



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG**

CASE NO: 13750/2013

In the matter between:

MTHOBISI LUCKY THUNGO

PLAINTIFF

Vs

OFFICER MADIDA

FIRST DEFENDANT

OFFICER MABUYAKHULU

SECOND DEFENDANT

THE MINISTER OF POLICE

THIRD DEFENDANT

ORDER

The following order is granted:

The defendants are liable to the plaintiff jointly and severally, the one paying the others to be absolved, for damages for unlawful arrest, detention and assaults.

JUDGMENT

D. Pillay J

Introduction

- [1] The plaintiff, born on 3 January 1987, claims damages arising from his alleged assault by Officer Madida the first defendant, and Officer Mabuyakhulu the second defendant, on 18 March 2012 at Ezintabeni, Waaihoek, a rural area in Ladysmith. His assailants were employees acting in the course and scope of their employment with the third defendant. The trial proceeded on liability alone.
- [2] It was common cause that the plaintiff sustained burn wounds on his calves, on the back of his right thigh and on the back of his left fingers. The defendants denied that they caused these or any wounds. They contended that the arrest was staged at the instance of the plaintiff to ward off suspicion that he was a police informer. At the time of his arrest the plaintiff was wearing a tracksuit pants made of plastic-like fabric. The defendants had no knowledge as to who burnt him but suggested that it could be those who suspected the plaintiff of being a police informer. It was also common cause that the defendants arrested the plaintiff and handcuffed his hands behind his back. The defendants contended that the plaintiff was unharmed when they parted company with him. Whether the defendants assaulted the plaintiff is the primary dispute. Determining whether the arrest was staged or genuine goes to proving the reason and justification for the arrest and consequently the credibility of the parties in respect of the primary dispute. To prove their defence that the arrest was staged the defendants also had to prove that the plaintiff was a police informer.

The Plaintiff's Case

- [3] The plaintiff lived with his grandmother, aunt and sister of twelve years. He testified briefly that the police arrived at 8h00 at his home. Officer Madida entered the house, grabbed him by the arm, handcuffed him, assaulted him by slapping him with open hands and took him out into the yard. Officer Madida demanded that the plaintiff produce a firearm. He did not have a firearm. Officer Mabuyakhulu hit the plaintiff with a stick. They took him to an unmarked police vehicle.

- [4] Officer Madida gathered some dry grass. Officer Mabuyakhulu produced a match and plastic bags. They lit the grass. The flames burnt him. He remained tied to the pole for about three hours. The officers continued to add grass to keep the fire alight. Eventually they untied the plaintiff and took him to Sidogiphola where they dropped him off. The plaintiff had to make his way home slowly on foot, resting now and then. He arrived home late at about 19h00. The following day an ambulance transported him to the hospital. The plaintiff remained hospitalised for two weeks.
- [5] He concluded his evidence in chief by correcting his particulars of claim. His evidence was that the police untied him from the pole; it was not a passer-by who untied him as stated in the original particulars of claim nor was it members of his family according to his amended particulars of claim.
- [6] The plaintiff's examination-in-chief was brief. Much more emerged during cross-examination and clarification by the court. Under cross-examination the plaintiff acknowledged knowing Officer Madida because he had seen him when he had been detained on a previous occasion. He had no contact with Officer Madida thereafter. He denied that he was an informer and that he had assisted the police in solving nine cases against his family members in 2012. The defendants' counsel did not identify these cases for him.
- [7] He did not know Officer Mabuyakhulu until one day he arrived at the house to see the plaintiff's brother. The plaintiff denied any knowledge of his family suspecting Officer Mabuyakhulu of having thrown his brother out of a moving vehicle and killing him.
- [8] After Officer Mabuyakhulu and Officer Madida assaulted him in the yard it emerged that they took him to Nogqaza. The plaintiff agreed with the defendants that they had taken him away from his home to search for his uncle. The plaintiff said that he was not assaulted inside the vehicle but his hands were still bound. After searching for his uncle they returned to his

home. Using a white rope the police tied him around his waist pinning his arms behind him as they did so and then tied him to a washing line pole in the yard. The rope was also tied across his chest and neck. The washing line pole was 30cm wide and wedged between his arms and his back. He was not handcuffed.

