

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – BHISHO**

Case No: 469/2009

REPORTABLE/NOT REPORTABLE

In the matter between:

SABELO LIGHT

Plaintiff

and

MINISTER OF SAFETY & SECURITY

First Defendant

INSPECTOR NGCANGCA

Second Defendant

INSPECTOR MKHOSANA

Third Defendant

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The plaintiff issued summons against the defendants claiming (a) that on 14 May 2009, at Zwelitsha Police Station, the second defendant wrongfully and intentionally assaulted him repeatedly with a stick; (b) that the third respondent,

despite owing a legal duty to protect the plaintiff whilst in the care of the police, failed to protect him and to ensure that he was not assaulted by the second defendant.

[2] As a consequence of the injuries the plaintiff sustained, he claimed for:

“15.1 pain and suffering and economic loss to the amount of R100 00.00 amenities of life, for which the plaintiff holds the first and third defendant jointly and severally liable”.

15.2 Payment of the sum of R100 000.00 as and for general damages as well as Contumelia, each paying to absolve others; . . . “ (*sic*)

[3] The claim is based on vicarious liability in that the second and third defendants were, at the time, acting within the course and scope of employment with the first defendant.

[4] The defence raised by the defendants is a bare denial where the plaintiff is put to the proof of its allegations against the defendants.

[5] The issue of liability was separated from *quantum* by agreement between the parties.

B. Evidence:

[6] The plaintiff testified as a single witness. The second and third defendants also testified.

[7] The plaintiff testified that earlier on there was a burglary at his place. Some of his clothes were stolen. He opened a case with the South African Police Services (SAPS). The third defendant was the investigator thereof.

[8] On 13 May 2009, while at his “stand” where he works as a Hawker he saw a person wearing his jersey and pair of trousers. He ran to the police station, in particular to the office of the third defendant. He entered the office running. At the office, he met with the second and third defendants. The second defendant enquired from him as to why he entered the office like that and whether he was “drunk or high on drugs”. The plaintiff explained to him that he had seen someone wearing his clothes which were stolen during the break-in at his place.

[9] The second defendant became angry. He took a stick and assaulted him on his ribs, knee and left mandible. The plaintiff became angry and sat on the chair. On realising that the second defendant wanted to assault him further, he ran out of the office towards the Community Service Centre (CSC) and went out of the police station and proceeded to his home. He reported the matter to his mother and told her he was hit on the mandible. An ambulance was called and it took him to Grey Hospital for treatment. The plaintiff testified that the third defendant was present when he was assaulted by the second defendant. The third defendant did nothing to protect him or prevent the assault on him. He reported the assault on 14 May 2009 at the CSC.

[10] The plaintiff denied having made a withdrawal statement of the housebreaking docket. He denied the signature appearing on the withdrawal statement to be his. The withdrawal statement is dated 11 February 2009. The time of reporting the assault case on 14 May 2009 became a bone of contention during his cross-examination. The plaintiff maintained that though he was not certain about the time but he reported the matter after 14h00 on 14 May 2009. The plaintiff was shown hospital records which indicated that he was at the hospital after 14h10 on 14 May 2009. He disputed the time appearing on the hospital records. He further disputed that he reported his assault to the police at about 10h00 on 14 May 2009. He later conceded, despite his lack of recollection of the time he was at the hospital, that he must be making a mistake about the time he reported the incident to the police.

[11] It was put to the plaintiff that the reason why he did not report the incident of his assault to the police on 13 May 2009 on his way out of the police station, is because he was not assaulted by the second defendant. The plaintiff responded repeatedly that “that is so”.

[12] The version of the defendants which is consistent with the testimony of the second and third defendants, was put to the plaintiff. He denied it. The import of the version is that the plaintiff came to report about someone who had taken his money. The second and third defendants told him to open a case at the CSC. The plaintiff refused. He was smelling strongly of alcohol. The second defendant pushed him out of the office. The plaintiff disputed the version and that the second defendant pushed him out of the office.

