

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

CASE NO.: 524/2012

In the matter between:

ANDILE MDUTYANA

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

BESHE J:

[1] This is an action for damages against the Minister of Police for damages suffered as a result of an assault that is alleged to have been perpetrated by defendant's officials whilst acting within the course and scope of their employment with the defendant.

[2] At the start of these proceedings I ordered a separation of issues in terms of *Rule 33 (4) of the Uniform Rules* of this court with the issue of the merits / liability being dealt with first and quantum to be determined later, should it be necessary to do so. So, the issue to be determined is whether the plaintiff was assaulted by the officials of the defendant whilst acting within the course and scope of their employment with the defendant; whether, if plaintiff was assaulted, such assault was unlawful or not.

[3] It became common cause between the parties that on the evening of 21 December 2011 and at near Sapukanduku, in the district of Ntabankulu, officials of the defendant met with the plaintiff who was driving a Nissan van on the road between Ndakeni and Mt Ayliff. Where the parties diverge in this regard is on the reason why plaintiff brought the vehicle he was driving to a halt and what happened thereafter.

[4] Plaintiff's version briefly stated is as follows:

During the day in question he had attended a circumcision party at a relatives' home. During the course of the celebrations a quarrel ensued between some boys and the newly initiated young man. Plaintiff feared for his safety as well as that of the other people at the premises because stones were thrown at windows causing some of the windows to break. As a result he summoned the police. However before the police could arrive, his cousin **Mr Nkosiyozyuko Mavaba** arrived at the homestead where plaintiff was, which is **Mavaba's** home. He had been assaulted by young men outside the premises. He was bleeding from an injury on his head. Plaintiff rushed him to hospital in a van that had been parked in the premises (the Nissan). On the way to hospital, he came across a police van which was driving in the opposite direction. In other words, towards Ndakeni locality from where they were coming. He carried on driving, he observed that the police van had turned and was following theirs at a high speed. Because the road was narrow, he pulled off the road so as to give way to the police van. Instead of the police van driving past it stopped. Police alighted from the van and approached the Nissan. One of them opened the driver's door and pulled him out of the vehicle and struck him with fists. He was made to lie on the ground and hit with plastic sticks, kicked with booted feet and punched by officials of the defendant – the policemen who were driving in the police van. One of the police who assaulted him was **Mr Buqaqawuli Nyembezi** also

known as **Sanda Qaqawuli** who is related to him. He later intervened on his behalf referring to him as his older brother.

[5] Plaintiff testified that as a result of the assault by the defendant's officials he lost three (3) teeth, fractured his left arm, had swollen right arm, sustained injuries on his back and waist.

[6] Plaintiff denied that he was stopped by the police asserting that he stopped on his own. He denied that police asked why he drove recklessly. He denied that he was injured during the commotion that broke out at the ceremony he had attended earlier that day. He denied that he had told the police at the scene he was injured at the ceremony. He denied having been provided with a J88 medical report by the police at the scene to take to hospital.

[7] **Mr Mavaba** confirmed what plaintiff said about arriving at his home where there was a party bleeding from an injury on his head. He testified that he was assaulted by some young men outside his home. He confirmed that plaintiff bundled him into a van and drove him to hospital. He confirmed that they came across a police van driving in the opposite direction. After a short while he observed that the police van had turned around and was now following theirs. Plaintiff pulled off the road to give way to the police van. Instead of driving past the police van stopped close to theirs, a number of police men alighted from their van and proceeded to the vehicle plaintiff was driving. They opened the driver's door as well as his door. When the police saw that he was bleeding, those on his side let go of him and all converged on plaintiff's side. They started assaulting the plaintiff who was protesting asking why he was being assaulted. One of the officers was **Qaqawuli** who intervened on behalf of plaintiff saying

plaintiff was a member of his family. **Qaqawuli** also made the point that he (**Mavaba**) needed to be rushed to hospital. The police van followed them to the hospital. **Mavaba** testified that the police assaulted plaintiff by striking him with batons and kicked him with booted feet. Plaintiff also received medical attention at the hospital to which they were driving when the incident occurred.

[8] **Mr Mavaba** denied that plaintiff drove recklessly or that the police signalled to him to stop the vehicle. He denied that plaintiff had any injuries when they were confronted by the police. **Mr Mavaba's** evidence concluded the plaintiff's case.