- [9] They burnt grass and plastic around him for about three hours. His tracksuit pants which was slightly burnt leaving small holes stuck to his skin. His feet did not burn because he managed to slide them away from the fire. There were no injuries to his buttocks because the pole protected him.
- [10] The police untied him before they took him away. His family was afraid to assist him. His explanation for the two amendments to his particulars of claim on the issue of who untied him was that his previous attorneys did not understand him even though he spoke through an interpreter.
- [11] The plaintiff further denied that one of his friends telephoned him while he was in the vehicle with the defendants, that he informed the police that this friend had an unlicensed 9mm Norinco pistol and that the police took him to his friend.
- [12] He was taken to hospital the following day at about 13h45 when he could not bear the pain. He did not go to hospital the same day because it was not immediately very painful.
- [13] The plaintiff denied receiving a call from Officer Madida the following morning enquiring whether everything went well after his arrest the previous day; he had no contact with Officer Madida after his assault. He also refuted having given Officer Madida his cellular phone number or ever calling him to say that he was suspected of being an informer or that he was afraid of being assaulted or killed. He never ran away from home. His arrest was real, not staged, he persisted.

- [14] In response to questions from the court, the plaintiff replied that the police took him to Nogqaza in search of a person by the name of Jabu. He knew who Jabu was but did not know what the police wanted from him. They did not find Jabu but found another boy whom the police assaulted.
- [15] When the police started burning him his grandmother went into the house whilst his little sister Nelile peeped through the door. He was facing them as he cried out in pain. So they saw and heard him. He did not go to the hospital on the same day because the transport was giving trouble.
- [16] He lodged a complaint at the police station in the same month of his assault. His grandmother has since passed away. Hence she was unavailable to testify. His sister was twelve years and too young to testify.
- [17] Ms Ncengumusa Thungo, an adult female and cousin of the plaintiff gave her eyewitness account of the police burning the plaintiff. Immediately after arresting the plaintiff they arrived at her house and locked her family in their home saying that they would return. Approximately three hours later they returned and opened the door to her house. They instructed Ms Thungo to use a shovel to dig the ground near her kraal. She was not challenged when she testified that the police had their name tags covered with brown plaster. She could not see clearly from the distance where she stood exactly whether the pole was wedged between the plaintiff's hands and back. However, she did see the flame behind and near his legs. After burning him for fifteen to twenty minutes the police untied him. They left with him. According to her the ambulance arrived at 9h00 the following morning. She denied that he was an informer and that there was any discussion to that effect in the family.
- [18] In an attempt to discredit her eyewitness account the defence cross-examined Ms Thungo about the distance between her house and the plaintiff's house. She testified that it was about thirty paces, that her house was below the plaintiff's house and that there was a fence between their houses. The

defence persisted at length that there were no houses nearby the plaintiff's house, which was in the rural area and therefore isolated.

- [19] Ms Thungo told the court that more than five policemen were present at the plaintiff's house. Two policemen carried short firearms in their hands and another had a long firearm over his shoulder. Two others carried big firearms. She saw the two policemen who came out of the house kicking and hitting the plaintiff with open hands. From where she was she did not hear what they were saying.
- [20] Through the cross-examination the defence suggested that Ms Thungo saw smoke that must have come from fires lit for the purpose of cooking. Ms Thungo was adamant that she saw flames near the brown washing pole. She could not recall clearly whether the plaintiff was handcuffed as well as tied with the rope when he was being burnt. Although she could not recall the colour clearly, she saw the brown or yellow rope used to tether animals binding the plaintiff to a black pole.

