

SOUTH AFRICA / JUDGMENT

Fourie v Minister of Police (CIV
APP FB03/2024) [2024]
ZANWHC 312 (31 October 2024)
[2024] ZANWHC 312

COURT

North West High Court, Mafikeng

BEFORE

DJAJE, MFENYANA, MAKOTI

CASE / FILE NUMBER

CIV APP FB03/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: CIV APP FB 03/2024

Reportable: YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO
In

the matter between: VENITA
FOURIE
APPELLANT
AND
MINISTER
OF POLICE
RESPONDENT
CIVIL
FULL COURT APPEAL

CORAM: DJAJE DJP; MFENYANA J & MAKOTI AJ

Heard: 21 JUNE 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The
date for the hand-down is deemed to be 31 OCTOBER 2024.
ORDER
The

following order is made: 1.
The appeal is upheld,
2.
The orders (i) and (ii) of the court a quo dated 8 March 2023 are substituted

with the following: " (i)
The Plaintiff's claim 1, of assault is granted with costs
(ii)
The Defendant is ordered to pay the Plaintiff the total amount of R179 231.36 for the assault and future medical expenses"
3.
The respondent is ordered to pay the costs of appeal, including the costs of
the leave to appeal and counsel on scale B.

JUDGMENT

DJAJE DJP

- [1] This is an appeal against the dismissal of the claim for damages suffered as a result of the assault on the appellant. The appellant had initially instituted an action against the respondent for unlawful arrest and detention as well as assault by the members of South African Police Services during the execution of their duties. In the court a quo the claim on assault was dismissed and the court a quo only granted an order that the respondent was liable for damages resulting out of the unlawful arrest and detention. The respondent was ordered to pay an amount of R10 000.00 as damages for the claim of unlawful arrest and detention.
- [2] The appellant was arrested without a warrant on 17 November 2018 in Vryburg at her place of residence. She was on that day with her boyfriend. They were approached by a group of people looking for a stolen television and they were pointing at her boyfriend as the person who took the television. The appellant ran into the house as she was fearing for her life from the angry group of people. The police arrived and handcuffed her boyfriend. She was watching all this from inside the house through a window. The police took her boyfriend to their room and she heard him screaming. On her arrival at the room, she found her boyfriend lying on the floor on his stomach with his hands tied behind his back.

[3] When she enquired from the police what was happening, she was instructed by one officer to move to another room. According to the appellant, she was pushed by Sergeant Diale who grabbed her "around her neck" out of the room. He continued to push her for approximately 3-4 metres down the passage leading to the other room. Sergeant Diale then hit her on the cheek with an open hand and the appellant shoved him away from her. He reacted by swearing at her and threatening to arrest her. The appellant was afraid that the Sergeant would shoot her when he moved his hand towards the R5 rifle. Instead,

the Sergeant used pepper spray on her which she managed to avoid. She moved to the kitchen and was followed by Sergeant Diale and Sergeant Ratsoma. Ratsoma arrested the appellant by pushing her against the wall and handcuffing her. She was placed in a police vehicle and was insulted for being in a relationship with a foreigner.

[4] On arrival at the police station she was left alone in the police kombi with all the windows closed and it was hot inside. After some time, she and her boyfriend were taken to another police station in Huhudi. She was eventually charged and released.

[5] The evidence by the police officer Sergeant Diale during the trial was that the appellant was interfering during the arrest of her boyfriend, telling him not to give anything to the police. She tried to enter the room whilst the police were conducting a search, and he prevented her from entering the room and the appellant assaulted him by scratching him on his face. He was defenceless and had his R5 rifle the whole time with both his hands and could not assault the appellant.

[6] The court a quo in dismissing the claim of assault held that:

"[27] The plaintiff did not present any evidence to corroborate her being assaulted by Mr Diale. Mr Diale denied to have assaulted the plaintiff, he stated that he was in possession of an R5 rifle which he was holding with both hands. The explanation of Mr Diale was probable and he could not have assaulted the plaintiff whilst in possession of an R5 rifle. Both Mr Diale and Mr Ratsoma testified that, it is not possible to shove the person with an R5 as it might pose danger to a shoved person and the shoved person might also grab the firearm and endanger the police officer.

