

SOUTH AFRICA / JUDGMENT

Shezi v eThekwin Municipality (7762/2015) [2017] ZAKZDHC 39 (11 October 2017)

[2017] ZAKZDHC 39

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

7762/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 7762/2015

In

the matter between:

SAMUKELISIWE

LONDIWE LORRAINE

SHEZI Plaintiff

and

ETHEKWINI

MUNICIPALITY Defendant

ORDER

[1]

The defendant is liable to compensate the plaintiff for one hundred per cent (100%) of her proven or agreed damages.

[2]

The defendant is directed to pay the plaintiff's costs of suit on the High Court party/party scale in respect of the issue of liability.

[3]

The plaintiff and her witness Velinkosi Mncwango are declared necessary witnesses.

[4]

The trial is adjourned sine die for the determination of

quantum.

JUDGMENT

Henriques J

Introduction

[1] The plaintiff sues the defendant for damages arising from an alleged unlawful assault by members of the Metro Police. The defendant's

plea is one of a bare denial and no particulars are pleaded in amplification of the denial. At the commencement of the trial, I

issued an order by consent in terms of rule 33(4) and the trial proceeded solely on the issue of the defendant's liability.

Pleadings

[2] The plaintiff alleges that on 2 November 2014, she was wrongfully, unlawfully, and without any justification, assaulted and insulted by two Metro police officers acting in the course and scope of their employment with the defendant. Particulars of the assault and the insults allegedly hurled at her by such police officers are pleaded[1] as follows:

‘5.1 at about 10:00pm on the 2nd November 2014 the Plaintiff was the driver of her motor vehicle at the entrance of Caversham and Underwood Roads in Pinetown when the Plaintiff's vehicle was blocked by a Metro Police vehicle with registration letters and numbers NDM 15028 (the Metro Police vehicle);

5.2 two White males who were dressed in Metro Police uniforms got out of the Metro Police vehicle with one police Officer pointing a firearm and, at the same time, the Plaintiff was punched in the face by the other police Officer;

5.3 upon being punched the Plaintiff fell down and the said police officer began kicking the Plaintiff whilst she was lying on the ground and he was kicking the Plaintiff on her head, face and other parts of her body;

5.4 Whilst kicking the Plaintiff the said police officer uttered words, inter alia, that he cannot even understand whether the Plaintiff was a male or a female and besides uttering other insulting derogatory words the said police officer shouted out that the Plaintiff and her passengers were “Kaffirs”;

5.5 The said police officers then conversed with each other and immediately left the scene with the Metro Police vehicle.’

- [3] In addition, the plaintiff pleads that at the time of her assault and being insulted, she had not committed or attempted to commit any offence in the presence of the police officers and they had no reason to suspect that she had committed any offence. The names of the police officers were not known to the plaintiff and, despite requests, the defendant did not provide her with such names. In the particulars,[2] the plaintiff indicates that she was assaulted by one Metro police officer whilst the other simply stood by and did not come to her assistance. The plaintiff suffered bodily injuries, required medical treatment and as a consequence of the incident, publications occurred in two newspapers in which she was referred to as a lesbian.
- [4] Her damages are computed in the sum of R500 000 in respect of general damages for her physical injuries, mental anguish, injuria, humiliation, indignity, embarrassment and the loss of amenities of life.
- [5] The plaintiff called two witnesses and the defendant called three, one of whom was an occupant in the plaintiff's vehicle at the time of the alleged incident. Various exhibits were handed in during the course of the trial, most notably exhibit "E" and exhibit "C".[3]
- [6] The usual admissions applied in respect of the documents contained in exhibit "C". I may add that the defendant did not discover any documents nor did it prepare a separate bundle and relied exclusively on the documents contained in the plaintiff's bundle of documents at the trial.
- [7] The plaintiff testified that at approximately 19h40 on 2 November 2014, whilst driving her VW Polo on Underwood Road in Pinetown, she took an incorrect right turn and entered the onramp to the M13. At the time she was accompanied by Velinkosi Mncwango ("Velinkosi"), her brother-in-law who was seated in the front passenger seat of her vehicle and Sithembiso Malinga ("Sithembiso") who was seated behind Velinkosi. As she was residing in Port Shepstone at the time and the area was unknown to her, Velinkosi was providing her with directions to his home in Westville North. The plaintiff was supposed to travel on Underwood Road to turn right at the robot controlled intersection with Caversham Road. When she took the incorrect turn, Velinkosi informed her of this and she immediately stopped her vehicle, put her hazard lights on and reversed towards the painted island.[4]
- [8] While waiting to see if it was safe to enter traffic on Underwood Road and proceed towards the intersection, a marked Metro police vehicle, a VW Jetta 5, stopped directly in front of her vehicle with the engines of the vehicles facing each other. The blue lights of the vehicle were on and two white male uniformed Metro police officers alighted from the police vehicle with their guns in their hands and approached the driver side of her vehicle. The plaintiff immediately alighted from her vehicle to explain to them that she was lost. However, before she was able to say anything, one of the policemen punched her on her forehead and she fell to the ground. The police officer then started kicking her all over her body with his boots and swearing at her, calling her vulgar names. She heard him use the words "kaffir" and

