

SOUTH AFRICA / JUDGMENT

Mtwalo v Minister of Safety and Security (8772/2009) [2014] ZAKZPHC 18 (27 March 2014)

[2014] ZAKZPHC 18

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Nzimande

CASE / FILE NUMBER

8772/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO. 8772/2009

In

the matter between:

ELIJAH

THEMBELA

MTWALO.....PLAINTIFF

and

THE

MINISTER OF SAFETY &

SECURITY.....DEFENDANT

JUDGMENT

delivered on 27 March 2014

NZIMANDE A J

[1] The plaintiff sues for damages in respect of unlawful entry, search, arrest, detention and assault. The claim was initially against the Government of the Republic of South Africa and one police officer who was alleged to have committed the delicts. However, at the inception of the trial leave to substitute the Minister of Safety and Security as the defendant was granted by the Court. The claim against the second defendant was not pursued because the second defendant passed away before the matter could proceed.

[2] The summons is made up of two parts; for unlawful search, arrest and detention, claiming the amount of R300 000.00 in general damages in respect of:

breach of the plaintiff's right to freedom of movement; breach of the plaintiff's right to privacy; breach of the plaintiff's right to dignity; breach of the plaintiff's right not to be unlawfully arrested and detained; contumelia and humiliation suffered

and for assault in which an amount of R500,00.00 is claimed as a global sum, in respect of pain and suffering, loss of amenities of life, loss of enjoyment of life, disfigurement, disability and general health.

[3] At the inception of the trial both parties moved a joint application for the separation of the issues of liability and quantum. The application was duly granted by the Court, ordering that the trial should proceed solely on the issue of liability.

[4] It is trite that the defendant bears the onus of proving that:

(a) a warrantless search of the house - see *Ndabeni v Minister of Law and Order* and another 1984 (3) SA 500 (D) at 571 D – E and

(b) a warrantless arrest and detention of a person suspected of committing a crime listed in Schedule 1 of the Criminal Procedure Act 51 of 1977 – see *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818 G – H

were lawful. In this regard the provisions of Section 22 and 40 of the Criminal Procedure Act No. 51 of 1977 and Section 11 of the Drugs and Drug Trafficking Act No. 140 of 1992 will come into play.

With regard to the claim for assault, the plaintiff bears the onus to prove his case on a balance of probabilities.

[5] However, the plaintiff decided to lead evidence first, testifying himself and also calling one other witness, one Satyelwa Lilian Mtatyana (Mtatyana). The defendant called the three police witnesses who testified orally and under oath, namely Detective Warrant Officer Elliot Nkonko (Nkonko), Lieutenant Colonel Manko Amelia Nketu (Nketu) and Sergeant Lance George Mara (Mara).

[6] It is common cause that:

(a) the police searched the premises of the plaintiff without a warrant on 21 October 2006;

- (b) the plaintiff was arrested and detained in hospital by the police on 21 October 2006;
- (c) Dagga was shown to the plaintiff by the police at the plaintiff's house.
- (d) The plaintiff sustained injury to his left leg in the course of his arrest;
- (e) According to the charge sheet (pages 54 – 59 of Bundle “A”) the plaintiff
- (i) was in custody and was granted bail on 10 November 2006.
- (ii) was charged with dealing in dagga and assault
- (iii) that the charge was withdrawn on 06 December as the Police docket was not at Court.

[7] The plaintiff testified that he was born on [...] and resides at Nyaniso, Masimangeni Village, Maluti District in the Eastern Cape. On the day in question five police officers in full blue police uniform jumped over his fence and approached him whilst he was sitting alone in his yard. Without introducing themselves they asked him about the dagga that he was allegedly selling. After he had told them that he was not selling dagga, the police instructed him to open the door to his house. As the Chairman of the Community Policing Forum (the Forum), he complied, as he knew that he had to obey police instructions. When the police entered his house he followed them into the dining room where he operated a tuck shop. The police then conducted a search of the dining room and the bedroom, which was situated to the right of the dining room. On searching the bedroom the officers opened wardrobes, lifted his mattress and threw items to the floor.

