

Reportable/Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH**

Case No: 1379/10
Date Heard: 3/08/2012
Date Delivered: 16/08/12

In the matter between

LEONARD JOSEPH

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

REVELAS J

[1] The plaintiff instituted an action against the defendant for damages suffered as a result of an injury he had sustained when a policeman allegedly assaulted him. According to the plaintiff, a policeman travelling in a vehicle caused the vehicle to collide into him on purpose while he was on foot, and subsequently, fired at him for no reason with his handgun. The bullet struck the plaintiff in the left buttock. The plaintiff claims for general damages and *contumelia* in the amount of R150 000.00, from the defendant.

[2] It is common cause that the incident in question occurred on Tuesday, 31 March 2009 at about 17h00 in Kyga, Greenbushes, Port Elizabeth. Although it is in dispute that the policeman in question, Constable Pule Paul Disenyane ("Disenyane") drove his vehicle into the

plaintiff on purpose, it is common cause that the plaintiff somehow found himself on top of the bonnet of Disenyane's red City Golf for an instant. Almost immediately thereafter, Disenyane alighted from the vehicle and chased the plaintiff and fired a shot with his gun. Disenyane thereafter took the plaintiff, accompanied by his mother, Mrs Rosie Avery, to the Provincial Hospital in his vehicle. There the plaintiff spent more than an hour, after which Disenyane fetched him and his mother and took them home again. Disenyane denies that the bullet discharged from his gun struck the plaintiff or that the plaintiff was injured.

[3] Even though there were facts which were either common cause or undisputed, the two versions pertaining to the events which preceded the plaintiff's visit to the hospital differ from each other in many, material respects.

The Plaintiff's Version

[4] The plaintiff testified that on the afternoon in question he visited his cousin, Shane May ("May") at the latter's parental home. The plaintiff's mother lives in the neighbouring house. After a few drinks (the two of them shared three quarts of beer), the plaintiff decided to return to his home which is also in Kyga, but some distance away. He did not live with his mother. May accompanied him to the gate where they parted ways. As he was walking down the road, the red City Golf driven by Disenyane drove up from behind and bumped him, causing to fall on its bonnet and bounce off again.

[5] Because the driver was known to him as "Paul" (Disenyane) who regularly visited the area, and he noticed that he had a fire-arm, he rose to his feet and ran away from him. Then he heard a shot, fell down and noticed that he was struck by a bullet in the left buttock. Shortly thereafter his mother arrived. Disenyane offered to take the plaintiff to

hospital, which offer he vehemently resisted. He only relented after the intervention of his mother, who insisted that accepting the offer would expedite their arrival at the hospital. May corroborated the plaintiff's version of events until the plaintiff gave chase. He witnessed the collision with the red golf but after the plaintiff had allegedly been shot, he had gone into his house and remained there.

[6] The plaintiff's mother was called from her house and found the plaintiff in an injured state on the ground. She corroborated the plaintiff's version that he initially resisted being taken to hospital by the policeman, but eventually gave in to her pleas to get into the car. In the vehicle, she said, the plaintiff was in a distressed state and his behaviour in the vehicle was somewhat unruly. She said he "het so aangegaan" that she could hardly talk to him.

[7] The plaintiff and his mother both testified that the plaintiff had repeatedly asked Disenyane inside the vehicle on their way to hospital why he had shot him. The latter allegedly said (more than once) that he did know why he did it. He however offered to pay them R2000.00 for any medical expenses. The plaintiff said he did not want the money. Later the plaintiff's family instructed an attorney who advised them that the plaintiff would be able to claim for more. That particular attorney did not pursue the matter and the plaintiff then instructed his present attorney.

[8] A criminal charge (attempted murder) was levelled against Disenyane four months after the incident. The plaintiff and his mother denied that any attempts by them to blackmail the policeman or that they laid the charges because he did not want to pay them.

The Defendant's Version

[9] According to Disenyana, he was driving less than ten kilometres per

hour at the time, keeping his eye on two male suspects in overalls who were walking in the street into which the plaintiff had just entered. These men were suspected of illegally selling fire-arms and he found himself at that particular place, in response to a tip received from an informant. While he was driving in the road the plaintiff suddenly appeared and moved onto the fender of his vehicle hoisting himself up onto it. The plaintiff then smiled, slid over and down the bonnet, and immediately started to run in the direction of the two suspects announcing his presence by shouting: "Police!"

