delivered
10/11/17

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: A396/16**

In the matter between:

**JATHEEN BHIMA** Appellant

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

06/11/17
DATE

SIGNATURE

and

**MINISTER OF POLICE** Respondent

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**JUDGMENT**

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Tuchten J:

1 This is an appeal from a decision of Kubushi J, sitting in a trial court in this Division. The plaintiff alleged in his particulars of claim that he was confronted, assaulted and humiliated at a roadblock on his way to the family business in Marabastad by members of the South African Police Services (SAPS). The evidence showed that the roadblock was manned by uniformed members of three agencies. Some were members of the SAPS. Others were members of the South African Revenue Service (SARS). Yet others were members of the Metro

Police. The appellant claimed damages from the respondent on the ground that the respondent was vicariously liable for the unlawful acts of the SAPS members.

2 Before the trial began, the learned judge below separated merits from quantum. So the trial proceeded on the issue of liability alone. In fact the only issue of significance between the parties in the court below was whether the appellant had proved that the persons who had so mistreated him were members of the SAPS. It was not suggested that the respondent was vicariously liable for the conduct of members of SARS or the Metro Police.

3 There was no appearance on behalf of the respondent. Out of respect for the court, the State Attorney briefed counsel to hold a watching brief over the proceedings. While we appreciate the courtesy displayed by the State Attorney, this is unacceptable conduct. Section 41(1)(c) of the Constitution provides that all spheres of government and all organs of state within each sphere must provide accountable government for the Republic as a whole. In *Zulu and Others v Ethekwini Municipality and Others,*[1] Van Der Westhuizen J, with whom Froneman J concurred, held that

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1 2014 4 SA 590 CC paras 70-71

> [70] ... The Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness. Section 165(4) of the Constitution provides:
> 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'
> [71] This duty echoes obligations of organs of state under s 7(2) of the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights, including 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing'. Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not. A court should be able to rely on the submissions of organs of state. Otherwise our very constitutional order would be undermined.[2]

4 The respondent as such an organ may not simply abandon or ignore litigation to which it is a party. The duty of an organ of state in this regard will vary from case to case. In some cases it will be enough if the organ of state informs the court that it will abide the outcome. In others, the organ of state will be constitutionally obliged to make submissions to the court, whether those submissions favour another party to the litigation or not. In the present case, the respondent opposed the action brought by the appellant and obtained a judgment in its favour. In these circumstances, the respondent may not

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2 Footnotes omitted.

constitutionally allow the case to go by default on appeal. This court is entitled to the benefit of the respondent's submissions. The presence of counsel watching the proceedings did not help the court to come to a just decision. By failing to provide those submissions, the respondent failed to fulfil his constitutional mandate.

5 It was accepted, correctly so, that while the onus to justify the mistreatment rested on the respondent, the defendant in the court below, the onus to prove that the persons responsible for the mistreatment were members of the SAPS rested on the appellant.

6 Evidence was led on both sides. At the conclusion of the trial, the learned judge found that the appellant had not discharged the onus of proving that the persons who had mistreated him were members of the SAPS. The learned judge ordered absolution from the instance against the appellant.

7 The appellant comes before us on appeal against that decision with the leave of the judge below.

8 The mistreatment caused considerable emotional pain and humiliation to the appellant. He was assaulted by being slapped and wrestled with and was verbally abused. The conduct of those who so mistreated the

appellant was disgraceful but the particulars of the mistreatment do not advance the appellant's case on appeal so I shall not dwell on them.

9 The learned judge regarded the evidence as constituting two mutually destructive versions. In such a case, the onus can only be discharged where the court concludes on adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false.[3] Where, however, the probabilities favour one version over another, other considerations come into play.[4]

10 In my view, the learned judge was partially correct in characterising the case as one involving two mutually destructive versions. The appellant's version was that he was mistreated by uniformed members of the SAPS. On the questions whether the appellant was mistreated at all and, if so, by members of which agency on duty that day, the position is more complex. The respondent denied on the pleadings that the appellant was mistreated as alleged by him and added that the respondent had no knowledge of any such mistreatment. But the evidence adduced on behalf of the respondent

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3 *National Employers' Mutual General Insurance Association v Gani* 1931 AD 187 at 199

4 See *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie* and Others 2003 1 SA 11 SCA para 5.

did not constitute a denial that the appellant had been mistreated. The evidence of each of the respondent's two witnesses who testified at the trial was that the witness did not know whether the appellant had been mistreated or not and, if so, by whom.