“fucker” and say to her that he did not even know whether she was male or female.

- [9] The plaintiff tried to cover her head and lay in a foetal position to protect her body from sustaining serious injuries, but she felt the police officer’s boots all over her body and heard the vulgar language, although she could not clearly see who was using such language or booting her.
- [10] The plaintiff testified that she understood the words in the context of her gender and because of her physical appearance. She testified that she could not say for certain which of the Metro policemen had used such vulgar language and whether one or both of them assaulted her. During the incident, Velinkosi and Sithembiso were outside of the vehicle and she heard the Metro police officers tell them to “fuck off”. They then told Velinkosi to drive the vehicle home as the plaintiff was crying and injured. The plaintiff climbed into the back passenger seat, with Sithembiso in the front passenger seat and Velinkosi drove the vehicle to his home in Westville North. They arrived at Velinkosi’s home just after 23h00 and the plaintiff’s sister helped her and took photographs of her injuries. At approximately 23h34, the plaintiff, accompanied by her sister, Velinkosi and Sithembiso, attended at Westville Hospital where she was treated by doctors and nurses. Her sister provided all the relevant patient information to the hospital staff and photographs were taken following her treatment at the hospital which forms exhibit “D”.
- [11] The plaintiff was subsequently telephoned by reporters from The Witness and Isolezwe newspapers who interviewed her and took photographs of her.[5] She testified that prior to and during the assault, she did not say anything to the Metro policemen and further that she did not have an opportunity to do so as they immediately started assaulting her when she alighted from her vehicle.
- [12] Velinkosi Hamilton Mncwango (“Mncwango”), the plaintiff’s brother-in-law, corroborated her evidence. He testified that on 2 November 2014, an incident occurred immediately before the Caversham / Underwood Road intersection at approximately 22h00. The plaintiff was driving her vehicle from their friend’s place along Underwood Road and they were proceeding towards the intersection of Caversham Road as they were travelling to his home in Westville North. He was seated in the front passenger seat and Sithembiso was behind him in the rear passenger seat. He was providing the plaintiff with directions to his home as she did not know the area. It was a Sunday night and the roads were fairly quiet. Immediately before the intersection, the plaintiff made an incorrect right turn onto the onramp to the M13. He immediately told her to stop the vehicle as she had taken the wrong turn. The plaintiff stopped her vehicle, put on the hazard lights and reversed to the painted island where she brought her vehicle to a complete stop. She was stationary there for a while determining whether it was safe to proceed towards the intersection when a Metro police vehicle came in front of them in the direction of oncoming traffic and parked close to the intersection.

- [13] Two uniformed white Metro policemen alighted from the vehicle with their firearms drawn and walked towards them. One of them approached the driver's side of the vehicle and the other his passenger door. The policemen enquired from them what was going on and forced them to open the doors and climb out of the vehicle. As they all alighted from the vehicle, the Metro policeman on the plaintiff's side of the vehicle started swearing and using vulgar language and asked the plaintiff whether she was a boy or a girl and kicked and punched her very badly. He testified that he and Sithembiso did not have an opportunity to say anything as the officers told them to raise their hands and place them on the vehicle. They did so, all the while the Metro policeman on their side of the vehicle stood behind them pointing his firearm at them.
- [14] They observed the policeman on the other side of the vehicle punching the plaintiff, hitting her and swearing at her until she fell to the ground. Whilst she was lying on the ground, he carried on kicking her and booting her with his feet all the while pointing his firearm at them. Neither he (Velinkosi) nor Sithembiso were able to do anything as they were extremely shocked by the incident and it was over very quickly. Eventually, the policeman on their side of the vehicle demanded that they proceed to the driver's side of the vehicle and he joined the other Metro policeman in kicking and booting the plaintiff whilst she was lying on the ground.
- [15] All the while the officers kept on referring to them as "kaffirs" and "bastards". The plaintiff was screaming and crying and one of them then said to him to put her in the vehicle and "fuck off". He and Sithembiso assisted the plaintiff onto the backseat of the vehicle and she lay there crying. He then climbed into the driver's seat and Sithembiso sat in the passenger's seat next to him. He observed the Metro policemen walking back to their vehicle and climbing into the vehicle. As he drove off he took down the registration letters and numbers of the Metro police vehicle and also noticed that the Metro policemen likewise left the scene. He was extremely disturbed and was very shocked by the incident and was worried about the plaintiff as he regarded her as his sister, as he is married to her sister.
- [16] On arrival at his home, the plaintiff and his wife went to the Westville Hospital. The following morning they reported the incident to the police. Velinkosi testified that he did not accompany them to the hospital as he was travelling to Mauritius the next day. As such, he only reported the incident to the police and provided the police with a statement a few days after the incident at the Pinetown Police Station. That then was the evidence for the plaintiff.
- [17] Adv. Mfeka who appeared for the defendant, thereafter made application for absolution from the instance in terms of rule 39 of the Uniform Rules of Court. The relevant provision of rule 39 reads as follows:

