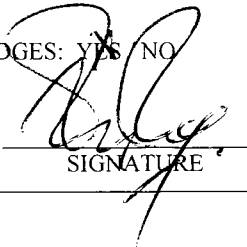




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED 8/12/2015 DATE	
SIGNATURE	

17/12/15

Case Number: 59521/2012

J.M. MAKHETHA

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

STRYDOM AJ:

1. The plaintiff issued summons against the defendant for unlawful assault upon him, by unknown members of the defendant. At the commencement of the trial counsel for the plaintiff applied for separation of the merits and quantum of the plaintiff's claim in terms of rule 33(4), which application was opposed by the defendant's counsel. After having heard argument on behalf of both parties, I exercised my discretion and granted separation of merits and quantum.
2. Accordingly *only the merits* of the plaintiff's claim went on trial before me. The trial was held on three days being 6, 7 and 13 October 2015. A substantial portion thereof was taken up by cross-examination of the plaintiff by counsel for the defendant.

PLEADINGS:

3. The plaintiff issued summons against the defendant on **18 October 2012** for unlawful assault upon him, during Friday night 17 February 2012, by unknown members of the defendant. As a result of the alleged assault the plaintiff further allegedly sustained bodily injuries, pain and suffering in respect of which he claims damages in the amount of R250, 000. 00 (***Two hundred and fifty thousand rand***) from the defendant. Save for admitting the identity of the plaintiff and its own citation, the defendant, in its plea, denied each and every averment made by the plaintiff.¹
4. Counsel for the defendant submitted that the defendant's *plea do not constitutes a bare² denial*. This submission is clearly ill founded for the following reasons: *Firstly*, the defendant comprehensively denied the allegations of the plaintiff, to the extent that it not only denied *that the assault occurred*, but also *that the perpetrators where members of the defendant*. *Secondly, abudandum cautella*, the denial is not qualified in any manner.

EVIDENCE PRESENTED BY THE PLAINTIFF

5. Two witnesses were called in support of the plaintiff's claim on the merits, being the plaintiff and his mother, Ms Gladys Makhetha. The Plaintiff's mother testified first.

Evidence of Ms Gladys Makhetha.

6. Ms Makhetha testified that the plaintiff is her son and lives with her. She saw the Plaintiff at approximately 19:00 on Friday, 17 February 2012, when he returned from work. At this time he was his normal self and in a cheerful state of mind. The plaintiff was without any injuries. The plaintiff indicated that he is going to visit a friend and departed from home. Ms Makhetha later went to bed.

¹ Comp. record, p 9, par 3. It merely reads: "*This is denied and the Plaintiff is put to the proof thereof.*"

² I.e. a blank or empty denial.

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7. Later that night, while Ms Makhetha was asleep for some time, she was awoken by the screaming voice of her son. He shouted that she should open the door for him, because someone wanted to kill him.³ She also heard other unknown screaming voices.
 8. When Ms Makhetha opened the door of her house, she was confronted with a number of unknown armed males within the premises of her residence. Two men, with hand guns remained close to the door and her son was standing a mist⁴ the group. She asked the men: "*What has my son done wrong?*" She was met with silence. She did not have any further discussion with anyone at this time. As she was asking the latter question she looked to her left and noticed that the plaintiff had fallen to the ground and someone was kicking him. She cannot recall how many times he was kicked.
 9. Ms Makhetha described her emotional state at this time as "gripped by fear" and "panic stricken".
 10. The witness went on to testify that she saw two police officers in uniform, after they arrived in a marked police vehicle. She was relief because she thought her son will now be safe. Her utter relief was short-lived because the plaintiff was manhandled by the uniformed policemen. They took the plaintiff and throw him in the back of the police van without confrontation of the assailants or speaking to her.
 11. The two armed men remained at Ms Makhetha's home after the police van departed. They told her that they were police officers and had the authority to search her house. They then demanded to search the house for someone named *Motintinyane*. The two men thereafter carried out a search of her house, without any result, where after they left.

