

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1967/2018

Date Delivered: 25 May 2021

In the matter between:

DEON JONATHAN WILLIAMS

Plaintiff

and

SEAN BLUNDEN

Defendant

JUDGMENT

RAWJEE AJ:

[1] This is a delictual claim for damages for the alleged unlawful, intentional or in the alternative negligent shooting of the plaintiff by the defendant. The issues of liability for damages and *quantum* of damages were separated by order of this Court in terms of Rule 33(4). The trial therefore proceeded before this Court only in respect of merits with the issue of *quantum* standing over.

[2] It was common cause that on 20 June 2015 and at 66 Beethoven Avenue in Walmer Heights, Port Elizabeth, the defendant's firearm was discharged resulting in the plaintiff sustaining a gunshot wound to his abdomen; that the plaintiff and

defendant had an acrimonious relationship; that Constable Petrus of the South African Police Services arrested the defendant who was already in handcuffs; that the defendant was pointed out by Mr Herselman of Atlas Security, now deceased, as the person who allegedly shot the plaintiff; that Constable Petrus took possession of a Glock 19-9mm pistol, a magazine and 10 rounds of ammunition; and that this pistol was pointed out as the firearm used in the shooting of the plaintiff. The parties furthermore agreed that the transcript of the criminal trial was to serve as evidence before this Honourable Court.

[3] The plaintiff agreed that he bore the *onus* to prove his claim and the duty to begin. The plaintiff and his daughter, Ms Kayleen Williams ("Ms Williams"), tendered evidence in support of the plaintiff's claim.

[4] Ms William's evidence contextualises the shooting incident and places the plaintiff and defendant on the scene in a heated family argument. Her evidence is confirmed by the defendant in that, *inter alia*, he testified that : he was extremely angry with Ms Williams for accusing him and Ms Marlene Blunden ("Ms Blunden") of being fraudsters and thieves and that they wanted her to stop doing so; Ms Williams refused to talk to the defendant and Ms Blunden resulting in the defendant wanting to remove her from the home; Ms Williams called the plaintiff for help; when the plaintiff arrived on the scene, Ms Williams was sitting in the lounge with Ms Blunden; that the plaintiff ran past the patio doors and entered from the back door into the kitchen; the security guard ran out of the house; and that after the shooting incident, in the foyer between the lounge and dining room, Ms Williams hit the defendant over the head with a statue. She heard the plaintiff telling the security guard to call the police and the defendant

telling the plaintiff to get out of his house. She then heard the first shot being fired while she was sitting in the lounge and ran towards the kitchen and then saw the defendant pointing a firearm at the plaintiff. At this stage, Ms Williams positioned the defendant somewhere close to the fridge and patio door. While the defendant was pointing a firearm at the plaintiff whom she could not see, she heard another shot being fired in the direction of the back door. She then jumped up and ran into the kitchen (for the second time) and followed the plaintiff and defendant who were moving in the direction of the back door.

[5] During cross examination, Ms Williams initially testified that her father was not a violent person. Mr Beyleveld, counsel for the defendant, had to remind Ms Williams of her evidence during the criminal trial about the protection order granted to her mother against the plaintiff. She finally conceded that the plaintiff can be quiet intimidating and she became aware of a protection order being granted to her mother against the defendant during the criminal trial. Ms Williams was referred to the photographs which formed part of the docket which showed marks on the defendant's neck and his t-shirt being torn. Her evidence was that she did not know when the defendant sustained the injuries to his neck or when his t-shirt was torn. She however confirmed that the defendant's t-shirt was not torn and he did not have the marks on his neck before he entered the home. The evidence of the plaintiff and the defendant as to where they were respectively standing in the kitchen, the plaintiff's evidence as to where the table and chairs were in the kitchen at the time of the incident, the evidence of the expert witness as to the trajectory of the two bullets and the plaintiff's evidence at the criminal trial make it highly improbable that Ms Williams witnessed the shooting incident which resulted in the injury to the plaintiff. Ms Williams correctly

deferred any questions regarding the trajectory of the bullets to expert opinion. Ms Williams did not leave the impression that she had any intention to mislead the Court. She did testify to being stressed and having heard her evidence and read her testimony in the criminal trial, this court finds that the consequential trauma she faced from the events of that day has had an impact on her recollection of events.