'At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.'

[18] When a party applies for absolution from the instance at the close of the plaintiff's case, the applicable test is not whether the evidence establishes what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff. This is often referred to

as prima facie evidence or a prima facie case. The use of the words "prima facie case" means evidence sufficient to avert a ruling of absolution from the instance but in addition is sufficient to cast a duty to adduce evidence on the defendant.[7]

[19] In other words, it requires an answer from the other party. Normally at absolution stage, questions of credibility of witnesses are not investigated except where the witnesses have palpably broken down and it is clear that what they stated is not true.[8] A court must refuse absolution from the instance unless it is satisfied that no reasonable court could draw the inference which the plaintiff contends for. This means that the court must assume in the absence of special considerations that the evidence is true. A court does not weigh up possible inferences but must determine which one of the reasonable inferences is in favour of the plaintiff.[9]

[20] Amongst the issues raised by Adv. Mfeka during the application for absolution was the status of the photographs. At the commencement of the trial, he objected to the admission of the photographs as, according to his instructions, a request for copies of them had not been responded to by the plaintiff's attorneys. Subsequent enquiries and e-mails handed up by the plaintiff's attorneys revealed that notice had been given in terms of rule 36(10) of the Uniform Rules of Court and correspondence handed up, which had been exchanged between the parties' legal representatives, confirmed that copies of the photographs had been served on the defendant's attorneys of record and signed for by a staff member as per their request. It was based on this that the objection was ruled unfounded and the photographs were admitted into evidence as exhibit "D". The effect of such admission into evidence of the photographs dispensed with the need to call the photographer and the need to deal with the authenticity of the photographs.[10]

[21] Among the submissions Adv. Mfeka made for absolution from the instance was that the plaintiff had not established a prima facie case and there was no onus on the defendant to discharge. He urged the court to consider the credibility of the plaintiff and her

witness and to find that their evidence was not true. He submitted that their credibility was seriously questionable as they did not corroborate each other and the contradictions and inconsistencies in the evidence were material. As a consequence, there was no basis to conclude that there was a reasonable possibility that a court might find for the plaintiff. He emphasized the fact that the versions of the plaintiff and her witness fell to be rejected, and the inconsistencies, specifically in relation to the manner in which the Metro policemen left their vehicle and the manner in which the plaintiff was assaulted, were material and therefore not true and fell to be rejected.

