

SOUTH AFRICA / JUDGMENT

Owies v Minister of Police (9891/2014) [2022] ZAWCHC 242 (21 November 2022)

[2022] ZAWCHC 242

COURT

Western Cape High Court, Cape Town

BEFORE

Mangcu-Lockwood

CASE / FILE NUMBER

9891/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 9891/2014

In

the matter between:

WILLEM
OWIES
Plaintiff
and
THE
MINISTER OF
POLICE
Defendant

JUDGMENT

DELIVERED ELECTRONICALLY ON 21 NOVEMBER 2022

MANGCU-LOCKWOOD, J

A.

INTRODUCTION

[1] The plaintiff has instituted a damages claim for injuries sustained in an alleged unlawful assault by members of the defendant at the Malmesbury Police Station whilst he was incarcerated there. He abandoned his claim relating to an alleged unlawful incarceration. This judgment pertains only to the merits of the claim, per agreement between the parties.

[2] Paragraphs 4 and 5 of the plaintiff's particulars of claim state as follows:

"4. On or about 25 November 2012 and at approximately 13h00 and at or near the Malmesbury South African Police Service Station, members of the SAPS unlawfully and wrongfully assaulted and incarcerated the plaintiff, which conduct on the part of the members of the SAPS constituted a wrongful and unlawful assault and incarceration.

5. In and as a result of the assault and incarceration of the plaintiff, the plaintiff sustained certain bodily injuries:

5.1 A head injury

5.2 Injuries to the cervical spine.

5.3 Injuries to the left leg.

5.4 Injury to the left arm.

5.5 Various other soft tissue injuries, bruises and abrasions over the plaintiff's entire body.

5.6 The plaintiff was detained for 24 hours."

[3] In response to paragraph 4 of the particulars of claim the defendant's plea states as follows:

"3.1 Save to admit that on 25 November 2012, the Plaintiff was arrested by members of the Defendant, Defendant denies each and every allegation contained in this paragraph as if specifically set forth and traversed.

3.2 In amplification of its denial and without derogating from the generality of the foregoing, Defendant pleads that:

3.2.1 Sergeant Coetzee (F) and Constable Abrahams were on duty in uniform on 25 November 2012;

3.2.2 They attended a telephonic complaint at 274 Alpha Street, Malmesbury ("the premises") at around 12pm;

3.2.3 When they attended at the premises, they were informed by one of the residents at the premises that the Plaintiff was drunk and was chasing people around the house with a knife and was generally being rebellious;

3.2.4 They were asked by the Plaintiff's brother to arrest the Plaintiff;

3.2.5 Plaintiff was formally arrested in terms of the Criminal Procedure Act 51 of 1977 (“the Criminal Procedure Act”);

3.2.6 Plaintiff was taken to the Malmesbury Police Station where he was formally charged and processed in terms of section 50 of the Criminal Procedure Act;

3.2.8 At no stage, during the Plaintiff’s arrest and transport to Malmesbury Police Station and/or detention in the police cells, was the Plaintiff ever assaulted by members of the Defendant nor did the Plaintiff sustain any injuries due to any actions on the part of the members of the Defendant;

3.2.9 Whilst the Plaintiff was incarcerated, Constable Cilliers was on cell duty and checked the cells every 30 minutes;

3.2.10 Plaintiff was asleep during the entire period and at no stage during the cell visits did the Plaintiff complain of any injuries;

3.2.11 Constable Cilliers released the Plaintiff at around 17h15 in terms of a J534 fine.

3.3 In the premises, Defendant denies that any of its members assaulted the Plaintiff or caused him any injuries between the time that the Plaintiff was arrested at 12:00pm and released at 17:15 pm.”

[4] The plaintiff called six witnesses, namely Mr Vuyo April, the ambulance driver; Mr Lesiba Solomon Somo, the ambulance assistant; Mrs Anna Owies, the plaintiff’s wife; the plaintiff; Mrs Magdalena Adonis, the plaintiff’s sister; and Mr Peter John Petersen. The defendant called one witness, Sergeant Stanley Gcinikhaya Ntshwanti.

[5] Mr Vuyo April was an ambulance driver from 1998 to

2020. In 2012 he was an ambulance driver for the Metro Emergency Services (“EMS”) in Malmesbury. On 25 November 2012, whilst he was on duty, he and an assistant Mr Lesibo Somo attended to a call to fetch a patient, who turned out to be the plaintiff, from Malmesbury Police Station, and take him to Swartland Hospital. The call came at 19h15 and they were dispatched at 19h17. They arrived at the Malmesbury Police Station at 19h20.

[6] Upon arrival, they parked the ambulance in front of the police station, close to the charge office. Inside the police station, there was only one police officer on duty. Mr April and his ambulance assistant were surprised, and asked the lone police officer why this was the case. When they enquired about the plaintiff, they were taken

by the police officer to the cells, where they found the plaintiff lying in the centre of the floor. There was no cell guard present. Mr April testified that it was not often, but they did occasionally have to fetch patients from the police cells at the Malmesbury Police Station.

[7] They approached the plaintiff inside the cell, and when they asked him what had happened, he responded that “die polisie het my geskop in die rug”. The plaintiff complained of back pain. They attempted to lift him but were unable to, so they went to the ambulance to fetch

the stretcher and a spinal board. According to Mr April's assessment on that day, the plaintiff had a serious spinal injury and was paralysed, and he (April) needed to ensure that the plaintiff was properly secured with a spinal board. He completed an Ambulance Patient Care Report Form ("the ambulance form") that night in which he made the following annotations regarding the plaintiff's complaints upon presentation: "Back pyn"; "fell & assaulted". Regarding the condition of the plaintiff, Mr April noted as follows: "intoxicated and back pain".

- [8] They transported the plaintiff to Swartland Hospital. However, later that same night, around midnight, they received an instruction that the person they had taken to Swartland Hospital was now disabled, and that they must transport him to Tygerberg Hospital for neurological surgery.
- [9] During cross examination Mr April was presented with police records which indicate that the plaintiff was released from police custody at 17h15, and that there are no records of phone calls made for an ambulance between 19h00 and 19h10. He stood by his evidence in chief.
- [10] He was further presented with documents from Swartland Hospital which indicate that the plaintiff remained there from 25 to 27 November 2012 and was discharged on 27 November 2012.
- 2012. There is no record of him having been transferred to Tygerberg Hospital from Swartland Hospital. Further, the Swartland Hospital records indicate that the plaintiff was released with crutches, an indication that there was no spinal injury. His response was that Swartland Hospital did not have facilities for neurological injuries, which is what the plaintiff needed assistance with, and they normally send such cases to Tygerberg Hospital. And in such cases, he explained, Tygerberg Hospital would not discharge a person immediately but would keep the person there for approximately a month.
- [11] Mr April was adamant that the plaintiff was their last ambulance call on the night of 25 November 2012 when they took him to Tygerberg Hospital at about midnight. The circumstances of the incident were vivid for him, he said. He remembered that there was a Xhosa lady doctor who was present together with another doctor when they fetched the plaintiff that same night from Swartland Hospital. He says he even spoke about the circumstances of the plaintiff at home and with colleagues because the injuries experienced by the plaintiff were very serious, involving injury to the c-spine. Even back then his view was that this was going to be a court case because it was not just about a drunk person but the drunk person had now incurred a serious injury.
- [12] It was put to him that the notes made in the hospital records make no mention of back pain. He was adamant that that was the complaint made to him by the plaintiff. He did not notice any bleeding or any other injuries on the plaintiff.