[6] The plaintiff's evidence is that he was called by Ms Williams saying the defendant was trying to throw her out of the home and he rushed to her aid. He entered the home through the back entrance which leads directly into the kitchen. The defendant was standing in the kitchen next to the hob talking to the security guard. He walked up to the defendant and with the use of expletives asked him what he thought he was doing and told the security guard to call the police. The defendant responded with more expletives ordering him to leave his house. There was a robust verbal altercation between them which ended up in the plaintiff pushing the defendant's hand away from his face. The plaintiff and defendant had to be in close proximity to each other for this to have occurred. The defendant then moved his hand to his belt and the first shot was fired. The security guard then ran out of the house from the same back door through which the plaintiff entered the house. Soon thereafter, the defendant was pointing the gun at him and he fired two more shots at him. He was only hit by one bullet which entered and exited just above the right hip in the right iliac breast. He moved towards the passage. The defendant was still pointing a gun at him. He grabbed the defendant's sister, Ms Blunden, to protect himself. His daughter then hit the defendant from the back. He collapsed and was then taken by the paramedics to hospital. Under cross-examination the plaintiff admitted that the defendant and him had an acrimonious relationship. The plaintiff could not explain

why he simply did not advise his daughter to call the police for assistance. His response was that he did not do so because he knew the defendant was abusive towards women and children. This was quickly laid to rest when the plaintiff conceded that he was the one who had a protection order against him for physically assaulting his ex-wife (the defendant's sister and Ms Williams' mother). The plaintiff further conceded to being "cross" at the time. He further testified that on arriving at the home he ran to the back door and ran inside and once inside walked at a fast pace to where the defendant was standing next to the stove, in front of the oven and started confronting him. During the confrontation, he tried to push the defendant's hand away from his face to prevent the defendant from hitting him in the face and it was during this movement that the defendant's hand went down to his side and the first shot went off. At this stage he did not see the gun yet. He could not comment on the bullet hole in the cupboard door close to where him and the defendant were standing. He correctly said that he did not have any knowledge as to the degree of the trajectory of the bullet being consistent with where the defendant was standing and from which the firearm was discharged from his hip. He was asked to confirm that at the criminal trial his evidence was that after the first shot was fired, he tried to prevent the defendant from taking out the firearm and that he was trying to wrestle the gun away from the defendant while they were fighting. His maintained that after the first shot was fired, he did not wrestle but only attempted to wrestle the gun away from the defendant. He said that after the first shot was fired, he turned around and moved towards the entrance to the lounge while the defendant stood near the stove pointing the firearm at him and fired a shot at him when he turned to the side to go to the passage. He could not say where this projectile went after exiting him. He admitted that this could not be the second projectile which hit the toaster on the opposite end

of the kitchen and that the only two bullet holes that were found in the kitchen was the one in the cupboard door under the stove and the one in the toaster. The plaintiff had gone to the house after he was discharged from hospital to see if he could find any other bullet marks and he was not able to find any. Except for his say-so at this trial only, there is no evidence of a third shot being fired. Furthermore, the plaintiff could not explain how the defendant's t-shirt was torn or how the defendant received the marks around his neck. The plaintiff excluded his daughter or his ex-wife from having caused the marks around the defendant's neck and from tearing his t-shirt. It was common cause that the photos regarding the defendant's torn clothes and marks on the neck were taken by his son and formed part of the police docket. During the criminal trial the plaintiff said the marks were self-inflicted. Fortunately for him, this was not his evidence before this Court. Despite the vigorous cross-examination during this trial, the plaintiff maintained that he did not know how the defendant sustained the injury to his neck or how his clothes were torn. This placed his credibility and reliability in question. This court finds that the defendant tailor made his evidence of three shots being fired, in the absence of any supporting evidence, to support his version of the defendant taking aim and firing two shots at him. Having considered the evidence of the acrimonious relationship between the plaintiff and defendant, the plaintiff's temperament, that the defendant was angry, the marks on the defendant's neck and his torn clothes and the ballistic evidence (detailed below), it is probable that there was a scuffle between the plaintiff and defendant.

