

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

CASE NO.: 78/2013

In the matter between:

MALUSI MALASHE

Plaintiff

And

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

BESHE J:

[1] In this matter the plaintiff instituted an action against the defendant for what plaintiff alleges was an unlawful assault on him that was perpetuated by defendant's officials.

[2] It is common cause that plaintiff was arrested by members of the South African Police Services during the evening of the 22 July 2012 on a charge of possession of an unlicensed firearm.

[3] Plaintiff alleges that it was during the course of the questioning regarding the whereabouts of the firearm at his house and subsequent arrest that he was assaulted by officials of the defendant.

[4] Plaintiff whose reputed age was sixty two (62) years at the time of the incident was asleep at his home at Nqabara Administrative Area, Dutywa during

the night in question. He testified that at about 24h00 he felt a sound as the door of the room in which he was sleeping was being forced open. At the same time people who identified themselves as the police were demanding that he should open the door. He observed that someone had entered his room carrying a torch and a firearm. At the time he (plaintiff) was only dressed in his underpants. The light was off in his room. The police were shining a torch on his face. He was questioned about the whereabouts of a .38 firearm. When he denied knowledge of firearm he was struck with an object / stick on his forehead. Soon he realised there were several people inside his room, he was thrown on top of his bed with others swearing at him. His underpants were lowered. One of the intruders switched the light on. He was thereafter kicked, punched and hit with electricity cables. The assault took approximately twenty (20) minutes. After the light was switched on he observed that there were many people inside his room with only one of them dressed in police uniform. None produced a search warrant. With his hands tied to the back, he was once again thrown on top of his bed and questioned about the whereabouts of the .38 firearm. He produced a firearm which was in his headboard which he had picked up the previous day and intended handing over to the police the following day. Plaintiff stated that this was however not the firearm they were looking for. He was then taken out of his room with his hands still tied. Once outside he observed that there were many other police officials as well as a man from the locality who was also naked and had his hands tied to his back.

[5] This man was one **Nogwayiti Sijili**. His (plaintiff) son was also outside so was his wife and daughter. Together with **Sijili**, they were loaded into a Combi that was parked nearby. As they were proceeding to the Combi they were assaulted by the police. Inside the Combi he was made to lie on top of the engine behind the driver's seat which had protruding hinges which ate into his

back. As a result of the assault he sustained injuries on his chest both on the front and back as well as on his arms.

[6] **Mr Malashe** testified that he laid a charge of assault against the police as a result of the assault. As a result of which he was provided with a medico legal examination report form – J88 for the doctor to complete. He testified that he was examined by **Doctor Potelwa** who completed the J88 referred to above.

[7] From this medico-legal examination report that was compiled by **Doctor R. K. M. Potelwa** the following emerge:

Plaintiff was seen at 14:36 on the 23 July 2012.

Clinical findings made;

Bruises and abrasions anterior chest wall, the back of chest and both fore-arms.

The injuries are also noted or marked on sketches that represent the human body and form part of the report. These show marks captioned bruised and abrasions on diverse parts of the back and front of the chest and on the wrists.

[8] Plaintiff further stated that he did not provoke the police and that they had no right to assault him. He contended that his life will never be the same after the assault in question. To this end he is claiming compensation for pain and suffering in the sum of R200 000.00 and R50 000.00 for shock and embarrassment. He testified that he was handed clothes to wear after they had been driving around with the police who searched four homesteads that evening.

[9] During cross-examination it was put to him that the police did not have any reason to assault him because he readily pointed out a firearm. He was however adamant that they assaulted him because they were looking for a different firearm to the one he pointed out.

[10] **Malashe's** evidence as to what happened that morning was to a large extent corroborated by **Sijili. Sijili** who is also from one of localities in Nqabara testified that whilst asleep at his house he heard what sounded like someone was fiddling around with the chain used to lock his gate. He thereafter heard a knock on his door followed by the forceful opening of his door. Police got in and assaulted him. Thereafter they took him to plaintiff's place asserting that they were going to get a certain firearm the type of which they identified. At that stage he was naked with his hands tied to his back. Once at plaintiff's homestead, he was instructed to alight from the vehicle in which he was travelling. He did, and observed the police kicking plaintiff's door open. Some of the police officials entered plaintiff's room. Thereafter he heard screams emanating from plaintiff's room. After a long time, plaintiff emerged from the room naked with hands tied to his back. As he was walking out of his room, one policeman proceeded to hit him on his back with a stick. A lot of people had gathered outside plaintiff's place by then. It was cold it being in early hours of a winter morning. Police also used a rubber object to hit plaintiff as they were escorting plaintiff to a police vehicle. He noticed that like him, plaintiff had weals on his back which he did once they were both inside the police Combi. He also confirmed that plaintiff was caused to lie on top of the engine.

