

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, MTHATHA)**

CASE NO.: 1019/09

In the matter between:

NONCEDO TSHONEFINI

PLAINTIFF

And

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

BESHE, J:

[1] Plaintiff herein is suing the defendant for damages arising from an incident that took place on the 22 January 2009 at plaintiff's place in Bizana, under the following heads:

- | | |
|--|-------------|
| 1. Damages for pain suffering and loss: | R700 000.00 |
| 2. General damages for <i>contumelia</i> : | R300 000.00 |

[2] Plaintiff alleged that she was assaulted by an employee of the defendant, who also broke down a door at her house and forcefully searched the house

for one **Themba**. At the time he was acting within the scope and course of his employment.

[3] In his plea defendant contends that employees of the defendant struggled with the plaintiff when she blocked their way when they wanted to enter a flat at her premises in order to search for a suspect that they were looking for. Further that the actions of the police officers were justified or necessary in order to effect an arrest or to prevent the suspect they were looking for from escaping.

[4] It transpired from plaintiff's as well as defendant's evidence as well as the latter's pleadings that the following is common cause:

On the 22 January 2009, two employees of the defendant **Constables Mthintso** and **Gwayi** visited the home of the plaintiff, a female who was 40 years old at the time. The purpose of the visit by the two constables was to follow upon an information on one **Themba** who was a suspect in a murder case that was being investigated by their colleague, **Inspector Williams**. **Mthintso** and his colleague were wearing civilian clothing. They were driving in an unmarked police vehicle. Their intention was to arrest the said **Themba**. Upon enquiring from plaintiff about **Themba's** whereabouts plaintiff said he was not home.

It is common cause that **Mthintso** insisted that **Themba** was present and proceeded to look for him inside the house.

It is common cause that plaintiff sustained the following injuries on that day: Superficial and extended bruising on both thighs and left (posterior) arm.

That she received treatment at St Patrick's Hospital in Bizana.

Common cause also is the fact **Mthintso** and **Gwayi** did not have a warrant authorizing them to search plaintiff's house.

It appears to be common cause that they did not have a warrant of arrest for the said **Themba**. Plaintiff did not grant **Mthintso** permission to enter her house. **Mthintso** forcefully opened the door of plaintiff's house.

[5] The parties proffered divergent versions of how the plaintiff sustained the injuries that were observed on her by **Doctor Khalifa** at St Patrick's Hospital on the 23 January 2009.

[6] According to the plaintiff at about 11h00 on the 22 January 2009 a sedan motor vehicle with two occupants a man and a woman arrived at her home. The two alighted from the motor vehicle and enquired about the whereabouts of one **Themba**, who is her brother. She informed them she did not know where **Themba** was. The two proceeded to a flat inside the premises, kicked the door open and proceeded to search for **Themba** who they did not find. They moved to the second room and ultimately found **Themba** asleep in the third room that they searched. Using a stick that one of the two people, **Mthintso**, found underneath one of the beds at plaintiff's place, he assaulted the plaintiff therewith on her buttocks, waist and on her back. **Mthintso** held both plaintiff and **Themba** by hand, placed the latter inside the boot of the motor vehicle in which they were travelling. Thereafter continued assaulting plaintiff with a stick until the stick broke. **Mthintso** continued assaulting the plaintiff with fists causing the plaintiff to fall. It was at the stage when **Mthintso** was assaulting plaintiff that he remarked that he was a policeman and would kill the plaintiff for lying to him or by hiding **Themba**. She testified that until **Mthintso** opened the door of the third room

and found **Themba** asleep inside the room, she did not know that **Themba** was there because the last time that she checked **Themba** was not home.

[7] Plaintiff denied that she blocked **Mthintso's** way when he tried to get to one of the rooms at her premises or holding on to his leg.

[8] According to **Mthintso**, who gave evidence on behalf of the defendant, having received information that **Themba** who was a suspect in a murder case, was seen at plaintiff's home, he called **Inspector Williams** to confirm whether he was looking for **Themba** in connection with one of the cases he was investigating. Upon **Williams'** confirming that he was looking for **Themba**, he together with **Student Constable Gwayi** proceeded to the home of the plaintiff. They found plaintiff standing in front of the house they intended searching to see if **Themba** was not there. He introduced himself as **Constable Mthintso** from Flagstaff and introduced his partner as well. He then asked plaintiff where **Themba** was. Plaintiff responded that he left three days ago. He insisted that **Themba** was inside the house in front of which he was standing and insisted that he was going to enter the house. He moved towards the door of the said house whereupon plaintiff blocked his way. He pushed her aside and headed to the door. Plaintiff held on his thigh. He proceeded to walk towards the door thereby dragging the plaintiff along. He got into the house where he found **Themba**. Thereafter they took the latter with them. He testified that as far as he is concerned plaintiff sustained injuries as a result of being dragged at the time she was holding on to him. He testified further that the plaintiff's homestead comprised of two structures or buildings. During cross-examination by *Mr Notyesi* for the plaintiff, **Mthintso** testifies that they did not tell plaintiff why they were

