

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON**

Case no: 1263/2012
Case Heard: 26/02/16
Date Delivered: 26/04/16

In the matter between:

ROBERT MZIKAYISE FISA

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

SMITH J:

Introduction

[1] The plaintiff claims damages from the Minister of Police (“the defendant”) arising from his alleged unlawful arrest, detention and assault by police officers acting within the course and scope of their employment.

[2] He alleged in his particulars of claim that he was arrested without a warrant by police officers at 10h30 on 5 January 2012 at his place of employment, and subsequently detained at the Southernwood and Duncan Village Police Stations until approximately 16h00 that same day.

He also averred that he was assaulted and tortured by the same police officers before his release. He claims the sum of R150 000 in respect of his unlawful arrested and detention; general damages in the sum of R600 000 arising from his assault and torture; a sum of R31 437 for future medical expenses; a sum of R34 569 for past loss of earnings; and the sum of R133 664 in respect of future loss of earnings.

[3] In his plea the defendant denied that the plaintiff was arrested, and averred that he was merely requested to accompany the police officers to a police station for questioning after dagga was discovered at premises under his control. The plaintiff voluntarily accompanied the police officers to the Fleet Street Police Station where he was questioned and released after a short period. The purpose of the questioning was to establish whether he could have been a potential state witness. The defendant also denied the allegations in respect of the alleged assaults.

[4] Mr Clarke appeared on behalf of the plaintiff and Mr Dukada on behalf of the defendant.

The evidence on behalf of the plaintiff

[5] At the time of the incident, namely 5 January 2012, the plaintiff was employed as a barber at the Uhuru Hair Salon, at Gilwell Taxi Rank, East London. The salon was operated from a container.

[6] Between 10h00 and 11h00 on that day he was outside the container attempting to attract customers when he was approached by four police officers. He was subsequently able to identify two of them, namely Constables Asanda Nyameka and Professor Mgunuza. He was searched by Nyameka, and Mgunuza pretended to slap him. A foreign national by the name of Wacky Kasembe and two other Tanzanian nationals were also in the container at the time. The police officers searched the container but did not find any contraband.

[7] The police officers then ordered him to accompany them to their vehicle, being a Toyota Quantum, and drove off with him to Malcomes Park, Southernwood, where they parked in a corner of the parking lot close to their offices. He denied that he accompanied the police officers voluntarily, but stated that he did so out of fear because they were aggressive.

[8] Nyameka and one of the other unknown policemen went into the offices while Mgunuza and the other one remained with him. At some stage Mgunuza also got out of the vehicle, leaving him alone inside the vehicle with the other police officer. That police officer then suffocated him with a glove and plastic packet while interrogating him about dagga.

[9] After Nyameka and the other police officer had returned, they drove off to the Wesbank prison where they collected food parcels and thereafter proceeded to a shop in Settlers Way where they purchased soft

drinks. They were then also accompanied by an unknown young man who had joined them at the Southernwood offices. While they were waiting outside the shop one of the police officers got out of the vehicle, picked up a plastic strip from the ground, and used it to bind his hands behind his back.

[10] They thereafter took him to the Duncan Village police station. There he was taken into a room, made to stand on a chair which had been placed on a table, and after his arms were placed behind him and over a wooden beam, his wrists were fastened to burglar bars with a piece of wire. They then removed the chair, thereby leaving him suspended from the beam which passed between his arms and torso. His body was stabilised by the wire.

[11] He was left in that position for a few hours while he was being questioned about dagga and mocked by the police officers. They eventually untied him from the beam and instructed him not to tell anybody about what had happened to him. They returned him to the taxi rank at approximately 16h00.

[12] Upon his return to the taxi rank he related the events to Andile Mpongoshe and Kasembe, and also showed them his injuries. He borrowed money from Kasembe for a taxi to his home. Later that same night he went to the Frere Hospital where he was examined and treated by Dr Sifuba. The following day he went to consult a private doctor,

namely Dr Yapi, and thereafter proceeded to the Duncan Village police station where he laid a criminal charge of assault against the police.

