

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION - MTHATHA

CASE NO 1551/13

In the matter between:

NOTHEMBA PRETTY SIBULALI

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGEMENT

MGXAJI AJ

[1]The plaintiff instituted this action against the defendant suing for damages arising from an alleged unlawful and wrongful assault on her by members of the South African Police Services. The plaintiff alleges that the assault took the form of torture, plastic suffocation, sticks and coercion.

[2]In her amended particulars of claim in paragraph 3 and pertinently in paragraph 5 thereof the plaintiff pleaded her assault claim in the following terms:

“3. On the 10th May 2013 at Mantusini location Mthambalala A/A Lusikisiki district, the plaintiff was wrongfully and unlawfully assaulted by the members of the South African Police Services tortured, suffocated using plastic, coerced or assaulted by sticks, by people who addressed themselves as members of the South African Police Services whilst they were executing their duties within their scope of employment.

4. This tragedy arose while she was bereaved for the death of her sister in their homestead.

5. These members wore Police uniforms using vehicles [B.....] and [B.....].

6. The defendant’s conduct was blameworthy to society; and so as such their actions resulted to liability.

7. The conduct of the tortfeaser was directed against the plaintiff with the intention to injure her.

8. As a result of their wrongful conduct the plaintiff suffered these damages, unlawful conduct which causes harm to the plaintiff.

8.1 Infringement of dignity of the plaintiff.

8.2 Invasion of privacy.

8.3 Physical injuries.

8.4 Fault on part of the defendant, contumelia.

8.5 Voluntary wrongful conduct directed to the plaintiff, pains and suffering by the plaintiff.”

[2]The defendant denied the assault allegations and in its plea relative to the above quoted paragraphs of the plaintiff’s particulars of claim, pleaded as follows:

“4. AD PARAGRAPH 3-8THEREOF

4.1 The defendant denies that it ever assaulted or dealt with the plaintiff in the manner pleaded by her. Defendant admits though meeting the plaintiff on the date in question.

4.2 Defendant through an informer acquired information that plaintiff had a firearm in her premises which was being used in the commission of a criminal offences.

4.3 The members of the defendant visited the plaintiff and after she arrived at her homestead the members of the defendant requested consent to search her home after all her rights were explained to her. After her rights were explained to her, she agreed. Indeed the members of the defendant searched the premises as agreed upon.

4.4 The defendant at no stage did they drive a motor vehicle [B.....]; plaintiff is put to proof of his allegations. The balance is denied.”

[3] At the commencement of the trial Mr Mkhongozeli, who appeared on behalf of the Plaintiff, advised the court that the Plaintiff was pursuing only the claim of the alleged assault for determination and abandoning all other issues in the plaintiff's suit and that only the Plaintiff would testify on her behalf. Mr Kunju representing the Defendant confirmed the alleged assault claim being the only issue this court will have to make a finding on at the end of the trial and that the defendant would possibly call one witness. It is so that the matter fell to be dealt with on merits and quantum.

EVIDENCE

[4] The Plaintiff in her evidence in chief, led by Mr Mkhongozeli, testified that she resided at Mantusini locality, Mthambalala Administrative Area, Lusikisiki and on the 10th May 2013 was at her sister's homestead attending a night vigil when at 3:00 am Police Officers amongst them a Police woman arrived looking for her. They slapped her with an open hand and the female Officer started to assault her without identifying themselves. She testified that they asked for her husband who was not at home but at his great home, inquiring further from her as to where the firearm was and in respect to which she told them she had no knowledge of.

[5] She testified that the Police put a plastic on her nose spraying something on her eyes, handcuffed her wrists while hitting her with sticks on her back in

which she sustained strikes. She stated that the fire arm was not found and she had to consult a Doctor in Hospital at Lusikisiki on the following day as a result of the assault. At this stage a J88 completed Form was provisionally handed in after an objection by the defendant's counsel to the document on the basis that it was completed by a Doctor who should be summoned to hand it in. She confirmed the notes regarding her injuries as recorded in the J88 Form provisionally made EXHIBIT A praying that this court should grant her a compensatory order.

