

SOUTH AFRICA / JUDGMENT

Combo v Minister of Police (5904/2018) [2024] ZAECMHC 33 (11 June 2024)

[2024] ZAECMHC 33

COURT

Eastern Cape High Court, Mthatha

BEFORE

M Makaula

CASE / FILE NUMBER

5904/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL

DIVISION, MTHATHA)

CASE

NO: 5904/2018

In the matter between:

SIYAMBONGA

COMBO

Plaintiff

and

MINISTER OF

POLICE

Defendant

JUDGMENT

MAKAULA J:

A.

Introduction

- [1] The plaintiff issued summons against the defendant claiming an amount of R3,015,000.00 (three million fifteen thousand rand) (sic) for injuries sustained because of being unlawfully and wrongfully shot by the members of the defendant (the police) who at the time were acting within the course and scope of employment with the defendant. The amount claimed by the plaintiff is for future loss of earning capacity and general damages. The action is opposed by the defendant on various grounds.

B. The Plaintiff's case.

- [2] The plaintiff testified that he was employed by the Department of Education (the department) as a Scholar Transporter responsible for transporting children to and from school. On 24 May 2018, he dropped the students as usual at their school and proceeded to town to wash the motor vehicle and to have a haircut. Having done so, he drove down Madeira Street in Mthatha with the intention of driving through Sutherland Street. However, he could not do so because there were police blocking the road leading to Sutherland Street. That compelled him to drive down Madeira Street. While passing the police station, he was prevented by the police from turning into Elliot Street. He stopped the vehicle on the side of the road and proceeded on foot towards the police with the intention of informing them that he was intending to turn to Elliot Street. As he was 5 meters away from them, they started shooting at him using rubber bullets. When he was struck by a rubber bullet on the front of the right thigh and as he turned to run away, a second rubber bullet hit him on his buttock. He could see that it was the police because they were wearing police uniforms with a badge and police tag, bullet proof vests, helmets and were carrying rifles. However, he could not dispute that there were municipal police present. He was certain that those who shot at him were police in full uniform. He phoned a friend who arrived and took him to Mthatha General Hospital where he was treated and discharged. He went to look for his vehicle where he had left it but was notified that it had been impounded by the police. The next day he went to the police station, produced his motor vehicle logbook and the contract that he held with the department and his vehicle was released to him on the same day. He also opened a case against the police. He was given a J88 form[1] to be filled in by the doctor.
- [3] The plaintiff testified that at the time of the incident he was earning between R6000.00 and R10,000.00 monthly from the department. When he fetched the motor vehicle, the police informed him that his contract with the department would be suspended for a period of four months. Indeed, his contract was suspended for four months and he lost income during that. He could not work for a period of two weeks and had to hire a driver at a rate of R700.00 per week. The driver worked for him for two months while his wound was recovering.
- [4] It was put to him under cross examination that he went to the hospital on 2 May 2018 as reflected in the particulars of claim which were later amended. It was further put to him that he did not report the matter to the police as there was no record on the occurrence book to that effect. The plaintiff maintained that he went to the hospital and gave the J88 to

the doctor on the same day he was shot. He disputed that he worked as a gardener as reflected in his particulars of claim. He stated that he had notified his attorneys to amend that as he never worked as a gardener. He could not produce the

contract he had with the department nor any document which established that. He further could not produce proof or evidence to substantiate that he lost income for a period of either two months or four months from the department.

C. The Defendant's case

[5] Nkosayipheli Zongwana testified that he was a Lieutenant Colonel in the SAPS. On the 24 April 2018, there was a road blockade by taxis in Madeira Street. Members of various law enforcement agencies were activated including the Police, Public Order Police, Municipal Police, Crime Intelligence etc. Each department or section was to look after its interests, e.g. traffic officers would look after traffic offences while police would maintain order. Each unit of the police represented in the operation, was led by its own commander. He was not on the ground but was operating on a radio

control in one of the police buildings. He was coordinating instructions from commanders to the various units either by phone,

landline or radio communication. He said the police officers were armed with firearms, stun grenades, rubber bullets and so forth. He testified that many motor vehicles were impounded that blocked the road. He reported that he inspected the occurrence book at Madeira police station and found that no report was made about the injury sustained by the plaintiff.

