

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 2625/2013

In the matter between:

STEVEN TSIDISO MOKOENA

Plaintiff

(Identity number: 9.....)

And

THE MINISTER OF THE POLICE

Defendant

CORAM:

MOLOI, J

HEARD ON:

3 SEPTEMBER 2014

DELIVERED ON:

18 SEPTEMBER 2014

MOLOI, J

- [1] In this matter the plaintiff sued the defendant for payment of an amount of R2 100 000-00 being compensation for estimated future medical expenses, estimated future loss of earnings, pain, suffering and shock, loss of amenities of life and disability. The claim arose from an incident that occurred on the 22nd of February 2013 at Deneysville where a member of the South African Police Services acting within the course and scope of executing his duties is alleged to

have assaulted the plaintiff and caused him serious bodily injuries. At the commencement of the hearing the merits were separated from the *quantum* by agreement between the parties.

- [2] The plaintiff, a 24 year old Grade 9 learner was called as a witness. He testified that he had had a fallout with his girlfriend of two years, namely Sana Tsotetsi (Sana). Both him and Sana were summoned to the principal's office by the deputy principal on 22 February 2013. In the principal's office he found two police officers, namely Sergeant Mphuthi (Mphuthi) and Constable Zwane, a female officer (Zwane). Sana also joined as well as the deputy principal, Madam Ntsalong. After he confirmed his identity and address he was told that Sana wanted to terminate the relationship between them. He demanded the gifts he gave her back namely, a cellular telephone and bunny chow he bought her. The deputy principal asked Mphuthi to take him away and beat him up.
- [3] The two police officers drove with him to the local police station. At the police station Mphuthi took him to a separate room leaving Zwane behind. In that room his eyes were pepper sprayed by Mphuthi. Mphuthi pushed him against the wall and he fell to the floor and he was kicked. He then heard the footsteps of Zwane approaching. Mphuthi picked him up and dragged him to a tap with a zinc where water was run over his head. After talking to Zwane Mphuthi left. Zwane and another police officer drove him back to school. He was struggling to walk and ran out of breath. He sat for a while on the chair of the security guard near the gate. The

guard wanted to know why his eyes were bloodshot and he was bleeding from the mouth. Later his sister took him to the hospital for treatment. He never threatened to assault or stab Sana nor did he resist going with police to the police station. He never hindered the police in any manner whatsoever.

- [4] In cross-examination he ended up conceding that Mphuthi against whom he had laid an assault charge was acquitted. He said the date of 22 March 2013 and the fact that he was in Grade 11 as per particulars of claim were wrong and that the incident actually took place on 22 February 2013 and that he was then in Grade 9. He conceded that the police went to the school upon the complaints made by Sana as she feared that he would assault her and demanded to engage with her sexually which she was not prepared to do. He denied having threatened her with a knife. He then went further to say in the principal's office and within the view of all present Mphuthi assaulted him by pinning him against the wall. He expressed surprise that not even the doctors at the hospital could find signs of assault on him especially the swelling he alleged he had on his forehead caused by Mphuthi knocking his head against the wall in the principal's office. He could not remember making a statement to the Independent Police Directorate and denied the signature on a statement shown to him as his. He passed out in the principal's office and did not know how he got to the hospital save for what his sister told him afterwards. This was after he was taken back to school from the police station. He denied having been aggressive in the principal's office and

reiterated that he only demanded the gifts he had given to Sana. For the first time he said Mphuthi strangled him in the principal's office and hit him with a clenched fist. When he left the room Mphuthi took him in at the police station, his head was wet from the water ran over him and his shirt had lost a few buttons as a result of Mphuthi pulling him after he was pepper sprayed. He did not report the incident to the police who took him back to school as he was enduring pain and was afraid. He did not tell the guard at the schools entrance either as he could not speak. After returning to school he could not recall if the deputy principal asked him what happened nor that he demanded his mother. He, however, recalled that his friends accompanied him home and that they told him he fell down. He had a protruding swelling on his forehead, his neck was painful as well as his left leg. He conceded that the particulars of claims where they referred to the right leg injured were wrong and this was later amended. A departmental official visited him at the hospital with many others except the deputy principal. The doctors were supposed to see and note his injuries. He was fitted with neck brace given by one of the nurses.

- [5] The next witness called was Mita Mokoena, the plaintiff's mother. She testified that on 22 February 2013 she saw the plaintiff at home at approximately 11h00 when he was brought there by other learners who claimed he fell at school. They carried him into the house and placed him on a sofa. He cried when she touched him on the head. He could not explain what happened until after two weeks. She went to see the principal on the same day of the incident.

