

SOUTH AFRICA / JUDGMENT

Sibanda v The Minister of Police (24475/2005) [2022] ZAGPJHC 634 (2 September 2022) [2022] ZAGPJHC 634

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela

CASE / FILE NUMBER

24475/2005

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 24475/2005

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

2 September 2022

In the matter between:

SIBANDA PILGRIM WILLIE

Plaintiff

and

THE MINISTER OF POLICE

Defendant

Judgment

Mdalana-Mayisela J

Introduction

[1] The plaintiff instituted an action against the defendant for delictual damages. The claim arises from the assault which allegedly

occurred at the plaintiff's residential property at number [...], B [...] 1 H [...] , B [...] 2, Johannesburg on 2 January

2004. The defendant is sued in the representative capacity. The action is opposed by the defendant.

[2] The parties agreed on the separation of issues of liability and quantum, and it was so ordered in terms of Rule 33(4) of the Uniform Rules of Court. The issue of quantum was postponed sine die. This court is required to determine the issue of liability only.

[3] The plaintiff in his particulars of claim avers that on or about 2 January 2004 he was unlawfully assaulted by members of the South African Police Services ("members"). Amongst the members was Inspector (now called Warrant Officer) CD Muller, and were all there and then acting within their scope of employment with the defendant. As a result of the unlawful assault he sustained serious bodily injuries, including internal injuries, loss or partial loss of hearing of the right ear, and epilepsy. He opened a case of assault with intent to do grievous bodily harm and pointing of a firearm at Hillbrow Police Station under the case number 78/01/2004.

[4] The defendant is denying that the plaintiff was assaulted and pointed with a firearm in any way by Warrant Officer Muller or by any other member on 2 January 2004, and he is put to the proof thereof.

Evidence

[5] This was a trial of a long duration. I have considered all the evidence tendered by both parties during the trial. I intend to summarise briefly only the evidence relevant for the determination of the issue of liability.

[6] The plaintiff testified and called one witness, Midas Thibela . The defendant led the evidence of 5 members who were at the scene of the alleged assault, and the complainant in the robbery case, Patrick Nkomo. The five members were Warrant Officers CD Muller, Khiba, N Senoamadi, C Pather and P Nkomo.

[7] The plaintiff testified that in the morning of 2 January 2004, he was at his apartment at [...] B [...] 1 H [...] , B [...] 2, where he was staying alone. The apartment complex has 16 units and 4 floors. He heard a sound of someone screaming from the second floor apartment number 203 below his. Thereafter, he had a knock, like a banging sound on his door. The person

outside his apartment swore and shouted at him to open the door. He was scared. He looked through the frosted window pane and the window was slightly open. He could see that the person who was shouting at him was a white person. The white person hit a frosted window pane with something and it cracked.

- [8] At the beginning he was reluctant to open the door as he thought they were criminals. He ran to the bedroom where he called 10111 emergency line. Thereafter he went closer to the main door as the white man had calmed down. He opened the wooden door. The burglar door was still closed and locked. He first saw three members. They identified themselves as policemen. He did not open the security door immediately because he wanted them to produce a warrant of arrest or search. They did not have it. He opened the burglar door. As they were entering the living room, he noticed that there were five members, one white, one Indian and three black. All were in civilian clothes.
- [9] As they were entering his apartment, the one in front was a white member who swore at him, calling him mofi, a derogatory name for a gay man. The white member pushed and kicked him on his right ear. The plaintiff fell to the floor. He continued to assault him, kicking him and jumping on his body approximately 30 times, and still calling him a mofi. He kicked him with a sharp object in his shoes ripping pieces of flesh out of the bottom of his legs. He also dragged him by his collar and knocked his head on the wall. He was bleeding from his right ear and was screaming. He pulled him with his shirt and asked him where David was. He responded that David was another gay man who had a fight with his partner (the complainant in the robbery case). The three black members were laughing at and mimicking him, as the white member asked him to demonstrate how gay men engage in sexual relations. The Indian member also slapped him once on his face, but apologised when they were leaving his apartment.
- [10] The Indian member received a call. The white member took a phone from him, went outside, and then came back. Thereafter, the white member and three black members left his apartment. The Indian member remained with him. The Indian member asked if he was not David and also enquired about the ownership of his apartment. He responded that he was not David and that he was renting the apartment. He noticed that the Indian member was doubtful, he then reached out for a file on the wall unit, showed him a lease agreement he entered into with David, for him to stay at his apartment from 15 to 26 December 2003 at a rental of R500. David left his apartment on 25 December 2003 after he got his salary.
- [11] At that stage he telephoned David asking him to come to his apartment to take him to hospital as he was injured. David arrived at his apartment at the same time as the white member and three black members returned. Both the wooden and burglar doors were open. The members were not aware that David was the suspect they were looking for. He identified David to the members, and they arrested him. He then heard the Indian member telling the white member that what they did was wrong as they assaulted a wrong person. At that stage he was still on the floor, unable to stand. The members together with David left his apartment. The white member locked the door and left with the keys.