[13] It was put to the plaintiff that “evidence will be led to the effect that when Ngcanga pushed you, the force used was not that strong because you did not fall and neither did you hurt yourself, you simply left the office”. The plaintiff disputed that. The plaintiff insisted that he was assaulted in the presence of the third defendant.

[14] The plaintiff was shown the statement he gave to the police about his assault. He confirmed making the statement and the signature appearing on it to be his. He, however disputed a portion of the statement which reflected that the second defendant accused him of making noise hence he pushed him out of the office.

[15] The second defendant testified that on 13 May 2009, he was in his office with the third defendant. They were winding-up paper work preparing to leave the office to conduct investigation in other matters when the plaintiff came into the office. He was drunk because he was smelling strongly of alcohol and was not co-operating. The plaintiff told them that there was a person who took his money. The third defendant advised him to report the matter at the CSC. The plaintiff did not want to listen. As they were about to leave the office, he slightly pushed the plaintiff out of his office. The plaintiff got out. He locked the office. The plaintiff did not bump himself against anything. He staggered and proceeded to the direction of the CSC. He learnt on 14 May 2009 that the plaintiff had laid a charge against him. He denied that he assaulted the plaintiff. He denied the plaintiff’s version about why he went to their office on 13 May 2009.

[16] Under cross-examination, the second defendant was confronted with the evidence of the third defendant who did not mention that the plaintiff was drunk. He ascribed that to the fact that he is the person who was close to the plaintiff and the third defendant possibly did not know the smell of alcohol in someone's breath because he was not a drinker.

[17] The second defendant confirmed the contents of his statement that after leaving his office, the plaintiff "went to the Station Commissioner to report the matter". He explained that the matter he went to report was not being attended to and not that he was assaulted by him. He testified that the context must be seen in the backdrop that at the time he was aware of the charges laid by the plaintiff against him. He confirmed further that his statement does not reveal that the plaintiff complained of not being attended to.

[18] The third defendant's testimony is on all fours with that of the second defendant pertaining the events that took place in their office on 13 May 2009. He denied that the plaintiff was assaulted. He stated that the second defendant merely pushed him out of the office and the plaintiff left. He further confirmed that indeed he investigated a case in which the plaintiff was the complainant. The plaintiff later signed a withdrawal statement on 11 February 2009. He filed the withdrawal statement in the docket and took the matter to the Public Prosecution for decision. On 23 February 2009 the Public Prosecution endorsed the withdrawal and the docket was closed.

[19] The third defendant stated that he did not approve of the pushing of the plaintiff by the second defendant but he could not do anything as he was merely pushed once. He further told the second defendant to leave the plaintiff alone and advised the latter to open a case about his money. The third defendant was quizzed about what he said in a warning statement which was obtained from him. It transpired under further questioning that it was a witness statement that was obtained from him as he was not a suspect in the matter involving the plaintiff. He admitted and ascribed that to human error.

[20] *Mr Maseti*, on behalf of the plaintiff, argued that the plaintiff was consistent in his evidence. It was submitted on behalf of the plaintiff that the second and third defendants did not corroborate each other on the state of sobriety of the plaintiff. He further argued that the defence raised by the defendants was a bare denial. The plaintiff submitted that all the facts that were relied on by the defendants especially the evidence of the second and third defendants were not pleaded. He referred me to *Jowell v Bramwell-Jones and Others*¹, I agree with the principle enunciated in the *Jowell* matter as it is the correct exposition of the law. Heher J, (as he then was) cited with approval the following passage from Jacob and Goldrein on *Pleadings: Principles, and Practice* at 8 – 9 which in parts read thus:

“ . . . For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. . . . The Court itself is as much bound by the pleadings of the parties as they are themselves. . . . Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. . . . To do so would be to

¹ 1998 (1) SA 836 (WLD) at 898 F – J.

enter the realms of speculation. . . . The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “any other business” in the sense that points other than those specified in the pleadings may be raised without notice”.²

C. Analyses:

[21] Rule 22 (2) of the Uniform Rules of Court provides:

“22 (2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies”. (My underlining).