[7] The defendant called Mr Jacobus Steyl, a ballistics expert, as a witness who also testified at the criminal trial. His experience includes *inter alia*, ballistic examinations, interpreting wound ballistics and reconstructing crime scenes. Mr Steyl

confirmed the correctness of the content of his report save insofar as an amendment was made as to the trajectory of the bullet being slightly downward. He explained that this amendment did not impact when he has regard to the basket of ingredients, he uses to reach his findings in his report. Mr Steyl's experience as a ballistics expert was brought into question during his cross examination. He however detailed his qualifications and expanded on his qualifications and experience, in particular that he has the same qualification of the American Services which is equivalent to a degree in South Africa. The reason for his American qualification is that there was no degree in South Africa at the stage when he studied and all firearm examiners were sent for education and training to America where they obtained an equivalent qualification and also to do further courses in America. He has an equivalent degree dealing with his training and experience and is a member of the Association of Firearm Tool Mark Examiners. The Court accepts Mr Steyl is an expert in the field of ballistics.

[8] Mr Steyl's evidence related to the two gunshots which were fired and the probable trajectories of those bullets. His evidence is that when drafting his report he considered the factual scenario which supported his own trajectory of the bullets, the photographs at the scene, the J88 of both the defendant and the plaintiff, the statement of Ms K Williams and D Williams, the defendant's Plea Explanation and consultations with the defendant's attorney. Mr Steyl further said that he never puts any version which is given to him by a party in his report as it is forensically incorrect to do so. He confirmed that the photographs used in his report were taken by himself and that it is his own examination and trajectory and not that of the plaintiff. He first examined the bullet hole itself and then did the trajectory of that bullet hole. He then saw where the

trajectory would come up and the angle of that trajectory as indicated in the photographs.

[9] Mr Steyl visited the scene three and a half years later, i.e. on 7 January 2019, and one of the exercises he conducted was to look for any other marks or any other impact marks that could relate to the incident. He did not find any evidence of a third projectile or third mark in this matter but admitted that the delay in examining the scene was not ideal. There was no evidence led of a third shot being fired at the criminal trial. He testified that the firearm used was a Glock firearm which is a semi-automatic pistol designed in such a fashion that pressure would have to be applied to the trigger to fire a shot. Mr Steyl described the damage to the cupboard door as a stable bullet impact consistent with the angle a bullet would have followed if somebody with the defendant's height was standing close to the oven. He then dealt with the second trajectory, i.e. the hole in the toaster and confirmed that the impact damage on the toaster can be associated with the bullet after it perforated the complainant. He explained that when a bullet is in flight it is normally 9mm in diameter so when anything is impacted it will leave a round defect. The defect on the toaster, however, is irregular in that it is a little bit oval on the top section with a sharper point on the bottom section. This means the bullet of the projectile was unstable or it was damaged which created this defect itself and it further confirms as to why this bullet is then found inside the toaster instead of it hitting right through the toaster. He was consistent in his evidence that a normal 9mm parabellum bullet will shoot right through the toaster if it was a direct impact shot. It was his uncontested evidence that the shot to the toaster was not a direct impact shot and that it was most likely that this was the bullet which hit the plaintiff.

[10] The two trajectories he found were very different trajectories. As to whether the plaintiff's version could be correct that he did not touch the firearm and instead he only pushed the defendant's hand away and the defendant's hand then went to his side and then the firearm went off, Mr Steyl testified that it was clear from the trajectory that the firearm was pointing downwards towards the cupboard when the shot went off and more importantly that because of the positive trigger pressure required to shoot, this shot could not have gone off with just a touch to the firearm. He said that this ballistic evidence is more consistent with the defendant's version of a scuffle between him and the plaintiff with them grappling with the gun when the shots were fired.

