



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: 09/05/2022 **Signature:**

CASE No. 13425/2019

In the matter between

MATHE, MDELWA SIMON

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MAHOMED AJ

1. This is a claim in delict for damages. The plaintiff claims damages arising from injuries he sustained after being assaulted by members of the South African Police Services (SAPS). The plaintiff alleges that the defendant is vicariously liable to him for the conduct of its servants who assaulted and seriously injured him, whilst acting in the course and scope of their

employment as police officers. This court is to determine the merits in the matter.

PRE TRIAL AGREEMENTS

2. The defendant agreed to condonation of the plaintiff's failure to serve his notice in terms of The Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
3. The defendant agreed further to an amendment to include the words, at paragraph 6.2

"or using an object to hit the plaintiff ..."

THE PLEADINGS

4. The particulars of claim is based on vicarious liability for injuries caused by member of the SAPS in course and scope of their employment. The relevant allegations are as follows:

"6. On or about Thursday, 14 June 2018, at or about 23h35 at or near 5964 Zone 12 Sebokeng, police officers, being servants of the defendant, whose full and further particulars are unknown to the plaintiff, unlawfully assaulted the plaintiff, inter alia, as follows:

6.1 By manhandling, beating and knocking the plaintiff to the ground;

6.2 *Kicking the plaintiff or using an object to hit the plaintiff in the left leg and knee;*

7. *As a result of the assault, the plaintiff suffered the following harm:*

7.1 *a fractured left knee and an open wound over the knee;*

7.2 *He was admitted to the Sebokeng Hospital on 16 June 2018 and underwent a surgical procedure on 5 July 2018 involving the insertion of a pin into the tibia of the left leg. He was discharged from hospital on 6 July 2018. He continued to receive treatment as an outpatient thereafter; ... “*

5. The defence is a bare denial of all allegations made in the particulars of claim. Advocate Nkosi appeared for the Defendant and submitted that the defendant denies the incident ever happened, and therefore denies being vicariously liable for any injuries the plaintiff alleges to have suffered.

THE BACKGROUND

6. On 14 June 2018, at approximately 23h50 the plaintiff returned home from visiting his friend, with whom he had shared three quarts of beer, each about 750ml, whilst they watched movies. He stated that he was a bit tipsy and testified he would need to drink about four of those quarts to be inebriated. He denied he was drunk when he returned home. Upon entering through the kitchen door into the dining room he found his niece, his sister's daughter Nomsa, ironing her shirt on the deep freezer without any protective layer over the freezer surface. He questioned her about it

as he felt she would damage the surface with the hot iron. She responded that he was talking too much. He tried to get hold of the iron from her hand when she struck him with the hot iron on the right side of his face on the cheek to the neck and ran out the house. His sister Joanna who was in her bedroom at the time, entered the dining room and inquired as to the commotion, when he explained to her that her daughter had burnt him with the iron.

7. Approximately ten minutes thereafter, whilst he was still explaining the incident to his sister Joanna, he heard a police siren, saw rotating blue lights, and thereafter heard knocking on his house door. Three persons, two males and a woman, the police whom he identified by their uniforms, entered the house, ordered the plaintiff to step outside the house and instructed his sister and niece to shut the door after them. The plaintiff's evidence is that both his sister and Nomsa are members of the community policing forum in their area and were familiar with the police at the station in the area. The plaintiff realised that Nomsa had called the police when she ran out the house.

THE PLAINTIFF'S CASE

8. The plaintiff testified that upon entering their home, the police ordered him to step outside and as he stepped out one of the police officers, grabbed at his jacket and pulled him around the corner to the side of his

home at 5964 Zone 12 Sebokeng. There two of the three officers assaulted him on instruction from the third, a female officer, who also instructed them to avoid his face because he was burnt there.