[9] **Mr Buqaqawuli Nyembezi**, an official of the defendant testified on behalf of the defendant. He testified that he was at work with his colleagues who were performing their duties as a van crew. They received a report via the police radio that certain people were being attacked at Ndakeni locality in Mt Ayliff. He advised his colleagues that, being from that area, he was familiar with it as well as the dynamics of the battles that that often take place in that area. They drove to the area in a double cab van. On the way to the homestead in respect of which the report was received, he observed a Nissan van approaching from the opposite direction at a high speed. He recognised it as belonging to the homestead where it was reported there was trouble. The police van had to veer to the side of the road to avoid colliding with this Nissan van. He suspected that the occupants of the van could be the attackers in respect of the incident they were attending. He suggested to his driver that they should try and stop the Nissan van. Indeed with their blue light on, siren blurring, they turned around and tried to stop the Nissan van. This was at about 20h00. They chased the Nissan van for approximately 3km before they managed to stop it, having

overtaken it and by stopping in front of it. **Nyembezi** and his colleagues alighted from their motor vehicle and proceeded to the Nissan van. Light from the Nissan van provided illumination at the scene. They surrounded the van. He approached the passenger side of the vehicle. He asked **Mr Mavaba** to open the door - who at first refused to open the door. He observed that he was bleeding. **Mavaba** reported that they were assaulted next to his home. He also spoke to plaintiff who made a similar report – that they including him were assaulted in the locality where a ceremony was held. **Nyembezi** confirmed that plaintiff was taken out of the Nissan van protesting that they were in a hurry having been assaulted and he was bleeding from his mouth. After being made to alight from the Nissan van, plaintiff was searched. However nothing was found in his possession. He then suggested that they let plaintiff and **Mavaba** proceed to hospital and go after the young men who assaulted them. He denied that he and his colleagues assaulted the plaintiff with plastic sticks or in any way. He admitted that he told his colleagues that plaintiff was his brother. But he denied he intervened on his behalf when he was being assaulted.

[10] During cross-examination **Nyembezi** admitted that plaintiff laid charges of assault against him and his crew. He could not dispute that plaintiff did not lay any charges against three men he (**Nyembezi**) alleged **Mavaba** implicated in their assault. He also admitted that plaintiff was on the ground when he was being searched by his colleagues kneeling, according to him. Although it was put to plaintiff that after stopping him the police asked him why he was driving recklessly, this did not transpire from **Nyembezi's** evidence.

[11] Plaintiff told court that as a result of the assault by defendant's officials, he sustained the following injuries: lost three teeth, fractured his arm and sustained

injuries to his back and waist. That the plaintiff sustained these injuries was not placed in issue. The only divergence in the versions proffered by the parties was as regards the author of those injuries.

[12] In his particulars of claim which have been amended several times, plaintiff alleges that defendant's officials "dragged him out of the bakkie pointing him with firearms and ordered him to lie down. They assaulted him by kicking him with booted and punching him with fists for no apparent reason". However during his testimony there was no mention of being pointed with firearms. Instead plaintiff and **Mr Mavaba** stated that plaintiff was also struck with plastic sticks / batons.

[13] It is clear from the foregoing summary of the evidence that I am confronted with two irreconcilable versions regarding whether or not the defendant's officials assaulted the plaintiff.

[14] It is trite that the standard of proof that is applicable in civil cases is proof on a balance of probabilities. In other words the party on whom the onus rests is required to prove its case on a balance of probability.¹ In *casu* the onus rests on the plaintiff.

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".

[15] The technique to be applied in resolving factual disputes where a court is faced with two irreconcilable versions was suggested by *Nienaber JA* in *SFW Group Ltd and Another v Martell Et Cie and Others*² to be the following:

“[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' 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' 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.”

[16] The following facts appear to be common cause or not placed in dispute by the defendant. Police officials amongst whom was defendant's witness **Nyembezi** were acting within the course and scope of their employment with

² 2003 (1) SA 11 at 14 [5].

the defendant during the evening in question. At some point they chased plaintiff's vehicle. Plaintiff's vehicle stopped – according to plaintiff to give way to the police van – according to the police officials he was forcefully stopped (See paragraph 2 of defendant's plea). This is also according to **Nyembezi**. It is also common cause that plaintiff was caused to alight from the Nissan van. That he ended up being on the ground. Kneeling according to **Nyembezi**, lying down according to **Mavaba**. His passenger **Mavaba** who was bleeding from an injury on his head remained in the Nissan. Defendant's officials had however also opened his door but did not cause him to alight. It also appears to be common cause that plaintiff sustained injuries on the day in question.