- [13] He was further challenged regarding omissions he made from the ambulance form, including his evidence that the plaintiff could not feel his lower limbs, and had incurred a c-spine injury, as well as the treatment he and his assistant administered to the plaintiff when they attended to him. Although he could not account for the omissions, he stood by his evidence in chief. He did add the following during his cross examination: “He told me he fell while he was being handled by the police”. When he was challenged that this is not the same as what earlier stated - that the plaintiff said he was ‘geskop’ by the police, his answer was that the plaintiff had said “geskop and fell”.
- [14] Mr April was also challenged about the time taken
- recorded as a total of 7 minutes in the ambulance form - to conduct all the tasks he alleges he undertook when he and his assistant attended to the plaintiff. These tasks included palpating the plaintiff upon arrival; trying to see if he could walk on his feet; fetching the stretcher from the ambulance and bringing it to the cell; taking him by means of the stretcher to the ambulance. It was put to him that it was impossible for him to have undertaken all these tasks within 7 minutes, given the breadth of the police station building, and the fact that there are so many locked doors and gates to pass through. Mr April’s response was that he is experienced enough to have taken that time. He explained that he can palpate in seconds and can take blood pressure measurements once inside the ambulance.
- [15] Mr April was asked during cross examination whether he would recognise the single policeman who was on duty on that day, and he pointed to two gentlemen present in the court room, thinking it could be either one of them. It was pointed out to him that the person who was actually on duty that night was not one of the two, but was also present in court. Mr April was adamant that he would have recognised the policeman him if it was him.
- [16] Mr Lesiba Solomon Somo was the second witness. He is an ambulance attendant and is still stationed in Malmesbury. He attended at the Malmesbury station together with Mr April on the day of the incident. However he could not remember anything specific relating to the plaintiff. He testified that there are a lot of people with the surname ‘Owies’ in that area whom he has worked with. He could not assist the Court in this matter.
- [17] Mrs Owies, the plaintiff’s wife, described the circumstances under which the plaintiff was arrested on the Sunday afternoon of 25 November 2012. There was a confrontation between the plaintiff, who was drunk, and their niece. Two policemen arrived and arrested the plaintiff, and took him away in a police van which he got into by himself, without needing assistance.

- [18] The next time she saw the plaintiff was on the Tuesday 27 November 2012, when he arrived via a lift from a man who worked at the hospital. The plaintiff was not able to walk properly. The man had carried the plaintiff out of the car into the house. Mrs Owies did not ask the plaintiff what had happened to him, and he did not volunteer that information.
- [19] On the Sunday after the plaintiff came home without being able to walk, her sister-in-law came to fetch her and the plaintiff and moved them to her home in Kuilsriver.
- [20] Mrs Owies confirmed during cross examination that the plaintiff suffered from pain and was injured on his back, not on his hips. She denied that the plaintiff was heavily drunk when he was arrested. She also denied that a Sergeant Jacobs visited her home on 30 November 2012 or that she signed the entry made in his pocket book on that date.
- [21] The plaintiff is a 60 year old pensioner. In November 2012 he lived in Malmesbury. He confirmed that he was arrested at home on 25 November 2012 after he had an altercation with his niece and a neighbor called the police. He walked into the police van when he was arrested and could walk on his own.
- [22] At the police station, while being taken to the cells, after reaching what he referred to as the first gate, he felt a blow to the back of his head. He immediately fell and became unconscious. He did not see who hit him. His evidence was that he was only in the presence of the police that arrested him when he felt the blow to his head, although in cross examination and re-examination he stated that he confined himself to stating that he did not see anyone else.
- [23] His first recollection after he regained consciousness was that he was still lying at that same location by the first gate, alone. When newly arrested drunk prisoners arrived, he told them he could not move, and they picked him up and took him to the cells at the back. In the cell he lay on the ground and could not move. Just before the cellmates went home, he requested them to ask the police to phone an ambulance.
- [24] The ambulance personnel arrived and fetched him from inside the cell. They placed him on a stretcher, and took him out of the cell into an ambulance. They took him to Swartland Hospital where he was discharged after approximately 3 days. His evidence was that he told the personnel at Swartland Hospital that it was the police who had assaulted him.
- [25] During his evidence in chief the injuries recorded in the Swartland Hospital records were put to him. They indicate that on the 25 November 2012 the patient reported he was assaulted by police; that he smelled of alcohol although he reported that he drank on the previous day. Then it was noted that there was a left hip pain, a left shoulder pain, left leg palsy, and bruising on the left elbow. It is also recorded that he was unable to move the left leg and that an x-ray was undertaken on the left hip/pelvis. On 26 November 2012 an x-ray is noted and it is also recorded that he was given crutches. On 27 November 2012 at 9:17 the following progress note is recorded "patient comfortable in bed; ate his breakfast; says he feels fine; no complaints at moment; discharge; wait for his transport; nursing care

rendered”.

- [26] The plaintiff’s response was that the doctors at Swartland Hospital did not examine him and they just left him there. He stated that no x-rays were taken at Swartland Hospital, and he was not given any medication for pain. He disagreed with the hospital records, and at some point stated that the hospital documents were typed afterwards.
- [27] During the his re-examination, the plaintiff’s identity document was introduced and it reflected 24 June 1961 as his date of birth, which the plaintiff confirmed is the correct date of birth. He was then taken through the medical records of Swartland Hospital in which his date of birth is sometimes recorded as 13 February 1961, and he stated that this was incorrect. This included a note from the physiotherapist. However, he confirmed that he was admitted there and was discharged on 27 November 2012.
- [28] When the plaintiff was discharged from Swartland Hospital he asked a person who worked at the hospital to give him a lift home. When he arrived home, he shouted for his family to bring a wheelchair belonging to his uncle from the house for him to use. Between Tuesday (27 November 2012) and Friday (30 November 2012) he did not go anywhere because he could not go anywhere or do anything, and could not use his hands.
- [29] The plaintiff’s sister, Mrs Adonis, arrived on the Saturday of the same week that the plaintiff was discharged from hospital, and took him to her home in Kuilsriver. The plaintiff’s evidence was that his sister took him to Delft Hospital, where he was given a form to complete and was referred to Tygerberg Hospital.
- [30] A neighbour with a car took him to Tygerberg Hospital where he was taken for testing which took half a day. The doctor told him that his neck had moved by about 1.5cm, put on a neck brace on him and told his sister (Mrs Adonis) to be very careful when walking with him. The doctor said he would open a case of police assault on his behalf and he agreed. The medical personnel in Tygerberg Hospital took x-rays, and that is where he was informed of the extent of his injuries. He confirmed that the birth date recorded in the Tygerberg Hospital reports is his birth date and that the address indicated there is also his.
- [31] Mr Peter Petersen had helped him lay charges against the police with the IPID. The plaintiff, however, had not attended at the IPID offices when the charges were laid. He was shown a signature appearing on the IPID statement and stated that it was not his signature. He explained that the police statement, which is signed by Mr Petersen, was made in his absence because he did not go to the IPID offices, but that Mr Petersen had been accompanied by his (plaintiff’s) sister, Mrs Magdalene Adonis. He had given information to Mr Petersen regarding the incident. He could not explain why the charges against the SAPS were opened in January 2013 instead of December 2012.

