

SOUTH AFRICA / JUDGMENT

Nyamanda v Minister of Police (2400/2009) [2022] ZAECKMKHC 60 (6 September 2022) [2022] ZAECKMKHC 60

COURT

Eastern Cape High Court, Makhanda

BEFORE

N G Beshe

CASE / FILE NUMBER

2400/2009

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE DIVISION, MAKHANDA)

Case

No: 2400/2009

In

the matter between:

SISA
SYDNEY
NYAMANDA
Plaintiff
And
MINISTER
OF POLICE
Defendant

JUDGMENT

BESHE J:

- [1] Plaintiff initiated an action for damages against the defendant in connection with an incident that occurred on the 18 July 2008 at or near Joza Township in Makhanda. Initially, plaintiff's claim fell under two heads, being: (i) unlawful arrest and detention and (ii) wrongful and unlawful assault. Both delicts were alleged to have been perpetrated by members of the South African Police Service who were acting within the scope of their

employment as servants of the defendant. The claim for unlawful arrest and detention has since been abandoned by the plaintiff. The court is now called upon to determine whether the plaintiff has a claim against the defendant for assault.

- [2] Plaintiff pleaded that he was unlawfully assaulted by members of the SAPS whose full and further particulars are unknown to him except that they included Warrant Officers Siebriets, Sweeney and Oelofse. He further pleaded that he was assaulted by means of being doused with pepper spray on his face and eyes, punched and kicked with booted feet repeatedly on his body even after having been handcuffed.
- [3] Defendant in turn denied that plaintiff was wrongfully and unlawfully assaulted by its members. In amplification thereof pleaded that members of the defendant only used reasonable, necessary and minimum force in the course of arresting the plaintiff who was avoiding a lawful arrest effected on him by members of the defendant. The use of pepper spray is admitted by the defendant it being alleged that it was used in a bid to overcome resistance by the plaintiff.

Common cause factors

- [4] The plaintiff and his wife were both members of the defendant at the time of the incident. During the evening in question, plaintiff's wife was on night duty whilst plaintiff was home. Both were attached to the Grahamstown Police Station. Plaintiff was visited by Colonel Cassim (Cassim) together with Captain Mamothubi (Mamothubi) who were also stationed at Grahamstown Police Station. The intention was to take the plaintiff to the police station in connection with a case or inquiry that had been opened by a Director Moyakhe. It appears to be common cause that present at the scene were also four to five other police vehicles and approximately ten policemen in addition to Cassim and Mamothubi. The ten or so officials were surrounding plaintiff's yard. Plaintiff, Mamothubi and Cassim proceeded to the motor vehicle in which the two officials (Mamothubi and Cassim) were travelling. It is common cause that plaintiff later disembarked from the said motor vehicle. The versions of the parties diverge as to what happened thereafter.

Evidence in support of Plaintiff's case

- [5] Three witnesses testified in support of the plaintiff's case. A medical report that was compiled by Doctor Santhia who examined the plaintiff was also handed in by agreement between the parties. Witnesses who testified in support of plaintiff's case were: The plaintiff and his two neighbours Messrs Makina and Mahabeni a retired petrol attendant and male nurse aged 72 years and 63 years respectively.
- [6] According to the plaintiff, following discussions he had with Cassim and Mamothubi in their motor vehicle whilst waiting for his wife to be dropped off from work so that their child would not be left alone, he needed to go and get a document that he mentioned during the discussions, from his house. He disembarked from the car and proceeded towards his house. It was at that stage that he met five policemen. He was told he was under arrest,

when he asked why he was being arrested, the response he got was being pepper sprayed, pushed to the ground, pinned down, handcuffed, kicked and trampled. All throughout the assault he was pleading with his colleagues not to assault him. After the assault which took place inside his yard he was made to get up. At that stage, he could not see. Once outside his yard he was once again caused to fall, this time on a heap of sand and his colleagues continued to assault him. They stopped after his wife who by then had arrived at the scene, screamed asking why they were assaulting him. At that stage a number of people had converged on the street to watch the spectacle. After the second episode of the assault he was thrown into the back of the van with his hands cuffed. He emerged from the incident with left eye that was bruised and bleeding, a sore knee, pains all over his body and head as a result of being kicked and trampled. He sustained a bulge at the back of his head. He was very distressed, felt embarrassed, small, that his self-esteem had been lowered in the eyes of his neighbours who witnessed the assault on him by his colleagues. He had to receive counselling and psychiatric

treatment. He now takes chronic medication for depression.

[7] In his report, Doctor Santhia recorded the following injuries:

- 3 cm laceration on the left occiput;
- Abrasions with swelling and tenders on the left temple;
- Left subconjunctival haemorrhage involving the outer left eye;
- Tender swelling with abrasions over the left zygoma;
- Tender medial aspect of the right knee;
- Tender upper back.