- [12] After they left, some residents of the complex came to his apartment, screaming that he should open the door. He could not open for them as he was locked inside. He crawled to the bathroom after hearing one of the residents saying the white member threw the keys inside his apartment. He found the keys inside a basin. He managed to unlock and open the burglar door. The wooden door was not locked. They came inside and poured water on him. They called the ambulance but it did not arrive. Two residents then carried him walking on foot to Hillbrow Police Station as he did not have money to pay for a taxi.
- [13] On arrival at the police station he laid criminal charges against a white police member who had assaulted him. During that time, the white member came inside the charge office and he pointed him out as the perpetrator of the crime of assault. The white member then pointed a firearm at him, threatened to shoot him and shouted at him to go away. This second incident happened in the presence of the other police officers inside a charge office. A Superintendent Officer then told him that the white member's name is Inspector Muller.
- [14] The Superintendent Officer called the ambulance and it did not arrive. He then transported the plaintiff to Hillbrow clinic with a police van. On arrival at the clinic, the Superintendent Officer requested the medical staff to allow the plaintiff to skip the queue to be examined as he was injured. They acceded to the request. He was examined by a medical doctor and a J88 form was completed and given back to him. Thereafter, he was transported back to Hillbrow Police Station.
- [15] He testified that during the assault he sustained injuries to his head, mouth, eyes, right ear and bruises on his body. Prior to the incident in question, early in December 2003 he developed an abscess on the right shoulder blade. On 22 December 2003 it was removed, and the following day he went to Hillbrow clinic where he was treated and a gauze and plaster were put on the wound. He had an allergic reaction from the antibiotic treatment and he developed jaundice due to liver damage caused by the medication.
- [16] The window pane of his apartment as well as the door of the room were damaged during the incident in question. The members also stole his R200 note. He took photos of the damages on his apartment. These photos were admitted as evidence.
- [17] Sometime after the incident in question, he received a letter from the Area Commissioner of SAPS, Johannesburg, Superintendent Patchai informing him that a departmental action was taken against Warrant Officer Muller and he had been issued with a verbal warning.
- [18] He reported Warrant Officer Muller to the Public Protector, POWA, United Nations Commissioner for Human Rights. He also lodged a complaint at the Equality Court.
- [19] The plaintiff's witness, Midas Thibela testified that he used to live at apartment number [...] at the corner on the floor above the plaintiff's floor. He could see the plaintiff's apartment from his floor. He knew the plaintiff as a resident in his complex and used to greet him, whenever they met. In the morning of 2 January 2004, he was alone in his apartment relaxing when he had a noise along the passage. He went outside to investigate. He saw five

men, one white, one Indian and others black. The white man was in front of apartment [...], banging a door. He saw him pull something like a firearm from right side of his waist. He became scarred, went inside his apartment and locked himself in. He heard a male person screaming. The five men were wearing civilian clothes.