- [32] The plaintiff testified that although he was arrested for being drunk and disorderly he never paid a fine or appeared in court for the arrest. He also stated that he did not lay a complaint with the police in Malmesbury or speak to anyone else regarding the filing of a police complaint during that time.
- [33] He was referred to an entry made by a Sergeant Jacobs in a pocket book in which it is indicated that Sergeant Jacobs and another police officer (Warrant Officer Leander) visited at the house of the Owies' in Malmesbury on 30 November 2012, and interviewed the plaintiff in front of his wife. The pocket book entry corresponds with an entry made in the SAPS10 (OB) entry on that day by Sergeant Jacobs. It is recorded in the documents that the plaintiff informed the police officers that he was assaulted by an unknown person but he does not know who; he is currently paralysed in one leg; his family suspected it was done by a police official. The pocket book entry adds that the plaintiff stated it could not be a police official that had assaulted him. It is also recorded that he did not want to open a criminal case and he could not remember what had happened. It is also recorded that he had suffered injuries before his arrest. The note in the pocket book also states that the plaintiff did not know who had hit him but it could not be a police official. The pocket book entry was thereafter signed with the inscription "Willem". It also states: "Anna Owies – witness". The plaintiff denied any knowledge of this visit by Sergeant Jacobs and Warrant Officer Leander on Friday 30 November 2012. He also denied that that it was his signature appearing on the pocket book entry, and explained that it could not have been his handwriting because at the time he could not hold anything and could not use his hands and both hands were numb.
- [34] He stated that he still feels the same pain and stiffness on his back that he experienced on the day of the incident and that the doctor explained to him that it starts from his neck and affects the left arm and left leg which causes him not to be able to work. He stated that from the incident he could not stand up anymore because of pain.
- [35] During cross examination, after being shown photographs depicting the layout of the Malmesbury police station, the plaintiff conceded that the alleged assault took place at what was referred to as the fourth gate in the police station, and not at the first gate. When the prisoners took him through to the cells, the police were present and they just came to lock the cell and left.
- [36] During cross examination he stated that the pain on his left hip was caused by being trampled upon. This evidence was challenged because, according to him he was unconscious, and his response was that the pain would not have come out of the blue. He, did, however admit that he was unconscious. As regards his left elbow, he confirmed that it was bruised because he fell to the ground. He confirmed that the left shoulder was swollen and he could not move it. It was put to him that, according to the Swartland Hospital records he was given Voltaren for his pain, and he disputed this, stating that he was not given anything. He was taken to x-ray notes which appear in the hospital records which record that he did not have a fracture, and his response was that no x-rays were taken at Swartland Hospital.

- [37] It was put to him that the Swartland Hospital note of 26 November 2012 mentions “refer physio”. He disputed that he was referred to physiotherapy. The Swartland Hospital records include a note dated 26 November 2012 to the physio stating as follows “patient fell; complains of left hip pain”. His response was that this is not what he told the medical personnel at Swartland Hospital. He also denied that he was given crutches by the hospital upon his release on 27 November 2012. He testified that he could not make use of his hands, and that a patient next to him at Swartland Hospital had to feed him because he could not make use of his hands. This was challenged because there is no note from the hospital mentioning that he could not use his hands. It was also put to him that if he was given crutches that suggests that he could use his hands at the time.
- [38] He was taken to the records from Delft Day Hospital which indicate that his visit there was on 7 February 2013. He conceded that he only attended at Delft Hospital on 7 February 2013 and not the day after he moved to his sister’s house.
- [39] The records of Tygerberg Hospital are dated 28 May 2013, six months after the alleged incident. He denied that the first time he attended at Tygerberg Hospital was six months after the incident. It was put to the plaintiff that the records from Delft Day Hospital and from Tygerberg Hospital indicate that he had a previous neck injury which he incurred in Paarl and/or Worcester during another assault in December 2012, and which is referred to as his ‘second assault’. He denied that he was in Paarl or Worcester in December 2012, or that he sustained an assault there.
- [40] It was also put to the plaintiff that the injuries recorded at Swartland Hospital on 25 November 2012 are very different from the injuries recorded in the Tygerberg Hospital records where it is recorded that there was a neck injury and a left arm monoparesis (paralysis). He could not explain these discrepancies.
- [41] During his re-examination the plaintiff also stated that in the days following his discharge from Swartland Hospital his neck was hanging and could not straighten up.
- [42] Documentary evidence from the police cells at Malmesbury Police Station was put to the plaintiff. The documents indicate that, when he was arrested, there were three other drunken people in the cell. His response was that when he was being taken to the cells he was struck and became unconscious and he does not know who else was at the back of the cells.
- [43] It was put to him that the police conducted cell visits every 30 minutes, and that there were approximately 10 cell visits by police officers from the time of his arrest until his release. His response was that they would only open the gate and not come in. He also stated that there was only one police officer on duty and the others were out. He stated that at 12h50 when it is recorded that the prisoners in the cells were fed he did not receive any food. As regards the entry made at 13h25 that some drunken prisoners were released, he explained that that is when he asked them to tell the police to call an ambulance. At this point it was put to him that this was contrary to his earlier evidence that there was no one else

present when he first arrived and that he appeared to admit that there were 3 other prisoners when he arrived. His later response was that he could not say because he was beaten unconscious.

- [44] It was put to him that at 17h15, the time at which the records indicate he was released, there were five other prisoners who were also released together with him. His response was that at the time that those prisoners were released he was lying on the floor and could not move, and that is when he told them to tell the police to call an ambulance. It was put to him that the reports from the cell visits indicate that there were no complaints received from him. His response was that he was lying there inside the cells and could not talk or move because he was in so much pain.
- [45] The plaintiff was asked about the case opened at IPID on his behalf relating to assault GBH on 18 January 2013. His evidence was that it was Peter Pietersen who had opened the case on his behalf. He testified that he does not know what came of the case, and he made no inquiries regarding this case. This was because he does not have a phone, he stated, and could not talk. It was also because he looked for Peter Petersen after the case was opened and could not find him.
- [46] He was referred to a note made in the police investigation diary after the criminal matter opened on 18 January 2013, which recorded as follows: "According to complainant two unknown police men – one lady and one male arrest (sic) him and bring (sic) him to the station. They then took him to the cells and assault him. He was then taken to hospital via the ambulance. According to him he is now in a wheelchair [as a result of] the assault. The suspect will be identified by the witness". It was put to the plaintiff that the account of his assault given in this investigation diary is different from what he testified in court. Although he confirmed that it was indeed two unknown police men - a lady and a male - who arrested him, his evidence was that the investigation diary was incorrect. He explained that someone else had written it and that it was Peter Petersen who had opened the docket on his behalf.
- [47] He was taken through the statement in the docket of the criminal case of 18 January 2013, which is signed and deposed by Peter Petersen and appears to have been made on 2 January 2013 ("the IPID statement"). Paragraph 4 of the IPID statement states as follows: "At our arrival at SAPS Malmesbury they took me straight to the cells, at the back of the police station and put me inside it. I was at that stage alone in [the] cell and they started assaulting me by kicking me against my head and body. I was then immediately [un]conscious and cannot remember how they assaulted me further. I later became conscious still in the cell and saw +- six to seven other male persons that were detained or put in the cells, but before that I was alone in the cell". The plaintiff disputed most of the contents of paragraph 4, stating that he was effectively unconscious from the first blow he felt. He does not know if he was assaulted further because he was already unconscious. He does not know anything about the '6 to 7' other males because he lay on the floor for a long time before he was moved to the cell. He was adamant that that is not information he conveyed to Mr Petersen.

