

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

1541/13

8/12/2017

In the matter between:

**LODEWIEKUS JOHANNES DE KLERK**

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL LIMPOPO  
DEPARTMENT OF ROADS AND TRANSPORT**

Defendant

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**JUDGMENT**

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**Baqwa J**

**Introduction**

- [1] In this matter, the plaintiff claims damages arising out of an assault committed upon him by traffic officers employed by the defendant on 24 November 2011 at or near the town of Matoks, Limpopo, the said traffic officers being Thomas Mashimbye, Malepo Mashita and Masenya Maloka.

### The Parties

- [2] The plaintiff is an adult male of [...] whilst the defendant is the member of the Executive Council : Limpopo Department of Roads and Transport, who is sued herein in his official capacity as such.

### Common Cause Facts

- [3] The defendant admits the following facts:
- 3.1 That the three officers implicated in this action namely, Thomas Mashimbye, Malepo Mashita and Masenya Maloka were employed by the defendant as at the date of the incident in question.
  - 3.2 The said traffic officers were on duty on the N1 at or near the town of Matoks on 24 November 2011.
  - 3.3 The officers were acting in their official capacity in the course of their employment with the defendant.
  - 3.4 The plaintiff laid an assault charge against the three officers which was prosecuted at the Sekgosese Magistrate's Court which resulted in all three being found not guilty and discharged.
  - 3.5 When the plaintiff was stopped for speeding by the traffic officers, he was issued with a speed violation ticket.
  - 3.6 The defendant admits vicarious liability for the unlawful acts and omissions of the Limpopo Traffic Police.
  - 3.7 The parties agreed that the matter proceeds for the determination of liability only and that the issue of quantum be postponed **sine die**

### The Issues

- [4] The issue for determination by this Court is whether or not the plaintiff was indeed assaulted by the Limpopo Traffic Police at the place and date alleged by the plaintiff.

### The Defence

- [5] The defendant denies that the plaintiff was assaulted by the traffic officers

and that whilst he was stopped and issued with a ticket for a traffic violation nothing further transpired between them.

### The Evidence

- [6] The plaintiff called four witnesses including himself. The other three were Anthony Scott and Ors Badenhorst and Strubel.
- [7] In his testimony the plaintiff gave his account as follows. On 24 November 2011 he was travelling in the N1 between Polokwane and Louis Trichardt when he was stopped by a traffic officer at about 16h10 near the town of Matoks. He was informed that he had been driving at 92 kilometres per hour in a 60 kilometre zone.
- [8] His response was that according to the computer in his Audi motor vehicle his speed at the time was 62 kilometres per hour. The traffic officer informed him that he was working with a radar machine and not the computer of a motor vehicle. The plaintiff requested the officer to proceed and issue him with a traffic ticket. The traffic officer hesitated and let him know that the problem could be solved if they came to an arrangement.
- [9] The plaintiff insisted that the traffic officer should proceed and issue the ticket as he was not a person who pays what is commonly referred to as "*Tshotsho*" meaning bribe money.
- [10] The traffic officer appeared to get cross and mumbled words in a language that the plaintiff could not understand to the other two traffic officers working with him.
- [11] The officer (first officer) then started to write the ticket whereafter he informed the plaintiff of the court date. At that time the two officers (second officer and third officer) stopped a bakkie vehicle with a GP registration apparently for a speeding violation . The bakkie was driven by an Indian male.
- [12] After a conversation between the driver of the bakkie and the second and third officers he observed the driver producing money in blue notes. The

plaintiff asked the driver why he was getting involved in corruption whereupon the first officer reprimanded him not to talk to the people next to the road.

[13] At that point the plaintiff decided to take photographs using his cell phone camera. He took photographs of the white bakkie driven by the Indian male and a photograph of the official traffic vehicle. He also photographed the first officer at about 16h19.

[14] When the plaintiff took the photograph of the first officer the latter became aware that the plaintiff was taking photographs. He then attacked the plaintiff by stabbing him on his right side with a pen he was holding in his hand. The first officer then jumped on his back and started strangling him. He was then joined by the other two officers in a free for all assault with fists, kicks and arm twisting. They were trying to get hold of the plaintiff's cell phone and at the same time verbally abusing the plaintiff.

