

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

CASE NO.: 3908/2019

Date of hearing : 6 September 2024

Date delivered : 26 November 2024

In the matter between:

SALVADO NCELE

Plaintiff

And

MINISTER OF POLICE

Defendant

JUDGMENT

MAJIKI ADJP

[1] The plaintiff sued the defendant for damages he allegedly suffered because of his arrest and assault by members of the South African Police services (SAPS). His action is based on vicarious liability, the defendant is the person who is responsible for the actions committed and or omissions by the members of SAPS, within the course and during the scope of their employment. The action is defended by the defendant.

[2] At the commencement of the trial the parties successfully moved an application in terms of section 33(4) of the Uniform Rules for the separation of issues. Only the issue of merits requires determination at this stage.

[3] Between the years 2016 and 2020 the plaintiff was a branch manager of Boxer superstores (Boxer) in Willowvale. It is common cause that on 20 April 2019 he reported a business robbery. A case was opened under CAS 55/04/19. After he interacted with the police officers about the CCTV footage and had made his statement, on 3 May 2019, around 13h00 to 14h00 police officers arrived at his workplace. He was taken to the local police station for questioning.

[4] From then on, the parties' versions differ as to what transpired until the time the plaintiff parted with the police. Before delving into their evidence regard must be had to the pleadings.

[5] In his particulars of claim regarding the arrest the plaintiff averred:

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The said police officers then took plaintiff to Msobomvu Police Station where he was further interrogated and subsequently released at about 20h00 without being charged.

9

Plaintiff's arrest and subsequent detention was malicious, wrongful and unlawful in that:

9.1 there was no reasonable or probable cause that Plaintiff had committed the said offence;

9.2 there was no evidence linking Plaintiff to the commission of the offence for which he was arrested and detained.

12

Plaintiff's malicious, wrongful and unlawful arrest and detention and/or malicious deprivation of liberty aforesaid:

12.1 constituted an intentional interference and justifiable infliction of restraint upon the Plaintiff's personal liberty;

12.2 was insulting and injurious to the Plaintiff;

12.3 impaired the integrity, dignity and self-esteem of the Plaintiff;

12.4 caused Plaintiff to be aggrieved, embarrassed and humiliated.'

[6] Regarding the assault, the plaintiff averred that he was unlawfully and wrongfully assaulted with fists, booted feet, injured by tightening of cable ties, tortured and suffocated with plastic bag by members of SAPS, amongst whom were Mr Mgudlwa and Lt Cl Gcasamba.

[7] The defendant's pleaded version is that the plaintiff was called to the police station for questioning about his knowledge or involvement in the housebreaking that had taken place at Boxer. Further the defendant denies knowledge of a police official named Mgudlwa at Willowvale police station. The defendant confirms that that Lieutenant Colonel Gcasamba (Lt Cl Gcasamba) works at that police station but denies that he had anything to do with the matter.

[8] During the hearing only the plaintiff and Lt Cl Gcasamba testified in the parties' cases respectively. The plaintiff testified that his initial statement was made to a police officer, Mr Mgudlwa. On the day of his arrest Lt Cl Gcasamba declined his invitation to meet him in his office and said they needed to go to the police station. When he stepped out of the building, he saw a marked police combi with open doors. The occupants in police uniform were taking positions around the shopping complex. He was driven in a Toyota Atios sedan (Atios), sitting with one police officer at the back, the other two police officers sat at the front. Their motor vehicle was escorted by the police marked combi. All police officers came in with him to the one office at the police station.

[9] After Lt Cl Gcasamba introduced himself, he was shocked to hear him saying that according to the information they had, the plaintiff was involved in the robbery. He denied his involvement, Lt Cl Gcasamba took his phone and said they had no choice but to take him to Msobomvu police station. He was accompanied to take his

motor vehicle from work and park it at his rented home. When they went back to Boxer, the staff members were all present, Lt Cl Gcasamba said he should not do any foolish act. He was escorted by the police to his place of residence, some surrounded the yard. His neighbours looked on. He was taken back in the Atios and sat in between Lt Cl Gcasamba and another police officer at the back. Mr Mgudlwa was sitting at the front.