- [48] Paragraph 5 of the IPID statement states as follows: “My right ear was bleeding and my left leg had bruises. It was extremely painful and I couldn’t move and the ambulance took me from the police station, the same day to Swartland Hospital Malmesbury. I received treatment for my injuries and was only discharged on Thursday 29 November 2012.” At this point the plaintiff stated that he was not taken to hospital on the same day but was taken in the morning after the incident. It was put to him that this was not in accordance with his earlier evidence in terms of which he was taken to hospital on the same day at 19h15. His response was “yes I think so”, and appeared to be very confused.
- [49] He confirmed that his right ear was bleeding and his left leg had bruises. It was put to him that there is no mention of bleeding ears in the ambulance report, and that the ambulance driver Mr April did not recall seeing blood in his ears. His response was that the ambulance drivers did not examine him and he told them he was in pain. The question was repeated again and the plaintiff stated that the blood had already dried in his ear and he had taken out the dry blood. He continued that when he arrived in hospital he felt that his ear was sore and when he checked with his finger, he saw blood. It was put to him that this was new evidence which he had not mentioned before. He was adamant that the ambulance driver did not examine his ear.
- [50] At paragraph 6 of the IPID statement it is stated that the plaintiff is permanently in a wheelchair and is still experiencing a lot of pain. It was put to him that this could not be correct because as at the time that he was giving evidence he was not in a wheelchair. His response was that he taught himself to walk while staying at his sister’s house. He stated however that he is still in pain.
- [51] Paragraph 7 of the IPID statement states as follows: “Lena Engelbrecht.....who stays in my same street saw the police officials who assaulted me when they picked me up at my home. She knows their names and will be able to identify them.” The plaintiff disputed that he conveyed this to Mr Petersen.
- [52] Mrs Adonis, the plaintiff’s sister, confirmed the plaintiff’s evidence that she fetched him from Malmesbury in the same week that he was discharged from Swartland Hospital and took him to her home in Kuilsriver. She had asked Mr Peter Petersen, a pastor and relative, to give her a lift for that endeavor.
- [53] When they arrived at the plaintiff’s home, the plaintiff sat in a wheelchair and could not stand on his legs. He also could not use his hands. What concerned her the most was his frame of mind. He would repeat words and would, later on in conversation, return to conversations already held. In order to get the plaintiff into the car Mrs Adonis and Mr Petersen pushed the wheelchair out to the car, and then Mr Petersen picked him up and placed him inside the car.
- [54] At Mrs Adonis’s home she bathed the plaintiff, dressed and fed him. She taught him how to use his right hand because he was born left-handed. His main complaint to her was pain. However, he did not have any medication, so on the following day, the Monday, she obtained

a lift and took the plaintiff to Delft Day Hospital. At Delft Day Hospital they were referred to Tygerberg Hospital, where they attended on the following day, the Tuesday. According to her evidence, the visit to the Delft Day Hospital would have been on 26 November 2012, and the visit to Tygerberg Hospital would have been on 27 November 2012.

[55] During cross examination it was put to Mrs Adonis that the medical records from Delft Day Hospital are dated 7 February 2013, whilst the records from Tygerberg Hospital are dated 28 May

2013. She, however, was adamant that they attended at those hospitals on the days that she says they did, and could not explain the discrepancy.

[56] From the time that she took the plaintiff to hospital, he started receiving medication. He continued taking this medication until the lockdown period caused by COVID-19. This evidence was challenged because there is no indication anywhere in the documents before court of medication received from Delft or Tygerberg Hospital before May

2013. Mrs Adonis testified that she holds Mr Owies' hospital card but she did not have it with her at court and had not been requested to produce it. Likewise, she stated she no longer has the reference letter from Delft Hospital which would have been given to them in December 2012.

[57] Regarding the incident that led to the plaintiff's injuries, Mrs Adonis testified that the plaintiff could not say who had struck him from behind because he was rendered unconscious.

[58] Mrs Adonis testified that the plaintiff did not go anywhere during the month of December 2012 and was always at her house. She stated that he could not go anywhere because he was bound in a wheelchair.

[59] She further testified that she, the plaintiff and Mr Petersen attended at IPID offices in Bellville on the following Wednesday, in December 2012, to open a criminal case. She was adamant that the plaintiff was in attendance at the IPID offices and that the visit was on about 5 December 2012 and not in January 2013.

[60] Mr Peter John Petersen is a pastor, traditional leader and relative of the plaintiff and Mrs Adonis. He confirmed the evidence of Mrs Adonis that on the Sunday after the plaintiff was discharged from hospital he had assisted her by taking her to Malmesbury to fetch the plaintiff and bring him back to her home. He stated that when they arrived at the plaintiff's home he could not walk properly, and was dragging his feet. He could not use his hands and was bound in a wheelchair. Mr Petersen had physically picked up the plaintiff to get him inside the car, and later, in Kuilsriver had again physically picked him up to put him inside the house.

- [61] Mr Petersen further testified that on the same Sunday Mrs Adonis had asked if he could take them to Delft Day hospital on the following day, but he could not assist. He stated that on the Monday, when they came back from Delft Day Hospital, Mrs Adonis had again contacted him and asked for a lift to Tygerberg Hospital because the plaintiff had been referred there by Delft Hospital, but again he could not assist them.
- [62] On the following Wednesday he took the plaintiff and Mrs Adonis to the IPID offices in Bellville where a charge was laid against the Malmesbury police. He never went to Malmesbury police station to report the incident because he did not trust the police officials there. He confirmed that the signature appearing at the end of the IPID statement was his, and that the statement was made on 2 January 2013 not 2012 as reflected in the statement. He could not explain why the statement was made on 2 January 2013, and not on 5 December 2012, which was the date on the Wednesday immediately after the plaintiff's relocation to Kuilsriver. However, during cross examination he admitted that he could be mistaken about when exactly he took the plaintiff and Mrs Adonis to the IPID offices, and that it could have been on 2 January 2013 and not December 2012.
- [63] Mr Petersen disputed the plaintiff's version that he did not attend at the IPID offices with him and Mrs Adonis. He explained that the plaintiff was present, and conveyed his version in Afrikaans, which he (Petersen) interpreted for the investigating officer into English. He advised the plaintiff not to affix his signature on the IPID statement because he (plaintiff) cannot read or write, is illiterate, and cannot understand English. He also could not use his hands. At the same time, his evidence was that the "X" appearing next to his signature on the statement was affixed by plaintiff.
- [64] The IPID docket describes the assault on the plaintiff as "assault GBH" (with grievous bodily harm), which is set out as follows: "kicked several times against head, face and body". It also describes the instrument used in the assault as a boot. He denied that this was information conveyed to him by the plaintiff, or information conveyed by him to the investigating officer.
- [65] However, Mr Petersen was adamant that the plaintiff had indeed conveyed to him the following facts which are contained in the IPID statement: that he was assaulted in the head and body; that he saw six or seven other people in the cell after regaining consciousness; that he was discharged on the Thursday 29 November 2012; that he would be able to identify the police officials who assaulted him. He stated that he does not know why the plaintiff is now denying this information. The plaintiff had also told him that, when he arrived at the police station, he was taken to an area in the cells, after 'the first gate', where the prisoners relaxed or exercise, and that no one was at the cells when he arrived. It was put to him that the fact that he signed the statement concerning facts which are not known to him and on behalf of the plaintiff constitutes fraud.