[6]The Plaintiff was cross-examined on behalf of the defendant by Mr Kunju and testified that she never saw a firearm at her home and that the Police Officers were taken by her nephew from her home to her sister's homestead where she was attending a night vigil whereafter entering the house she was in with other mourners the Police Officers came and just clapped her, manhandled her hitting her with sticks. She stated that they started the assault with open hands while she was at her sister's place continuously and at her home they handcuffed her and kicked her having been subjected to such assault on the way to her home crying too. She testified that she was telling them that there was no firearm and had no knowledge of it.

[7]She testified that she was sprayed in her eyes and could not see as her eyes looked as though it was dark. When asked how she saw those who assaulted her to have been in Police uniform she stated that her eyes had tears and they told her when assaulting her that they were Police Officers. When put to her that she was never tortured she answered that she was handcuffed at her home. The plaintiff, when it was put to her that the Police on the day had no sticks, stated that they used firewood from her homestead picked from a fireplace. When it was put to her that the Police would testify that she had co-operated and they had no reason to assault her, she replied that they started at her sister's place to assault her after she had told them that she had never seen a fire arm at her homestead.

[8]When asked whether was there no other infringement she complained about she stated that she was pepper sprayed on her eyes, plastic was put on her nose after being taken from her sister's place and was assaulted all over the body specifically on her thighs, that she had cuts on both hand wrists, also at her back sustaining strikes on it and after the assault she had difficulty urinating, her head became painful and also her buttocks were painful from the assault although she was never stripped. When asked if she told and showed her body to the doctor she answered that she merely informed the doctor of her injuries. She testified that when she reported on the cell phone in the presence of the Police Officers to her husband about the assault her husband said to her the Police should go to him. When it was put to her that her husband rebuked her on the phone for co-operating with the Police in the latter's search for the firearm she denied that her husband had said so but that the Police should go to him.

[9]When re-examined by her attorney she testified that the Doctor who examined her was no longer in Lusikisiki.

[10]The Plaintiff closed her case without calling further evidence.

[11]On behalf of the defendant Ayanda Jafta testified that she was a 44year old member of the South African Police Services since 1994 and as on the 10th May 2013 was attached to the Public Order Policing Unit on patrol in a group of twenty Police Officers at Mthambalala, Lusikisiki having been so commanded as a consequence of the spate of robberies and murder of Pakistan Nationals in the area. She stated that in one homestead after they had subdivided into a unit of five officers they found an unkempt boy who introduced himself as the nephew in the homestead whose owners had gone into the neighbourhood and who led them on their request to the homestead where the plaintiff was.

[12]At this homestead this boy whilst standing at the door pointed at the plaintiff whom the witness requested to speak to and who without any resistance acquiesced. She stated that they asked the plaintiff for permission to search her homestead as they had information of a firearm kept at her premises, denying the plaintiff's assault allegations at the homestead where they fetched her. She

denied handcuffing the plaintiff and when she agreed to the search for the firearm the plaintiff pointed them to near the kraal but nothing was found and then the plaintiff led them to a shrub, still in the homestead, in which when they could not retrieve it they asked her husband's whereabouts.

[13]The witness stated that they caused the plaintiff using their cell phone to speak to her husband regarding their presence in search of a firearm in their homestead. She testified that when they noticed that her husband was not cooperative they left with her their phone number to which they instructed the plaintiff that her husband on his return should call them as he refused to disclose where he was. She stated that there was whilst at the plaintiff's homestead a neighbourly man who joined them in observance. She further stated that there was at all time the boy who had accompanied them to the home to which the plaintiff had gone for a night vigil and from which they fetched her, denying that they tortured and suffocated the plaintiff.

[14]The witness was cross-examined by Mr Mkhongozeli on behalf of the plaintiff as to who had informed them about the firearm to which the witness in reply stated that it was their Commander and that she had never met the plaintiff before or after that day. She admitted being the only lady in her patrol sub group of five Police Officers denying any assault on the plaintiff. She conceded that they gave the plaintiff their cell phone to call her husband but who, the witness testified, threateningly dissuaded her against cooperating with them in their search denying that when they could not find the firearm they repeatedly assaulted the plaintiff with sticks and suffocation. She admitted that the Police motor vehicle BSJ EP was used by them on the day. When put to her that they assaulted the plaintiff the witness denied.

