



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

CASE NO: 2210/2015

In the matter between:

NKCUBEKO BEBE

Plaintiff

and

XHOBANI SECURITY SERVICES

Defendant

JUDGMENT

MAKAULA J:

A. Introduction

[1] The plaintiff issued a summons against the defendant, seeking damages arising from an assault by the defendant's employees, whom the plaintiff claims were acting within the course and scope of their employment. I shall refer to the witnesses by their first names and mean no disrespect to them. Further, I shall, where necessary, use the defendant, the security guards, and the defendant's employees interchangeably.

[2] In his claim, the plaintiff averred that on 18 April 2015, at the sports ground of the Walter Sisulu University (WSU), he was confronted by two security guards, employees of the defendant, who accused him and his friend of complicity in the snatching of the cell phone belonging to a female student. The matter is before me on liability only.

[3] The plaintiff pleaded that he was arrested, handcuffed, and taken to the security guardhouse. He was detained in the guardhouse until a group of students stormed in and assaulted him. He averred that the defendant;

‘Failed to protect him from further assault by the enraged group of students as they were obliged to do so by reason of their having detained and manacled him and his friends, thus rendering him helpless and/ or defenseless in the face of the attack.’

B. The plaintiff's case.

Nkcubeko Bebe

[4] Nkcubeko (the plaintiff) testified that on 18 April 2015, he left home with friends, Sinawo, Siphenathi, and Luxolo. They proceeded to WSU, where a music festival (bash) was taking place. After a while, they decided to go home. He and Sinawo looked for others and found them socialising with their friends. They told them that they had had enough and were going home. Their friends refused, saying that they were still enjoying themselves. He and Sinawo headed for the gate. They met two security guards who were with a girl. The security guards pulled out firearms and fired shots in the air, ordering them to lie down on the ground. They obliged. They handcuffed one to the other and took them to a guardhouse. The girl had identified them as the ones who took her cell phone. They denied that. The security guards searched for them and did not find the cell phone.

[5] In the guardhouse, they found three more security guards, one of whom was a female. They were ordered to sit on the floor whilst still handcuffed to one another. They denied knowledge of the cell phone. The security guards interrogated and assaulted them. The female guard tried to intervene on their behalf, to no avail. The students looked through the guardhouse windows as the plaintiff and the security

guards were interrogating Sinawo. The plaintiff was hit by one of them with a baton on the head. He lost consciousness.

[6] He regained consciousness after four months in the hospital. He had sustained a traumatic head injury and lost his teeth. He underwent a head operation. He was taken to a physiotherapist who taught him how to walk again. He remained in the hospital for eight months. He left the hospital in a wheelchair. His parents took him for rehabilitation to another hospital. He could not continue schooling because he was paralysed. His dominant right hand and right leg are weak.

[7] He testified under cross-examination that it was the female student who pointed them out to the security guards. He disputed that a cell phone was found with them. He denied that they were apprehended and assaulted by the students at any time before he lost consciousness. He was not aware that the students had entered the guardhouse.

Sinawo Masi

[8] Sinawo testified that on the day in question, he was with the plaintiff. They attended a bash at WSU. After some time, they decided to go home. As they stood at the gate, two ladies and two security guards confronted them. The two ladies informed the security guards that they had snatched one of their cell phones. One of the security guards fired shots in the air and ordered them to lie down. They complied. They were searched, and none was found. They denied snatching a cell phone from the female student. The security guards ordered them to raise their hands above their heads and walked them down to the guardhouse. In the guardhouse, they found three security guards, one of whom was a female. They were handcuffed together, interrogated, and assaulted by the security guards with batons, who demanded the cell phone. Only the female guard did not assault them. They accused them of being thieves from Payne location. He denied that the security guards found a cell phone in their possession.

[9] Two security guards left the guardhouse and returned with Simile, Luvo, and Xolisa, whom they knew from their locality. The guards asked whether they knew each other, and they all admitted they did. The students who followed them to the guardhouse attempted to enter, but the security guards prevented them by closing the door. Nevertheless, the students forced their way into the guardhouse and joined

the security guards in assaulting them. The plaintiff was noticed to be unconscious. The students dragged the plaintiff and Sinawo out of the guardhouse. The security guards did nothing to stop the students. Soon thereafter, Sinawo became unconscious and regained consciousness the following day in the hospital. He had sustained a head injury.

