



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **514/2022**

In the matter between:

MOHLABANE KGALANE

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **12, 13 SEPTEMBER and 31 OCTOBER 2023**

DELIVERED ON: **05 JANUARY 2024**

- [1] The Plaintiff instituted a delictual claim against the Defendant for damages in the amount of R2 630 000.00 arising out of the injuries sustained when the Plaintiff was shot on the leg. The Plaintiff alleges that he was negligently shot by unknown members of the South African Police Service acting within their scope of duty and employment with the Defendant. The parties have agreed to a separation of the merits and quantum and this court accordingly ordered such separation in terms of Rule 33(4) and the issue of liability will thus be adjudicated first in this trial.

- [2] The defence of the Defendant is succinctly captured as follows in the plea:

"2. AD PARAGRAPH 4 THEREOF

2.1 ... the defendant avers that there were no police officials who were around the area where the plaintiff alleges that he was shot by the police. There is no evidence linking any police official to the alleged shooting. Defendant denies that any of its members were involved in the shooting incident.

2.2 On or about the 31st May 2021 the police were deployed on the R30 public road at Theunissen town, Free State where there(sic) protests. Members of the community who were protesting were moving from the location adjacent to the R30 into R30 and blocking it and throwing stones at passing vehicles.

2.3 As a means to disperse the protest on R30 the police used rubber bullets firing towards the protesters who were around the R30. The police only concentrated on R30 and did move into the location at the time and date mentioned in the Plaintiff's particulars of claim.

3. AD PARAGRAPH 5 & 6 THEREOF

The defendant has no knowledge of the incident as alleged by the plaintiff and denies that any police official was involved in such incident of shooting and thus deny that any police official in the employ of the defendant was negligent as alleged by the plaintiff in his particulars of claim."

- [3] Three witnesses, who included the Plaintiff testified on behalf of the claimant. The Plaintiff testified that he was from work on the day of this incident. Along the way to his home he made an excursion to the shop to buy candles as there was load shedding. He was walking on foot. Having bought the candles, he proceeded on his way home. Along the road in a street which was in the township where he resided, he met three policemen in uniform and also wearing bullet proof vests. The policemen had firearms in their possession.

He suddenly heard three shots being fired. He felt something hot or warm on his right leg. He had been shot with rubber bullets. He fell to the ground.

- [4] He was near the house of one Papiki. He screamed and called Papiki for help. Papiki came out of his house and pulled him into his yard. The policemen shot again and Papiki left him and ran into his house. Later Papiki came out again and pulled him into the yard. He was later taken to hospital for treatment.
- [5] Mr Lebohang Alfred Moleti also testified on behalf of the Plaintiff. At the material time he owned a shop in the area where the Plaintiff resided. He confirmed that on the day of this incident the Plaintiff was at his shop and bought candles. He also testified that he saw when the Plaintiff was shot in the street where his shop is. He further testified that the police were also under his carport and were shooting at people who were around. According to him, the police were also chasing people who were on the football ground. He testified that the police also hid behind a tree which was behind his shop and shot numerous times.
- [6] The last witness to testify for the Plaintiff was Mr Innocent Mantswe Mojaki (also known as Papiki). He testified that at about 18h00 he was at home watching television when he heard the screaming of the Plaintiff at his gate. The screams of the Plaintiff were of a person in pain and seeking help. He went out to inspect what was happening. He found the Plaintiff sitting on the ground. He enquired from the Plaintiff as to what was wrong and the latter informed him that he was shot by the police. The Plaintiff was full of blood on the right leg. The Plaintiff asked him to get him in his yard. While he was helping him into the yard, he heard a shot being fired. He ran away into his house. He, however, confirms that he saw three policemen in uniform with 'long firearms'. A while later he came out of his house and took the Plaintiff into his house. His wife and son arrived in a car and the Plaintiff was taken away. That concluded the Plaintiff's case.
- [7] The Defendant called two witnesses. The first witness was Mr Olebogeng Phillemon Setlogelo. He is employed by the Independent Police Investigative

Directorate as an investigator. He was essentially called to testify on the circumstances surrounding his taking of the statement of Mr Mojaki. He confirmed that he read the statement back to him after he had written it.