9. The plaintiff testified that the male officers manhandled him, punched, and hit him with open hands and fists on his chest and abdomen area.
10. He was pushed down to the ground and each of them stood on either side of him hitting him, whilst he held his arms and hand over his head, trying to protect himself and the burn wound.
11. He lay supine a bit to his right, on the ground, whilst the officers who were on either side of him assaulted him and he felt a very hard kick to the lateral side of his left leg. The pain was excruciating. His evidence is it felt like he was kicked by a hard nose of a boot, the type worn by police officers.
12. He was injured on the side of his left knee and when the police left the property, he tried to stand up, but the pain was excruciating, and he realised he could no longer stand up.
13. He crawled to the front door of his home and knocked on the door, when his sister let him in. He moved on his buttocks and palms of his hands to his bedroom and went to sleep.

14. When he awoke later that morning, on 15 June 2018, he realised he could not move, and remained in bed, after taking medication for the pain. He expected that he would recover in short time.
15. However, on the morning of 16 June 2018, he realised that the injury was more serious than he thought. His sister called an ambulance and assisted him to the vehicle as he could not walk by himself.
16. He was taken to the Sebokeng Hospital, where he was treated by a female doctor, to whom he relayed the incidence of his injury to his face and his knee.
17. He was hospitalised for three months and was discharged with double crutches which he used for about a few months thereafter and later a single crutch which he continues to rely on to the present day.
18. Upon discharge he reported the incident to the police and advised them that he could identify the police officers, if necessary. He went to live with another one of his sisters, in another area, for a few months to recuperate.
19. Whilst there the police contacted him and informed him they has mislaid his statement and he made another statement. He has not heard from them since.

20. In cross examination, the plaintiff denied that he was drunk but conceded he may have been a bit tipsy. And admitted that he tried to grab the hot iron from Nomsa's hand by restraining her when he grabbed her jacket.
21. In cross examination he stated that he identified the police by the uniforms and badges they wore, although they did not see their name tags, but when he stepped out of the house on their instruction and saw the vehicle it confirmed that they were the police. A marked police vehicle was parked outside his home. Although he did not see Nomsa call the police, he knew as a member of the local community policing forum she may have known the police in their area. The police arrived very shortly after she ran out the house, she may have called them.
22. The plaintiff stated in cross examination that he was attended to by a medical doctor at the Sebokeng hospital on 16 June 2018 when he told her that he sustained both injuries on 15 June 2018.
23. He did not report he was hit with fists and bare hands by police on his chest and abdomen. He explained that he did not think they were serious as they were not bleeding, he did not think they were serious enough to warrant reporting.
24. Counsel for the defendant referred to the second statement he made to the police, exhibit F and inquired as to why he did not report injury to his

face. The plaintiff did not report injury to his face to the police as they injured him on his knee after they assaulted him, Nomsa injured him on his face.

25. Mr Nkosi put to the plaintiff that he reported to the police that he was drunk on the night of the incident, as appears in his statement "Exhibit E." The plaintiff reiterated he was not drunk but tipsy, the police recorded it as drunk. The plaintiff stated that he did not correct the police statement as he was in a lot of pain and that it was made in a rush. He did not write the statement, he only relayed the facts to the policeman who recorded them.

Bheki Isaac Skosana

26. Mr Skosana, the plaintiff's neighbour and cousin, testified on behalf of the plaintiff.
27. On the night of 14 June 2018, he was watching television in his dining room when he heard a police siren and saw rotating blue lights outside the plaintiff's home.
28. A fence separates the two homes. He looked out the window, to ensure that the vehicle was not on his property. He has tenants on his property and thought the police may have come to them. He noticed the police

vehicle as it was marked with the blue and yellow markings and the back door had a cage area on the door.

29. He assured himself that they were not visiting anyone on his property, he returned to his seat and soon thereafter decided to retire for the night. He preferred not to be involved in any way as it did not concern him.
30. He testified that he did not hear any noise from the plaintiff's property, he was watching television.
31. His bedroom is the furthest point off the street, he therefore did not hear or see anything further.
32. His further testimony is that following the visit by the police, at or about 11h00, on a Saturday, he was in his yard chatting to his tenant when he saw the plaintiff being supported by his sister by her shoulder, she was assisting him to walk toward a waiting ambulance.
33. He stated that the plaintiff looked like he was in pain and could not walk by himself.
34. The witness was unsure as to the exact date that the plaintiff was taken away by ambulance, he said it was a long time ago and he could not be sure. It may have been a week later, but he may be wrong.

