



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 4808/2017P

In the matter between:

ELLIAS THATHEZAKHE NGUBANE

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

ORDER

1. The issue of liability is decided in favour of the plaintiff.
2. The defendant is ordered to pay costs.

JUDGMENT

Delivered on:

Mngadi J

[1] The plaintiff in an action claims damages from the defendant for assault. Issues in terms of Rule 33 (4) having separated, the issue of liability falls to be determined.

[2] The plaintiff is Ellias Thathezakhe Ngubane and adult male security guard. The defendant is the Minister of Police, a minister of state in the government of Republic South Africa responsible for the South African Police Service.

[3] The plaintiff claimed that on or about 10 February 2012 at midnight at his home he was assaulted by the members of the South African Police Service causing him some bodily injuries and pain and a severe psychological trauma.

[4] The plaintiff issued summons on 03 May 2017. He claimed in the summons that he acquired knowledge of the defendant as the responsible organ of state when he consulted with the legal representative.

[5] The plaintiff in the particulars of claim made the following averments. On or about the 10th February 2012 and approximately 12h00 midnight and at the plaintiff's home in Kwahlaza Reserve, Empangeni, in KwaZulu-Natal, the plaintiff heard a loud knocking on the main door of his home. The plaintiff requested the identity of the person knocking on the door and the person responded by saying 'it's me your friend'. The plaintiff opened the door and two police officers dressed in civilian clothing entered into the plaintiff's home. The two police officers informed plaintiff that they were searching for a firearm. The plaintiff told the two officers that he did possess a firearm and he handed to them the firearm licence authorizing possession of the firearm and he produced to the officers the firearm. One of the officers told the plaintiff they do not require the firearm that he handed to them which

was a licensed firearm, but they wanted an illegally possessed firearm. The two police officers then started viciously assaulting the plaintiff after they had handcuffed him on his wrists behind his back, they viciously slapped him across his face; one of them placed a plastic tube three times around the plaintiff's head in order to suffocate him; the other police officer took a twenty litre container and filled it to capacity with cold water and threw the cold water on the plaintiff; the officer produced a stun gun and applied over both legs of the plaintiff shocking him with electric current. The police officers after the assault placed the plaintiff into the rear of the police van after they had wrapped a blanket around his face. The police officers drove with the plaintiff to kwaMthethwa region. They arrived at the Mthethwa region, parked near a certain homestead and pushed the plaintiff roughly out of the van. They drove away.

[6] The above-mentioned averments were restated in a statutory demand notice dated 12 November 2014 attached to the summons. The defendant filed a plea pleading no knowledge of the incident, denying the allegations and putting the plaintiff to the proof thereof.

[7] The plaintiff testified, and he led evidence of two witnesses, namely, Alpheus Msileni Biyela and Sikhumbuzo Erick Ngubane. The defendant led evidence of one witness, namely, Mondeni Wellcome Dubazane. The plaintiff as documentary evidence introduced (j88) medical examination report and a police statement of the plaintiff which were marked exhibits A and B respectively.

[8] It became common cause that for purposes of liability the dispute centred on whether the persons involved in the incident were members of the South African Police, and if so, whether they were acting within the course and scope of their duties.

[9] The plaintiff in the particulars of claim stated that the incident took place on or about 10 February 2012, but it is clear that, in fact, the incident took place on 16 February 2012. The contents of the police crime docket Empangeni CAS 611/02/2012 opened when the plaintiff laid a criminal complaint at the police station indicates that on 20 February 2012 the plaintiff and the witnesses reported that the incident took place on 16 February 2012 at 01h00. The doctor who examined the plaintiff on 24

February 2012 stated that it was reported that the incident took place on 16 February 2012. In addition, the defendant did not make the date of the incident an issue.

[10] In the statutory demand notice attached to the summons it is stated that the incident took place on 10 February 2012 at approximately 12 midnight and in Parag 7 of the said notice it is stated that:

'In terms of Section 3(3) of the Institution of Legal Proceedings against Certain Organs of State Act 2002, a debt may not be regarded as being due until the plaintiff 'Creditor has knowledge of the identity of the Organ of State. Notwithstanding that the cause of action herein arose on 26 November 2012, client only acquired due and actual knowledge of the identity of the office of the Minister of Police on the date of consultation with his legal representative herein, being 4 November 2014'. It was not explained why the notice referred to 10 February 2012 as the date of the incident and in the same breath mention 26 November 2012 as the date of the incident. But again, the defendant did not make any issue about the different dates.

