



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 number: 3178/2021

In the matter between:

KEITUMETSEJOYCE MOLOI

Plaintiff

and

THE MINISTER OF POLICE

Defendant

HEARD ON:

01,02 & AUGUST 2023
WRITTEN HEADS OF ARGUMENT DELIVERED ON 11,
23 & 25 AUGUST 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

08 DECEMBER 2023

- [1] In this action, the plaintiff claims damages against the defendant for the head and ankle injuries she sustained on 20 January 2020 during a service delivery protest in Rakitla's street situated in Phuthaditjhaba where she resides. The claim is predicated on the allegations that the cause of the injuries is the rubber bullet that was unlawfully and/or negligently discharged by the defendant's employee, a members of the South African Police Services (the police).

- [2] The defendant denies that the plaintiff was shot by the police let alone injured by a rubber bullet alternatively, if indeed she was injured by a rubber bullet, it is the defendant's case that the plaintiff was not shot at Rakitla street but at Mampoi road where she was part of the rioting group which the police sought to disperse by firing rubber bullets to restore public order in that case, the shooting was justified. In the further alternative, liability is disputed on the grounds that the plaintiff contributed to her own injuries by standing within the crowd of protestors thereby placing herself in danger of being shot.
- [3] The brief background is as follows: on the early morning of 20 January 2020 about 400 to 500 members of the community armed with stones and sticks embarked on a protest against lack of service delivery which turned violent. The roads, in particular the main road known as Mampoi road was barricaded with stones, shops in the vicinity were looted and vandandalized. A vehicle was also overturned and set alight. In order to quell the riots, police fired rubber bullets and also arrested some of the rioting protesters.
- [4] By agreement between the parties, the only issue that I had to determine was the merits of the claim. Quantum was stayed over for later determination.
- [5] The plaintiff gave evidence in support of her claim and also called Mr. Mohlominyana Daniel Thomas Matabula as her witness. On the other side, Lieutenant Colonel Ntauleng Margaret Motaung, Siphon Collen Zwane and Captain Senya Johannes Molema testified for the defendant's case. In addition, a photo album of the aerial photographs of the township and the video footage taken during the protests were handed in as evidence by agreement as Exhibit "A" and "B" respectively.
- [6] The plaintiff testified that on the morning of the incident, around 8h00 a message was circulated on the community WhatsApp group about a "strike." There was also mention of a vehicle that was set on fire by the protesters somewhere by the hotel in Mampoi street. She decided to go and see for herself what was happening. On arrival at Mampoi road she found other community members

already congregated at the bus stop watching the burning vehicle. The police drove past travelling in a Nyala and after passing them they fired at them with rubber bullets. This happened about three times they ultimately decided to leave the bus stop. They went to Mr Twala's house which is on the same street as her home but only a few minutes from the bus stop to seek shelter.

- [7] About 30 minutes later two police officers came and ordered everybody out of Mr Twala's house including children. They were taken back to Mampoi street and placed into the two Nyalas that were parked there. They were released after one of the children suffered a panic attack. The police were still firing randomly towards all directions when she began to walk back home on Rakitla street.
- [8] The plaintiff further stated that a police officer approached from the opposite direction firing shots at a fleeing protester who was running towards her. After feeling something hitting her on the forehead, she collapsed and lost consciousness. When she regained consciousness her face was full of blood. She tried to stand up but could not. When she looked down at her legs she realized that her right ankle was broken. She does not know what caused the injury. People came to assist her and took her to Mr. Twala's home where an ambulance was called. She was transported by the ambulance to Manapo hospital where she received treatment for an abrasion on her forehead and a fractured right ankle.
- [9] It was her testimony that she did not participate in the protest therefore there was no reason for the police to shoot her.
- [10] Under cross-examination she confirmed that she left home knowing very well that there was a complete shut-down in the area resulting from the violent protest and that the police would be involved to control the unruly crowd. When asked whether she was not scared of the violence that had erupted her response was that, she was wanted to see what was happening with her own eyes.

