

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 1100/2014

In the matter between:

MINISTER OF POLICE

Applicant

And

JEANETTE JACK

Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

BESHE J:

[1] This is an application for leave to appeal against my judgment in which I found in favour of the plaintiff. I found that the plaintiff had succeeded in showing that the defendant was liable for the damages she suffered to her right eye.

[2] The parties will be referred to as per their appellation were during the trial.

[3] At the stage when the trial got underway, the parties had narrowed the issues to allegations that are contained in paragraphs 4 and 5 of the plaintiff's particulars of claim. Those allegations being the following:

"4. On or about 15 August 2012, and on, at or near Bantom Road, Kwanobuhle, Uitenhage, a member of the South African Police Services ("SAPS"), whose further particulars are unknown to the Plaintiff, wrongfully and unlawfully, and intentionally, shot the Plaintiff with a rubber bullet / projectile which struck her above the right eye, alternatively, unlawfully and negligently, discharged a firearm, discharging rubber bullets / projectiles, in the direction of the Plaintiff, and in so doing the Plaintiff was shot above her right eye, as aforesaid.

5. In respect of the alternative claim, the said member of the SAPS acted negligently and unlawfully in that when he discharged his firearm he knew, alternatively, should have known:

5.1. of the presence of the Plaintiff;

5.2. that the Plaintiff could be struck by the rubber bullet / projectile so discharged from the said firearm, by the aforesaid member of the SAPS, if he discharged the same in the direction of the Plaintiff;

5.3 that the Plaintiff would be injured if struck by the said rubber bullet / projectile.”

[4] Plaintiff’s claim for damages was for a sum of R450 000.00. A day preceding the commencement of the trial, defendant admitted / conceded the quantum of damages to be the sum of R204 968.00.

[5] Neither of the parties’ ophthalmic experts could determine, having assessed the plaintiff’s injury to the eye, what caused the injury. Both experts were of the view that the injury could have been caused either by a discharge of a rubber bullet or by a stone.

[6] After hearing testimony from six (6) witnesses, five (5) in support of plaintiff’s case and one (1) in support of defendant’s case, I found in favour of the plaintiff.

[7] **Warrant Officer Felix** who testified in support of the defendant’s case denied that at the stage plaintiff suggests she was injured the police at the scene had protective gear, carried rifles or that there were armoured vehicles at the scene and according to him no rubber bullets were fired at that stage.

[8] All five (5) witnesses who testified on behalf of plaintiff's case testified that there were armoured motor vehicles at the scene at the relevant stage, that the police were wearing protective gear and were armed with rifles. Two of the witnesses were not even aware that plaintiff allegedly got shot or was injured at that stage. (**Mr and Mrs Matai**). They did not even know the plaintiff and her son **Bongani**. So did witness **Mr Tose**.

[9] The appeal is premised on *inter alia* the grounds that:

Material contradictions were abound in the account given by the witnesses who testified in support of the plaintiff's case and that on that basis I should have granted absolution from the instance at the close of plaintiff's case.

[10] As I indicated earlier in this judgment, the issues were narrowed down to whether plaintiff's injury was caused by a stone thrown by one of the protestors who were pelting police with stones or by a rubber bullet that was fired by the police in their bid to quell a violent protest or disperse the crowd.

[11] It was argued on behalf of the defendant that the following, *inter alia* were material contradictions which should have cast the plaintiff's version in doubt and should have rendered plaintiff's evidence not to be credible:

Plaintiff having initially stated that she stopped because teargas was affecting her chest and later saying because she anticipated it would affect her;

Whether her windows were rolled up as she suggested or open according to her son **Bongani**;

Whether she was struck as she was going around the car (**Bongani**) or alighted from motor vehicle already injured (**Mr Tose**);

Whether the group of protestors was toyi-toying or just listening to a person addressing them.

A lot was made about what the police *vis-à-vis* crowd were doing when plaintiff and her son were driving to one **Gomma-gomma's** house.

[12] A lot was also made about plaintiff having disavowed seeing the protestors hurling stones at the police. Yet according to one of the witnesses in support of plaintiff's case **Ms Matayi** the crowd threw stones at the police.

[13] I held the view, and still do, that the suggested contradictions, where there are such, are not material to the issue in dispute.

[14] I was satisfied and still am that witnesses in support of plaintiff's case corroborated each other as regards *inter alia* the police having been armed with rifles and wearing protective gear and firing shots. Defendant's sole witness denied this. Regarding the firing of shots, defendant's counter to this was that the witnesses must have mistaken the sound made by stun grenades for rubber bullets shots.

[15] There was no evidence placed before me by the defendant to show that plaintiff was negligent in any way to warrant a finding that there was contributory negligence on the part of the plaintiff.

[16] The appeal is also directed at my at my order directing the defendant should pay costs at a High Court scale even though I awarded her damages in the agreed amount of R204 968.56. It is trite that in awarding costs, the court has a discretion

that it has to exercise judicially upon a consideration of the facts of the case under consideration. My order in this regard was influenced amongst other things by the fact that the claim for damages was initially for a sum of R550 440.00. It was only during pre-trial conference held on the 19 and 21 May 2015, the last date being the date on which the trial commenced, that defendant admitted the quantum of plaintiff's claim for general damages as a result of the incident in question to be R150 00.00. Surely it could not have been expected of plaintiff to halt the process and apply for a transfer of the matter to the Magistrates' Court at that late stage.

[17] In my view, plaintiff was justified in instituting the action in the High Court given that there was uncertainty regarding the prognosis of her injury to right eye which required surgery.

[18] I am therefore not persuaded that the appeal has a reasonable prospect of success.

[19] Accordingly, the application for leave to appeal is dismissed with costs.

NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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