Luvo Agreement Kolwane

[10] Luvo resided at Payne location like the plaintiff. He also attended the bash at WSU and met the plaintiff. On their way to the gate, next to the guardhouse, they encountered three security guards who cocked and pointed firearms at them and ordered them to lie on the ground. They complied. They were searched and taken to the guardhouse, where they found other security guards, the plaintiff, and Sinawo. They were asked whether they knew each other. They confirmed they did, but Sinawo told them they had not attended the bash together. The security guards searched him. They found his cell phone in his pocket, took it, and never returned it to him. The security guards instructed him and his friend to leave, but he refused. He told the security guards he would only leave when the police arrived. Some students surrounded the guardhouse, including Student Representative Council (SRC) members. A security guard opened the door and let the students enter one by one. Eventually, the door was wide open, and the students flooded the guardhouse. The students assaulted the plaintiff and Sinawo. At that time, Nkcubeko and Sinawo were standing, leaning against a pillar in the room. They were handcuffed to one another. The security guards stood there and did nothing. An SRC member directed him to hide in the toilet. He remained inside the toilet until it was quiet. He walked out and saw the plaintiff and Sinawo lying on the tarred road next to the guardhouse. An ambulance arrived and took them. He left for home.

C. Defendant's case

Lindinceba Poswa

[11] Lindinceba testified that he commenced working for the defendant on 1 December 2014. He was on duty on the day of the incident, working night shift. He received a message on the radio that some children were causing commotion at the stadium. The call was for all armed security guards. He responded to the message and, on his way to the guardhouse, he met armed security guards and two boys who

had been identified as the plaintiff and Sinawo. The boys were not handcuffed. He did not hear any gunshots at that juncture. The security guards got inside the guardhouse with the two boys. Students had gathered around the guardhouse, baying for their blood. They were chanting, saying they must be released to them.

[12] Their supervisor, Nomnqophiso Klass, and controller, Khedamile Dila, got inside the guardhouse with them. Lindinceba remained outside. However, he could see what was happening inside through the window. He heard a lady saying one of the boys had snatched her phone. He later heard her say, 'This is my phone.' Xuluba Zingisa, a member of the reaction unit, was instructed over the radio to go and call the police. The armed guards left the guardhouse and came back with four boys. The student numbers increased. They started pushing against the door. The students eventually managed to push the door open. Upon entry, they assaulted the plaintiff and Sinawo using stones and iron rods. The assault continued relentlessly. They switched off the lights. They later dragged them out of the guard house. Mr. Zingisa fired a shot to disperse them, but they did not. He and Nomnqophiso watched helplessly while they sat on the pavement. The police arrived at about 1h00, even though they were informed of the incident at about 22h00. When the police arrived, the plaintiff and Sinawo were lying on the pavement. There was a lot of blood where they were. The students were chanting next to a Nedbank ATM.

[13] He stated that all they could do to protect the plaintiff was too close and lock the door to prevent the students from getting inside. They called a campus security company to come and assist. They were, in the same breath, searching for the cars that drove in and out of the campus. They would occasionally check what the students were doing. He testified that the plaintiff and Sinawo were neither assaulted by him nor by the security guards.

Nomnqophiso Klaas

[14] Nomnqophiso was the supervisor of the security guards at the time of the incident. She was on patrol duty at one of the residences when she received a call through a security radio from the control room. The controller informed her of students whose cell phones had been snatched. She went to the control room and found about twenty students, including those whose cell phones had been snatched. She got on the radio and called the security guards who were patrolling the area

where there was a function, to come to the guardhouse. The security guards arrived and left with the two female students to look for the culprits.

[15] After a while, the security guards returned with two boys who allegedly snatched the cell phones. She enquired with the two boys whether they had stolen the cell phones. They denied. She told the boys to take out the things that were in their pockets. They took out two cell phones. The cell phones needed security codes to open. The students used their security codes to open them. The cell phones had the students' profile pictures. One of the boys confirmed that they stole the cell phone.

[16] She testified that a group of students gathered around the guardhouse, demanding that the boys be released. Pandemonium ensued. The security guards closed the windows and locked the door. She instructed the radio controller to call the police as the situation was getting out of hand. The students started breaking the windows and pushing the door. They pushed back. She instructed the reaction unit, which comprised two extra guards, to fetch the police themselves.

[17] The students eventually managed to force their way to the guardhouse. Upon entering, they switched off the lights. They got hold of the two boys, dragged them out of the guardhouse up to the front gate, and assaulted them. They intervened, but in vain. There were fewer than 10 security guards at the gate, even though there were about 26 security guards around the campus. After a while, the reaction unit came back reporting that the police said they were coming.

[18] She denied that the security guards assaulted the two boys. She stated that they do not use handcuffs and even leave the batons in the guardhouse. She testified that the police eventually arrived and rescued the boys. She said that no case was opened against the students, nor was there any against the security guards.