[15]At this stage Mr Kunju advised that he was closing the defendant's case.

[16]In argument Mr Mkhongozeli submitted that the plaintiff's evidence was unshaken and that the J88 medical report which has been provisionally handed in should be finally admitted in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. He argued that the defendant's witness, as in the

defendant's plea, was just denying the assault because she was the only woman in the Police group. He urged me to find in plaintiff's favour and grant a compensatory order for general damages.

[17]On behalf of the defendant Mr Kunju argued that I have to determine whether the plaintiff was ever assaulted by the defendant's members contending that the plaintiff's evidence is full of contradictions, unreliable and exaggerated. He argued that the plaintiff had an onus to prove her allegations but failed to call witnesses like the boy the plaintiff was staying with and who was present to corroborate her testimony. He further submitted that the J88 Form which merely reflected bruises should not be admitted as it has not been agreed to by the defendant and that the Doctor who completed it has not been called too. To help in analysing the evidence in this matter he referred me to the tools of analysis enunciated in **STELLENBOSCH FARMERS' WINERY GROUP LTD AND ANOTHER v MARTELL ET CIE AND OTHERS**¹.

[18]Mr Kunju argued that the defendant's witness did not contradict herself and in denying the assault, given the paucity of the plaintiff's testimony, nothing more could be expected of the defendant.

PLAINTIFF' S ASSAULT ALLEGATIONS AND PROOF

[19] In my assessment of the evidence the issue to be determined is whether the plaintiff has discharged the onus cast upon her of proving the alleged assault by the defendant's members on the 10th May 2013. The onus the plaintiff bears is the overall duty of proving the factual circumstances of the alleged assault which factual issue the defendant in its plea has denied. If the plaintiff has failed to satisfy this court that she is entitled to a finding in her favour ineluctably her claim must fail. Put differently it follows that if the plaintiff has failed to furnish some measure of proof of the assault on her by the police, then no prima facie case has been established and there will be no duty cast upon the defendant to

¹ 2003 (1) SA 11

adduce evidence to combat or in rebuttal.(See: **SOUTH CAPE CORP v ENGINEERING MANAGEMENT SERVICES**²).

[20]Only the plaintiff testified on her behalf regarding only the assault she alleges in her particulars of claim was inflicted by police officers amongst whom was a female who clapped her face with an open hand whilst at her sister's place where there was a night vigil, also was assaulted on her way home handcuffed, and at her home they assaulted her all over her body. The plaintiff stated that she did not identify the Police neither did they identify themselves because it was in the dark.

[21]In paragraph 5 of her particulars of claim the plaintiff mentioned the motor vehicle registration numbers [B.....]1B and BSJ834B as number plates of the motor vehicles used by the three Police Officers who assaulted her, testifying at court that the former registration numbers she had noted it from a Police Vehicle at the hospital when she attended at about 10h00 to the Doctor on following day. The defence witness testified that her Police Unit did not use a motor vehicle with registration numbers [B.....]1B but [B.....] in their patrol that night.

[22]Under cross examination as to when was she assaulted she testified that she was assaulted with an open hand, sprayed in the eyes and handcuffed with a plastic put on her nose whilst at her sister's place and on the way to her home. When asked if the Police were in uniform she answered yes yet in her evidence in chief she testified that it was dark and unsure in what attire were these Police. Over and above the assault methods aforesaid in her evidence the plaintiff further testified about an indiscriminate assault all over her body with sticks which under cross examination she said were firewood collected by the Police at her home.