- [22] He also submitted at this very late stage of the proceedings that the veracity of the photographs could not be accepted as the person who took the photographs did not testify.
- [23] In addition, he also submitted that on the plaintiff's own version, she had admitted that when she was interviewed by newspaper reporters she willingly and of her own volition advised them that she was a lesbian.
- [24] He further submitted that having regard to the contents of the J88 report, which was read into the record by the plaintiff, this recorded superficial lacerations which was not consistent with the plaintiff's evidence and that of the witness regarding the nature of the assault described. The inconsistencies in the evidence of the plaintiff and her witness were so material to the extent that the court could not accept it and seriously called into question their credibility.
- [25] Adv. Naidu who appeared for the plaintiff, submitted that the plaintiff had established a prima facie case for the defendant to answer. He submitted that the inconsistencies in the evidence of the plaintiff and her witness were not so material so as to be rejected and further, that it was not for the court to engage at this interim stage with an enquiry in relation to the credibility of the witnesses. He submitted that the credibility of the witnesses could not be called into question as the evidence was dissimilar. After hearing and considering the submissions of the parties and of the parties' representatives, I dismissed the application for absolution from the instance with costs and indicated that my reasons would follow in the judgment. These are my reasons.
- [26] It is trite that at the absolution stage the test is whether the plaintiff has established evidence upon which a reasonable court might find for the plaintiff. A court does not normally engage in credibility findings of witnesses unless the evidence is so palpably false that it falls to be rejected. I accept that there were certain inconsistencies and contradictions in the evidence of the plaintiff and her witness. Among these was the difference in the plaintiff's evidence at court regarding the assault and that which was stipulated in the letter of demand and pleaded in the particulars of claim. The plaintiff relied on an assault by a single Metro police officer and an omission by another Metro police officer. In considering the evidence, one must consider the evidence as a whole, and not in a piecemeal fashion.
- [27] The plaintiff's evidence as suggested by Adv. Mfeka was that she was assaulted by both Metro police officers. I differ somewhat with what Adv. Mfeka's submissions were insofar as what the evidence of the plaintiff was. My notes in the matter reflect that the plaintiff testified that whilst lying in a foetal position on the floor, covering her body to protect herself from the blows as she was assaulted, she could not see precisely whether or not the second Metro police officer also participated in the assault. Be that as it may, liability arises on the part of the defendant for the conduct of its Metro police officers either in the form of an active participation in an assault or from an omission in the event of the court finding an assault did occur.

- [28] The difficulty which I had in granting an application for absolution was that at no stage during cross-examination of the witnesses, when the defendant's case was put to the witnesses, was it disputed that the two Metro police officers were on the scene. This coupled with the fact that there was an allegation of an assault and verbal abuse, calls for some response by the defendant as the Metro police officers were on the scene. This is despite the inconsistencies in the evidence of the plaintiff and her witness.
- [29] The defendant then called Sithembiso Canaan Makiwana Malinga as a witness.[11] He confirmed he was a passenger seated in the rear passenger seat of the motor vehicle driven by the plaintiff on the night of the incident. He and the plaintiff had travelled to Pinetown to pick up Velinkosi who was having dinner with his family at a friend's home. Velinkosi was seated in the front seat giving the plaintiff directions. He confirmed both the plaintiff's and Velinkosi's evidence that she had taken the wrong turn and reversed the vehicle onto the island. His evidence further corroborated the plaintiff's that the Metro police vehicle stopped directly in front of them and differed somewhat from what Mncwango testified to.
- [30] He confirmed that the vehicle was parked in front of them on the island and that two uniformed, white policemen alighted from the Metro police vehicle with their firearms drawn. One Metro policeman proceeded to the driver's door of the vehicle and the other to the passenger side of the vehicle. The police officers ordered them to alight from the vehicle and the one on the driver's side of the vehicle pulled the plaintiff out of the car and assaulted her. The other Metro police officer pointed the firearm at them and started swearing at them calling them "kaffirs".
- [31] After the Metro policeman had pulled the plaintiff out of the vehicle, he started hitting her and swearing at her. The plaintiff
- then fell to the ground and that was when the other Metro policeman on their side of the vehicle told them to place their hands on the roof of the car. At this stage the plaintiff was lying on the floor and he could hear her crying and screaming. The policeman on their side of the vehicle then ordered them to move to the other side of the vehicle and he joined the other policeman in assaulting the plaintiff.
- [32] He testified that whilst on the passenger's side of the vehicle with his hands on the roof of the vehicle, he noticed the Metro policemen boot the plaintiff, as he was facing them. In addition, when they moved around the vehicle he also saw the first Metro police officer boot the plaintiff and noticed the second Metro police officer join in the assault after he had told them to place their hands on the roof on the driver's side of the vehicle. During the assault, neither he nor Velinkosi could do anything to stop the Metro policemen as their firearms were drawn and pointed at them whilst the assault was taking place.
- [33] He heard the one policeman ask the plaintiff whether she was a man or a woman and swore at her whilst she was lying on the floor and they were booting her with their feet. After they had finished the assault, one of the Metro policemen asked Velinkosi to drive the vehicle. The plaintiff climbed onto the backseat and he sat next to Velinkosi in the front of the

vehicle. It was then that the policemen had told them to “fuck off”. As they left the scene they noticed the Metro police vehicle also follow and leave the scene. They then drove to Velinkosi’s house in Westville and travelled to the Westville Hospital accompanied by the plaintiff’s sister and Velinkosi.

