IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO 2001/13198

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED: YES / NO	
..... DATE	..... SIGNATURE

In the matter between

MARCUS MOTHLOU SEBESHO **PLAINTIFF**

and

MINISTER OF SAFETY & SECURITY **DEFENDANT**

J U D G M E N T

VAN OOSTEN J

[1] This is an action in which the plaintiff claims from the defendant damages resulting from an alleged assault. At the commencement of the trial and pursuant to an agreement between the parties, I ordered a separation of the issues of merits and *quantum*, and the matter proceeded on the merits only.

[2] The incident from which the plaintiff's claim arose occurred around midday on 16 October 2002 at the Brixton police station. The plaintiff, who is a practising attorney, attended the Brixton police station for purposes of arranging and paying bail monies for a client who had been arrested for drunken driving. He first arranged for bail and then left to draw monies at an ATM. On his return to pay the bail monies he parked his vehicle in the parking grounds of the police station. Entrance to the parking area was through a gate

(it apparently stood open), and it is surrounded by a high wall. Having paid the bail money the plaintiff who was accompanied by his client and a friend of his, Maleba Dolamo, returned to where his vehicle was parked. When he arrived at his vehicle it was blocked in by another vehicle quite obviously purposely parked behind his vehicle so as to prevent him from moving out. This vehicle it is common cause belonged to Insp Mngomezulu, who was stationed at the Brixton police station.

[3] The plaintiff started making enquiries around as to who the owner of the vehicle was. In the meanwhile Inspector Mngomezulu and Captain Naidoo arrived in another vehicle. They parked in the same area and the plaintiff directed his enquiries to them. The enquiry soon developed into a heated argument. The plaintiff was accused of wrongfully parking in an area which was reserved for police vehicles only. The plaintiff quite willingly conceded his wrongdoing and informed the police officers that he was an attorney and explained the purpose of his visit to the police station. It had no effect. On the version of the police officers it was the plaintiff's arrogance that prolonged and intensified the argument. Be that as it may, it has become common cause between all the witnesses who were present that a heated argument developed resulting in an exchange of words on which there are as many versions as witnesses.

[4] It is the plaintiff's version, as corroborated by Dolamo, that while the argument was in progress Inspector van der Mescht, who was also stationed at Brixton, arrived and without more ado, assaulted him. The assault he testified happened as follows: Van der Mescht, who was well built and physically strong man, without more ado, joined in and started manhandling him. He hit him with fists and pushed him resulting in the plaintiff falling down. He fell on his back on raised area of the parking area (which in the absence of a proper description having been provided I will refer to as a kerb), in between two vehicles. While he was lying down Van der Mescht kicked him several times on his body. Dolamo eventually assisted him in getting up. He immediately proceeded to the Rand Clinic where he consulted Dr Ramakgopa, an orthopaedic surgeon, who was well-known to him both as his

patient and in his professional capacity. Dr Ramakgopa immediately examined the plaintiff, sent him for x-rays and urine testing, and prescribed certain medicines. I will return later in the judgment to his evidence and the findings he had made.

[5] The version on behalf of the defendant was given by the police officers I have already referred to, Mngomezulu, Naidoo and Van der Mescht. As mentioned they admitted the heated encounter. The reasons for their unhappiness appears to be firstly, the plaintiff's failure to have observed two prominent notice boards at the entrance to the parking area clearly indicating that it was reserved for police vehicles only and secondly, the plaintiff's reluctance to accept that Mngomezulu at that very moment was not in possession of the keys of his motor vehicle and his insistence on the immediate removal of Mngomezulu's vehicle. On the alleged assault however, their version was quite different. They deny that the plaintiff was assaulted. Naidoo, who was the senior police officer present, testified that the plaintiff's attitude eventually turned into agitation and the making of offensive remarks. He then merely in order to avoid further confrontation, grabbed the plaintiff by the arm (which he said is what he meant by earlier using the term "forcible removal") and in this way escorted him towards the exit gate where he left him standing outside the premises. Van der Mescht testified that he was on his way out from his office to conduct some investigation elsewhere when he observed the heated argument. He said he remained a fleeting observer and did not become involved in the altercation at all. In particular he denied having assaulted the plaintiff.

[6] The issue I am required to determine is whether the plaintiff was assaulted, in the way alleged by him. Except for the witnesses I have already referred to, three medical experts testified. Dr Ramakgopa who examined the plaintiff was called to testify on the plaintiff's behalf and Professors van der Spuy and Botha on behalf of the defendant. Their evidence is, as will presently become apparent, of crucial importance in the assessment of the credibility of the plaintiff's version in the light of the probabilities.