35. In cross examination, he stated that he did not hear any noise or sounds coming from the direction of the plaintiff's home.

36. The window in his dining room is across from the plaintiff's home, from which he observed the arrival of the police. He did not wait to see the police alight from the vehicle as he was afraid, they might question him as to his peeping at them.

Dr Bemah Barnor

37. Dr Barnor testified that she held a MBChB and was a general practitioner. She worked at the Sebokeng hospital for four years after her internship until 2019 when she moved to the Chris Hani Baragwanath Hospital as is currently a registrar there.

38. On 16 June 2018, she attended to the plaintiff and completed the statutory J88, exhibit D in which she recorded her observations and the report from the plaintiff regarding his injuries.

39. Dr Barnor testified that she identified an "old burn" on the plaintiff's face, which had a scab on it and stated that it was probable that it was from the day before, it was in line with her observations. It was a second-degree burn, she observed a layer of skin which looked like a blister on his cheek. She further reported that she examined the left knee and found it

tender and warm to the touch. It was swollen and she diagnosed it to be a fracture of the knee.

40. She further noted on the J88 that the left knee had a limited range of movement and that there was no open wound. She marked the sketch in the J88, exhibit G on the appropriate places in line with her observations and it included the x ray report which identified a tibial plateau fracture of the left knee.
41. In cross examination she conceded that there may be a mistake on dates she may have confused dates, however she confirmed that the two injuries were recent. She conceded that she did not use a translator because it was not necessary the plaintiff understood her and no other injuries were reported to her.
42. Dr Barnor could not tell whether or what instrument was used to assault the plaintiff. She found his knee swollen and it did not move along its normal path, and this caused the plaintiff pain.
43. Dr Barnor stated that it is possible that both injuries happened together as both were recent and she confirmed that he would have difficulty standing on that leg but could limp on the right leg.

44. She confirmed that the plaintiff was treated for the injuries on the 16 June 2018 and her report is consistent with the plaintiff's version.

Dr SG Wouters

45. Dr Wouters is a practising orthopaedic surgeon who has twenty-nine years of experience as a doctor. He focuses on trauma joint replacements.
46. He works from the Garden City Clinic in Johannesburg and submitted a report dated 19 June 2019.¹ Exhibit H
47. He testified that he observed the plaintiff walked with a limp.
48. He found deformity in the left knee and wasting (when a limb is used less, one puts less pressure on it, there is a wasting of the muscle in that limb).
49. The witness referred to the x ray report and identified that a metal plate was put into the left knee at the tibia, a bone graft was done, which means that his bone in the area collapsed which resulted in a knock knee deformity.

¹ Caselines 003-13

50. He cannot straighten his left knee and arthritis has set in. He had a fracture at the lateral tibial plateau. His cartilage, which is the bearing for a knee, is destroyed.
51. He surmised that a hard force from the outside of the femur injured the lateral tibial plateau. It is probable that he was lying on the ground a bit to his right side when he was hit.
52. Dr Wouter testified that with enough force the plaintiff's injury is possible, especially when one has soft bones, often due to poor nutrition. He further confirmed that his outcome of a limp is very possible, as his lateral joint space is obliterated, he was very seriously injured.
53. On the date of the examination, he noted that the plaintiff had lost 20% mobility which meant that he has lost power, he is unlikely to be able to walk long distances and his condition will get progressively worse and painful. In his opinion the plaintiff will always walk with a limp.
54. In the future, the plaintiff will need compartmental replacement, and later a full knee replacement.

THE DEFENDANT'S CASE

55. The defendant denied that the incident happened and denied that the defendant is vicariously liable. The defendant did not lead any witnesses nor refer to any documentary evidence, in defence.

JUDGMENT

56. Advocate van Rooyen agreed that the plaintiff bears the onus to prove, on a balance of probabilities, an unlawful act, committed in the course and scope of the employment of the police officers who unlawfully assaulted and injured him on his left knee that caused him to lose the full use of his leg.
57. I noted that the plaintiff who is unemployed, worked previously as a caregiver on contract. His is not a job at a desk but he is reliant on his physical fitness and physical ability to earn his living.