[8] Thereafter the police came right up to him, held him by the collar of his T-shirt and demanded dagga and a firearm. The plaintiff could not say anything, as he was in a state of shock. The police then started punching and clapping him on the head, which caused bleeding from his nose and mouth.

At that stage the plaintiff managed to run out of the house through the front door, where he encountered more police officers who then joined the others in assaulting him. By that time he was in an open space where his neighbours could witness this assault. He was also being kicked with booted feet from all angles by the police, until he fell down. He then realised that he had dislocated his left knee.

Constable April (April), whom the plaintiff alleged had caused his fall, then lay on top of him, throttling him with his hands. The plaintiff raised his head, lunged forward and bit April on the cheek, causing him to release the plaintiff.

[9] The police officers then left the plaintiff and searched all over his premises. On their return they instructed him to get up, enter his house and point out a firearm. Due to his dislocated knee, he could not walk, so he crawled backwards on his hands and buttocks, dragging his legs until he reached the dining room. At all times the police continued to kick him, telling him to point out the firearm. Plaintiff told them that there was no firearm in his house. Thereafter, on instructions from the police officers, he crawled to the police vehicles which

were parked outside his premises. One Thokozani Mvumvu (Thokozani) helped him to climb into the police van. As the police did not say anything, the plaintiff assumed that he was being arrested. He was taken to the Lukholweni Police Station, where no rights were explained to him. However, the police made him sign a typed document which they claimed contained his rights. He was later taken to the Taylor Bequest Hospital in Matatiele and the police took him to the X-ray department. Thereafter he was referred to Edendale Hospital in Pietermaritzburg on a stretcher.

- [10] He stayed in Edendale Hospital for three weeks and his leg was put in plaster. Thereafter he asked to be released because he was worried about his perishable commodities in his tuck shop. He was transferred to Matatiele Hospital in the hospital ambulance thereafter Nketu and another police officer picked him up in police vehicle, first taking him to Mount Fletcher and then to Lukholweni Police Station, where he was detained for three days. He was not told why he was detained and three days later he appeared at Maluti Magistrates' Court where he was granted bail of R1 500.00 and released. However, when he went to Court again he was told to claim his bail money because his matter had been withdrawn.

He then proceeded to Maluti Police Station to complain about the actions/behaviour of the police where he was referred to Lukholweni Police Station to lay a charge about the incident which resulted in his injuries. When he got there he submitted a written statement which was recorded by the police in a foreign language, meaning it was not in isiXhosa. The police then told him to leave, promising to give him a case number later which never occurred.

When he approached the Police Station again he was informed that the police docket had gone missing. Some time later Nketu came to him and took down his statement, but nothing ever happened about his complaints against the police. At some stage he even wrote to the Provincial Police Commissioner but in vain.

- [11] Under cross-examination he confirmed that he had been the Chairperson of the Forum in October 2006 but not since 2003. He was aware that Nketu was the station Commissioner but denied that he frequently interacted with her in his official capacity prior to the 21st October 2006. He further denied that on discharge from the hospital he was taken to his home by Nketu, insisting that from hospital he was taken into custody at Lukholweni Police Station. He denied that Nkonko would have informed him of the date on which to appear in Court because he was never taken home when he was discharged. When it was put to him that in his evidence-in-chief he had stated that April had been lying on top of him he denied it, and that he could not remember saying this because he had been upset when giving evidence the previous day. He denied that any rights were explained to him and also that three parcels of dagga were found on the window sill in his dining room. He also denied that he told the police the dagga that was found was for his personal use as he smoked dagga. He also denied that the police had found him smoking dagga when they arrived. He denied that he had tried to reach April's firearm. He denied that he had grabbed April from behind, pushed him to the ground and sat on him. He denied that he tried to escape but had slipped by the corner of his house on an uneven surface, falling and colliding with the wall of his house. He

denied that police officers assisted him from his house to the police van.

