

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 31781/2013

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE: 15/01/2021

In the matter between:

MAKOLA AMOS SEALANE

PLAINTIFF

AND

MINISTER OF POLICE

FIRST DEFENDANT

LIEUTENANT COLONEL SOMA

SECOND DEFENDANT

AND

CASE NO: 66025 /2015

In the matter between:

MAKOLA AMOS SEALANE

PLAINTIFF

AND

THE NATIONAL DIRECTOR

OF PUBLIC PROSECUTIONS,

FIRST DEFENDANT

THE NATIONAL PROSECUTING AUTHORITY

THE MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT,
THE DIRETOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT

SECOND DEFENDANT

JUDGMENT

MAVUNDLA . J.

AD UNLAWFUL ASSAULT AGAINST MINISTER OF POLICE: CASE NUMBER 31781/2013

- [1] The plaintiff, an adult male born on 29-11-1979 issued summons against the defendants under case number 31781 / 2013 on 21 May 2013, claiming damages in the amount of R7 000 000 (seven million rand) for unlawful arrest, assault, and unlawful detention.
- [2] Sometime later after discovery of the police docket, the plaintiff instituted action against the National Director of Public Prosecutions (NPA), the Minister of Justice and Constitutional Development under case number 66025 /2015, claiming damages in the amount of R7 000 000 (seven million rand) for unlawful detention on the grounds that the NPA knowingly opposed bail with no reasonable grounds. The action against

the Minister of Justice and Constitutional Development has since been withdrawn.

[3] At the inception of the trial on 29 May 2018 the above-mentioned matters were consolidated, and the issues of merits and quantum were separated in terms of rule 33 (4) and the quantum issues were postponed *sine die* and the matter proceeded on the merits. The evidence in respect of both claims was heard as one. For purposes of convenience, separate judgments are prepared in respect of each matter.

[4] On the aforesaid first day of the trial, the plaintiff abandoned the claim for unlawful arrest and detention against the Police, leaving the only issue for determination against the Police being the alleged assault. The arrest and detention of the plaintiff prior to his first appearance in court was in terms of a warrant of arrest . In respect of the claim against the NPA the issues remained the same as indicated in paragraph 3 above.

[5] In respect of the assault and unlawful detention, the plaintiff in his particulars of claim pleaded as follows:

“6.1 After the unlawful arrest the plaintiff was taken to his home in Sterkfontein and a search of the dwelling and the premises was conducted without a search warrant.

6.2 Nothing was found.

6.3 Thereafter the Plaintiff was taken to his mother’s house in Tafelkop and again a search was conducted without any search warrant.

Once again nothing was found.

6.4 The plaintiff was taken to Mahwelereng police station and instructed to lie on the floor for approximately 2 hours whereafter an

interrogation started.

6.5 During the interrogation the Plaintiff was assaulted by means of torture by members of the 1st Defendant. The torture/ assault consisted *inter alia* of:

- (i) Electric shocks.
- (ii) Plastic bag pepper sprayed inside was held over his head.
- (III) Vicious pulling of his penis.
- (iv) Slaps in his face and kicks to his body .

6.6 The plaintiff was refused any medical attention for a period of one month.

6.7 The plaintiff was released on bail on 14 September 2011 and all charges were withdrawn on 21 August 2012 .”

[6] The following is common cause:

6.1 The identity of the plaintiff

6.2 The identity of the defendants.

6.3 That the members of police (SAPS) and the Public Prosecutions acted within the cause and scope of their employment and duties to Defendants namely Minister of Police and the NPA.

6.4 That the plaintiff was arrested by members of the SAPS at Glen Cowie on 21 July 2011 at around 14:00.

6.5 Searches were conducted at the house of the Plaintiff at Sterkfontein as well as the house of his mother at Tafelkop. Nothing incriminating was found.

