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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case Number: 33413/2015

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 21/01/2025

SIGNATURE

In the matter between:

M[...] T[...]

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGEMENT

MNGQIBISA-THUSI J

[1] The plaintiff, Mr T[...] M[...], has instituted an action for damages due to his alleged emotional shock and psychological trauma suffered after he allegedly witnessed the alleged assault and humiliation of his father, Mr V[...] M[...] M[...] (“Mr M[...]”), by members of the South African Police Service (SAPS), on 25 October 2012. At the time of the occurrence of the incident in question, the plaintiff was about six years old.

[2] From the pleadings it appears that at the time the plaintiff's claim was instituted, he was still a minor and Mr M[...] brought claims against the defendant (as first defendant) and the National Director of Public Prosecutions ("the NDPP"), also on behalf of the plaintiff.

[3] Consequently, two court orders were granted on 30 July 2018 and 4 February 2020, respectively, in which Mr M[...]’s claims against the defendant and the NDPP were settled. It is apposite at this stage to set out the provisions of the two court orders.

[4] The court order, by agreement, of 30 July 2018 reads in part as follows:

“1.

The First Defendant is liable for all the Plaintiff’s damage pursuant to the arrest on 25 October 2012 and the detention up until date of first court appearance on 29 October 2012.

2.

Any and all liability of the First and Second defendant pursuant to detention and incarceration from 29 October 2012 until 26 November 2012 as well as any and all liability in respect of assault and malicious prosecution is postponed *sine die*.”

[5] The second order granted on 4 February 2020 reads in part as follows:

“1.

Without admitting any liability the First Defendant shall pay the Plaintiff an amount of R350’000.00 (Three Hundred and Fifty Thousand Rand) in full and final settlement of Plaintiff’s claim in respect of the cause of action as pleaded by the Plaintiff.

...

3.

The claim of the Plaintiff against the Second Defendant is abandoned with no order as to costs.”

[6] In its plea, the defendant asserts that the arrest of Mr M[...] was lawful but denies the claims of assault and the purported humiliation experienced by the plaintiff in witnessing the alleged assault on his father, as the plaintiff was not present during the police's presence at his grandparents' homestead with his father.

[7] During the hearing of these proceedings, the parties agreed that the sole issue to be determined is reflected in paragraph 6 of the minutes (dated 8 December 2020) from their pre-trial meeting on 23 April 2020,, which states as follows:

“The presiding officer will be called upon to decide whether an incident occurred, in the presence of the minor, during which, on 25 October 2012 at the plaintiff and minor’s familial place of residence the plaintiff was severely assaulted and/or humiliated and/or a unlawfully arrested, in the presence of the minor, by at least two uniformed members of the South African Police Services, whose full and further particulars are unknown to the plaintiff. The parties further record that any further aspect pertaining to this matter should be postponed *sine die*.

[8] The plaintiff, in his amended particulars of claim, asserted that he had emotional shock and psychological trauma due to the unlawful arrest and assault of his father.

[9] The plaintiff’s evidence is as follows. On 25 October 2012, while playing football with friends in an open field near his residence, he saw his father arriving at their

home in Mavhela, accompanied by police officers, some in civilian attire and others in uniform. At that moment, his father was restrained with handcuffs while the police officers were dragging him towards the pit toilet in the yard, shouting at him. He abandoned his play and proceeded to the yard, positioning himself at a footpath, around five paces from the pit toilet. He witnessed the police assaulting his father but could not recall the number of times his father was kicked. At the pit toilet, he observed the officers excavating a hole at the back of the pit toilet with a tool he described as a 'gwala,' a type of steel implement employed for digging in the earth. The plaintiff testified that following the excavation of the pit which was partially filled with excrement and other refuse, his father was ordered to enter it. When his father was ordered to enter the pit-toilet hole, one of his arms was uncuffed. The father entered the pit hole feet first. He testified that during this procedure, the police officers persisted in shouting at his father. Upon entering the hole, he saw his father using a shovel to excavate excrement and other waste outside the hole. He said that upon witnessing his father's actions, he was crying, shocked and terrified. The plaintiff further testified that while his father was excavating, there were members of the community both inside and outside the yard observing the event. He testified that while the witnesses to the occurrence remained silent, other learners at school discussed the events that transpired at his residence on the day in question and remarked that his father would ultimately face sentencing by a court. The plaintiff stated that upon recollection of the occurrence, he experienced feelings of distress and fear, and that he becomes anxious or disturbed whenever he encounters a police officer. The plaintiff further testified that when the police and his father arrived at his residence, his paternal grandmother was present, although she left briefly and returned later.

- [10] Under cross examination, the plaintiff conceded that his father was not arrested at home but somewhere else. He denied telling a certain clinical psychologist that he had consulted that when the police came with his father, they had hit him with a sjambok, as reflected in the psychologist's report. He, however, added

that when the police were pulling and kicking his father, his father had fallen to the ground and the police refused to assist him to get up. He further testified that after he left his paternal grandparents' home two years after the incident, to go and live with his maternal grandparents, he was no longer scared of police officers who he believed could come back to his paternal grandparents' homestead.