[11] The second aspect when looking at bullet trajectories is that the height of the firearm plays a pivotal role in that it determines the trajectory that this projectile will follow. The height in the firearm in this case is important because it will determine whether the bullet will hit the toaster itself on impact. Mr Steyl found that the plaintiff's wound runs from left to right and if he was placed in the trajectory of the bullet penetrating the toaster his back will face the cupboard with the toaster on it and the left-hand side of the plaintiff would be facing the firearm itself. Mr Steyl opined that the defendant's version as to how the events unfolded is consistent with the projectile examination and evidence in that the scuffle originated near the cupboard where the first projectile was found and then moved towards the side where the toaster was when the second shot went off. He considered the plaintiff's version that he was standing at the opposite wall close to the kitchen door when the second shot went off. He testified that this would mean the projectile would not have had enough energy to hit the wall and then go across the room to hit the toaster. His evidence was that it was very unlikely that this had happened. Mr Steyl furthermore, based on the two

trajectories and the injury to the plaintiff, excluded a frontal shot from being possible. He confirmed the left-hand side wound to be 108cm from the ground and the right-hand side wound to be 100cm from the ground leaving an 8cm difference which was a slightly downward trajectory. This slightly downward trajectory did not change his opinion regarding the projectile entry into the toaster. One of the reasons he concluded that there was a struggle was because there were two opposing bullet trajectories found. In his experience, the two opposing trajectories are consistent with a struggle scenario.

[12] Under vigorous cross examination, Mr Steyl maintained that the injury sustained by the defendant to his neck and his torn t-shirt, the injury sustained by the plaintiff as a result of being shot at and the two trajectories could only be explained by a firearm being held low and parties moving around in a scuffle. This was the difference between the more probable version of a struggle trajectory versus an aiming and firing shots trajectory. He maintained that the two trajectories were not consistent with the plaintiff's version of the defendant aiming and firing a shot at him. With regard to the change of the trajectory to slightly downwards, Mr Steyl said that when a trajectory goes through the body itself there are differences in the trajectory and all that tells him is that he has to take into consideration that the person could have been moving. The slightest movement of the body can change a trajectory and he is alive to this in his report. His second consideration was the low height of the firearm. He said that if he took the low height of the firearm plus the trajectory through the body into consideration the trajectory could still end up in the toaster. Mr Steyl testified that only if he was dealing with the one ingredient in the ballistic basket could he find the plaintiff's version to be probable. This is however not done. He further testified that

the now slightly downward trajectory of 8cm did not change his conclusions reached because it would depend on the body height at the angle of the person moving as well as the height of the firearm. He concluded that it was highly likely that there was a struggle scenario where two parties were moving.

[13] Mr Steyl pointed out that his opinion would remain the same even though he was presented with new information of a slightly downward trajectory, in particular that a struggle scenario was now more likely because the firearm was still low. Mr Steyl then reconfirmed that the trajectory of the bullet through the body is relevant in that the movement in the body by bending or any other movement can easily explain the 8cm difference in the trajectory.

[14] The three reasons for the opinion that there was a struggle scenario was the two opposing bullet trajectories, the downward or level trajectory and that the firearm was in a lower position. He confirmed that there would obviously be a difference if there was a straight downward trajectory. His opinion was that it was more likely that there was a struggle.

[15] The plaintiff's opinion that Mr Steyl did not correctly mark the impacts of the bullets to say which impact belonged to which bullet is not supported by expert evidence. The court accepts the expert evidence of Mr Steyl that the bullet which hit the cupboard was a stable bullet and therefore could not have penetrated a body. The second shot to the toaster, however, indicates that it had penetrated a body before hitting the toaster. There is no evidence to contest this.

