

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. : 3523/2015

Date of hearing: 29 and 30 July 2019

Date delivered : 28 November 2019

In the matter between:

MANDLANANDILE MAXWELL RAWU

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

MAJIKI J:

[1] The plaintiff, a 48 year old male sued the defendant for damages he suffered as a result of the alleged wrongful conduct of the defendants' servants. The defendant is sued in his capacity as the person who is vicariously liable for delicts committed by the members of the South African Police Service (SAPS) whilst acting within the course and scope of their employment with the defendant. The action is defended by the defendant.

[2] The plaintiff had initially cited the defendant as the minister of safety and security. However, during trial the parties agreed that the party who was defending the action was the minister of police. The objection to the citation of the former was therefore abandoned by the defendant. By agreement between parties the matter proceeded on liability aspect of the claim only.

[3] According to the plaintiff on 19 October 2015, at night, he was wrongfully arrested, detained and assaulted by the members of the SAPS. His arrest was without a warrant of arrest. In his plea the defendant denied that his officers were ever involved in the actions alleged by the plaintiff and further stated that he had no knowledge of the injuries allegedly suffered by the plaintiff.

[4] Only the plaintiff tendered evidence during trial. He together with his wife testified. Most of the evidence about the people who arrived at night, knocked, assaulted and took the plaintiff was not placed in dispute. The plaintiff testified that he reported the incident at central police station, Mthatha. In cross-examination it was put on behalf of the defendant that those people could not have been members of SAPS. There was no record of members of SAPS having been dispatched to that area on the day in question. Further, at central police station there was neither a record at the instance of members of SAPS, of the plaintiff having been arrested nor of a report of the arrest by the plaintiff himself. However, no evidence was placed before court in support of the said suggestion. In the circumstances, the version of the plaintiff stands uncontroverted.

[5] Both witnesses testified that on the night in question they were sleeping at their homestead with their one (1) year old baby. Around 23h00 they heard people knocking at their two roomed structure saying they were police. They lit torches and said they wanted the plaintiff. The witnesses said those were three (3) police in police uniform (full police clothing with boots and caps), two (2) males and one (1) female. The police tags with their names were concealed. Mrs Rawu did not see the police badges in their clothing. She opened the door against her husband's wishes. She jumped up because the police proceeded to their son's separate four cornered structure. She heard her son saying he was not his father and then heard gun shots. She saw that the one that was positioned directly opposite her was firing the shots. She shouted her son's name, Patrick and he responded. She opened after the second shot was fired.

[6] Both witnesses said the room was lit with electric lamp. Two police entered and handcuffed the plaintiff. They neither had a search warrant nor a warrant of arrest. They requested to search for a firearm, the plaintiff told them he never

owned a firearm. They searched their bedroom and the dining room. They left things in a mess. The plaintiff specifically said they turned the bed upside down and caused the couple's one (1) year old child to fall. They also searched the other rooms the one where their son was and the other where the rest of the children were. During the search they were in the plaintiff's company, whilst he was in handcuffs.

[7] Mrs Rawu said she then saw the police officers leaving with the plaintiff. She turned back at the gate and did not see any motor vehicle, even though her husband had told her he was taken away in a van. After midnight the plaintiff returned with the police. He was crying. Two police officers entered and left with the plaintiff once more. It was only later after 3am when the plaintiff returned that he related to her that he had lied earlier and said the firearm was under the wardrobe. They all came back and still found nothing. He was dirty, swollen in his mouth and face. His wrists were injured. He told her where he had been taken to, in Langeni and Befula areas, around Mthatha. He was assaulted, stamped with booted feet on his body and tortured with a plastic. The plaintiff went to report at central police station, the next day. They received a police confirmatory short message service (sms) of his report. The plaintiff only went to hospital after three (3) days because they had no money.