Procedurally, if there was a person who got injured during that operation, the incident would be entered in the occurrence book. He concluded that there was no such incident since there was no entry on the occurrence book and was not reported in their parade. After calm was restored, the police units dispersed.

[6] The doctor who examined the plaintiff has since left the Department of Health and was thus unavailable to testify. The doctor who completed the J88 form has passed away. Due to these factors, the medical records and the J88 form were explained and interpreted by Dr. Vusumzi Mehlo, who is a senior manager Medical Services in the Mthatha Regional Hospital. He supervises all the clinical doctors and nurses in the area. Apart from the treatment and the medical history provided in the medical documents read by doctor Mehlo the records, reflected that on 24th April 2018 at 14H57 the plaintiff was attended to at Mthatha Regional Hospital complaining of being assaulted by the police. The record reveals "complains of right thigh pain after suffering a gunshot. ... Patient is limping with blood-stained clothing. Patient not in distress. ... 0.5 cm length by 2cm depth gunshot wound actively bleeding, no visible or obvious oedema on surrounding tissue, no raised temperature, wound is clean: Ass. Gunshot."The J88 form was filled by Dr R.A. Osinjolu who noted; "I Transcribed the medical examination note of Dr Jametto".

- [7] On the medical history column, Dr Osinjolu reflected on the injury in paragraph 6 above. On the J88 form there appears to be two different dates as reflected by the date stamps. On the first page, it appears that the J88 form was signed on 4 May 2018 yet on the second last page appears a date 2 May 2018 and that it was commissioned on 4 May
2018. Regarding the conflict in dates Dr Mehlo testified that at the time the plaintiff was consulted they were understaffed. He suspected that the plaintiff was examined on 24 April 2018 and the J 88 form was filled by Dr Osunjolu on 2 May 2018 and was taken to the records clerk on 3 May 2018. The plaintiff collected it on 4 May 2028 hence there were different dates. Dr. Mehlo, therefore, testified that there was nothing wrong with the J88 form as it contained information that is in accordance with the medical form which was initially signed by the treating doctor of the plaintiff on 24th April 2018.

D. Argument

- [8] The plaintiff argued that he has proven “beyond reasonable doubt” that he was injured by the police during the course and scope of their employment with the defendant. The plaintiff argued that he has established through medical evidence that he was injured on the day of the incident. The plaintiff further argued that it is not in dispute that the members of the defendant were amongst those who were deployed on the day in question as there was an unrest.
- [9] The defendant attacked the evidence of the plaintiff on different fronts. It criticized the evidence of the plaintiff in that he said he was employed as a gardener and earned a sum of R2500.00 in his particulars of claim. The plaintiff later denied that and stated that he was earning a sum of R6000.00 to R10,000.00 as a scholar transport owner employed by the department. The defendant further attacked the date on which the incident occurred relying on the amended particulars of claim which referred to 24 April 2018 whereas the first particulars of claim stated that the incident occurred on 2 May 2018. The defendant submitted that the plaintiff was unable to tell whether he was shot by municipal police or members of the defendant or any other law enforcement agencies which were at the scene. The defendant discredited the evidence of the plaintiff in that he stated he was picked up by a friend after he was shot at 14h30 whereas the J88 form states that he was attended at hospital at

the same time. The defendant made moment of the fact that the plaintiff did not know the sex of the doctor who attended him and

whether that doctor spoke Xhosa or not.

E.

Analysis

[10] First and foremost, I should mention up front that the claim before me encompasses both merits and quantum. However, no meaningful evidence was led by the plaintiff regarding quantum and neither did both parties address the issue in their respective Heads of Argument and in oral argument. All the plaintiff stated was that he was receiving the amount stated above from the Department and nothing further.

[11] I find the following facts to be common cause.

11.1 That there was a protest in Mthatha on 24 April 2018 which necessitated the calling of law enforcement agencies including the members of the defendant.

11.2 In maintaining order, the members of the defendant were armed with rifles, shotguns as well as rubber bullet firing firearms.

11.3 That the plaintiff sustained an injury on his thigh and consequently received treatment on 24 April 2018 at Mthatha General Hospital and was later referred to Ngangelizwe clinic which was closer to where he was residing.