[19] Under cross-examination, she testified that the two security guards who apprehended the two boys were unarmed. Only the two reaction unit members were armed. She stated that the two security guards who apprehended the boys never left the guardhouse. The two boys are the plaintiff and Sinawo. She denied sending the same security guards to look for other boys. She denied that four more boys were

brought to the guardhouse. She tried to protect the two boys by closing the door, but the students pushed it open and dragged them out.

D. Argument

The plaintiff's argument

[20] The plaintiff argued that the defendant's witnesses were not reliable and credible. The contention was that their evidence contradicted what was pleaded. The argument was that the defendant owed the plaintiff a duty of care. Furthermore, it was negligent in not protecting him from the students whose intention was clear from the outset that they wanted to assault him and Sinawo. The plaintiff contended that the harm to himself was reasonably foreseeable and preventable. The submission is that an alert guard acting reasonably would have jumped into action, taking preparatory steps to prevent harm to the plaintiff at the start of the fracas. That was not done, thus breaching the legal duty resting on the defendants' servants.

[21] The argument went on to state that the plaintiff established that the defendant's servants initiated the assault when the plaintiff and Sinawo were interrogated. The plaintiffs admitted that there were acts of commission and omission by the defendant's servants, and therefore the harm suffered by the plaintiff was causally connected to their conduct.

The defendant's submissions

[22] The defendant averred that the plaintiff, in his amended particulars of claim, failed to plead that the assault on the plaintiff was wrongful and unlawful. The contention was that the plaintiff had not alleged wrongfulness or blameworthiness on the part of the defendant, causally linking that conduct to the injuries he sustained. The argument is that such failure resulted in the plaintiff's own argument conflating negligence with wrongfulness, thus missing the point in his particulars of claim; he relied on the omission to protect the plaintiff from the students. The submission was for the dismissal of the action on this ground.

[23] The argument is that the plaintiff's evidence failed to establish the claim against the defendant. The defendant relied, for this submission, amongst others, on the fact that the plaintiff failed to bring corroborating evidence of the ambulance driver's notes, which 'would demonstrate that, the plaintiff and his fried (sic) were

found still handcuffed because, the plaintiff and his friend do allege that they were not, at any time prior to them collapsing into unconsciousness, untied from the handcuffs.’ It was argued by the defendant that ‘it must be then that they were found by the ambulance undertakers still tied in the same way they had been handcuffed on being apprehended by the guards, at least on the version of the plaintiff.’ (sic)

[24] The defendant relied heavily on the contradictions of the plaintiff’s witnesses. The defendant argued that the evidence of the plaintiff, who bears the overall onus, did not contain a sufficient basis for it to be believed in the light of the aspects disputed by the defendant. It further contended that the plaintiff failed to lead evidence to demonstrate that there were other actions available to be taken over and above those that the employees of the defendant took. The evidence of the plaintiff is so weak that it fell woefully short of establishing the liability of the defendant on the facts or even an accurate version that supports liability. The argument went further that the probabilities favoured the defendant, particularly regarding what occurred at the time of apprehension, in the guardhouse, the contradictions, and the reason for their apprehension. In conclusion, the defendant argued that the plaintiff had failed to prove its liability on the balance of probabilities and that the action should be dismissed with costs on a scale of C.

E. Analysis

[25] The essential elements of the cause of action in a delictual claim, like the present, have been amply dealt with by Corbett JA in *Evins v Shield Insurance Co Ltd*,¹ where he stated them as follows:

‘(a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of culpa or dolus, on the part of the defendant, and (c) damnum, ie loss to the plaintiff’s patrimony, caused by the bodily injury.’

[26] In *H v Fetal Assessment Centre*², the Constitutional Court held as follows:

‘[54] From this it is apparent that “harm-causing conduct” is a prerequisite for the further enquiry into the other elements of delict, namely wrongfulness and fault.

¹ 1980 (2) SA 814 (A) 838-839; *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* [2000] 4 ALL SA 545 (SCA); 2001 (4) SA 814 (SCA) para 13.

² 2015 2 BCLR 127 (CC); 2015 2 SA 193 (CC) para 54.

Without harm-causing conduct, there is no conduct which can be found to be wrongful or committed with the requisite degree of fault.’

[27] Based on the principles enunciated above, I must determine whether the facts of this matter fall squarely within the elements of delictual liability. It is common cause that the cause of action is premised on vicarious liability. The defendant is sued based on the action or non-action of the defendant’s employees. They were on duty on the day the plaintiff was injured. There is no dispute that they were executing their duties when they apprehended the plaintiff.

[28] I must determine whether the plaintiff was assaulted by the defendant’s employees and subsequently by the students. If I find that the students did so, a determination must be made whether the defendant failed in its duty to protect the plaintiff from the students.

