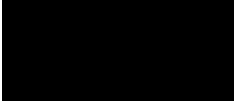


IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES /NO
9 January 2024	
.....	
DATE	SIGNATURE

Case No: **4574/2021**

In the matter between:

LUNGA THOMAS MASHABA

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

Mazibuko AJ

1. The plaintiff sued the defendant for an amount of R1 million for Constitutional damages and R1.5 million for general damages (pain and suffering, as well as emotional stress and trauma) he suffered following the conduct of the members of the defendant ('the SAPS') at Pienaar, Daantjie police station on 28 February 2021, acting within the course and scope of their employment with the defendant. Wherein the plaintiff was assaulted and treated in a degrading manner.
2. Before the trial commenced, the parties agreed to separate the quantum and merits. At the closing of the plaintiff and defendant cases, the parties requested to file heads of argument ('the heads'). Through his counsel, the plaintiff filed his heads on 2 November 2023, whilst the defendant filed theirs on 15 November 2023.

3. On 20 November 2023, correspondence was dispatched to the parties inquiring whether the parties insist on the separation of merits and quantum or the parties would elect to make further submissions relating to the quantum, considering the concession made by the defendant in that the plaintiff's claim may be awarded as per the particulars of claim.
4. On 13 December 2023, the plaintiff responded and requested the court to consider merits only since both parties agreed that merits and quantum should be separated. This judgment will, therefore, focus on the merits.
5. It was common cause between the parties that on 28 February 2021, there was community unrest or protest at or near Pienaar Dantjie police station. The police arrested people, and one of them was the plaintiff.
6. During the trial, the facts in dispute between the parties were that the plaintiff was brutally assaulted, tortured, and treated in a cruel, inhumane and degrading manner by the police. The police failed to uphold section 205(3) of the Constitution of the Republic of South Africa Act 108 of 1996, and the police violated the plaintiff's Constitutional rights.

Plaintiff's case

Plaintiff

7. The plaintiff testified that he went to Pienaar police station to open a case of attempted murder and hijacking after someone attempted to hijack his NP200 motor vehicle. That person had stabbed him in his shoulder and had in his possession a firearm. The community members arrested the plaintiff's assailant. The community leaders took him to the police station with the plaintiff.
8. The police refused to open a case, informing them that they wanted the firearm they alleged the assailant had in his possession. The community members refused to hand over the firearm until the case was opened. The police informed them to leave and come back at 11H00 with the firearm. In that midst, Mr Siyabonga Manana, the second plaintiff's witness, got arrested, and the

community became upset. They began to chant, throwing stones, barricading the roads and closing the police station's gates.

9. The police fired rubber bullets shots. Later, the live ammunition. They ran away. The plaintiff ran and hid inside a neighbouring house. He was arrested and could identify Sergeant Maseko as one of the police who arrested him. He was hit on the front head with a fist and with a butt of a gun on his chest. On their way to the police station, the police stepped on his feet with their boots. He was kept in a waiting cell with handcuffs on for about four to five hours.
10. During his stay in the cell, he asked the police to go to the toilet, but they just laughed at him and did not open the cell doors for him to go to the toilet. He called one of the police known to him as Zebra, who told him he would see what he could do. He was unable to go to the toilet with his hands cuffed. Subsequently, he was forced to urinate himself. He asked the second witness, Mr Manana, to capture a video footage. After a few hours, the police came and, removed the handcuffs and took him to a single cell. He was later charged. His cell phone and belt were then taken from him.
11. At about 8 PM on the same day, the police came and found him lying down and assaulted him, asking him for his friends. At about midnight, they came again and assaulted him further.
12. On Monday morning, he requested the police officer for medication as his wrists were swollen and the two tiny fingers were turning green. He was advised the station did not have medicine for his injuries and that he would need to go to the clinic. On Tuesday, he appeared before the court and was granted bail. He could not pay as the police needed the receipts book. He was released later, and the clinic was already closed.
13. He attended court for about eight months until his charges were withdrawn, as the docket was not in court.

14. Four video footage clips taken by Mr Manana with the plaintiff's cellphone were played in court. They reflected the plaintiff being handcuffed whilst inside a police holding cell. His pants appeared wet, and he testified that that was because he urinated himself to relieve himself, as the police did not take him to the toilet.

Siyabonga Manana

15. Mr Manana testified that he was also arrested and kept in the same holding cell as the plaintiff. He took the video footage with the plaintiff's cell phone at the police station holding cell, where he was kept with the plaintiff.

Defendant's case

16. The defendant relied on the evidence of Sergeant Ophrey Maseko (hereinafter referred to as '*Sergeant Maseko*') in its defence. He testified that the plaintiff and others came to submit a firearm on the day in question. While assisting them, they became violent and started throwing stones at them, which led to their arrest. In an attempt to control the crowd, they arrested the plaintiff together with other people. The plaintiff had injuries at the time of his arrest.
17. He denied that the plaintiff was assaulted and sustained injuries at the police station and also denied that the plaintiff was left with handcuffs on in the holding cell for a period of four to five hours.