- [66] According to Mr Petersen, although he has a very busy schedule, he thereafter made a point to visit the plaintiff regularly to support him spiritually. He recalled that in September or October 2013 he was invited to a confirmation party, where he saw for the first time that the plaintiff had mobilised and was walking with crutches.
- [67] The next witness called to give evidence was Sergeant Stanley Gcinikhaya Ntshwanti, a police officer at Malmesbury Police Station who has been stationed there for 19 years. He testified that there are ten police officers on duty at Malmesbury police station at any given time. Of these ten, six conduct patrols at night in three vans containing two passengers each, resulting in four police officials left in the station at night. He admitted that there are times when there is not enough staff when police officers report for duty for a shift. In those instances, they always make sure there is one van conducting patrols out of the three, and that there is a CSC Commander, someone to answer the phones, and a cell guard. He was taken through the names of police officers who were on duty on 25 November 2012 during the evening shift, and confirmed that there was no shortage of staff on that day. He testified that, in all his years at Malmesbury Police Station, there has never been a time when there was one single police man on duty at a time for the whole police station.
- [68] On 25 November 2012 he was the cell guard on duty. There is one cell guard on duty at Malmesbury Police Station at a time. A cell guard cannot be absent from his post without reason. If that happens they will be charged departmentally, and that has never happened to him in his 19 years of service. If a cell guard needs to take a break, for example a toilet break, anyone needing access to the cells would have to wait for the cell guard, because the keys are kept by him and he keeps the doors locked. The keys of the cell guard cannot be given to anyone else, and even a police officer from the CSC office cannot visit the cells without a cell guard present.
- [69] He explained the importance of cell visits, stating that drunk people in particular, can fight amongst each other at any time, or vomit or have seizures. As a result, the police procedure is to conduct cell visits upon them every 30 minutes, while the other prisoners are only visited once every hour. He explained that when a cell guard conducts

a cell visit he asks a police officer at the CSC office to accompany him and they go into the cells together. A cell guard cannot go into the cells alone because it can be dangerous to him, as prisoners can overpower him. A count is conducted by both police officials, to the satisfaction of the cell guard. Usually, when Sgt Ntshwanti conducts a count he makes them stand by the wall before he counts them. In the case of drunk prisoners he opens the blankets and counts them one by one. The length of the counting process depends on how many prisoners there are. Through photographic evidence, he confirmed that every prisoner in the drunk cell is visible even from the door of the cell. The number of prisoners inside each cell is recorded in the SAPS10 as a unit.

- [70] He was taken through the police documents of 25 November 2012 and confirmed their contents. In summary the SAPS10, read with the SAPS14, indicates that the plaintiff was arrested at 12h10 on 25 November 2012 and it is recorded as a 'drunk arrest'. According to the SAPS10, at the time of his arrest, there were three other prisoners who were already in custody from 08h30 that morning and had been arrested for drunkenness. Sgt Ntshwanti explained that drunken prisoners are kept in the same cell, separate from other prisoners arrested for serious crimes and those awaiting trial.
- [71] The SAPS10 further records that when the plaintiff was arrested, his constitutional rights were explained verbally and that he was free of visible injuries or complaints. Thereafter, the SAPS10 records that there were cell visits conducted at 12h30 and again at 13h00 with no complaints recorded, and sixteen units were in custody. In between those times, at 12h50, the prisoners were fed. Then, there were further cell visits at 13h30, 14h00, and 14h30, again with no complaints received, and it is recorded that all was in order.
- [72] At 13h20 a drunk arrest was made; while at 13h25, the three prisoners who had been arrested at 08h30 that morning were released. This means that, from 13h25 - after the plaintiff had been in custody for approximately for one hour and fifteen minutes - there would have been 2 drunk prisoners left, including the plaintiff.
- [73] Then, at 14h30 and 14h45, four drunken arrests were made, taking the tally of drunken prisoners to six. Thereafter, it is recorded that cell visits were conducted at 15h00, 15h30, 16h00, 16h30, and 17h00. On all these visits it is recorded that there were no complaints and all was in order.
- [74] At 17h15 it is recorded in the SAPS10 that six prisoners were released, including the plaintiff. In respect of each of the six prisoners it was recorded that they were released in terms of the J534 and a reference number was allocated to each prisoner's name. Sergeant Ntshwanti explained that a J534 is a book which facilitates an admission of guilt fine and/or written notices to appear in court. He described it as a release form for drunk people. A copy of the notices issued to the plaintiff formed part of the record and contains his residential address as well as his names. He explained that the reference number itemised in the SAPS10 in respect of each prisoner corresponds to the reference number in the J534 book. He explained that the J534 is issued by a cell guard, in this case Sergeant Cilliers. An accused person does not sign the form but receives the original copy, while a copy is kept at the police station. According to Sergeant Ntshwanti what this means is that the plaintiff was released from custody at 17h15 and was issued with a J534 upon his release.
- [75] On 25 November 2012 he arrived at work at 17h30 and his duty started at 18h00, although the official handover to him was at 17h49. When he resumed his duty at 17h49 there were no drunk people in the cells. All the fifteen units recorded at that time were people charged with serious crimes and those awaiting trial. He had counted the fifteen prisoners recorded in the SAPS10 at handover himself.

- [76] He explained that if there was an injured person in the cells, the handover of shifts would not have been effected properly because the injured person would have been the responsibility of the police officer handing over. That would have to be dealt with before a handover could be undertaken. And in those circumstances, he (Ntshwanti) would not have accepted the handover. Furthermore, an injured person cannot be detained, he stated. If an injured person were to be found in the cells and it was not reported, disciplinary steps could be taken against the arresting officer and the cell guard.
- [77] It is recorded in the SAPS10 and the SAPS14 that a drunk arrest was made at 17h55, taking the total tally of prisoners to sixteen. Then, there were cell visits recorded at 18h01, 18h30, 19h00 and 20h00. On all those cell visits it is recorded that Sergeant Ntshwanti visited the cells together with either Constable Cilliers or Warrant Officer Basson. In all those visits it is recorded that there were sixteen units in the cells with no complaints reported.
- [78] Sergeant Ntshwanti further testified that if there had been a call for an ambulance on 25 November 2012 it would have been recorded in the SAPS10, and no such entry was made in that book. Further, it would have been him as the cell guard on duty who would have called an ambulance at 19h15, and he would have recorded it in the SAPS10. There is no record of an ambulance arriving at Malmesbury Police Station on 25 November 2012; and no ambulance or ambulance driver arrived while he was on duty as a cell guard on the day of the incident. He recalled that there have been two or three incidents in his 19 years at Malmesbury Police Station, where ambulances came to the cells to fetch injured persons. It is not an everyday occurrence.

As a result, if such had happened in this case he would have remembered it.

- [79] He explained that the protocol when a detained person gets injured is to call an ambulance, and to write down the time of calling the ambulance, the time of arrival of the ambulance, and the time of examining the person in the cells in the cells Occurrence Book. Upon arrival of the ambulance personnel, they would have communicated in the first instance with the CSC Commander at the front of the office, and then with him (Ntshwanti) at the cells.
- [80] Then, if the prisoner must be taken to hospital, one of the police members must accompany the prisoner. In such an instance, a form called the SAP70 must be completed and taken to hospital by the police officer escorting the prisoner. The SAP70 must also contain the time the injuries were incurred, the name of the prisoner, and the charges against him. It also ensures that the hospital bill is later paid by the SAPS. Similar to the J534 book, the SAP70 would have had its own reference number. Furthermore, the cell guard must sign the SAP70, confirming that the prisoner is released from custody to the ambulance personnel, and the form must be dated and stamped. In addition to the SAP70, there is another form that must be completed at the hospital once the prisoner is examined. It must also be stamped by the hospital.