[16] Mr Steyl confirmed that his reconstruction of the crime scene and the ballistic examination goes hand in hand. The main criteria for ballistic examiners to visit scenes is to determine trajectories, to determine bullet angles and impacts, velocity and determine the energy of projectiles and fragmentation and damage to different surfaces. That is all part of the ballistic examination. Identification is only one aspect of ballistics. He explained that none of the ingredients in his ballistic basket could be taken in isolation. If it was taken in isolation then anything would be possible. It was therefore necessary that all the ingredients be taken together. The height of the firearm was the third ingredient. Mr Steyl based his opinion on matters of fact and during his evidence he clearly drew a line between matters of fact and matters of value thereby assisting the court as an expert witness (and not usurping the role of the Court).

[17] The defendant pleaded that the firearm was discharged and that the plaintiff did sustain a gunshot wound to the abdomen as a result of such discharge, but that this came about as a result of an unlawful attack by the plaintiff on the defendant which culminated in a scuffle and a struggle with the firearm accidentally being discharged.

[18] His evidence was that he collected a large sum of cash from the airport before going to 66 Beethoven Street, as agreed with his sister, Marlene Blunden. He confirmed the plaintiff's evidence that the only way to enter the house was through the back door as his mom normally held the key to the front security gate which remained locked. The back door leads into the kitchen where the alleged shooting incident took place. Both his sisters, Ms Cheryl Williams and Ms Blunden, as well as his mom were present. He enquired from his sister as to why the plaintiff was involved in their family

business as they were divorced. He also stated that they have done nothing wrong to his sister and her daughter. Ms Williams arrived at home and she was told that they want to talk to about the accusations made by her that they are thieves and fraudsters. Ms Williams refused to speak with them and went to her room and locked the door. They followed her. The defendant admitted to kicking a hole in Ms William's bedroom door and entering her room where they continued arguing. It was during this argument that Ms Williams called the plaintiff. They then went back to the lounge area. The alarm was going off and a security guard came to the house. He came to the front door and enquired as to whether there was an emergency and the defendant said no, there was just a family dispute. He told the security guard to come around the back, which he did, and he came in through the kitchen door. He then also went to the kitchen and stood next to the stove. The security guard then went to the lounge and spoke to Ms Williams and her mother, Ms Cheryl Williams, and Ms Marlene Blunden. He remained standing at the stove listening to them.

[19] The plaintiff rushed in from the back door of the kitchen swearing at him. He was still standing at the stove when the plaintiff entered the kitchen, and they had an argument and exchanged expletives heatedly. He was grabbed by the sweater and it was then that his sweater was torn. The plaintiff then grabbed him by the neck and proceeded to strangle him. He managed to pull one of the plaintiff's hand away from his neck and in that action the plaintiff's hand hit the gun and he realised that the defendant had a gun on him. The plaintiff then went for his gun which was on the plaintiff's left hip with the butt facing him. He tried to prevent the plaintiff from pulling the gun out. The plaintiff then let go of his neck completely and used this hand to get the gun. While they were struggling with the gun, he pulled it resulting in a shot going

off. They were moving during the scuffle. They continued to struggle and he made sure that the gun was not facing in his direction. He got it away from the plaintiff when the second shot went off and everyone was now in the kitchen. He had control of the gun. He put it back into his hip and moved towards the lounge area. He was in a daze. He denied that there was ever a third shot that was fired. The plaintiff also moved into the dining room area which is opposite the lounge. The plaintiff was coming over to him on the lounge side to engage with him, but his sister, Marlene, prevented this. He was then facing the plaintiff with his back towards the passageway when he felt something hit him on the head. He saw Ms Williams walk away with the statue in her hand. He was bleeding and in a daze and in shock. His sister, Marlene, then said he needed to get out of the house for the plaintiff to be treated by the paramedics and he left the house by the back door through which he entered. The Atlas security guard then told him to put his hands behind his head and kneel on the paving, which he did. The guard then took possession of his gun. His son had taken the photographs at the scene. He denied shooting the plaintiff deliberately or that he was preparing himself to shoot the plaintiff when he came to the house. This is highly improbable as the plaintiff did not reside there and the defendant knew this. During rigorous cross-examination by Mr Niekerk, the defendant maintained that he was trying to prevent the plaintiff from pulling out his firearm and that he did not pull out the firearm. He explained that when he said he defended himself during his bail hearing he meant he was preventing the plaintiff from pulling out his firearm. This is accepted.