Issue

18. The issue is whether the plaintiff has made out a case to be awarded Constitutional damages and general damages for a breach of his right not to be tortured and subjected to cruel, inhuman or degrading treatment and assaulted by the SAPS.

Legal principles

19. Section 49 of the Criminal Procedure Act¹, provides:
'(2) If any arrestor attempts to arrest a suspect and the suspect resists the

¹ Act 51 of 1977

attempt, or flees, or resists the attempt and flees when it is clear that an attempt to arrest them is being made, and the suspect cannot be arrested without the use of force, the arrestor may, to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or*
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'*

20. Section 12(1) of the Constitution² ('*The Constitution*'), provides:

- (1) Everyone has the right to freedom and security of the person, which includes the right-*
 - (a) not to be deprived of freedom arbitrarily or without just cause;*
 - (b) not to be detained without trial;*
 - (c) to be free from all forms of violence from either public or private sources;*
 - (d) not to be tortured in any way; and*
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.*
- (2) Everyone has the right to bodily and psychological integrity, ...*

Discussion

21. The plaintiff argued that his delictual claim following the unlawful conduct of the police of assaulting and treating him in a cruel, inhumane and degrading manner ought to succeed. The details of the assault alleged and which form the

² The Constitution of the Republic of South Africa No. 108 of 1996

basis of claims of assault are pleaded in paragraphs 6.1. to 7.3 of his particulars of claim, in that the SAPS had no reasonable cause to assault him, refuse to remove handcuffs whilst kept in a police holding cell, and deny him access to use the toilet which forced him to urinate himself.

22. Regarding the Constitutional damages, in paragraphs 8.1 to 8.6 of his particulars of claim, in summation, the plaintiff pleaded, placing its reliance on section 205(3) of the Constitution, in that the SAPS had to protect him and had no right to assault and humiliate him and treat him in a cruel, inhumane and degrading manner. Further, his right to human dignity, the right not to be assaulted or tortured, treated or punished in a cruel, inhuman or degrading way, was violated.
23. The defendant argued that on the day in question, there was public violence, arrests were made to control the crowd, and reasonable force had to be exercised on some of the people. It placed its reliance on the case of *S v Trainor*³, where it was held: *'All that is required is that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place.'*
24. What the particulars of claim assert and the plaintiff's oral evidence are the same save to note that the particulars stated that he was first kept alone in the single cell whilst he testified that he was first kept with other people in the cell before he was taken to a single cell. This difference between the pleadings and the oral evidence does not affect the material factual evidence of the plaintiff's case.
25. The plaintiff has a right in terms of section 10 of the Constitution, which provides: *'Everyone has inherent dignity and the right to have their dignity respected and protected.'* No convincing evidence was presented indicating that the plaintiff resisted arrest, justifying any form of assault. What was presented was that he was assaulted with the butt of the firearm and stepped on his feet from the moment he was taken from the house where he was hiding after they were dispersed by the police using rubber bullets until his detention

in the police cell. Whilst detained in the police cells, he continued being handcuffed for a period between 4 to 5 hours and was caused to urinate himself when he was denied access to the toilet. I find that the SAPS's conduct in assaulting the plaintiff was not justified. Further, there was no other reason to conduct themselves the way they did except to demean the plaintiff in front of other detainees whilst violating his right to dignity. His right to dignity was not respected and protected whilst under police custody.

26. Section 205(3) of the Constitution provides: *'The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'* The factual evidence is that he requested to go to the toilet in a different room from the police cell where he, Mr Manana, and others were.
27. Sergeant Maseko's evidence does not establish why the SAPS did not remove the handcuffs from the plaintiff as he was already inside the police cell, even after he requested them to, and others were not handcuffed. Also, why they refused to uncuff him so he could go and relieve himself. The plaintiff's testimony was that he was forced to urinate himself, and in front of other people, he had to remain in wet pants until he was charged and taken to a single cell. I find that the police breached their Constitutional duties and violated the plaintiff's Constitutional rights when they assaulted him without any good cause, kept him in a police cell with handcuffs on and denied him access to the toilet, which is cruel, inhuman and degrading treatment by the SAPS.
28. Having so concluded, what appropriate relief should be granted? The plaintiff's claim is that of general and Constitutional damages for compensation for loss suffered as a result of the assault and breach of constitutional rights and duties by the SAPS. The case the plaintiff sought to make did not turn on anything distinguishing his matter from any other falling under the same category. There

³ 2003 (1) 35 SACR SCA at para 13

is no basis to conclude that the Constitutional damages need to be awarded in addition to the general damages. The facts before me do not justify the award of Constitutional damages as a separate claim. The facts the general damages are based upon are the same as those of the Constitutional damages. The award of the general damages will be the appropriate relief. The SAPS's unlawful conduct of assault on the plaintiff is already an offence punishable by laws which are aligned with the Constitution. The award of the general damages will serve to vindicate the Constitution.

