

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 35598/2014

26/1/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE
	26/01/2018

In the matter between:

MATHUNYANE TSHARARA RICHARD

Plaintiff

versus

MINISTER OF POLICE

Defendant

JUDGMENT

MPHAHLELE J

[1] The plaintiff instituted action against the defendant for damages arising from an assault.

[2] At the commencement of the trial, the merits for liability and the quantum were separated in terms of rule 33(4) and the issue of quantum was postponed *sine die*.

[3] The defendant admitted that on 11 July 2011, members of the defendant arrested and detained the plaintiff on reasonable suspicion of having committed a schedule 1 offence(s) as contemplated in section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (as amended) which are offences of housebreaking and theft. The plaintiff conceded that the arrest was lawful and his claim against the defendant has its cause on the premise of assault. The defendant denies that the plaintiff was assaulted.

[4] The plaintiff, a 49 year old male person, testified that members of the South African Police Services arrested him on 10 July 2011 at his cousin's place. He was assisting his cousin, a music disc jockey to put music on a DVD and a laptop. At the time of his arrest, the police found him sleeping in a bedroom with his cousin (Evans Selape Mathunyane). One of the police officers hit the plaintiff with a pistol on the left eye. The said police officer then instructed the plaintiff to lie on the bed so he could handcuff him. The police officer was later identified as Mr Thobakgale.

[5] After handcuffing the plaintiff, two other police officers arrived and assaulted the plaintiff whilst he was lying on the bed. He identified one of the police officers involved as Mr. Masuku. Masuku was wearing civilian clothes whilst the other unidentified officer was wearing police uniform. These officers assaulted the plaintiff and punched him all over

his body. They also used a rifle in the assault. The assault caused his left hand to be broken. The police officers caused the plaintiff was to wear Evans' trouser, which happened to be big, without a belt. The police officers did not allow the plaintiff to put on his shirt and shoes.

[6] The officers took the plaintiff and Evans to an unmarked Nissan bakkie without a canopy parked inside the yard and continued to assault them. They instructed them to lie down inside the Nissan bakkie. Outside the house were many people who the plaintiff could not identify or tell whether they were police officers or not as it was dark. The Nissan bakkie then drove out of the yard for approximately 500 metres to a point where the plaintiff and Evans were moved to the back of a marked police bakkie (the police bakkie). The police bakkie had a canopy and blue lights. The plaintiff remained handcuffed.

[7] The police officers then took them to the plaintiff's parental home which was about 6,5 kilometres away. Upon arrival there, the officers took them out of the police bakkie. The plaintiff was also assaulted at his parents' home. The officers searched the property and the search yielded nothing. The police denied the plaintiff's mother an opportunity to give him a shirt and shoes to put on. The officers said he was a thief and deserved to walk around without a shirt and shoes. Plaintiff was then pushed back into the police bakkie, still in handcuffs.

[8] Upon arrival at the Hlogotlou police station at about 02h05, the plaintiff was taken out of the bakkie straight to the charge office. The officer who was instructed to take the handcuffs off the plaintiff informed the officers present in the charge office, in particular

Thobakgale, that the plaintiff's hand was broken. Their response was that plaintiff be taken to a cell, the officers indicated that they wanted to sleep and would only attend to the plaintiff the following day. He was then locked in a cell with fifteen other inmates. The other inmates noted the injury on the plaintiff's hand and they tried to get the attention of the police to no avail.

[9] The plaintiff stated that he was never assaulted by any of the inmates in the cell. It was on a cold winter night and he never fell asleep at all in the cell due to the painful hand. He did not receive any medical attention for the injury to his hand. In the morning, just before 06h00, the officers on duty attended at the cell to count them, and one of the inmates asked them why they brought the plaintiff who was injured in the cell. In response, the officers indicated that they were merely following instructions.

[0] The plaintiff was taken to the Klipspruit clinic, Hlogotlou at 10h00 in the morning in a police bakkie. He rode in the bakkie with both feet cuffed. A nurse at the clinic diagnosed him with a fracture and was given a referral letter to St. Ritas hospital. The officers took him back to the police station and only took him to the hospital at around 15h00 on the same day. At the hospital he was examined by a doctor who requested the officers to remove the cuffs. He was diagnosed with a fracture and a plaster of paris was applied to his injured hand. He was thereafter taken back to the police station.