[17] According to both plaintiff and **Mavaba** he was not injured before they met the police. Both testified that it is the police who assaulted him. Plaintiff testified that he fractured an arm, lost some teeth and was injured on his back and waist. **Nyembezi** confirms that he required medical attention and asserts that he provided him with a J88 medical form although plaintiff and his witness deny that he provided them with J88 forms. **Nyembezi** stated that although he could not tell from where blood was coming from – plaintiff was bleeding. It is common cause that plaintiff laid a charge of assault against the police in connection with this incident.

[18] Defendant's case is that the plaintiff was not assaulted by the defendant's officials but by young men in the locality where a ceremony was held. This was however not raised in defendant's plea initially. It was only later in its plea to plaintiff's amended particulars of claim that defendant raised this defence. In response to an allegation that one of the police officials who accosted the

plaintiff was **Sanda Qhaqhawuli (Nyembezi)** who was the one who suggested that his colleagues should stop assaulting the plaintiff; defendant pleaded that this is denied as there was no need for **Qhaqhawuli** to stop anyone as plaintiff was never assaulted on the day in question by defendant's members save being assaulted in a ceremony in his locality. It is not clear to me why if defendant's officials became aware of the assault on plaintiff by local people they did not raise this defence in their plea initially. I am inclined to agree with **Mr Mantyi** for the plaintiff that this was an afterthought on the part of defendant (his officials). If, as **Nyembezi** suggests plaintiff was injured when they stopped his vehicle, why was he caused to kneel on the ground (although according to plaintiff and his witness he was lying on the ground when he was assaulted) whereas his passenger who was also bleeding was not caused to alight so that he could be searched.

[19] **Nyembezi** denies he intervened on behalf of the plaintiff but admits that he did tell his colleagues that they were related. According to him this was said in the context that his colleagues should let them proceed to hospital because they were injured. Why did he not make that suggestion earlier on – upon seeing that both occupants of the Nissan van were injured? If what **Nyembezi** says is true, why did **Mavaba** who was also injured not accuse the police of assaulting him? It was common cause or at least not in dispute that he laid a charge against young men from his locality.

[20] Plaintiff's evidence does seem to have been embellished or the assault on the plaintiff exaggerated. In plaintiff's particulars of claim, no mention was made of an assault with plastic sticks / batons. It was only in their evidence that

plaintiff and **Mavaba** mentioned the use of plastic sticks. Plaintiff could not explain why there was no mention of plastic sticks in his particulars of claim.

[21] After evaluating all the evidence and assessing the probabilities, I am of the view that the following is the most probable version:

Defendant's officials observed plaintiff's motor vehicle and concluded or realised it was being driven recklessly. Felt that the driver of the motor vehicle nearly collided with their motor vehicle thereby endangering their lives / bodily integrity. Turned around and chased it. Plaintiff's motor vehicle having stopped (be it to give way to the police or motor vehicle or having been forced to stop) defendant's officials approached plaintiff's van. Opened his door, manhandled him causing him to fall to the ground asking why he was driving recklessly. Others were shouting, as both witnesses who testified in support of plaintiff's case indicated "kill this dog". Probably feeling aggrieved by the plaintiff's "reckless" driving. Defendant's officials proceeded to assault the plaintiff. The version proffered by the plaintiff is the more probable of the two divergent versions. I am satisfied that plaintiff has discharged the onus of proving on a balance of probabilities that defendant's officials assaulted them. There was no lawful excuse or justification for defendant's officials to assault the plaintiff. The assault was wrongful and unlawful.

[22] In the result there shall be judgment in favour of the plaintiff.

The defendant is liable to the plaintiff for such damages that he is able to prove, arising from the assault on him by the officials of the defendant on the 21 December 2011.

The defendant is ordered to pay costs of suit.

N G BESHE

JUDGE OF THE HIGH COURT

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Date Heard	:	31 August 2015 and 1 September 2015
Date Reserved	:	1 September 2015
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