[11] The purpose of a statutory demand notice is to place the defendant at early stage in a position to investigate the incident and to collect evidence relating to the incident including how it happened and who were involved to enable the defendant to deal with the claims or allegations arising from the incident forming the basis of the civil claim. In this case the statutory demand referred to two different dates as the date of the incident and both dates mentioned were wrong. It contained no other details other than the name of the plaintiff. It made no reference to the laying of the criminal charge and the reference of the police docket.

[12] The plaintiff testified as follows:

'He was 50 years old. He had a highest standard of education of Grade 11. Around the 15th of February 2012 he was not sure of the date, at 23h15 he was at his home. He had finished watching Tv at his home at kwaHlaza at Empangeni. He heard a knock on the door. He asked who it was. The response was that he must open, it was the police. He went to the door to open. His friend shouted and said open Troy it is me. Troy is his calling name. The friend in question was Ephraim Msweli Biyela. He recognised the voice of his friend. He opened the door. He saw police officers. They were four in fact, two of them were in civilian clothes and the other two were

wearing police uniforms. His friend Biyela was with them, one police officer pointing a firearm at him, instructed him to lie on the ground which he did. He could identify the police officer if he saw him. That police officer was wearing a police uniform and a bullet proof vest. He lied on the floor on his stomach facing the ground. The police officer sat on his back and handcuffed him from the back. The other three police officers stood watching. His friend Biyela stood near the door. Having been handcuffed, two police officers carried him to the centre of the room. The one who handcuffed him, demanded the firearm from him. He told the police officers that he had a licenced firearm, and he told the police officer where the firearm was. The police officers said they did not want a licenced firearm; they wanted an illegally possessed firearm. The police officer sitting on his small back slapped him on the sides of his face repeatedly. The other police officer started kicking him on his body in the rib area. They demanded that he must produce the illegally possessed firearm. He showed them his licenced firearm, but they continued assaulting him. They took a tube and placed it over his face suffocating him with it. They told him to move his waist when he was ready to talk. He would move his waist and they would stop and ask him to produce a firearm. When he did not, they repeated suffocating him with a tube. The tube would be held and pulled tight by the one sitting on his back. The tube would be held tight for 2 to 3 minutes intervals. He then passed out. When he woke up, he was wet, cold water having been poured over him. When he woke the police officers shocked him with a stick with electric current. They shocked him on his body twice, and he fell down.

[13] The plaintiff testified that after he had fallen, the police officers picked him up. They took him to a police van. He was still in handcuffs. The van was a bakkie. His friend of many years, more than ten years, Biyela was placed in a condor motor vehicle which was one of the two vehicles the police officers were driving in. The bakkie was a ranger and two of the police officers travelled with him in the bakkie, the other two travelled with Biyela in the condor. They drove out of his home. They drove to another area which was about 20km away. They arrived at a Sokhela homestead in the area of kwaLamula also known as kwaMthethwa. He knew the homestead because he used to pass next to it. He was taken out of the police van, and he stood with a police officer guarding him next to the van. Two police officers jumped over the fencing into the homestead. Biyela stood with another police officer next to the condor.

[14] The plaintiff testified that after about 15 to 20 minutes the police officers returned from the Sokhela homestead. They said they had found what they were looking for. They had with them a big firearm and a person from the Sokhela homestead. They took off handcuffs from him and they told him to go. It was at about 02h00. He then went back to his home, and he told his mother and his siblings what happened. His mother gave him the money to go to the doctor. He went to doctor Panday. He had planned to open a charge at the police station, but he was told by the police to first go and see the doctor. He then went to open a charge at eMpangeni Police Station. The police talked amongst themselves as to who was working that night. Col Nyawo phoned, and he said police agreed that they were at KwaHlaza and they met Ngubane and Biyela, referring to him and his friend Biyela.