29. Section 7(2) of the Constitution states: *'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'* It is common cause that the SAPS failed to perform certain obligations towards the plaintiff, which resulted in him suffering injuries emanating from the assault and being humiliated when he was denied access to the toilet, resulting in him urinating himself. The claim for constitutional damages results from the defendant's failure to perform those obligations. The Constitution obligates the state *'to protect, promote and fulfil'* fundamental rights. In *Modderfontein Squatters Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*,⁴ it was held: *'Courts are mandated, if a constitutional duty has been breached, to grant appropriate relief. Relief must also be just and equitable.'*
30. It was explained in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*⁵ that: *'As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the*

⁴ (Agri SA and Legal Resources Centre Amici Curiae); *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre Amici Curiae) 2004 (6) SA 40 (SCA) para 18.

⁵ 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 72; *Bernstein and Others v Bester and Others* NNO 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) at paras 132-3.

litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.'

31. In *Komape and Others v Minister of Basic Education*⁶, it was said, '[67] What then is the object of the claim for constitutional damages and an order for a declaration of rights? The aim of a claim for damages *ex delicto* is not to enrich a claimant who has suffered loss but to compensate for the loss suffered.⁷ In my judgment, the reality is that the compensation claimed as constitutional damages is nothing short of a claim for punitive damages.⁵¹ A court, faced with such a claim, must decide whether an award of constitutional damages is just and equitable. An appropriate remedy, in my view, is an order directed at the enforcement, protection and the prevention of future encroachment of the rights protected in the Bill of Rights if the harm suffered is not adequately addressed by an effective common law claim for damages the elements of which include violations of protected human rights.⁵²'
32. In *Fose v Minister of Safety and Security*⁸, it was said: '[98] I have argued that "appropriate relief" vindicates the Constitution and deters further violations of it. I see no reason in principle why common law and statutory remedies can never be suitable for this purpose. The appellant has not persuaded me to the contrary. Of course, there will be instances where these remedies are ill-suited. For example, a common law remedy is unlikely to address a diffuse and systematic pattern of rights violations.¹⁵ Nevertheless, common law remedies - particularly delictual remedies - have been designed to protect personality interests such as dignity which are central to chapter

⁶ [2019] ZASCA 192; 2020 (2) SA 347 (SCA).

⁷ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 12.

⁸ 1997 (3) SA 786 (CC), at paras 98-100.

three.¹⁶ *In cases where the harm arising from a rights violation is highly localised, a common law remedy may well be appropriate; that is, it may effectively vindicate the Constitution and deter further violations of it. This is not to speak of the wide range of common law administrative remedies which are readily harnessed to our constitutional needs.*

*[99] There are powerful reasons for not excluding common law and statutory relief from the ambit of s 7(4)(a). Many recent statutes, such as the Labour Relations Act 17, seek to codify constitutional rights and are expressly designed to provide suitable relief for the infringement of constitutional rights. It would undermine the best efforts of the legislature to exclude these remedies from a court's arsenal of remedial options. In the case of the final Constitution, the indications are more compelling, and I would have thought conclusive, that the drafters had no intention of excluding common law and statutory remedies from the remedial scheme.*¹⁸

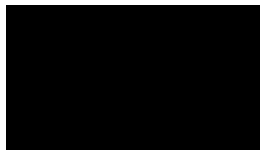
*[100] A court has a wide range of remedies in exercising its s 7(4)(a) powers. These remedies include common law relief (developed if necessary by s 35(3)), statutory relief, declaratory relief (expressly mentioned in s 7(4)(a)) and a number of potential remedies under ss 98 and 101(4). There is no reason, at the outset, to imagine that any remedy is excluded. Provided the remedy serves to vindicate the Constitution and deter its further infringement, it may be "appropriate relief" under s 7(4)(a).*¹⁹

33. I am not persuaded that the plaintiff has made out a case for Constitutional damages to be awarded in addition to the general damages claimed. With the facts before me, the award of the general damages as claimed would be an appropriate relief to protect and enforce the Constitution. No persuasive evidence emerged that the award of the Constitutional damages will serve to protect the rights violated or that such will serve to enforce any of the violated rights differently from the award of general damages.

34. Following the considerations in the cases mentioned above, I believe the defendant must be held vicariously liable for the unlawful assault and demeaning treatment of the plaintiff by the SAPS. Considering all the facts before me, the general damages claim should succeed.

Order

35. For these reasons, the following order is made;
1. The plaintiff's claim for general damages succeed.
 2. The defendant shall pay the costs of suit.

_____  _____

N. Mazibuko

Acting Judge of the High Court, Mpumalanga, Mbombela

This judgment is digitally submitted by emailing it to the parties.

Counsel for the Plaintiff:

Mr WP Meintjies

Instructed by

Meintjies and Khoza Attorneys

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Mr SP Nkosi

Instructed by:

State Attorney's office, Mbombela

Date of hearing:

12 October 2023

Judgment delivered on

9 January 2024