- 6.6 The Plaintiff was subsequently taken to Motetema police station and thereafter to Mahwelereng police station
- 6.7 The police left with the plaintiff at about 18:45 and the distance to Mahwelereng is about 150km.
- 6.8 The Plaintiff was booked into the cells at Mahwelereng at 23:14 according to the cell register (*vide* Exhibit “ F”).
- 6.9 The plaintiff made a first appearance in court on 25 July 2011.
- 6.10 The Plaintiff’s case was remanded several times with the Plaintiff in custody up to 14 September 2011 when he was granted bail.
- 6.11 Bail for the plaintiff was opposed by the NPA.
- 6.12 The case was withdrawn against the Plaintiff on 21 September 2012.

AD ASSAULT MATTER: AGAINST THE POLICE: CASE NUMBER 31781/2013

- [7] In respect of the matter against the police, the issue to be determined is whether the plaintiff was indeed assaulted, as he alleged, which was denied by the defendant . I therefore do not intend to traverse the entire evidence of the Makola but confine myself to the relevant issue pertaining the alleged assault.
- [8] The arrest of the Makola is a sequel to the killing of Lieutenant Colonel Makubane (hereinafter referred to as the deceased) on the 16 July 2011 between 00:00 and 01:30, whose lifeless body was found next to a state vehicle with registration number [5..] he was driving along the road. He

had multiple injuries and gunshot wound on the head. next to the police vehicle. There were empty cartridges and live ammunition of 9mm and 7,65 mm calibre lying on the scene of crime. The state vehicle was parked on the left side of the road with hazards on, the keys were found lying in the middle of the road. The jack was placed under the right front wheel of the vehicle together with the wheel spanner next to it. The deceased was discovered by Emergency Service officials from Matlala Hospital. According to the Emergency Services officials, the victim's service pistol was on the ground next to his body. One chief Mashegoane arrived at the scene of crime and was requested by the Emergency Medical Service officials to guard the scene while going to report the matter to the police. When they returned to the scene with the police, the chief and the firearm were not there. However, the firearm has since been recovered.

- [9] The fingerprints of the plaintiff (hereinafter referred to as Makola) were subsequently uplifted from the deceased's vehicle on 17 July 2011 and confirmed as such on 17 July 2011 by WO LC LA Grange (*vide* Annexure "P" of Notice in terms of Rule 35(3) of case number 31781/2013. Makola was subsequently arrested on 21 July 2011 for the alleged murder of the deceased.

PLAINTIFF'S CASE

- [10] The plaintiff testified, *inter alia*, that in 2011, he worked in office administration and crime prevention at the Groblersdal Cluster

Commander's Office. He had been a Police Reservist Constable since 2008. At about 11h 00 on 21 July 2011, Makola received a call from Soma inquiring about his whereabouts. Makola informed Soma that he was at Glen Cowie at the memorial service of Makobane. Soma asked him to stay at the memorial. At about 14h30 on 21 July 2011, Soma arrived with other police officials in approximately 17 to 18 unmarked police vehicles. Soma presented a warrant of arrest to Makola. He was being arrested for the murder of Makobane. Makola was driven away in a Toyota Fortuner by Lieutenant Makweya to his (Makola's) place of residence in Sterfontein. The police searched the house and did not find any evidence. After searching his residence in Sterfontein, police officials proceeded to Makola's mother's residence in Tafelkop. The police searched Makola's mother's residence in her presence but without her consent and found nothing.

- [11] According to Makola, he was taken to Motetema police station but remained in the police vehicle. He was taken from Motetema between 17h00 and 18h00 in Lieutenant Makweya's Toyota Fortuner vehicle. He estimates that they arrived at Mahwelereng between 19h00 and 20h00. He was in the back of the Fortuner and it was already dark, as such he cannot say how many vehicles were travelling behind the vehicle, he was in. When they arrived at Mahwelereng, he was put into an office, whereafter approximately 16 to 17 police officers entered the office. He was ordered to lie face down, on the ground while he was handcuffed. The police officers began "randomly" asking him questions. Lieutenant Makweya was sitting in the room at a desk writing down his response as