[15] The plaintiff testified that the police did not come back to tell him about the progress of his case. He saw Dr Panday who examined him on 16 February 2012, but it is a longtime ago he is not sure of the date. The incident took place between the 15th and 16th February 2012. He told the doctor what happened. The police at the Sokhela homestead slapped him before they removed the handcuffs. The police at Sokhela homestead took him out of the police van but did not immediately leave as stated in the particulars of claim. The police when they left with him from his home, they wrapped him with a blanket. The police who assaulted him, one was in civilian clothes and the other in a police uniform. He did know the date stated in the particulars of claim. When at his home he opened the door, the police pointed firearms at him. He sees that Dr Panday stated that he saw him on 24 February 2012 not on 16 February 2012, he is not sure it happened a longtime ago. He did not know whether Dr Panday was a private doctor or not. He was going to Ngwelezane Hospital, but police told him to go to Dr Panday. The police did not invite him to attend an I.D parade to point out the police officers who assaulted him. The man from Sokhela home was arrested and taken by the police to a police station. The relatives of that man told him that they found the man taken by the police at the police station. He had told the family, that the Sokhela man was taken away by the police. He would identify the two police officers who assaulted him if he saw them. His mother tongue is isiZulu.

[16] The plaintiff testified that those involved in the incident were police officers. They said they were police officers. They travelled in one vehicle which was a marked police vehicle. Some of them were in police uniforms. They handcuffed him. They demanded from him an illegally possesses firearm.

[17] The plaintiff called the first witness Alpheus Mzweleni Biyela (Biyela). Biyela testified as follows. He was 57 years old. His highest standard of education is Grade 11. The incident involving the plaintiff took place in 2012. The police came to his home at Obizo in the area of Empangeni at 10 pm. They were four, two in police uniform and the other two were in civilian clothes. The police uniform they were wearing was greyish in colour. They told him that they wanted a firearm from him. They entered the house, and they separated him from his wife. He told them he did not have a gun. They took him to his late brother's rondavel. They assaulted him in the rondavel for about an hour.

[18] Biyela testified that he told the police officers he did not have a firearm. He told them that the firearm they used for hunting belonged to the plaintiff and it is a licenced firearm. The police took him to the plaintiff's home. They were travelling in two motor vehicles. It was a marked police van and a van silver in colour. They arrived at a plaintiff's home after 11pm. They were four police officers as they were in his home. They parked vehicles in the yard. They instructed him to show them the plaintiff's house. He showed them the house. They told him to knock. He knocked and the plaintiff asked who it was. He told the plaintiff it was him and asked the plaintiff to open. The plaintiff opened the door. Three (3) police officers got into the house. One police officer remained outside.

[19] Biyela testified that police officers that got into the house assaulted the plaintiff, they slapped him, and kicked him. The plaintiff fell to the ground. They suffocated him with a tube. The plaintiff lost consciousness. They poured water over him. They shocked him with an electric current stick on his body which produced sparks. The plaintiff had dreadlocks and one police officer held the plaintiff's hair and cut them with a small knife. The plaintiff was bleeding. The police officer in their two vehicles took him and the plaintiff to KwaLamula area to a homestead, he did not know. He found

out later that it was Sokhela homestead. They travelled in separate vehicles. The plaintiff was in the marked police vehicle.

[20] Biyela testified that at the Sokhela homestead the police parked the vehicles outside the yard. They took him out of the motor vehicle. He remained next to the vehicle with one police officer. One police officer remained with the plaintiff. The other two police officers jumped over the fence to the Sokhela homestead. They came back with a young man from one of the houses and a large firearm to a waist level if standing on the ground. The young man was in handcuffs. They put the young man in a marked police vehicle. They drove away with the young man. They left him behind and they also did not take the plaintiff with them.

[21] Biyela testified that the plaintiff laid a complaint of a criminal charge, and he also laid a complaint of a criminal charge with the police at eMpangeni Police Station. The investigating officer of the case was Dubazane. He made a statement, he spoke in isiZulu. He did not know the four police officers. It was his first time to see them. If he could see them, he could identify them. He knew the plaintiff for a longtime, they grew up together. He did not see any name tags in the clothing worn by the police officers. Although plaintiff did not mention in his evidence, his dreadlocks being cut, he saw it, it happened in front of him. He was never invited to an I.D parade to point out the police officers involved.