³ The words was translated as: "*Mom open for me, they are killing me.*"

⁴ Counsel for the plaintiff tried to pin the evidence of Ms Makhetha to the word *midst*, construing it to mean "in the middle". The word has other meanings as well being: "***Among; amid***". See: *The American Heritage Dictionary of the English Language, 4th Edition*, Houghton Mifflin Company. I am of view that the witness, with reference to her evidence, only intended to indicate that the plaintiff was among the persons when she opened the door of her home.

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12. A while later the plaintiff returned home crying with *a swollen eye*. She told him that the police were looking for someone named *Motintinyane* and had searched her house. The plaintiff told her that he was assaulted because the assailants identified him as *Motintinyane*. The following morning Ms Makhetha noticed that the plaintiff's arm and shoulder were bruised. The plaintiff left her home after he told her he was going to the police station to report the incident.
13. Sometime later a policeman named Erasmus took a statement from her about what happened. She was talking to Erasmus in a combination of Sotho and Afrikaans when he took her statement, although she told him that she could not understand Afrikaans.
- 13.1. In cross-examination she testified that she could not make out how many people in total were in her yard that night. She confirmed that she did not speak a word with the plaintiff when she opened the door and only spoke to the two men who were with him.
- 13.2. She could not make out who was assaulting the plaintiff because it was dark. Later, the light improved when the police van arrived and stopped in front of the gate with the headlights on.⁵

Evaluation of the evidence of Ms Makhetha

14. The witness was in my view honest and credible. She did not contradict herself and did not detract from her version in any material aspect in cross examination. She was adamant about the occurrence of the incident, i.e. the assault on the plaintiff and the involvement of the South African Police Service in it.
15. The contradictions in evidence are to be expected of a person who was traumatised and is reconstructing the events of the evening of 17 February 2012 in October 2015.⁶ It was clearly a traumatic event for her when she heard her son scream and

⁵ Whether the police stopped parallel or vertical in the gate was never canvassed with this witness.

⁶ *Commissioner for Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd* 1987 (3) SA 453 (A) at 469F – G where the court found "*Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short*

thereafter faced by men with fire arms as she opened the door of her house. Under the prevailing circumstances, I am not surprised that the witness did not embark on an elaborate conversation with the assailants or that she was not able to have a discussion with the plaintiff.

16. There is no reason to justify a conclusion that Ms Makhetha's evidence is false or a fabricated. In view of the latter considerations I find Ms Makhetha to be a reliable witness and accept her evidence as truthful.

Evidence of the Plaintiff

17. The Plaintiff testified that he resides with his mother at her residence. He was about 21 when the assault on him occurred. He works as plumber and on 17 February 2012 he went to work and came back home at about 19h00. He greeted his mother and thereafter went to visit a friend. He stayed with his friend till about 10h00, where after he went to a tavern called *Manamotella*.
18. At the tavern the plaintiff bought himself a beer and cigarettes. As the plaintiff was about to sit down an unknown male came and placed his arm around the plaintiff's shoulder and asked him what his name is. He told him his nickname where after the man accused him of lying and told him that he was *Motintinyane*. The stranger insisted that his name is in fact was *Motintinyane* even after he had told him his full names. Thereafter the stranger demanded that the plaintiff should accompany him, still holding his arm around the plaintiff's shoulder, which he did. The stranger continued to insist that his name is *Motintinyane* and upon his further denial, the stranger struck him in the face with a clenched fist.

one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction." In this regard it is also apposite to refer to the remarks of Diemont JA in S v Nyembe 1982 (1) SA 835 (A) at 842F - H in respect of contradictions relating to events that had occurred some eight months before the hearing in that case:- "I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise trial Judge knows that human memory is only too fallible ..."