The Defendants' Case

- [21] Warrant Officer Jerome Madida has been a policeman for twenty-two years and a Warrant Officer for one year. He testified that the plaintiff had been his informer for about ten years. He met him as a member of his soccer team. The plaintiff was concerned about many problems in the area. They exchanged telephone numbers and arranged that the plaintiff would miss-call him whenever he had information and he would return the call. Officer Madida used to buy him airtime from his own funds. He did not register the plaintiff as an informer because he would have had to do so in Ladysmith police station. The plaintiff was afraid of those policemen who resided in his area.
- [22] On 13 March 2012, Officer Madida was part of a team led by Warrant Officer Mabuyakhulu assigned to police a concert in Ladysmith. On arriving there they discovered that the concert had been rescheduled. Officer Madida approached Officer Mabuyakhulu with the suggestion that they stage an arrest upon the plaintiff who feared being attacked because he was suspected

of being an informer. Officer Madida then called the plaintiff to arrange the staged arrest. Officer Mabuyakhulu called the team together and briefed them that they were to proceed to the plaintiff's place.

[23] At the plaintiff's home Officer Madida and Constable G.N Mthembu entered whilst other policemen were around the house. Two drivers remained with the two vehicles, one of which was an unmarked police vehicle.

[24] The plaintiff volunteered information about his uncle having an unlicensed firearm. They proceeded with the plaintiff to the cattle dip and then to the tavern in search of his uncle. The plaintiff alighted from the vehicle to identify his uncle. His uncle was not there. They returned to his house to search for his uncle's firearm. They found no firearm at the plaintiff's house.

[25] On the way back from the tavern the plaintiff received a cellular phone call from a friend inviting him to a dance. They decided to go to the friend's place. Officer Mabuyakhulu and two other officers proceeded with the plaintiff in the unmarked police vehicle.

[26] Officer Madida was emphatic that there were no neighbours within one kilometre of the plaintiff's house. Ms Thungo was not a neighbour. Her property was separated from the plaintiff's property by a fence. He persisted that she could not have witnessed any assault on the plaintiff from the distance of her home. Then the possibility of an *in loco* inspection arose. Quickly he conceded that Ms Thungo was about thirty-five metres away. He denied instructing his counsel that the neighbouring houses were about 1000m away. He could not explain why his counsel put this figure to Ms Thungo.

[27] He was not concerned about staging the arrest with other policemen being in attendance as he had worked with them for a long time and trusted them.

Officer Mabuyakhulu briefed the ten members of the police team on how they would conduct the staged arrest. When the plans changed to go in search of firearms that was also communicated to the police team.

- [28] Warrant Officer Frank Themba Mabuyakhulu began testifying in chief through an interpreter that he was a policeman for twenty-three years. Officer Madida reported to him that the plaintiff had said that the 'community was going to attack him'. This was apparently incorrectly interpreted and Officer Mabuyakhulu elected to continue to testify without an interpreter. He clarified that Officer Madida advised him that the plaintiff was suspected of working with the police and people were threatening to kill or assault him. Officer Mabuyakhulu had seen the plaintiff once on 27 January 2012 and had not known then that he was Officer Madida's informer. He instructed his members to provide cover at the homestead. He dropped off his team some distance from the homestead so that people, including the plaintiff who would have had to join them to avoid suspicion, would not run away as they usually did when they saw a police vehicle.
- [29] After arresting the plaintiff from his home the plaintiff accompanied the police to point out suspects. Observers would not have known that the plaintiff was co-operating with the police because he had a way of pointing out suspects without them noticing. As for the pointing out of the plaintiff's friend the latter accompanied the plaintiff and the police to the person from whom the friend had borrowed a firearm. On arrival Officer Mabuyakhulu realised that he had already retrieved that firearm and abandoned that investigation.
- [30] Officer Mabuyakhulu speculated that the plaintiff was falsely implicating him because his family had suspected that he had killed another Mr Thungo in January 2010 when he caused that Mr Thungo to jump out of a moving vehicle. On 1 November 2009 he arrested the plaintiff's uncle who was involved in the taxi industry and found him in possession of 300 rounds of

ammunition and two unlicensed firearms. He had information that the uncle was expecting another consignment of seven R5 rifles from Johannesburg and the police were still looking for those rifles. On 4 January 2010 they found his uncle in possession of an AK47. None of this evidence was put to the plaintiff. Although Officer Mabuyakhulu instructed his counsel that he met the plaintiff at a traditional ceremony this too was not put to the plaintiff.

