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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG**

CASE NO: 10061/2020

Heard on: 16/08/2023

Judgment: 9/11/2023

IN THE MATTER BETWEEN:

KHUMALO JOHNSON KUQANGAMI

Plaintiff

AND

MINISTER OF POLICE

Defendant

JUDGMENT

STRIJDOM AJ

INTRODUCTION

1. The plaintiff's case is a claim for damages arising from an incident that occurred on the 8th of March 2019 at Emmanuel bar along Catherine Ave in Berea. The plaintiff sustained a fracture of the ankle as a result of wrongful conduct, which he attributes solely to the employees of the defendant.
2. In terms of the averments contained in the particulars of claim, the plaintiff was assaulted by two uniform police officers whose full names and ranks are unknown to him.
3. The plaintiff avers that he was kicked by members of the South African Police Service ('the SAPS') and he, as a result thereof, fell over the stoep and sustained a fracture on the lower left leg and injuries on his limb.¹
4. The court ruled that the issue of liability be separated from quantum and that the hearing should proceed on liability only.
5. It was submitted by the respondent that the special plea is abandoned.
6. The issue of onus and duty to begin was raised and both parties were *ad idem* that the plaintiff bears the onus of proof and the duty to begin.

THE ISSUES IN DISPUTE

¹ Caselines: 001 – 4; para 2 and 3 of POC

7. The core issue to be decided is, whether the plaintiff has established on a balance of probabilities that members of the defendant were at the scene of the incident and that their conduct at the time resulted in the injuries sustained by the plaintiff.

THE COMMON CAUSE FACTS

8. The following facts are common cause between the parties:
 - 8.1 That Emmanuel bar is situated along Catherine Ave and close and across the corner of Catherine Avenue and Kotze street;
 - 8.2 The bakkie with registration number plates [...] belongs to the Hillbrow SAPS;
 - 8.3 The said bakkie was allocated to the defendant's employee, officer Ndlovu, at 17:00 on the 8th of March 2019 until early morning of the 9th of March 2019;
 - 8.4 That warrant officer De Wee, who is of coloured descent was the crew of officer Ndlovu to the said bakkie on the date and times referred to above.

THE PLAINTIFF'S CASE

9. The plaintiff testified that on 8th March 2019 at around 19:45 he and three of his friends, inter alia one Eric Ndlovu, were sitting on crates drinking liquor in front of Emmanuel bar as discernible from Exhibits A1 to A5 of the record.

10. Following a commotion that ensued as a result of police who conducted a raid on patrons that were hanging around on the elevated stoep of the veranda, the patrons started fleeing toward the entrance of Emmanuel bar.
11. He testified that two members of the police, one black male and one coloured male during the fracas ascending the stoep from the stairs. The two police officers engaged in the breaking of liquor bottles and kicked crates that had been used by the patrons, whilst hounding everyone, rebuking them for drinking on the stoep.
12. The plaintiff got up as well to flee towards the doors of Emmanuel bar, and in the process, he was confronted by the bulky black policeman on the stoep, (marked 'X1' on Exhibit 'A1') who without ado kicked the plaintiff on the ankle and shoved him.
13. As a result of the push by the police officer the plaintiff fell over the stoep and landed on the pavement of Catherine Avenue (marked 'X2' on Exhibit 'A1'), sustaining a broken ankle. The plaintiff's assertion is that the episode did not take more than two minutes.
14. The plaintiff further testified that the black man and the coloured man who were clad in civilian clothes were employees and members of the defendant, because: (i) the fleeing patrons, shouted 'here are the police', (ii) the two individuals were carrying firearms on their waists and (iii) that the two individuals approached the scene from the direction in which a marked police van was parked.
15. Plaintiff was subsequently hospitalised and discharged six weeks later. He proceeded to lay a criminal charge of assault at the Hillbrow SAPS, regarding the incident, after his discharge from the hospital.
16. **Mr Eric Ndlovu** testified that he arrived at Emmanuel bar at around 17:50. He consumed liquor with friends, one of whom being the plaintiff.