[22] When the plea is a simple denial there is usually no necessity for the defendant to plead or state any facts, as the defence is based upon negating the plaintiff’s allegations³. The necessity to state the material facts to be relied on does, however, arise when the denial implies some positive allegation on which the defendant intends to rest the defence⁴. In *Van Biljoen v Botha*⁵, Brink J said:

² *Jowell* page 898 F – J).

³ Herbstein and Van Winsen Practice of the High Courts of South Africa, 5th Ed. Volume 1 page 592.

⁴ *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE).

⁵ 1952 (3) SA 494 at 499 A – B.

“Ordinarily evidence should not be pleaded, but if it is essential for a pleader to plead evidence in order to inform the other party of the case which he has to meet, he should do so”.

[23] Rule 22 (2) merely requires the pleader to state the material facts on which reliance is made and not the evidence that the pleader will adduce in support of that fact⁶.

[24] In *hoc casu*, the onus to establish the assault lies with the plaintiff. The latter has to establish on a balance of probabilities the assault on him. The defence raised by the defendants, as alluded to, is a bare denial and the plaintiff is put to proof of his allegations. That is a complete defence. The plaintiff did not except to it. The plea would not be exceptable in any event.

[25] Reliance by the plaintiff on the *Jowell* matter is misplaced. The plaintiff argued that the defendant did not plead certain facts, especially the evidence that the plaintiff was drunk or had consumed liquor. This to me, is not a fact to be pleaded but forms part of the evidence the defendants lead. These are facts which need not be pleaded because they constitute evidence.

[26] In evaluating the evidence, I have to consider various factors. The version of the plaintiff is irreconcilable with that of the defendants⁷. The plaintiff maintains that

⁶ Herbstein and Van Winsen *supra* at page 593.

he went to the office of the third defendant to follow up on a matter he had laid charges. He saw a person wearing his stolen clothes and went to the third defendant to report that and for the latter to take urgent action. The second and third defendants proffer a contrary version which is that the plaintiff had come to report a person who had taken his money. In order to substantiate that claim, the defendants discovered the docket wherein the Public Prosecutor issued a certificate of *nolle prosequi* dated 23 February 2009 basing that decision on a statement purportedly made by the plaintiff on 11 February 2009. I say purportedly because the signatures on his statement (reporting the events pertaining the theft of his clothes) and the withdrawal statement appear to be different. However, what cannot be doubted is the decision of the Public Prosecutor not to proceed with the case which was taken almost three (3) months before the incident. The facts as they are in this regard, do not establish that the plaintiff had gone to report about the case that he had withdrawn. I say so in spite of the plaintiff's evidence that, that was the purpose of his visit to the police station.

[27] The plaintiff testified that when he entered the office he was running. The second defendant asked him why he entered his office in that fashion and enquired whether he was drunk or "high in drugs". The second defendant picked up a stick and assaulted him on the ribs, knee and face. He spit blood on the floor and realised that his jaw was sore. He proceeded and testified in chief as follows:

"I bled and peed on the floor on noticing that my jaw was sore, I then peed some blood there M' Lord, Mr Ngcanga came up and pushed me on noticing that Mr

⁷ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at para 14 – 15 deals with such instances and the manner in which such has to be resolved.

Mkhosana was again picking up, still carrying this stick intending to hit me once more, then I ran out. I ran home. On arriving at home I found my mother present at home, I then reported the incident to her, she enquired as to where exactly was I hit and I told her that I was hit on the mandible M' Lord, then an ambulance was called for me. After the ambulance arrived I was conveyed to Grey Hospital M' Lord. At Grey Hospital I was taken to casualty M' Lord. I was then advised M' Lord that I would be conveyed to Frere Hospital in East London M' Lord. Indeed on the following day I was taken to Frere Hospital". (Sic) (My underlining)

[28] Further down *Mr Maseti* proceeded as follows:

"Mr Maseti: The doctor at Grey Hospital stipulates that he saw you on the 14th of May 2009.