- [20] After about 30 minutes it became quite and he went outside his apartment. He noticed that the door at [...] was opened and people were going inside. After few minutes he saw the five men again. After they left, he and other residents went to apartment [...]. Inside apartment [...] he saw the plaintiff bleeding and his clothes were blood stained. He also noticed blood on the wall. The plaintiff told him that the five men were police officers. The residents were very angry about what happened to the plaintiff. He left the plaintiff's place to attend to his commitments. He returned in the evening to check on him and found him lying on the bed.
- [21] Warrant Officer Muller testified that on 2 January 2004 he went to investigate a case of robbery in docket Cas no. 55/01/2004, together with his four colleagues from Serious and Violent Crimes Unit, Hillbrow Police Station. The complainant in that case, Patrick Nkomo and witness, Mduduzi Mkhonza accompanied them. They first went to Norman Nkwane's apartment no. 203, B [...] 1 H [...] and conducted a search looking for David Klaas. Norman told them that David used to frequent flat [...]. They then proceeded to apartment [...]. He knocked on the door and announced that they were the police officers. The plaintiff then opened the wooden door. He informed the plaintiff that they were looking for David Klaas. The plaintiff said he does not know that person. The plaintiff unlocked the security door, they went inside searched the apartment but found nothing.
- [22] They received new information about the whereabouts of David Klaas and they proceeded to Joubert Park. There they found stolen property and arrested four suspects. One of the suspects informed them that David Klaas left to B [...] 1 H [...] . They then drove back to B [...] 1 H [...] .
- [23] On arrival at apartment [...], he ordered the plaintiff to open the security door. He grabbed the keys from the plaintiff's hand from outside and opened a security door. The plaintiff was standing on his way. He pushed the plaintiff and he fell to the floor. They searched the apartment and found David inside the bedroom. He was arrested and taken to Hillbrow Police Station. As they were leaving B [...] 1 H [...] complex the residents were writing down the registration numbers of their two vehicles, but he was not bothered by that.
- [24] Inside the plaintiff's apartment, the plaintiff kept on accusing him of assault and informing them that he was taking medical treatment. He saw a scab above the left eye, which from a healing wound. The plaintiff could walk.
- [25] On arrival at the police station, there were ten people inside a charge office. There was a lady busy taking statements, and she informed him that a case of assault and pointing of a firearm was opened against him. The plaintiff was also in the charge office. He pointed at him and said 'this is the white guy who assaulted me'. He was the only one in his crew implicated by the plaintiff. He confirmed that he was given a verbal warning from Director

Louw and was told not to bring SAPS into disrepute. He also confirmed the contents of the letter addressed to the plaintiff by the Area Commissioner. Again he was the only one in his crew that was given a verbal warning. He also confirmed that Norman Nkwane opened a case of assault against him.

[26] Warrant Officer Ngoako Senoamadi testified that on 2 January 2004, he together with the other four members went to the plaintiff's

apartment. Upon arrival he stood against the wall at the entrance outside the apartment, with his firearm drawn guarding against any ambush, and whilst other members went inside. He could not remember seeing Warrant Officer Muller assaulting the plaintiff during the first visit. He did not hear him shouting or banging the door. They did not find David and other suspects on their first visit. They then proceeded to Joubert Park where they arrested other suspects. They were informed that David went to B [...] 1 H [...]. They proceeded back to the B [...] 1 H [...]. Upon arrival he remained in the car guarding the suspects whilst other members went to the plaintiff's apartment. Before they left B [...] 1 H [...] to police station, another man came to their cars and took the registration numbers.

[27] Warrant Officer P Nkomo testified that on 2 January 2004, together with the other four members and two civilians they went to the plaintiff's apartment twice on that day. Upon arrival on the first visit he knocked on the door. The plaintiff opened the curtain. When told under cross-examination that there was no curtain at the plaintiff's apartment as the windows were frosted, he said he could not remember. Upon arrival on second visit, the plaintiff took few minutes to open the wooden door. The security door remained locked. Warrant Officer Muller, while standing outside the apartment, pulled the plaintiff who was standing inside, took the keys and opened the security door. Warrant Officer Muller pushed the plaintiff hard, and he fell on the bed. He said that the plaintiff was wearing full clothes when he opened the wooden door. He did not see any bandage on the plaintiff's body. During their visits at the plaintiff's apartment, their firearms were not drawn. He did not see anyone writing down the registration numbers of their cars.