[11] Asked why he did not mention assault on the plaintiff when he submitted a statement to the police, he indicated that it was because the case in respect of

which he was submitting the statement concerned the assault on him. He testified that he did not observe any swelling on plaintiff's face / forehead.

[12] **Mr Bekuxolo Malashe** who is plaintiff's son was next to testify in support of plaintiff's case.

[13] According to **Malashe Junior** he was awoken to find police inside his room some pointing firearms at him. His hands were tied to his back, demands for him to produce a firearm were made by the police. Later he was taken out of his room only dressed in a pair of pants police instructed him to wear. The police found these pants inside his room. Outside he observed **Sijili** who was naked and sporting injuries on his body. He saw his father (plaintiff) coming out of his room with police, naked. He observed that one of the police officials was carrying a stick that belonged to him which he used to hit his father from behind. Both plaintiff and **Sijili** were taken away by the police still naked. The evidence of **Malashe Junior** concluded plaintiff's case.

[14] **Captain Sthembele Matshoba** was the first witness to testify on behalf of the defendant. **Matshoba** testified that on 23 July 2012 during the course of the investigating a charge that was laid against the police by plaintiff together with other complainants, plaintiff handed him a J88. Plaintiff alleged that he had been assaulted the previous day but did not know the names of his assailants. Whilst interviewing the plaintiff he did not observe any injuries on him. Upon further investigating he established that a warrant officer had signed plaintiff's detention warrant when he was locked up in connection with unlawful possession of a firearm. Registers kept at the police station also recorded that plaintiff was detained without any injuries.

[15] During cross-examination **Matshoba** stated that he could not dispute that plaintiff had injuries on his body but he did not observe any. He also admitted that he did not remove plaintiff's clothes to examine him for injuries. He could not tell whether the person who made an entry that plaintiff was detained without injuries removed plaintiff's clothes to check for injuries.

[16] Next to testify was **Warrant Officer Mamazana**. He testified that as a result of information received he together with his colleagues proceeded to the home of the plaintiff which was pointed out by an informant. He together with two of his colleagues stood at plaintiff's door, identified themselves as police and asked him to open the door and switch the light on. Although the door was ultimately opened, the person who opened the door did not switch the light on. A torch was shone at the person who opened the door, he was instructed to raise his hands. After the light was switched on he saw that the person inside the room was the plaintiff and that he was naked. Because his crew included a female officer he insisted that the plaintiff should get dressed. Plaintiff put his pants on. **Mamazana** proceeded to introduce himself to plaintiff and to explain the purpose of their visit at plaintiff's house. Requested permission to search which was granted by the plaintiff. Just as he was starting to search the room, plaintiff said he should not bother searching and told him the firearm was underneath the bed. The firearm was retrieved from underneath the bed. He asked whether plaintiff had a licence for the firearm. He could not produce one explaining that he picked the firearm in the forest. He informed plaintiff he was under arrest for possession of an unlicensed firearm. Plaintiff pleaded with him not to arrest him saying he intended taking the firearm to the police. As this exchange was taking place, **Mamazana** told plaintiff to get dressed and come with them. Plaintiff's son joined them from another room. **Mamazana** informed him that he was arresting plaintiff for possession of an unlicensed firearm.

Plaintiff was then taken to Dutywa where he was detained. He denied plaintiff was assaulted in his presence. He admitted that plaintiff was handcuffed but denied he was handcuffed tightly saying there would have been no need for that because plaintiff co-operated.

[17] During cross-examination it emerged that **Mamazana** was accompanied by five to six officials. He admitted shining a torch in plaintiff's face but denied forcefully opening plaintiff's door. Denied seeing **Sijili** at the scene during that morning when plaintiff was arrested. **Warrant Officer Mamazana's** evidence concluded defendant's case.

[18] It is trite that the standard of proof that is applicable in civil cases is that of proof on a balance of probabilities. This entails that the party on whom the onus rests is required to prove its case on a balance of probabilities.¹ See also *National Employers' General Insurance v Jagers*.²

[19] It is common cause as would appear from the summation of the evidence that plaintiff was arrested at his house by officials of the defendant in the early hours of the 23 July 2012. He was charged with possession of an unlicensed firearm that was recovered from his house and detained at Dutywa police cells. Plaintiff alleges that he was assaulted by members of the defendant's department during the course of the search and after the recovery of the firearm in question. Defendant denies that plaintiff was assaulted.

¹ See *Miller v Minister of Pensions* 1947 (2). All ER 372 at 374 – adopted by our appeal court in *Ocean Accident and Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A). In *Miller v Minister of Pensions* the following was said as regards standard of proof in civil cases. "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".

² 1984 (4) 437 at 440 D – E.

[20] In my endeavour to determine whether the plaintiff has succeeded in discharging the onus that rests on him, I find the dictum in *National Employers' General Insurance v Jagers supra*³very instructive. It will be appropriate therefore to refer to this dictum copiously. This is what *Eksteen AJP* had to say:

“It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”

[21] Not much criticism was levelled at the manner in which plaintiff and his witnesses gave evidence or at their evidence. In my view not much criticism could be levelled at any of witnesses who testified in support of plaintiff's case. Barring a few discrepancies here and there all three witnesses gave evidence in a straight forward manner. Gave a coherent account of what happened that morning. All three witnesses corroborated each other.

