

SOUTH AFRICA / JUDGMENT

Bantsheng v Minister of Police (1179/2019) [2023] ZANWHC 118 (20 July 2023) [2023] ZANWHC 118

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

1179/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: 1179/2019

Reportable:

YES

/ NO

Circulate

to Judges:

YES

/ NO

Circulate

to Magistrates:

YES / NO

Circulate

to Regional Magistrates:

YES / NO

In

the matter between:

TUMELO

ERNEST BANTSHENG

PLAINTIFF

and

MINISTER

OF POLICE

DEFENDANT

Delivered: This judgment was handed down in open court on 20 July 2023 at 10h00am. A hard copy has been placed in possession of the legal representatives of the parties.

ORDER

In

the result, it is ordered that:

(i)
The defendant is liable for the assault of the plaintiff for such damages as may be agreed upon or determined by the Court.

(ii)
The defendant shall pay the plaintiff's costs in respect of the merits of the action, including the costs occasioned by the application for absolution from the instance at the close of the case for the plaintiff.

JUDGMENT

PETERSEN J

Introduction

- [1] The plaintiff instituted an action against the defendant for assault at the hands of members of the South African Police Service (SAPS) on 18 January 2019.
- [2] The action which is defended by the defendant proceeded on merits only. The issue of quantum was separated in terms of Uniform Rule 33(4) of the Uniform Rules of Court.
- [3] The defendant adduced evidence of a single witness Constable Orapile Joseph Plaatjie. The plaintiff testified in support of his claim and relied on the evidence of two (2) witnesses Kelebogile Maria Lemmer and Thabang Mngwero.

The pleadings

- [4] The peculiar facts and circumstances of this matter necessitates a reference to the pleadings to appreciate the cause of action on which the claim is based. Paragraphs 3 and 4 of the amended particulars of claim is formulated as follows:

“3. On Friday, 18 January 2019 at approximately 21:00 and Tlaskgameng, Vryburg district, within the jurisdiction of the above Honourable Court, the Plaintiff was unlawfully assaulted by Constable Plaatjie and 3 other police officers whose identity is unknown to the Plaintiff, whom is associated with the South African Police Service, who have beaten him with closed fists, kick him while he was lying on the ground and spray him with tear gas.

- 4. During and as a result of the foregoing unlawful assault by the above mentioned police officers the Plaintiff sustained injuries, inter alia, as follows:

4.1 Left humerus fracture

4.2 Injury to fingers

4.3 Bruises

4.4 Shock and trauma

4.5 Contumelia

4.6 Psychological damage.”

- [5] The defendant’s plea which followed after initially being placed in bar constitutes a bare denial and in so doing raises no defence or ground of justification for the assault allegedly perpetrated on the plaintiff by members of the South African Police Service. At the outset it must be made clear that it is untenable in our law to simply plead a bare denial particularly in circumstances where a party can verify the averments levelled against it with relative ease. In *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA), Musi AJA stated as follows in this regard in the context of an unlawful arrest:

“[8] It is unacceptable for a party to plead a bare denial in the face of straightforward and undeniable allegations against such party. It goes without saying that a trial by ambush is unfair; courts should be very slow to allow a party to mount a case at trial other than the one that the party has pleaded. In Minister of Safety and Security v Slabbert it was stated that:

“The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial.” (Footnote omitted.)

- [9] In this matter, the respondent pleaded a bare denial and persisted with such denial in circumstances where it obviously knew that the information at its disposal is incongruent with such plea. This must be so because the statements of the respondent’s witnesses that were disclosed to the appellant clearly show that the appellant was arrested by members of the SAPS.”

The onus of proof

- [6] It is trite that the infringement of bodily integrity of another is prima facie unlawful.[1] Whilst the burden of proof rests on the plaintiff to prove an infringement of bodily integrity, once such infringement is proven

the onus shifts to the wrongdoer to prove some ground of justification. In the peculiar circumstances of the present matter, the incidence of onus - the burden of proof rests on the plaintiff. The plaintiff accordingly had the duty to begin.

Issues

of common cause and issues in dispute

- [7] There are no issues of common cause between the parties. The defendant's defence as alluded to supra is an untenable bare denial.

The evidence for the plaintiff

The plaintiff

- [8] The evidence of the plaintiff may succinctly be summarised as follows. On Friday 18 January 2019 he was seated at the back of a bakkie with Thabang Mngwero. The bakkie was driven by one Seuntjie, a colleague of his uncle. Seuntjie had offered to take them to Poedigane to purchase sugar and coffee for Kelebogile Lemmer. As the bakkie arrived at a street corner where he resided with his grandparents in Garabetse Section, Tlakgameng, North West Province, a single cab police bakkie stopped in front of Seuntjie's bakkie. A second police vehicle, a double cab stopped behind Seuntjie's bakkie. Two persons alighted from the police vehicle in the front. As the two persons made their way to the bakkie, the plaintiff remarked

to Thabang that the police officers were going to search them. According to the plaintiff he in no way insulted or threatened the

said police officers.