[81] Because none of the above protocols were followed, Sgt Ntshwanti disputed the version of Mr April. He also disputed Mr April's evidence that it took seven minutes to conduct all that he claimed to have conducted. He itemised all the gates and doors that must be passed before reaching the cells from the front office, and disputed that it could take seven minutes to enter and exit them four times both ways. He explained that the police station is a wide building. Furthermore, a police officer must accompany the ambulance personnel and must open and relock all the doors and gates that one must go through in order to arrive at the cells. The doors and gates are never left open at the police station. He estimated that it would take about sixteen minutes just to go back and forth without speaking to anyone or conducting any examination on a patient.

[82] During cross examination Sgt Ntshwanti was taken through the list of police officers at Malmesbury and was questioned about their seniority and length of service vis-a-vis him. He was questioned at length about how he obtained his promotion. He confirmed that he was promoted to Sergeant in December 2013. He was promoted based on his ten-year service at the time. He had applied for the promotion in 2013 when he became eligible, and his promotion date was December 2013. He confirmed that if a police officer has pending cases – criminal or disciplinary – they will not be promoted. He was

not subject to disciplinary investigations regarding the plaintiff's alleged assault, and was not aware whether there were any disciplinary investigations. He was also not aware that there was an IPID investigation. He could not recall if any IPID investigator

spoke to him regarding his involvement in the incidents in this case. He also had no knowledge of an investigation conducted by Sergeant Jacobs on 30 November 2012 regarding the alleged assault in this case.

[83] It was put to him that the assault against the plaintiff took place at about 12 pm on 25 November 2012 and he had not yet reported for duty and therefore it would be other police officials who would know what had happened. He confirmed that he did not complete any of the police records before 17h49 when he signed for the handover, and that he did not make prior entries himself. He stated however that there was no prisoner taken from the cells by ambulance during his shift on that day. It was put to him that he does not have independent recollection of what happened on that day but is simply stating what

the police records state. He answered that the documents remind him of what happened, and this is how he is able to recollect events in any situation.

[84] He confirmed that the evidence he gave in his evidence in chief is obtained from the cell book register. He was cross examined about the fact that there is a separate OB book kept at the CSC office, which is not in the record before Court. He explained that, although there are two OB books in the station, everything that transpires in the cells is entered in the cell records, and everything that transpires at the CSC is recorded in the CSC book. If a person was found lying

on the floor in the cells, that would be reported in the cell records. He further explained that, if a police official other than a cell guard, finds a person lying on the floor in the cells, that police official would not write a report, but would inform the cell guard, who must go and witness it himself and record it in the cell records. It would be his duty as the cell guard to record such an incident. He admitted, however that there is no reason why that police officer cannot still record the incident in the OB, but that would be in addition to the cell record.

[85] It was put to Sergeant Ntshwanti that if a phone call is made for an ambulance to fetch a prisoner from the cells, it would be reported in the CSC book, and he disputed this. He explained that the SAPS10 records all the instances involving a person's arrest, release, and even when they attend court. He confirmed that the second gate by

the exercise area, where the plaintiff is said to have fallen unconscious, falls under the cell area and would be recorded in the

cells OB. There would be no reason to record that in the CSC register. If the ambulance driver had arrived at 19h15, that would

have been recorded in the cells OB by him.

[86] Sergeant Ntshwanti was challenged for the fact that no cell visit is recorded at 19h30, or at anytime between 19h00 and 20h00. It was put to him that this explains why he was not present when the ambulance driver arrived. He admitted that there is no record of such a visit and that this means he did not conduct such a visit in the official sense. However, he stated that an ambulance driver could not have had access to the cells if he was not there, because no one would be able to open for him. Then, through the records he explained what occurred between 19h00 and 20h00. The records indicate that a suspect was charged from 19h05, which means Sergeant Ntshwanti would have had to bring him out from the cells and thereafter return him to the cells. Charging a suspect can take approximately ten minutes to complete, which, in this case would mean he returned the suspect to the cells at approximately 19h15, five minutes before the ambulance is said to have arrived. This places Sergeant Ntshwanti in the cell area at the time that the phone call for an ambulance was allegedly made, and when the ambulance personnel arrived.

[87] There is also no cell visit recorded at 20h30. He explained, through the cell records, that this was because he had gone to detain people at 20h20, which means he effectively conducted a cell visit. He explained that if drunk arrests were made at 20h20, he would have placed the prisoners inside the cells at approximately 20h30. He was challenged because his name is not mentioned regarding the arrests made at 20h20. He explained that the officers who detained the two prisoners at 20h20 could not have detained the prisoners in his absence.

[88] Regarding the J534 fine, it was put to him that the plaintiff never paid a fine and was never summoned to attend court for failure to pay the fine. He could not respond to this.

[89] It was put to Sergeant Ntshwanti that the docket of the plaintiff's arrest is not included in the bundle, and he initially stated that the file probably expired because the arrest was approximately ten years ago. Later, however, he stated that a drunken arrest does not result in a formal docket being opened. Instead, there is a form known as the FIC which deals with drunk people, and only contains the form of an arresting officer because no statement that can be taken

from a drunk person, which is what would normally be contained in a docket.

B. THE LAW

[90] An assault consists in unlawfully and intentionally applying force, directly or indirectly, to the person of another; or inspiring a belief in another person that force is immediately to be applied to him or her.[1]

[91] In the law of delict assault is recognized as an *actio iniuriarum* in which it is defined as an infringement of the right to bodily integrity - physical and psychological.[2] An assault such as the kind alleged in this case would be an affront to rights enshrined in the Constitution[3] to dignity (section 10), freedom and security (section 12), rights of detention (section 35(2)).

[92] In a civil case involving assault, the claimant (in this case the plaintiff) bears the onus to prove his case, and must do so on a balance of probabilities.[4]

[93] Where there are factual disputes, the technique generally employed by courts was summarised in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*[5] as follows: "To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case,

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”[6]

[94] A similar approach had been stated as follows in *National Employers General Insurance Co. Ltd v Jagers*[7]:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the evidence of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as in a criminal case, but nevertheless where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and if the balance of probabilities favour the Plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.”

[95] When dealing with circumstantial evidence the first rule applicable is that the inference sought to be drawn must be consistent with all the proved facts.[8] If it is not, then no inference can be drawn. Secondly, in civil cases the proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.[9] There is a distinction to be drawn between inference and conjecture or speculation.[10]

[96] Where a party fails to call as his witness one who is available and able to elucidate the facts, whether the inference that the party failed to call such a person as a witness because he feared that such evidence would expose facts unfavourable to him should be drawn could depend upon the facts peculiar to the case where the question arises.[11]

[97] In *Tshishonga v Minister of Justice and Constitutional Development and Another*[12], it was held that a failure to call a witness is reasonable in certain circumstances, such as when the opposition fails to make out a prima facie case, but an adverse inference must be drawn if a party fails to place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.