The plaintiff was examined at 02h30 on the 19 July 2008. Doctor Santhia concluded that the injuries are consistent with history of assault by kicking over the head and body.

[8] Both Makina and Mahabeni testified that their attention was drawn to the incident involving the plaintiff by noise which sounded like a number of people who were talking loudly. Makina had seen plaintiff on his return from work earlier that evening and he was looking normal. Makina saw plaintiff being brought towards his gate by police. He observed that his hands were handcuffed to his back and he was being

assaulted. Plaintiff was asking why the police were assaulting him. He witnessed plaintiff being thrown on top of a heap of sand next to his gate. He observed that there were several policemen around but could not say how many of them assaulted the plaintiff. The plaintiff was kicked and trampled on. He was shocked to see a policeman being assaulted by his colleagues in front of many

onlookers. The police thereafter lifted the plaintiff by holding him on both sides and threw him inside the back of the police van like a bag of salt, according to him. He did not observe plaintiff doing anything to his colleagues before being bundled into the back of the van. Similarly, Mahabeni noticed the plaintiff lying on top of a heap of sand being assaulted with four to five policemen around him. They were trampling on him and kicking him all over his body. Both witnesses were cross-examined at length but were adamant that plaintiff was assaulted at the time he was lying down and not doing anything to his colleagues. Mahabeni could only testify about what happened to plaintiff outside his yard.

Defendant's case

[9] The only witness who testified in support of defendant's case was Warrant Officer Sweeney (Sweeney). At the time of the incident he was attached to the crime prevention unit of the Grahamstown Police Station. He confirmed that the complement of members per shift was between nine and ten members. On the day in question, members of his unit were briefed about the impending arrest of the plaintiff in connection with attempted murder charges laid against him by Moyakhe. They set off to plaintiff's place in a convoy of approximately four to five motor vehicles. Senior officers were going to speak to the plaintiff first and would then call them to action when required. Meanwhile Sweeney and members of his unit took positions outside plaintiff's perimeter fence and monitored the situation. He observed the plaintiff walking from his house to the motor vehicle in which the senior officers were driving in the company of Cassim and Mamothubi. The three got into the officers' motor vehicle. Sweeney moved towards the plaintiff's front gate. At that stage he observed plaintiff jumping out of the officers' motor vehicle and approaching them at a fast past and uttered the words "fuck off my yard". Sweeney then placed his hand on plaintiff's shoulder. Plaintiff pushed his hand away and swung his hand and hit him on the chest. His colleague, Siebert warned plaintiff to co-operate failing which he will pepper spray him. Meantime Sweeney was trying to hold plaintiff's hands without success. Siebert warned plaintiff for the second time and then pepper sprayed him. Plaintiff became more aggressive and ran towards the fence. They

chased him and caught up with him and tripped him in a bid to immobilise him so that he could be handcuffed. This caused the plaintiff to fall on his stomach. Still, plaintiff did not co-operate and resisted being arrested. They pulled his arms towards his back with one officer pressing his feet down to stop plaintiff from kicking them. Sweeney placed the handcuffs on the plaintiff, got him off the ground, out through his gate and placed him on a heap of sand. He denied that plaintiff was kicked and trampled on in his presence. After the plaintiff had been placed on a heap of sand outside his yard, Sweeney left to go and get the police van. Plaintiff was then placed at the back of the van. He does not know what happened in his absence. He did not at any stage see any of the officers assaulting the plaintiff. He confirmed that plaintiff sustained some injuries which he observed at the police station. He confirmed that plaintiff remained handcuffed at the police station, in what he termed a 'prep room' as opposed to a cell. Explaining that plaintiff who was still being processed, was kept in handcuffs because he was violent. Plaintiff testified that

after he was placed in a cell he remained in handcuffs until a colleague from Seven Fountains, Constable Hector (Hector), came to lock up someone. It was after his intervention that handcuffs were removed. In a statement Sweeney submitted in connection with the matter he apparently stated that plaintiff at some stage reached for his firearm. When asked if that was a misleading statement, he said he had nothing to say in that regard.

[10] It also emerged that all the policemen in Sweeney's company including Sweeney had firearms.

Discussion

[11] In light of the evidence, it is apposite to remind one's self of the defendant's plea to the plaintiff's claim (assault). It was pleaded that the police used minimum force in order to arrest the plaintiff who was resisting a lawful arrest. Use of pepper spray was admitted. Kicking and punching even after the plaintiff had been handcuffed was denied. In respect of the allegation that plaintiff sustained body injuries (specified) as result of the assault, this was denied by the defendant. Alternatively, if he sustained any injuries which is denied (my underlining) defendant pleads that he has no knowledge of who inflicted them or when plaintiff sustained same. We know that Sweeney observed the injuries when plaintiff was in the police cells that evening. So, defendant cannot deny that plaintiff had sustained some injuries that evening. The injuries were also confirmed by the doctor who examined the plaintiff a few hours after the arrest in the early hours of the 19 July 2008. The arrest is alleged to have taken place at about 21h00 on the 18 July 2008.