[23]Further under cross examination she stated that the Police started to assault her heavily from the feet to the head after asking her husband's whereabouts

² 1977 (3) 534 at 548A-D

and a fire arm about which she testified to have answered that she had no knowledge and that her husband had gone to their great home. She testified that the Police caused her to speak to her husband who she told about the assault she was subjected to but her husband rebuked her for co-operating with the Police. She admitted that in the Doctors J88 report which was provisionally admitted there was no recording of the assaults she testified to have sustained but only a three centimetre linear bruise on her left hand and 5 x 6 bruises at the back. It was her testimony that she was stripped naked on her upper body and assaulted as also in her buttocks and head all about which she had told her Doctor.

[24]During the assault on her, as she testified, from her sister's home and until her home there was the young boy staying with them who accompanied the Police to the plaintiff at the night vigil and back to her home. Further she testified that when she was suffocated with a plastic bag there was a man observing all the assault on her. Notwithstanding the defendant's denial of the assault on her the plaintiff has not called as a witness the young man who, she testified, to have been her nephew and who she testified witnessed the assault nor has the plaintiff called the man, who she testified, to have been from her neighbourhood, who was present at her home during the perpetration of the assault by the Police neither her husband who, she testified, to have informed when she was caused to speak to him on the cell phone by the Police.

[25]Of course consistent with its plea the defendant's witness denied in her evidence any assault on the plaintiff and that the plaintiff never spoke of assault to her husband when they caused her to speak to him regarding the firearm.

[26]In her testimony on behalf of the defendant the Police witness denied having assaulted the plaintiff, admitted having spoken to the plaintiff whom they fetched assisted by a young boy from her sister's place in the night vigil and that they searched her homestead for a firearm. It must be said that what was put to the defence witness under cross examination that the plaintiff was assaulted by Police as a group but not the witness in singular deviated from the plaintiff's evidence in chief that she was assaulted with an open hand by the

only female Police Officer in the group even though the plaintiff has not in her testimony provided specifics as to who exactly assaulted her at what stage and who sprayed her when and when was she put plastic on her nose. Her failure to testify regarding specifics such as at what stage she was caused to undress her upper body, if by herself, and by whom amongst the Police Officers was she ordered to strip bare her upper body and how thick the firewood or the sticks she testified were used in the assault on her body, in my assessment, left her narration inadequate and hazy.

[27]The plaintiff's evidence of assault with fire wood or sticks, which the Police witness denied, would ordinarily have produced weal all over her body and her testimony about a number of strikes having been inflicted on her head, in my view, she would not have escaped sustaining haematoma yet the Doctor's J88 Form reflects none of those, not even a bruise, which to me renders her version to be an implausible claim. The plaintiff's legal representative attributed these shortcomings in the plaintiff's evidence to her elementary schooling, a characterisation I disagree with because she was led in her evidence presentation and her glib answers reflected not so much her inability to convey her recollection of her alleged ordeal but rather a lack of an account of what actually had taken place.

[28]The plaintiff appeared to me to be a self confident vivacious young woman who cannot be said has had personal constraints consequent from her lack of a formal education. In my view she seemed to lack the necessary information of a personally experienced event narrator. It is on account of this glaring absence of a coordinated way of recounting the assault she alleged was perpetrated by the Police that her version I find to be unbelievable. It comes as not surprising, it seems to me, that the plaintiff has not been advised to seek corroboration by the young boy, she testified, once stayed with her as her nephew who accompanied the police officers to where she had been in the night vigil or the neighbourhood man who, according to her evidence, was at her home during the alleged assault nor anyone at her sister's home attending the night vigil, where according to her

testimony, she was clapped with an open hand right in the doorway of the house by the female police officer.

[29]It is my fortified view that the plaintiff's version is factually incredible and her recollection of the assault, if the alleged assault ever occurred at all, unreliable and in my assessment and evaluation of it against the evidence of the defence witness it is highly improbable too.(SEE: **SFW GROUP LTD &ANOTHER v MARLTEL ET CIE & OTHERS**³). In her evidence in chief the plaintiff stated that she was given the J88 Form at the Police Station which she took to the hospital where it was filled by a Doctor. She has no hospital medical card which she would ordinarily be issued with had she, as a consequence of the alleged assault, initially attended the hospital for medical examination.