C. DISCUSSION

- [98] Evidentially speaking, the circumstances of this case are far from ideal. The plaintiff is effectively a single witness regarding the account of his alleged assault. However, he was drunk at the time and was rendered unconscious for some time after the alleged incident.
- [99] To add to the perplexity, the medical reports which formed a significant part of the plaintiff's case remain hearsay evidence. No witness was called to give oral evidence regarding the medical reports. As in *Rautini v Passenger Rail Agency of South Africa*[13] the parties agreed that the discovered documents, including the medical records, are what they purport to be, but that the correctness of the contents was not admitted. Their discovery, however, does not make them admissible as evidence, unless the documents could be admitted under one or other of the common law exceptions to the hearsay rule.[14] Hearsay evidence is prima facie inadmissible. There was no application made for admission of the hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988.
- [100] The plaintiff was also not a coherent and cogent witness, and at times gave contradictory evidence. At one stage he stated that the hospital records were 'typed afterwards' despite the fact that they are handwritten. He claimed he did not have access to a cellphone to follow up on the IPID investigation regarding his alleged assault, but it was later established that he did indeed have access to his wife's cellphone. There were many times during his cross examination where it appeared he did not even realise that he was giving contradictory evidence and this had to be pointed out to him by the cross examiner. In fact his sister, Mrs Adonis and Mr Petersen stated on a few occasions that he is 'confused about the facts'. Mr Petersen went as far as to suggest that the plaintiff might need mental examination although this was when he (Petersen) was confronted with contradictory versions.
- [101] The plaintiff was also prone to exaggeration. He stated that his left hip pain was caused by being trampled upon despite his evidence that he was rendered unconscious by the alleged assault. He was also very reluctant to admit that he was drunk and that this was the reason for his arrest despite common cause evidence that he was arrested for drunken behaviour. In short, my assessment of the plaintiff is that he was not a credible and reliable witness.
- [102] The plaintiff cannot say whether he was in fact assaulted, because his evidence is that he felt a blow on the back of his head and he fell and immediately became unconscious. He does not know who or what hit him. Although, during his evidence in chief he stated that there was no one else around other than the police escorting him to the cells when he felt the blow to his head, in his cross examination and in his re-examination when this issue was revisited, he could only state that he did not see anyone else around him other than police officials. In other words, apart from the fact that he could not say whether he was assaulted, he also could not say who inflicted the alleged assault, and could not exclude the possibility of another agent inflicting the assault.

- [103] In addition to all of this, it is common cause that he was drunk when he was arrested. There is no evidence as to how drunk he was. However, it is common cause that his drunken behaviour caused a neighbour to phone the police for his arrest. Although this is not a decisive factor on the facts of this case, it is something to bear in mind when considering the reliability of his version of the assault.
- [104] All the other witnesses who came to support the plaintiff's case were given a version by the plaintiff, starting with Mr April. Although Mr April initially stated that the plaintiff told him that 'die polisie het my geskop in die rug', he changed this version during cross examination to "he told me he fell while he was being handled by the police". These are vastly different versions, and the latter might exclude an assault. Then, when he was challenged about this disparity, a third version emerged – that the plaintiff had said he was 'geskop and fell', effectively combining the two versions.
- [105] The ambulance form completed by Mr April at the time stated 'fell and assaulted', and no mention was made that the plaintiff was kicked or that it was the police who did so. In this regard, it is insightful why Mr April states that this incident was etched in his memory, and why he discussed it with family and colleagues at the time. It was because a drunken person had incurred injury whilst in police custody. There was no mention in his evidence that it was because the prisoner had allegedly been kicked or somehow assaulted by the police, which is what I would have expected if that is what was reported to him by the plaintiff. On the balance of probabilities, I do not believe that the plaintiff told Mr April that he was kicked or assaulted by the police.
- [106] Nevertheless, Mr April did write 'fell and assaulted' in the ambulance form. This could only be upon such a report having been made to him by the plaintiff. The credibility of the recordings made in the ambulance form, which would have been written contemporaneously, has not been impugned. But even so, the plaintiff bears the onus to lead evidence to support that allegation, an issue to which I return later.
- [107] Another person to whom the plaintiff relayed an account of what happened is his sister, Mrs Adonis. Her version is that when she asked him what had happened, all he could say was that he did not know who had struck him on the head from behind. There was no mention in this account of police officials.
- [108] The last account of the alleged assault was given to Mr Petersen, and according to him, it is contained in the IPID statement. That account is the most vivid and detailed account of the alleged assault. The version contained there is that the plaintiff was kicked in the head and in the body by police officers; that they continued to assault him after he was rendered unconscious; and that he would be able to identify the police officials who were accompanying him when the alleged assault took place. However, the plaintiff denies that account of the assault, whilst Mr Petersen is adamant that this was the account of the assault conveyed to him and the investigating officer by the plaintiff. The investigating officer was not called to give evidence regarding the taking of the statement.

- [109] The version contained in the IPID statement is not borne out by any evidence led before this Court, and when viewed against that evidence, is false. The details mentioned therein are only contained there and nowhere else. No other witness, including the plaintiff, supported the version. Regardless of whether or not this version was conveyed to Mr Petersen by the plaintiff, he does not have first-hand knowledge of the alleged incident and in this regard his evidence constitutes hearsay. But as I have said, it is disputed by the plaintiff.
- [110] What the plaintiff told the Court is that he felt a blow to the back of his head, fell and was rendered unconscious. He could not say who or what hit him. In fact, the defendant's Request For Further Particulars requested information regarding how the plaintiff was assaulted and the response was that the plaintiff was hit against the head with an unknown object. The Request For Further Particulars also requested the plaintiff to provide details of who assaulted him and the response was that the identities of the members of the defendant were unknown to the plaintiff. Even after all the evidence led in this trial, there remains no evidence of whether there was in fact an assault on the plaintiff or that it was inflicted by members of the defendant.
- [111] Another problem for the plaintiff's case relates to the surrounding circumstances of his alleged assault. Although his initial evidence was that he was alone at the time of the arrest and assault, he conceded to the defendant's documentary evidence that there were three other drunken prisoners present in the cell, although during the same questioning he stated that he did not know who else was there because he was rendered unconscious. This is one of the contradictory moments of his evidence. In either version, he does not dispute that he was not alone at the alleged time of the assault. It strikes me as improbable that the plaintiff would be left in front of the cells lying unconscious, bleeding and bruised for all and sundry to see, while different police officers conducted 10 visits into the cells, and while they were sometimes taking prisoners to and fro. Considered against the evidence led on behalf of the defendant on this issue, namely that there were three other drunken prisoners at the time who were released at 13h25, the probabilities when applying the SFW and National Employers General Insurance Co Ltd cases are in favour of the defendant's version. I have found no similar contradictions, improbabilities or unreliability when considering the defendant's evidence on this score.
- [112] Another conundrum relates to the injuries allegedly sustained by the plaintiff as a result of the alleged assault. According to him, when he regained consciousness, he could not move and had to be picked up and taken to the cells. In support of this version Mr April states that the plaintiff was paralyzed and needed neurological intervention that very night. I note, firstly, that Mr April's diagnosis was not mentioned in the ambulance form.
- [113] In any event, contrary to the 'paralysis' allegations, the plaintiff was discharged from Swartland Hospital after only two days. And according to him and Mrs Adonis he was discharged with no medication. Further, with no wheelchair or crutches. If any of this

evidence is believed, it suggests that at the very least when the hospital discharged him, its personnel did not consider his injuries to have been so serious as to warrant further serious intervention. Otherwise, the Swartland Hospital would have retained him for longer or transferred him to a better-resourced hospital. However, none of that is established by the evidence.