[31] Contradictions emerged between Officer Mabuyakhulu's evidence and his warning statement. He testified that paragraph 8 of his warning statement was a mistake in so far as it recorded that the plaintiff's friend was still with them when the plaintiff alighted. It was also not correct that the plaintiff phoned his friend but rather that he was phoned 'by' his friend. He attempted to correct paragraph 5 of his statement by suggesting that the word 'by' was missing in the first line of that paragraph. If the word 'by' was missing from that sentence, this explanation did not cover the second sentence, from which it was clear that it was the plaintiff who phoned his friend.

[32] That concluded the evidence for the defendants.

Analysis

[33] The plaintiff's evidence-in-chief covered the bare essentials of his claim. More details emerged from his cross-examination and questions for clarification by the court. The fact that the plaintiff did not give a detailed account when he testified in chief cannot be held against him because his counsel did not question him in any detail about the events of that day. Furthermore, the defence did not make any submissions about new evidence coming to light under cross-examination or from questioning by the court. The new evidence related to being driven away from his home, in handcuffs, to find his uncle and to Jabu Nkosi in search of illegal firearms. The plaintiff had pleaded this. When he was cross-examined it emerged that these facts were not in dispute.

- [34] This evidence would have been vital to the plaintiff's case if he had pleaded a claim for damages for unlawful arrest and detention. Each act constituted a separate cause of action and should have been specifically pleaded.¹ Although the plaintiff's erstwhile attorneys had pleaded that the plaintiff had been unlawfully arrested, they failed to lodge a claim under this heading. Even though it was common cause that the plaintiff was detained in police custody, this was also not specifically pleaded. This was not the only deficiency in the plaintiff's particulars of claim.
- [35] The plaintiff's attorneys omitted to plead another assault. Although the plaintiff testified that Officer Mabuyakhulu assaulted him with a stick and Officer Madida with his open hand, these assaults were not specifically pleaded. The Patient Report Form notes that the examination of the plaintiff revealed that he had been assaulted on his head and body. Ms Thungo also corroborated the plaintiff's testimony on this issue.
- [36] The plaintiff was not prone to exaggerate the harm he suffered. For instance he answered 'no' to being assaulted in the police vehicle. Furthermore he said there was just swelling but no bleeding from the stick wounds on his shoulders. His evidence that he was burnt for three hours was exaggerated possibly because it seemed to go on for a long time. He was not seriously challenged on this point. The probabilities are that the plaintiff had been assaulted on his back and shoulders.
- [37] A more serious difficulty for the plaintiff emerges from the amendment of his particulars of claim. Both versions were inconsistent with his evidence. The credibility of his evidence has to be tested against all the evidence. The fact that his erstwhile attorneys did not claim for his unlawful arrest and temporary detention in police custody and the assault on his shoulders is an indication that they might not have been sufficiently attentive to their duties. The

¹ *Brandon v Minister of Law and Order & another* 1997 (3) SA 68 (C) at 79A; *Vincent Ngobeni v The Minister of Police* (49069/2013) [2016] ZAGPPHC 61 (9 February 2016) para 18.

competence of the interpreter who interpreted for the attorney has also not been objectively established. Whether an interpreter was used on both occasions, that is, when the particulars of claim were formulated and reformulated, was not fully ventilated in evidence in chief or probed at any length under cross-examination. It does not necessarily follow from the contradiction between the plaintiff's evidence and his particulars of claim that he is mendacious.

[38] The plaintiff's first explanation for not going to the hospital immediately after the incident because the pain was not that bad, finds some support in the nurse's assessment of him on admission, namely that his burns were 'superficial'. Furthermore, pain is relative, depending on an individual's tolerance level. However, the recording in the nursing history compiled on the day of his admission into hospital, which was a day after his arrest, confirms that his circulation was impaired, that he was restless and suffered from insomnia due to the pain from his wounds. He had another explanation.