Plaintiff could not walk and there was that protruding swelling on his fore head on the left hand side.

- [6] In cross-examination she said the plaintiff could not speak sensibly for two weeks. He did not even know about the swelling on his forehead and she told him about it. He could not say how it came about. He said at the police station the police ordered him to rub his eyes before he was pepper sprayed. The police assaulted him as a result he fell on the floor where he was kicked. A female police officer walked him to a bench to seat and was given tissue paper to wipe himself off. His left hand side from the shoulder to his leg was dysfunctional. The case against Mphuthi was opened by her husband Daniel Thibelo Mokoena. She was called to the school and was informed by the principal and the deputy that the plaintiff was taken by the police. When she got to the school the plaintiff was already at the hospital as the ambulance had already removed him. The plaintiff was brought by schoolmates to her parental home which she uses as a crèche. She admitted discussing the merits of the case with the plaintiff. She and the plaintiff were present in court when Mphuthi was acquitted of the assault charge laid by the plaintiff.

After the mentioned amendments were made, the plaintiff's case was closed.

- [7] The defence called Dr Jaers of Metsimaholo Hospital, Sasolburg who examined the plaintiff on 22 February 2013 and completed the standard J88 form. According to her no

injuries at all could be seen on the plaintiff and his shirt was intact. There was also no bleeding from the mouth. The plaintiff was however behaving in a strange way during the examination. She could, however, not find her clinical notes she would require to describe the strange behaviour of the plaintiff. She did not examine the plaintiff neurologically but conceded strange behaviour is possible if the brain is disturbed. Dr Banyane also worked at Metsimaholo Hospital in Sasolburg. She completed the discharge form of the plaintiff on 5 March 2013 the plaintiff having been admitted to the hospital on 27 February 2013 complaining about assault resulting in a head injury. A CT scan was commissioned and showed no injuries.

- [8] The defence presented the evidence of Phehello Daniel Mphuthi, the Sergeant in Social Crime Prevention at the SAPS, Deneysville. He was the campaign head of “adopt a cop” by the same school. On 22 February 2013 together with Zwane he attended Gomotse school regarding a complaint lodged by Sana of threats of assault and demands for sexual engagement by the plaintiff. At the school they all met in the principal’s office though the principal was not present. It was himself, Zwane, the deputy principal, the plaintiff and Sana. Sana and the plaintiff confirmed their relationship and Sana requested that the plaintiff be warned not to insist on having sexual engagement with her and threaten to assault her with a knife as she was not prepared to do all that. Moreover, she officially terminated the relationship with the plaintiff. The plaintiff flew into a wave of rage and demanded the return of all the presents he gave

her. The plaintiff also became rude and aggressive threatening to do what will please him. The attempts to calm him down did not help as he abruptly left the office and tried to run away. He chased after the plaintiff and at a point the plaintiff slipped and fell down. He helped the plaintiff up and took him in the police vehicle to the police station together with Zwane to allow him time to calm down. This he did on his own volition and was not asked by the deputy principal to do so. He was concerned the plaintiff could harm Sana the way he was worked up. At the police station the plaintiff was allowed to sit in an office adjacent to the charge office and he left leaving Zwane to complete the formalities in terms of the Domestic Violence Act. He drove to Vereeniging where he attended a meeting. He never assaulted the plaintiff at all least of all in the manner described by the plaintiff.

- [9] In cross-examination he conceded that causing a person to fall down may in certain circumstances constitute assault. He denied having tripped the plaintiff and cause him to fall down. All he wanted to do and did was to bring sense back to the plaintiff by talking to him. He conceded that the plaintiff, by demanding the gifts he gave to Sana, might have truly believed he was entitled thereto. He was telephonically informed the plaintiff collapsed during a meeting with the principal after he was taken back to school. When he was back from Vereeniging he went to the plaintiff's house to see him but could not find him. He denied the plaintiff's collapsed as a result of the assault by him.