[12] The defendant has admitted the assault on the plaintiff in the form of pepper spray but claim same was used to overcome the resistance that was put up by the plaintiff. The rest of the assault as alleged by the plaintiff is denied.

[13] The defendant only admitted that plaintiff was pepper sprayed and that such was justified. The bulk of the alleged assault is denied. It is trite that the onus to prove that the assault on the plaintiff was lawful (minimum force in a bid to thwart resistance by the plaintiff) rests on the

defendant. What the court said in *Mabaso v Felix*[1], in my view applies with equal force in the present circumstances. Namely that the onus to prove that the assault was on the plaintiff was justified because of some statutory provision, rests on the defendant.

[14] From the pleadings, the parties appeared to have divergent versions as far as the assault on the plaintiff. However, from the only defendant's witness, Sweeney, it transpired that he was not in a position to deny that the plaintiff was assaulted in the manner he described. This is in view of the fact that on his version after the plaintiff was placed on top of the heap of sand he left the scene to go and fetch the police van. He does not know what happened in his absence. He did not witness any assault on the plaintiff. Barring of course the pepper spraying and the pinning down of the plaintiff after he had been caused to fall. So, plaintiff's evidence about how he was assaulted after being placed on the heap of sand is

uncontradicted. Plaintiff denies that he resisted a lawful arrest.

[15] What are the probabilities of plaintiff having resisted an arrest in the circumstances that are mostly common cause between the parties? Plaintiff and his wife worked at the Grahamstown Police Station, he was therefore well known to his colleagues. He was fetched from his house and walked freely with two senior officers. He sat with them in their motor vehicle for a while. How does one jump out of a stationary sedan? He is not said to have fled, he is said to have walked at a “fast pace” and towards his house. We know that there were a number of policemen at the scene all armed with firearms. Also at the scene, were four to five police vehicles. It seems improbable that plaintiff would have resisted an arrest in these circumstances.

[16] It is trite that in any civil case or criminal case, the onus can be discharged by adducing credible evidence to support the evidence of the party on whom the onus rests.[2] Trite also is the principle that where the versions are mutually destructive, the party on whom the onus rests can only succeed if he satisfies the court on a balance of probabilities that his version is true and accurate and therefore

acceptable, and that the version advanced by the other party is false or mistaken and falls to be rejected. See *SFW Group Ltd and Another v Martell et Cie & Others*[3] regarding the approach to be followed in the case of two irreconcilable versions.

[17] Earlier in this judgement I pointed out factors that point away from plaintiff having attempted to flee or resist an arrest. The version presented by the defendant is highly improbable in this regard and it is rejected as being untrue. Even if I were wrong in this regard, at the time when the plaintiff had his hands handcuffed to his back and having been pepper sprayed and immobilized when he was made to fall, there is no question of him being able to resist an arrest. It is not only the testimony of the plaintiff that the court must have regard to as to what was done to him. One of his neighbours, Makina saw plaintiff being taken out of his yard, with his hands cuffed and being assaulted. Both Makina and Mahabeni confirm what plaintiff said happened after he was made to lie face down on the heap of sand outside his yard. How he was trampled on and kicked and thereafter placed at the back of a police van. According to Makina plaintiff was thrown into the police van “like a bag of salt”. Their evidence has not been gainsaid. All Sweeney could offer in this regard was that the plaintiff was not assaulted in his presence. In any event, he cannot tell the court what happened after he left to fetch the police van. I have no difficulty in accepting plaintiff’s evidence as being credible and plausible. It is therefore my considered view that the assault on the plaintiff was unlawful and that the defendant is liable for the damages suffered by the plaintiff as a result of the assault on him by defendant’s employees.

[18] In considering what would constitute a reasonable award for the damages suffered by the plaintiff, I will keep in mind that an award for damages is meant to fairly and adequately compensate an injured party. That a court has a wide discretion to award what it considers to be a fair and adequate compensation to the injured party in the circumstances before it.

[4] Further that awarding general damages with reference to awards made in previous cases is fraught with difficulty. Furthermore that awards in previous cases are however a useful guide to what other courts have considered.[5] In the matter of Minister of Safety and Security v Seymour (see footnote 5) at paragraph [20]the following point was made:

“[20] Money can never be more than a crude solatium for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have

referred to reflect no discernible patterns other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.”