- [34] Mr Malinga was shown a typed, unsigned statement, exhibit “C”. [12] He confirmed after reading the document in court that the contents of the document were similar to a statement he had made to a police officer, one Mr Naidoo. He did not know however where the document originated from and could not confirm that this was a statement he had made as he had not typed the statement, nor was he aware of who had typed it and it did not have his signature appended to it. He confirmed that over the last two days whilst sitting outside court waiting to testify, he observed two Metro policemen who were the same policemen who were on the scene on the day of the incident. He also recognised their vehicle. He confirmed that at the time of the incident Velinkosi had taken down the registration letters and numbers of the vehicle.
- [35] The next witness to testify was Emmanuel Jardine, an inspector in the Metro police services. He testified that he has been in the employ of the Metro police services since 1991 and a member of the Dog Unit since 1994. On the day in question, he and Inspector Payne were performing crime prevention duties in the Pinetown area, having reported for duty at 18h00 that evening. Whilst patrolling the Pinetown Crompton Road area, they received a call over the radio that there had been a hijacking which had occurred earlier on in the day and the description of the vehicle that had been taken during the hijacking was a VW Polo, dark in colour. They were patrolling the area looking for a similar vehicle.
- [36] As they entered Crompton Road turning into Underwood Road, he noticed a VW Polo vehicle facing oncoming traffic. It was parked on Underwood Road where one takes the onramp to enter onto the M13. The vehicle was parked in an area which was not well lit and the driver’s door of the vehicle was open. This looked suspicious to him and he stopped the Metro police vehicle to investigate. He testified that he put the blue lights of the Metro police vehicle on as well as the headlights. He and Inspector Payne then alighted from their vehicle and approached the other vehicle with their firearms drawn. As he got closer to the VW Polo, the driver stepped out of the vehicle and he asked the occupants if everything was ok. It was at this stage that the driver started swearing and shouting at them, asking them why the Metro policemen had stopped them. He also observed two other occupants in the back of the vehicle who then alighted from the vehicle as Inspector Payne had instructed them to do so.
- [37] He proceeded to the driver’s side of the vehicle and noticed the keys to the vehicle lying on the driver’s seat. His attention was focused on the driver and he could not recall exactly how the two occupants had alighted from the vehicle. As he tried to reach for the keys of the vehicle, the driver bent over him and tried to grab the keys from him. He pushed the driver away with his arm and shoulder and that is when the driver fell to the ground. It was at that stage he realised that the driver was very drunk. The driver continued being very abusive and continued shouting and swearing at them.

- [38] He testified that at that stage he was not sure if the driver of the vehicle was a male or a female because of the way the driver was dressed. The driver of the vehicle was tall, with short hair and was wearing shorts and a t-shirt and kept on shouting at him that she was a woman and that he could not search her.
- [39] It was then that he realised that the driver was a woman and he could not conduct a search. He searched the motor vehicle and everything seemed alright. At that stage Inspector Payne spoke to the other occupants of the vehicle and asked him (Jardine) for the keys to the vehicle.
- [40] Jardine indicated that what he understood by this was that Payne was to hand the keys to one of the occupants who did not appear to be drunk so that he could move the vehicle to a safer location. He confirmed that when they first approached the vehicle, given where the vehicle was situated, and the manner in which it was parked with the door open, they approached their vehicle with their firearms drawn and he had shouted for the occupants to alight from the vehicle.
- [41] Payne handed the keys to one of the occupants who then moved the vehicle to a safer location as it appeared as though the driver was too drunk to drive. They then left the scene and continued searching for the hijacked vehicle. He denied that he or Payne swore at the plaintiff or any of the occupants in the vehicle and further, that either he or Payne assaulted the plaintiff at any stage.
- [42] A few days after the incident he was called into his director's office and questioned as to whether he was on duty on the day of the alleged incident. Both he and Payne confirmed that they were and he was advised that a criminal charge had been laid against him for an assault alleged to have occurred on 2 November 2014. He subsequently reported at the Pinetown Police Station where he was formally charged and released on warning. He instructed a private legal representative and attended at court pursuant to a written notice to appear.
- [43] On the day in question, the criminal charges against him were withdrawn and he was advised that it was due to insufficient

evidence. He indicated that the reason why it took a few days for the incident to be reported and for him to be called in was that he was informed that the registration number of the vehicle reported as being involved in the incident had been incorrect. It had been reported that the Metro police vehicle involved in the incident was NDM 5038 whereas the vehicle he and Payne were in on the day of the alleged incident was NDM 15028.

[44] He confirmed that no disciplinary proceedings were instituted against either him or Payne and that the criminal charges were not reinstated. He testified that neither he nor Payne made an entry in their pocket books or reported the incident to their commander. He confirmed that at the time of the incident he recalled the plaintiff had a small cut to her eye but he could not recall exactly which eye. He testified that the plaintiff sustained this cut when she fell to the ground.