- [8] Warrant Officer Ralikhomo was the last witness to take the stand for the Defendant. At the time that he testified in these proceedings he had been in the South African Police Service for thirty-three years. His is the commander of the Public Order Policing in Selosesha, Thaba Nchu. On 31 May 2021 his unit was called to assist at Theunissen where there were protests. He was also in charge of the unit. He testified that his unit was the first one to arrive on the R30 provincial road where it was later confined for the rest of the operation. He confirmed that there were only officers of Selosesha on the R30 provincial road from the morning until 20h00. He testified that no incident of shooting was reported to him on 31 May 2021. He did not know how many rubber bullets were fired on this day. He confirmed that he only authorised the firing of two rubber bullets.
- [9] By agreement certain evidential material in the form of documents was handed into record. I will specifically refer to Exhibit C, which is the Incident Registration Information System report (IRIS report) during the cause of this judgment.
- [10] The crisp issue for determination is whether the Defendant is liable for the injuries sustained by the Plaintiff when he was shot on the leg. Allied to this question is whether the Plaintiff was shot in the location by the police acting within their scope of duty and employment with the Defendant.
- [11] A delict is generally defined as an act that is wrongful and culpable and causes harm to another. In *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd*¹ the court stated that in general the essential elements of delict are: a) a conduct, initiating wrongfulness by the defendant; b) fault, in this instance negligently by the defendant; c) harm suffered by the plaintiff; d) causal connection between the conduct and the harm.

¹ 2001(4) SA 814(SCA) at para 13.

- [12] The versions of the parties are diagrammatically opposite to each other. The Plaintiff asserts that he was shot in the location when he came from the shop of Mr Moleti. On the other hand, the pleaded case of the defendant is *that 'the police used rubber bullets firing towards the protesters who were around the R30' and that 'the police only concentrated on R30 and did not move into the location at the time and date mentioned in the Plaintiff's particulars of claim.'*
- [13] It is trite law that the Plaintiff bears the overall onus of proof. In this case he needs to prove that he was shot by the police in the location and was not part of the people who were involved in the protest on the R30 on the date and time he alleges in the particulars of claim. Simply put, he must prove on a balance of probabilities that his version is more probable than the version of the Defendant.
- [14] The version of the Plaintiff and his witnesses is largely undisputed. This is understandable in view of the denial by the police that any of their members were at the scene where the alleged shooting took place. The police cannot deny that the Plaintiff was shot and sustained injuries. There is no other explanation as to how he could have sustained an injury. The police can also not dispute that he was shot by rubber bullets as they do not even know how he came to be injured.
- [15] The crux of the submission on behalf of the Defendant is that the 'version by the Plaintiff that he was shot in front of the house of Papiki is suspicious and improbable because Papiki did not hear any gun shots even though the shooting is said to have occurred in front of his shop.'² The cross examination of the Papiki clearly established that he did not hear the first shooting when the Plaintiff was injured. What however remains undisputed is that the Plaintiff screamed and called for the assistance of Papiki in front of his house. The testimony of the Plaintiff is corroborated in material respect that while he was being hauled into the yard by Papiki, the police fired a shot. That Papiki left the Plaintiff and ran away into his home again provides another corroboration

² See para 8.6 of the Defendant's Heads of Argument.

to the testimony of the Plaintiff. Much as it is argued that there were contradictions in the versions of the Plaintiff and Papiki, such contradictions are immaterial. In my view, the contradictions in the testimony when viewed in the totality of the evidence rather seem to show that Papiki and the Plaintiff did not tailor their evidence to be the same.

- [16] The testimony of W/O Ralikhomo together with the IRIS report establishes the improbability of the version of the Defendant. W/O Ralikhomo was the commander in charge of a unit from Selosesha. Under his command were seven other members. His evidence clearly show that his unit was confined to the R30 provincial road. Of importance, his testimony further established that his unit was not the only unit called upon to quell the protests at Theunissen on that day. It is not his testimony that all other units besides his were also confined to the R30 road. He could only testify about the movements of his unit as well as the rubber bullets issued to his group.
- [17] The IRIS report, compiled by the police shows the following:
*"At 11h00 W/O Kgatlane reported that approximately 500 residents of Masilo approached the R30. They were burning tyres inside Masilo(my emphasis). They threw stones at people's vehicles in the location. Only a few attempted to barricade the R30."*³
*"The group scattered back into the location."*⁴
*"At 14:45 W/O Kgalane reported that ...people burned tyres inside Masilo."*⁵
"At 17h01 members patrolling the area and monitoring the situation"
- [18] The IRIS report show that apart from the unit under the command of Ralikhomo, there were other units at Theunissen on the day of this incident. according to Exhibit D, W/O Kgatlane was the unit commander of one such unit. While the report by W/O Kgatlane related to an incident which happened at 11h00, it contradicts in material respect the pleaded case of the Defendant that the police were only confined to the R30 road. I say this because it is inconceivable that while the residents were burning tyres and throwing stones

³ See Plaintiff's trial bundle, page 51.