11 The plaintiff testified that he was able to distinguish between the different departments represented by the officers at the roadblock. He testified that Metro officers wore brown trousers and shiny objects over their uniforms at chest height bearing the words Tshwane Metro Police; SARS officers wore dark shirts that had "Customs" written on them; and the uniformed SAPS members present wore the SAPS uniform, consisting of blue trousers and a blue short sleeve shirt with black boots that came above the ankle. There was also evidence that some or all of the officers present wore berets.

12 The appellant testified further that the SAPS members wore bluish coloured bulletproof vests. He could not dispute, when it was put to him, that SARS officers also wore bulletproof vests.

13 One of the witnesses called by the defendant, WO Matthysen, testified that he had been present at the roadblock. In evidence in chief, Matthysen said that he did not know whether the SAPS members had worn bulletproof vests. But in cross-examination,

that both SAPS and Metro Police members had worn bulletproof vests.[5]

14 According to the appellant, there were many people at the scene of the incident who witnessed the way the appellant had been mistreated. The appellant testified that the Marabastad commercial community was one that had existed for many years. As the appellant put it, there were "relationships between all the shop owners" and "people would recognise me as being Mr Bhima's son".

15 The appellant's evidence was that after the incident, he went to his aunt's shop and reported what had happened to him. The appellant was shocked and emotional as a result of the way he had been mistreated. As he was sitting there, he saw three uniformed SAPS officers passing by. He recognised one of them as one of the officers who had been present at the scene.[6] Later in his evidence in chief, the appellant indicated that this particular officer had been one of the "assaulting police officers".[7] When they saw him, the appellant said, they started laughing. He went closer to the officer he recognised to

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5 Record pp123 and 131

6 Record p99

7 Record p107. In paragraph 10 of her judgment, the learned judge in the court below found that the evidence of the appellant had been that he recognised one of these three officers as the one who had earlier assaulted him. It was not suggested on appeal that this finding of fact was wrong.

look at his name badge. He said he saw "L Thokwe" written on the officer's name badge and shouted out the name to his aunt who wrote it down.

16 The appellant laid a charge at the Pretoria police station arising from his mistreatment on the day of the incident. He made a statement on the same day. He did not mention in his statement that "L Thokwe" had been a person who had mistreated him. Indeed, his evidence was that he had given the paper on which his aunt had written the police officer's name to his father and that while he did not know what his father had done with the information, he, the appellant, had never told the police of his identification of L Thokwe.

17 Matthysen however testified that he had been appointed as investigating officer pursuant to the charge laid by the appellant and on 14 March (presumably in 2011) he and the appellant had a telephone conversation during which the appellant reported that he had obtained the name of one of the members present that day, ie Lesiba Thokwe. Matthysen confirmed that there had been no Lesiba Thokwe on duty at the roadblock that day. Indeed, Matthysen testified, he could not trace any SAPS officer with the surname Thokwe. But Matthysen traced another SAPS officer called Cst Lesiba Thoka.

18 Thoka also gave evidence for the respondent. Thoka had however not been at the roadblock. Thoka said he established this fact from his work schedule documents. These documents were not put before the court. The appellant was not recalled to testify about whether he recognised Cst Thoka. Thoka further testified that his name badge bore only his surname Thoka and did not bear either his initial or his full given name.

19 The learned judge below evaluated this evidence and came to the conclusion that the appellant's case that those guilty of mistreating him were members of the SAPS had not been proved on a balance of probabilities. She found that there were no probabilities that favoured the appellant.

20 The learned judge below found that both Matthysen and Thoka were credible witnesses. But she was critical of the appellant as a witness. She pointed to the strong emotion displayed by the appellant while he gave evidence. She particularly criticised the evidence of the appellant in relation to his alleged identification of "L Thokwe". The learned judge was rightly critical of the appellant's evidence linking the letter "L" to the name on the name badge. She properly accepted the evidence that the name badge worn by an SAPS member bore no indication of the initial of the given name of the member. The learned judge also

considered that the appellant's failure to call witnesses who could be expected to corroborate his evidence, if it were truthful, should be held against him.

21 In the court below, counsel argued that it was the duty of the SAPS officers to stop vehicles and search them. The learned judge correctly rejected this contention as having no foundation in the evidence. There was simply no evidence that the first contact made with the occupants of vehicles stopped at the roadblock was made by members of one of the services there present that day rather than another. Had there been such evidence, the result of the trial would probably have been different. Why this evidence, if it existed, was not elicited from Matthysen, one cannot say.

22 The same applies to the argument, made at the trial, that only the SAPS officers would have been legally entitled to carry weapons and apply force. There is simply no evidence to that effect.

