

IN THE HIGH COURT OF SOUTH AFRICA  
(SOUTH EASTERN CAPE LOCAL DIVISION)

**(NOT REPORTABLE)**

Case No.: 4226/2005

Date delivered: 7/2/08

In the matter between:

**TOTO JEFFREY MSELENI**

Plaintiff

and

**THE MINISTER OF SAFETY AND SECURITY**

Defendant

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### **JUDGMENT**

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**JANSEN J**

This is an action for damages. It is common cause that a number of police officers visited the premises of the plaintiff on 11 December 2003. The plaintiff was inside his house when the police arrived on the scene. The plaintiff was making a living from selling liquor. A shack at the back of his house was used by persons drinking on the premises. A person, who was apparently a suspect in a murder and sodomy case, who was drinking in the shack, was pointed out by an informer and arrested by the police and placed in the police van. It is further common cause that the police then demanded entrance into the plaintiff's main house but access thereto was refused by the plaintiff. The police eventually kicked the door open and a dog handler in the services of the South African Police released his dog to control the plaintiff whereafter he was arrested. He was handcuffed and put into the police van

with the same person who was arrested in the shack. The plaintiff was then taken to the police station. He was thereafter taken to the hospital where he was treated for injuries he sustained when he was attacked by the dog.

The plaintiff's case against the defendant is divided into three categories. In his first claim he claimed an amount of R30 000 in respect of malicious damage to his property. It was his case that the police officers in the course of their scope and employment unlawfully, intentionally, wrongfully and acting in common purpose damaged property belonging to the plaintiff. The second claim for an amount of R100 000 is for general damages in respect of the plaintiff's assault, removal of his freedom, shock, pain and suffering. The allegation is made that the policemen unlawfully and deliberately and without justifiable reason assaulted and unlawfully arrested the plaintiff thereby depriving the plaintiff of his freedom. It was specified that the plaintiff was assaulted in that the police officers threw two cans of smoking teargas through the front and bedroom windows of this house, that the police set a dog on the plaintiff which bit him on his right forearm and that the police, after the dog had bitten him, assaulted the plaintiff with fists and batons on his face and all over his body and kicked him and trampled on his body while he was lying on the ground. The third claim, also for R100 000, is for damages in respect of infringement of the plaintiff's dignity including his honour and value, as well as damages in respect of the infringement affecting his name including his good name and/or reputation. As far as this claim is concerned the

plaintiff alleges that an unknown policeman employed by the defendant unlawfully, deliberately and without justification laid false charges of attempted murder against the plaintiff. It is alleged that there was no reasonable possibility that the plaintiff was guilty of the charge of attempted murder. It is common cause that the plaintiff appeared on a charge of attempted murder in the Magistrates' Court on 15 December 2003 whereafter he was released on bail. Subsequent to that the plaintiff appeared in court on numerous occasions whereafter the charge against him was withdrawn on 22 November 2004.

Although it is not denied that certain damage was caused to the plaintiff's property the defendant denies that it was done unlawfully, intentionally and wrongfully. Although it was admitted that the plaintiff was arrested, the defendant denies that it was done unlawfully or intentionally. It was further denied that the plaintiff was assaulted. It is the defendant's case that the force used on the plaintiff at the time was used in the course of affecting an arrest which force was reasonably necessary and proportionally in the circumstances. Although the defendant admits that a case docket was opened against the plaintiff for offences of attempted murder, *crimen injuria* and interfering with police duties and resisting arrest, it was denied that the plaintiff is entitled to damages in respect of infringement of his dignity, honour, value and damage in respect of his good name and reputation.

The plaintiff could not deny that the police received information from the suspect arrested that another suspect was inside the plaintiff's house. The plaintiff testified that he had indeed been requested by the police to open the door and to give them access to his house and conceded that he refused them leave to enter his house. He demanded a search warrant as he wanted the police to prove to him that they were indeed members of the police. According to him he had a previous experience with the police when they entered his house and took his liquor and money and broke bottles. It later on appeared from evidence from Inspector Chamberlain that the police did in the past visit the house of the plaintiff and interfered with his illegal liquor selling. According to Inspector Chamberlain the plaintiff was selling a concoction that adversely affects people drinking it. According to the plaintiff, when he refused to let the police in, they started throwing bricks and stones through the windows of his house and damaged the windows. The police also threw teargas into his house. With him, inside the house, were his wife and a friend and a little child. They were helped out of the house by a friend. The police witnesses called to testify on behalf of the defendant conceded that those three persons were indeed inside the house but according to the defendant the police officials, Inspector Chamberlain and Inspector Ludick, assisted them to get out through a window.