[8] In his testimony the plaintiff said the police refused to disclose their names. They told him that they were taking him to central police station, despite the fact that they did not find him in possession of a firearm. He said he walked with them for about 300 metres for about 15 minutes before they could reach where they had concealed their motor vehicle. When they were close to it, they ordered him to turn around and move backwards towards the motor vehicle. He saw that the motor vehicle was a white van. He was never made to see the markings of the van. They made him squat at its tail gate and pushed him into the van. They drove in high speed without being considerate of him. He kept on balancing in between the seats at the back of the van.

[9] He was made to alight at an area next to Langeni factories, in front of some entrance. They kicked and assaulted him until he said the firearm was under his

wardrobe. They said if he had said so earlier he would have just been arrested. He said he lied because he was hurt by hard pressed handcuffs. They went home and still did not find the firearm. They took him again, they stopped along the road at Mhlahlane.

[10] He said he asked them to phone his wife or their superiors, including, Loyiso Mdingi, those two knew that he never owned a firearm. The female officer then said he must be released. Another police said he must be killed and his death be reported the next day. The female police officer refused and said he must be released. He was then uncuffed and released at 02h00. He walked for about 1½ hours back home. He found his wife with his two neighbours and the children. He reported to them what happened to him.

[11] He said he sustained injuries. His body was swollen and sore. Both his wrists were injured. In court he showed healed marks that were still visible in both wrists. The next morning he went to report at central police station. He was given a case number and the investigation officer said he would send him a confirmation sms. He went to hospital and was given treatment.

[12] He was hurt that he was abused in front of his children, when he had not committed any wrong. Other people were watching from their homes after hearing the gun shots.

[13] The issue for determination is whether the plaintiff proved that he was arrested, detained and assaulted by the members of the SAPS, if yes, how long did his ordeal last in their hands.

[14] The evidence led on behalf of the plaintiff was clear and credible. The plaintiff and Mrs Rawu did not contradict each other in any material respects. Mrs Rawu was honest and did not exaggerate. She could have said she saw a police vehicle or any vehicle which was used to transport the plaintiff, but she said she did not see it. Similarly, with the police badges, she said she did not see them. The plaintiff was honest as well in his testimony. He said he did not see the

markings of the white van he was in. Both witnesses appeared not to be sophisticated but were impressive.

[15] The appellate division in **Ocean Accident and Guarantee Corporation Ltd v Koch 1963** (4) SA 147 adopted the principle stated in **Miller v Minister of Pensions 1947** (2). ALL ER 372, which principle has become trite, regarding the standard of proof in civil cases. It was said, “it must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged, but if the probabilities are equal it is not”.

[16] The uncontroverted evidence the plaintiff’s witnesses tendered, does in a balance of probabilities prove that the plaintiff was in the hands of the police for the duration of four (4) hours on 19 October 2015. He was handcuffed after 23h00 and was released after 2h00, but had to walk and arrived at home after 3h00.

[17] The people who took him identified themselves as police. They said they were taking the plaintiff to central police station. They also said if he had told them earlier where the firearm was, they could have just arrested him, that is, they would not have assaulted him. They were clothed in full police uniform. They used handcuffs. When the plaintiff mentioned a person in the name of Loyiso Mdingi, who he said was a high ranking official in SAPS, they were shocked and released him. Over and above the period of detention they made him walk for 1^{1/2} hours back home. They were as responsible for his walking alone in those ungodly hours. His children witnessed their entire homestead being ransacked, the shootings and their father being taken away in handcuffs.

[18] No evidence was led on behalf of the defendant to prove either that no vehicle together with members of SAPS was dispatched to the plaintiff’s area on that day or account for the whereabouts of the members who were on duty that day. If it could be validly suggested that none were so dispatched, clearly, the source of that information could have been presented to court together with that of where members on duty had been, if there were officers who had left in police

vehicles that night. The matter has to be decided on the plaintiff's version, which I have found to have proved his case on a balance of probabilities

[19] In the circumstances the plaintiff discharged the onus to prove his case against the defendant.

In the result,

1. The minister of police is hereby held liable for Mr Rawu's proven damages.
2. The minister of police is ordered to pay the costs of the action to date.

B MAJIKI

JUDGE OF THE HIGH COURT

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