they interrogated him. At around 21h30 to 22h00, the police officers including Makweya and a woman Lieutenant colonel left the room, leaving only three or four male police officers. The remaining officers switched off the lights in the office and began assaulting him by hitting him with their hands and kicking him. The police officers proceeded to put over his head a plastic bag pepper sprayed inside. His genitals were electrocuted and pulled. The assault continued until about 22h05. He knows this because after the assault, the police read him his rights and detained him. He was not given an opportunity to tell the police about his attorney. The accompanying right document (SAPS14) records him as being in the Community Service Centre "CSC") at 22h15. According to Makola he also suffered injuries to his wrists because of the way he was handcuffed when he was arrested. On 22 July 2011, he asked the police to take him to the hospital because his whole body was in pain and full of blood. At the time of his arrest, he had an abscess on his chest and taking tablets which, he had with him, but lost during the assault. On Sunday 24 July, he was charged by Warrant Officer Langa ("Langa"). While in the cells at Mahwelereng, the other suspects that were in the cells with him assaulted him. His family did not know where he was, until he was taken to court at Nebo on 25 July 2011. At court on 25 July 2011 he was represented by Adv Mabaso. When the latter came to see him at the cells on 25th, he asked him why he was full of blood and swollen. He informed Mabaso that he was assaulted by the police. (It needs noting that according to Exhibit A pages 173 to 267 which was read into the record, Mabaso explained to the magistrate that Makola was beaten by

the police. Vide transcript 31781/2013 2018-05-29 page 28 lines 3-6).

[12] Makola further testified that he was detained at Nebo Police station on 25 July 2011. He was since then detained in three different police stations, including Paxton in Witbank. He said that the cells at both Mahwelereng and Nebo were not clean, had flies and the blankets had bed bugs. Sometimes there would be no water, which would be brought in litre bottles. The police took some of his clothes saying that they were going to conduct forensic examination on these. In the Merits Trial Bundle C to be found at page 1-6 to 181 at the last page there are three photographs which were handed in as exhibit B, showing handcuff marks on his wrist, which Makola said were caused by the cuffs. These marks he said were also on his ankles caused by the chains placed on his legs.

[13] Makola was extensively cross examined. He estimated that the trip from Motetema to Mahwelereng took about three hours, and they arrived at Mahwelereng police station at about 22:13. This was an estimate because he did not have a watch with him. He further said that this time was also recorded in the cell register as well as the notice of his rights document. He disputed that he arrived at Mahwelereng at 22:30. He was shown exhibit F which reflected the time of his detention to be 23:14. Makola said that he did not agree with that recorded time. Makola further said that on their arrival at Mahwelereng he was placed in a certain office where there was plus or minus 17 to 18 police officers who started asking him questions. He said some of the police officers were from Mahwelereng, including Colonel Somo, W/O Ramos and sergeant Malatji.

[14] Makola further said under cross examination that he had visible injuries, which were all over his body. When he appeared at court in Nebo on 25th his advocate observed that his body was swollen, and he informed him that he was tortured. He said that on the day of the torture on the 21st he was bleeding. His body was bleeding and swollen . He bled through his mouth and nose. He was wearing a jacket and a white shirt as well as a white t-shirt underneath. There was blood on the t-shirt. When he was being taken to CSC, along the way there was a tap from which he washed his face. His hands had been uncuffed. Asked whether the t-shirt had blood, he said that he could not remember. When asked why he had taken off his shirt, he said that it was because he was feeling hot and the shirt was blood stained. He further said that his hands were swollen, his wrists had sustained injuries because of the handcuffs. One could see the underlying flesh because of the handcuffs. It was pointed out to him that in his evidence in chief he did not tell the court that after the torture he had to pour water on his face as he was being taken to the CSC offices. When asked whether he showed anyone at the CSC his injuries, in particular the person who detained him, Makola said that the very person who detained him is the very person who was present when he was tortured, and it was W/ O Langa and there was no need to show him his injuries. It was pointed out to him that on the previous occasion he had said that he did not see the people who tortured him because the lights were off, and he did not know their identity. He said that he could see one of them because after the torture the lights were switched on and he was therefore able to see one of them. Langa is the one who took him to