23 In the final analysis the appellant's case depended on his credibility. The learned judge found the evidence of the appellant to be unsatisfactory. The circumstances in which an appeal court can reverse a trial court's finding on credibility are limited. Perhaps the

leading case in this regard is *R v Dhlumayo and Another*,[8] where the court laid down at pp705-6 the principles which should guide an appellate court in an appeal purely on fact. Crucially, it is not sufficient for such an appellant to demonstrate that there is doubt about the correctness of the trial court's decision. That decision must be shown to be wrong.[9]

24 Where, however, the trial court misdirects itself materially by giving unsatisfactory reasons for its conclusion or overlooks in coming to that conclusion certain facts and probabilities, the appeal court may interfere. The appeal court must then evaluate the evidence and come to its own conclusion, The onus is then "all-important".[10] These principles apply equally to civil and criminal appeals. *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 2 SA 450 A 451H.

25 Counsel for the appellant did not contend for a misdirection by the court below in the sense of a material error of fact or inadequate reasoning. But he submitted that the learned judge had failed to take certain important facts into account. Counsel emphasised that the

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8 1948 2 SA 677 A

9 See also *S v Hadebe and Others* 1997 2 SACR 641 SCA 645*h*

10 *Dhlumayo p706 para 13*

appellant had identified his assailants by their uniforms and the fact that the appellant had correctly identified the senior uniformed officer present that day as a member of the SAPS.

26 I do not think counsel is correct. The court below took this evidence into account. But even if we should consider the evidence untrammelled by the adverse credibility finding against the appellant, I think that he ought not to succeed. I come to this conclusion largely as a result of what I regard as the appellant's unacceptable evidence of his identification of "L Thokwe".

27 That evidence, it will be recalled, was that on the same day, shortly after the incident and while the appellant was in his aunt's shop recovering from his ordeal, he identified one of his assailants who was in SAPS uniform, got close enough to him to read out the name on his badge and called out the name to his aunt who then wrote it down as "L Thokwe".

28 That same day, the appellant went to lay a charge with the police. He laid a charge of assault. But his statement made no mention of the name of any perpetrator. In paragraph 3 he described his assailants as being police officers. Then in the last paragraph of his statement, paragraph 4 he said:

> I did not give anyone permission to assault me. I can identify the suspects if I can see them again. I request further investigation. *They were wearing black berets.*

29 The italics are my emphasis. I use them to emphasise that this sentence was written in after the initial statement had been drafted. I do not suggest that the insertion was made in any improper way but that it was probably made after the appellant had read the statement over and before he signed it.

30 Paragraph 4 of the appellant's statement is wholly inconsistent with the appellant's version that he had got his aunt to write the name written down so that he could use the name to provide evidence. If that had been true, he would have told the police at the outset that he had identified one of the perpetrators present at the scene and named that person in his statement. Not only did he not identify "L Thokwe" but he considered it necessary to mention that his assailants had worn black berets. Clearly, he thought that this fact would help the police trace and identify his assailants. I might mention that Matthysen's evidence was that the SAPS members were not wearing black berets.

31 And then the appellant said that he would be able to identify his assailants if he saw them again. Why did he not tell the police when he laid the charge that he *had* seen one of them again? The inference

is irresistible he did not at this stage have any evidence linking a specific SAPS member to the alleged crime.

32 The facts that the name as recorded included the officer's initial of his given name, that Matthysen was only told of the identity of the suspect some weeks after the incident, that there was no "L Thokwe" on duty at the roadblock and that the appellant did not give the name of the suspect when he laid the charge point decisively away, on the probabilities, from the appellant's version of how he came by the name "L Thokwe".

33 The probability is that the appellant did not identify the perpetrator as he testified but that some time afterwards the appellant received information that one of his assailants was "L Thokwe". This conclusion must lead to a finding that the appellant was unreliable on a crucial issue relating to the identification of those persons who mistreated the appellant.

34 In all the circumstances, it cannot be said that the credibility finding against the appellant has been shown to be wrong. On the contrary, in my view it was correct. The evidence adduced at the trial does not in my view demonstrate that the version of the appellant, that the mistreatment he suffered was caused by uniformed members of the

SAPS, was probably true. It follows that the appeal cannot succeed and must be dismissed. As the respondent did not contribute to the adjudication of the appeal, there will be no order as to costs.

35 I accordingly make the following order:

The appeal is dismissed. There will be no order as to costs.

NB Tuchten
Judge of the High Court
06 November 2017

I agree.

WRC Prinsloo
Judge of the High Court
07 November 2017

I agree.

HJ de Vos
Judge of the High Court
08 November 2017

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