[45] The next witness for the defence was Norman Jack Leslie Payne, Inspector Jardine's crew on the night of the incident. He confirmed Jardine's evidence that they were conducting crime prevention duties and corroborated Jardine's evidence in relation to the incident. He denied that he or Jardine assaulted the plaintiff or swore at her or the occupants of her vehicle. The plaintiff's vehicle had been parked contraflow on Underwood Road with the driver's door slightly ajar. He initially

approached the driver's side of the vehicle and the plaintiff, who had alighted from the vehicle, was extremely abusive.

[46] He also confirmed that he did not know whether the driver of the vehicle at the time of the incident was male or female. As he approached the vehicle, he observed two passengers and asked them to alight from the vehicle as he was not certain whether or not they were armed. The two persons alighted and stood next to the vehicle. He spoke to the rear seat passenger who appeared to be big in build. At the same time Inspector Jardine was attempting to talk to the driver of the vehicle but she was screaming at him and being very abusive towards him. He spoke to the front passenger of the vehicle and asked him what the problem was and to the best of his recollection, the passenger informed him that either they were coming from or going to a party and that they had got lost.[13]

[47] Whilst this conversation was taking place, the plaintiff kept on screaming 'I'm a woman, I'm a woman'. It was then that he asked the passenger whether the plaintiff was a male or female and the male passenger confirmed she was a female. He testified that both passengers, who remained outside the vehicle, were extremely co-operative with him. When the passenger had

indicated that the plaintiff was a female, he decided to "de-escalate" the situation and handed the keys to the passenger to move the vehicle to a safer location.

[48] All the while, whilst having a conversation with the passenger, his back was to the plaintiff and Jardine and he could not see or hear an assault. He testified that his contact with the plaintiff was minimal and he further denied that either he or Jardine assaulted the plaintiff or abused her or her passengers in any way. He in fact testified that it was the plaintiff who was being abusive. He did not notice any injuries to the plaintiff and spoke to the male passenger whom he had been communicating with. He focused on the two male passengers to keep them under observation.

[49] Neither he nor Jardine made a report regarding the incident nor did they arrest the plaintiff for drunk driving as he wanted to de-escalate the situation. He testified that in such situations, it is a matter of his discretion. He confirmed that the vehicle was not stolen as it was driven by a female and the keys were readily available. This was also confirmed by the fact that the passengers

were extremely co-operative towards him. He testified that when the plaintiff and her passengers were told to drive off, he did not notice any blood or injuries on her.

[50] That then was the evidence of the defendant.

Submissions

of the parties

[51] Adv. Naidu appearing for the plaintiff submitted that the plaintiff had discharged the onus to prove her case on a balance of probabilities. The plaintiff in my view had somewhat of an easy task in light of the fact that she closed her case and the defendant called her third witness, Mr Malinga, as its witness. It is as a consequence of this that the defendant was now in a position where it had two diametrically opposed versions from its witnesses – that of Mr Malinga and that of the two Metro Police officers, Inspectors Payne and Jardine.

[52] Given this, Adv. Naidu submitted it was appropriate to accept the evidence of the plaintiff and her witness Velinkosi as corroborated by Sithembiso in its entirety. This was the basis to reject the evidence of the Metro police officers coupled with the fact that the defendant's

version was that of a bare denial and no version had been pleaded. It was also for this reason that Adv. Naidu sought an attorney and own client costs order. He referred to several authorities on this issue[14] in support of his submission.

[53] The defendant's plea was a bare denial and despite being forewarned not only at the pre-trial stage but also on the first day of trial, and given an opportunity to amend its plea, Adv. Naidu submitted the defendant elected not to do so and then attempted to amend its plea by leading evidence. He also alluded to the manner in which the defendant had conducted the trial over the three days of hearing in support of his submission for an attorney and client cost order.

[54] Adv. Mfeka, for the defendant, submitted that the plaintiff deliberately chose not to call its witness Mr Malinga. He testified that there were inconsistencies in the evidence of the plaintiff and Mr Mncwango and that of Mr Malinga. Mr Malinga's version, so the submission went, differed significantly from that of the plaintiff and did not support the plaintiff. He further submitted that the evidence of the two Metro policemen supported the plea filed by the defendant. The appropriate way of dealing with the evidence was to reject the evidence of the plaintiff, Mr Mncwango and the defendant's witness Mr Malinga and decide the matter solely on the evidence of the two Metro policemen. He submitted that the defendant persisted in its denial of wrongfulness and that the charges of assault were withdrawn

against Inspector Jardine and never reinstated.

