



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

NOT REPORTABLE

Case no: CA233/2021

In the matter between:

CLAYTON ANDREWS

Appellant

and

MINISTER OF POLICE

Respondent

JUDGMENT

Govindjee J

[1] The appellant claimed damages for an alleged assault by members of the South African Police Service (SAPS), acting within the course and scope of their employment with the respondent, on 25 March 2014. According to a medico-legal report accepted into evidence, he suffered injuries to his right knee, right wrist, right shoulder and right elbow, as well as acute post-traumatic shock. The respondent denied any assault by its employees and claimed that the appellant had sustained any injuries prior to his arrest.

[2] The respondent, in replying to a request for trial particulars, accepted that 'member(s) of the South African Police Service did handled the Plaintiff by grabbing him and put him down to the ground in an attempt to control him' (sic). In terms of an amended plea, the respondent indicated that its members had used a degree of force as was reasonably necessary to defend themselves or to restrain or search the appellant. The appellant alleged that the assault took the form of being dragged out of a classroom, being thrown to the ground and tramped by a police officer.

[3] The presiding magistrate drew an adverse inference from the appellant's failure to call witnesses and from his description of events. The magistrate also found that the injuries sustained were, on the probabilities, sustained as a result of a fall rather than an assault. This followed the magistrate's attempt to evaluate the irreconcilable versions of the parties as to the likely cause of the injuries.

[4] There is a presumption that the trial court's evaluation of the evidence is correct and it will only be disregarded if it is clearly wrong. The trial court has advantages over an appellate court in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial, having had the opportunity to observe demeanour. There may be a misdirection of fact by the trial magistrate where the reasons are either on their face unsatisfactory or where the record shows them to be such. There may also be a misdirection where, though the reasons as far as they go are satisfactory, the presiding officer is shown to have overlooked other facts or probabilities. The appellate court is then at liberty to disregard the court a quo's findings of fact, even though based on credibility, and to come to its own conclusion on the matter. Where there has been no misdirection on fact by the trial magistrate, the presumption is that their conclusion is correct and the appellate court will only reverse it where it is convinced that it is wrong.

[5] In this case the magistrate misdirected herself in her assessment of the probabilities.¹ This is evinced by the drawing of an adverse inference against the appellant for failing to call his mother and the teacher in the classroom in support of

¹ One of the grounds of appeal is that the magistrate erred in rejecting the appellant's evidence in respect of his assault.

his version. The magistrate did so without applying the applicable test for drawing an adverse inference. There was, for example, no consideration that the teacher would have been equally available as a witness to the respondent. Whether the teacher would have been in a position to elucidate the facts was also not considered. The availability of the appellant's mother was also not canvassed during the trial, despite the appellant indicating that she was sick. In short, the position of the two potential witnesses was not interrogated and no inference unfavourable to the appellant could properly be drawn.²

[6] The magistrate also misdirected herself in finding that the force used to bring the appellant to the ground was not 'sufficient to constitute an unlawful act of assault' and that 'the interference with his bodily integrity was justified in the circumstances where the police were of the view that he was possibly armed'. In coming to this conclusion, the magistrate gave no consideration to the wording of Section 27(1) of the Criminal Procedure Act, 1977,³ ('the Act') which provides, in part:⁴

'A police officer who may lawfully search any person or any premises ... may use such force as may be reasonably necessary to overcome any resistance against such search ...'

[7] By time the search took place, any resistance on the part of the appellant had crumbled. The magistrate's approach ignores Humphries' evidence that he had engaged with the appellant for some 15 to 20 minutes and had managed to convince him to come out willingly, having asked him to do so on approximately three occasions. Humphries advised the appellant that he was a police officer and nothing would happen to him when he exited the classroom. Having done so of his own free will, he was physically 'taken down' without being asked. This is consistent with Humphries' written statement that 'the police were forcing him to go to the ground to search him for a possible firearm in his possession'.

² See, in general, *HAL obo MML v MEC for Health, Free State 2022 (3) SA 571 (SCA)*.

³ Act 51 of 1977.

⁴ S 49(2), dealing with an arrestor's attempt to arrest a resisting and / or fleeing suspect, is couched in similar terms.

[8] Given these misdirections, this court is in a position to disregard the court a quo's findings of fact, even though based on credibility, and come to its own conclusion on the matter. This court's analysis of the material dimensions of the evidence follows.

[9] The appellant was stopped by police in an unmarked vehicle in Gelvandale, and fled the scene on foot. Constable Holster was following the appellant at close quarters, so much so that he was able to describe what the appellant had been doing with the bag he was carrying. On his version, he only lost sight of him for a time once the appellant had entered the school premises and was running in the corridors of the school. During the chase he was alone behind the appellant. His pocket book entry and report made contemporaneously made no reference to the appellant having fallen to the ground during the chase. Holster could only speculate during the trial that the appellant might have fallen during the chase. His state of mind was that the appellant was still a danger, carrying a bag with unknown contents and possibly armed. He testified that he acted in the interests of his own safety 'and for the safety of the people around me ... I am in direct contact, that is what I am trained to do, to neutralise a dangerous situation, which it was at that stage for me ...' He held a gun while doing so and was poised to counter-act any actions on the part of the appellant.