[13] The plaintiff thereafter also led the evidence of Andile Mpongoshe and Kasembe. They both corroborated his version in all material respects, and Kasembe, in particular, confirmed that the plaintiff was removed from the rank by four police officers, that one of them pretended to slap him, and that he only returned to the rank at about 16h00, when he told them that he had been assaulted by the police and also showed them his injuries. He also confirmed that he had lent the plaintiff taxi fare to his home.

[14] In addition to corroborating the plaintiff's version, Mpongoshe also testified that he was summoned to Nyameka's office where the latter offered to withdraw a criminal case against him if he agreed not to testify on behalf of the plaintiff. Nyameka also gave him an affidavit to sign.

[15] The plaintiff also called the evidence of Dr Perumal, a forensic pathologist. Dr Perumal examined the plaintiff on 24 June 2014. He thereafter prepared his report based on the examination as well as the contents of the J88 which had been completed by Dr Sifuba. He also had regard to photographs of the plaintiff's injuries. He concluded as follows:

- (a) in his opinion the haematomas on the back of the plaintiff's head were in all likelihood caused by the plaintiff banging his head whilst being suspended in the manner described by him;

- (b) the multiple bruises on his arms are consistent with the plaintiff's claims that he had been tied with a rope or wire while being suspended; and
- (c) the plaintiff had in all probability been assaulted in the manner claimed by him, and his findings were consistent with those claims. In his opinion the assaults were deliberately perpetrated in such a manner so as to leave no visible injuries.

[16] Dr Sifuba was also called to testify regarding her examination of the plaintiff at 21h50 on 5 January 2012. She said that the plaintiff had complained of a headache and pains in his arms, and she also observed bruises and swelling on his arms and haematomas on the back of his head. She recorded those injuries on the J88 form.

[17] The clinical psychologist, Mr Meyer, thereafter testified and confirmed that the plaintiff will require 15 sessions of relationship, family and sexual counselling at the rate of R920 per session. His prognosis is regarded as being poor.

[18] The parties also filed a joint minute compiled by their respective industrial psychologists, Dr Van Daalen and Mr Venter. In that minute they agreed that prior to the events of 5 January 2012 the plaintiff would have earned between R2 000 and R3 000 per month, and that his earning capacity had thereafter been reduced by 25%.

[19] In another joint minute prepared by the parties' respective clinical psychologists, namely Mr Meyer and Ms Nyipika, those experts agreed that the plaintiff had initially developed acute stress disorder followed by post-traumatic stress disorder with depressed mood. They also agreed that his condition has become chronic and he will require 15 to 20 session at R920 per session.

[20] The report compiled by the defendant's psychiatrist Dr Magagula, was also admitted as evidence, and the contents thereof were admitted by the plaintiff. Dr Magagula diagnosed the plaintiff with major depressive disorder and chronic post-traumatic stress disorder. She concluded that he suffers from distress triggered by exposure to cues which remind him of the trauma, namely nightmares, insomnia, intense fear and the fear of being left alone in public places where he is likely to encounter police officers. He further suffers from low self-esteem, sexual problems, daytime drowsiness and poor attention and concentration. She recommended both pharmacological and psychological treatment.

[21] The parties also agreed on the actuarial calculations by Dr Koch and Mr Londen. The plaintiff's loss of income was quantified in the sum of R168 061 and his future medical expenses at R87 357.

The evidence on behalf of the defendant

[22] After the plaintiff's case was closed Nyameka, Mgunuza and one Liutenant Colonel Luvuyo Lungongolo were called to testify on behalf of the defendant. Luvuyo's evidence related essentially to the location and use of the office at the Duncan Village Police Station where the plaintiff was allegedly tortured. His evidence was not of much assistance to the court and neither counsel has referred to it during argument. Although I have had regard to the relevant aspects thereof, I do not regard it as necessary to provide a summary thereof. Nyameka's and Mgunuza's testimonies can be summarized as follows.