[12] As aforesaid the defendant strenuously argued that the plaintiff could not as a matter-of-fact state that the people who shot at him were the members of the defendant. However, as dealt with in paragraph 2 above the plaintiff categorically described the law enforcement officers who fired shots at him and identified them by their uniform and badges as they were seven meters from him. Apart from stating that there were many law enforcement agencies at the scene, the defendant failed to gainsay the evidence of the plaintiff in this regard. The plaintiff remained unshaken in his identification of the people who shot at him, stating that it was members of the defendant. Furthermore, Lieutenant Colonel Zongwana was not at the scene and did not witness anything that was happening on the ground as he was in his office at the police headquarters communicating with the Police Commanders on the ground through radio and cellular phones. That, there was no entry in the occurrence book and related registers does not take the matter any further since the plaintiff was not responsible for making such entries. He reported the incident to the police hence he had a J88 form when he visited the hospital. A J88 form gets given to a complainant by the police for it to

be filled by the doctor attending to him or her. It is inexplicable that the plaintiff would have had access to a J88 form if it was not given to him at the police station as he alleged.

[13] As previously stated, the defendant criticized the different dates appearing on J88 and the medical records which were submitted as an exhibit. However, the explanation given by Dr Mehlo puts the issue to rest. There is no evidence tendered which suggests that the J88 form, the affidavit accompanying it and the date stamps appearing on those

documents were fraudulent. Therefore, nothing turns on the various dates appearing on those documents. The defendant took issue with the fact that the plaintiff alleged that he was picked up by his friend at 14h30 while at the same time the J88 form also reflects 14h30 as the time he was

treated by the doctor at hospital as discrediting his evidence. With the respect this does not affect the credibility of the plaintiff for the reason that it is not a requirement in establishing the truthfulness of his evidence especially if no further criticism can be leveled against his evidence. Under the prevailing circumstances at the time, no reasonable person would expect the plaintiff to be accurate about the time he was picked up. After all, I can take judicial notice that the Mthatha hospital is less than a kilometer from where he alleged he was picked up. There can be no dispute about that.

[14] An issue was made in argument as to whether the doctor who attended to the plaintiff was male or female and whether he spoke Xhosa or not. I cannot fathom of what importance this issue is, as it has no relevance to establishing the truthfulness of the plaintiffs' assertions. Based on this issue and related others the defendant argued that the plaintiff failed to prove his case "beyond a reasonable doubt". This is astonishing. The reason being that the test is not beyond reasonable doubt but balance of probabilities. I find no reason to accept the submission that the credibility of the witness leaves much to be desired and highly inconsistent in respect of the identification of the people who shot at him. The plaintiff remained resolute that he was shot at by the members of the defendant and clearly identified them as stated above. As aforesaid, the perpetrators were seven meters from him and in broad daylight.

[15] It is doubtless that the plaintiff was shot at on 24 April 2018 with a rubber bullet by the members of the defendant. It is common cause that he did sustain a rubber bullet injury on his thigh as confirmed by the findings of the doctor who treated him. I say a rubber bullet wound because the doctor only picked up and treated a rubber bullet wound on the thigh and not on the buttocks as alleged by the plaintiff. Had the plaintiff sustained a rubber bullet on the buttocks, the doctor would have noted that. It is apparent that at the time the members of the defendant shot at the plaintiff, they were acting within the course and scope of their employment with the defendant as they were trying to quell the violence which was prevailing at the time. In all probability the plaintiff was not part of the protesters.

F. Quantum

[16] The amounts that are claimed by litigants against defendants especially government departments are leaving much to be desired. Exorbitant, unsubstantiated amounts, with no basis at all, find their way in the summons. Practitioners have developed a habit of throwing in and claiming huge unsubstantiated amounts. This matter is no different. In *Diljan v Minister of Police*[2] the SCA lamented the conduct of practitioners who fall foul of this tendency as follows:

"[20] A word has to be said about the progressively exorbitant amounts that are claimed by litigants lately in comparable cases and sometimes awarded lavishly by our courts. Legal practitioners should exercise caution not to lend credence to the incredible practice of claiming unsubstantiated and excessive amounts in the particulars of claim. Amounts in monetary claims in the particulars of claim should not be 'thumb – sucked' without due regard to the facts and circumstances of a particular case. Practitioners ought to know the reasonable measure of previous awards, which serve as a barometer in

quantifying their client's claims even at the stage of the issue of summons. They are aware, or ought to be, of what can reasonably be claimed based on the principles and enunciated above."