[30]Inferably it seems to me, even though it was not specifically put to the plaintiff, the J88 Form was given to her because she had gone to the Police Station to lay a complaint of assault on her that having been her first step on the day after the alleged assault on her, hence the plaintiff's inability to obtain evidence by a hospital Doctor or Superintendant who would have worked in giving evidence in this matter from the hospital notes relating to plaintiff's hospital examination. This is so notwithstanding the fact the Doctor who completed her J88 Form has not been said to have been beyond reach but merely transferred from Lusikisiki.

[31]What renders further the plaintiff's version incredible is the fact that under cross examination she stated that the Doctor when he completed the J88 Form did not examine her body but merely noted what she relayed to him. Her evidence under cross examination that she was assaulted on the head and buttocks is not supported by the notes on the J88 Form presupposing that she had not mentioned to the Doctor that she had been assaulted on these body parts. Further if her testimony that she told the Doctor without her body having been examined on which part the assault had been inflicted is to be believed

³ 2003 (1) SA 11 SCA par 5

how could she have identified and counted the 5 x 6 bruises at her back as noted in the J88 Form. Still further on what basis the Doctor could have recorded the bruises without having examined the plaintiff and recorded what him/herself had observed. This is a jigsaw puzzle only the plaintiff could have in her testimony resolved but failed though invited to deal with.

[32]In view of these glaring incongruities on behalf of the plaintiff in order to help bolster her version it was imperative that medical evidence should have been produced. When under cross examination it was put to her that not only her husband reproached her during their cell phone conversation in the Police presence at her home using their cell phone but also that she was assaulted by her husband after his return home, the plaintiff glibly answered that she was at the funeral on his arrival. It remained unclear whether she was denying the assault by her husband or not.

[33]As a last aspect in this matter on behalf of the plaintiff tendered was a J88 medical report which was objected to on behalf of the defendant. In her evidence the plaintiff stated that the Doctor who examined her left the Hospital. Mr Mkhongozeli on her behalf applied for the admission of the J88 medical report placing reliance on section 3(1) of the Law of Evidence Amendment Act 45 of 1988 that this court must admit the J88 medical report in the interests of justice. He however has not been able to advance which interests of justice on the facts and circumstances of this matter would be that this court should be persuaded to admit the copy of the medical report.

[33]It is so that the Doctor who filled the J88 Form according to the plaintiff moved from Lusikisiki and there has not been any attempt to determine which hospital has he/she joined neither am I advised of any attempts to locate him/her nor has there been any endeavour to secure such evidence from the hospital the plaintiff was examined in by issuing a subpoena duces tecum utilising rule 38 (1) so that the J88 Form becomes admitted to corroborate her assault allegations.

[34]In such circumstances I do not consider it necessary to even begin to investigate, where there are hospital doctors and notes available relating to the plaintiff's examination, and consider the circumstances that must inform the basis for the admission of hearsay evidence as are enumerated in section 3(1)(c) of the Law Of Evidence Amendment Act 45 of 1988.

[35]The plaintiff's legal representative if he had any spirited effort to have the J88 medical report admitted in these proceedings would have ensured that a doctor from the hospital in Lusikisiki has been secured with ease to help the plaintiff in these proceedings if the plaintiff had attended the hospital for her alleged assault injuries. In my view the J88 medical report remains inadmissible as it is hearsay unless the doctor upon whose credibility the probative value of what it records depends has been called and testified.

[36]Accordingly I find that the plaintiff failed to establish the alleged assault on her by the police on the 10th May 2013 and her claim must fail.

[37]In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.

MGXAJI AJ

ACTING JUDGE OF THE HIGH COURT

DATE HEARD:

26 MAY 2016

JUDGMENT DELIVERED:

21 JUNE 2016

FOR THE PLAINTIFF:

MR MKHONGOZELI

PLAINTIFF'S ATTORNEYS:

H. N. MKHONGOZELI ATT.

NO. 5 PARK ROAD

MTHATHA

FOR THE DEFENDANT:

MR KUNJU

THE OFFICE OF STATE ATTORNEY

NO. 94 SISSION STREET

BROADCAST HOUSE

FORTGALE

MTHATHA