[23] Only the two of them visited the Gilwell Taxi Rank on 5 January 2012, and neither Mpongoshe nor Khasembe was present at the time. They had searched the salon and discovered a "bompie" of dagga. Nyameka did not make any entries in his pocket book regarding the events and Mgunuza had lost his pocket book. They requested the plaintiff to accompany them to the Fleet Street Police Station and he did so voluntarily. They did not arrest him, but merely intended to recruit him as an informer, and in particular, to provide information to them regarding the activities of Mpongoshe, who is a well-known dagga dealer.

[24] They drove with the plaintiff to the Fleet Street Police Station where Nyameka discovered that he did not have the key to his office in his possession. They then drove to the police offices at Malcomes Park, Southernwood, where they fetched another set of keys, and thereafter returned to Fleet Street where they questioned the plaintiff regarding the

dagga discovered at the salon and also in respect of Mr Mpongoshe's activities.

[25] They did not make any entries in the occurrence book at Fleet Street Police Station since they did not arrest the plaintiff but were merely interviewing him in order to recruit him as an informer. They returned the plaintiff to the rank at approximately 12h00 that same day. They denied that they assaulted or tortured the plaintiff in any manner.

[26] They were both subsequently contacted by the officer who was charged with the investigation of the plaintiff's complaint, namely Warrant Officer Dicks, but were merely asked what their connection was to Mpongoshe. Even though they were aware that Dicks was investigating charges of assault against them, they both made affidavits wherein no mention was made of the plaintiff's arrest (or for that matter his alleged voluntary removal from the Gilwell Taxi Rank) and the subsequent interview at the Fleet Street police station. They both admitted that the affidavits were made with the sole purpose of discrediting Mpongoshe (who was identified by Dicks as being an important witness), and that the prosecuting authority's decision not to prosecute was mainly based on the contents of those affidavits.

[27] They both attempted to proffer explanations for the factual inaccuracies in their affidavits - Nyameka contending that he was confused regarding the dates, and Mgunuza claiming that Dicks simply did

not minute his statement correctly. They both claimed that the “bompie” of dagga was recorded in the SAP13 register that same day.

[28] The defendant initially filed a comprehensive affidavit by one Mbeki, explaining why the register could not be located. This was obviously done in the realisation that the entry in respect of the dagga was crucial to the defendant’s case, as it was that discovery that allegedly caused Nyameka and Mgunuza to request the plaintiff to accompany them to the Fleet Street police Station for questioning.

[29] When the matter was heard during November 2015 the defendant applied for leave to discover an extract of the SAP13 Register which had been fortuitously discovered.

[30] When the trial resumed during February Mr *Dukada*, however, placed on record that after consulting with his witnesses, the defendant abandoned his application for leave to introduce the document into evidence. The extract of the SAP13 was nevertheless admitted by agreement and Mr Clark thereafter applied to reopen his case. That application was not opposed by the defendant, and being of the view that it would be appropriate and fair to do so under the circumstances, I allowed the plaintiff to reopen his case in order to call Captain Franzen, who is the custodian of the SAP13 Register at the Fleet Street police station.

Further evidence on behalf of the plaintiff

[31] Franzen testified that he is charge of the SAP13 Register at the East London police station (also known as the Fleet Street Police Station). He stated that only documents are kept in the archives and the SAP13 Register would have been readily available.

[32] The Register indicates that in respect of the entry at 5.1 of the extract, only items 1 to 9 were received by his clerk. Item no 10 was recorded as being a dagga "bompie". Items no 2 to 9 were subsequently destroyed in his presence on 20 May 2012 and recorded as such under column 6.

[33] Item no 1, which is a bicycle, was sold at public auction on 30 November 2012. At that time item no 10 had not yet been recorded in the register, since he had drawn a line underneath item no 9 to indicate that the entry had been closed off on 30 November 2012. He was accordingly adamant that the entry in respect of the dagga bompie (item 10) had been inserted afterwards. The upshot of this witness's testimony was thus that the entry relating to the dagga bompie must have been inserted after 30 November 2012. This was no doubt done with the view of creating the false impression that the entry had been made on 5 January 2012.