[11] The next witness called to testify on behalf of the plaintiff was Sergeant Divhuwani Sonnyboy Makgwathana who is stationed at the Local Criminal Research Centre in Makhado. Sgt Makgwathana testified that on the day in question he was requested by a colleague to join them at a pointing-out scene for the purposes of taking photos of the process of recovering a firearm. On arrival at the scene, he found a number of police officers, both in uniform and in civilian clothes and a suspect. He confirmed that he was not part of the investigating team. He testified that there were also many people who had gathered there. Sgt Makgwathana testified that he saw when the suspect was ordered by one of the police officers to climb into the opened pit-toilet hole. According to Sgt Makgwathana the suspect went into the pit-toilet hole with his whole body and was ordered to take out faeces inside the hole in search of a firearm. He took photos of the whole process. He testified that although the photos were later downloaded, they were, however, never used as no firearm was found or recovered inside the hole of the pit-toilet. When he left the scene, some police officers had remained. Sgt Makgwathana was not cross examined.

[12] The last witness called on behalf of the plaintiff was Mrs S[...] P[...] M[...], the plaintiff's paternal grandmother. Mrs M[...] testified that upon the arrival of the police with her son, she left the residence and proceeded to her sister's home. Mrs M[...] refuted, as indicated in her police statement, that she had granted the police permission to excavate a hole at the pit toilet.

- [13] After the plaintiff closed his case, counsel for the defendant applied for absolution from the instance. Counsel submitted that the plaintiff failed to make out a *prima facie* case with regard to the issues as set out in paragraph 6 of the parties' pre-trial minute referred to in paragraph 7 above. Counsel argued that the plaintiff failed to make out a *prima facie* case that, as a result of the incident relating to his father, he has suffered emotional shock and psychological trauma or that he was present when the police came with his father to his paternal grandparents' residence. Counsel urged the court to take a deem view of the fact that despite being present in court during these proceedings, Mr M[...] failed to testify about the humiliation he suffered as a result of the alleged treatment by the police officers who accompanied him on the relevant day to his residence.
- [14] On behalf of the plaintiff, counsel submitted that in view of the settlement agreement encapsulated in the court order dated 30 July 2018, the defendant conceded that there was an unlawful arrest and detention of Mr M[...]. It was further submitted that it was not the humiliation as experienced by Mr M[...] which was in issue, but the humiliation and mental trauma experienced by the plaintiff at observing how his father was treated by the police officers on the relevant day.
- [15] After argument on the issue of whether absolution from the instance should be granted or not and having considered the plaintiff's evidence and the submissions made, absolution from the instance was refused.
- [16] The test for absolution from the instance was formulated in *Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (AD)* at 409 G-H as follows:

“...when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the

plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)).”

- [17] In elucidating of the test for absolution from the instance as set out in the *Claude Neon* matter (above), the court in *Gordon Lloyd Page Associates v Rivera and Ano* [2000] 4 All SA 211 (AD) held at 243B that:

“This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim – to survive the absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff” (*Gascoyne (loc cit)*) – a test which has its origin in jury trials when the “reasonable man” was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of the plaintiff’s case, in the ordinary course of events, will nevertheless be sparingly granted but when the occasion arises, a court should order it in the interests of justice.”

- [18] Considering the evidence presented concerning the events surrounding Mr. M[...]’s arrival at his residence on 25 October 2012 and the treatment he received from the police officers in charge, I concluded that there exists sufficient evidence for a reasonable court to rule in favour of the plaintiff regarding his claim. The

evidence presented by the plaintiff regarding the events of the pertinent day was largely supported by Sgt Makgwathana. I reaffirm my previous decision denying absolution from the instance.

[19] The defendant closed its case without calling any witnesses.

[20] As agreed between the parties, the matter has to be assessed in the context of the issues as set out in paragraph 6 of the minutes of the pre-trial conference which are, mainly:

20.1 whether an incident occurred in the presence of the plaintiff;

20.2 whether Mr M[...] was severely assaulted; and/or

20.3 humiliated; and/or

20.4 unlawfully arrested, in the presence of the plaintiff.

[21] The plaintiff's testimony as an eyewitness to the events that transpired at the home of her paternal grandparents on 25 October 2012, when police officers arrived at Mr. M[...]s residence, accompanied by his father who was handcuffed, is in brief as follows.

[22] Upon the police officers' arrival at his property, they forcibly escorted his shackled father through the yard towards a pit toilet. An officer kicked Mr M[...], resulting in his collapse to the ground. The police excavated a hole behind the pit toilet and instructed Mr M[...] to enter the hole and extract excrement and other waste with a shovel. During these occurrences, numerous community members, both within and outside the yard, were there to view the proceedings, alongside the plaintiff and Sgt Makgwathana. There is no evidence to refute the aforementioned evidence. I am of the view that the plaintiff and Sgt Makgwathana's testimony was credible, plausible, and delivered in a coherent and honest manner. The plaintiff was willing to concede that his father's unlawful arrest did not take place in his presence. The plaintiff remained consistent, even

during cross-examination. The defendant did not provide any evidence to refute the plaintiff's account, which was largely supported by Sgt Makgwathana's testimony, regarding the events that occurred at the plaintiff's paternal grandparents' home on 25 October 2012, when the police arrived with his father.

[23] I am convinced that the plaintiff has, on a balance of probability, established that his father was severely assaulted in his presence, having been kicked by a police officer and subsequently` falling to the ground. The physical attack was further exacerbated by his father being compelled to enter a pit filled with excrement. Moreover, I am convinced that the plaintiff has established that the assault on his father, witnessed by both him and community members, resulted in the humiliation of his father, both in his son's perception and in the perception of the community members present during the incident.

[24] In the result, an order is granted in terms of the proposed draft order marked "X."

NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 04 September 2024

Date of judgment: 21 January 2025

Appearances

For plaintiff: Adv C Van Jaarsveld (instructed by Gildenhuis Malatji Inc. Attorneys)

For defendant: Adv P Nel (instructed by the State Attorney, Pretoria)