- [12] The plaintiff further stated that after he had fallen down, April bent over him and throttled him. The plaintiff confirmed that April bled from his cheek where he had bitten him. He stated that he did not bleed anywhere else other than from his nose and mouth. He sustained further injuries in the form of bruises on his face and a swelling on his lower lip
- [13] He stated that he was handcuffed when he was already in the police van. He confirmed that dagga was found on his premises but stated that he did not know exactly where. He HHe confirmed that the police had shown it to him and that it was contained in plastic bags, inside a 10 litre bucket. However, he stated that he did not see where the bucket was found.
- [14] When asked why he had not mentioned this earlier in his evidence, his answer was that he had forgotten to mention it. When he was referred to paragraph 6 of his statement to the police, where he stated that the police had searched his person on the day in question, he said that he could not recall being searched. When he was referred to paragraph 10 of his statement, where he mentioned that Thokozani had been inside his premises, he repeated that he had forgotten about this because when he gave evidence-in-chief he had become emotional. Questioned by the Court he stated that when he went to the police van the gates to his house had already been opened. This concluded the evidence of the plaintiff.
- [15] Mtatshana testified that she is 43 years old and unemployed. She lives in Peddi in the Eastern Cape. In October 2006 she lived at Masimangeni in Matatiele and she knew the plaintiff as her neighbour at Masimangeni. Since 2010 her eyesight had become dim due to overdose of medication for TB. On 21 October 2006 she was at home during the day doing washing outside her house. Her house and that of the plaintiff were separated by a thoroughfare for pedestrians and her house was lower than that of the plaintiff. She noticed three police vans stop on the road behind the plaintiff's house, and that one of them was marked with the words "Aliwal North". Thereafter a number of police officers alighted and proceeded to the side of the tuck shop at the plaintiff's house. When they came to the gate they said the gate was locked, and they then jumped over the gate. From where she was she could not see the other gate to the plaintiff's house as it was obscured by the plaintiff's house. At that stage she could not see the plaintiff but she could hear loud voices from the house saying "you are selling dagga yet you are a member of the Forum". Thereafter one police officer came from the house and opened the gate for more police officers to enter the plaintiff's premises.
- [16] Thereafter the police officers walked around the yard while she continued with her washing. When she later raised her head she saw the plaintiff sitting on the ground leaning against the wall of his house, and the police officers were busy kicking him. The plaintiff was shouting asking why he was being assaulted and the plaintiff later told her that the police officers had injured him. He threw his cell phone into her yard and asked her to make a phone call to his brother. She then picked up the cell phone and went into her house to make the call as she did not want the police to overhear her conversation. She did not see any injury on the plaintiff's body at that stage as he was a distance away from her.

- [17] The police called her to the plaintiff's house where she observed that the plaintiff's left knee was swollen and his pants were completely torn from the knee area to the foot on his left leg. Then Nketu pointed to the dagga that was allegedly found in the plaintiff's house which was contained in plastic bags inside a bucket. One of the police officers told the plaintiff to walk to the police van, but the plaintiff crawled into his house using his hands and buttocks moving forward, as he could not walk.

The plaintiff eventually left his house through the kitchen door when he proceeded to the police van. His hands were free all the time until he reached the van. When he could not climb into the van a certain male person in the van helped him. When the police vehicles drove away, she went to lock the plaintiff's gates. She saw the plaintiff again when she visited him at Edendale Hospital and again at Maluti Magistrate's Court. She did not know how the plaintiff got there as he was already in Court when she found him. She paid his bail and accompanied him home.

