

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No. 115/2022

Heard on: 28 February 2024

Date delivered: 16 May 2024

In the matter between:

NONDYEBO SIPOLO

Plaintiff

And

FIKILE SIPOLO

Defendant

JUDGMENT

MAJIKI J:

[1] In very unfortunate circumstances, the plaintiff an unemployed adult female sues the defendant, his brother, for damages she allegedly suffered as a result of wrongful assault on her body. The action is defended by the defendant.

[2] During the trial the parties jointly applied and an order was granted for separation of issues in terms of rule 33(1) of Uniform Rules. This court has to determine the issue relating to the merits only at this stage.

[3] The assault on the plaintiff by the defendant with a stick on 30 October 2020, on her right leg, is common cause between the parties. What is in issue is whether the head and face injuries sustained by the plaintiff were also a result of the assault by the defendant.

[4] According to the plaintiff the conduct of the defendant caused her pain and suffering. She also had to undergo surgical operation, among other damages she claims to have suffered.

[5] The plaintiff and doctor Potelwa testified in support of the plaintiff's claim. Dr Potelwa had examined the plaintiff on 31 October 2020, the day following the assault. He completed the medical report of the plaintiff, commonly known the J88 which was admitted as exhibit 1. According to Dr Potelwa the plaintiff informed him that she had been assaulted. However, he examined and made observations on the plaintiff which informed his findings. His drawings in the J88 illustrate the extent of the injuries.

[6] Dr Potelwa recorded the injuries as follows: haematomata in the frontal area of scalp; left peri-orbital oedema and bruising and laceration in the lateral aspect of lower leg. He said the injuries in the leg, oedema and one on top of the head were inflicted by use of a blunt object and could not have been a result of falling. The haematoma in the forehead is the only one that could possibly both be a result of falling or use of blunt object.

[7] The plaintiff testified that she had gone to her parents 'rondavel to take dishes after meals. The defendant who was in discussion with their father accused her of having influenced their younger sibling, Nomabandla. Their father had just informed the defendant that Nomabandla requested a piece of land and that he would be subdividing their homestead, to allocate land to her. The plaintiff disputed that she influenced Nomabandla, instead she told the defendant that it was a certain nurse who had a discussion with their sibling, which might have made her to have the thought of asking for land. Subsequently she stepped out of the rondavel.

[8] Whilst at the door step, she did not notice the defendant who approached her from the behind, until he had passed and was facing her. He assaulted her with a stick on top of her eye. She grabbed the defendant, the defendant fell. She unsuccessfully tried to grab the stick. The defendant then assaulted her on her head and leg. This sequence of events slightly changed in cross examination.

She explained that the defendant hit her on the head whilst she was looking down. She lifted her head looking for a key and warding off further blows with her arm. She was hit above the left eyebrow and the stick cracked. She bled and could only see with one eye as they wrestled over the stick. He then hit her on her leg.

[9] She managed to free herself from his grip. She never fell and hit her head on the stock kraal's stonewall. She denied that she insulted the defendant or their father. She said at some stage after the assault she became unconscious.

[10] She confirmed that her eye became swollen. She said she had injuries on the head and leg. She said she first went to a local clinic; she was then referred to Butterworth hospital. Subsequently, she went to Cecilia Makhiwane hospital where a surgery was performed on her leg. She also consulted Dr Appavoo. She said she did not hear the defendant's apology to her. At criminal court it was the prosecutor and his lawyer who pleaded with her.

[11] The defendant and his relative, Mncekeleli Dumezweni testified in his case. The defendant said after sunset he was summoned by his father from his own homestead within the same locality. He found his parents in their rondavel. His father informed him of his intention to subdivide the parental site in order to allocate land to Nomabandla. The plaintiff came in and out as they were having the said conversation. The plaintiff burst out and said such a discussion, without the involvement of the family, was hypocrisy. She insulted them calling them snakes, liars, dogs. She would not be refrained. He got disturbed and became very angry.

[12] He gave a history of having been supportive to the plaintiff. He said he contributed towards the payment of her school fees and he used to buy clothes for her. The plaintiff had become a source of family disputes and differences. She accused him of funding his lifestyle with proceeds of monies received from burial societies, as a result of relatives' claims payout. They reached a point of not being in talking terms in 2015. The plaintiff was expelled by her father; the plaintiff had conceded the expulsion during her evidence.

[13] About the assault he said he apologised to her on two occasions. At first it was in a meeting attended by their brothers from Ziwundwana, Idutywa. Dumezweni confirmed that. He went on to state that the plaintiff had accepted the defendant's apology but said the defendant should not live closer to her. The next was during criminal proceedings in court, after he had been convicted, in the presence of the prosecutor and his legal representative. He tendered and gave the latter a sum of R5 000.00 as compensation, the plaintiff accepted the tender but her legal representative said she never collected the money.