[10] As for Fritz, his testimony was correctly criticised by the magistrate for its vagueness. Yet the magistrate failed to consider that evidence together with the evidence of Holster and the appellant in assessing the probabilities. Fritz's testimony was, in material respects, unreliable. The record reflects that he was a particularly poor witness. He stated that he saw the appellant fall somewhere outside the school while he was in a car with Slater. Yet he and Slater had driven around the school in order to prevent the appellant from exiting the school on the other side from where the appellant had entered that premises. How Fritz could then have seen the appellant falling was not properly canvassed during evidence. The magistrate's acceptance of that version also ignores the reality that Holster was pursuing at fairly close quarters, as confirmed by Fritz, and saw no such fall outside the school premises. On Fritz's initial version, Holster was running behind the appellant at the time of the fall somewhere in a concrete quadrangle and should have observed the fall clearly. Later he backtracked on this aspect, initially saying that he had not seen Holster at the time and then conceding that he could not recall aspects of what had occurred. Had the

appellant fallen in an open space outside the school buildings, and given the suggested nature of the fall, it is likely that Holster would have been able to catch and apprehend the appellant at that moment. The record reflects clearly that the 'tactical' portion of Holster's chase was only inside the school premises, where Holster lost sight of the appellant while he ran in the cloisters. At that stage there were no other police officers in the vicinity. Fritz's testimony that he saw the appellant fall hard onto concrete outside the school premises, somewhere towards the back side of the school, while still in the vehicle outside the school premises, must be rejected.

[11] Humphries rightly conceded during cross-examination that a degree of force was used. He also testified that there was no threat to any of the police officers on the scene when the appellant exited the classroom. The appellant did so in a non-suspicious manner, with his hands visible. Three armed police officers were present at that moment. Their firearms were not drawn, indicating that the nature of the discussion with the appellant while he was in the classroom was such that there was no sense that he posed any danger. The police did not expect there to be any violence when the appellant exited the classroom. As Humphries acknowledged, the appellant could then simply have been instructed to lay on his stomach in order to be searched, as opposed to a rigorous application of the Standard Operating Procedures in these circumstances. Instead, he was, to use the words used by Holster, grabbed on his body and put down on the ground, while Holster screamed at him and kept his hand on him.

[12] It is trite that an assault violates a person's bodily integrity. A person who has been assaulted enjoys a cause of action based on the *actio iniuriarum*. Every infringement of the bodily integrity of another is prima facie unlawful. It is for the plaintiff to prove the fact of physical interference. The plaintiff must, generally speaking, allege and prove facts which prima facie and objectively indicate an assault. The onus of alleging and proving an excuse or justification for the assault rests on the defendant. The onus lies on a defendant who admits the 'assault' to prove the lawfulness of the 'assault'.

[13] It is clear that the appellant had surrendered to the police by time he exited the classroom. He was certainly not resisting a search of his person. The manner in which

he was forcibly manhandled amounts to an assault without justification. Put differently, it was simply unnecessary for the appellant to be grabbed and put to the floor in the manner in which this occurred. This amounts to a contravention of s 27(1) of the Act. The remaining issue is to determine whether the harm suffered by the appellant is attributable to that wrongful and intentional conduct.

[14] The injuries suffered by the appellant on the day are undeniable given the J88 report. The appellant testified as to the cause of those injuries. They are, as Humphries noted, of the kind that may well have resulted from forceful manhandling onto a concrete floor. There is no acceptable evidence to gainsay that explanation, the suggestions of a trip and fall during the chase amounting to conjecture. On the probabilities, the physical injuries suffered by the appellant were caused by his unnecessary treatment at the hands of Holster when he exited the classroom. This entitles him to an award of damages.

[15] The appellant claimed R80 000,00 in damages. This court has accepted, on the probabilities, that he was forcibly pushed to the ground in a manner that caused abrasions to his right knee, wrist, shoulder and elbow. He also experienced shock as a result of his ordeal, which occurred in view of members of the public. This court is obliged to consider, inter alia, the nature, extent and degree of the affront to his dignity and bodily integrity. An appropriate award must also be tempered with restraint and a proper regard to the value of money in order to avoid extravagant redress. Leaving aside the temporary shock, the injuries were nothing more than abrasions that would have been quick to heal. Ultimately, the damages awarded must be commensurate with the injuries inflicted, bearing in mind these realities and the facts of the case. In all the circumstances, an amount of R50 000,00 is fair and reasonable to both parties.

[16] The appellant has succeeded in his appeal and is entitled to costs.

Order

[17] The following order will issue:

1. The appeal is upheld with costs.
2. The order of the court a quo is replaced with the following:
 - ‘1. The defendant is ordered to pay the plaintiff the amount of R50 000,00 as and for damages, with interest thereon calculated at the legal rate per annum *tempore morae* from date of the order until date of final payment.
 2. The defendant is ordered to pay the plaintiff’s party and party costs, calculated at the legal rate per annum from 14 days from date of taxation until date of payment.’

A. GOVINDJEE
JUDGE OF THE HIGH COURT

I Agree

ZM NHLANGULELA
DEPUTY JUDGE PRESIDENT OF
THE HIGH COURT

Heard: 08 September 2022

Delivered: 18 October 2022

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