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19. Upon arriving at the door of the tavern, there was a group of men, who appeared to the witness to be acting in conjunction with the person who approached and assaulted him, because they were barring his departure. He had to "*force his way through them*", but managed to escape.
 20. In the process of fleeing, he heard *two shots* being fired, having heard the people chasing him, shouting that they will shoot him. The plaintiff was under the impression that it was the man who struck him in the face, who was shooting at him, because he initially saw him give chase, when he escaped. He admitted under cross-examination that he did not look back to see who was actually shooting at him. This is obviously an attempt to reconstruct the sequence of events in his mind, rather than positive observation of a fact.
 21. When the plaintiff eventually arrived at the residence of his mother, he hid amongst some trees. Some of the people who gave chase after him, dressed in civilian clothes, arrived. The plaintiff heard people speaking and a statement that when they find "*this guy*", they are going to shoot him. He was too afraid to emerge from hiding.
 22. When the plaintiff saw a police vehicle (van) arrive at the scene with two police officers in uniform, he emerged from his place of hiding and shouted for help to his mother. He later explained that although he emerged from his hiding at that stage and after having called out to his mother, he moved back towards the place where he was previously hiding. He also saw two armed men in close proximity to the door, when his mother emerged from the house.
 23. The plaintiff further testified that after he emerged from his hiding place, he was slapped with an open hand, by the person that earlier punched him in the face at the tavern. This caused him to fall to the ground. While the plaintiff was on the ground he was kicked a number of times. He attempted to avoid the impact of the assault by covering his head with both of his arms and hands. Eventually he was pulled up and upon opening of his eyes. The plaintiff realised that it was one of the police officers

- in uniform who pulled him up. He was grabbed by his clothes and “thrown” into the back of the police vehicle, by the two uniformed policemen.
24. The police drove the police vehicle (van) to 13th Avenue, in the same suburb. Here he was again subjected to the aggression of other policemen in uniform being present, until a female policewomen in uniform arrived and indicated that he (the plaintiff) is not *Motintinyane* and that he does not even look like the sought after suspect. He was there and there then released by the police and went to his mother’s home where he stays.
25. Upon his arrival at home, his mother observed his injuries and they had a discussion about *Motintinyane*, being the reason for the search of her house and the assault upon him.
26. The next day (Saturday, 18 February 2012), the plaintiff went to the police station to lay a charge and was given an endorsed but uncompleted J88-form,⁷ for the purposes of a medical examination by medical practitioner at the hospital. He was under the impression that the case number on top of the J88-form was written in at that time. He however was adamant that the balance of the document was not completed by a policeman, but by the doctor, on the same day at the hospital after the doctor examined him.⁸
27. After the medical examination he went back to the police station but they refused to register the plaintiff’s charge/complaint. Because the police refused to open a docket and record the plaintiff’s complaint, he consulted with his attorney (Mr. Grimbeek) on Monday, 20 February 2012. Due to the intervention of his attorney, his statement

⁷ A J88-form is a legal document that is completed by a medical practitioner documenting the observations of the injuries sustained by a victim in any circumstance where a criminal investigation might to follow. Sometimes the J88 is the only objective evidence available for a court to decide whether or not an assault occurred. Comp. Muller K and Saayman G, *Clinical Forensic Medicine: Completing the Form J88 – what to do and what not to do*, SA Fam. Pract 45(8) (2003).

⁸ During argument, I pointed out to Counsel of the Plaintiff that if the case number was written on the J88 by Captain Erasmus, as the captain testified, it would not have been on the document when it was given to the Plaintiff. Council conceded that this amounts to an incorrect observation and/or assumption on the part of the Plaintiff. It was however submitted that such error in his evidence would hardly destroy his total credibility as a witness. I agree with Counsel in this regard.

was eventually taken on Tuesday, 21 February 2012 by the police. A police docket was opened as a result hereof.