Discussion

[34] It must have been clear from my summary of the evidence that the plaintiff was a good and credible witness. His conduct immediately after the alleged assault was consistent with his claims of ill-treatment at the hands of the police. Immediately upon his arrival at the taxi rank he showed his injuries to both Kasembe and Mpongoshe and went to consult a doctor that same evening. He again consulted a doctor the following morning and thereafter laid assault charges at the Duncan Village police station. His evidence was corroborated in all material respects by both Kasembe and Mpongoshe. Kasembe, in particular, was in my view a very impressive witness. Despite being subjected to probing cross-examination by Mr *Dukada*, he remained steadfast in his assertions. And furthermore, the plaintiff's claims were crucially also corroborated by extensive medical evidence, which confirmed that his injuries were consistent with his claims of assault and torture. In my view accordingly, the plaintiff's version was eminently probable and compelling. It was thus not surprising that Mr *Dukada* has not been able to proffer any serious criticisms of the plaintiff's, or his witnesses' testimonies.

[35] It must similarly have been clear from my summary of the evidence proffered on behalf of the defendant that his version is fraught with improbabilities, and that it is contrived and patently false. I have no doubt that Nyameka and Mgunuza deliberately omitted to mention their encounter with the plaintiff in their affidavits made in response to Dicks's enquiries. They both reluctantly conceded that Dicks had told them about

the assault charges against them, yet they failed to make any mention of their interaction with the plaintiff on 5 January 2012. They also reluctantly conceded that, at least *prima facie*, the purpose of those affidavits were solely to discredit Mpongoshe and thus to convince the prosecuting authority not to prosecute. The fact that they failed to mention that, at least on their version, the plaintiff agreed to accompany them to the police station and that he was released after a few questions, compels the ineluctable inference that those assertions are false. It is in my view also highly unlikely that Dicks would merely have asked them to explain their connection to Mpongoshe and not invite them to address the plaintiff's allegations, when he was in fact investigating assault charges laid by the plaintiff.

[36] But it is the conduct of Nyameka and Ngunuza in regard to the discovery of the SAP13 Register that is a matter of even greater concern. As I have mentioned earlier, the defendant initially filed a comprehensive affidavit explaining the difficulties in locating the SAP13 Register which had allegedly been archived. These averments were, however, soundly gainsaid by Franzen, who was the custodian of the Register at all material times. Franzen has convincingly explained how relatively easy it would have been to trace the Register if indeed *bona fide* attempts were made in this regard. The serendipitous subsequent discovery of the Register was, in my view, nothing less than a brazen and duplicitous attempt to mislead the court through the *ex post facto* fabrication of evidence.

Franzen's evidence has conclusively established that the entry relating to the dagga "bompie" could only have been made after 30 November 2012. I am thus left with no doubt that that entry was in fact made after 30 November 2012, and in an attempt to justify the plaintiff's removal from the rank and his subsequent questioning at the Fleet Street Police Station. There can also be little doubt that this brazen ruse was perpetrated in the realisation that the alleged discovery of the "bompie" of dagga was a crucial element of the defendant's case. And there is, at the very least, a strong suspicion that Nyameka and Ngunuza had both been complicit in this serious attempt to fabricate evidence.

[37] I am thus of the view that the defendant's version is not only improbable but also patently false. Apart from the above-mentioned difficulties there are numerous other improbabilities in the defendant's version which must have been apparent from my summary of the evidence. By way of example, Nyameka and Mgunuza claim that they were constrained to take the plaintiff to Fleet Street for questioning because bystanders were gathering and making it difficult for them to do their work. This simply did not make any sense, since they did not intend to arrest the plaintiff but merely to question him regarding Mpongoshe's activities. On their own version they only asked him a few questions at Fleet Street Police Station and thereafter returned him to the rank. There was no reason therefore why that objective could not have been achieved by simply questioning him in the container.