[10] In Disenyane's view the plaintiff and the two suspects were in cahoots and that the plaintiff, who knew him from before, jumped on his bonnet to distract his attention from the suspects and to warn them, thereby facilitating their escape. Disenyane then alighted from the vehicle, placing his hand on his gun which was in a holster on his hip and the plaintiff gave chase, and he followed him. Why he chased the plaintiff, and not the suspects is unclear. At this point the plaintiff was running in front of him to his left, on the gravel verge. Disenyane ran on the tar surface of the road. The two suspects moved in the same direction, but on the right (opposite) side of the road, some distance - about seventeen meters which increased to forty meters - ahead. Just before they covered most of the aforesaid distance, one of the suspects turned around and pointed a fire-arm at him. In self-defence, Disenyane said, he fired a shot at this suspect. The two suspects then took flight and managed to escape amongst some dwellings in a nearby squatter camp. He denied that this bullet discharged from his fire-arm could have hit the plaintiff.

[11] Disenyane knew this to be the case because afterwards he looked at the plaintiff's left buttock and saw no bullet hole in the plaintiff's light blue jeans, and neither were there any bloodstains on them. When the plaintiff travelled on the backseat of his vehicle to the Provincial Hospital,

no blood leaked onto his seats either. Disenyane testified that what he did however see on the plaintiff's left buttock was an old scar.

[12] Disenyane testified that soon after he had left Mrs Avery's home, that he started receiving calls, (several of them), from people claiming to be representing the plaintiff and demanding money from him. At first the plaintiff wanted R20 00.00 he said then the following day, a man purporting to be the plaintiff's attorney, threatened to lay criminal charges against him if he did not pay R20 00.00. According to him, other callers also attempted to blackmail him in that fashion. This was denied by the plaintiff and his mother. Eventually he could only recall two calls made to him, other than that of the plaintiff.

[13] Another aspect in dispute was Disenyane's insistence that the plaintiff's mother had berated her son in the vehicle about his conduct. She allegedly told him that the incident was a sign of God, that he was lucky to be alive. She begged him to leave drugs and bad friends and turn to God. Collectively, the words resemble a little sermon of sorts which Disenyane also quoted *verbatim* in his warning statement. Ms Avery allegedly also included in her words to her son, her opinion of what a good man Paul (Disenyane) was, and not only once.

[14] As far as Disenyane was concerned, the plaintiff concocted his version and the plaintiff's mendacity was motivated solely by avarice. It was precisely "this type of conduct" according to Disenyane, which undermined the morale of policemen and prevented them from diligently carrying out their duties.

Medical Records

[15] No witnesses were called to testify about the plaintiff's injuries. The medical practitioner who was on duty in the casualty ward when the

plaintiff was admitted, specifically recorded that a bullet wound was indicated and the plaintiff's undergarments and jeans were bloodstained. He noted an entry wound and exit wound on the plaintiff's left buttock, causing a haematoma. Dry dressings of packed gauze were applied to the wounds. Painkillers (Brufen tablets) were prescribed for pain.

[16] Disenyane also disputed that the plaintiff had to be admitted to hospital in a wheelchair. This is contradicted by the medical records in which it was recorded that he was admitted to hospital in a wheelchair. The medical diagnosis on arrival at the hospital was noted as "Gunshot: left buttock" and "Entry and exit wound noted with bleeding".

Discussion

[17] Apart from being destructive of Disenyane's denial that the plaintiff was injured, the medical records are also significant for another reason. They show that the plaintiff had spent more than two hours (from 18h30 to 20h35) at the hospital on the evening in question. Disenyane's testified that only fifteen minutes after he had dropped off the plaintiff and his mother at the hospital, Mrs Avery phoned him to fetch them. Clearly this was proffered untruth to support his version that the plaintiff never sustained any injuries. Disenyane's persistence with this version that the plaintiff was never wounded and had lied about his injuries, is astonishing, given the irrefutable evidence to the contrary.

[18] The plaintiff and his witnesses were Afrikaans speaking and their evidence had to be translated into English for the benefit of counsel for the defendant. When asked to repeat what was allegedly said by Ms Avery to her son in the vehicle, in Afrikaans, Disenyane was unable to answer. Then, after a pause, he said that they spoke "fluent English" to each other in the car on their way back. Disenyane's rendition of Ms Avery's words, seemed rehearsed and contrived particularly since it is

unlikely that the plaintiff's mother would have spoken English to him. Also, Disenyane's ability to remember every word used after four months, which is when he made his statement to the police, seems rather improbable.

[19] It is not possible to make an accurate finding in this judgment about the circumstances under which the plaintiff landed on the bonnet of the policeman's car. The plaintiff submitted that the evidence about the two suspects on the other side of the road was a fabrication designed to dissemble and escape liability in this matter. That may very well be. Disenyane's statement to the police differed from his testimony in court, in that he said in his statement that he was monitoring three suspects, of which the plaintiff was one. In court he placed the plaintiff walking alone on the opposite side of the road. His explanation for this discrepancy was far from satisfactory. Given the blatant lies he told to trivialize the plaintiff's injuries and exculpate himself, it is very tempting to reject his version about the two suspects entirely.

