

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES
(3) REVISED.	☐ YES
11 Nov 2009	<i>Ismael</i>
DATE	SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 22558/2005

In the matter between :

KEOGAILE SAMUEL MASASA

Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

JUDGMENT

ISMAIL AJ:

[1] The plaintiff brought this action against the defendant by virtue of the fact that certain members of the South African Police Services acting in the course and scope of their employment with the defendant assaulted the plaintiff and that the plaintiff was wrongfully and unlawfully arrested by them.

[2] The plaintiff alleged that as a result of the conduct of the policemen he suffered damages arising as a consequence of the assault and wrongful arrest.

[3] At the commencement of the trial the parties sought a separation of the question of the merits and the question of quantum in terms of rule 33(4) of the Uniform Rules of Court. The matter proceeded before me in respect of the merits and the question of quantum was postponed sine die.

[4] Mr Masasa, the plaintiff testified that on the 23 March 2004 he was walking past a tavern in Shongoane at approximately midday when he observed policemen conducting an operation. He shouted at a person called Bashing to stop as he wanted the latter named

person to transport him to his place of employment. Two policemen who were seated in a vehicle alighted and approached him. A black policeman was accompanied by a white colleague. The black policeman enquired from him what he had said and he replied that he was speaking to Bashing. For no apparent reason the black policeman grabbed him by his belt and thereafter slapped him several times across his face. He could not identify the black policeman. Thereafter the white policeman grabbed him on his shoulder and he warded off the policeman's hand as he suspected that the policeman wanted to grab him by his throat. He was thereafter assaulted by both the officers all over his body with fists. Thereafter a group of policemen arrived and they also joined their two colleagues in further attacking him. He was kicked at, lifted and thrown to the ground. He was throttled and one of the policemen whom he knew, Koos Makwate, said to the other policemen what would happen if they killed the plaintiff.

[5] He was eventually handcuffed by the white policeman and placed at the back of the police van and he was taken to Villa Nora

police station where he was detained. He appeared in court the next day and was released on warning.

[6] According to the plaintiff he spent approximately a week at Ellisras Hospital and he was then transferred to Pietersburg Hospital where he spent a further two days as an in patient. He was again treated at Ellisras Hospital for the second time. He sustained injuries to his right eye, right shoulder and his ribs. He currently experiences numbness to the right side of his body and he has to sleep on the left side.

[7] He stated that he was acquitted of the charges which were laid against him by the policemen.

[8] In a statement made on his behalf by his attorneys and at paragraph 34 thereof the plaintiff stated:

" Die volgende persone was getuies:

1. Frans Majadibodu
2. William Mothopo
3. Tsitso- die winkelier

4. Basjan

The reference to the person Basjan from the evidence it appears to be the person referred to as Bashing referred to supra.

In the same statement the palintiff at paragraphs 2 and 3 stated:

" 2. op 23/3/2004 het ek en Mpho te voet na Shongoane

Uitbreiding 2 geloop.

Toe ons by die hek van die winkel kom waar ons sigarette wou

koop het ek vir Basjan gesien waar hy 'dice' speel.

3. ek het vir Basjan geskree ' Basjan ek kom vir jou pla' "

[9] Mr Gwala on behalf of the defendant put the defendant's version at length to the plaintiff. I will deal with the defendant's version hereunder in this judgment.

[10] Plaintiff's case was closed after he testified.

[11] Mr Gwala called sergeant Johannes Petrus Alberts to testify.

He stated that he was the only white policeman who attended a scene at Shongoane on the 23 March 2004. The police were conducting crime prevention operations relating to liquor sales without the owners being in possession of a license to do so.

[12] He stated that he was on the premises but not in the house where his colleagues were busy. According to him a person who was walking on the street shouted at him " *that they were disturbing the people and that it was not their place* ". Constabel Alberts warned him not interfere with their operation. This person continued making remarks as he advanced to the gate of the premises. Alberts warned him not to enter and that he should go away. This person ignored his warnings and entered the premises. Alberts once again warned him that what he was doing amounted to an offence and that he should leave. This advice was ignored. Alberts then placed his hand on the person's shoulder introducing himself as a police officer and the person became aggressive towards him.

[13] According to Alberts he pinned the aggressive person to the ground and then handcuffed him with the assistance of inspector Mashishi. He picked the palintiff up and walked him to the police vehicle where he was placed at the back of the vehicle. Whilst he was at the back of the van the plaintiff kicked the van's door open. He was pushed into the van as he was aggressive. He was thereafter taken to Villa Nora police station where he was detained.