⁴ See Plaintiff's trial bundle, page 52.

⁵ See Plaintiff's trial bundle, page 53.

in the location, the police would choose not to stop the commission of such offences and confine themselves on the provincial road. Common sense dictates that the police would attend the scenes where there were unrests, in this case, in the location.

[19] In cross examination, W/O Ralikhomo conceded that he could not deny that other members of the police got in the location on foot. He also accepted that he did not see what those members did while they were in the location. Of further importance the IRIS report show that the police fired over 70 rubber bullets on that day. The version of the Defendant, seen through the evidence of W/O Ralikhomo and the IRIS report make it highly improbable to the R30. It is therefore my finding that the police were not confined to the R30 provincial road.

[20] The submission in argument on behalf of the Defendant that 'the probability is that the Plaintiff was amongst the people throwing stones at the cars and that he was shot there and crawled to Papiki's place' is improbable and calls for speculation. The Defendant did not plead that the Plaintiff was part of the people protesting and was shot during the protests. He did not allege any justification to thwart the wrongfulness alleged by the Plaintiff. Such speculation must be rejected. In *Minister of Safety and Security v Slabbers*⁶ the court said the following:

"The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for the plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issue falling outside the pleadings when deciding a case."

The Defendant did not plead that the Plaintiff was part of the people protesting and was shot during the protests. The Defendant did not allege any justification to thwart the wrongfulness alleged by the Plaintiff. What is submitted is a mere speculation which must be rejected.

⁶ 668/2009[ZASCA] 163(30 November 2009).

- [21] The Plaintiff's claim is founded on the *actio iniuriarum*. The infringement the Plaintiff seeks compensation on, arises out of the right to bodily integrity, which is both physical and psychological. The court in *Minister of Justice v Hofmeyer*⁷ said the following:

"One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus*, but it has several facts. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element. For present purposes a convenient summary of the position is to be found in W A Joubert's *Grondslae van die Persoonlikheidsreg* (1953) at 131:

'(1) *Die reg op fisiese integriteit*

Die geobjektiveerde regsgoed is hier nie die liggaam in die gewone konkrete sin van die woord nie, maar *die hele fisies-psigiese kant van die persoonlikheid*. Die mens het onder hierdie hoof 'n persoonlikheidsreg t a v : die *liggaam*, waardeur hy beskerm word teen enige fisiese aantasting daarvan, hetsy deur gewelddadige besering, hetsy op meer indirekte wyse soos deur die toediening van gif, die veroorsaking van fisiese skokke, ens.; onafskeibaar van die voorgaande, die *gesondheid* in volle omvang, insluitende die verstandelike welstand; die *liggaamlike vryheid*, sodat hy beskerm word nie net teen gevangenhouding nie maar ook teen enige belemmering van die bewegings-en handelingsvryheid;...."

- [22] The police officials who shot the Plaintiff failed to live up to the standard of a reasonable police officer in the position of the Defendant's employees. When they shot the Plaintiff with three rubber bullets at close range, they should have foreseen the reasonable possibility that their conduct would injure the him. It is undisputed that they failed to guard against such occurrence. It cannot be argued otherwise that there is a clear connection between the wrongful conduct of the employees of the Defendant and the injury the Plaintiff sustained. That the police officials who shot the Plaintiff were conducting the business of the Defendant cannot be disputed. I accordingly find that the

⁷ 1993(3) SA 131(A) at 145J- 146A.

Plaintiff was shot by members of the South African Police acting within their scope and duty with the Defendant.

[23] it is trite that costs are in the discretion of the court. There was an application to compel which was withdrawn by agreement between the parties and costs thereof stood over for later adjudication. I am not satisfied that a proper case has been made out for the costs in that regard. I accordingly make the following order:

ORDER

1. The Defendant is liable for 100% of the Plaintiff's proven or agreed upon damages;
2. The Defendant is liable for the Plaintiff's costs of the trial;
3. Each party shall bear his costs of the application to compel.


P. E. MOLITSOANE, J

On behalf of the Plaintiff:	Adv. HJ van der Merwe
Instructed by	Symington & De KOK
	BLOEMFONTEIN
Ref	FKM 0147

On behalf of the Defendant:	Adv. NM BAHLEKAZI
Instructed by	State Attorney
	BLOEMFONTEIN
Ref	66/202200165/P7M