Evaluation of the Plaintiff's evidence

28. Counsel for the defendant directed my attention to the following flaws in the evidence of the plaintiff, which, according to him, struck his evidence with fatality:

- 28.1. He correctly pointed out that the witness was unclear, in cross examination as to where exactly he was first punched in the face by the unknown male that approached him and accused him of being *Motintinyane*. I can however hardly find that there is a real contradiction of fact here. The plaintiff throughout maintained that the first assault upon him, occurred after he was ordered to accompany the man outside and therefore on his way out of the tavern. In re-examination he confirmed, that the first assault most definitely did not occur where he was seated, but on his way out of the tavern and in close proximity to the door of the tavern. It could therefore have happened just inside or just outside of the door. Note should in this regard also be taken of the fact that the witness was reconstructing traumatic events that happened to him in 2012.⁹
- 28.2. He argued that the plaintiff contradicted himself in his evidence in chief with reference to his evidence on the first day and his evidence on the second day in respect of the men standing at the door of the tavern. On the first day the plaintiff testified that he had to "*force his way through them*". On the second day he added, still in evidence in chief, that while he was forcing his way through these persons he was also kicked and punched by them. Since this evidence was lead in evidence in chief (in contradistinction to during cross examination), I can hardly find that it is a contradiction. The witness merely clarified what happened during the proses that he was forcing his way through the persons in order to escape.
- 28.3. He submitted that there is a contradiction between the plaintiff's evidence and the evidence of his mother, as to exactly where the Plaintiff was during certain stages of the unfolding dramatic events. The distance in respect of who stood exactly where and for how long and at what time becomes immaterial if viewed against

⁹ See: Footnote 6, above.

the background of the events that took place. Distances becomes in such circumstances, as a matter of natural cause, distorted. No reliance can be placed thereon. Contradiction in this regard is due to take place. I would have been surprised if that was not the case. To say that the major events of the evening when the plaintiff was assaulted should be dismissed, on this basis alone, is to push the limits of laws of logical inference.¹⁰

- 28.4. During cross-examination, counsel for the defendant took the plaintiff, paragraph by paragraph, through his written statement he made to the police when he laid the complaint of assault. It was ostensibly done in an attempt to find contradictions between the plaintiff's verbal evidence and his said statement. The statement to the police did not however deviate in any material aspect from the verbal evidence of the plaintiff. In fact, no contradictions were pointed out to the plaintiff arising from such statement. In my view this supports the credibility of the plaintiff's version as not being a recent fabricated. The plaintiff reported the assault on him shortly after it happened.
- 28.5. Counsel for the defendant correctly submitted, that when the plaintiff was confronted with alleged differences between his evidence in chief and cross-examination he referred, out of context, to his written statement to the police and spontaneously added "*I don't know what I am saying*". Counsel for the defendant urged me to dismiss the plaintiff's evidence *in toto* on the basis of this evidence, considered with the other contradictions in his evidence. What the reason for this strange evidence was is unknown. It was however clear to me that the plaintiff was confused at that time as to what evidence he previously gave, which counsel for the defendant was confronting him with, during cross examination, as being contradictory. Accordingly, in my view no inference can be made from this strange evidence by the plaintiff, but that he was confused.
29. After lunch on the second day of trial, while the plaintiff was still under cross examination I noticed that he looked very uncomfortable and agitated in the witness box and enquired from him I about my observation. The plaintiff then indicated that he is scared of the police outside my court room. He identified one of them as

¹⁰ See: Footnote 6 above.

coming from the same police station where he laid the complaint of his assault by the police. The policeman looked at him and spoke to another policeman. Upon further enquiry I was informed by counsel for the defendant that the policeman outside was Captain Erasmus, the investigating officer in the complaint of the plaintiff and one of the defendant's intended witnesses. I explained this to the witness, but he insisted that he is scared of the police since the day of his assault. Counsel for the defendant urged me, during argument, to negate the expression of fear on the part of the plaintiff, in respect of the above incident. According to his argument the fear only appeared in cross examination which should be indicative "*of the fact*" that the plaintiff was lying about his alleged assault. The conclusion is unwanted. It is the plaintiff's case that the police assaulted him. The defendant denies this as well as any assault. Considering the defendant's version, the plaintiff had ample reason to be afraid of the police. In any event, fear remains a subjective emotion, often without any reasonable explanation.