[14] Constable Alberts as he then was denied the version which was put to him by plaintiff's counsel Ms Erasmus.

[15] With the completion of constabel Alberts' evidence the defendant's case was closed.

[16] Plaintiff's counsel submitted that the plaintiff proved its case against the defendant and that the court should find for the plaintiff on the merits. Mr Gwala argued the contrary and submitted that plaintiff's claim should be dismissed with costs.

[17] There exist two opposing versions of what transpired at the premises where the plaintiff was arrested. The authority which the court should follow in cases such as this is the matter of *National Employers Mutual General Insurance Association v Gany* 19931 AD 187 at 199 where Wessels JA stated:

" where there are two stories mutually destructive, before the onus is discharged , the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is the true version and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect."

Coetzee J in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237 H-238 B referring to the *Gany* matter stated:

** It is frequently said that the dictum in the Gany case does not apply to civil cases because of the omission of the learned Judge to have regard to the measure of proof in civil cases being on a balance of probabilities. But the criticism is invalid because, unless suitably qualified, it confuses proof with the measure of proof. Where there is no probability there is simply no proof of anything (regardless of the measure by which you measure it) unless you believe one person*

and disbelieve the other. Until then the chances of it being black or white remain exactly evenly balanced”.

[18] Mr Gwala relied on the provisions of section 40 (1) (a) of Act 55 of 1977, the Criminal Procedure Act, which permitted an officer to effect an arrest without a warrant. Section 40 (1) of the CPA reads as follows:

“ (1) A peace officer may without warrant arrest any person- who commits or attempts to commit any offence in his presence;

....

.....

(j) wifully obstructs him in the execution of his duty;

.....

(q)”.

He submitted that constable Alberts warned him not to enter the premises as the police were busy with an operation and notwithstanding such a warning the plaintiff entered the premises. When the policeman placed his hand on the plaintiff's shoulder in order to effect an arrest the plaintiff became aggressive which

necessitated reasonable force being applied. According to Mr Gwala the palintiff wanted " to be a hero".

[19] On the evidence presented before me according to the plaintiff he was severely beaten by several policemen in the presence of several onlookers. The defendant's version was that he was not beaten. One would in these circumstances at the very least have expected the plaintiff to call one or some of the persons mentioned in para [8] above to testify on his behalf. None of the persons mentioned by him were called to give evidence.

In fact I am told that the police officer referred to by the plaintiff who said that they were going to kill the plaintiff made a statement which is contained at pages 41 and 42 of the bundle. Inspector Koos Nkoati in his statement does not support the plaintiff's allegations, on the contrary he supports Alberts' version. At paragraphs 3 and 4 of his statement he statad that when he came out of the house he heard someone shouting at the police. He approached the back of the police vehicle in order to see who was making a noise and he saw the plaintiff.

[20] No medical evidence was led relating to the injuries which the plaintiff apparently sustained. I was informed by Ms Erasmus that the doctor who completed the medical report or J88 form refused to testify as he had some or other problem with the Health Professional Council. One wonders why another doctor was not called in his place as the plaintiff spent several days at the Ellisras Hospital and was even transferred to Pietersburg Hospital.

[21] The palintiff contradicted his written statement when he testified. In his statement he stated that "*toe ons by die hek van die winkel kom waar ons sigarette wou koop het ek vir Basjan gesien waar hy dice speel*". *Ek het vir Basjan gesreeu 'Basjan ek kom vir jou pla' "*. In his viva voce evidence he stated that he saw Basjan walking on the premises when he shouted at him, Basjan or Bashing as he was referred to, was not called to give evidence on behalf of the plaintiff.

[22] I am of the view that in the light of the evidence tendered before me I cannot make a finding on the probabilities that the plaintiff had

discharged the onus placed on him. Mr Gwala submitted that I should dismiss the plaintiff's claim with costs. I enquired whether it would not be proper if I were to find that the onus had not been discharged to grant absolution from the instance and Mr Gwala stated that he would not oppose such a finding.

[23] In the circumstances I make an order of absolution from the instance and order the plaintiff to pay the costs of the action.

A handwritten signature in black ink, appearing to read 'Ismail AJ', is written over a horizontal line.

ISMAIL AJ

For the Plaintiff: Adv N Erasmus instructed by Marias Basson Incorporated

For the defendant: Adv M. Gwala instructed by State Attorney Pretoria.

Date of Trial : 26 October 2009.

Judgment Delivered: 11 November 2009.