[11] The plaintiff appeared in the Moutse Magistrate's court on the Wednesday, 13 July 2011. In response to a query raised by the

Magistrate, he reported that he was assaulted by the police officers. The Magistrate then advised him to lay a criminal charge against the officers. He was only released on bail 13 days after the date of his arrest. After his release, he opened a criminal case at Motetema police station as the Magistrate advised him not open the case at Hlogotlou police station. Under cross-examination the plaintiff denied that the Magistrate advised him to lay a criminal case and not a civil claim. He denied that he was on the run from the police and stated that he was not aware that the police were looking for him. He denied that Thobakgale ever enquired with him as to why he ran away from the police. He further denied the existence of any pre-existing injuries before the assault by the police officers.

[12] Sellane Evans Mathunyane testified as follows: On 10 July 2011 at 20h30 he was with the plaintiff at his cousin's place, one Poo or Mandela. They were listening to music before going to sleep. Whilst sleeping with the plaintiff with the light on, he heard someone calling the plaintiff's name. The plaintiff woke up and Mathunyane noticed a man hitting the plaintiff with a short gun in the face. This was the man who called out the plaintiff's name. The plaintiff fell from the bed during the beating and two other officers, clad in police uniform, entered the room. As per the police instruction they put on trousers whilst the officers were busy assaulting them. They ended up wearing each other's' trousers, vice versa. Only the plaintiff was cuffed. He denied the defendant's version that he and the plaintiff were cuffed together.

[13] Mathunyane testified that at the plaintiff' home the officers took the plaintiff with into the house whilst he remained outside. Whilst outside, the officers assaulted him and told him to go home to sleep.

He then went to his parents' home. He never saw the plaintiff again after that incident. He and plaintiff grew up together and he maintained that the plaintiff had no pre-existing injury to his left hand. Mathunyane corroborated plaintiff's version of events in all material respects with regard to what happened when he was in the presence of the plaintiff.

[14] Kwená Andrew Thobakgale, a police officer, salient testified that on 10 July 2011 he was involved in the arrest of the plaintiff. The salient part of his evidence is that the arrest took place at Dikgalaopeng Village, a section of Tafelkop at the house of a girlfriend of the plaintiff's cousin (Mathunyane). The plaintiff was a suspect in case number CAS37/07/2011 in relation to an offence of housebreaking committed at the plaintiff's place of employment.

[15] Upon arrival at the home of Evan's girlfriend, they called out hoping someone from the house would open for them, all of these was in vain. As the gate was locked, Thobakgale jumped over the fence in order to gain access to the house. Mr. Mafalo, a fellow officer, accompanied him as back-up. The other officers, namely Masuku, Seloga and Moloto remained outside the premises. (Masuku and Seloga have since passed on).

[17] A young man opened the door for them and pointed out the room in which the plaintiff was sleeping. The young man opened the door and switched on the light of the room in which the officers found the plaintiff and Evans sleeping. The officers then woke up the plaintiff and Thobakgale enquired with him as to why he (the plaintiff) was fleeing from them. The plaintiff indicated that he was going to attend at the

police station the following day. Whereupon Thobakgale accused him of lying as he had information that the plaintiff was fleeing to Pretoria the following day. The plaintiff responded in the positive that he knew why the police were looking for him. Thobakgale then handcuffed the plaintiff's left hand with Mathunyane's right hand. Both the plaintiff and Mathunyane never resisted being handcuffed. Mathunyane was no suspect, he was handcuffed because his mother asked Thobakgale to bring him home should they find him in the company of the plaintiff.

[18] Thobakgale found the plaintiff sleeping on top of blankets, fully clothed with only his shoes off. After handcuffing the plaintiff, Thobakgale gave him an opportunity to put on his shoes as per request. Thobakgale then explained to the plaintiff his constitutional right, as he was explaining the rights to the plaintiff, the other officers whom he left outside the premises entered the room. They then left for the plaintiff's home to search for exhibits. The plaintiff and Mathunyane were put at the back of police bakkie. There was another vehicle used in the operation, viz. an unmarked, open bakkie as well as a vehicle belonging to the informer's friend. Thobakgale stated that during he never assaulted the plaintiff or Mathunyane during the arrest and did not notice anyone assaulting them. He stated that all the police officers involved in the arrest were had firearms.