30. The plaintiff was not the best witness; however I cannot find him to be untruthful. Despite being exposed to extensive cross-examination, during which the above said contradictions was pointed out to him, he did not deviate in any material aspect from his evidence in chief. His evidence cannot on any basis be found to be false or fabricated.

Evidential value of the J88-form

31. The defendant objected when the plaintiff attempted to submit the aforesaid J88-form as evidence.¹¹ The basis of the objection was that the plaintiff indicated, during argument for separation of merits and quantum, that the plaintiff was unable to trace the doctor who completed the J88-form; and, when submitting the document as evidence, indicated that the plaintiff do not intend to call the author of the document (the said doctor) at this stage.

¹¹ This was done when the counsel directed the attention of the plaintiff to the J88-form, contained on p 7 of the discovered police docket.

32. I dismissed the objection and admitted the J88-form as evidence upon the basis which the plaintiff tendered the document; being not as “*proof of the correctness of the clinical diagnosis*”, reflected in the J88-form, but as proof of the fact, that on a certain date the Plaintiff subjected himself to a medical examination by a doctor and that the doctor recorded his clinical observations in such document. Furthermore the document is in any event a *public document* and as such the court is able to take note of the content thereof without the author having to testify.¹² Lastly, there is no prejudice for the defendant if the document is admitted on the aforesaid basis. This is so because the document was not generated by the plaintiff or his legal team but was obtained by Capt. Erasmus as part of his official investigation into the complaint by the plaintiff that the police assaulted him.
33. Cognizance of the existence of the J88-form, and the inferences drawn hereunder as a result thereof, can hardly constitute conjecture or speculation. The existence of the J88-form, in respect of the plaintiff, justifies a legal inference.
34. The difference between conjecture and speculation was fittingly defined by Lord Wright in *Caswell v Powell Duffryn Associated Collieries*,¹³ as follows:¹⁴
- “Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which are sought to establish... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”***
35. As indicated by the evidence of Capt. Erasmus hereunder, the J88-form formed part of the official documents secured by the investigating officer during his investigation of the complaint by the plaintiff that he was assaulted by members of the police. Capt Erasmus placed it in the police docket pertaining to the plaintiff. The police

¹² See: CWH Schmidt: Law of Evidence, 3rd edition, pp.315 ff in particular p333. Comp also Northern Mounted Rifles v O’Callaghan 1909 TS 174 at 177. See also Section 18(1) of the Civil Proceedings Evidence Act, 1965 (Act no 25 of 1965).

¹³ 1940 AC 152 All English Law Reports.

¹⁴ Accepted with approval in *AA Onderlinge Assuransie-Assosiasie Beperk v De Beer* 1982 (2) SA 603A, *Macu v Du Toit* 1983 (4) SA 629A, *Motor Vehicle Assurance Fund v Dubu Zane* 1984 (1) SA 700A and *S v Mtsweni* 1985 (1) SA 590A.

docket of the plaintiff was discovered by the defendant. The authenticity of the J88-form was never disputed.

36. The plaintiff testified that an uncompleted J88-form was given to him by the a member of the police on Saturday 18 February 2012. He took it along with him to the hospital. Here the plaintiff was clinical examined by a doctor who completed the J88-form in the presence of the plaintiff. This evidence was never disputed by the plaintiff.
37. On perusal of the J88-form it appears that it was completed by a medical practitioner,¹⁵ who completed the form on 18 February 2012, the day after the plaintiff was allegedly assaulted. He made the following clinical findings:¹⁶ *Tenderness over right shoulder, ribcage & scapula; tender right forearm; bloodshot left eye.* His ultimate conclusion¹⁷ reads as follows: *Blunt force injuries to right scapula chest wall and arm.*¹⁸
38. The J88-form in my view firstly constitutes documentary evidence of the fact that the plaintiff submitted himself on Saturday 18 February 2012 to a medical examination by a medical practitioner who made notes of his clinical observations and findings.
39. The J88-form further constitutes *prima facie* corroborating evidence that the plaintiff was assaulted. This inference can hardly be said to be a conjecture. This is so because the injuries recorded therein is consistent with the evidence of the extent of the injuries the plaintiff sustained. It is further consistent with injuries a person would expect to sustain if he was assaulted.