[28] Warrant Officer C Pather testified that five members went to B [...] 1 H [...] to look for a suspect David. They first went to apartment 203, then proceeded to [...], and were informed that no one knew David there. They then went to Joubert Park where they arrested some of the suspects and also recovered stolen property. They got information that David went to B [...] 1 H [...]. They went back to B [...] 1 H [...]. Upon arrival both doors were closed at [...]. The plaintiff looked through the window and he showed him his appointment card. The plaintiff did not open the security door to allow them in. The complainant, Patrick saw David inside [...] and informed the members. Warrant Officer Muller pulled the plaintiff forward, grabbed the keys and opened the security gate. The plaintiff blocked their way. Warrant Officer Muller pushed him out of the way and he fell on the bed. Warrant Officer Nkomo went to the bedroom and came out with David. He arrested him. When they were inside [...] the Plaintiff complained that Warrant Officer Muller assaulted him. He told the plaintiff to calm down. He denied that Warrant Officer Muller assaulted plaintiff. When they

were leaving B [...] 1 H [...] complex to police station, the plaintiff followed them to the parking area. They gave him their names and business cards. The plaintiff took the registration numbers of the cars and the commander's name.

Analysis

of the evidence

- [29] It is common cause that in the morning of 2 January 2004, on two occasions, the five members went to the plaintiff's place looking for David, a suspect in the robbery case; that on the first occasion the members searched the plaintiff's place but could not find David; and on the second occasion David was found and arrested.
- [30] It is also common cause that when the members were inside the plaintiff's apartment, Warrant Officer Muller caused him to fall on the floor; that inside his apartment he was complaining that Warrant Officer Muller assaulted him; and that he pointed out Warrant Officer Muller as the one that assaulted him, inside the charge office at Hillbrow police station. It is also common cause that Warrant Officer Muller was given a verbal warning and told not to bring SAPS into disrepute when conducting investigations.
- [31] It is also common cause that some of the residents of B [...] 1 H [...] complex wrote down the registration numbers of the members' cars.
- [32] It is not disputed that after the members left the plaintiff's apartment, some of the residents went inside and poured water on him; that the witness Thibela, on his arrival at plaintiff's place noticed blood on the plaintiff's clothes and wall; the plaintiff was carried by two residents of B [...] 1 H [...] and transported on foot to Hillbrow police station; the Superintendent who helped the plaintiff open the case against Warrant Officer Muller classified the offence as assault with grievous bodily harm; the same Superintendent transported the plaintiff to Hillbrow clinic wherein he negotiated with the medical staff to allow the plaintiff to skip the queue and be examined by the medical doctor; and the plaintiff was examined by the medical doctor and a J88 was completed.
- [33] What is in dispute is whether or not Warrant Officer Muller assaulted the plaintiff by kicking and jumping on him and also knocking his head on the wall.
- [34] The plaintiff is the single witness regarding the issue in dispute. He testified that he was screaming when the assault was taking place, and that he was bleeding from his right ear and other parts of his body. His witness Thibela testified that he heard a male person screaming from a third floor apartment. He went outside to investigate and saw the men standing next to the plaintiff's

door. After the men left the plaintiff's place he went inside the plaintiff's place. He noticed the blood on the wall and on plaintiff's clothes. The plaintiff was injured and the residents poured water on him. He came back in the evening to check on him and found him lying on the bed.

[35] This evidence of Thibela corroborates the plaintiff's version on the bleeding and injuries. His evidence that a male person was screaming corroborates the plaintiff's version that he was assaulted. The blood he noticed on the wall corroborates the plaintiff's version that his head was knocked on the wall. The noise that made him to go outside to investigate corroborates the plaintiff's version that Warrant Officer Muller was shouting and banging his door before he opened for them. Thibela's

evidence that he was scared because of the conduct of the members and locked himself inside his apartment, corroborates the plaintiff's

version that he was scarred when they were banging his door and shouting, he thought they were criminals and phoned 10111.

[36] Thibela's evidence was clear and satisfactory in all material respects. He had no motive to lie. He is not plaintiff's

friend. He knew him by sight. He no longer stays at the plaintiff's complex. He was an honest and credible witness. I accept his evidence.