[28] It is therefore my view that, it was not probable that Mr Diale could have assaulted the plaintiff whilst holding an R5 rifle. It is therefore my view that the plaintiff was not assaulted by Mr Diale on the day of the incident."

[7] The appellant raised several grounds for appeal as follows:

"The above Honourable Court erred:

1. By not upholding the Applicant's objection against the oral evidence given on behalf of the Respondent which evidence was not put to the Applicant during cross-examination.

2. In the alternative to 1 (one) above, by considering and relying on the evidence given on behalf of the Respondent which evidence was not put to the Applicant during cross-examination.
3. By admitting, considering and relying on the oral evidence given on behalf of the Respondent which evidence relating to a defence which was not pleaded, alternatively properly pleaded by the Respondent.
4. By ignoring the fact that on 11 October 2022, the Applicant and the Respondent agreed that if the Court a quo finds in favour of the Applicant on one of both claims, the Expert Reports by Ms Tsambos (clinical psychologist) are admitted as allowance hearsay evidence and/or evidentiary material.
5. By ignoring the outcome of the reports by the Ms Tsambo's reports in terms of which:
 - 5.1 the Applicant was initially diagnosed with PTSD and later with Moderate Depressive Disorder with Comorbidity of Moderate Stress Disorder.
 - 5.2 Ms Tsambo concluded that the Applicant will benefit from psychotherapy, psychopharmacological treatment, and prescription medicine. The total costs which amounts to R99 231.36.
6. By failing to take into consideration and/or to apply the future medical expenses of the Applicant to the damages awarded to her.
7. In failing to take into consideration that the Applicant, besides her unlawful arrest and detention, was also verbally and physically assaulted by the police including being sprayed with pepper spray. This conduct resulted therein that the Applicant suffered shock, trauma, psychological damages, humiliation and degradation."

Amendment of the particulars of claim

- [8] The appellant brought an application to amend the particulars of claim to include that Sergeant Diale also assaulted the appellant using pepper spray. The respondent objected thereto and filed a Rule 30 notice that this was an irregular step. The appellant relied on the decisions of *British Diesels Ltd v Jeram and Sons* 1958 (3) SA 605 NDP where the following was stated about amending pleadings on appeal:

"if it should appear that any substantial issue was duly canvassed in the code below, then in my opinion we ought to regard it as an issue to be decided between the parties whether it has been formally pleaded or not. If on the other hand, the application is to put on the record issues which were not fully canvassed, then no amendment ought to be allowed at this stage."

- [9] At this stage the court in considering whether to grant the amendment should consider the prejudice to be suffered by the respondent and indeed whether the issue sought to be introduced was fully ventilated during the trial. In this instance the issue sought to be introduced was mentioned by the appellant during the trial and she was extensively cross-

examined about the pepper spray. The amendment sought by the appellant will not introduce any new fact that was not canvassed during trial and there will certainly not be any prejudice suffered by the respondent. The amendment is therefore allowed.

- [10] The other amendment sought by the appellant was to include future medical costs under the claim for unlawful arrest and detention. It was argued that the respondent had agreed to the contents of the expert report which dealt with the psychological effect of the arrest on the appellant. The appellant in her evidence during the trial testified to the effect of the incident of the arrest on her and how it affected her psychologically. She was cross-examined about it by the respondent. This amendment is not prejudicial to the respondent and should be allowed.

Submissions

Expert report

- [11] The appellant argued that the court a quo failed to consider the report and diagnosis of the Clinical Psychologist despite the agreement between the parties that if the court found in favour of the appellant on one or both claims, the expert report would be admitted as allowable hearsay evidence. Further that the court ordered the respondent to pay for the costs of the appellant's expert witness but made no finding on the diagnosis and the suggested treatment.
- [12] In contention the respondent argued that the agreement between the parties in relation to the expert report is vague and unenforceable. It was argued that the report was for the assessment of the appellant's psychological and/or psychiatric consequences which were only pleaded in the claim for assault. This claim was dismissed by the court a quo and there could have been no reason to refer to the report.
- [13] At the commencement of the trial before the court a quo the parties submitted to the court on record about certain agreements made. Amongst these agreements was the agreement to admit and allow the expert report of the Clinical Psychologist as allowable hearsay evidence in relation to quantum. This agreement was made subject to the court finding in favour of the appellant in any of the two claims. The following appears from the transcribed record on this aspect:

"Now the parties agreed that if the Court find in favour of the plaintiff. Either for claim 1 of claim and 1 or 2 or claim 2 if the Court finds in favour of the plaintiff then the expert report and the addendum are admitted as allowable hearsay evidence or evidentiary material.