the cells. The people who tortured him were four. When the lights were switched on, he stood up and was able to see and identify W/O Legale. Langa was in their company when they were going to CSC. It was pointed out to him that previously he did not mention Langa, he responded by saying that when he was being tortured the lights had been switched off. It was pointed out further to him that he did not mention Legale in his evidence in chief. He further said that at the time he was being tortured he did not know who the people torturing him were. He further said that at the time of torture there were some of those who he knew and others he did not know. He further said that he was able to see and identify Legale when they were leaving the office, Langa was in their company as they were going to the Community Service Centre.

[15] Makola further said that during the torture he could not see the people who tortured him because he was lying on his tummy and the lights had been switched off. He identified one after they were done in assaulting him, when the lights were switched on as the door was opened. He further said that he did not tell the person who detained him in the cells, about the injuries he sustained, because he did not see any reason to do so, because that person was one of those who tortured him. He further said that the torture started round about 20:00 until 22:00 when they left the office where he was tortured. He also said that the times he mentioned were estimations on his part. He further said that he is not certain about the times but relies on the time of 22:15 which was recorded by the officers; besides, he was not himself at the time.

[16] Makola further said that when he was arrested at the memorial service,

he told the people who arrested him that he had a medical condition and had left his medication at home. He conceded that he did not tell the person who admitted him to the cells about his medical condition as well as about his injuries. He further said that he did inform Makwela who was driving a Fortuner. Makola said that he did not inform the person who detained him of his injuries and his medical condition, because he did not ask him. He further said that he did not consider it important to inform the person who detained him to the cells about his injuries. The second reason was that his body was sore and painful at that stage of detention . He was also mentally exhausted and confused. And a further reason was because he had realised that there was nothing he could do, and he was not being taken seriously. He further said that he requested the commissioner who was visiting the cells that he wanted to be taken to see a doctor but was informed that there was no van. He said that he could not dispute that in the OB it was not recorded that he had complained of any injuries nor that he had injuries. He further said that he was also assaulted by fellow prisoners at the cells. He would not be able to distinguish the injuries caused by the police and those by the fellow prisoners.

[17] Makola insisted that Somo was one of the officers who questioned him at Mahwelereng on the 21st as well as on the 25th . He further said that he could not remember whether he showed the blood -stained t-shirt to any police officer.

[18] Although Makola called witnesses, their evidence is in my view not relevant to the assault issue, as such I will not chronicle it for the

purposes of the assault matter, but in the judgment under case number 66025/2015.

DEFENDANT'S CASE

[19] On behalf of the defendant Lieutenant Colonel Somo was called to the stand. Somo confirmed that he arrested Makola at a memorial service of the late Colonel Mokabane at Glen Cowie and took him to a few places which were searched but nothing incriminating was found. He denied that he was among those officers who took Makola to Mahwelereng . He confirmed that nothing was found at the places where Makola was taken to and searched. Somo said that he called together the members of the team at Motetema police station where a debriefing session took place. Makola at the time was inside a vehicle guarded by one of the police officials . Thereafter at about past 18h00 or 18:45 W/O Mas hit a, W/O Langa and Dekgali drove with Makola to Mahwelereng. He saw Makola again on the Sunday of 25 July at Mahwelereng to charge him. Somo denied having been at Mahwelereng on the 21 July. He denied that Makwela travelled to Mahwelereng on the 21 July. He said that the distance from Motetema to Mahwelereng is about 150 kilometres and estimated the travelling time to be three hours because of the poor state of the road. He estimated that the team would have arrived at Mahwelereng round about 22; 45. When shown the entry of 23:14 on the cell register he did not dispute this. The rest of his evidence on this aspect of time was in my view pure speculative and need not be

chronicled.