UNLAWFUL ACT/ VICARIOUS LIABILITY

58. The defendant denied that the incident happened at all and denied that the perpetrators were its employees and therefor denied liability.
59. The defendant did not lead any witnesses and relied on the fact that the plaintiff had not identified the police officers who assaulted him.

60. The Defendant however also failed to investigate the report by the plaintiff of this incident. In fact, the defendant mislaid his statement and were forced to obtain another statement from the plaintiff. Counsel conceded that his client was responsible for the holding of an identity parade, to assist the plaintiff to identify his attackers. The defendant failed to hold such parade either, despite the plaintiff's report that he could identify the officers who assaulted him.
61. The defendant is required to observe certain rules of practise set out in standing orders, such as the keeping of records of incidences reported, the records of personnel on duty on the day, the number of police on the beat and the movement of vehicles.
62. No evidence of this nature was put to this court.
63. The plaintiff's case is probable. He was a good witness, and his evidence was consistent throughout, including when he relayed the incident as recorded by medical experts.
64. The plaintiff heard a siren, saw rotating blue lights, and thereafter three persons entered his home, all dressed in uniform, except for their name tags. He identified them as the police in positions of authority and therefor he obeyed their instructions to step out of his home. He reported

them to the local police station, on his first opportunity after he was discharged from hospital. The evidence was unchallenged.

65. Furthermore, Mr Skosana, his neighbour placed the police on the scene on the date and time that the incident occurred. He too identified the vehicle he saw as a police vehicle with a door at the back that looked like a cage. I am persuaded that the defendant's servants were at his home on the date and time the plaintiff testified.

CAUSATION

66. The injury to his knee was indeed a heavy blow from the outside, the kind which Dr Wouters surmised could result in damage of the nature identified, especially on soft bones, due to poor nutrition. The plaintiff was not built as an athlete or rugby player.
67. The plaintiff's evidence is that he felt an extremely hard blow to his knee from the nose of a boot that the police wear.
68. The plaintiff testified that he was lying supine to his right when he was injured, and Dr Wouters testified that it is highly probable that one can sustain such an injury when lying in that position.

69. In **CARLITZ AND OTHERS v MINISTER OF POLICE**², the court referred to the judgment in **KRUGER v COETZEE**³ wherein the court held:

“For the purpose of liability culpa arises if-

A diligens paterfamilias in the position of the defendant-

Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and

Would take reasonable steps to guard against such occurrence; and

The defendant failed to take such steps.”

70. The police knew what that they were going to “effectively” injure the plaintiff. There is no evidence before this court that they had any reason to. They went ahead, nevertheless.
71. This can never be the acceptable attitude and behaviour of any “diligens paterfamilias.”
72. The plaintiff respected the authority of the police, as a proper citizen, he followed their instructions to step outside. He had faith and hope in their services, even after they brutally assaulted him, when he went to the station and reported the incident. He cooperated with police when they

² Case no. 62934/2014 [2014] ZAGPPHC 733 (29 October 2021) par 32

³ 1966 (2) SA 428 A

misaid his original statement and made another statement, determined that those who injured him must be brought to book.

73. The police failed him. The custodians of our laws and enforcement agencies posed a danger to him. Such incidences cannot be allowed to continue, such brutality and arbitrary action against any individual must be condemned in the strongest of terms.

73.1. Equally abhorrent to this court, is the fact the police knew he was already injured, again brutally, with a hot iron, yet continued their “mission” to deliberately injure the plaintiff.

73.2. He was already in pain, already needing both his hands to protect his face and head. He was plainly, defenceless in that moment in Sebokeng, where he lived in a home, his parents left to him. At the very least he could have been afforded the right to an investigation, a warning, a fine, but never should he have been maimed for the rest of his life at the hands of our law enforcement agencies, whom we have a right to call upon for “our protection and for our safety”.

73.3. There was no reason in law for this behaviour and certainly the “penalty” was utterly disproportionate. It is no wonder that Mr Skosana, his cousin opted to remain in his home and in fact did

not even stay long enough at his window, for fear of the repercussions, from the police in the area.

73.4. Our people are forced into complacency for fear of such brutality and arbitrary action.

74. Except for a bare denial, the defendant failed to argue its defence either by leading evidence of witnesses or otherwise.