[39] As for his second explanation that transport to the hospital was a problem, the court can also not reject this explanation outright. The defendants did not cross-examine the plaintiff about his transport problem when, to their knowledge, his family owned taxis and there was good gravel road access to his home. If he had access to his family's taxis he would not have had to wait for an ambulance that, according to the Patient Report Form, arrived as late as 16H00, or even at 13H43 according to the hospital records that show that as the time when the admitting doctor examined him, which is more consistent with the plaintiff's evidence. Although there were differences in the evidence relating to the time that the plaintiff went to hospital, these differences are immaterial once it became common cause or not disputed that the plaintiff went by ambulance to hospital the following day for treatment for his wounds.

[40] Ms Thungo who had passed grade 11 was a thoughtful witness. She corroborated the plaintiff's evidence first to the extent that she saw the police assault him by hitting him as he was brought out of his house. Although she heard the police shouting she could not hear what they were saying from where she was. Second, she saw the police burn a fire behind the plaintiff who was tied to a pole with a rope used to tether animals. From the distance where she was, she could see flames; they were about the same height as the plaintiff attested to. However she could not see that he was being burnt at that time; she saw his burns only the next morning when the ambulance arrived to take him to the hospital. She recalled seeing burning plastic bags flying off in the wind which has a ring of truth because it is something that she would notice as a person living in a rural setting of dry grass and homes with thatched roofs. Third, the crux of her cross-examination was aimed at putting her dwelling as far away as possible from the plaintiff's home in order to discredit her eyewitness account of events. This tactic failed once Officer Madida conceded that the neighbours were about thirty-five metres from the plaintiff's home. She was not that far that she could not see a flame half a metre tall. Fourth, the suggestion by the defendants' counsel that the flame could have been from the fires lit for cooking in a rural area where there was no electricity implied that the defendants did not dispute that there might have been a fire in the vicinity but it was there for cooking, not for the purposes of burning the plaintiff. Last, she denied that the plaintiff's family or the community believed him to be an informer.

[41] Ms Thungo did not exaggerate. She was also unshaken under cross-examination. Unlike the officers who had testified in court proceedings previously, the plaintiff and his witness were unsophisticated, unpractised novices. Typically there were some discrepancies about time, timing, distance and colour in the evidence for the plaintiff. None of these discrepancies are material.

- [42] The evidence for the defendants is far from flawless. Some of the contradictions within and between the evidence of the two officers, and between their testimonies and their statements, are self-evident from my summary of their evidence above. To succeed with their defence that the arrest was staged the defendants had to establish in rebuttal that the plaintiff was a police informer. If they failed to do so then they will also fail to justify the reason for their presence at the plaintiff's home and for arresting him. If he were not an informer then neither the plaintiff's family nor the community would have had a motive to burn him. The defendants specifically disavowed any suggestion that the plaintiff's injuries were self-inflicted.
- [43] Was the plaintiff a police informer? If Officer Madida had registered the plaintiff as an informer, it might have been *prima facie* documentary proof that the plaintiff had been an informer. If neither Officer Madida nor the plaintiff trusted the Ladysmith police it is unclear why a police informer of a Newcastle officer would have to be registered in Ladysmith, especially when the police from Newcastle work in Ladysmith. Either the officers realised belatedly that not having registered the plaintiff now created a problem for them or the plaintiff was not an informer.
- [44] Officer Madida had never lodged a claim for payment for the plaintiff. Hence he did not know what an informer's reward would be for good information regarding unlicensed firearms. Officer Mabuyakhulu set the record straight with his evidence that his unit did not use informers because it had no money to pay for them; instead it relied on crime prevention.
- [45] Under cross-examination Officer Madida responded that the plaintiff had worked for him for about five to six months before the incident. This contradicted his evidence in chief that the plaintiff was his informer for ten years. Officer Mabuyakhulu further contradicted the evidence for the defendants saying that plaintiff provided information that led to arrests of his

family members in 2009 and 2010. When exactly the plaintiff became an informer is not clear. The cases in which the plaintiff provided good information could have been objective evidence of him being a police informer. These cases were neither put to the plaintiff nor were their records produced.