[20] Langa was also called to the stand on behalf of the defendant. He confirmed that he is a member of the SAPS. He confirmed that on 21 July 2011 he was present when Makola was arrested and taken to several places and eventually to Mahwelereng. He said that they left Motetema round about 18:50. He was with Mashita, Dikgale and Makola. They arrived at Mahwelereng at about 22:50. They parked their vehicle at the police station and proceeded to CSC where they found WO Mahowa who was busy with administrative duties. They informed him that they had brought Makola. He further said that the administrative books were handled by Makgongwa. He said that Makola was received at Mahwelereng without any injury. He denied that Makola was tortured before he left him there nor after he was booked at the cells. He denied that Makweya was with them at Mahwelereng.

[21] Under cross examination Langa confirmed that in exhibit G his name is reflected and that he booked out Makola from the cell without injury. The purpose of booking Makola out on 24 July 2011 was to have him charged. He took Makola to Somo. He denied that Makola was ever assaulted nor tortured at any stage in his presence. He said that there were lots of cars at the memorial service but denied that there were 17 to 18 blue lights flashing vehicles. He said some were there to attend the memorial service. He confirmed that the lady Lieutenant colonel Makweya was also present, as well as colonel Somo and were driving in the Toyota Fortuner. He recalls that he and others were driving in the

Focus. He reiterated that Dikgale, Mashita, Makola and himself were driving in the Ford Focus, while Somo and Makwela were driving in the Fortuner. He said that at Motetema Makola remained seated in the car while they went into the police station. He said that he could not recall that Makola was interrogated at the time. According to him they left for Mahwelereng and reached there at about 22h00 to 23h00, about 150 kilometres. He said that he was not present when Makola was being interviewed. He said at Mahwelereng his role was only to take Makola to the cells. He confirmed that in exhibit **H** (which is the SAPS 14) the time inscribed is 22:15 and said the person who wrote that time made a mistake because they arrived at Mahwelereng at 11 at night. The reason for the delay in travelling was due to road works, stop and go and animals along the road. He denied that there was any occasion where Makwela was seated at a desk while Makola was being interrogated at Mahwelereng. He confirmed that there were two statements taken by Somo, one from Makola and another from Faith. He confirmed that these two statements were given to him by one of his seniors, Koekemoer to file in the police docket . He further said that on their arrival at Mahwelereng they went to the CSC. He denied that Makwela was present at the time. He denied that there was any stage when the lights were switched off and Makola tortured or assaulted. He denied having asked Makola to explain why his fingerprints were on the spare wheel of the deceased's vehicle. He said that he was instructed to get a detailed statement from Makola regarding alleged threats made to the deceased but forgot to carry these instructions. He said that he does not recall anything about exhibit **J** and

exhibit I statements that were handed to him by Somo because it was quite a long time ago. He conceded that when Somo said that he gave these two statements to the investigating officer, he would have been referring to him. He further conceded that there is nowhere reflected in the docket that these two statements were filed. He further denied that Makola was arrested by lots of police. He denied that there were 17 to 18 vehicles when Makola was arrested. He denied that Makola was a passenger in the Fortuner with Makweya. He denied that Makweya was present at Mahwelereng seated at a desk taking a statement from Makola. He denied that Makola saw him and Dikgale when he was or after allegedly tortured.

[22] That completed the case for the defendant.

[23] It is trite law that in assault cases, particularly in civil matters, the victim as claimant bears the onus to prove his case. To discharge the onus resting on the claimant, he or she must do so on a balance of probability; vide *Prinsloo v Van Der Linde*¹; *Pillay v Krishna and Another*². In casu, the defendant denies the version of Makola. In other words, in casu there are two mutually destructive versions. The approach to be adopted by the court in such a situation is succinctly stated by the Supreme Court of Appeal in the matter of *Stellenbosch Farmers' Winery Group and Another v Martell ET Cie and Others*³ as follows:

“[5]...The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To

¹ 1997 (3) SA 1012 (CC) at 1028.

² 1946 AD 946.

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 extra curial 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' 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."