Prima facie proof

40. The plaintiff had the burden of proof to establish, *on a preponderance of probabilities*, that he was assaulted as alleged by him in his particulars of claim.

¹⁵ Dr P Ntandane (?).

¹⁶ In paragraph 5 of the document.

¹⁷ Paragraph 8 of the document.

¹⁸ At this time no conclusion can be drawn in respect of the correctness of the observed injuries the plaintiff sustained because the author (i.e. the doctor) did not testify.

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41. After the plaintiff closed his case, I informed the parties that it appears to me that the plaintiff has *prima facie* proved that he was assaulted by unknown members of the defendant.
42. Counsel for the defendant objected to my remark on the basis that I have prejudged the case without having heard the evidence of the defendant. His submission is clearly wrong. Although it is correct that the defendant had not yet presented his evidence at this stage, the defendant was required to put his version to the plaintiff in cross examination, which he has done. The defendant's case was that the plaintiff was not assaulted at all, and in particular not by members of the defendant.
43. In *Ex parte Minister of Justice: in re R v Jacobson and Levy*,¹⁹ Stratford, JA indicated in this regard:

“If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence “calls for an answer” then, in such case he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof...”

- 43.1. I further informed the defendant that he is called upon to fully *rebut* the evidence of the plaintiff or convince me in argument that I am wrong in my view that that the plaintiff *prima facie* proved his case.

EVIDENCE PRESENTED BY THE DEFENDANT

44. The defendant called **one witness** to rebut the evidence of the Plaintiff, being **Captain Erasmus**.

Evidence of Captain Erasmus.

45. Capt. Erasmus testified that he was the investigating officer designated to investigate the complaint of plaintiff. He investigated the plaintiff's complaint by interviewing the plaintiff and his mother. He conducted these interviews in a combination of English and Afrikaans. According to Capt. Erasmus, after 25 years of service in the

¹⁹ 1931 AD 466 at 478

South African Police Services, on many occasions stationed in rural areas, he cannot speak a word of any of the indigenous languages of South Africa. Capt. Erasmus was further of view that Ms Makhetha lied when she testified that he interviewed her in a combination of Sotho and Afrikaans. She further never informed him that she cannot speak Afrikaans.

46. He thereafter enquired at the police station if anyone knew about the alleged assault of the plaintiff. He could not find any evidence of the alleged assault of the plaintiff. Capt Erasmus also interviewed the owner of the tavern who informed him that he cannot recall "*such an incident taking place*".
47. Capt Erasmus further testified that some days before the alleged assault on the plaintiff, a well-known soccer player, *Jeffrey Ntuka*, was stabbed to death in Maokeng.²⁰ He attended the scene of the murder and the perpetrator was identified as a person by the name of *Motintinyane*. Some of the detectives at the Maokeng Police Station knew *Motintinyane* because he "*brushed with the authorities*" on prior occasion. The latter detectives also knew where *Motintinyane* lived and that he was living with his mother. According to Capt. Erasmus he personally made copies of a photo²¹ of *Motintinyane* and distributed it amongst his colleagues. At the time of the alleged assault of the plaintiff, the police had knowledge that *Motintinyane* fled to the Kroonstad area. Capt Erasmus was adamant that in the event that the plaintiff was assaulted by the police, while they were looking for *Motintinyane*, the incident would have been discussed during the morning parade. This is so because the *Ntuka matter* was a high profile case.
48. Capt Erasmus further testified in cross examination that a J88-form was part of the docket in respect of the plaintiff's complaint of assault by the police on him. Although he did not consult with the doctor who conducted the medical examination and completed the J88-form, he confirmed that the original thereof was part of the

²⁰ The neighbourhood in which the plaintiff was assaulted.