- [17] The plaintiff made averments in his particulars of claim which were not established by the evidence led. It is disturbing that even the amount claimed is ridiculously high regard being had to the fact that the plaintiff sustained a rubber bullet wound on the thigh and was treated and discharged from hospital. That on its own, speaks to the less seriousness of the injury sustained by him. For purposes of completeness, it is essential that I should refer to the particulars of claim as they are in this regard. The relevant paragraphs read:

"10. As a consequence of the shooting, the plaintiff sustained gunshot wounds on the right. He also suffered injury to his, dignity and deprived of his liberty and enjoyment of amenities of life. Accordingly, the plaintiff suffered general damages in the amount of R1000 000.00 (One million rand) (sic)

Past loss of earning capacity

11. It is the plaintiff's contention that between the dates of the shooting to date, he has not been able to return to work as a scholar transport driver. Accordingly, he has lost past earnings in the amount of between R13000,00- R15000,00 (thirteen thousand rand) to (fifteen thousand rand) per month. (sic)
12. It is the plaintiff's further contention that he would have working until he attained the age of 70 years: he would have continued to work as a scholar transport driver earning the amount of R13,000 .00 (thirteen thousand rand) to R15,000 00 (fifteen thousand rand per month and that his earning would have gradually progresses with time and inflation (sic)
13. Accordingly the plaintiff has lost future earnings capacity in the amount of R2000,000 .00 (two million rand) (sic)
14. The amounts claimed in respect of:

14.1. General damages represent a fair and reasonable amount of damages suffered by the plaintiff for discomfort shock, injury to his person, dignity, deprivation of liberty, deprivation of enjoying of amenities of life, humiliation, pain and suffering. It is not reasonably possible to give a precise amount for these various issues but the amount accords with previous awards granted by this court in cases of this nature. (sic)

14.2 Past loss of earnings resents a global figure that the plaintiff would have earned per month from the date of the shooting to the date of this summons and will be subjected to industrial psychological verification and actuarial calculation. As soon as the reports by industrial psychologists and actuary are at hand, same will be availed to the defendant's legal representatives. (sic)

....

16. The plaintiff claims as against the defendant:

16.1 Payment of the sum of R3015000. 00 (three million fifteen thousand rand) (sic)

16.12 interest there on at the mora rate payable 14 (fourteen) days from the date of

judgment:

16.3 Costs of suit, and

16.4 Further and or alternative relief.” (emphasis added)

[18] Contrary to what is stated in the particulars of claim about quantum, all the plaintiff testified to regarding it, was that he was unable to work for a period of four months due to him being suspended and that in the first two months after the injury, he had to hire a driver at a cost of R2800.00. The medical report shows an injury which is 0, 5 centimeters in length and 2 centimeters deep and reflects that he was given brufen tablets and referred to a clinic for further dressing of the wound. It is not clear after how long the wound healed. It cannot be disputed that he did suffer pain because of the injury and needs to be compensated for that. However, in the absence of proof I am unable to find that he was suspended by the department for a period of four months.

[19] Strangely, no evidence was led as to future loss of earning capacity despite the huge amount claimed. It is, therefore, inconceivable how in paragraph 13 of the particulars of claim the plaintiff arrived at an amount of R2,000,000.00 bearing in mind that he did not sustain an injury that rendered him incapable of working in future. It has not been established further that the plaintiff did not receive an income for four months as no documentary evidence was proffered to substantiate that, taking into consideration, he had a contract with the department. It was expected of the plaintiff to submit proof from the Department that he lost an income during that period. Based on the evidence I am unable to find that the plaintiff did not work or receive an income for a period of four months.