The police denied any attack on the plaintiff. According to the police witnesses the plaintiff was inside the house and armed with a knife and also

with bricks and bottles. He threw bottles and bricks through the windows at the police. One of these objects hit a police officer. The police officers denied throwing stones at the house. It was categorically stated by Inspector Chamberlain that the police do not throw stones.

It is common cause that the door, which was apparently a side door of the house, was forced open and that the police got access to the house. It was the plaintiff's case that a bench which was standing outside was used by the police to force the door open. According to the police officials on the scene the door was kicked open. In that process a room divider inside the lounge area of the plaintiff's house, which was standing close to the front door, was pushed over. That caused damage not only to the wall unit but also to a television set and other equipment such as a music centre and a DVD and video recorder. It could not be disputed by the defendant that these articles were damaged, but it is the defendant's case that the damage was not caused unlawfully, intentionally and maliciously. It is also the defendant's case that the subsequent arrest and detention and appearance of the plaintiff in the court were not unlawful. It is conceded that a police dog was used to apprehend the plaintiff. That was done because the plaintiff resisted arrest and did not want to open the door for the police to enter and the plaintiff was throwing stones and bottles at the police. Two attempts to control the plaintiff by using teargas also did not have a positive result. According to the plaintiff two teargas canisters were thrown into the room. The police denied that.

According to them they were not equipped with teargas canisters but only with teargas spray cans. Inspector Chamberlain admitted that he twice sprayed teargas into the house in an attempt to persuade the plaintiff to come out, but with no success.

Although the original request made to the plaintiff to open the door was for the police to search it in an attempt to get the second suspect on the murder and sodomy case, which, however, according to the defendant, changed after an attack by the plaintiff on female Inspector Ludick was launched. According to her she was standing just outside the plaintiff's house back door at the shack immediately after the suspect was removed from the shack by Inspector Chamberlain. She then felt hot water on her back. She turned around to see what was happening and to get away from it. She then slipped. She fell towards the door which was closed with a security gate. She then saw the plaintiff there. He had a kettle and a steak knife in his hands. When she fell towards the security gate she stretched out her arms, obviously in an effort to protect her from falling against the gate. In that process the plaintiff stabbed at her with the knife. He struck her on the chest, but fortunately for her she was dressed in a police bullet proof vest. That vest was made available in Court. Two cut marks on the vest can be seen. Those small cut marks, approximately 10mm apart, were, according to her, caused by the knife in the plaintiff's hand. She immediately reported that to Inspector Chamberlain. He then decided to arrest the plaintiff on a charge of assault with intent to do

grievous bodily harm. The charge eventually formulated was one of attempted murder. Immediately after this incident, according to the police officers, the plaintiff became very aggressive. He swore at the police and threw bricks and bottles through the windows of his house at the police. It was thereafter decided to call in the assistance of Inspector De Souza, who was a dog handler. When he arrived on the scene the police kicked the door open. He then introduced himself to the plaintiff, whom he saw through the door that was kicked open, with a knife in the one hand and a bottle in the other. He warned him that if he does not come out he would send the dog in to apprehend him. Despite that warning the plaintiff did not give up. The dog was released and the dog, biting the plaintiff on the right arm, brought him down. The plaintiff was still in possession of the knife and he attempted to stab the dog. The quick intervention of Inspector De Souza prevented that. He took the dog off the plaintiff whereafter Inspector Chamberlain immediately stepped in and used some force to turn the plaintiff around on his stomach whereafter the plaintiff was handcuffed from behind.

After the plaintiff was removed from the house Inspector Ludick took possession of the steak knife and the kettle. Those articles were handed in at the police station as exhibits. The kettle had the hot water in which was thrown at Inspector Ludick. The steak knife, she says, was used by the plaintiff when he stabbed at her. A case docket was immediately opened against the plaintiff. Inspector Ludick wrote out her statement which was filed

in the docket. Herein she described the events and in particular the fact that hot water was thrown on her and that she was stabbed with a knife but fortunately for her injuries saved by the bullet proof vest. This statement was proved through Inspector Ludick by the plaintiff during cross-examination.

The onus as far as the first claim, malicious damage to property, is concerned, is on the plaintiff. Paragraph 6 of the minutes of the Pre-trial Conference attended by counsel and the instructing attorneys reads as follows:

“The parties were in agreement that the plaintiff had the onus of proof and duty to begin.”

