

In the matter between:

MNYAMEZELI WILFRED MADOLO

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NHLANGULELA DJP

[1] The plaintiff claims for payment of R300 000,00, against the defendant, arising out of an alleged wrongful arrest and detention; and assault committed by the members of the SAPS which the defendant is vicariously liable to pay in the event that the claims are proved.

[2] At the trial the plaintiff testified, and also called one Mr Silindile Gilidikazi to corroborate his evidence. The defendant called Mr Deon Muller and Mr Zandisile Ngqandu, to testify on his behalf. Both police officers are Sergeants by rank and were at all times relevant to the incident giving rise to the claims in the employ of the department of SAPS in which the defendant serves as a political head.

[3] On the joint application of both parties, a ruling was made in terms of the provisions of Rule 33 (4) separating the determination of the merits and the amount of damages to be paid. The defendant conceded that Mr Muller was the police officer that effected arrest and placed the plaintiff into the detention cell.

However, he denied that the actions of Mr Muller were wrongful and/or unlawful as justificatory reasons informed the actions of arrest, and detention, from which the defendant should be exonerated from liability. In essence the defence of the defendant implicates the provisions of s 40 (1)(a) of the Criminal Procedure Act 51 of 1977 in terms of which arresting a citizen without a warrant authorizing arrest may be lawful, if a person commits an offence in the presence of a peace officer.

[4] I recount the evidence led at the trial in brief. On 01 December 2017 and in the district of Libode the plaintiff, the owner of a security company in which Mr Gilidikazi was the employee, received a report from his security guards that one Mr Varhoyi had trespassed into a building construction site secured by the plaintiff without permission and damaged a TLB construction machine placed thereon. The plaintiff rushed to the site and found Mr Varhoyi having already been placed in the custody of the security guards. He took a decision that Mr Varhoyi, the suspect, would be taken to Libode Police Station for the purposes of being charged for trespassing and malicious damage to property. He conveyed the suspect on his vehicle, in which Mr Gilidikazi, two other male security guards and the local Chief Zimise were present. The decision taken that the suspect must be referred to the police had been supported by the Chief, who had been given a report concerning the activities of the suspect. On the way to the Police Station the vehicle was stopped at Dalagubha Junction to enable the suspect to pass water. Immediately the suspect got out of the vehicle, he pulled out a knife and stabbed the plaintiff with it once on the arm, whereafter Mr Gilidikazi restrained the suspect by punching him on the face with a fist that felled him to the ground. To confine the suspect into his custody Mr Gilidikazi followed the suspect with the result that a struggle ensued. The punching on the face and physical restraining of the body of the suspect, met by a hard resistance, resulted in the suspect being stopped from fleeing. The plaintiff stopped his other employees from charging at the suspect, and as he was stopping Mr Gilidikazi from committing further assault upon the suspect, Mr Muller and Mr Ngqandu arrived at the scene and, without

saying a word, assaulted him. Thereafter, the police placed him under arrest and drove him in a police vehicle to the Libode Police Station where a charge of assault was laid against him and detained in a holding cell until 5-6 pm. Mr Gilidikazi confirmed these facts when he testified.

[5] In support of the evidence that the police assault occurred that sustained him serious bodily injuries, a medico-legal report (Exhibit “A”) was placed before the Court.

[6] At Libode Police Station premises, the plaintiff was taken out of the police vehicle, ordered to position his hands up above the head, pointed with a firearm and marched into the charge office. A warning statement in terms of s 35 of the Constitution was made, which the plaintiff was caused to sign.

[7] The plaintiff was never caused to appear before a court of law in connection with the charge of assault with intent to cause grievous bodily harm that was laid against him. Not only did he deny assaulting the suspect, he also informed the police that he had been stabbed by the suspect. However, a police statement was not taken from him; and Mr Varhoyi and Mr Gilidikazi were not charged at all. Neither were Mr Gilidikazi and two other security guards of the plaintiff caused to make police statements.