- [46] Surprisingly, although Officer Mabuyakhulu had met the plaintiff only once before, he was able to testify that the plaintiff had 'a clever system of pointing out suspects to the police'. Hence he would not expose himself as an informer when he pointed out suspects to the police. If he had only that day come to know that the plaintiff was Officer Madidas' informer, which was one of his versions, how did he know this about the plaintiff? He could also not have had direct personal knowledge that as a result of information from the plaintiff the police were able to retrieve rifles and pistols from his brother and a member of the Nkosi family. If anyone should have given this evidence, if it were true, it would have been Officer Madida, the plaintiff's alleged handler. Officer Mabuyakhulu as the last witness for the defence was simply making up evidence to cover up any perceived cracks in the defence case.
- [47] It is not clear from the evidence for the defendants as to whether the plaintiff reported that his family members or members of the community suspected him of being a police informer. On clarification by the court Officer Madida conceded that the plaintiff did not mention his family specifically, but they had been arrested as a result of information from the plaintiff. Officer Madida was therefore assuming that the family suspected the plaintiff.
- [48] The police had to be clear about who suspected the plaintiff beforehand in order to protect him properly and to ensure that they staged the arrest before such persons. The officers did not seek out the plaintiff's uncle, grandmother or friend to show them that they had arrested the plaintiff; they sought these persons out in pursuit of their search for firearms. They gave no evidence of

the impact or reaction on those observing the plaintiff's arrest nor could they say that they had put on a convincing performance. Clearly, they had not because the plaintiff had been assaulted, on their version by someone other than themselves.

[49] Officer Mabuyakhulu volunteered that the plaintiff provided information that led to arrests of his family members in 2009 and 2010 to explain why the plaintiff might falsely implicate him. However under cross-examination he testified that there was a feud between him and the Thungos, excluding the plaintiff. The suggestion that the plaintiff might falsely implicate him conflicts with the defendants' case that the plaintiff was a good informer, a person who gave reliable information free of charge out of a sense of concern for crime in his area. If the plaintiff wanted to falsely implicate Officer Mabuyakhulu then the plaintiff could not have made common cause with the police about investigating crimes and in particular about retrieving firearms from his family and other members of the community.

[50] Officer Mabuyakhulu's evidence that the plaintiff was being manipulated by another member of his family and the media into lodging this complaint against the police was entirely hearsay and not put to the plaintiff. Nor was the plaintiff cross-examined at all about lodging his criminal complaint.

[51] In response to the court's question, Officer Madida testified that the officers changed their plans when the concert was rescheduled and after he received a telephone call from the plaintiff advising him that he was under suspicion. The new plan was to stage an arrest; it was not to retrieve firearms initially. The idea that they should recover firearms occurred to him after they had arrested the plaintiff and were walking to the vehicle. Some time prior to the staged arrest the plaintiff had allegedly reported that his uncle was abusive to his grandmother when he consumed alcohol. Hence they revised their plan to

find the plaintiff's uncle. That the idea to recover firearms was his and not the plaintiff's contradicts the defendant's version that the searches were voluntary and at the instance of the plaintiff.

- [52] Regarding the call the plaintiff received on his cellular phone from a friend, neither party canvased how the plaintiff was able to receive this call with his hands handcuffed behind him. The defendants could not explain why the plaintiff remained handcuffed even whilst he travelled in the unmarked police vehicle. This would not have been necessary if his arrest was staged.
- [53] Officer Mabuyakhulu drove the unmarked vehicle so fast that the marked police vehicle was unable to keep up with it. Using an unmarked police vehicle hardly served the purpose of staging a police arrest. The purpose of this trip to the friend had to be to search for firearms. It had nothing to do with convincing members of the community that the plaintiff was not an informer.
- [54] The officers colluded with each other in an attempt to tailor their evidence. For instance, the evidence of the defendants that no one was in the car when the plaintiff was dropped off in Sidogiphola is inconsistent with Officer Mabuyakhulu's warning statement. There he had stated that when the police 'released him his friend was still with the police'. Furthermore, the police failed to call the friend or any of the other policemen in the vehicle to corroborate their version that the plaintiff was unharmed when they dropped him off.
- [55] Officer Madida had always met the plaintiff alone previously. Not even his superior Officer Mabuyakhulu had known that the plaintiff had been Officer Madida's informer when he saw him on 27 January 2012. Officer Madida had elected not to register the plaintiff in Ladysmith for fear that it would expose the plaintiff to the police there. Having allegedly taken all these precautions to safeguard the plaintiff, the impromptu decision to stage an arrest that exposed

