified as provided for in section 40(1)(a). Accordingly, the arrest was unlawful it follows too that the detention was unlawful. Based on all these reasons, the defendant is liable to compensate the plaintiff for the damages he has suffered.
- [32] In his particulars of claim, the plaintiff's damages are set out under the following heads:

32.1. Unlawful arrest	R1 000 000.00
32.2. Unlawful detention, humiliation, degradation and contumelia	R2 000 000.00
32.3. Past medical and hospital expenditure	R100 000.00
32.4. Estimated future medical treatment	R1 000 000.00
32.5. General damages	<u>R1 400 000.00</u>
TOTAL	<u>R2 500 000.00</u>

⁶ *Mabaso v Felix* **1981 (3) SA 865** (A) at 874.

- [33] The plaintiff has persisted with the said amounts simply on the basis that the amounts are fair and just to compensate the plaintiff for the damages he has sustained.
- [34] On the other side, seeking reliance on *Minister of Police v Erasmus* [2022] ZASCA 57 and *Mahlangu and Another v Minister of Police* [2022] SACR 595 (CC) the defendant contended that the amounts claimed by the plaintiff are excessive having regard to the fact that the plaintiff was detained for less than twenty-four hours. The award for unlawful arrest and detention must be scaled down to R12 500.00 and for the assault to R200 000.00. According to the defendant, the plaintiff is not entitled to the damages relating to past and future medical expenses as no expert evidence has been led in that regard.
- [35] An arrest constitutes an infringement of a person's right to dignity and the right not to be deprived of one's freedom without just cause⁷ whilst assault violates a person's right to bodily integrity, both physical and psychological.
- [36] It is trite that there is no fixed formula in terms of which awards for compensation for deprivation of liberty are made, they are assessed *ex aequo et bono* (according to what is right and fair) taking into consideration amongst others, the circumstances under which the deprivation of liberty occurred, the personal particulars of the plaintiff (his health, age, social status etc), the fact that the plaintiff was the author of his own misfortune, the manner in which the arrest was effected, the duration of the detention, the presence/absence of the arresting officer's improper motivation behind the arrest and whether the defendant has apologized including previous comparable cases bearing in mind that they are a 'useful guide to what other courts have considered to be

⁷ Sections 10 and 12 (1) (a) of the Constitution Act No, 108 of 1996.

‘appropriate but they no higher value than that.’⁸ Each case must be judged on own merits.

- [37] In this matter, besides the usual degradation which comes with being unlawfully arrested in full view of the members of the community, the plaintiff was treated badly by the police. After shooting him they detained him for about fifteen (15) hours instead of taking him to hospital for medical treatment.
- [38] As a consequence of the injury, the plaintiff suffered a total loss of vision on the injured eye. The injury has curtailed the enjoyment of his amenities, recreational and occupational activities, psycho-social aspects and finances in that, he is no able to drive himself and he also struggles with reading, the permanent disfigurement has had an adverse effect on his self-esteem and he experiences pain and discomfort associated with the injury which has affected the other eye as a result he relies on analgesics to manage the pain. He still requires medical treatment for the uninjured eye as it has also been affected.
- [39] It is aggravating that cause of the plaintiff’s pain and disfigurement is the police and they are expected to uphold the law and protect the citizens. The police’s disregard of the plaintiff’s plea for medical attention indicates that their actions were motivated by pure malice and total disregard of the law.
- [40] I have considered the amounts suggested by the respective parties and I am in agreement with the amounts suggested by the plaintiff. I consider them to be excessive under the circumstances because regard must be had to the aims of compensatory awards namely, *“that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn*

⁸ Visser & Potgieter *Law of Damages* 3 ed page 545 to 548; *Minister of Safety and Security v Seymour* **2006 (6) SA 320** (SCA) **[2007] 1 All SA** 558 para 17.

of plenty at the defendants' expense."⁹ I also hold the view that the amounts suggested by the defendant will not be adequate to compensate the plaintiff for the damages he suffered therefore, taking into consideration the facts of this matter and the case law to be applied, I find that the amount of R1 400 000.00 for the damages he sustained as a consequence of the unlawful shooting and the amount of R100 000.00 for damages arising from the unlawful arrest and detention would be just and equitable to compensate the plaintiff.

[41] With regard to the claim for past and future loss of medical expenses, while it is indisputable that the plaintiff has incurred medical and other related costs pursuant to the injury the plaintiff has only provided proof of the incurred expenses totaling the amount of R16 822.00, see Exhibit "B11-15". There is no proof of how the rest of the amount claimed is arrived at.

[42] Much as the plaintiff is not required to prove his claim for the loss related to future medical expenses on a balance of probabilities, expert medical evidence is required to establish the nature, extent and effects of the injury to enable the court to assess the amount of damages to be awarded in this regard.¹⁰ It is common cause that no expert evidence has been provided to substantiate this claim. The claim must accordingly fail.

⁹ *De Jongh v Du Pisani N.O.* **2005 (5) SA 547** (SCA) para 60; *Minister of Safety and Security v Tyulu* (**2009**) **ZASCA 58; 2009 (5) SA 85 (SCA)**.

¹⁰ *Supra* at fn 10, at page 459.

[43] On the aspect of costs, the plaintiff has substantially succeeded with the claim for that reason, he is entitled to be awarded the costs.

ORDER

[44] In the circumstances, I make the following order:

1. Judgment is granted in favour of the plaintiff for:
 - 1.1. Payment of the amount of R2 400 000.00 (two million four hundred thousand rand) as damages consequent to unlawful assault, arrest and detention.
 - 1.2. Payment of the amount of R16 822.00 (sixteen thousand eight hundred and twenty- two rand) in respect of past medical and related costs.
 - 1.2. Payment of interest on the said amount at the prescribed rate per annum at tempore morae.
2. The defendant shall pay the costs.

N.S. DANISO, J

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