[22] The third and the last witness for the plaintiff is Skhumbuzo Ngubane (Ngubane). He testified that he was 42 years old. He at school went up to Grade 11. The plaintiff is his elder brother. In February 2012, police officers came to his home, and they assaulted the plaintiff. It was at about 01h00, and dark outside. It happened at his home inside a house, in the area of KwaHlaza in the area of Cebekhulu. He was in a different house from the house in which the plaintiff was in. His house was about 10 metres away from that of the plaintiff.

[23] Ngubane testified that the police arrived, and they proceeded to the plaintiff's house. He saw the police van. Two of the police officers were in uniform. The police officers got into the plaintiff's house. He then heard the plaintiff crying. He heard that the police were saying to the plaintiff they wanted a firearm. It took a longtime about

an hour. The police took a firearm, they took the plaintiff and they left with him. He did not go out of his house. The door through which he watched had a crack. He could see outside. After the police had taken away the plaintiff, he went to the plaintiff's house. The floor was wet and there were bloodstains. The house was in disorder. It was dark outside but not very dark. He could not identify the police officers; he could not see their faces clearly.

[24] The defendant lead evidence of Mzondeni Wellington Dubazane (Dubazane). Dubazane testified that he was retired from the SAPS due to medical grounds. He retires in 2020 holding to the rank of a Captain. In February 2012 he was employed as a detective stationed at Empangeni Police Station. He was allocated to investigate the assault case wherein plaintiff was the complainant against the police. He investigated the case, interviewed witnesses and obtained statements. He completed the investigation, and he submitted the docket to the senior public prosecutor who took a decision to decline to prosecute.

[25] Dubazane testified that the problem was that the complainant and three witnesses were not able to identify the perpetrators. They did not know the registration numbers of the vehicles used. He had the docket relating to the matter, but he suffered a stroke which has caused him to be unable to read. His supervisor directed him to hold an I.D parade but he could not hold an I.D parade because he could not find out which police officers worked outside the police station on that night. A police officer working outside the police station was required to make an occurrence book entry. He checked the occurrence book register and no entry had been made. He could not hold an I.D parade involving all police officers working that night. The investigation is directed by evidence. He could not interview all the police officers that were on duty that night.

[26] The evidence of the plaintiff, his witnesses, the medical report (J88) of Dr Panday and the opening of a criminal charge by the plaintiff and his witnesses making statements to the police establishes that the incident took place at about 01h00 on 16 February 2012. It also establishes that during the incident the plaintiff was assaulted.

[27] The evidence of the plaintiff together with the evidence of Biyela and Ngubane show that the four persons travelled in two motor vehicles. These four persons just before midnight first arrived at Biyela's home. They demanded from Biyela an illegally possessed firearm. They took Biyela to the plaintiff's home with them. They demanded from the plaintiff an unlawfully possessed firearm. They took both Biyela and the plaintiff to another homestead about 20 km away. Two of them got into the homestead and came out with a young man and a big firearm. They took away with them the young man and they left the plaintiff and Biyela.

[28] The evidence of the plaintiff, Biyela and that of Ngubane to a lesser extent show that the four persons said they were police officers, they used handcuffs, some of them the time were in a uniform similar to that of the police, and one of the two vehicles they used, had marking similar to markings of the police vehicles.

[29] There is no indication that the persons could have been members of any other police force other than the South African Police Service. Therefore, what needs to be determined is whether the evidence establishes that the four persons were police officers, members of the South African Police Service. The duties of the members of the South African Police Service is exclusive to them. It is the only police service that can conduct raids in the manner the four persons did.

[30] The plaintiff and Biyela are unable to identify any of the four persons because they were unknown to them. Both the plaintiff and Biyela were the victims of the four persons and the incident took place at night, it is understandable that they could not have an opportunity to take note of the registration numbers of the two vehicles used by the four (4) persons. Understandingly, they would not know the names of the four persons not wearing name tags and not introducing themselves and not showing them the appointment certificates.