[37] The plaintiff's evidence was also clear in material respects. He had outbursts during his testimony because he had a pre-existing condition and was feeling sick. He was frustrated by the cross-examination that lasted for a long time. At times I had to adjourn to allow him to take medication. He also indicated that he was frustrated by the delay in finalising his civil case which was instituted in 2005. He had lost hope in the justice system. The defence argued that he was not a good witness. I disagree. I understand the plaintiff's difficulties and they cannot be used against him. I accept his evidence of assault perpetrated by Warrant Officer Muller as credible.

[38] The defence contends that the bruises noted on the J88 were caused by the plaintiff's pre-existing condition. I reject this contention. No medical evidence was tendered by the defence to support this contention. When the members arrived at the plaintiff's

place on first occasion, he had a bandage on his shoulder blade covering his wound where the abscess was. There is no evidence from the defence that the wound was bleeding or his clothes were bloodstained or there was blood on the wall when they arrived. The probability is that, the blood that the plaintiff and his witness testified about were caused by the assault which occurred during the members' presence at his place. There would be no reason for the residents to write down the registration numbers of the members' cars if they did not do anything wrong inside the complex.

[39] The defence witnesses contradicted themselves in material respects. Warrant Officers Muller and Senoamadi testified that the residents wrote down the registration numbers of their cars. Warrant Officer Pather testified that when they were leaving the plaintiff went down to the parking area, he took the registration numbers of their cars. They also gave him their names, business cards and the commander's name. Warrant Officer Pather's version in this regard is improbable because the plaintiff was injured and could not walk. His evidence

that he was carried by two residents to the police station because he could not walk was not disputed by the defence.

- [40] Warrant Officer Muller testified that when they were knocking at the plaintiff's apartment, he drew his firearm and instructed other members to draw theirs. This evidence corroborates Thibela's evidence that he saw one of the men pulling something that looked like a firearm outside the plaintiff's apartment. W/O Nkomo contradicted W/O Muller's evidence in this regard and said that the firearms were not withdrawn.
- [41] Patrick testified that on arrival at the plaintiff's place, the plaintiff was half naked, and he saw a bandage on his chest. W/O Nkomo testified that the plaintiff was fully dressed and he did not see any bandage on him.
- [42] W/O Muller, Nkomo and Pather testified that on the second occasion the plaintiff refused to open a security door. W/O Muller pulled him forward, grabbed the keys and opened the security door. This evidence is not mentioned in their statements. W/O Pather stated in his statement that the plaintiff opened the doors on both occasions. Furthermore, W/O Pather and Nkomo testified that W/O Muller pushed the plaintiff and he fell on the bed. W/O Muller testified that the plaintiff fell to the floor. The Plaintiff also testified that when W/O Muller kicked him he fell to the floor. It is clear that these members fabricated the version about W/O Muller pulling the plaintiff, grabbing the keys and opening the security gate. This version is improbable because the plaintiff was injured and could not walk when they returned to his place, as he was assaulted on the first occasion. What makes it even more improbable is that according to these members, W/O Muller was standing outside and plaintiff was inside when this occurred.
- [43] I reject the versions of the defence witnesses as false, as far as they are inconsistent with the versions of the plaintiff and his witness on the issue in dispute.

Conclusion

- [44] I accept the versions of the plaintiff and his witness on the issue in dispute. In taking into account the evidence presented by the plaintiff and the common cause facts, I find that the plaintiff has discharged the onus on a balance of probabilities that W/O Muller assaulted him on 2 January 2004 and caused him to sustain injuries. The nature and extent of injuries will be determined in a quantum trial.
- [45] The plaintiff seeks costs of the action. He is successful on liability. I find no reason why the costs should not follow the

event.

- [46] In the premises, I make the following order:

ORDER

1. The defendant is liable for plaintiff's 100% proven damages resulting from the assault that occurred on 2 January 2004.
2. The defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include the fees of senior and junior counsel on the applicable High Court Scale.

MMP Mdalana-Mayisela J

Judge of the High Court

Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 2 September 2022

Appearances:

On behalf of the plaintiff:

Adv DJ Joubert SC

Adv C Britz

Instructed by:

Morwape Mashiloane Attaroneys

On behalf of the defendant:

Adv L Montsho-Moloiwane SC

Adv M Manthata

Instructed by:

State Attorney, Johannesburg

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