[20] On the other hand, one cannot accept that Disenyane, for no reason whatsoever, and on purpose, knocked the plaintiff over with his car. Perhaps it was an accident, perhaps the plaintiff did jump onto his vehicle to help the suspects. When Disenyane testified about how he had followed the plaintiff and the bullet was fired, he explicitly refused to concede that the one suspect never fired a shot from the gun allegedly pointed at him. I therefore had to consider whether or not a bullet discharged by the suspect did not perhaps hit the plaintiff. Such a scenario is hardly possible, since the so-called suspects were far ahead of the plaintiff (on Disenyane's version) and such a bullet, if fired by one of them, would have struck the plaintiff on the front of his person, not his buttock.

[21] There was only one shot fired, and that was by Disenyane who was behind the plaintiff. He was ideally placed to have shot the plaintiff in his

left buttock. He said the suspects were to his right. Therefore, he could not have aimed at them when he fired the shot, because the bullet hit the plaintiff who was to his left. The entry wound, slightly lower, to the right of the exit wound supports that assertion. Because Disenyane denied that the plaintiff was wounded at all, or that he had shot the plaintiff, the defendant is unable to prove in what circumstances the shot was fired.

[22] Counsel for the defendant argued that since *dolus eventualis* as pleaded in plaintiff's particulars of claim was not proved, and negligence was never pleaded in the alternative, the defendant was not liable. I disagree. On the evidence available, the plaintiff was shot for no reason by a member of the police services, admittedly acting in the scope and course of his duties. On Disenyane's version of events, he must have shot the plaintiff in anger for warning the suspects of his presence in the neighbourhood.

[23] Even if the plaintiff had done something which offended Disenyane, or breached the law in some way, Disenyane was not entitled to shoot the plaintiff solely to prevent his escape, or because he was annoyed with him. Since he was such an untruthful witness about what really happened, there is no explanation for the shot. The fact remains, that on the plaintiff's version, the shot was unjustified and therefore the plaintiff is entitled to his damages.

Quantum

[24] An appropriate award for general damages and *contumelia* is the next matter for determination. In my view, the plaintiff and his mother embellished their evidence as to the seriousness of his injury and the period (eight months) during which he was incapacitated. The plaintiff sustained a soft tissue injury which required no stitches or further surgery. At the hospital his wound was cleaned and dressed and he was

discharged. He was not even given any crutches. I accept that he must have had some discomfort for a while and that the wound would have caused him intermittent pangs or stabbing sensations. He fully recovered and suffered no loss of amenities for any significant period. He is sometimes made aware of the wound by some sensations in it, but these do not amount to discomfort. In the circumstances of this case, an award of R150 000.00 for damages strikes me as extravagant.

[25] In the matter of *April v The Minister of Safety and Security* [2008] JOL 21681 (E) the plaintiff was on his way to work when he struck by two bullets fired by the police. One struck him in the front of the right thigh just above the knee, and the other in the left lower back. The first bullet had fragmented with a large portion thereof embedded the head of the fibula, which had to be surgically removed. The second bullet caused an entrance wound through the gluteus muscle of the left buttocks which caused a compound fracture of the left ileum, before it exited in the left anterior inguinal area, also requiring surgery. The plaintiff was treated for pain with pethidine (a very strong drug) and after three days he was discharged from hospital on crutches. Three months later he still walked with a limp. The medical doctor who testified at the trial was of the opinion that the injuries that would have caused the plaintiff pain of moderate severity for seven to ten days. A clinical psychologist also testified about severe psychological complications. In addition the court found a high degree of *contumelia* which justified a substantial award. He was awarded R110 000.00 (R136 000.00 in present day terms) for general damages.

[26] In the matter under consideration no medical or expert evidence was presented as to the nature of the plaintiff's injuries. They are however far less serious than those suffered in *April's* case. I will accept that the plaintiff suffered a moderate degree of pain and discomfort for, at best, for four weeks. He testified that his wound required changes of

dressings for a month. I will also take into account the seriousness of the assault and that it involved some measure of *contumelia*, in respect of which there is a tendency of the courts to award higher amounts than was previously the case. Having regard to some other cases I was referred to, where plaintiffs suffered similar injuries but were awarded far less than claimed in this matter, for more serious injuries, I have concluded that R70 000.00 is a reasonable award in the circumstances.

[27] Consequently, the following order is made:

1. The defendant is to pay damages to the plaintiff in the amount of R70 000.00, with interest thereon at the prescribed rate from a date fourteen days from the date of judgment to date of payment, together with costs on the scale as between party and party and interest thereon at the present rate from a date fourteen days from the date of the taxing Master's allocated to the date of payment.

E REVELAS
Judge of the High Court

Counsel for the Plaintiff

:

Adv S Potgieter
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Instructed by	:	Carol Geswindt Attorneys Port Elizabeth
Counsel for the Defendant	:	Adv D Smith Port Elizabeth
Instructed by	:	State Attorneys Port Elizabeth
Dates Heard	:	1-3 August 2012
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