75. I am satisfied that the plaintiff has proved on a balance of probabilities that in the early hours of 15 June 2018, the police were on his premises, they assaulted and injured him on his left knee, whilst they were on duty.

75.1. It is very probable they were called to his premises by his niece Nomsa whom he had reprimanded, and as a member of the community policing forum, she is likely to have persuaded the local police to fight her battle for her.

76. The details of the assault remain unchallenged. Mr Nkosi's attempts at discrediting the witness focused on his failure to report the incidence of his being punched and hit on his chest and body.

77. It is not inconceivable for a plaintiff in his pain, to have overlooked or discounted the less serious or milder effects of an assault. In fact that was his personality, as after the assault in the early hours and during the

course of that day, he did not believe it to be a serious assault and tried to self-medicate and endure his pain, until the following day when he could no longer manage the pain, when he called for an ambulance and medical help.

78. I am satisfied that the plaintiff has proved that the defendant is vicariously liable for the injury he suffered.
79. The plaintiff's version is uncontradicted, plausible and unchallenged and he remained consistent in his version.
80. I was satisfied with Dr Barnor's credentials who was the attending doctor at the Sebokeng hospital on the date of admission, who reported the facts in which the plaintiff explained to her how he sustained the two injuries. Her diagnosis of the second degree burn as "old" with a scab is in line with the facts of the case as to the position of that injury and that it was recently inflicted. She identified the knee to be swollen and warm to the touch, therefore an injury that was recently sustained.
81. Dr Barnor's diagnosis of a fracture of the left knee was confirmed by the x ray images and further corroborated by the evidence of Dr Wouters.

82. Dr Wouters is an orthopaedic surgeon in private practise. He has been an academic and in private practise for a combined period of thirty years and this evidence and I found his evidence useful.
83. In his report, "exhibit G" he recorded the incidence of the two injuries which was in line with the plaintiff's testimony.
84. In his opinion, the injury the plaintiff sustained is an expected outcome of the way he was assaulted.
- 84.1. Dr Wouters explained that the plaintiff sustained a very hard hit from the outside on his femur, which with the impact, served as a "hammer", to damage the lateral tibial plateau of the plaintiff's knee.
- 84.2. His further evidence was that he noted from the x ray, that all the cartilage, the bearings of a knee, is destroyed and that arthritis has set in.
- 84.3. He reported that the knee has been operated on and screws and plates have been inserted to repair the knee. When he examined the plaintiff, he noted that the plaintiff had already lost 20% of this mobility on that leg.

- 84.4. Dr Wouters stated that the injury of this nature would cause a person to lose power in the knee, reduce his walking endurance and continue to experience pain in his knee.
- 84.5. In his opinion, the plaintiff will never be able to straighten his knee again and will walk with a limp for the rest of his life. He proffered that in the future the plaintiff may require a knee replacement which will require regular medical attention.
85. In cross examination, he reported that he was aware of only a burn to the face and a fracture to the knee. He could not tell what caused the injury to the knee but was clear that it was a very hard hit to his femur which resulted in a hammer effect and the force destroyed the lateral tibial plateau of the plaintiff's knee. In his words "his lateral joint space was obliterated."
86. I am satisfied that the injury which the plaintiff sustained was knowingly caused by the unlawful actions of the police, who were on duty at the time they assaulted the plaintiff.
87. Although no submissions were made on costs, I am of the view punitive costs are appropriate, the defendant failed to raise any defences and not much was achieved in cross examination of the witnesses, furthermore, there is no evidence that the defendant has even investigated the

complaint made by a member of the public, instead it defends a legitimate claim on a denial.

I make the following order:

1. The issue of merits and quantum is separated.
2. The defendant is 100% liable for the plaintiff's proven damages.
3. The issue of quantum is postponed sine die.
4. The defendant is ordered to pay the costs of the suit on an attorney client scale, including the fees of experts Dr Barnor and Dr Wouters, and costs of the interpreter.



S MAHOMED

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 9 May 2022.

Date of Hearing: 24 -26 January 2022

Date Delivered: 9 May 2022

Appearances.

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