²¹ He obtained the photo from the mother of *Motintinyane*.

police docket of the plaintiff's complaint. He obtained the original J88-form, from the office of the district surgeon. After he verified that it contained the particulars of the plaintiff he personally wrote the relevant police docket number at the top of the said document.

Evaluation of the evidence of Capt Erasmus

49. Capt. Erasmus was not by any standard an impressive witness. His evidence falls narrowly short of deliberately attempting to mislead the court. In essence Capt. Erasmus's evidence was limited to the fact that he was unable to find (a) any indication that the assault on the plaintiff occurred or (b) that the police was involved in it. I gained the impression that he conducted his investigation in a *lazy fair manner*, ostensibly only going through the motions. My view is fortified by the following considerations:

- 49.1. Apart from interviewing the Plaintiff and his mother, Ms Makhetha, he conducted an interview with the owner of the tavern, who indicated that he could not remember the alleged incident which occurred at the tavern. He conceded, that such lack of observation or memory by the owner does not mean that the incident did not occur, as described by the plaintiff. Capt. Erasmus did not make any further inquiries at the tavern. He could for instance have questioned the employees of the tavern owner, or ascertain if there are regular customers and questioned them if any of them have noted the assault on the plaintiff at the tavern. Capt. Erasmus apparently just assumed that because the owner of the tavern could not recall the incident, it did not occur.
- 49.2. He further did an investigation at the Police Station enquiring if any police officer new about the alleged assault on the plaintiff. His investigation appears to have been general and cursory. He did not consultant with the officers that was the relevant night on duty. His explanation that "*if there was such an assault on the plaintiff*" it would have been discussed at the morning parade "*because the Ntuka matter was a high profile case*", is totally unconvincing. It is ridicules to suggest that an unlawful assault, in mistaken pursue of the murder suspect *Motintinyane*, would be reported during the morning parade to the commanding officer of the

Police Station. I have seldom come across a person that intentionally incriminates himself as a participant in criminal and unlawful conduct. The evidence of Capt. Erasmus²² becomes doubtful on its own account. In cross examination he conceded that although policemen are supposed to act in a prescribe manner, they do make mistakes like all ordinary people and deviate from their lawfully prescribed manner of conduct. He also admitted that it is not uncommon for a person who made a mistake, to deny involvement, if it would expose him/her to retribution. Upon a question by me, and reference to a well published incident of police brutality against an immigrant, Capt. Erasmus admitted that in law enforcement unlawful assaults on members of the public sometimes occur and, despite the involvement by police in such unlawful conduct, policemen sometimes deny involvement or guilt. He also admitted that it is well-known that in some instances, police officers make use of unnecessary force to effect an arrest.

49.3. According Capt. Erasmus the police stopped looking for *Motintinyane* in Maokeng “*because the police had knowledge that Motintinyane fled to the Kroonstad area.*” The suggestion of Capt. Erasmus is that, as normal police practise a policeman/woman will stop being on the lookout for a suspect the moment he/she receives information that the suspect is in another district. Capt. Erasmus’s evidence in this regard is self-evident misleading and wrong. I do not for one moment believe that a police officer will refrain from attempting to arrest a murder suspect, if he/she see and positively identifies the said suspect, regardless that it was reported to the said police officer that the culprit is in another district.

49.4. Capt. Erasmus further conceded that he is not aware of any reason why the plaintiff or his mother would falsify evidence. He cannot deny that the plaintiff was assaulted; and, that such assault was done by members of the defendant. This is so despite the fact that he was unable to find evidence to support the charge laid by the plaintiff. It is clear to me that Capt. Erasmus did not do much effort to establish whether or not the plaintiff was at least assaulted. He conveniently ignored the existence of the J88-form, not deeming it even necessary to consult with the doctor who completed the J88-form.

²² I.e. that the plaintiff’s assault would have been discussed on the morning parade ground.