17. His attention was drawn to a commotion, as people were shouting, here come the police. During the commotion, he got to his feet leaving plaintiff behind and fled into Emmanuel bar.
18. In the process of fleeing, he had remarked to the plaintiff about the presence of police, as bottles of liquor and the creates were kicked around by the police officers.
19. He further testified that he heard people shouting that 'they injured him'. He then returned outside only to discover plaintiff lying injured on the pavement below the stoep of the veranda. He felt aggrieved that the police had injured his friend and decided to secure details of their vehicle. He proceeded to take note and committed to memory the registration number plate of the marked police van that was parked across the road, namely BVB 751 B. Other than the police emblem and colours, the van had the inscription 'Hillbrow' on its rear side.
20. He testified that the assailants were indeed members of defendant because they carried firearms on their waists openly, and that they approached the stairs towards the stoep from the direction of where the police van was parked across the road.
21. After the plaintiff was taken away for medical attention, he proceeded to Hillbrow SAPS in order to open a case regarding the injury caused by police on the plaintiff. The police however turned him away under the pretext that a case could not be opened by him in the absence of the victim.
22. After the discharge of the plaintiff from hospital they accompanied each other to Hillbrow SAPS to open a case. He provided the police with the registration number of the vehicle in which the members of the SAPS were travelling in.
23. **Mr Ningi Phoswayo** testified that on the day in question he was sitting on a concrete bench (marked 'Z' on Exhibit 'A1') facing east towards the

Emmanuel bar veranda and stoep and behind him was Catherine Avenue. Between the concrete bench where he sat and the stoep is a pedestrian walkway.

24. Whilst sitting on the bench he saw bottles and crates that were on the stoep being kicked by police who ascended the stoep from the stairs in front of Emmanuel bar and the stairs on his left of the veranda.

25. He further testified that he saw a policeman that he knew by sight to be from the Hillbrow police station. The particular policeman was on the stoep and busy pushing the plaintiff from which action plaintiff fell over the veranda stoep. Plaintiff landed on the pedestrian walkway just in front of him and sustained a broken ankle.

26. The known policeman left the scene with the rest of the police and entered into a police van.

THE DEFENDANT'S CASE

27. The defendant called two witnesses, being sergeant Ndlovu of Hillbrow police station and Mr. Deysel, who testified regarding the AVL report in respect of the movement of the police vehicle with registration number[...].

28. Sergeant **Ndlovu** testified and denied any involvement in the assault of the plaintiff and that he and/or his crew Warrant Officer De Wee and/or his allocated police van with registration[...], were even near Emmanuel bar or along Catherine Avenue in Berea on the evening and time of the incident. He denied that he was anyway close to the area of Berea, Emmanuel bar or along Catherine and/or Kotze street.

29. He admitted that his crew Warrant Officer De Wee was in fact a coloured male person.

30. **Mr Deyssel** testified that he is employed by a company named C Track Fleet Management. The company is contracted to the SAPS. He is a consultant of the SAPS AVL system and that he provided fleet management by fitting satellite tracing to their vehicles.
31. He confirmed that the police vehicle with registration [...] was according to its movement report indeed recorded to be in Catherine Ave, Berea at 19:48:10, Kotze Street, Hillbrow at 19:49:45, and Kotze Street, Hillbrow at 19:54:45.
32. The speed of the said vehicle is recorded to be 13,24 and 1 respectively, and that the accuracy thereof has a deviation of at least 1km/h less than the recorded speed. Taking the accuracy deviation into account he concluded that the recorded speeds would have at least been between 11 and 12:22 and 23 or 0 respectively.

EVALUATION OF THE EVIDENCE

33. It was argued by the defendant that the plaintiff's case in the pleadings was at variance with the case presented in court. It was submitted that the witness, Eric Ndlovu, stated in his affidavit to the police, that the police who assaulted the plaintiff were in a vehicle with registration number [...]. Thus, the identity of the police that allegedly assaulted the plaintiff was known. This was contrary to the case made in the pleadings by the plaintiff that he was assaulted by unknown police officers.
34. It was further argued by the defendant that the particulars of claim alleged that the plaintiff was assaulted by uniformed police, whilst the evidence presented in court was that the plaintiff was assaulted by police in civilian clothing.