- [18] Under cross-examination she stated that on the day in question she had known the plaintiff for thirteen years, since 1994. She did not see the plaintiff sitting in the yard when the police arrived. She was unable to estimate the distance from the front of the plaintiff's house to where she was sitting doing her washing. She disputed that only three police officers entered the plaintiff's house. She further stated that some neighbours were watching the incident from the local church, which is situated in front of the plaintiff's house. When questioned by the Court she stated that she did not know why the plaintiff had never mentioned the cell phone in his evidence. She confirmed that she did not witness the bleeding from the plaintiff's face. This concluded the case for the plaintiff.

- [19] Nkonko stated he is a Detective at the Mount Fletcher police station and has twenty years' service. During October 2006 he was a Detective-Sergeant stationed at Lukholweni Police Station at Masimangeni. At that time, the Nketu was the Police Commissioner. On 21 October 2006 whilst on duty he was involved in a search operation for dagga as well as shebeens, led by Nketu who had received some information from a police informer. He was also accompanied by Mara and April from Aliwal North Police station. En route to the plaintiff's house they apprehended one Thokozani, who was a suspect in a housebreaking matter. Thereafter they proceeded to the plaintiff's house where they found the plaintiff standing outside in front of his house smoking dagga. Nketu had remained in the vehicle guarding Thokozani. April then introduced the police to the plaintiff and all the officers produced their appointment certificates. April explained to the plaintiff the purpose of their visit, which was they had information that he was dealing in dagga. Plaintiff denied this whilst he continued to smoke dagga. Nkonko's attempt to stop him from smoking fell on deaf ears and he realised that the plaintiff was belligerent or arrogant. He decided to ignore him in order not to hinder their attempt to get what they wanted. April then asked permission to search the plaintiff's house and he agreed to this, but maintained that he was not dealing in dagga.

[20] Three officers then entered the house through the dining room door accompanied by the plaintiff. They discovered that a tuck shop was operating from there. On searching the dining room April found three parcels on the window sill, which turned out to contain dagga. April asked who the owner of the parcels was, and the plaintiff replied they belonged to him and that he kept the dagga for smoking. Since the officers had received information that dagga was hidden in the plaintiff's yard they then asked for permission to search his yard as well. They left the house with the plaintiff without searching any other rooms. April found an area in the garden where weeds were growing, but also had a section of lawn that had been cut and placed there. When the lawn section was removed by April he discovered a bucket or pail which he found to contain Ntsu tobacco and two bags half full of dagga. April asked the plaintiff about the ownership of the dagga and he replied that it belonged to him as he used it for smoking. The plaintiff's rights were then explained to him by April and he was advised that that he was being arrested for dealing in dagga. April read out his Constitutional rights from his pocket book in isiXhosa. April then attempted to handcuff the plaintiff but the plaintiff grabbed April by his clothing in the chest area, punching him and also reaching out for April's firearm which was in his holster on his left side. However Mara was able to quickly remove the firearm from April's holster and moved away from the

altercation. Plaintiff then caused April to fall to the ground and sat on him, clapping him whilst he was on the ground. Nkonko and reserve Constable Nketu grabbed the plaintiff, trying to remove him from April but the plaintiff managed to bite April on the cheek. Ultimately the police managed to remove the plaintiff away from April and they handcuffed the plaintiff with his hands behind his back.

[21] They released their hold on the plaintiff in order to get him to the police van. However, the plaintiff then started running towards the back of his house and when he was about to round the corner of the house his left foot slipped and went under his right foot. He then fell down, and was leaning against the wall of the house. When the police officers reached the plaintiff they realised that he was unable to rise and they discovered that the plaintiff's left knee had been dislocated to such an extent that his foot was facing backwards. Nketu then arrived at the scene and instructed the police officers to take the plaintiff to the police van and he was driven to the police station. From there the plaintiff was taken to Taylor Bequest Hospital in Matatiele. The witness saw the plaintiff again after he was released from hospital. The plaintiff's leg was in plaster when he was released and Nkonko accompanied Nketu to take the plaintiff to his house in a police vehicle. As the investigating officer, he reported to the prosecutor at Maluti that the suspect had been hospitalised. The plaintiff appeared in the Court at Maluti on 10 November 2006 and prior to this he had not been kept in the police cells because of his injured leg. He confirmed that they did not have

a warrant for the arrest of the plaintiff on the day in question, neither did they have a search warrant, but it was their Commander's

decision to search and arrest the plaintiff. He never noticed any bleeding on the plaintiff's face.