[19] They found Mathunyane's mother at plaintiff's home and then Mathunyane was handed over to his mother. The plaintiff was then asked to hand over the items stolen from Metro where he worked as a guard. The plaintiff then pointed out the items which were then put in the open bakkie. The plaintiff was then taken to Hlogotlou police station. They however went searching for plaintiff's co-worker, one William who

was also suspected of committing the offence with the plaintiff. After finding William, they proceeded to Hlogotlou police station. The plaintiff was eventually locked up at 02h05.

[20] On detention, no injuries were noted on the plaintiff. If any injuries were noticed on the plaintiff, he would not have been detained. In such a case, the CSC (Community Service Centre) will organise guards for the injured accused person. If the injured accused person is however detained the injuries would be registered in the occurrence book. The police would then summon an ambulance to take the injured to hospital for medical attention. But the police, if capable, they would take the injured accused person to hospital for medical attention.

[21] Under cross-examination, Thobakgale stated that he noticed a long stitch mark on the plaintiff's hand at the time he was completing the docket. He could not recall if it was the right or left hand. Thobakgale failed to record this injury in the occurrence book. Thobakgale knew about the assault case against him reported at the Motetema police station. He informed the officer during an interview that he, and his colleagues present at time of plaintiff's arrest, never assaulted the plaintiff.

[22] Constable Madimetja Andries Mafalo was involved in the arrest of the plaintiff at relative's home where they found the plaintiff and Mathunyane in a room. He remained at the door when Thobakgale approached the men, handcuffed them and then woke them up. Thobakgale informed the plaintiff that he has been looking for him and the plaintiff informed him that he was intending to report at the police

station. Plaintiff and Mathunyane were then locked into a police van with a canopy. Mafalo was the driver of the van with a canopy. During this period, plaintiff and Mathunyane were never assaulted by any of the officers present. Constabel Mafalo corroborated Thobakgale's version of events.

[23] They then drove to the plaintiff's home in two vans. He never saw the Toyota Hilux belonging to informer's friend. Upon arrival, only Thobakgale, Masuku and Seloga entered the plaintiff's home whilst he remained in the van. Thobakgale returned with the plaintiff, having left behind the gentleman found sleeping with plaintiff. Masuku and Seloga were carrying exhibits which were then placed in the unmarked van. As per Thobakgale's instruction they went searching for another suspect. On finding the suspect, they took both the suspect and plaintiff to the police station. During the whole process, he did not witness any assault on the plaintiff.

[24] The versions of the plaintiff and that of the defendant's witnesses regarding the assault are mutually destructive. In *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET CIE & Others* 2003 (1) SA 11 SCA the court stated the following regarding resolving factual disputes:

"[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii)

internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[25] The defendant denied that the plaintiff was assaulted or injured during the arrest. However, Thobakgale's evidence is that he noticed the stich mark on the plaintiff's hand when he was completing the docket. The police did not record the plaintiff's injury in the occurrence book at the time of his detention. This seems to have been a deliberate attempt to dissociate the police from the injury. If it were not so, they would have simply recorded the injury to indicate that the plaintiff had the injury when he was arrested or detained.

[26] There is undisputed evidence that the police took the plaintiff to the clinic in the morning of his arrest and to the hospital later that day. If the plaintiffs' inmates caused the injury, the probabilities are that he would have reported the incident to the police. The probabilities are also that the plaintiff would not have gone to bed with a broken hand and continued to sleep peacefully until Thobakgale woke him up during

the arrest. I find the plaintiff's version that he could not sleep throughout his first night in the cells due to the excruciating pain caused by the broken hand more probable and in line with his evidence that the injury occurred during his arrest.

[27] The plaintiff informed the court about the assault during his first appearance in court. He also laid a criminal charge against the police on his release on bail. I find the conduct of the plaintiff in this regard consistent with that of a person who seeks justice and redress after violation of his bodily integrity and dignity. I must add that the evidence of the plaintiff's witnesses was reliable and credible. Having taken into account the mutually exclusive versions of the plaintiff and the defendant, I am satisfied that the version of the plaintiff is more probable than that of the defendant. Accordingly, I make the following order.

[29] in the circumstances, the following order is hereby made:

1. The defendant is liable to pay 100% of the plaintiff's proven or agreed damages caused by the assault on the plaintiff on 11 November 2011.
2. The defendant to pay the costs.



S S MPHAHLELE
JUDGE OF THE HIGH COURT,
PRETORIA

For the plaintiff: Advocate F H H Kehrhahn

Instructed by: Mphela & Associates

For the defendant: Advocate A Moja

Instructed by: The State Attorney