[15] During the physical struggle the plaintiff fell to the ground and felt kicks on his back, buttocks, stomach and upper legs whilst covering his head to protect himself. At that stage he could not exactly see which officer kicked him and he was not even certain whether it was all of the three officers.

[16] He managed to get up after grabbing his phone whereafter the three officers again assaulted him by hitting him on the body with fists.

[17] During the assault the plaintiff noticed an unknown white male watching what was happening and he shouted for help while at the same time identifying himself.

[18] The plaintiff managed to break loose and escape to his vehicle. He drove off and the unknown male drove behind the plaintiff until they then stopped along the road away from the traffic officers. They exchanged personal details thereafter Scott, the man who had seen the assault, drove behind the plaintiff all the way to Zoutpansberg Private Hospital.

[19] The plaintiff had to go to the hospital as he was feeling dizzy with a sore neck and a swollen wrist

- [20] As part of the factual matrix presented by the plaintiff, he relies **inter alia** on the chronology and timing of the events that day. The plaintiff submits that the time frames make it improbable that the plaintiff sustained the injuries in any other manner, or any other place other than at N1 Matoks where the traffic officers were stationed.
- [21] The chronology of the events was as follows. The plaintiff was issued with a traffic fine at 16h10. He then proceeded to and was admitted at 17h00 where he was attended to by Dr Strubel, who also recorded the plaintiffs injuries.
- [22] The following morning he was attended to by Dr Badenhorst who also recorded the plaintiff's injuries.
- [23] The plaintiff also presented the evidence of Mr Anthony Scott (Scott) who testified that he saw the plaintiff being assaulted by traffic officers after being stopped by one of them. Upon enquiring about what was happening he was given back his licence and told to leave but he stayed to observe what was happening .
- [24] He testified that he witnessed the hitting, kicking and strangling of the plaintiff by the traffic police but later conceded his uncertainty about the kicking. He also stated that he was worried about the plaintiff who was outnumbered by the officers assaulting him.
- [25] He saw the plaintiff breaking loose and running to his vehicle and leaving. He drove behind the plaintiff and a few kilometres away from the assault scene, they both stopped and exchanged personal particulars. He confirmed that he would testify on the plaintiff's behalf in the event of a court case arising.
- [26] After their discussion he drove behind the plaintiff until he reached the hospital just to ensure that the plaintiff was safe.
- [27] The plaintiff also tendered the evidence of Drs Strubel and Badenhorst who both confirmed that the injuries observed during their examination of the plaintiff were consistent with a report he made to them to the effect that

he had been assaulted by three traffic officers.

- [28] Dr Strubel had seen the plaintiff on the evening of the assault whereas Dr Badenhorst had examined him the following morning. Strubel had prescribed strong pain medication as the plaintiff was in pain.
- [29] Dr Badenhorst completed the J88 form and recorded his clinical findings therein.
- [30] The defendant presented the evidence of the traffic officers Mashimbye and Maloka who were both part of the team that was on duty on 24 November 2011 on the N1 Matoks, Limpopo and who were present at the scene where the plaintiff alleges to have been assaulted.
- [31] Both Mashimbye and Maloka deny that the plaintiff was assaulted by them. The third officer, Molepo Mashita was not called as a witness as he has since passed away.
- [32] Mashimbye admitted that he was the person appearing in the photograph which was taken by the plaintiff and further stated that he did not know who had taken the photograph and when it was taken.
- [33] He confirmed that he did speak to the plaintiff whilst issuing a traffic ticket. In the photograph, Mashimbye is depicted holding a pen.
- [34] According to Mashimbye, Officer Mashita was operating the speed camera whilst he issued the plaintiff with a ticket and that after issuing the ticket he saw the plaintiff moving towards his vehicle.
- [35] Maloka testified that Mashita was manning the camera, whilst Mashimbye was writing a ticket for the plaintiff. He then heard him (Mashita) shout for Maloka to stop a white motor vehicle with a GP registration.
- [36] This vehicle belonged to an Indian gentleman and it has featured rather prominently in this case as the plaintiff was under the impression that the Indian man had paid a bribe to two of the traffic officers. This was however denied and Maloka testified that the Indian man was issued with a traffic ticket and left. Whilst there are conflicting versions regarding what

happened regarding the Indian driver. that incident does not further the versions of either party regarding the main issue of the alleged assault on the plaintiff. The issue of any possible or alleged corrupt act on the part of the traffic officers with the Indian male is a collateral issue which may be relevant to detail regarding the activities on the day in question.