- [9] The plaintiff was forcefully pulled from the back of the bakkie by one of the police officers whom he identified as a male member of the South African Police Service dressed in uniform and whose further identity and rank were not known to him. Once pulled from the bakkie, the two police officers without uttering a word proceeded to assault

him. As he lay on the ground, the two police officers struck him with clenched fists, kicked him with booted feet and sprayed pepper spray in his face. The pepper spray caused eyes to water and he felt dizzy and coughed. As a result of the assault he soiled himself, which only came to his knowledge later that evening when he used the toilet at Ganyesa Hospital where he was taken for medical treatment by police officers.

- [10] He was dragged to the single cab police bakkie and placed in the back. When the police officers closed the door of the bakkie, the fingers of his right hand and left wrist were hit by the door causing him injuries. The plaintiff assumes because his vision was impaired from the pepper spray, that when he was dragged to the police vehicle, more police officials were involved in the assault on him as he attempted to break loose.

- [11] Once he had already been locked in the back of the police bakkie, his grandparents, uncle and Kelebogile arrived at the scene. Thabang had gone to call them. When his uncle enquired from the police officers why they had taken him, no response was forthcoming. Another unknown male person was already in the back of the police bakkie. The police vehicle left with the plaintiff and other detainee to a place called Bens Dam for an unknown reason. At Bens Dam, a certain uniformed police officer who later became known as Molefe arrived. Molefe told the police officers that he received a call from Kelebogile who informed him that the plaintiff had been taken away members of the South African Police Service.

When the plaintiff was asked if he was the said person he confirmed same.

- [12] According to the plaintiff, at this stage at Bens Dam, his left upper arm was swollen, he was bleeding close to his armpit and he experienced pain. The plaintiff told Molefe that his arm was fractured and Molefe issued instructions for the plaintiff to be taken to Tlakgameng Clinic. The police officers duly complied with Molefe's instruction. Molefe followed them to the Clinic. The other detainee was dropped off en route. At the Clinic a nurse informed the police officers to take the plaintiff to Ganyesa Hospital. At Ganyesa Hospital, the plaintiff was admitted, examined and X-Rays were taken of his left arm, which was consequently set in Plaster of Paris.
- [13] On 19 January 2019, the plaintiff was transferred by ambulance to Klerksdorp Hospital where he received further treatment for his injured left arm and discharged on 23 January 2019. He was transported back to Ganyesa Hospital from where he returned home.
- [14] The plaintiff was asked to explain the allegation in paragraph 3 of the amended particulars of claim regarding the reference to Constable Plaatjie as one of the police officers who assaulted him. According to the plaintiff, his attorney may not have understood him correctly, as he did instruct him that Constable Plaatjie assaulted him along with three other police officers. He explained that he only heard the other officers refer to Constable Plaatjie. This he attributed to not being fluent in English.

Kelebogile Maria Lemmer

- [15] The gist of Kelebogile's Lemmers evidence is that the plaintiff who was related to her was raised in her presence and that she had been a caregiver to him in the absence of his mother who was employed in Rustenburg. She lived opposite his grandparents where he resided.
- [16] According to Lemmers she was on her way home after talking to the plaintiff. After hearing the sound of speeding motor vehicles she turned to look back and saw two police vehicles. The two police vehicles stopped Seuntjie's bakkie at the corner of the street where she resides. Lemmers immediately saw Thabang running in the direction of the plaintiff's grandparents home, calling out to them. Lemmers and the plaintiff's grandparents proceeded to the corner where Seuntjie's bakkie had been stopped. Upon arrival at Seuntjie's bakkie, Lemmers saw police officials hitting the plaintiff with clenched fists. She could only see two police officials behind the plaintiff and could not see how many other police officers were present.
- [17] When the police took the plaintiff to a police vehicle parked in front of Seuntjie's bakkie, herself, her grandparents and the plaintiff's uncle approached the police officers and asked what was happening, but they were simply pushed aside. Lemmers being involved in community safety called Captain Molefe whom she knew at Ganyesa Police Station as there is no police station at Tlakgameng. She informed Captain Molefe of the incident and that the plaintiff had previously sustained an injury to his left shoulder for which he was still receiving regular treatment at Klerksdorp Hospital. Captain Molefe gave her an undertaking

to investigate her complaint and to revert to her.

- [18] Captain Molefe later informed her that the plaintiff had been taken to Tlakgameng Clinic. However, when she arrived at the Clinic with other family members, they were informed that the plaintiff was taken to Ganyesa Hospital and the following morning at Ganyesa Hospital they were informed that he had been taken to Klerksdorp Hospital. Lemmers next saw the plaintiff after his discharge from Klerksdorp Hospital with his arm in Plaster of Paris, which was not the position prior to the assault by the police officers. She is unable to identify any of the police officers involved in the assault and neither did Captain Molefe inform her who they were.