During argument, however, both counsel conceded that that agreement was wrong and that the onus on the claim based on unlawful arrest is on the defendant. I was not addressed by either counsel as to the question of onus on the third claim based on, as it was termed, “the laying of charges against the plaintiff on no reasonable grounds”. I will accept what the plaintiff indeed wishes was to claim damages for malicious prosecution. I will accept for purposes of this judgment (in the light of conflicting views expressed in some reported judgments) that the onus as far as the third claim is concerned is also on the defendant.



Before me are two mutually destructive versions. On the one hand, according to the plaintiff, the police without any apparent reason ordered him to open the door of his house to them and, when he refused, they launched these attacks on his house with stones and bricks and teargas canisters and broke his door with a bench and attacked him with a police dog, handcuffed him and laid false charges against him. This unlawful and brutal attack according to the plaintiff happened in the presence of approximately thirty police officials (the plaintiff initially said between fifty and one hundred) with members of the community watching. It is highly unlikely that the police would act in such a manner. It was specifically testified by Inspector Chamberlain that the police duties are to protect and serve the public. The plaintiff, on the other hand, was clearly not pleased with some action taken by the police in the past. They interfered with his illegal liquor selling. They did not only destroy his liquor but, according to him, also broke some bottles and took his money. He admitted that he refused to open the door of his house when requested by the police to do so. Had the police only in reaction to the plaintiff's refusal to open the door and his demand for a search warrant broken the door and arrested him, he would probably have been successful in his claim. The evidence on behalf of the defendant that the plaintiff launched an attack on a female police officer is overwhelming. Inspector Ludick immediately reported that to Inspector Chamberlain. She showed him the tears in her bullet proof vest. They demanded thereafter that the plaintiff open the door. The police wanted to arrest the plaintiff. The charge Inspector Chamberlain had in mind was one

of assault with intent to do grievous bodily harm. The plaintiff then resisted arrest. The crime committed by the plaintiff on the defendant's case was a very serious one. It is clear from the action taken by Inspector Chamberlain that he in fact did not want to get into the house, but that he wanted the plaintiff to get out of the house. That is why he used teargas. I accept the evidence by Inspector Chamberlain that he sprayed teargas and that he did not throw teargas into the plaintiff's house. He testified that the police were not equipped with teargas canisters at the time. In any event, had the police been equipped with canisters at the time he would, in my view, have been entitled to use it under those circumstances. There would therefore not have been any reason for him and the other police witnesses to lie about that aspect. The teargas did in any event not have the required result as the plaintiff still did not want to get out of the house. The police, in my view, were quite entitled to break the door open. The plaintiff was on the inside. He testified that a bench was used to force the door open. That was also the evidence of his witness Nomonde. The plaintiff could not see what was happening outside because he was inside. It is clear that there must have been a discussion between the plaintiff and his witness about that incident. In my view, the police were entitled at that stage to break the door open to arrest the plaintiff. Had it been necessary to use a bench the police would, in my view, have been entitled to use it. There was, therefore, no reason at all for the police to lie about that. It was specifically stated by Inspector Chamberlain that the door was kicked open and not broken open with a

bench. He was corroborated to that effect by Inspector De Souza who witnessed that just before he arrived at the door. Further corroboration for the assault on Inspector Ludick is found in the fact that immediately after the arrest of the plaintiff she took possession of the steak knife and the kettle used in the assault on her. She entered those as exhibits. She immediately opened a docket and wrote out her statement as to the events of the evening.

The clumsily formulated second claim of the plaintiff deals both with the unlawful arrest and with an assault perpetrated upon the plaintiff. As far as the second claim is concerned the onus is therefore partially on the defendant as far as the unlawful arrest is concerned and partially on the plaintiff as far as the allegation of assault is concerned. It was alleged that the police assaulted the plaintiff by using three different methods namely (1) throwing teargas canisters at him (2) setting a police dog on him and (3) thereafter assaulted him with fists and batons and kicked him and trampled him while he was lying on the ground. In my view no assault with teargas was perpetrated on the plaintiff. He resisted requests to get out of the house by the police after he had assaulted a police officer. He resisted arrest. The police were therefore entitled to use teargas in an attempt to get him out. As far as the alleged assault by the dog is concerned the evidence of Inspector De Souza, who in particular made a very good impression upon me, was that he had seen the plaintiff standing inside the house armed with a knife as well as a bottle. He warned the plaintiff that he should come out of the house and if not he would

send in the dog. When the plaintiff refused to obey the dog was sent in. Inspector De Souza closely followed the dog. The dog immediately after he had brought the plaintiff down by biting him on his right arm let go of the plaintiff on command of Inspector De Souza. This action by the police was justifiable under the circumstances. No assault was perpetrated by the dog on the plaintiff. According to the plaintiff he was after he had been handcuffed severely assaulted by the police. He in particular mentioned in his evidence assaults perpetrated upon him by several police officers with their booted feet after he had been handcuffed. No mention was made by the plaintiff that he was assaulted with batons as alleged in the Particulars of Claim. It was conceded by Inspector Chamberlain that he immediately after the dog had been taken off the plaintiff used some force in turning the plaintiff around onto his stomach whereafter he was handcuffed. That force was necessary to control the plaintiff. It was denied by the police that the plaintiff was kicked or trampled or assaulted with fists.