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- 49.5. Capt Erasmus confirmed that at the time of the alleged assault on the plaintiff, the murder suspect, *Motintinyane*, was not yet apprehended by the police. This makes the version of the plaintiff plausible, i.e. that he was assaulted and apparently arrested due to a mistaken identification by a policeman that he was the murder suspect, *Motintinyane*.
- 49.6. Capt. Erasmus further attempted to create the impression, that virtually every person in the Maokeng neighbourhood was aware of the involvement of *Motintinyane* in the murder of the well-known soccer player, *Jeffrey Ntuka*; and, that all police officer at that police station knew how this suspect looked. This suggestion is completely improbable. Firstly, Capt Erasmus eventually, under pressure in cross examination, conceded that not everybody is necessarily a keen supporter of soccer as a sport or would have recognised the noteworthiness of the murder of *Jeffrey Ntuka*. It follows that it is doubtful that every person in Maokeng neighbourhood would have known who *Motintinyane* was or- that he was a murder suspect. The fact that a female police officer identified the plaintiff as not being *Motintinyane*, where after he was released, was never challenged by the defendant. It was met by the evidence of Capt. Erasmus that he distributed a photo of *Motintinyane* at the police station. It is inconceivable that *all police officers* would have memorised the photo of *Motintinyane* or would have taken note thereof. In comparison, the version of the plaintiff is more probable than that of the captain. Not all police officers at the Maokeng Police Station were able to identify *Motintinyane*. A female police officer, who was not part of the assaulting party, according to the plaintiff, had to verify whether or not he is the suspected *Motintinyane*.
50. It follows from the above considerations that the evidence of Capt. Erasmus is largely unreliable. It contains no defence of any nature against the claim of the plaintiff nor did it rebut his evidence in any manner. His evidence supports however the plaintiff's version in the following respects: That the plaintiff laid a complaint (charge) with the police shortly after he was assaulted by the unknown members of the police; that the J88-form, formed part of the official documents in the docket pertaining to the plaintiff; and, that a written statement was taken from the plaintiff's mother shortly after the complaint was made.

51. The defendant closed its case after it presented the evidence of Capt. Erasmus.

CONCLUSION:

52. In civil cases the burden of proof is discharged on a preponderance of probabilities.

Lord Denning expressed the standard of proof as follows:²³

“It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not.”

53. All probabilities favours the version of the plaintiff that he was unlawfully assaulted and arrested, on Friday night 17 February 2012, by unknown members of the defendant. This occurred due to a mistaken identification that he was the suspected murderer, *Motintinyane*, of a well-known soccer player, *Jeffrey Ntuka*.

54. The defendant’s version on trial was that his investigating officer, Capt Erasmus, could not find any supporting evidence in respect of the plaintiff’s complaint that he was assaulted or that such assault was done by members of the defendant. Remarkably the defendant simply ignored the existence of the J88-form in the police docket as evidence. I have rejected the evidence of Capt. Erasmus as unreliable. The defendant presented no evidence in rebuttal of the plaintiff’s *prima facie* evidence that he was he was assaulted by members of the defendant. It follows by necessary implication that the evidence became conclusive proof thereof.

55. The plaintiff did not institute any claim for unlawful arrest, most probably because he was only under arrest for a relatively short time.

²³ *Miller v Minister of Pensions* 1947 (2) All ER 372 at 374. The Appellate Division in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) approved this expression.

ORDER

The following order is made:

1. The plaintiff was unlawfully assaulted by unknown members of the defendant on 17 February 2012.
2. The defendant is ordered to pay the plaintiff's proven or agreed damages sustained as a result of the aforesaid unlawful assault.
3. The defendant is ordered to pay the plaintiff's cost for this trial on the merits.



J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

Instructed by:

Counsel for the Defendant:

Instructed by:

Date of Trial:

Date of Judgment:

Adv. W Dreyer

Van Zyl Le Roux Inc.

Adv. P Nonyane

State Attorney, Pretoria

6, 7 and 13 October 2015