[8] In the witness box, the plaintiff told the court that the conduct of the police officials, Mr Muller and Mr Ngqandu, constituted a terrible infraction upon his constitutionally protected rights to dignity and bodily integrity. He dropped down into tears, apparently still being haunted by the events of 01 December 2017.

[9] Mr Muller and Mr Ngqandu gave versions that contradicted the evidence of the plaintiff and his witness in material respects. Both police officers testified that on 01 December 2017 they, and six other policemen, were driving on R61 road using two police vehicles and heading to Ntlaza locality where they had been called to prevent bloodshed following upon violent conflict involving opposing

factions between members of taxi associations. As they were driving past Dalagubha Junction they observed that a group of men, carrying sticks, were involved in violent action that required them as the police to intervene. They deviated from the main road in order to access what they regarded as a crime scene. Mr Muller told the court that, on his own observation, three men were each carrying a stick and another was carrying a belt which they were using to assault Mr Varhoyi as he was lying helplessly on the ground. To stop what to him was a severe assaulting action, he shouted for the men to desist from their conduct. They indeed responded to the call, except for the plaintiff who continued to singularly beat Mr Varhoyi severely by means of a stick. According to him the beating of Mr Varhoyi was so severe that he sustained serious bodily harm. Mr Ngqandu had to fire two warning gun-shots but which the plaintiff ignored and continued to beat up Mr Varhoyi. Thereafter, Mr Ngqandu grabbed the plaintiff from behind and Mr Muller followed by disarming the plaintiff. At that juncture, Mr Muller had already dispossessed the other three men of their sticks and a belt. According to Mr Muller, whilst he was still at the scene, he destroyed the sticks that he had recovered from the plaintiff and his employees. The plaintiff and the other three men were ordered to follow the police vehicles to the Police Station where the plaintiff was locked up. Thereafter, Mr Muller and Mr Ngqandu proceeded to Ntlaza. And that was the last they heard about Mr Varhoyi's complaint of assault by the plaintiff.

[10] When Mr Ngqandu testified it appeared that he did not observe that the actions of the employees of the plaintiff's properly due to the reason, according to him, that his attention was focused on the continued assault perpetrated by the plaintiff against Mr Varhoyi and that his efforts were directed at saving the life of Mr Varhoyi. He told the Court that in his observation, there were four to five men who were assaulting Mr Varhoyi, but whose identities escaped him. He could not even tell if Mr Gilidikazi played a role in the assault upon Mr Varhoyi. But he was adamant that the plaintiff was never assaulted by any of the eight policemen who were present at the scene to rescue the victim of assault. Mr Ngqandu stated

that at some stage he and Mr Muller spoke to the Chief who informed them that they got to be at the scene of crime due to the fact that Mr Varhoyi was resisting arrest, which had angered the plaintiff. The Chief also told them that Mr Varhoyi was being conveyed to the Police Station to be formally charged for committing offences at the construction site with a view of facing criminal prosecution. Significantly, the police gathered from the Chief that the plaintiff was a stubborn person would not let go of Mr Varhoyi despite the injury caused by Mr Gilidikazi, that he had sustained on the eye. That information had strengthened the resolve of policemen to ensuring that the plaintiff was arrested for the assault visited upon Mr Varhoyi.

[11] It is fair to conclude that it was upon the versions of facts given by Mr Muller and Mr Ngqandu during consultations that the defendant pleaded to the plaintiff's causes of action as follows:

“AD PARAGRAPH 4 AND 5 THEREOF

The defendant admit (*sic*) that the plaintiff was lawfully arrested and never assaulted by the members of South African Police Service. He was caught assaulting Khumbulani Varhoyi in the presence of the police and was detained and later brought before court.”

[12] The justification to arrest without a warrant will be successful if the following jurisdictional facts are met:

- (i) the arrestor must be a peace officer;
- (ii) the offence must have been committed or there must have been an attempt to commit an offence, and;
- (iii) the offence or attempted offence must be committed in his or her presence.

See: *Van Wyk & another v Minister of Police & another* (unreported, GP case no A617/15, 17 November 2016) at [18].

