

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1803/2012

Heard on: 07 November 2019

Delivered on: 12 November 2019

In the matter between:

XOLILE TENGILE

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

ZONO AJ

INTRODUCTION

[1] The plaintiff instituted action proceedings against the defendant for damages arising out of his unlawful arrest and detention and assault. The claim for unlawful arrest and detention was disposed of by consent in terms of the court order dated 10 November 2016. This court order held defendant liable for proven damages arising

out of his unlawful arrest and detention and the claim of assault as well as determination of quantum was postponed sine die.

[2] The matter was set down for determination of liability in respect of the claim of assault. Only plaintiff tendered evidence. The defendant did not call any evidence. It goes without saying that the matter will be decided on the basis of plaintiff's evidence. The plaintiff bears the onus of proof in respect of assault.¹

PLEADINGS

[3] The action is defended by the defendant. In so doing the defendant delivered notice to defend and plea. The plea dated 11 March 2013 was amended, by filing of a plea dated 22 October 2019.

[4] In the particulars of claim, the plaintiff avers that on 3 June 2012 at or near Gogozayo Administrative Area, Mqanduli, he was assaulted by police officers who are the members of SAPS attached to Public Order Police Service (POPS) Unit in Mthatha. He further avers that the police officers were on duty and were in full uniform, acting within the course and scope of the employment with the defendant. The police officers, when assaulting the plaintiff had no reason to do so. The assault took place in full view of the members of the public.

¹ Pillay v Khishna and Another 1949 AD 946 at 941-2.

[5] The defendant denies that the plaintiff was assaulted as alleged. In amplification of denial the defendant pleads that minimum force was used to take plaintiff out of his vehicle after failing to come out as instructed by the members. The defendant further avers that the orthopaedic injuries sustained by the plaintiff were not as a result of the assault by members of SAPS. The defendant concludes by denying liability.

EVIDENCE

[6] The salient features of plaintiff's evidence are that: on 3 June 2012, forenoon the plaintiff with two lady passengers were driving in plaintiff's motor vehicle attending church service at Tsolo. At Gogozayo Administrative Area, Mqanduli as he was driving stopped at a road construction works. Only the oncoming traffic was allowed to use the only lane available to be used by the motorists. He testified that there were two motor vehicles in front of him and he stopped just behind them. After sometime the road was opened for them to go and they did that. As they were driving a police vehicle behind them flicked lights for him to stop. As he was on the ascent, he made a hand signal indicating that he would stop on the summit. Not pleased with that, the police vehicle overtook him and immediately blocked his way and he unceremoniously stopped his motor vehicle to avoid collision.

[7] Three police officers who were not in uniform alighted from the police vehicle and approached his vehicle. One police official opened the back passenger door for two lady passengers to alight and the other one came to driver's door. The plaintiff

and the other police official opened driver's door almost simultaneously. The police official started hitting the plaintiff and others joined him to assault the plaintiff. They assaulted the plaintiff with open and closed fists tramp upon him with booted feet, dragging him on the road. He cried asking them what he had done. They asked him why he had not stopped when they were stopping him. They even suggested that he did not stop because of the whores he was travelling with. He was hand cuffed, thrown into the police vehicle and taken to Mqanduli Police Station. He testified that he was severely bleeding.

[8] The plaintiff described the nature of injuries he sustained. He testified that he, as a result of those injuries attended a number of hospitals and clinics for medical attention. He still suffers from the effects of assaults and injuries not healed and that affected his life, and his carrier prospects. He testified that he laid charges against the police officials under CAS 19/06/2012 and that case is still pending in Mqanduli Magistrates Court. Contents of the docket was handed up and marked as Exhibit A.

[9] In the light of the fact that the defendant did not call any evidence to gainsay plaintiff's version on assault, the version put on the plaintiff during cross examination is of no moment. Plaintiff's evidence was not gainsaid and that failure renders plaintiff's evidence a common cause. Of importance, the assault of the plaintiff is a common cause. There was an assault by members of the defendant. The defendant sought to advance a defence that only minimum force was used. I find that the plaintiff has succeeded to prove that he was assaulted by members of the defendant. The defendant failed to prove justification sought to be relied upon. The

defendant sought to rely on the provisions of **Section 49(2) of Criminal Procedure Act 51 of 1977**. No evidence to prove that jurisdictional facts prescribed by the section have been satisfied. He who asserts must prove.² The defendant has failed to prove the justification.

[10] The parties agreed that the plaintiff firstly bears the onus to prove assault, and once that is done, the onus shifts to the defendant to prove justification, if any. On the facts of this case no justification was proved as there was no evidence called on behalf of the defendant. I am left with no choice but to accept plaintiff's version as it was clear, credible and not riddled with contractions. Plaintiff's candour and demeanour was satisfactory.

[11] With regard to costs I find no reason why general rule that costs should follow the result cannot be followed herein. Where the case concerns an important constitutional right, the court has discretion to award costs on a high court scale regardless of quantum of damages.³ I was advised by defendant's counsel that there were costs previously reserved and I commend her for that disclosure. She submitted that costs should follow the result.

[12] **In the result I make the following order:**

(i) Plaintiff's claim for assault succeeds.

² Pillay v Krishna (supra) Page 941-2.

³ Mtola v Minister of Police (CA23/16) [2017] ZAECHMHC 56 (29 June 2017) Para 30.

(ii) The defendant is held liable to the plaintiff for proven or agreed damages consequent upon plaintiff's assault by members of the defendant on 3 June 2012.

(iii) The quantum of damages to which the plaintiff is entitled shall be determined on a date to be arranged with the registrar of this court.

(iv) The defendant shall pay costs of the action incurred thus far.

A.S. ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

For the plaintiff: Mr Dalasile

Instructed by: Mnikelo Dalasile & Associates

MTHATHA

For the defendant: Adv. Flatela

Instructed by: W.T. Mngandi & Associates

MTHATHA