- [22] During cross-examination he confirmed that the dagga was weighed on the same day in the plaintiff's presence at Lukholweni Post Office, before he was taken to hospital. The plaintiff was lifted and taken into the Post office, and placed on a chair in order for him to witness the weighing process. He stated that he had recorded the weight in his pocket book because he was in a hurry to take the plaintiff to hospital. The pocket book would have been filed at Lukholweni Police Station. He confirmed that he had told the prosecutor that he had written down the weight of the dagga as 2.4 kgs in his pocket book. He stated that he did not file a statement in the docket in response to the instruction by the prosecutor because when he verbally discussed it with her she had been satisfied with his explanation. He was subsequently transferred to Mount Fletcher in December 2006 and denied that he conducted a sloppy investigation into the criminal charge against the plaintiff. He admitted that he had discussed this case with Nketu after the trial had commenced. He further admitted that he had taken down the plaintiff's statement in connection with the plaintiff's complaint against the police and that his statement was identical to that of April. He was adamant that the handcuffs were removed from the plaintiff upon his injury. Questioned by the court he stated that he did not see the plaintiff's leg hit the wall as the plaintiff fell down.
- [23] Nketu is a station Commissioner at Sterkspruit Police station and she has twenty five years' service. She testified that on the day in question she held the rank of Captain and she was the station Commissioner at Lukholweni Police Station. When she came to Lukholweni police station in 2006 the plaintiff was already the Chairperson of the Forum. She confirmed that she was the Commander of the search operation carried out by the police at the plaintiff's house on the day in question, as a result of information received from a police informer. No search warrant was secured because the information received related to a quantity of dagga that was going to be removed from the plaintiff's house to another location. She believed that she would have got the search warrant if she had applied for one. When police officers entered the plaintiff's premises she remained in the police motor vehicle outside, interviewing Thokozani. When she heard a noise emanating from the plaintiff's house she went to investigate whereupon she found the plaintiff on the ground outside, near the corner of his house with his shoulder against the wall. The plaintiff reported that the police had injured him. She also observed that April was injured on his cheek.
- [24] The police officers then loaded the plaintiff into the police van because of his dislocated knee. The dagga that was allegedly found at the plaintiff's house was taken to the police station, together with the plaintiff. The plaintiff was taken to the clinic and then to the local hospital. En route to hospital the police stopped at the local Post Office to weigh the dagga allegedly recovered from the plaintiff. This was done in front of the plaintiff. She saw him again on 6 November 2006 when she and Nkonko took the plaintiff to his house from Matatiele hospital. She then instructed Nkonko to arrange with the prosecution regarding the plaintiff's first appearance in court. She never had any further dealings with the plaintiff after the first appearance in court.