[19] Plaintiff’s claim in this regard was initially for damages in the sum of R800 000.00. In argument

before me, his counsel Mr Cole SC submitted that plaintiff’s claim could reasonably be quantified to be in the region of R350 000.00 to R400 000.00. On the other hand, Mr Wolmarans for the defendant submitted that an amount of R10 000.00 to R20 000.00 would be more than adequate compensation for plaintiff’s injuries together with the contumelia associated therewith.

[20] The plaintiff is forty-seven (47) years old. The incident happened fourteen years ago. He is still a member of the SAPS holding the rank of a Sergeant. He has since been transferred to Alice. Although now divorced, at the time of the incident he was married. He has two children. He together with his witnesses painted a picture of what appears to have been a sustained assault at the hands of his colleagues. A photograph of how he looked a few hours after the assault was exhibited in court. The photograph depicted his upper body, with his head and face partly covered in pieces of grass and what appears to be sand on the head, dried blood and swollen eye (partly closed). The injuries were also described by the doctor who examined him. He was criticized that the medical report made no mention of the lump at the back of his head that he testified about. His evidence was also criticized for lack of proof that he suffered from emotional pain in addition to the physical pain he felt, as a result of which he received psychiatric treatment and that he is on chronic medication for depression.

[21] Plaintiff had recently joined the SAPS when the incident took place. He was assaulted and manhandled by his colleagues in full view of members of the community, which included the two witnesses who testified in support of his case. His wife also witnessed the incident and tried to intervene on his behalf. There is evidence that his child was also at some stage witness to the incident. Makina testified that he was shocked to see a policeman being assaulted by his colleagues in front of many onlookers. Having been taken to the police station, the plaintiff remained handcuffed until a colleague from another police station intervened. Plaintiff also testified that he was only taken to see the doctor hours after his arrest. There can be no doubt that this must have caused the plaintiff a lot of anguish. When he recounted the incident in court, fourteen years after it occurred, plaintiff unable to

control his feelings, broke down and started crying. It is clear from the evidence that plaintiff suffered contumelia associated with the assault in the form of pain, shock, humiliation and anguish. The incident must have been traumatic.

[22] In my view, plaintiff will be fairly and adequately compensated by an award for R100 000.00.

Costs

[23] As indicated earlier, it was submitted on behalf of the defendant that in the event of the court finding that the assault on the plaintiff was not justified, an award in the amount between R10 000.00 and R20 000.00 will be more than adequate. Consequently, that the court should order costs on the Magistrates' Court's scale. Further that the defendant should be awarded costs in respect of the unlawful arrest and detention claim that was officially abandoned on the day of the trial. In this regard, I was referred to the matter of Ricardo Llewelen Korkie v Minister of Police[6] where Bloem J ordered that costs of suit should be on the Magistrates' Court's scale. This was on the basis that plaintiff in that

matter could have instituted the claim in the Magistrates' Court. This matter is distinguishable in that in the Korkie matter damages sought were for R450 000.00 and R200 000.00 respectively in casu, the claims were for total amount of R1 500 000.00. In respect of the assault alone, the claim was for R800 000.00.

[24] The reason for the abandonment of the claim for unlawful arrest and detention was that the plaintiff had only complied with the provisions of Section 3 of Act 40 of 2002[7] in respect of the assault claim. Granted that this was drawn to the attention of the plaintiff by means of a special plea as early as in 2009, I do not think that this would be an appropriate case to punish the plaintiff for his attorney's omission. And that I should exercise my discretion in favour of awarding costs to the defendant in this regard. It has not been brought to my attention that the defendant suffered any prejudice as a result of the abandonment of the claim in respect of the arrest and detention on the door step of the court.

[25] Accordingly, the following order will issue:

1. The defendant is liable for damages suffered by the plaintiff as a result of being unlawfully assaulted by his members on 18 July 2008.
2. The defendant is ordered to pay to the plaintiff the sum of R100 000.00 as and for damages for the aforesaid unlawful assault.
3. The defendant shall pay interest on the sum of R100 000.00 at the prescribed rate of interest from date of judgment to date of payment.
4. The defendant shall pay plaintiff's costs of suit, such costs to include plaintiff's cost of the photograph, Doctor Santhia's qualifying expenses, if any, and costs of Senior Counsel.

N G BESHE

JUDGE OF THE HIGH COURT

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Date Reserved : 9 June 2022

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[1] 1981

(3) SA 856 at 873.

[2] National Employers' General Insurance v Jagers 1984 (4) SA 437 ECD at 440.

[3] 2003

(1) SA 11 SCA at 14 – 15.

[4] Road Accident Fund v Marunga 2003 (5) SA 164 SCA at 169 [23].

[5] Minister of Safety and Security v Seymour 2006 (6) 320 SCA at 325 I.

[6] Case number 2129/2020 (Makhanda).

[7] Institution of Legal Proceedings Against Certain Organs of State Act.

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