[29] It is a common fact that the plaintiff and Sinawo corroborate each other regarding the manner in which they were apprehended, i.e., the firing of gunshots in the air, they being ordered to lie on their stomachs, and the search. Their evidence differed regarding other details. They both testified that the defendant’s employees assaulted them in the guardhouse. However, Sinawo claimed that they were also assaulted by the students who forcefully entered the guardhouse. Luvo arrived when the students were assaulting them and dragging them out of the guardhouse. However, he did not see the security guards assaulting them. Sinawo testified that Luvo and others arrived after the security guards had assaulted them.

[30] The plaintiff differed with Sinawo as to which stage they were handcuffed. He stated that they were immediately handcuffed after being apprehended, while Sinawo said it was in the guard house. However, the fact that they were handcuffed is corroborated by Luvo, who said he found them handcuffed to one another in the guard house. Therefore, I find it immaterial that there is a conflict as to when they were handcuffed. The truth is that they were in handcuffs when they were assaulted. In the same breath, I reject Nomngqophiso’s claim that the security guards did not carry handcuffs.

[31] Lindinceba stated that armed guards were summoned over the security radio to the stadium because of children who were causing commotion. Indeed, on his way to the guard house, he met with armed guards in the company of the plaintiff and

Sinawo. That corroborates the presence of armed guards. Nomnqophiso testified that she instructed the two reaction unit guards to fetch the police. The issue of the armed guards confirms the version of the plaintiff and Sinawo that the security guards who apprehended them were armed with firearms. The plaintiff and Sinawo were adamant that two gunshots were fired into the air. Lindinceba also testified that Mr Xuluba, one of the armed guards, fired a gunshot in the air, *albeit* at the time the students were assaulting them outside the guardhouse. It therefore gives credence to the fact that the security guards fired gunshots, contrary to the denial by Nomnqophiso. Most probably, gunshots were also fired at the time of their apprehension.

[32] Nomnqophiso testified that cell phones were found with the plaintiff and Sinawo, contrary to their denial. However, Luvo testified that the security guards confiscated their cell phones upon entering the guardhouse. They never returned them. Premised on this, Lindinceba testified that the armed guards left and returned to the guard house with four boys. The plaintiff's witnesses confirmed this version. Nomnqophiso is the only one who denied it. Considering these versions, I accept that Nomnqophiso's evidence stands to be rejected as erroneous.

[33] It is uncontroverted that when the plaintiff and Sinawo were apprehended, they were followed by students to the guard house. The evidence reveals that they were baying for their blood. The number grew larger as they proceeded. They followed them up to the guard house. It is safe to say that the security guards were negligent in taking the plaintiff, who was in handcuffs, to the guardhouse, which is an enclosure, well knowing that the violent students were in tow. It was foreseeable that the students would overpower the plaintiff.

[34] I have accepted that the plaintiff and Sinawo were handcuffed throughout. Their movements were restricted, and they could not ward off the danger from the students. The security guards continued to keep them in handcuffs even in the wake of violence. It should have been clear to them at the time when the windows were broken and the door was forced open that the plaintiff was in danger. They should have uncuffed him. The plaintiff was still handcuffed to Sinawo when the students managed to get inside the guardhouse. A reasonable security guard in their position would have realised the danger and removed the handcuffs to enable him to either

escape or defend himself, especially since the security guards were helpless. The security guards were grossly negligent in not doing so in the wake of the violence the student posed. The defendant acted wrongfully in continuing to allow the plaintiff to remain in handcuffs under those circumstances.

[35] The plaintiff testified that the security guards assaulted him, and the students joined in thereafter. In the wake of the evidence of the plaintiff, Sinawo, and Luvo, I have no reason to reject the version that the defendant's employees assaulted him. Lindinceba's denial in this respect should be rejected. He did not get inside the guard house. He was looking through the window. The evidence shows that the students 'flooded' the guard house, meaning that it was full of students. They switched off the lights thereafter. Therefore, Lindinceba's observation cannot be relied upon.

[36] Based on the above analysis, the plaintiff and his witnesses gave credible and reliable evidence. The probabilities favour the plaintiff. I reject the evidence of the defendant as far as it conflicts with the accepted evidence.

F. Costs

[37] The plaintiff has been successful. I find no reason why the traditional rule that costs should follow the results should not apply. The defendant shall have to bear the costs incurred by the plaintiff.

[38] As a result, I make the following order.

1. The defendant is liable for the plaintiff's damages as may be proven or agreed upon.
2. The defendant is to pay the costs of the action.

M MAKAULA
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff : Adv Jozana
Instructed by : **NONTSWABU INC. ATTORNEYS**
For the Defendant : Adv Maswazi
Instructed by : **MBABANE & MASWAZI INC.**
Date heard : 21 August 2025
Judgment delivered : 09 June 2026