looking for **Themba**. He also admitted during cross-examination that he forced the door at plaintiff's place to open. He also admitted that plaintiff was older than him. **Mthintso** explained that at the time plaintiff was holding on to his leg – she was dragged across the ground face down – in other words the front of her body was closest to or facing the ground.

[9] The approach to be adopted by court when confronted with divergent versions was determined in *SFW Group Ltd and Another v Martell et cie and Others 2003 (1) SA 11 at 14 paragraph 5*:

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of

its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[10] However before I can embark on the analysis of the evidence of the two versions in the fashion suggested in the *SFW Group Ltd* case (*supra*), I believe that evidence clearly reveals that the employee of the defendant (**Mthintso**) entered the house of the plaintiff without her consent and he did so after forcing the door open. That plaintiff sustained injuries as a result of **Mthintso's** actions. Whether the said injuries were sustained as at time when plaintiff held on to **Mthintso** in a bid to stop him from entering her house as **Mthintso** suggested or by assaulting her with a stick and open hands as suggested by plaintiff, that is in dispute. Defendant's employees did not have a warrant that authorized them to search plaintiff's place, nor did they have a warrant for the arrest of **Themba**. This being the case therefore, it was incumbent upon the defendant to justify the conduct of his employees. This in view of section 12 (1) of the Constitution which provides that: everyone has the right to freedom and security of the person, which includes the right

(a)

(b)

(c) to be free from all forms of violence from either public or private sources.

[11] In what way does the defendant contend that the actions of the defendant's employees were justified? As indicated earlier in this judgment defendant pleaded that the police officials concerned forced their way through in the face of resistance on the part of the plaintiff who was blocking their way. That their actions were justified and or reasonably necessary in order to effect a lawful arrest of **Themba** or to prevent an escape from arrest. Defendant denied that plaintiff was assaulted with a stick. In his evidence **Mthintso** stated that he pushed plaintiff aside. Although he did not suggest that plaintiff fell as a result of being pushed aside by him it would seem that he suggests that she landed on the ground. Because according to him, plaintiff was dragged across the ground when she held on to his right thigh.

[12] I have already alluded to what plaintiff's version is in this regard. Which then is the correct version of what transpired on that day? Not much criticism was leveled at plaintiff's evidence. Her evidence was assailed on the ground that her sister, who she alleged was present at her home when the incident took place, was not called. The way I understood her evidence in this regard was that her sister was in the toilet when the police arrived and only came out as a result of her screams. If plaintiff is to be penalized or an adverse inference is to be drawn against her for failure to call her sister as a witness, the same should apply to the defendant. **Student Constable Gwayi** who was in the company of **Mthintso** was also not called to testify in support of defendant's case. Plaintiff's evidence was also assailed on the basis that the name that is reflected in the medical report is **Noncedo Jali** and not **Noncedo Tshonefini**. She deposed to an affidavit explaining that this was a mistake. During her testimony she further explained that **Jali** was

her clan name which was supplied by her sister on admission at the hospital because she could not speak as a result of the assault on her. This in my view is a satisfactory explanation of the discrepancy regarding her last name.

[13] In my view plaintiff gave a good impression as a witness. She struck me as a truthful witness. Had she wanted to exaggerate the extent of the assault on her, she could easily have said **Gwayi** also assaulted her, but she did not. Her evidence was straightforward and accords with probabilities of the case.

[14] The same however cannot be said of defendant's witness **Mthintso**. He did not appear to be a particularly honest witness. He was not forthcoming as to how the door was opened. Suggesting that the other part of the door was open and he used that open part to go in. Later however he admitted that he forced the door open. Although it is clear that plaintiff landed on the ground, **Mthintso** did not admit that as a result of his pushing plaintiff aside she fell. He does not explain how she landed on the ground, for her to be dragged across the ground. His explanation of how plaintiff could have sustained the injuries that were observed on her by the doctor is improbable. He testified that plaintiff was facing downwards when she was dragged across the ground. However the injuries she sustained are located on her buttocks – extending to the thighs. Hence I say the injuries are not consistent with those sustained in the manner suggested by **Mthintso**. I say this mindful of the fact that the doctor who examined the plaintiff did not indicate whether the injuries are consistent with assault with a stick or dragging in his report. He was not called to testify about the injuries either. Be that as it may, I am still of the view that the injuries are not consistent with what **Mthintso** suggests happened. This brings me to question whether, if

Mthintso's version was to be accepted, he was justified in dragging plaintiff in the manner he suggests she was dragged in the circumstances.