[38] Mr *Dukada* argued that the plaintiff's version was improbable since it was unlikely that he would not have shouted or screamed at some stage of his ill-treatment to alert members of the public or other police officers at the Duncan Village police station about his plight. He argued, in addition, that it was unlikely that the police would have acted in the claimed manner despite the presence of the young man who would have been a damning witness. I do not agree. In my view it is not improbable that the plaintiff would have been too petrified under the circumstances to attempt any action that might have upset the police officers. Relatively soon after his arrest, at least on his version, he had been assaulted and threatened, and would no doubt have been in state of shock and profound fear for the entire duration of his detention.

[39] I am accordingly of the view that the plaintiff has proved on a balance of probabilities that he was unlawfully arrested by Nyameka, Mgunuza and two other unknown police officers between 10am and 11am on 5 January 2012, thereafter assaulted and tortured at the Southernwood and Duncan Village Police Stations, and only returned to the Gilwell Taxi Rank at approximately 16h00 that same day.

Quantum of damages

[40] The defendant has admitted the quantification of plaintiff's loss of earnings (being R168 061), and the parties have agreed that the usual contingency of 15% should be applied to that amount, thus leaving an amount of R142 851.85.

[41] The plaintiff's future medical expenses have also been agreed in the sum of R87 357.00.

[42] In respect of general damages Mr *Clark* has referred me to *Peterson v Minister of Safety and Security* 2009 6 QOD K6-1 (ECG), where Plasket J awarded R60 000 in respect of unlawful arrest and detention, and R120 000 in respect of assault, to a plaintiff who had been pepper-sprayed, dragged from his home in shorts, and locked in cell for 8 hours. The present day value of those amounts are R86 000 and R172 000, respectively.

[43] In *Poswa v Minister of Safety and Security* (115/08) [2011] ZAECPEHC 41 (29 September 2011), Beshe J awarded damages in the amount of R170 000 to a plaintiff who developed depression and post-traumatic stress after being assaulted by police officers.

[44] Mr *Clark* argued that a sum of R350 000 in respect of general damages would be appropriate, since the assaults on the plaintiff in this case are more severe than those perpetrated in the above-mentioned

cases. Mr *Dukada*, on the other hand, submitted that an amount of R250 000 would be fair.

[45] The assaults on the plaintiff were indeed more serious than those perpetrated in *Peterson and Poswa (supra)*. What is also of concern is the brazen and cruel manner in which the assaults were perpetrated by the police officers and their subsequent irregular attempts to hide their unlawful actions. Although the plaintiff was detained for only about 5 to 6 hours, he had been severely traumatised during that period and the *sequelae* of the assaults are serious and will undoubtedly be long-lasting. The plaintiff's post-traumatic stress has resulted in an irrational fear of police, which he will probably endure for the rest of his life.

[46] For these reasons I am of the view that general damages in the sum of R300 000 would be fair and appropriate.

Order

[47] In the result the following order issues:

1. The defendant must pay the plaintiff:
 - 1.1 the sum of R300 000.00 (three hundred thousand rand) in respect of general damages;
 - 1.2 the sum of R142 851.85 (one hundred and forty two thousand eight hundred and fifty one rand and eighty five cents) in respect of loss of income;

- 1.3 the sum of R87 357 (eighty seven thousand three hundred and fifty seven rand) in respect of future medical expenses;
2. The defendant must pay the plaintiff interest on the above amounts at the prescribed legal rate from the date of service of summons, namely 31 October 2012 to date of payment;
3. The defendant is ordered to pay the plaintiff's costs of suit on the party and party scale, which costs are to include:
 - 3.1 the qualifying experts expenses of Dr HD Van Daalen, Mr Ian Meyer, Mr G Perumal, Dr RJ Koch and Mr R Berg;
 - 3.2 photographs depicting plaintiff's injuries and the Duncan Village Police Station;
 - 3.3 Mr Andile Mpomgoshe, Wacky Kasembe, Captain Franzen and Dr Sifuba are declared necessary witnesses.
4. The defendant must pay the plaintiff interest on the costs of suit on the prescribed legal rate from date of *allocatur* to date of payment.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

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