35. It was submitted by the defendant that the contradiction amongst the witnesses of the plaintiff and also as compared with the case made out in the pleadings by the plaintiff are so material that the claim has to be dismissed.²

36. Parties are usually restricted to cases alleged in pleadings: The court will not always (rigidly) restrict the parties to the cases which they allege in their pleadings. Whether or not a court will do so will depend on all the relevant circumstances. The approach was outlined in **Robinson v Randfontein Estates G M Co Ltd**:³

‘The object of pleading is to define the issues and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for the pleadings and where a party has had every facility to place the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleadings of the opponent has not been as explicit as it might have been.’

37. In my view the new issues were fully canvassed by all the parties and the court will pronounce on those issues.

38. The plaintiff gave a detailed and through account of the incident in a straight forward manner. He made a favourable impression on the court as an intelligent witness whose account was truthful and reliable. He has put forward cogent reasons for his assertions regarding the identity of his assailant. He is corroborated by his witnesses who also made similar observations on the strength of which the view was held that the culprits were employees of the defendant.

39. His evidence regarding the incident was free from material contradictions and discrepancies regarding the details.

² Caselines: 023-23; para 12 Heads of Argument

³ 1925 AD 173 at 198

40. His evidence is further corroborated by the defendant's witness, Mr Deysel, who places police van BVB 175 B, driven by Sergeant Ndlovu and his crew, in both the streets where Emmanuel bar is located between 19:48 and 19:54.
41. The witness Eric Ndlovu also impressed me as a reliable witness. He did not contradict himself on material aspects. There is nothing to cast doubt on his veracity concerning the actual incident and subsequent events. His evidence is corroborated by the evidence of the plaintiff and Ningi Phoswayo. I cannot find any inherent improbabilities in the evidence of the plaintiff's witnesses.
42. Mr Ningi Phoswayo's evidence was credible and free from material contradictions and discrepancies. His evidence was also corroborated by the evidence of the plaintiff and Eric Ndlovu on material aspects.
43. Sergeant Ndlovu did not impress me as a reliable witness. Despite his evidence in chief that in his shift, and more specifically around the time of the incident, that he and his crew, and/or his police allocated car were never near Emmanuel bar or had any reason to be, he later recanted during cross examination. When he was confronted with the AVL records of his allocated bakkie during cross examination he changed his version. His evidence was contradicted by the evidence of Mr Deysel, who places police van BVB 175 B driven by sergeant Ndlovu and his crew near the scene of the incident.
44. The evidence of Mr Deysel is consistent with the version of the plaintiff and his witnesses with regard to the time of the incident and the fact where the police bakkie was parked at the time.
45. It is unlikely that the plaintiff and his witness would have known about the existence of the AVL records of the police bakkie and that the crew man in the implicated bakkie was of coloured descent at the time of going to lay the criminal complaint. This fact provides credence to their respective testimonies regarding the presence of at least two police officers and one of whom being admitted a coloured male person.

46. It must be borne in mind that not every error and not every contribution or deviation adversely affects a witnesses' credibility.⁴ Unsubstantial variations are not necessarily relevant.
47. The contradictory versions must still be considered and evaluated in the context of all the evidence.
48. The proven facts leave no other conclusion other than those, that the defendant's employees attended Emmanuel bar where the incident took place. The facts proven by the plaintiff exclude any other reasonable inference other than that the defendant's employees were on the scene and that the plaintiff was assaulted by one of them. It is also clear that they were not on a frolic of their own, but where officially deployed to deal with, *inter alia*, Taverns, such as the Emmanuel bar, to enforce the law.
49. On a conspectus of all the evidence before me, I am persuaded that the plaintiff has proven his case on a balance of probabilities.
50. In the result, I find the merits in favour of the plaintiff and that the defendant is liable for any proven damages by the defendant.

STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG

Appearances:

⁴ S v Bruiners en 'n Ander 1998 (2) SACR 432 (SEC) at 437g.

For the Plaintiff:

Instructed by:

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For the Defendant:

Instructed by:

Adv P M Ramashoba

State Attorney