[15] In *Govender v Minister of Safety and Security 2001 (4) SA 262 SCA* the court was concerned with the use of force by the police in effecting an arrest. (Old section 49 (1) of the Criminal Procedure Act 51 of 1977) The court held that "A person fleeing from the police has usually not yet been convicted of an offence. The presumption of innocence must be respected in such a case. But even an escaping convicted person has all the constitutional rights mentioned above". In *casu* we are not even talking about a suspect or convict. The plaintiff was neither suspect or a convict who, as was stated in *Govender supra* also have constitutional rights".

[16] Adopting the approach suggested in *SFW Group Ltd* above, I am of the view that plaintiff's version is credible, reliable and accords with probabilities. She denied that **Mthintso** and his colleague introduced themselves. **Mthintso** confirmed that he did not inform her why they were looking for **Themba**. They were travelling in an unmarked motor vehicle, wearing civilian clothing. **Mthintso's** partner was pregnant. The two could have been looking for **Themba** for any number of reasons. Without them introducing themselves there was no way she could have known they are police. In any event she says she did not know **Themba** was home because the last time she checked he was not home. *Mr Notyesi* who acted for the plaintiff argued that she had a right to resist the unlawful entry into her premises. I agree with *Mr Notyesi*. **Mthintso** and his partner did not have a search warrant. She did not give them permission to enter her house. They did not have a warrant for the arrest of **Themba**. She would therefore have been entitled to resist the unlawful search. In the circumstances, I am

satisfied that the actions of defendant's employees on the day in question constituted a breach of plaintiff's constitutional right to security of her person. I am satisfied therefore that plaintiff should succeed in her claim for damages arising out of the assault by an employee of the defendant on the 22 January 2009.

[17] In determining what amount will be appropriate to compensate the plaintiff for the damages she suffered, I will be mindful what *Watermeyer JA* stated in *Sandler v Wholesale Coal Supplies Ltd 1941 AD* namely that "it must be recognized that though the law attempts to repair the wrong done to a sufferer by compensating him in money, yet there are no scales by which pain and suffering can be measured and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the judge's view of what is fair in all the circumstances of the case". Plaintiff is claiming an amount of R1 000 000.00 for damages. It is trite that the amount of damages is determined by the nature, duration and intensity of plaintiff's suffering. There can be no doubt that plaintiff suffered a great deal in the hands of **Mthintso**. The seriousness of the assault and the effect thereof on her is apparent from the fact that her sister is the one who gave plaintiff's particulars at the hospital. This resulted in the furnishing of a last name that does not appear in plaintiff's identity document. The seriousness of the assault is also apparent from the extent of injuries plaintiff sustained. Plaintiff was 40 years old at the time and a mother of three children. She was going about her business at her home when defendant's employees arrived and proceeded to violate her right as stated above. There is however no evidence that the injuries caused were of a permanent nature. I will however

take into account that the injuries necessitated the hospitalization of the plaintiff for three days. Be that as it may, I will be mindful of what was said by *Nugent JA* in *Minister of Safety and Security v Seymour 2006 (6) SA 320 SCA at 326, paragraph [20]*, namely that: Money can never be more than a crude solatium for deprivation of what in truth can never be restored and there is no empirical measure for loss. ... our courts are not extravagant in compensating loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection". In my view taking into account all the factors that are relevant to this matter, an appropriate award for damages would be that of R150 000.00.

[18] In the result the following order will issue:

- (a) Judgment is entered in favour of the plaintiff.**
- (b) Defendant is ordered to pay to the plaintiff damages in the sum of R150 000.00 for pain, suffering, loss and *contumelia*.**
- (c) Interest in the sum of R150 000.00 at the legal rate from date fourteen (14) days after judgment to date of payment.**
- (d) Costs of suit.**

N G BESHE
JUDGE OF THE HIGHCOURT

APPEARANCES

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Date Heard : 29 & 30 August 2012

Date Reserved : 30 August 2012

Date Delivered : 25 October 2013