- [25] During cross-examination she conceded that in 2007 she submitted a second statement in this case as the first one had allegedly gone missing. She confirmed that the informer told her that the plaintiff was storing and selling dagga and larger quantities were stored underground in the plaintiff's yard. She denied that the plaintiff was lying down by the side of the house where the police vehicles were parked. She also denied that the handcuffs were removed from the plaintiff at the scene. She also denied knowledge of the plaintiff's complaint against the police. She further denied that the arrangement not to detain the plaintiff was some kind of house arrest. She denied that she had discussed this case with Nkonko at the B&B. Finally she denied that her evidence was merely a police cover up.
- [26] Sergeant Lance George Mara (Mara) is stationed at the K9 Unit of the South African Police Service in Aliwal North, and has twelve years' service. He confirmed that on 21 October 2006 he was involved with Nkonko and April in the search conducted at the plaintiff's house, where the dagga was uncovered. They found the plaintiff standing in the yard in front of his door smoking dagga. April introduced the police officers to the plaintiff and told him the purpose of their visit. April asked for permission to search the house and plaintiff gave his consent. On searching the dining room, April found three rolled parcels of dagga on the window sill. Plaintiff stated that the said dagga was for his own use. Thereafter the police searched the yard in the company of the plaintiff who was still smoking dagga.
- [27] Some dagga was found buried in the yard by April. This was contained in a 10 litre bucket and Ntsu snuff tobacco bags. April then told the plaintiff that he was being arrested and explained his constitutional rights to him. He confirmed that he saw the plaintiff reach out for April's firearm and quickly retrieved the firearm from April's holster and moved away. A struggle between April and the plaintiff ensued and eventually both fell down with the plaintiff ending up sitting on top of April. Nkonko and other police officers managed to hold the plaintiff's arms, but the plaintiff was able to bend forward to bite April on the cheek. The police officers handcuffed the plaintiff who then suddenly ran away, falling down as he approached the corner of his house. As a result of this fall the plaintiff sustained a dislocation of his left knee. Nketu then arrived on the scene and instructed the police officers to take the plaintiff to the police vehicles. The plaintiff was taken to Lukholweni Police Station where he was formally charged. Mara then left the charge office to feed the police dogs and exercise them.
- [28] Under cross-examination Mara stated that the plaintiff's fence consisted of barbed wire around wooden poles. The gate was also made of wire and wooden poles. He confirmed that the plaintiff was arrogant towards the police but that he gave permission to search, saying that the police would not find anything. The police officers then spread out and searched the yard. He did not know why the plaintiff bit April and denied that the plaintiff used his hands to crawl to the police motor vehicles.

[29] I will not refer to the heads of the argument in minute detail. However, it is clear that the plaintiff challenges the defendant's evidence on the basis that there were immaterial contradictions and improbabilities, which render the defendant's case false,

unreliable and lacking credibility. Such discrepancies, it is argued, include the following questions, inter alia:

whether the police informer referred to the specific locations of dagga at the plaintiff's house;

why the plaintiff bit April; how the plaintiff sustained his injury;

the weighing of dagga;

the detention of the plaintiff at his house post hospitalisation;

the missing police statements and the withdrawal of the charge against the plaintiff.

The plaintiff further argues that the court should draw an adverse inference from the defendant's failure to produce critical information or call the necessary witness. It was also submitted by the plaintiff that the Court should find that the entry, search, arrest and detention of the plaintiff was unlawful and illegal.

With regard to the second claim, the plaintiff submits that he testified openly and honestly, with an accurate and clear recollection of all material and relevant facts, despite the lapse of almost seven years since the incident. The plaintiff did not contradict any circumstantial evidence in any material way. It is further argued that Mrs Mtatyana was a credible reliable and independent witness.

[30] The defendant submits that all the three witnesses called by the defendant were forthright in their evidence and that the plaintiff's version is not probable. Alternatively, it is argued that certain difficulties exist in the case for both the plaintiff and the defendant and that as such, this case should be determined by the onus of proof.

[31] I now turn to the statutory provisions mentioned in paragraph [4] above. I must hasten to say that these provisions were not referred to in evidence but only surfaced in the defendant's heads of argument.

Section 22 of the Criminal Procedure Act provides:

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20;

- (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or the premises consent to such search and the seizure of the article in question; or
- (b) if he on reasonable grounds believes:-

- (i) that a search warrant will be issued to him under paragraph (a) of Section 21(1) if he applies for such warrant; and
- (ii) that the delay in obtaining such warrant would defeat the object of the search.”

In the case of *Magobodi v Minister of Safety and Security & Another* 2009 (1) SACR 355 (Tk) at 360G Miller J held that proper consent in terms of Section 22 (a) of the Act must be voluntary. I am satisfied that in this case the plaintiff voluntarily gave consent, as in his own words he stated that he has respect for the police. In the circumstances the defendant’s evidence in support of Section 2 (b) was superfluous.