COURT: That expert report is in relation to quantum?

MR MAREE: It is in relation to quantum so, My'Lady to put it differently if the Court does not find for the plaintiff whether it is in respect of claim 1 or 2 or both of them then the reports are then accepted as evidence as what they purport to be. Now I beg leave at this stage and this is just to assist the Court to hand up the handwritten agreement and my colleagues can just confirm that. As the Court pleases.

MR MOLEFE: As the pleases the Court, My'Lady. I do confirm the contents of the document and the arrangement thereof."

[14] Despite having found for the appellant in the claim for unlawful arrest and detention, the court a quo did not consider the expert report and the findings therein. The findings in the report by the Clinical Psychologist were as follows:

7.3.1 the tests found no signs of malingering and/or feigning cognitive deficits.

7.3.2 the plaintiff is diagnosed with Post Traumatic Stress Disorder with depressive features.

7.3.3 "Ms Fourie's orientation is towards possible feelings of apprehension and misery. She is anxious, constantly melancholic and shows signs of neNousness, with a high degree of ambiguity and anger... there are clear signs of hypersensitivity to social attitude and criticism."

7.3.4 It is recommended that "Ms Fourie should attend future fortnightly psychotherapy session for the next 12 months... It is also suggested that subsequently monthly follow-up session can continue for the next 12 months." The total costs for this amounts to R55 764.00.

7.4 The material findings in the addendum report are:

7.4.1 the tests found no signs of malingering and/or feigning cognitive deficits.

7.4.2 the plaintiff is diagnosed with Moderate Depressive Disorder with Comorbidity of Moderate Stress Disorder.

7.4.3 "...Ms Fourie's orientation is towards possible feelings of dread and misery. She is anxious, constantly melancholic and shows signs of nervousness, with a high degree of doubt and anger... There are clear signs of hypersensitivity to social attitude and disparagement."

7.4.4 ... "Ms Fourie should attend future monthly psychotherapy session for 18 months." It is further recommended Ms Fourie receive psychopharmacological treatment.

7.4.5 the total costs amount to R33 408.00 for psychotherapy, R 45 000.00 for psychopharmacological treatment, and R20 832.36 for prescription medicine."

[15] The SCA in *Nel & Others v Cilliers* (197/2023) held that: "Pre-trial proceedings are legally binding proceedings in which the issues to be determined at trial are identified and crystalised" par. 17. See also *Price NO. v Allied - JBS Building Society* 1980

(3) SA 874 (A) para 8820-H.

- [16] After the parties made the submission about the agreement concerning the expert report, the court a quo admitted same, and no issues were raised thereafter. However, in the assessment of the evidence the court a quo did not consider the report in its totality. This evidence was excluded, and no reason given for such exclusion. As correctly submitted by the appellant, this is a valid ground for this court of appeal to interfere.

Inadmissible evidence

- [17] The appellant argued that the court a quo in dismissing the claim for assault considered inadmissible evidence that was not put to the appellant to either admit or deny. The court a quo as stated above dismissed the appellant's claim for assault on the basis that it was improbable that she could have been assaulted by Sergeant Diale when he was holding an R5 rifle with both his hands. When the appellant testified about the assault and how it happened, it was put to her during cross examination that Sergeant Diale will deny assaulting her. There was no explanation given of the details of the denial.
- [18] The respondent's witnesses testified in chief about a version that was not tested with the appellant. Despite several objections by counsel for the appellant when such evidence was introduced, the court a quo overruled the objections and allowed untested evidence on the assault to be led by the respondent. This resulted in the court a quo analysing inadmissible evidence and using that as a basis for dismissing the appellant's claim on assault. That on its own is a ground for this court of appeal to interfere with the finding of the court a quo on the dismissal of the claim on assault.
- [19] The appellant testified how she was assaulted by the police officers and gave a full explanation thereto. Despite being cross-examined she stood her ground and did not contradict herself. The police officers testified that the appellant assaulted Sergeant Diale scratching him on his face whilst he was holding an R5 rifle. This version is improbable that the appellant would assault a police officer who was armed with a rifle in the presence of his colleagues. There was no reason for the appellant to assault the police officers as they are the ones who were chasing her out of the room where they were conducting a search.
- [20] The respondent alleged that the appellant was interfering and assaulted police officers. In terms of section 67(1) of the South African Police Service Act 68 of 1995 any person who interferes with the member in execution of his duties shall be guilty of an offence and be liable to a fine or imprisonment for a period not exceeding twelve months. If indeed the appellant assaulted the police officer whilst they were performing their duties on that day, her arrest would have been justified and kept in custody. However, these charges were withdrawn against the appellant despite there being a witness. The probabilities are that the appellant was assaulted by the police officers by pushing her away from the room they were in, slapping her and using pepper spray. The court a quo's finding should be set aside the claim for assault succeeds.