[7] The plaintiff bears the onus of proof. Two mutually destructive versions have been put before me. The approach to be adopted has crystallised and become well established. First, the well-known and oft quoted passage in from *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199 reading as follows:

> *"Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version and that in this case absolute reliance can be placed upon a story told by A Gany."*

Second, the confirmation and expansion of this *dictum* by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W) at 426 where he said:

> *"Waar daar immers geen waarskynlikheid bestaan nie en die twee weergawes mekaar uitwis, word niks tog ooit bewys (wat ookal die bewys maatstaaf mag wees) tensy 'n mens 'absolute reliance' kan plaas op die getuienis van die litigant wat die bewyslas dra nie. Dit is net in ander taal gestel wat alreeds bevat word in die eerste sin van sy dictum (die van Wessels AR in Gany) nl 'that the story of the litigant upon whom the onus rests is true and the other is false'."*

(See also *African Life Assurance Co v Cainer* 1980 (2) SA 234 9W) 237)

[8] The plaintiff's evidence on a number of aspects was seemingly unsatisfactory. On the cardinal aspect of the assault he was markedly vague and argumentative. I was left with the impression that he cautiously adjusted his evidence in respect of certain aspects to forestall certain difficulties. One clear example will suffice. In his statement to the police, made on the day of and shortly after the incident, he made it clear that he was hit "on my face until I fell on the ground". In his evidence the plaintiff retracted from this statement and

said that he was hit with the fist on his body. On the specific question whether he was hit in the face he replied “My face I think is part of my body but I was just hit all over”. That he soon changed to a version that he “assumed” he was not hit in the face. When this obvious discrepancy between his evidence and his statement to the police was pointed out to him, he professed not to see any difference at all between the two. A probable explanation for the unease the witness experienced in answering the questions directed on this aspect and the resultant discrepancy is not hard to find: the plaintiff’s medical examination later that day did not reveal any external or visible injuries. That being so, it leaves me with some scepticism as to the truth and honesty of his version especially when considered in the light of the medical evidence as I will point out later in the judgment. Another unsatisfactory aspect of the plaintiff’s evidence was his constant refusal to give any indication of the number of times he was hit or kicked. A wide margin of the possible number of times was given to him to allow him at least to give some indication of the number of times he was assaulted but he remained unwilling to commit himself in any way. Exactitude in the nature of mathematical precision obviously cannot be expected from the plaintiff, but the absence of at least some indication of the number of assaults, in my view, seriously compromises his version. In conclusion it merely has to be noted that on the plaintiff’s version the assault upon him involving fists blows, manhandling and kicking, was extremely severe. I will revert to this aspect in the consideration of the medical evidence later in the judgment.

[9] I turn now to the evidence of the defendant’s witnesses. Their evidence is not entirely free from criticism. Naidoo left me with the impression of tenaciousness. The whole saga was nothing more than the proverbial storm in a teacup. The plaintiff’s trespassing did not inconvenience any of the police officers: there was ample parking left

for police vehicles. Naidoo as the senior police officer present could and should have by virtue of his rank and seniority, taken control of the situation which he quite easily could have defused. He dismally failed to do so. Instead he oddly decided to “use force” by grabbing the plaintiff by the arm and escorting him of the premises, which by no means was a solution to the problem at all. I do not consider it necessary to further comment on his conduct. Suffice to say that Naidoo, on the plaintiff’s version is not the *dramatis persona*. The aggressor, who assaulted him the plaintiff said, was Van der Mescht. He as I have indicated denied the assault. It is common cause that he only arrived on the scene somewhat later. On the plaintiff’s version it seems improbable that he without more ado, where one of his superiors was involved, would have joined in. I refrain however from expressing final views on this aspect. I say this for the reason as will become apparent later, that on the evidence as a whole his denial stands. No reasons were further advanced for rejecting it.

[10] This brings me to the medical evidence. Dr Ramakgopa’s evidence concerns his examination (which occurred at 16h25 on the afternoon of the day of the incident) and treatment of the plaintiff, which was based on the information given to him by the plaintiff and of course his own observations. On the information furnished to him by the plaintiff, Dr Ramakgopa concluded that he was subjected to a very severe assault. The plaintiff he testified “battled to walk” and with his hands supported his back. He complained of severe back pain and his range of movement had decreased to zero. Plaintiff’s getting up from a sitting or lying position because of severe back ache, he said, was almost impossible. There were however no neurological deficits. In examining the plaintiff he by hand searched the effected areas of the plaintiff’s body pointed out to him by the plaintiff, for possible injuries such as lumps, abrasions and contusions. Except for extreme symmetrical tenderness to the area of the mid spinal and paraspinal muscles of the thoracic and lumbar area, none was present. The absence of visible injuries

he explained in a person of dark skin colour is of no moment and in itself insufficient to conclude that no injuries had been sustained. He concluded that the plaintiff had sustained a severed back injury which mainly affected the soft tissues. The plaintiff was sent for an X-ray examination and urine testing (to test for possible injury to the kidneys) but the test results revealed nothing abnormal. He prescribed four types of medication including “very potent” non-steroidal anti-inflammatories for four weeks. No follow up consultations and examinations were however arranged with the plaintiff although he did receive some telephonic feedback from the plaintiff a few weeks later that “he was feeling better”.