³ Page 440 D – G.

[22] One of the aspects of plaintiff's evidence that was justifiably questioned or assailed by **Mr Notyesi** for the defendant was as regards his assertion that he was struck on his face with a stick. As a result of which he sustained a lump on his face which was swollen. However none of the witnesses, plaintiff's and defendant's, observed the injury. Not plaintiff's son, not **Sijili**, **Doctor Potelwa** made no reference to it. Be that as it may – **Doctor Potelwa** observed other injuries that are in keeping with the manner in which plaintiff testified he was assaulted.

[23] **Sijili** was also criticized for testifying about an assault that allegedly took place inside the house and yet in his evidence he was not inside plaintiff's house during the assault.

[24] **Sijili** explained why he said plaintiff was assaulted inside his house. He explained that he heard sounds of blows and heard plaintiff screaming.

[25] On a preponderance of probabilities I am satisfied that the version presented by the plaintiff and supported or corroborated by his witnesses is credible.

[26] **Mr Vuthela** categorised defendant's defence as a bare denial. I am inclined to agree with him in this regard. Especially in light of the following:

Upon his release from detention plaintiff was examined by **Doctor Potelwa** who observed injuries that are consistent with the assault described by the plaintiff. It is noteworthy that **Warrant Officer Mamazana** did not say that the plaintiff was not assaulted by members of the defendant but rather – he was not

assaulted in his presence. In my view, in light of the credible evidence presented by the plaintiff, defendant's bare denial falls to be rejected as untrue.

[27] In my view, probabilities favour plaintiff's case and he must succeed. Evidence shows that plaintiff was wrongfully and unlawfully assaulted by defendant's officials. He is therefore liable for damages consequent upon the assault on the plaintiff by his members.

[28] Plaintiff's claim for compensation for damages suffered as a result of the assault by defendant's officials is the following:

General damages for pain and suffering	R200 000.00.
Shock, humiliation, embarrassment and contumelia	R50 000.00.

[29] As stated earlier in this judgment, as a result of the assault, as would appear also from the J88, plaintiff sustained bruises and abrasions on both front and back of his chest as well as on his wrists. A large part of his chest is covered in bruises and abrasions. He testified that he was struck with a stick, a big cable, fists and open hands. He was also made to lie on top of hinges protruding from the engine of the Combi that transported him to Dutywa police station. For most part he was naked when the police drove around with him in the locality. At the time plaintiff was sixty two (62) years old. It is clear from the above that the assault was a sustained one. There can be no doubt that plaintiff endured a lot of pain and suffering during the course and as a result of the assault. **Sijili** drew the court's attention to the fact that it was cold it being in winter. He was naked so was the plaintiff. I have no doubt therefore that the incident was a traumatic one for the plaintiff. It must have been no doubt shocking. Given that it was in the

middle of the night. His door was forced open and he was attacked in his naked state in the presence of female officer/s and with all the officers having, in all probability being younger than him. He was then paraded naked to the police Combi in full view of **Sijili**, his son, wife, daughter and people who by then had gathered outside plaintiff's premises. There can be no doubt that plaintiff was humiliated and embarrassed and suffered indignity. That his right to dignity, respect, privacy and to bodily integrity was treated with disregard or were disregarded.

[30] Do the amounts claimed by the plaintiff amount to fair and reasonable awards in the circumstances of this case? In attempting to determine whether they are, I will be mindful of what was said by *Watermeyer JA* in ***Sandler v Wholesale Coal Suppliers***⁴ about the assessment of reasonable awards. Namely that:

“In considering that question it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case.”

Although in *Sandler* the court was concerned with a collision, I am of the view that these words ring true of the damages suffered in circumstances of this case.

[31] In his testimony plaintiff confirmed that his claim was for a total of R250 000.00 but said because his life would never be the same after the incident

⁴ 1941 AD 194 at 199.

(a) General damages for pain and suffering **R120 000.00.**

(c) Interest on the amounts mentioned in (a) and (b) *supra* at the legal rate from date fourteen (14) days after judgment to date of payment.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff	:	Mr SC Vutula
Instructed by	:	SC VUTULA & CO.
		Nobakhe House
		17 Madeira Street
		MTHATHA
		Tel.: 047 – 532 3084
		Ref.: SCV/mk/M143/12
For the Defendants	:	Mr M Notyesi
Instructed by	:	MESSRS MVUZO NOTYESI INC.
		2 nd Floor, T H Madala Chambers
		14 Durham Street
		MTHATHA
		Tel.: 047 – 531 4714
		Ref.: MN/018/14-MR LUZIPHO
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