[55] In addition, he submitted that according to the J88, the injuries suffered by the plaintiff were superficial injuries and consequently the evidence of the plaintiff was not consistent with the J88 and the alleged injuries she sustained. Given the

contradictions between the plaintiff and Mncwango, it was submitted that one must accept that the plaintiff's version was

fabricated and that the defendant's two witnesses, being the Metro policemen must be preferred. It is for this reason that he submitted that the plaintiff's version must be rejected in toto as same is improbable when compared to that of the defendant's two witnesses.

[56] In his written submissions, Adv. Naidu submitted that the plaintiff and her witness were honest witnesses and that it cannot be argued that they have fabricated their evidence. No adverse inferences must be drawn against them regarding their credibility and demeanour. In addition, he submitted that the plaintiff provided a plausible explanation for the difference in her statement as well as the letter of demand and the particulars. The evidence that the second policeman also assaulted her was corroborated by the defendant's witness Mr Malinga.

[57] A further factor which ought to be considered is that Mr Malinga confirmed the two police officers had assaulted and abused the plaintiff and they were lying by denying such assault and abuse. The defendant, who called Mr Malinga as its witness, did not declare him a hostile witness and therefore his evidence must be accepted as being evidence for the defendant. The fact that his evidence corroborates that of the plaintiff and her witness Mncwango does not mean that it must be disregarded and rejected in toto.

[58] In his written submission Adv. Mfeka submitted that:

'...in light of the material inconsistencies in the Plaintiff's evidence, the Plaintiff did not discharge her onus on the balance of probabilities. The Plaintiff's attempts to explain such inconsistencies are wholly inadequate. Based on the inherent probabilities in the versions, it is submitted that the Plaintiff's version is wholly improbable as to warrant its rejection.'[15]

[59] Insofar as the punitive costs order sought, Adv. Mfeka in his written submissions submitted that such award is only granted in exceptional circumstances and is regarded as punitive. He submitted that the defendant was entitled to defend the action and did not do so simply to frustrate the plaintiff and consequently, it cannot be argued that the defence was frivolous. For these reasons he submitted that the court should grant costs on a party/party scale.

Analysis

[60] The biggest difficulty which the defendant faces, in my view, is the evidence presented and the manner in which the defendant chose to present its case. The plea constituted a bare denial. The defendant led the evidence of Mr Malinga and two Metro policemen. But for

calling Mr Malinga to testify on its behalf, the court would have been faced with two diametrically opposed versions of the evening's events. The court would then have had to decide the matter on the probabilities and the credibility of the witnesses. Alternatively, the court may have been in a dilemma and may have been forced to find absolution at the end of the entire case, given the two diametrically opposed versions. The defendant, in its conduct of its case, made matters simple for the plaintiff in that it led the evidence of the plaintiff's witness Mr Malinga and did not declare him a hostile witness. The crux of Mr Malinga's evidence corroborated that of the plaintiff and Mr Mncwango. It was in contradistinction to that of the two Metro policemen who denied an assault or abuse of the plaintiff.

[61] I accept that there may be inconsistencies in the evidence of the plaintiff and her witness when compared with that of Mr Malinga.

However, I am not convinced that these are material and that as a consequence the plaintiff's version must be rejected outright.

If one considers the case as a whole, the inconsistencies in the main related to the following:

[61.1] where the Metro police vehicle was parked at the time of the arrival at the scene;

[61.2] whether Mr Mncwango accompanied the plaintiff to the hospital after the alleged incident;

[61.3] whether one or both Metro policemen assaulted the plaintiff at the time of the alleged incident.

[62] This in my view does not mean that the evidence as a whole falls to be rejected.

[63] The defendant must bear the consequences of presenting its case. The conclusion is inescapable. The plaintiff has discharged the onus of proving her case on a balance of probabilities. This has been bolstered by the fact that the defendant chose to lead the evidence of a passenger in the plaintiff's vehicle at the time of the incident and a witness whom the plaintiff's legal representatives chose not to call.

[64] In his written submissions, Adv. Mfekahe submitted[16] that he was not allowed to lead evidence on this document. If one considers this document, it is not signed, it is not clear when the statement was taken down or who took the statement down. The witness was asked to identify the document to which he responded that he is not certain where the document emanated from, who typed it but the contents thereof were similar to a statement which he had deposed to before the investigating officer or a policeman.