[14] The defendant confirmed that during criminal trial he pleaded guilty. He said he signed his plea statement in terms of section 112 of the Criminal Procedure Act 51 of 1977 but he did not write it himself. He thought he had said that he delivered only one blow. It was pointed out to him that he pleaded guilty to a charge of having assaulted the plaintiff all over her body. He confirmed that he was sentenced to three (3) months imprisonment on condition that he did not interfere with the plaintiff. He said he was still extending his apology to the plaintiff, the apology would heal the family. As the eldest sibling he would still need to lead the family.

[15] On the events around the assault, he initially said the plaintiff blocked his way out of the door. In cross examination he explained that the plaintiff was giving him her back, blocking him and he hit her. The plaintiff ran and fell. He also said he hit her as she was moving away but he did not say that she bumped against the stonewall kraal.

[16] It was submitted on behalf of the plaintiff that the injuries were consistent with the assault as alleged by the plaintiff. The doctor's evidence that a blunt force was used to inflict injuries, two of those not being capable of being caused by falling, was not challenged through another expert. The defendant had no version about how the plaintiff could have sustained other injuries, other than the one in the leg. His accepted version that he tendered in compensation, in criminal court also supports that he inflicted all the injuries alleged by the plaintiff.

[17] Further, the defendant was inconsistent about the circumstances around the assault. He said the plaintiff was standing, he changed to say she was running. His plea to the charge of assault all over the body presented a different version altogether to the one in the pleadings which was also presented to the plaintiff in court.

[18] On behalf of the defendant, considering the concession by Dr Potelwa, it was submitted that it is probable that the injury in the forehead was not caused by the assault. The plaintiff did trip and fall. However, attorney for the defendant conceded that had the plaintiff not been assaulted she would not have suffered even the other injuries, regardless of how the plaintiff sustained them.

[19] According to **Van der Walt and Midgley** principles of delict 2nd edition at page 29 paragraph 31,

‘To found a claim in delict, a plaintiff must have suffered ... an injury to an interest of personality (injuria) or must have experienced pain and suffering.’ The prerequisite is that the plaintiff must have suffered harm which was culpable caused by the defendant.

[20] The defendant did not raise any defence regarding the alleged wrongful conduct of assaulting the plaintiff. Similarly, there was no issue regarding the assault having caused the injury in the leg.

[21] During the hearing the court was apprised of the interaction between the parties. The plaintiff communicated that the matter ought to be settled, in the light of the fact that the assault in the leg was not in dispute. The court also engaged with the defendant’s counsel with regard to causation. The defendant was of the view that his defence that only one blow was delivered ought to be pursued to finality. The other injuries were as a result of the plaintiff falling down.

[22] In **Plaatjies v Minister of Police** (CA 165/2021) [2022] ZAECKMHC 8 (3 May 2022) paragraph 9 Nhlangulela DJP explained assault as follows:

‘assault is the same under both civil and criminal law, criminal law, CR Snyman:

Criminal law 4th Edition (Lexis Nexis publication) in chapter XV1 defines assault as the offence consisting of unlawful and intentional applying force, directly or indirectly

to the person of another, or inspiring a belief in another person that force is immediately to be applied to her ... '

[23] In the present case assault is proved and no defence is put across to seek to justify it. The evidence of doctor Potelwa and the plaintiff is probable in relation to the fact that the injuries were inflicted by the defendant using a stick or blunt object. The defendant could not challenge this evidence. He had no version about how the other injuries, not in the leg, were sustained by the plaintiff. His version was inconsistent even in relation to how the admitted assault in the leg, was inflicted.

[24] The version about the injuries having been caused by hitting stones in the kraal could not be sustained. Even if they, indeed, were subsequently caused by the plaintiff falling after she was hit, it is difficult to understand how such injuries would be separated from the initial assault.

[25] In **International Shipping Company (Pty) Ltd v Bently** 1990 (1) SA 680 at 700 E-I

'As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was

a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'.

[26] In the circumstances of this case the assault by the defendant caused the plaintiff's injuries. This court is of the view that, even if the infliction of the other injuries other than the admitted one in the leg, had the initial assault not occurred, the plaintiff would not have suffered the then disputed injuries. The defendant has no basis to escape liability for all the injuries suffered by the plaintiff.

In the result,

1. The defendant is hereby held to be liable for all the plaintiff's proven damages.
2. The defendant is hereby ordered to pay the costs of the action to date, on a party and party. Scale B shall apply from the date of the filing of the plea.

B MAJIKI
JUDGE OF THE HIGH COURT

Appearances:

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