Mr Light: That's correct M' Lord.

Mr Maseti: The doctor saw you on the 14th of May, which is the following day, after you were at the police station.

Mr Light: That's correct M' Lord, after the incident I ran to my home and I was thereafter taken to hospital.

Mr Maseti: On the following day?

Mr Light: That's correct M' Lord, on the following day". (My underlining)

[29] What comes across from the evidence of the plaintiff repeatedly is that he went to the hospital on the day of the incident and not, the following day. He merely confirms that it was the following day, each time when such is put to him by *Mr*

Maseti. It is expected that he may confuse the date that he visited the hospital but not when after he was assaulted he visited the hospital for treatment. His testimony is not convincing in the circumstances, especially in the backdrop of the defendant's evidence that when he left their office he had neither been assaulted nor injured.

[30] The plaintiff says he was assaulted because he came to the office running. The defendants do not dispute that but add to say that he did not listen to what they told him. He was merely pushed out of the office because he did not want to listen. There is a dispute of fact as to the reason why he had gone to the office. There is further an irreconcilable dispute as to what led to either the pushing or the assault on the plaintiff. Be that as it may, I have to rely on the probabilities. It is common cause that the plaintiff, once before, had laid a charge at the police station. He was familiar with the police station, especially the third defendant who investigated his complaint. It is further his evidence that he was assaulted with a stick and sustained a fractured mandible to an extent that he bled. That occurred at the police station and not far from the CSC. Certainly at that stage his injuries were fresh and could be seen. He proffered no reason why he left the police station without reporting the matter to the police or at the CSC. It was expected of him in the circumstances to have reported the incident at the CSC whilst it was still fresh and both defendants were still within the precinct of the police station.

[31] There is a dispute in the evidence of the plaintiff as to what time he visited the hospital and the CSC on 14 May 2009. He maintained that he went to the police station after 14h00. It transpired from the records that he went to the police station

on 14 May 2009 at 10h00 to report the incident. This further contradicts, in a way, the plaintiff's evidence that he was taken to Grey Hospital the following day i.e. 14 May 2009. In the light of his testimony, he was taken to hospital first and was due to be transferred to Frere Hospital the following day. The medical records reveal that he was attended at Grey Hospital at 14h10 on 14 May 2009. The confusion, if I may, regarding when the plaintiff went to Grey Hospital in relation to the day of the assault casts doubt as to when he sustained the injuries. I am mindful that the information given by him to the nurse and reflected on the medical records, is to the effect that he was assaulted the previous day i.e. 13 May 2009. What compounds the issue of whether he was assaulted is his evidence under cross-examination which reads thus:

"Do you admit that the most logical thing to do after allegedly being assaulted by Ngcanga on 13 May 2009 in his office was to report the assault to the charge office on your way out?"

Mr Light: That's correct.

Ms Da Silva: I put it to you that the reason you did not report any assault on 13 May 2009 when you were leaving the police station was because you were never assaulted by Ngcanga at the police station.

Mr Light: That is so M' Lord.

Court: That is so?

Mr Light: That is so M' Lord.

Interpreter: He's asking me to repeat M' Lord.

Court: Yes.

Mr Light: That is so M' Lord.

Ms Da Silva: I also put it to you that you didn't go to the hospital after seeing Ngcanga on 13 May 2009 because you were never assaulted when you left Ngcanga's office.

Mr Light: He assaulted me M' Lord, he is the one who assaulted me".

[32] This contradiction is inexplicable.

[33] On the probabilities, I am unable to find that the plaintiff was assaulted by the second defendant. Even the pushing admitted by the defendants in the circumstances does not amount to an assault. I find that the plaintiff has failed to discharge the onus vested on him.

[34] Consequently, the action is dismissed with costs.

M MAKAULA
Judge of the High Court

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Dates Heard:

*24 April 2019; 25 April 2019 &
26 June 2019*

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26 June 2019

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