### Assessment of the Evidence

[37] The approach to resolving factual disputes was definitively set out in the case of **Stellenbosch Farmer's Winery Group and Another v Martell & Cie and Others** (2002) ZASCA 98: 2003 (1) SA 11 SCA para 5 when Nienaber JA said:

*" The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised 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's 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 calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's 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."*

- [38] The plaintiff alleged that he was assaulted with fists and open hands and that he was choked and kicked several times. It is common cause that the plaintiff and the traffic officers did not know each other until he was stopped for speeding on 24 November 2011. There is no evidence or even a suggestion that he was in any way injured at the time he was stopped by a traffic officer.
- [39] The plaintiff testified that he was injured shortly after he met the officers and that he received medical attention with regard to these injuries not long after his encounter with the officers. A perusal of the traffic ticketing documents and the time he was examined by Dr Strubel indicates that all these events occurred within an hour of each other.
- [40] The plaintiff is supported by Scott and Ors Strubel and Badenhorst. Among these it was only Dr Badenhorst who had known the plaintiff prior to the incident as he had been his family doctor. The others therefore bring a measure of independence in that they had no prior association with the plaintiff.
- [41] The injuries suffered by the plaintiff were recorded by Dr Badenhorst on the J88 form as
- 1) A punctured wound on the R side of his body with surrounded contusion.
  - 2) Pain and swelling of the R wrist.
  - 3) Pain and spasm of the lumbar region of the back.
  - 4) Severe pain and tenderness of the R lower ribs (10 - 12 ribs).

He also recorded that the plaintiff was "*clearly emotional and in pain*".

- [42] Both doctors Strubel and Badenhorst were General Practitioners. Dr Strubel was attached to Zoutpansberg Private Hospital.
- [43] Counsel for the defendant sought to challenge their credibility regarding



their expertise. It is worth noting that none of the doctors presented themselves as specialists in any field of medicine and that they testified that in their capacities as General Practitioners. Though submissions were made to the contrary, I did not find them to have strayed into any specialist field in their testimony. I do not accept that a General Practitioner is not qualified to comment on an emotional state of his patient. In fact one of the subheadings that a medical officer is called upon to comment on the J88 form is the "*Mental health and emotional status*" of the person examined. There were no complex medico-legal issues to determine.

[44] The defendant's counsel even suggested that their evidence was biased in that they came from the same town as the plaintiff. In my view, not much turned on where the doctors practised from and I found them both to be both honest and professional in their testimony. Whilst there may have been some contradictions between the plaintiff and Badenhorst as to when and how the J88 form was completed. Badenhorst confirmed that he was the one who completed the form and also confirmed his signature and the correctness of the contents thereof.

[45] Anthony Scott was an important witness for the plaintiff in a number of respects. He was an independent witness in that he had not known the plaintiff prior to this incident. He testified how his mind became focused on what was happening when he observed the plaintiff being assaulted by the traffic officers and was told to leave when he tried to enquire what was happening.

[46] Scott gave his evidence in a chronological manner and did not deviate from his version even under intense cross-examination. His evidence provides an independent but vital link between what happened at the scene of the assault until the plaintiff arrived at Zoutpansberg Private Hospital. That link also serves to exclude the possibility that the plaintiff could have received the injuries elsewhere and then attributed same to the traffic officers.

[47] From Scott's testimony, I am satisfied that he had sufficient opportunity to

observe the event (the assault) and I am equally satisfied with regard to the quality, integrity and independence of his recall thereof.

[48] The plaintiff testified that he shouted at Scott when he noticed him standing by the roadside. Scott testified that he did not hear the plaintiff shouting at him. This minor gap in their testimony was significant to me in that it demonstrated an absence of collusion between the plaintiff and Scott and entrenched the corroboration in their narration of how the events unfolded.

[49] Whilst there were some internal and external contradictions in the versions presented by both the plaintiff and the defendant I do not find it necessary to put much weight on them in determining the main issue in this case. What is of importance is that the versions presented on behalf of the plaintiff and the defendant are irreconcilable and mutually destructive.

[50] The question to respond to therefore is whether the plaintiff discharged the onus that rests upon him to prove his case on a balance of probabilities.