the plaintiff as an informer to as many as eight or more policemen is at best ham-handed or negligent. On the defendants' own version their plan failed because it had precisely the opposite effect: someone assaulted and burnt the plaintiff after he had been with the police. If his uncle or anyone else had been arrested then however discreetly the plaintiff identified the arrestees, the fact that he accompanied the police to effect the arrest would have been sufficient to fortify any pre-existing suspicion that he was an informer, unless they were planning to charge him too. As policemen the defendants ought reasonably to have anticipated this result. Policemen acting reasonably would have planned a staged arrest carefully and not on the spur of the moment. Furthermore on their own version the playacting turned out to be a genuine search for illegal firearms. If the plaintiff was an informer he was obviously not a good one. Therefore all the indications are that the searches were at the instance of the defendants.

[56] Significantly, the plaintiff was emphatic that he was not a police informer. If the information led to arrests in 2009 and 2010 and his family did suspect that he was an informer he could not have continued to remain with his family and community for such a long time, at least not without some incident. The defendants attested to no facts about how, according to the plaintiff, the suspicion manifested, what form the threats took, who issued the threats and how they would be executed. On their version they simply accepted without questioning the plaintiff's allegations.

[57] In summary the defence of staging an arrest was one of few defences that the defendants could invoke once they could not dispute that the plaintiff suffered burns after they arrested him. Their only hope was to persuade the court that the plaintiff was burnt after they had released him. If the plaintiff had been threatened the defendants failed to explain how he managed to continue to live with his family for the past two or three years since he allegedly gave information that led to the successful arrest of his family members. His evidence that he had not run away from home went unchallenged. The defendants also failed to establish who precisely threatened the plaintiff and what the nature of the threats was.

[58] The particulars of claim omit to itemise claims for unlawful arrest and detention. Counsel also omitted to specifically seek findings on liability under these headings. However, it is common cause that the plaintiff was arrested and detained, albeit for a few hours, the only dispute being whether the arrest and detention were at the request of the plaintiff. In addition to the compelling authorities from the appellate courts² it is in the interests of justice and expeditious dispute resolution for the court to recognise these claims. The court finds that the plaintiff has proven these claims for unlawful arrest and detention, even though they were not pleaded or sufficiently particularised. As for the primary dispute, even if the defendants succeeded in proving that the plaintiff was an informer, the unshakeable evidence of Ms Thungo supports the court finding the defendants liable for the burns. The medical records corroborate evidence for the plaintiff to support a finding that the defendants assaulted the plaintiff on his shoulder and back. This claim too is recognised on a similar basis as the claims for unlawful arrest and detention.

[59] I find that:

- a. the plaintiff was not an informer;
- b. his arrest by the officers and other policemen in the service of the third defendant was real and initiated exclusively at the instance of the defendants;
- c. the arrest and subsequent temporary detention of the plaintiff were unjustified and unlawful;
- d. Officers Madida and Mabuyakhulu and other policemen under their command unlawfully assaulted the plaintiff by burning his calves, thigh and fingers and striking him on other parts of his body.

²*Minister Of Safety And Security v Kitase* 2015 (1) SACR 181 (SCA) para 15; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) para 10-12; *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A).

Order

[60] Accordingly I conclude:

The defendants are liable jointly and severally to the plaintiff, the one paying the others to be absolved, for damages for unlawful arrest, detention and assaults.

D. Pillay J

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Date of Judgment	: 16 September 2016