[11] The findings and conclusions of Dr Ramakgopa were challenged by the defendant’s two medical experts. They of course were bound to do a desk top exercise by examining the evidence of Dr Ramakgopa given in this court as well as the evidence and statements of the plaintiff and the other witnesses who testified in this case. The bone of contention is the common cause fact that no external or visible injuries were found by Dr Ramakgopa when he examined the plaintiff. This gave rise to diametrically divergent opinions. I have already referred to the views of Dr Ramakgopa. The defendant’s experts on the other hand, held the opposite view. In their opinion the absence of external or visible injuries on the plaintiff’s body, in the clinical scenario, cannot in any way be reconciled with an assault of the severity described by the plaintiff.

[12] Prof Botha explained that he would have expected a pattern of injuries resulting from an assault as serious as described by the plaintiff. The injuries he said would have included multiple contusions over the chest caused by fist blows, multiple contusions and abrasions over the thighs resulting form the kicking and possible internal injuries as a result of blunt trauma having been applied. As for the plaintiff’s complaints concerning pain, both witnesses said pain is a subjective experience, and that the treating physician obviously has to rely on the information conveyed to him by the patient. The same holds true for the patient’s limitation in movements. It is for this reason that a meticulous

examination must be conducted on the patient which where necessary would include further testing. It is only after having thus gone beyond the mere information furnished to him, that the clinician will be able to reach an informed clinical conclusion. Mainly two aspects of this case led them to conclude that in all probability the plaintiff could not have been assaulted in the way he had described. Firstly, the absence of any superficial or external signs of injury (which except in persons of a very dark skin colour would be visible and if not, at the very least, be detectable by an examination using one's hand) which they would have expected resulting from an assault by a man of the physique of Van der Mescht and secondly, the absence of any radiological or urinary signs of injury.

[13] Both experts were of the view that certain aspects of the medical management of the plaintiff by Dr Ramakgopa clearly point to the unreliability of his findings. Those include: his unreserved reliance on the information furnished to him by the plaintiff without proper consideration of the clinical scenario, not arranging any formal follow-up checks or examinations, his sole reliance on the feedback of the patient and not advising the plaintiff to remain in bed for two or three days which was what he had considered necessary as part of the treatment.

[14] There are no good reasons for not accepting the evidence of the defendant's expert witnesses. They are both reputed members of the medical profession with considerable experience in the field on which they have given evidence. Their evidence and conclusions in all respects are in consonance with plain logic and common sense. A finding to the contrary has quite understandably so, not been suggested in argument.

[15] Finally, it remains to deal with one aspect in the evidence of Prof Botha. He was of the view that the tenderness described by Dr Ramakgopa "may be consistent with an injury incurred when falling onto the back". This brings to the fore whether this evidence can be considered as corroboration for the tenderness found by Dr Ramakgopa in line with a back injury having been sustained by the plaintiff. I do not think so. Prof Botha was dealing with a

hypothesis of tenderness on the one and the compatibility thereof with a back injury on the other. That he was of the view is possible. As for the plaintiff two considerations militate against a finding on this aspect in his favour: firstly, Prof Botha testified, had the plaintiff fallen on a kerb one would have expected some imprint on the skin resulting from the impact. That we know was absent. Secondly, the presence of a kerb (or something similar) where the incident occurred, was specifically denied by the Mngomezulu. His evidence on this aspect was not challenged. One last observation on this aspect: in view of the unreliability of Dr Ramakgopa's findings and conclusions I would in any event be hesitant, in the absence of other cogent evidence, to accept that he in fact had found tenderness.

[16] To sum up: the plaintiff's evidence failed to cross the first barrier of credibility in order to discharge the onus. The probabilities, which in assault-related cases are usually found in the nature of the injuries sustained by the victim, are against accepting the version of the plaintiff. He has accordingly failed to discharge the onus of proving an assault. His claim therefore falls to be dismissed.

[17] In the result the plaintiff's claim is dismissed with costs.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DEFENDANT'S ATTORNEYS	***THE STATE ATTORNEY***
DATES OF HEARING	***16, 17, 21, 22 MAY 2002 &*** ***1 DECEMBER 2008***
DATE OF JUDGMENT	***05 DECEMBER 2008***