[13] Van Zyl ADJP (as he was then) in *Scheepers v Minister of Safety & Security* 2015 (1) SACR 284 (ECG) stated, correctly so, that the question to be answered by the court is whether the arresting officer had knowledge at the time of the arrest of the arrestee of such facts which would in the absence of any further facts or evidence, constitute proof of the commission of the offence in question. That is, the honest and reasonable belief that a crime was committed is irrelevant – see: *Tsose v Minister of Justice & Others* 1951 (3) SA 10 (A).

[14] I proceed to evaluate the facts. The evidence raises the question whether the plaintiff did as a fact assault Mr Varhoyi with a stick.

[15] I agree with *Mr Msindo*, for the plaintiff, that the tool used in deciding which of the versions in conflict must be preferred are the principles set out in the case of *Stellenbosch Farmers Winery Group (Ltd) and Another v Martell et Cie* 2003 (1) SA 11 (SCA) at page 14. Based on this case, the Court is enjoined to make findings on (i) the credibility of the witnesses; (ii) their reliability, and (iii) the probabilities.

[16] The evidence of the plaintiff and his witness is credible in that Mr Gilidikazi's evidence that he, not the plaintiff, assaulted Mr Varhoyi was not challenged. The contention that such evidence is bad simply because it was adduced by the employee of the plaintiff, is not a sufficient basis to reject it. The plaintiff did not only tell the Court that the police assaulted him; but he placed before court a medical report proving that he sustained serious bodily injuries at the time when he had contact with Mr Varhoyi and the members of the police force. Despite the denial by the police, the inference that the police caused him the injuries is a reasonable one to be made. The evidence that four – five men carried sticks and a belt which they used to assault Mr Varhoyi is not plausible. Mr Varhoyi did not testify and there is no documentary proof that he was assaulted by sticks and a belt. The weapons used (the sticks), though allegedly taken away from the assailants, were not kept as the police exhibits. The fact of existence of such weapons is cast in serious doubt. The apparent lack of enthusiasm on the

part of the police to lay a charge against the plaintiff for refusing to follow police orders negate the evidence, denied by the plaintiff, that warning shots were fired. The story that the sticks were destroyed, coupled with unexplained whereabouts of the belt is improbable. The fact that the police made no effort to obtain a statement from the plaintiff or even sought oral explanation of the events from him negate the assertion that the plaintiff assaulted Mr Varhoyi. The evidence of Mr Muller that the intention of the police was never to seek prosecution of the plaintiff until they were pressed by Mr Varhoyi at the Police Station to open a docket against the plaintiff is, in my opinion, sufficient re-inforcement of the plaintiff's version that he did not assault Mr Varhoyi. On the contrary, proof by medical evidence that the plaintiff was the victim of assault is a plausible version. In the circumstances, the version of the defendant is rejected as unreliable.

[17] The constitutional protection of the plaintiff's rights to dignity, bodily integrity and freedom of movement is sacrosanct. These rights cannot be eroded by police arrest that does not comply with the provisions of s 40 (1)(a).

[18] In this case proof that the plaintiff did as a fact assault Mr Varhoyi and in the presence of Mr Muller are jurisdictional facts which are not established by the evidence. Consequently, the arrest of the plaintiff was unlawful.

[19] *Mrs Klaasmani* submitted that the Court should take into account the fact that since policing work can, at times, be too onerous, the objectives of policing duties in terms of s 205 (3) of the Constitution ought to provide a shield against liability that the defendant is faced with in this matter. The submission is wrong, lest the courts were to be allowed to sanction wanton police brutality that took centre stage in policing that was witnessed prior to the ushering in of a democratic legal dispensation under the new Constitution.

[20] On the foregoing, the plaintiff has proved his case against the defendant. The costs must follow the result.

[21] In the result the following order shall issue:

1. **The defendant be and is hereby held liable to compensate the plaintiff with such amount of damages as may be proved in due cause.**
2. **The defendant to pay costs of the trial on the issue of liability.**
3. **The hearing on the issue of quantum is postponed sine die.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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