Thabang Mngwero

- [19] Mngwero confirmed his presence on the back of Seuntjie's bakkie when two police vehicles stopped the bakkie. According to Mngwero two police officers approached the back of the bakkie and whilst one of the two was in the process of pulling the plaintiff from the back of the bakkie the other started assaulting him. Mngwero jumped off the back of the bakkie and ran to the plaintiff's grandparents residence calling out to them. When he returned to the scene, he saw the plaintiff in the back of the police vehicle which had stopped in front of Seuntjie's bakkie. It is at this stage that he saw the plaintiff's grandparents, uncle and Lemmers approach the police officers to enquire what happened. They received no answer and the police officers got back into their vehicles and left.
- [20] According to Mngwero there were a number of male police officers in uniform, but he could not identify any of them. The next time he saw the plaintiff was after his discharge from Klerksdorp Hospital with his arm in Plaster of Paris. According to Mngwero, the plaintiff was not injured before the assault.

Application for absolution at the close of the case for the plaintiff

- [21] An application for absolution from the instance at the close of the case for the plaintiff was dismissed. The plaintiff's evidence *prima facie* demonstrated an assault on him by members of the South African Police Service, albeit that their identities were not known and the evidence related to Captain Molefe's intervention remained unchallenged.
- [22] It is trite, that once an infringement of bodily integrity is proved, the onus shifts to the alleged wrongdoer to prove some ground of justification for the assault. (See *Moghamat v Centre Guards CC*
- [2004] 1 All SA 221 (C)). Absolution from the instance therefore could not be granted at the close of the case for the plaintiff and the sentiments expressed in *Biyela supra* is apposite.

The evidence for the defendant

Constable Plaatjie

- [23] The defendant called Constable Plaatjie to testify in defence of the plaintiff's claim. The gist of Constable Plaatjie's evidence emanates from entries in an SAP 10 register at Ganyesa Police Station which confirms his evidence in chief that he could not have been present at the time of the alleged assault of the plaintiff. According to entries 704 and 739 of Friday 19 January 2019, he left Ganyesa Police Station at 04h55am for Bospoort and Rooigrond and arrived back at there at 20h40pm on the same day.
- [24] The extent of his knowledge of the incident is that he was informed upon his arrival at the station at 20h40pm that the plaintiff alleged that he was assaulted by himself and three other police officers. When he called Captain Molefe to report to him that he had returned from Rooigrond and Bospoort, he told him that someone was injured and that he had instructed that the injured person be taken to hospital. Captain Molefe further told him that he had been called by the injured person's sister who complained to him. He, however, has no knowledge of the incident where the said injured person was picked up or at the hospital. Under cross examination and of own volition Plaatjie testified that Captain Molefe informed him that the person was injured after he insulted police officers involved in the incident.

Discussion

- [25] The defendant's defence is a bare denial of any assault on the plaintiff in the face of clear evidence of an assault on the plaintiff by members of the South African Police Service. Evidence of the assault albeit hearsay from Molefe echoes the plaintiff's allegations. The effect of the defendant's bare denial is that there is consequently, no ground of justification raised as a defence.
- [26] The evidence adduced by the defendant of Constable Plaatjie is at best neutral. It in the main does nothing to advance the case for the defendant, but confirms aspects of the evidence of the plaintiff and Lemmers as to Captain Molefe's involvement which was brought about solely on the basis of the complaint made to him by Lemmers.
- [27] The indisputable evidence inherent in the plaintiff's case is that he was hit with clenched fists and kicked by police officers who placed him in the back of a police vehicle and left with him. At that stage his arm, which according to Lemmers had been previously injured was not in a cast of Plaster of Paris. The further indisputable evidence in the plaintiff's case is that he was taken to Tlakgameng Clinic and Ganyesa Hospital by police officers. On Plaatjie's evidence, Captain Molefe told him that he instructed that an injured person, which by a process of logical deduction could only have been the plaintiff, had to be taken to hospital.

[28] The injuries sustained by the plaintiff having regard to the facts as a whole, could only have been at the hands of members of the South African Police Service, albeit that their identities are unknown. No justification has been proffered by the defendant for the actions of its members, which could have been ascertained with relative ease. The police officers were clearly on duty at the time and there is no evidence to gainsay the fact that the defendant is vicariously liable for their actions.

Conclusion

[29] The plaintiff's claim on the merits should succeed. The defendant is accordingly held liable for the actions of its members who perpetrated the assault on the plaintiff.

Costs

[30] Costs ordinarily follow suit. Costs incurred in the prosecution of the merits of the action accordingly stand to be awarded to the plaintiff. The costs shall include the costs occasioned by the application for absolution from the instance at the close of the case for the plaintiff.

Order

[31] In the result, it is ordered that:

AH PETERSEN

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE PLAINTIFF: ADV C. J. ZWIEGELAAR Instructed by: Nienaber & Wissing Attorneys 4204 Palmer Crescent LEOPARD PARK MAHIKENG FOR THE DEFENDANT: ADV P. TSHAVHUNGWE Instructed by: THE STATE ATTORNEY 1ST Floor, East Gallery MEGA CITY MMABATHO Date of hearing: 20 April 2022; 28 February 2023 Heads of Argument filed: 11 April 2023; 21 April 2023 Date of judgment: 20 July 2023

[1] Benson & Simpson v Robinson 1917 WLD 126.

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