[10] The defence presented the evidence of Mokhali Goria Ntsalong, the deputy principal of the school. She confirmed the attendance of the meeting in the principal's office between herself, Mphuthi, Zwane, the plaintiff and Sana. She reiterated what transpired and the attitude adopted by the plaintiff. She stated further that the plaintiff would not listen to any reason. She emphasised that Mphuthi never assaulted the plaintiff in the office. She confirmed plaintiff left the office furious and running but she did not see him fall down as she was the last person to leave the office. She denied ever telling the police to go beat the plaintiff up. She again saw the plaintiff in the principal's office when the principal ordered him to stand up from the floor where he apparently threw himself down. This was after he came back from the police station. On his way to the principal's office she was told, the plaintiff was walking normally. She asked him what happened and the crying plaintiff said he wanted his mother. His clothes were still intact. She arranged with his friends to take him home. He never said he was assaulted at the police station. Later at approximately 14h00 the mother came and reported the plaintiff was taken to the hospital. She accompanied the director to the hospital on Thursday and saw the plaintiff walking normally towards them. When the director got to him and asked him where he was going, he answered he was going to charge his cellular telephone. Suddenly when the director introduced himself to him, the plaintiff fell down and started crying. Held would thereafter not respond to the director's questions and started crying and demanding to go home. The doctor's confirmed to the director that the plaintiff

had no injuries. She did equally see no injuries on the plaintiff when she met him in the principal's office on 22 February 2013.

In cross-examination she confirmed the plaintiff's performance at school was poor. Some aspects of her statement were questioned eg. where she said she reprimanded the plaintiff during the meeting. She explained that she saw Mphuthi holding the plaintiff in the corridor as they were going towards the police vehicle. She had not seen him falling nor being tripped.

- [11] Mamoratana Sana Francenia Zwane, a constable in the SAPS was the person who accompanied Mphuthi to the school on the said date following the complaint by Sana, the plaintiff's girlfriend. She testified that in the principal's office the plaintiff was not assaulted at all and also at the police station. She was in a position to see everything happening in the room Mphuthi placed the plaintiff to calm him down. She arranged for the transportation of the plaintiff back to school as Mphuthi left immediately to attend a meeting at Vereeniging. Constable Joseph Baba Motloun confirmed giving the plaintiff a lift to school as he was going on investigation of a different matter. He was asked by Constable Zwane to do so. The plaintiff was normal in all respects without any injuries and walked normally towards the school entrance. He conceded that certain injuries sustained in assault case may not show outwards signs. That closed the defence case.

[12] The court must consider the whole evidence placed before it and make a value judgment thereon. The evidence of the plaintiff is that he was assaulted by Mphuthi in the principal's office by being pushed against the wall. He did not offer any resistance when he was taken to the police station after the deputy principal asked the police that he be taken to the police station and be beaten up. All the plaintiff did was to demand the presents he gave to Sana back. At the police station Mphuthi took him to a room where he pepper sprayed him, pushed him against the wall where he fell to the floor and was kicked. Thereafter Mphuthi pulled him up and led him to where the tap was, pushed his head under the tap and ran water over it. After Mphuthi left he was driven to the school and left at the entrance. He struggled to walk and limped to the seat of the security guard where he sat down. The guard asked him why his eyes were bloodshot (red). He was also bleeding from the mouth.

[13] Mita Mokoena, the plaintiff's mother saw the plaintiff later that morning at about 11h00 when he was brought home carried by his schoolmates in a vehicle. The plaintiff was crying and had a swelling on his forehead. The plaintiff was thereafter taken to the hospital by an ambulance and was accompanied by his sister. The plaintiff could not talk and she told him about the swelling on his forehead only after two weeks when he could relay what had happened on 22 February 2013. After the plaintiff was taken to the hospital she went to the school. She explained that the plaintiff was forced to rub his eyes before being pepper sprayed. When he heard female footsteps he saw Zwane and he was given

a tissue paper to wipe himself off. The plaintiff's whole left hand side from the shoulder to the leg was dysfunctional. She knew of the assault case against Mphuthi for the assault on the plaintiff and that Mphuthi was found not guilty and was discharged on that charge.

[14] According to the particulars of claim the plaintiff was assaulted by Mphuthi without lawful reason by using unnecessary force upon the person of the plaintiff as a result of which he sustained the following injuries:

“6.1 A serious head injury which has resulted in the plaintiff suffering from continual headaches, loss of concentration and interference in his studies, pain and discomfort and depression;

6.2 An injury to his neck which has resulted in the plaintiff suffering from continual pain and discomfort;

6.3 An injury to his left leg which also resulted in a restriction of movement, pain and discomfort.”

While the *siquealae* of the alleged assault are important for the determination of *quantum*, the assault itself was not detailed in the particulars of claim. As far as the head injury is concerned there is no evidence that directly state how the swelling on the forehead was caused. It was left to speculation that the plaintiff was pushed against the wall and bumped his forehead exactly how is not known. Whether the swelling in the forehead was caused when the plaintiff

was kicked or when he fell down is not known. Even the falling down was not explained at all in his evidence. What is, however, more confusing is the evidence of the mother that she did not know if the plaintiff was aware of the injury to his forehead with the result that she told the plaintiff about the injury two weeks after the incident when he could communicate. How the injuries to his neck and left leg were caused remains a riddle, nor are they described. No evidence whatsoever was presented how these injuries were caused. The failure to describe how the assault took place led to the speculation that assault could be caused when one is made to fall or worse still when one was tripped in the absence of such evidence.