[20] The reason for my finding is that his vehicle was released the following day by the police. Moreover, he had to hire a driver for two months, presumably because he was recovering. The inconvenience, if at all to the children he transported was only for a period of a day. The circumstances that led to the suspension of the contract for four months have never been explained by the plaintiff. Put differently the plaintiff did not state any reasons why he was suspended and had no income for four months. Such information was crucial to the claim based on not being able to work for four months. His evidence reads: “It was kept at Vela Municipality pound. They released the motor vehicle. They said the contract would be suspended. It was suspended and prohibited from conveying the children for 4 months after which it was re-instated. I hired a driver because my leg had not healed completely.” This talks to the police. One wonders where did the police get the power to suspend a contract which was entered into between the Department and the plaintiff. Furthermore, on what basis did he hire a driver if the contract was suspended.

[21] The plaintiff alleged that he was remunerated for transporting school children in an amount between R6000.00 and R10 000.00 monthly. He submitted his Nedbank bank statements for the period 24 July 2017 to 24 February 2018. I hasten to mention that the plaintiff was never taken through the bank statements to establish the money that came from the department. Suffice to state that there are deposits which referenced “BASC37 EC: TRANS001124897”. The deposits made under that reference reflect an amount varying between R1438.41 dated 31 August 2017 and the highest is R11 900.00 dated 13 February 2018. Other deposits with such reference varied between the two amounts. No explanation was given by the plaintiff for such a variation in the amounts he received from the department for transporting the children. This court was not taken to the relevant period when the plaintiff did not receive the payment. In other words, the period of four months spoken to by the plaintiff was never established. Even if I were to accept that the plaintiff lost income for four months, based on the statements I would not have been able to determine how much in actual rands the plaintiff would have lost during that period as no evidence was led regarding how the amounts

were calculated and why they varied so much. Be that as it may, it is my finding that the plaintiff failed to prove on a balance of probabilities that he lost an income for four months after his injury.

[22] As it can be gleaned from the cited particulars of claim above, under the head General Damages the plaintiff claims that he suffered “injury to his dignity and was deprived of his liberty and enjoyment of amenities of life” These allegations are concerning because the plaintiff was never deprived of his liberty let alone losing amenities of life. How, therefore, the plaintiff makes such allegations is dumbfounding, to say the least. Let alone how the amount of R1,000,000.00 is arrived at.

[23] Another disturbing feature is that the plaintiff is claiming an amount of R2 000 000.00 for loss of earning capacity. How on earth such an allegation is made escapes me. As aforesaid, there is no semblance of evidence to establish that the plaintiff lost future earning capacity based on the injury which was on the thigh. This speaks to the nonchalant way in which these particulars of claim were drafted. This conduct must be deprecated and nipped at the bud. The sentiments I expressed in the Diljan matter referred to above find application in this matter. Huge amounts without merit must not be claimed by practitioners who are always guided by previous awards made by our courts.

[24] Having had regard to the matter, the only award the plaintiff is entitled to is the general damages in respect of pain and suffering which he had to endure because of the injury on his thigh. Considering the latter head of damages, I am of the view that a sum of R50,000.00 which has also been conceded and suggested by the defendant would be sufficient to compensate the plaintiff. It is a reasonable amount.

G. Costs

[25] It is trite that costs should follow the results. That applies to this matter. However, the manner in which the plaintiff attorneys handled the matter necessitates a re-look at the cost order. This matter should have been litigated at the Magistrate's court. But for the conduct of the plaintiff's attorney in claiming huge amounts of money on heads of damages which were not supposed to have been claimed in the first instance, the defendant cannot be mulcted with such costs at a High Court scale on a matter which, properly construed, should have been heard at the Magistrates court. Therefore the costs shall be awarded at the Magistrate's scale.

[26] Consequently I make the following order:

1. The defendant is liable to pay the plaintiff an amount of R50 000,00 (fifty thousand rand) for pain and suffering.
2. Costs of suit at the Magistrates' court scale.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff

: Adv Sintwa

Instructed by

: S. BOOI & SONS ATTORNEYS

Office No. 3 Clublink Building

MTHATHA

For the Defendant : Adv Gumede

Instructed by

: STATE ATTORNEYS

94 Sisson Street

Fort Gale

Date heard

: 2 February 2023; 18,19, April 2023; 26,

28, 29 September 2023 and 27 October 2023

Judgment

delivered : 11 June 2024

[1] A Report on Medical Examination by a Healthcare Practitioner.

[2] (746 of 2021) [2022] ZASCA 103 (24 June 2022)

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