[20] The plaintiff's evidence and that of the defendant are similar insofar as it relates to their close proximity to each other when the gun was first fired and that there was a heated argument between them on the plaintiff's arrival at the home.

[21] The defendant was present while evidence was led and while the plaintiff's counsel raised this during cross examination, he did not pursue the prejudice to the defendant in his written argument. This was not the first time any of the witnesses had testified regarding this incident and this court finds the defendant's evidence to have remained consistent in material respects. The same cannot be said for the evidence of the plaintiff who at the criminal trial said the defendant inflicted the injuries on himself and during this trial could not explain how the defendant sustained the injury to his neck or how his t-shirt got torn. He more pertinently now testified to three shots being fired without any supporting evidence.

[22] In a delictual action such as this, the onus rests on the plaintiff to prove on a balance of probabilities legal causation and wrongfulness; *damnum* (damages); negligence; and factual causation of the injury, i.e. the injury must have been caused by the negligent conduct of the defendant. The classic test for negligence as formulated in *Kruger v Coetzee*¹, is applicable.²

[23] This court is faced with two mutually destructive versions. The plaintiff alleges he was aimed at and shot at by the defendant while the defendant alleges that the plaintiff was shot accidentally during a scuffle between them. This court must adopt

¹ 1966(2) SA 428(A) at 430 E

² "for the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person ... and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

... Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case."

the approach set out by the Supreme Court of Appeal in the matter of *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie SA and others* 2003 (1) SA 11 (SCA) by making findings on the credibility of witnesses, their reliability and the probabilities.

[24] I refer to what is detailed above *inter alia*, that Ms William is a credible witness, but her evidence cannot be relied on as I found that she was traumatised by the incident which resulted in her recollection of events being impeded. I do not find the plaintiff to be a credible witness for the reasons stated above, *inter alia*, that three shots were fired. The defendant has remained consistent in his version of a scuffle between him and the defendant which resulted in the shooting incident (this was his version at the criminal trial too).

[25] Mr Steyl's evidence is uncontroverted and the plaintiff's reliance on the judgment of *Abdo N.O. v Senator Insurance Co Ltd & Another* 1983 (4) SA 721 (ECD) is accordingly misplaced. Central to the issue in this matter is the trajectory of the bullets and Mr Steyl's expert knowledge and skill in ballistics places him in a better position to draw inferences than this Court and I have accordingly relied on his expertise to assist me. (*PriceWaterhouseCoopers Inc v National Potato Co-op Ltd* [2015] 2 ALL SA 403 (SCA) refers).

[26] The plaintiff did not discharge the onus of proving his case on a balance of probabilities when considering all the evidence as a whole, in particular, the acrimonious relationship between the plaintiff and defendant, the plaintiff's temperament, the fact that both the plaintiff and defendant said they were angry at the

time, the defendant's torn t-shirt and the marks around his neck and the uncontested expert forensic and ballistic evidence of Mr Steyl.

[27] I accordingly make the following order:

27.1 the plaintiff's action is dismissed; and

27.2 the plaintiff is to pay the defendant's costs.

A handwritten signature in blue ink, appearing to read 'Rawjee'.

A RAWJEE

ACTING JUDGE OF THE HIGH COURT

(Electronic signature)

Appearances:

For Plaintiff: Adv D Niekerk instructed by Brown, Braude and Vlok Inc

For Defendant: Adv A Beyleveld SC instructed by Kaplan Blumberg Attorneys

Date Heard: 19-25 March 2020 (postponed *sine die* due to Level 5 Covid 19 lockdown)

Due to lockdown the matter could not proceed in open court and heads of argument were filed electronically