[65] During the course of the trial, Adv. Mfeka applied for an adjournment to obtain the statement. Such adjournment was refused and detailed reasons were provided which are a matter of record. The defendant took no steps to secure this document even though it had the original docket and it was in possession of the plaintiff's discovered documents for a considerable period of time. Whilst the purpose of leading this evidence may have been to show inconsistencies between this witness's evidence and that of the plaintiff's witnesses,

this does not affect the onus which the plaintiff has to discharge.

[66] In para 7.3 to 7.5 of the plaintiff's particulars of claim she seeks to hold the defendant liable as a consequence of certain reports made in the news and print media regarding the incident. Having regard to the plaintiff's evidence, she was contacted by members of the news and print media regarding the incident and provided interviews to them. She voluntarily provided interviews and disclosed circumstances of the incident to them which was then published. In my view, the defendant cannot be held liable in respect of this cause of action pleaded.

[67] Insofar as the remaining cause of action is concerned, I must accordingly find in favour of the plaintiff based on the evidence

presented. I do so not making any credibility findings in respect of the defendant's witnesses.

Costs

[68] As already alluded to earlier, the plaintiff seeks a punitive costs order and its detailed written submissions contain the basis therefore. I have considered the authorities referred to by Adv. Naidu and I am of the view that the facts of this matter do not warrant a punitive costs order.

[69] In any event, it is trite that the award of costs is a matter which falls within the discretion of the court, which discretion must be judicially exercised. I am of the view that there is no reason to depart from the usual rule in respect of costs however, the award of costs should be on a party/party scale.

[70] In the premises the orders I issue are the following:

[70.1.] The defendant is liable to compensate the plaintiff for one hundred per cent (100%) of her proven or agreed damages.

[70.2] The defendant is directed to pay the plaintiff's costs of suit on the High Court party/party scale in respect of the issue of liability.

[70.3] The plaintiff and her witness Velinkosi Mncwango are declared necessary witnesses.

[70.4] The trial is adjourned sine die for the determination of quantum.

HENRIQUES J

Case Information

Date of trial

: 24, 25 & 26 August 2016

Date of submission of

Plaintiff's written submissions : 9 September 2016

Defendant's written submissions : 1 September 2016

Date of judgment

: 11 October 2017

Appearances

Counsel for Plaintiff

: Adv. K. Naidu

Instructed by

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Ref: Errol Sibiya/TCN/52E336424

[1] Para 5 of the particulars of claim, exhibit "B", pages 7 to 8.

[2] Para 6, page 9 of exhibit "B".

[3] Exhibit "E" are photographs depicting the area and the scene of the alleged incident; Exhibit "C" is a bundle of the plaintiff's discovered documents.

- [4] The plaintiff testified using exhibit “E”. The painted island can be clearly seen in photographs “E1” to “E5”. Her vehicle was stationary on the island with its hazard lights on and was facing the robot-controlled intersection at Caversham Road.
- [5] Exhibit “C”, pages C17 to C19.
- [6] Rule 39(6).
- [7] *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *R v Shein* 1925 AD 6 at 9.
- [8] *Gafoor v Unie Versekeringsadviseurs (Edms) BPK* 1961 (1) SA 335 (A) at 340D; *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) at 439D-E.
- [9] Erasmus Superior Court Practice, Service 41 B 1-293.
- [10] D E van Loggerenberg Erasmus Superior Court’ Practice (2 ed) Vol 2 D1-493 ‘When a plan, diagram, model or photograph is admitted or received in evidence without proof in terms of this subrule, an admission is created only
- (i) as to the authenticity of the plan, etc, ie the need to call the author of the plan, etc or to provide other proof of its authorship is dispensed with; and (ii) as to the physical features actually found by the author.’ *Shield Insurance Co Limited v Hall* 1976 (4) SA 431 (A) at 438 F-G.
- [10] D E van Loggerenberg Erasmus Superior Court’ Practice (2 ed) Vol 2 D1-493
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- Shield Insurance Co Limited v Hall* 1976 (4) SA 431 (A) at 438 F-G.
- [11] I may also add that this was the plaintiff’s witness who did not testify during the course of the plaintiff’s case.
- [12] Exhibit “C”, page C20.
- [13] In fairness to Inspector Payne, he testified that he had no clear recollection of exactly what was reported to him by the passenger in the vehicle.
- [14] *Madzunye & another v Road Accident Fund* 2007
- (1) SA 165 (SCA); *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA); *Thoroughbred Breeders’ Association v Price Waterhouse* 2001 (4) SA 551 (SCA).
- [15] Paras 94 and 95 of defendant’s closing arguments.
- [16] Para 60.

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Prepared on 10 October 2026 · Esheria