The plaintiff's witness Nomonde testified that she had seen some assault by police officers on the plaintiff through the door that had been broken open. I do not believe her. On her evidence she had been handed the child through the window and in all probability she would have tried to get away from the teargas and the commotion around the house. It is highly unlikely that she would have gone to the front door on the side of the house to stand and look and see what the police were doing to the plaintiff. In any event, a one page

medical report obtained from the Livingstone Hospital where the plaintiff was treated after the incident does not support the plaintiff. On his version one would have expected numerous bruises and abrasions and lacerations all over his body. Apart from the bite marks caused by the dog there was only one 5 mm puncture wound on his forehead. The plaintiff did not give any explanation as to this wound. Inspector De Souza testified that broken glass was lying all over the place. It was also the plaintiff's evidence that there was glass on the room divider that broke when the door was forced open. That could have cut the plaintiff on his forehead when he was turned around with some force by Inspector Chamberlain to handcuff him. The only other abnormality on the hospital report is some tenderness on the plaintiff's left leg just below the knee. As far as the second claim is concerned the plaintiff, in my view, did not succeed to prove that he had been assaulted by the police. On the other hand, the defendant, in my view, succeeded to prove that the police were entitled to arrest the plaintiff.

It is common cause that the plaintiff was not successfully prosecuted on the charges laid against him by Inspector Ludick. The charges against him were withdrawn. Inspector Ludick could not give any explanation for the decision taken by whomever to withdraw the charges against the plaintiff. No explanation was tendered in evidence why the charges were in fact withdrawn. The only information I have before me regarding the alleged crimes committed by the plaintiff is the statement made by Inspector Ludick

which was, as I have indicated before, placed before me by the plaintiff. If regard is had to the contents of that statement a *prima facie* case was made out against the plaintiff. There may be various reasons for the decision to withdraw the charges against the plaintiff. It is often seen when review records are perused that prosecutors are forced to withdraw charges against accused after several appearances in court without proper explanation why the case cannot proceed. According to the plaintiff's Particulars of Claim it was on his eleventh appearance in court that the case against him was withdrawn. The magistrate probably refused a further request for a postponement which resulted in the case being withdrawn against him. It is, however, mere speculation. What is of major importance is that a *prima facie* case had been made out against the plaintiff. It is trite that an accused may be convicted on the uncorroborated evidence of a single witness whose evidence was clear and satisfactory in all material respects. It was never argued on behalf of the plaintiff that the evidence given by Inspector Ludick in this Court was not of a high standard. My conclusion is that it has properly been proved that the police did not institute prosecution against the plaintiff maliciously. The plaintiff can also not succeed on his third claim against the defendant.

That brings me back to claim 1. That is for damages suffered by the plaintiff as a result of his property damaged by the police. The plaintiff failed in his evidence in chief to prove quantum of damage. In an unusual step during

cross-examination Mr **Dala** elicited from the plaintiff the value of the articles which he claimed had been damaged by the police. This, however, was of no assistance to the plaintiff. As mentioned above I do not believe the plaintiff and in particular not his evidence that the police threw stones at his house. I do not believe the plaintiff and his witnesses when they testified that the windows of the house were broken by the police. The plaintiff was the aggressor. He threw stones and bricks from inside his house to the police. He caused damage to his own windows. As far as the door and the contents of the house is concerned, it was never the intention of the police officers to damage the property of the plaintiff. The plaintiff resisted arrest. In spite of the fact that teargas was sprayed at him he refused to get out of the house. The police wanted to arrest him on a serious charge. They were entitled to break the door open to arrest him. The police were unaware that the room divider was standing close to the door. It was never the intention of the police to damage the room divider or the television set and the other instruments which got damaged by the police's action. It has, in my view, not been proved that the police, when they broke the door and entered the house, maliciously caused injury to the property of the house. The plaintiff cannot succeed on the first claim.

In the result, the plaintiff's action is dismissed with costs.

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**J C H JANSEN**

**JUDGE OF THE HIGH COURT**