- [15] What remains astounding is why Zwane, the deputy principal and worst still, the two medical practitioners could not see, the obvious injury to the plaintiff's head (if it was there), and why clinical examination did not reveal the other injuries which would have been reflected on the J88 form. There is uncontroverted evidence of constable Motlounq who took the plaintiff from the police station that when the plaintiff alighted from the vehicle he walked normally to the school entrance and not lumping or struggling as the plaintiff alleged. There is uncontroverted evidence of the deputy principal, that in the principal's office, the plaintiff feigned the fall and was asked by the principal to stand up. How he got to the principal's office from the entrance of the school premises is not explained. There is uncontroverted evidence of the deputy principal that on the Thursday she went to the hospital with the director, the plaintiff was walking normally on the way to

charging his cellular telephone. But immediately the director was introduced to him he fell down and cried. He would not tell the director what happened and demanded to go home instead. The doctors confirmed to the director the plaintiff had not suffered any injuries. Constable Zwane who was present in the principal's office and could see everything happening in the room adjacent to the charge office where the plaintiff was placed to cool down saw no incident of assault on the plaintiff. Constable Joseph Baba Motlouni who transported the plaintiff from the police station to the school saw no blood in the plaintiff's mouth and spoke to him. From the above it is clear that the version of the plaintiff is in direct conflict with that of the defendant. In his particulars of claim the plaintiff simply referred to having been physically assaulted by Mphuthi without stating how the assault took place.

- [16] On the contrary doctors Jaers who attended the plaintiff on 22 February 2013 found no injuries on him and completed the J88 form. She could however, subsequently not find the clinical examination notes. She did not prescribe a cervical collar for the plaintiff. Dr Banyane who completed the discharge form for the plaintiff on 5 March 2013 could also find no evidence of assault on the plaintiff. Mphuthi denied assaulting the plaintiff in the principal's office, *en route* to the police station nor in the room at the police station. The objective of taking the plaintiff to the police station was to allow him, to calm down as he was fuming after the girlfriend jilted him before all present and feared he could harm her. The deputy principal, Mokhadi Gloria Ntsalong, denied any

assault in the principal's office where she was present. She did not see the plaintiff being assaulted between the principal's office and the police vehicle before being driven to the police station. The plaintiff was walking normally. When the plaintiff was back at school she went to the principal's office where she was told the plaintiff flung himself to the floor and cried asking for his mother. The principal ordered him to stand up. What is confusing here and which is not explained, is what happened to the plaintiff after being examined by Dr Jaers on 22 February 2013. This is so because the discharge form by Dr Banyane indicates that he was admitted with the complaint of assault and head injury on 27 February 2013 and was discharged on 5 March 2013. There is no record of his discharge after he was in the hospital on 22 February 2013.

- [17] In civil matters the standard of proof required for the plaintiff to succeed in his claim is the proof on the balance of probabilities: **Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159 B–D.**

Where the court is faced with two or more conflicting versions of an incident, the court must look at the probabilities to determine which version is more probable: **The MEC for the Department of Health for the Province of Kwazulu-Natal v Denise Franks; SCA Case No 329/10 [2011] ZASCA 84 (27/5/2011).**

Above I have already indicated how the two versions in this matter are mutually destructive. As there is no direct

evidence of how the injuries allegedly sustained by the plaintiff were caused, the court cannot invoke the inferential conclusion as to what caused them in line with the principles set out in **R v Blom, 1939 AD 188 at 202 - 203**. There is no suggestion nor can it be inferred, that the defence witnesses concocted the denial of the assault on the plaintiff. It will be too far-fetched why the two doctors would fail to note the injuries on the patient if they were there, in particular.

[18] In the circumstances I cannot find that the plaintiff has proved his case on the balance of probability and consequently make the order following hereunder. In line with the principle of costs following the cause, the court has no reason to deviate therefrom.

ORDER:

[19] The following order is made:

1. The plaintiff's claim is dismissed with costs.

K. J. MOLOI, J

On behalf of the applicants: Mnr Röntgen
Instructed by:
McIntyre & Van Der Post
BLOEMFONTEIN

On behalf of respondents: Adv. Mene
Instructed by:

State Attorney
BLOEMFONTEIN

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