[10] Police Officers travelled with him. They made a brief stop at Dutywa police station. Whilst alone in the car one police officer came and told him to admit as he had already been implicated. He denied involvement in the robbery. After about 15 (fifteen) to 20 (twenty) minutes, they drove to Msobomvu police station, Butterworth with him. He was in the Atios with three police officers and Lt Cl Gcasamba drove alone in a greenish double cab bakkie. The marked police combi followed. They reached Msobomvu police station around 15h00.

[11] According to the plaintiff he was taken to an office and Lt Cl Gcasamba sat with him. He told the plaintiff that, that was his last chance to admit his involvement in the commission of the offence. Upon his denial Lt Cl Gcasamba looked up and told the police officers that they knew what to do. The plaintiff from thereon details how the police tortured him until he was taken to the person who was their source of information. It transpired that he implicated his deputy manager and not him.

[12] The police used cable ties to tie his wrists to the back, at Lt Cl Gcasamba's instructions, who said that was in order to control emotions not to run high. The uniformed police officers took him to another room. On the table he saw 5 litre bottles with water. He was told that when he was ready to tell the truth he must tap his left foot. He was made to lie on his back on his tied hands. His face was covered with a big red cloth. One sat on his lap; another held his legs and they poured about 10 to 15 litres of water in his nostrils. He would choke and suffocate, and when he was losing strength, he tapped his foot. When he told them he knew nothing, they seemed angry and assaulted him. The one who sat on his lap hit him with fists and hands. The one with the cloth pulled it and caused his head to hit the tiled floor. He urinated on himself; they said he must go and sit on the chair. He asked them to lift

him up, they refused, he knelt and crawled using his elbows for support to get to the wooden chair.

[13] He was asked to recline his head backwards with his face up. He was poured with water on his exposed chest. The bottles were filled again, at that stage he counted about 5 bottles of 5 litres and 1,5 litres. He became unconscious and was bleeding. His right eye was closed and swollen.

[14] They eventually stopped and asked him to stand up. He was taken back to Lt CI Gcasamba and the rest of the police officers. He was so weak, his arms had to be held as means to support him. He saw a young man who had a hooded top, kneeling and facing the wall. Lt CI Gcasamba asked that man to speak, the man said they got the information to get to Boxer from the assistant manager. He was not allowed to speak by Lt CI Gcasamba when he tried to. He was moved back towards the room where he was tortured. The passage they used was narrow, it only allowed one person to hold him for support. He said he was not an assistant manager. The attitude immediately changed to being polite as what he said was relayed to the rest of the officers. He said they should take out his name tag from the pocket of his shirt and look at it. They did, they were quiet, left him and stood at a distance. He cried in anger as he realised that they made a mistake by taking him. Lt CI Gcasamba and others joined in, police officers cut the cable ties. He was taken back to the office, he was left with Lt CI Gcasamba and the three police officers he was with in the Atios. After a while, Lt CI Gcasamba said they could see he was cold and shivering, he must be taken home. He handed the plaintiff his phone.

[15] The plaintiff then gave details of their travel from Butterworth to Willowvale, with Mr Mgudlwa and another officer. They stopped at Dutywa spar supermarket for their purchases, against his expectation of being taken to a healthcare centre. His eyes were swollen, he was cold and bleeding. Instead they proceeded to Willowvale. It was around 20h00 when they told him he could go, he was free. The plaintiff could not explain how he felt than saying he was hurt, embarrassed and hated life. He was made to feel like he was not human, in the hands of people who, ordinarily, should protect him. His arrest was in view of the shopping complex staff and customers. The

customers ' cars were parked all around the shopping complex when he was taken to the Atios.

[16] At home, his girlfriend screamed upon sight of him. She told him he had left the room and the car unlocked. He just sobbed and would not speak. She gave him pain tablets and applied hydrotherapy with warm water on the swollen parts. His writs were oozing. He would not have been able to drive to consult, medically. He could not sleep as well.