Quantum

[21] An award for damages cannot be calculated with mechanical precision, recourse must be had for guidance in previous similar fact decisions.

[22] The appellant argued that the amount of R100 000.00 for the assault is fair and reasonable in addition to the costs outlined by the Clinical Psychologist. The appellant referred to the following case law in support of their argument for payment of damages.

"9.6.1 DUARTE V MINISTER OF POLICE (201/34042) [2013] ZAGPJHC 51 (7 MARCH 2013). In the said matter the plaintiff was assaulted by members of the SAPS whilst in their custody and obtained the following injuries: bruised right eye and bruised ribs. In 2013 the plaintiff therein was awarded an amount of R60 000.00. The value of the award calculated with reference to the 2022 South African Consumer Price Index and by applying the calculation method as set out in The Quantum Yearbook by Robert J Koch] is R91 964.39.

9.6.2 MARWANA V MINISTER OF POLICE (3067/2010) [2012] ZAECPEHC 56 (28 AUGUST 2012). In the said matter the plaintiff was assaulted by members of the SAPS whilst in their custody and obtained the following injuries: excessive bruises on the back and upper arms, abrasions on both wrist joints and bruised knees. In 2012 the plaintiff therein was awarded an amount of R90 000.00. The value of the award calculated with reference to the 2022 South African Consumer Price Index and by applying the calculation method as set out in The Quantum Yearbook by Robert J Koch] is R145 903.47."

[23] The appellant herein was diagnosed with Post Traumatic Stress Disorder (PTSD) which was later replaced by moderate depressive disorder with comorbidity of moderate stress disorder. She testified that she is constantly afraid after the incident and remains indoors. She no longer trusts the police and that she will not call them for assistance. She is currently very emotional and suffers from nightmares. She was asked to resign from her employment as well because of her depressive disorder. The police acted unjustifiably towards the appellant on that day and not in a protective manner as expected of members of the police. The extent of the trauma suffered by the appellant is severe and as recommended by the Clinical Psychologist she will require ongoing therapy. She was kept in a vehicle with no ventilation unnecessarily and driven around from one police station to another. This conduct by the police officers on that day was cruel and the appellant should be compensated for her suffering.

[24] Taking into consideration the circumstances of the assault and the effect thereof on the appellant, I am of the view that the award of eighty thousand rand (R80 000-00) for damages is appropriate and an additional amount of ninety-nine thousand two hundred and thirty-one rand thirty-six cents (R 99 231.36) for future medical expenses as calculated by the Clinical Psychologist for psychopharmacological treatment, psychotherapy and prescription medicine.

Costs

[25] There is no reason why costs should not follow the event.

Order:

Consequently, the following order is made:

2. The orders (i) and (ii) of the court a quo dated 8 March 2023 are substituted with the following:

(ii) The Defendant is ordered to pay the Plaintiff the total amount of R179 231.36 for the assault and future medical expenses"
3. The respondent is ordered to pay the costs of appeal, including the cost of the leave to appeal and counsel on scale B.

J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree,

S MFENYANA

JUDGE OF THE HIGH COURT

M Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 21 JUNE 2024

DATE OF JUDGMENT : 31 OCTOBER 2024

COUNSEL FOR THE APPELLANT : ADV MAREE

COUNSEL FOR THE RESPONDENT : ADV GUMBI SC

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