[51] It is true that the plaintiff did not know the identities of the three traffic officers and that he had to resort to referring to them using numbers. The defendant's counsel addressed the Court at some length as to how the plaintiff referred to officer number 1 as the person who assaulted him first whereas according to the defendant's version of events it would have been officer number 3 (Mashita) who was the first to assault the plaintiff if he was assaulted at all. The defendants submit that this apparent contradiction or uncertainty on the part of the plaintiff ought to be accepted as being fatal to the plaintiff's case.

[52] What saves the plaintiff's case in this regard is the photograph that was taken by the plaintiff of officer Mashimbye on the day in question. Mashimbye admits his identity and even confirms that at the time the photograph was taken he was holding the camera. His presence and his identity is therefore beyond any doubt.

[53] The only issue left to be determined is the assault. In my view, the plaintiff

does not have to prove an assault by all the officers in light of the common cause facts. If he proves an assault by one or more of the traffic officers, he has discharged the onus upon him.

[54] The defendant's defence is a bare denial that the assault took place. This has to be juxtaposed against the testimony of three independent witnesses who corroborate the plaintiff's version . Even if Badenhorst is excluded as an independent witness, he had absolutely no reason to testify falsely against the defendant and I accept his evidence as true.

[55] In my view, what is presented by the medical evidence constitutes objective evidence which tilts the scale in favour of the plaintiff's version being much more probable than the version presented by the defendant.

[56] All the points which the defendant has sought to attack in the plaintiffs version are fully explained. By way of example, the plaintiff explained that the **causus belli** was his use of his cell phone to take pictures of the officers and their demand for his cell phone which led to the physical scuffle and assault.

[57] The defendant also questioned why the plaintiff failed to report the assault to the nearest police station. The plaintiff explained that he prioritised receiving medical attention first and reporting the matter to the police next. The defendant also sought to challenge the dates on which the various statements and reports were made. I find that whatever differences or contradictions there were in this regard , they were immaterial in light of the objective evidence I have referred to above.

[58] In the circumstances I find that the plaintiff has discharged the onus resting upon him to prove his case on a balance of probabilities and that the injuries suffered by the plaintiff are those reflected in the J88 form completed by Dr Badenhorst.

[59] In the result, I make the following order:

59.1 The defendant is to pay 100% of the plaintiff's proven or agreed damages. The issue of quantum is postponed **sine die**.

59.2 The defendant is ordered to pay all the plaintiffs costs of suit to date on the High Court scale up to date hereof. which costs include (but not limited to):

59.2.1 Costs of subpoena'd individuals, including reasonable travel and accommodation costs;

59.2.2 The costs of the preparation of 6 trial bundles as per the Directive issued by DJP W van der Merwe as agreed upon in the Pre-Trial Minutes;

59.2.3 The reasonable costs of instructing a correspondent attorney, which includes travelling costs, attendance to court, costs for preparing for Pre-Trial Conferences and formulation of Pre-Trial Minutes and costs for actual attendances to Pre-Trial Conferences;

59.2.4 The costs of instructing a correspondent attorney for preparation and attendance to trial:

59.2.5 Costs for attendance and preparation for inspection in loco by instructing and correspondent attorney as well as costs pertaining to consultation with the plaintiff;

59.2.6 Travel and accommodation costs for witnesses and the plaintiff to attend court;

59.2.7 Costs of counsel;

59.2.8 Expert costs of Dr Badenhorst, attendance fees; including reservation fees and

59.2.9 All costs which were previously reserved.

59.3 Should the defendant fail to pay the plaintiff's party and party costs as taxed or agreed within 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs, the defendant shall be liable to pay interest at the current rate per annum, such costs as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final

payment thereof.

- 59.4 The defendant shall pay the agreed or taxed party and party costs, within the period of 14 (fourteen) days from date of taxation along with interest incurred, into the trust account of Messers Gildenhuis Malatji Inc, ABSA Bank, Brooklyn Branch, Account number [...], Branch Code 335345 under Reference: G ERASMUS/MvZ/01688863.

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**S. A. M. BAQWA**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

Heard on: 16, 17, 18 & 20 October 2017

Delivered on: 08 December 2017

For the Plaintiff: Advocate M. Fourie

Instructed by: Gildenhuis Malatji Incorporated

For the Defendant: Advocate S. Mphahlele

Instructed by: State Attorney, Pretoria