[17] On the next day he consulted Dr Matolengwe who completed his medical report J88. It was admitted as evidence as exhibit A. The doctor recorded the following injuries :

- Conjunctural haemorrhage right eye
- Sub-orbital haematoma right
- Bruises around both writs
- Tender right temporal region
- Tender right elbow
- Blunt injuries

Conclusion : blunt injuries e.g. fists, handcuffs.

He stayed at home for seven days nursing the injuries. The photo album with 15 photos depicting his injuries was also admitted as exhibit B.

[18] In cross examination he said he did not feel threatened and was not manhandled by the police when they walked out of Boxer with him. He was however uncomfortable when he saw the marked police combi and uniformed police, as if they were following up on a lead. He could not recall whether they were armed or not. He said he was answering to questions at the time Mr Mgudlwa minuted his statement. He did not recall whether it was read back to him. He explained that on the night of the robbery, after he was alerted by the alarm company of the ongoing robbery, he followed the police motor vehicle to the shop.

[19] He persisted that he was arrested by the police. He even complained with IPID about his wrongful arrest. His movements were restricted, he could only move at the police instructions.

[20] Lt Cl Gcasamba, was assisting as a commander at Willowvale intelligence unit at the time of the events, that being one of the 32 police stations falling under Amathole district. He was with sergeant Jubase and warrant officer Mlonyeni (now retired) at the time. His testimony in the main, was that the plaintiff was not arrested but was taken for questioning as he was a complainant in the robbery at Boxer. That was a matter of course. According to him it was a long time ago that he interacted with the plaintiff. He did not know the police officer by the name of Mgudlwa.

[21] His evidence was inconsistent regarding whether he was present at Boxer. He first said he sent junior members in a double cab that was not branded. He said they had just finished eating after 2 (two) pm when the plaintiff asked to take his car from the shopping complex and only drove with the police from his place of residence to the police station. He later said he was present when the plaintiff was taken. However, at the time the plaintiff took his car to his place of residence, he proceeded to the police station, the plaintiff and other police officers found him there.

[22] He denied that he was present at Msobomvu police station. At all material times they were at Willowvale police station. He said he had no knowledge of the details of torture the plaintiff said he suffered at Msobomvu police station, he was not present. He never saw the plaintiff's statement. When it was shown to him he said he could not make out who wrote it. He however recognized the name of commissioner of oaths, one Kwenene.

[23] Lt Gcasamba sat down with the plaintiff. He said he could not recall if he was handcuffed, but the standing rules make that provision. When showed photos depicting injuries in the plaintiff's wrists, he sighed and said they never tighten their ties. They also use cable ties some times for the safety of the police as other people do become violent. He eventually said the plaintiff was advised of the reason to be handcuffed even during amicable questioning and was handcuffed. He said he asked the plaintiff to explain the events of the day of the robbery, the security company,

duration of that service, history of robberies at Boxer. That took about 7 (seven) hours as they finished with him after 9 (nine) pm. There was nothing noticeable when the plaintiff left, he saw him. He was never tortured or suffocated. He was taken back to the shop, he said he needed to check something, maybe in relation to the security.

[24] He denied that the plaintiff had the injuries depicted in the photos when he was with them. He denied ever saying his juniors know what to do after the plaintiff denied involvement in the robbery. He also denied that there was a person who gave them information about the involvement of a deputy manager. He said they did not have Atios during the said mission, they never used sedan vehicles in rural police stations. He did not recall the motor vehicle the plaintiff was driven in, to the police station.

[25] In cross examination he explained that since 1995 police no longer interrogate suspects and also do not use force. His version also changed regarding whether the plaintiff was handcuffed.

He said he had no knowledge about the police becoming polite to the plaintiff after they realized he was not the implicated person. When asked why it took 7 (seven) hours to question the plaintiff, he said many sections were involved. His cellular phone had to be checked and junior officers take time when working. He said sergeant Jubase had taken the plaintiff's cellular phone, when told it was taken by him he said he may have done so, it was a long time ago.