- [114] This is exacerbated by the evidence that the plaintiff only appears to have attended at Delft Day Hospital on 7 February 2013, not immediately after he moved to his sister in Kuilsriver. This suggests that, even in the mind of Mrs Adonis who was looking after him at the time, his injuries were not as serious as it is now alleged. I note that, according to Mrs Adonis the visit to Delft Day Hospital was on the Monday, 26 November 2012. This recollection was supported by Mr Petersen, but he did not attend at Delft Hospital with the plaintiff and Mrs Adonis. There was otherwise no evidence in support of the evidence that the visit to Delft Hospital was earlier than 7 February 2013. It is relevant in this regard that all the dates alleged by the plaintiff and the witnesses

who came to testify in support of his case were challenged as none of them were borne out by the documentary evidence produced by the plaintiff. And the plaintiff conceded that the visit to Delft Day Hospital was on 7 February 2013. Mr Petersen conceded that the visit to IPID offices was on 2 January 2013. There are no medical records which indicate any visit earlier than 7 February 2013.

- [115] Furthermore, and in any event, there is also no medical evidence supporting the version that the plaintiff was in immediate paralysis of the lower limbs. And the plaintiff's own evidence was that, although he is still in pain, he did mobilize and is able to walk. Lastly, it has not been shown how an injury or paralysis to his legs might be related to an assault to the back of his head.
- [116] Instead, the plaintiff confirms what is written in the hospital records that everything on the left side of his body was in pain on 25 November
2012. What is mentioned there is the left leg, shoulder, elbow and hip pain. However, none of these injuries suggest an assault inflicted by an object which struck him on the back of the head. Even the bruise he confirmed he had suffered on the forehead, was sustained, according to him, when he fell.
- [117] The evidence of Mr April is that the plaintiff complained of backpain, and it was confirmed by the plaintiff that he continues to suffer from pain and stiffness of the back. However, once again, there was no evidence of how this might be related to an assault to the back of his head. The same applies to the plaintiff's evidence, corroborated by Mrs Adonis and Mr Petersen, that he could not make use of his hands and was wheelchair-bound. There was no evidence of how this might be related to an assault to the back of his head.
- [118] During re-examination the plaintiff claimed that in the week following his discharge from Swartland Hospital, his neck was hanging and could not straighten out. This would be an alarming and unusual condition to experience. If it were true, I would have expected it to

have been noticed by Mrs Adonis and his wife who had occasion to observe him for some days after the alleged incident. They made no mention of it in their evidence, despite both being invited to give evidence of what they observed of the plaintiff's condition during that time. I find it very improbable that they would not have noticed such an unusual condition if it had been part of the plaintiff's injuries.

[119] The only witness who corroborated the plaintiff's evidence of a neck injury was Mr Petersen who stated the following: "He complained of pains - mostly in the neck area. That's the cause for his walking difficulty". I have grave difficulty with this evidence because there was no evidence that Mr Petersen has medical expertise to give such a

diagnosis. According to the plaintiff, it was at Tygerberg Hospital that he was informed that his walking problems are related to a neck injury, and according to the evidence that was in May 2013.

[120] Still, this raises a question as to whether Mr Petersen was told by the plaintiff soon after the alleged incident of the alleged neck injury. Firstly, I note that the neck injury was not mentioned in the IPID statement, which is what I would have expected if that was the case, especially if the neck injury was as drastic as the plaintiff claims it was. Secondly, I take into account that Mr Petersen is the only witness to give such evidence - Mrs Adonis and Mrs Owies gave no such evidence, despite the fact that they lived with the plaintiff after the incident. In light of the fact that Mr Petersen hardly saw the plaintiff after he gave him a lift from Malmesbury to Kuilsriver, this is strange. Thirdly, Mr Petersen's credibility has been brought into question by the contents of the IPID statement, most of which are disputed by the plaintiff, to which he affixed his signature, thus perjuring himself. When viewed in the light of the evidence before this Court, the contents of the IPID statement amount to exaggeration and falsities. On the balance of probabilities, I am not persuaded that the plaintiff reported a neck injury to Mr

Petersen soon after the incident. The probabilities rather are that this was later, after the plaintiff had attended at Tygerberg

Hospital, which the evidence suggests was in May 2013.

[121] There was mention made by Mrs Adonis regarding the plaintiff's state of state of mind in the early days after the alleged incident. There was no medical evidence to regarding these allegations, and there was again no evidence of how this might be related to an assault on the head which was inflicted on 25 November 2012. In any event, even on Mrs Adonis' evidence, this issue was resolved after a few months.

[122] It has accordingly not been established that the plaintiff was assaulted, and by members of the defendant on 25 November 2012. The plaintiff has failed to discharge the onus upon him. As Mr du Toit, who represents the plaintiff stated numerous in Court, the medical records submitted to this Court in support of the plaintiff's case "are in a state of a mess". There remains no explanation for why the plaintiff only went to the Delft Day Hospital in

February 2013 if his condition was as dire as he, Mr Adonis and Mr Petersen and Mr April state that it was from the incident of 25 November 2012. There is furthermore no explanation for why the Tygerberg Hospital records indicate that he only attended there in May 2013.

[123] Given that this claim was instituted in or about June 2014, I would have expected that if there were any problems with the medical records such as those identified during this trial in 2022, they would have been raised with those institutions and corrected years ago; and if necessary for some oral evidence to be led to make such necessary corrections or to place the medical records in their proper context.

D. ORDER

[124] In the circumstances, the following order is made:

- a. The plaintiff's claim is dismissed, with costs.

N. MANGCU-LOCKWOOD

Judge of the High Court

APPEARANCES

For the Plaintiff : Adv A du Toit

Instructed by : Mrs T Melville

Simpsons Attorneys

For the Defendant : Adv S Mahomed

Instructed by : Mr L Ngwenya

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[1] Jack 1908 TS 131 at 132-133; and Marx 1962

(1) SA 848 (N). See also JRL Milton, South African Criminal Law and Procedure, Volume II 3rd Edition at page 406.

[2] See JC Van der Walt and JR Midgley: Principles of Delict, 3rd Edition at p. 111, para 78. See Minister of Justice v Hofmeyer [1993] ZASCA 40; 1993

(3) SA 131 (A) at 145J-146A.

[3] Constitution of the Republic of South Africa 103 of 1996.

[4] Prinsloo v Van Der Linde 1997

(3) SA 1012 (CC) at 1028; Pillay v Krishna and Another 1946 AD 946.

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- [5] Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others 2003(1) SA 11 (SCA).
- [6] At para [5].
- [7] National Employers General Insurance Co Ltd v Jagers 1984
- (4) SA 437 (ECD) 440 to 441.
- [8] R v Blom 1939 AD 188 at 202-203.
- [9] Macleod v Rens 1997
- (3) SA 1039[E], and Zeffert, the South African Law of Guidance at p105.
- [10] See Probest Projects (Pty) Ltd v The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund (20761/2014) [2015] ZASCA 192 (30 November 2015) para [18] and the authorities cited there.
- [11] Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979(1) SA 621 AD.
- [12] Tshishonga v Minister of Justice and Constitutional Development and Another [2007] 4 BLLR 327 (LC); 2007
- (4) SA 135 (LC) (26 December 2006).
- [13] Rautini v Passenger Rail Agency of South Africa (Case no. 853/2020) [2021] ZASCA 158 (8 November 2021) para 10.
- [14] See Rautini para [11].
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