Section 11(1) of Act 140 of 1992 provides, inter alia, that:

“A police official may if he has reasonable grounds to suspect that the offence under this Act has been or is about to be committed by means or in respect of any scheduled substance, drug or property, at any time:-

- (i) Enter or board and search any premises, vehicle, vessel or aircraft on or in which any substance, drug or property is suspected to be found;
- (ii) Search any container or other thing which any such substance, drug or property is suspected to be found.”

I am of the view that the evidence proves that the police complied with the statutory provisions relating to search including Section 11 of Act 140 of 1992, as dagga is a drug mentioned in the schedule to this Act.

Section 40(1) of the Criminal Procedure Act provides:

“A police officer may without a warrant arrest any person:-

- (a) who commits or attempts to commit any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule I other than the offence of escaping from lawful custody.....”

In the case of *Minister of Safety and Security v Sekhoto & Another* 2011 (1) SACR 315 (SCA) the Court held that in terms of Section 40 the purpose of the arrest must be to bring the arrestee before court. I am satisfied that the arrest of the plaintiff was necessitated by the uncovering of a large quantity of dagga from his premises, which is an offence in terms of the law. Evidence revealed that the plaintiff was formally charged in the criminal court for dealing in dagga and assault.

[32] The plaintiff’s argument that this was a sting operation by the police begs the question as to why the police chose the plaintiff’s house out of all the houses in the village of Emasimangeni. In the circumstances, my view is that it is highly improbable that the police officers would have embarked on such a search without just cause. Common sense dictates that if the plaintiff was detained by the police immediately after his arrest, he would have

been placed under police guard for the duration of his hospitalisation. However, the circumstances dictate that this was not the case. Upon discharge from Edendale hospital the plaintiff was transported to Matatiele by ambulance. It is only then that he contacted Nketu to provide transport for him. In my view this also gives credence to the version that the plaintiff was not detained by the police upon his discharge from hospital.

- [33] In all the circumstances of this case I find that the police witnesses were clear, honest and forthright. These witnesses corroborated each other in all material respects. The contradictions existing in the defendant's evidence were of no material nature. I am satisfied that the police officers acted within the ambit of the relevant statutory provisions in relation to the search of the plaintiff's house and the arrest of the plaintiff on the day in question.

My findings are based on the facts which are common cause as well as the corroborated evidence of the defendant. The presence of dagga at the plaintiff's house is not disputed, only ownership thereof. This in essence lends support to the defendant's version that the police witnesses were justified in arresting the plaintiff. In my view the weight of dagga therefore bears no relevance to the wrongfulness of the arrest.

- [34] The plaintiff is a single witness on the claim of assault. This is so because the second witness for the plaintiff categorically stated that she did not witness how the plaintiff sustained his injury. The plaintiff's version that he bled from his nose and mouth due to the kicking and punching at the hands of the police was not supported by the available medical evidence (J88 form). Even on the nature and extent of the injury he sustained, the plaintiff's version was not supported by any medical evidence to prove that such injury would have been caused by the booting only.

- [35] I am satisfied that the defendant has succeeded in justifying the search of the plaintiff's premises without a warrant. I arrive at a similar conclusion with regard to the arrest and detention (if any) of the plaintiff. Finally I find that the plaintiff has failed to discharge the onus to prove that his injury was caused by the police.

In the circumstances I make the following order:

The plaintiff's claims are dismissed with costs.

NZIMANDE AJ

Appearances /

Appearances:

For the Applicant : Mr. A. R. Duminy

Instructed by: McLeod & Associates

Matatiele

For the Respondents : Ms S. Takchund

Instructed by: State Attorney KZN

C/o Cajee Setsubi Chetty Attorneys

Pietermaritzburg

Date of Hearing : 04, 06, 18, 19, 26 September 2013

Date Judgment delivered : 27 March 2014

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Prepared on 11 October 2026 · Esheria