[26] He said it was not possible that there could be a complaint at IPID because he never deposed to a statement. He said the plaintiff could not have driven his motor vehicle from the shopping complex if he was under arrest. He had no knowledge if the assistant manager was ever questioned.

[27] The issue to be determined is whether when the police held the plaintiff for about seven hour he was under arrest or not. Further, whether they assaulted him as he alleges.

[28] On these definitive issues, the parties versions are mutually destructive. The principle summarised in *STELLENBOSCH FARMERS WINERY V MARTELL ET CIE* 2003 (1) SA 11 at paragraph 5, is an acceptable standard to resolve the factual disputes in such circumstances. The court is required to make a finding on (a) the credibility of the factual witnesses, (b) their reliability, and (c) the probabilities.

[29] The court went on to explain the application of the principle as follows:

'As to (a), the court's finding on the credibility of a particular witness, will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra crucial statements or actions, (v) the probability or improbability of a particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii) , (iv) and (v) above under on (i) opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b), and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and in its evaluation of general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities will prevail.'

[30] As a starting point this court views the evidence tendered by the plaintiff as having been clear, coherent, detailed and spontaneous. It was consistent with what was pleaded in the particulars of claim. He gave honest answers without bias, even

when they were not in favour of his case. He did not exaggerate. For example, he said he did not feel threatened and was not manhandled by the police before he reached the police station. He was frank about the fact that he did not recall if the uniformed police were armed or not. Also, with regard to torture he said it only occurred much later, at Msobomvu police station. Eventhough he could recall the names of Mr Mgudlwa and Lt Cl Gcasamba, he was not tempted to implicate them in the physical torture.

[31] The plaintiff gave gross details of the torture, of which the paragraphs 12 and 13 above are dedicated to. He had no difficulty in recalling the evets, he did not appear as if he was making up facts as afterthought. He even became emotional and broke down, especially when expressing his disappointment at the fact that none of the officers extended a word of apology after they realised what they had done. Even with how he was transported at various times his version was consistent. He was certain about Atios and at what stage he was driven in it. Unlike Lt Cl Gcasamba who said he was not certain of what vehicle he was driven in when transported to Willowvale police station. He stuck with his version even during lengthy cross examination. His evidence was reliable and in this court's view more probable.

[32] Lt Cl Gcasamba's evidence in the first place was inconsistent with the pleaded version. The defendant had pleaded that Lt Cl Gcasamba he was not involved in the matter. He on the other hand said, he was in charge of the operation. He contradicted himself as to whether he was present at Boxer when the plaintiff was first approached and asked to go the police station. He was also inconsistent and less of being evasive regarding the issue of whether the plaintiff was handcuffed. He could not explain the lengthy questioning, in his version, from 14h00 (fourteen) to 21h00 (twenty-one). He blamed police officers who had taken the plaintiff's phone. He said processing the phone took them long, however, when confronted with the fact that he had taken the phone, he said he may have done so. As the only witness called by the defendant his testimony was not very helpful, he said he could not clearly recall the events, due to passage of time. He also distanced himself from anything that happened at Msobomvu police station, saying he was not there. In the final analysis he could profer no version about the detailed account of what the plaintiff said happened there. However, he said he saw the plaintiff when he was

taken home, he appeared normal with no injuries. That is despite the fact that Dr Matolengwe recorded injuries a few hours later, the next morning.

[33] Lt Cl Gcasamba appeared to be very casual and carefree, he kept on pushing the actual interaction with the plaintiff to junior officers. However, none of the said officers were called, not even Mr Mgudlwa. The defendant in the plea had only denied that Mgudlwa was at Willowvale police station.

[34] This court is of the view that the plaintiff has discharged the onus he bore to prove that the police did arrest, detain and assault him as alleged.

In the result,

1. The defendant is hereby held to be liable for all the damages the plaintiff will prove to have suffered as a result of his arrest, detention and assault by the members of South African Police Services on 3 May 2019.
2. The defendant is hereby ordered to pay costs of the action to date. Interest on costs shall start to run 14 (fourteen) days from the date of allocator or agreement of the amount of costs.

B MAJIKI
JUDGE OF THE HIGH COURT

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