[31] The plaintiff relies as evidence identifying the four persons as police officers is the mission of the four persons, that they used two vehicles one bearing markings of the police vehicles, two of them were wearing a uniform similar to a uniform of the police and the fact that they said they were police officers.

[32] The court in deciding whether the plaintiff discharged an onus on him considers whether the plaintiff could have produced better evidence than the evidence produced. The plaintiff became aware that the identification of the four persons was an issue when his criminal case was declined to be prosecuted but he could not have known that it was denied that they were police officers. In a plea filed on 2 July 2012 it was made clear that it was denied that the persons who perpetrated the act were police officers.

[33] The plaintiff saw the arrest and taking away of the young man from the Sokhela homestead by the four persons. He learnt that the young man was found detained in a police station. There is no indication that the plaintiff knew that documents and registers relating to the arrest and detention of the young man could show which police officers were involved in his incident although this must have been known to Dubazane. It is not explained why it was not investigated and found out which police officers had been involved in the arrest and detention of the young man.

[34] It may be accepted that if it is proved that the four persons were police officers, the fact that some were in uniform, they used vehicles at least one a marked police vehicle, they used handcuffs and their entire mission was to recover illegally possessed firearms, it cumulatively shows they were carrying out duties as police officers. In other words, they were acting in the cause and scope of their employment.

[35] It must be emphasised that Capt. Dubazane was not directing his attention in determining whether the said four persons were police officers or not. That was not an issue in the criminal investigation. Even if they were shown to be police officers, if they could not be identified, the criminal prosecution would fail. The fact that he did a shoddy investigation is irrelevant and nothing can be inferred from it. However, it is significant in showing that the defendant soon after the incident was placed in a position to ascertain whether the persons involved were police officers or not.

[36] The fact that the persons said they were police officers, travelled in vehicles one marked as a police vehicle, some were in a uniform similar to that of the police, carried handcuffs and importantly were in a mission that the police would normally be

conducting are relevant factors in determining whether the said four persons were in fact police officers. The plaintiff bears an onus to establish on the preponderance of probabilities that the four persons were members of the South African Police Service. In *Pillay v Krishna and Another* 1946 A D at 952 stated that he who asserts proves and not he who denies, since a denial of fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute. A onus is the duty which is cast on a particular litigant, in order to be successful of finally satisfying the court that he is entitled to succeed on his claim. The plaintiff produced evidence establishing objective facts and contend that the only reasonable inference to be drawn from the objective facts is that the four persons were police officers. In *R v Blom* 1939 AD 188 at 202-203 the court held that the 'two cardinal rules of logic' which would not be ignored when it came to reasoning by inference, namely, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. It needs to be repeated that the plaintiff did not prove that the vehicle was a police vehicle neither did he prove that the uniform worn by the two of the four persons was a uniform of the police. The cumulative effect of all the proved facts needs to be considered.

[37] The plaintiff must discharge the onus on a proof on the balance of probabilities. *Schacklard & Van Der Merwe Principles of Evidence*, 4ed. At p 627 states: 'In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a balance of probabilities but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that on a preponderance, it is probable that the particular state of affairs existed'?

[38] The other evidence produced by the plaintiff, in my view, shows that it is quite possible that the four (4) persons were police officers but the fact that when the plaintiff produced and showed them his licenced firearm, they did not take it and stated that they wanted from him an illegally possessed firearm strengthens the case that indeed they were police officers. In my view, indeed the probabilities do more than favour one party in preference to the other.

[39] In the result, judgment on the question liability on the issues identified is granted in favour of the plaintiff. It is found that the four persons were police officers and they were acting within the scope of their duties as employees of the defendant when they assaulted the plaintiff causing him some injuries causing him to suffer damages.

[40] It is ordered as follows:

3. The issue of liability is decided in favour of the plaintiff.
4. The defendant is ordered to pay costs.

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Mngadi, J

APPEARANCES

Case Number : 4808/2017P

For the Plaintiff : S R Naidu

Instructed by : Sanjeev Singh Incorporated
DURBAN

For First & Second Respondents : G M Mamvura

Instructed by : State Attorney (KwaZulu Natal)
DURBAN

Date of Hearing : 7 & 8 August 2023

Date of Judgment : 23 August 2023