[24] I must hasten to state that Mr Makola was not an impressive witness at all. He was argumentative, long winded, sometimes avoiding answering straight forward questions. The court had on several occasions cautioned

him, as the record reveals. He contradicted himself in many instances. In his evidence in chief Makola did not mention Legale as being one of the people who assaulted him. It was only during cross examination that he mentioned Legale's name. During cross examination he said that Langa was with them as they were walking to CSC. If he only saw Langa when they were walking to the CSC, there is no factual basis for him to conclude that Langa was inside the office during the alleged torture, nor that he participated therein.

[25] Makola is not a lay person, but a police reservist. He certainly must have known how crucial any piece of evidence is to prove that indeed he was tortured and had external injuries. According to him he bled through his nose and his t -shirt was blood stained. He decided to wash his face at the tap as they were on their way to CSC. When he was confronted why he decided to wash away such crucial evidence, he said that it is because he was feeling hot. I find his explanation unconvincing.

[26] Makola did not show the blood-stained t-shirt to the officer who admitted him to the cells. He further chose not to report to the said officer that he had visible injuries. His reason for not doing so is that he had concluded that the said officer was part of his tormentors and did not ask him. When the commissioner visited the cells, Makola did not report the alleged assault or any injury. The Occurrence Book and the cell register does not reflect any injury on the part of Makola. He failed to provide his own advocate with any name of the police who allegedly assaulted him, save to make a vague allegation that he was assaulted by the police. It needs noting that he had said some of the police officers who were in the office

where he was subsequently tortured, were unknown some he knew. One would have expected him to have placed on record through his advocate the names of those police he knew and believed to have assaulted him and even preferred criminal charges against them. This was not done. In my view, the probabilities are that the alleged assault and torture did not occur.

[27] Makola's evidence was that during his arrest he was requested to hand in everything he had with him. He did not have a watch, as such the times he mentioned were mere guess work and unreliable. On the contrary Somo and Langa, compared to Makola, were impressive witnesses who answered questions spontaneously . Their evidence regarding the departure of the police from Mtetema and arrival at Mahwelereng is reliable. Langa explained that the time 22:15 mentioned by Makola was an error, because they departed from Mtetema round about 18:50, and arrived at Mahwelereng at about 22:50. Makola was booked in the cells at 23:14. The trip took about 3 hours because of the stop and go road constructions . It was submitted on behalf of Makola that from the time of departure to when he was locked up, it took four hours, and that therefore, besides the 3 hours travelling time, there is an extra hour unaccounted for, and that the probabilities are that this was the period during which the torture took place, and the court must conclude that indeed the torture took place . I am not inclined to follow this logic, for the simple reason that the times mentioned are not precise. Besides, Makola was not an impressive witness to conclude that he was assaulted and tortured as he alleged . It needs mentioning that during his bail

application, dully represented by his counsel Mabaso, Makola said that he was being asked questions by about 15 to 16 policemen. At a later stage, they left the room, leaving him with one policeman who, he knows by sight, started to assault him, and trampled on him; vide Trial Bundle F (Merits) paginated page 681 lines 16-23, which is materially in contradiction with his testimony before this court.

[28] Consequently, I find that Makola has failed to discharge the *onus* he bore to persuade this court that he was assault ed. Accordingly, the assault claim stands to be dismissed with costs, such costs to include the costs of two counsel. The employment of two counsel was indeed justified.

[29] In the result the claim of assault is dismissed with costs, such costs to include the costs of two counsel.

N.M.MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 15 / 01 /2021

PLA INTI FF'S COUNSEL : A DV G. B BOTHA SC

WITH : ADV L D SCHOLTZ

INSTRUCTED BY :GP VEN TER, ATTO RNEYS INC.

DEFENDANTS' ADV : ADV MA RITZ SC

WITH : ADV MOKA DI KOA-CHAUKE SC

DEFENDANTS' ADV : ADV NOSHE SC

WITH : ADV MABUNDA

INSTRUCTED BY : STATE ATTORNEY PRETORIA