- [11] Matabula testified that due to the explosive nature of the of the protest, he left home to look for his wife and children and sent them home for safety. He thereafter went to the bus stop and found the plaintiff there with the other community members watching the burning vehicle. He corroborated the plaintiff's version that she did not partake in the protest and that after the shootings continued they all sought shelter from Mr Twala's residence. The police came and ordered them back to Mampoi street where they were divided into two groups and placed in two Nyalas. The plaintiff was in another Nyala and moments later she was released together with the community members that were in that Nyala. Matabula and those who were with him in the second Nyala were taken to the police station and that was the last time he saw the plaintiff. He did not see how and when the plaintiff was shot.
- [12] Under cross-examination he conceded that the police fired rubber bullets at them whilst they stood at the bus stop in order to disperse them because they thought they were protesters.
- [13] With regard to the defendant's case, Colonel Motaung is the unit commander of the Public Order Policing unit of the South African Police Services ("POP") which mainly deals with protest control for the Phuthaditjhaba area.
- [14] It was her testimony that earlier on the day of the incident, she received a report about a group of about 500 protesters looting and vandalizing shops at the Mampoi road. A police Nyala was dispatched to Mampoi road thereafter the police reported that the roads were blocked, the protesters were throwing stones and also burned a vehicle next to the liquor shop.
- [15] She stated that the police's duty is the take control of the situation by dispersing the crowd and arrest those who do not comply. As a result of the Tatane¹ incident, police are now using the so called "reduced rubber bullets" to disperse protesting

¹ Mr. Andries Tatane was killed on 13 April 2011 after being shot with rubber bullets by the police.

crowds and to ward off the protesters' attack on the police. Due their reduced strength, the impact has also been reduced in the sense that they do not cause severe injuries but just a scratch therefore, the injuries that the plaintiff alleges to have sustained could not have been caused by the rubber bullets used on the day of the incident. No report of any injuries was filed relating to those protests and according to her information, no police members were ever at Rakitla street as there was no protest taking place in that area but at the main road, Mampoi road.

- [16] She was adamant that if a protester is identified as having played a role in pelting stones and damaging property, police are entitled to arrest them including to chase them until they catch them.
- [17] Zwane is a videographer, he is also employed at POP. His duties involve video recording of protests incidences. On the day of the incident he was at Mampoi road. He arrived there shortly after 10h00 and went about recording what was happening. The voice narrating the situation was his and the time that he mentioned was 11h33.
- [18] He told the court that, the police were confronted with violent scenes as it can be seen on the video footage 2,4, 11 and 14. The street is barricaded with stones, there is smoke bellowing, shops were vandalized and looted and there was a huge number of protesters still milling around.
- [19] It was pointed out to him by defence counsel that the provided videos had no dates and time stamp. His response was that two video cameras were used on that day, the one that he was using did not have those features.
- [20] Captain Molema is also stationed at POP as a Platoon commander. On that day he was on duty and around 8h00 he went to Mampoi road in response to the report of a violent protest action. On arrival he found a group of between 400 to 500 protesters had barricaded the street and a business vehicle had been set

alight. The crowd was unrelenting as a result rubber bullets were discharged to disperse the rioting crowd and to bring order.

- [21] He corroborated Colonel Motaung's version that only reduced rubber bullets were used on that day and that these rubber bullets lose their power within a 100-meter radius thus they have no power to cause a bleeding injury let alone the injuries allegedly sustained by the plaintiff.
- [22] Captain Molema insisted that at all material times the police were at Mampoi street where the protest was taking place. He did not see any police entering the streets specifically Rakitla street either on foot or in the Nyalas. In fact, a Nyala cannot enter in such a street. That was in short the evidence relayed on behalf of the respective parties.
- [23] A shooting constitutes an assault, it infringes a person's bodily integrity which is *prima facie* unlawful and once the infringement is proved the police must prove justification.² The plaintiff's onus on the plaintiff to make out a *prima case* to prove the infringement on a preponderance of probabilities namely that, the conduct of the police caused the injuries she sustained with the result that she suffered the damages for which compensation is sought.
- [24] Having regard to the evidence proffered for the plaintiff's case, I am not persuaded that the plaintiff has discharged this onus. Except for the plaintiff's insistence, no evidence has been proffered either to prove that the object which struck her was a rubber bullet. Her witness, Matabula did not see when and how the plaintiff was shot. The allegation that she was injured by a rubber bullet is also not borne out from the hospital admission records. Under *Clinical Information*,³ it is recorded that the plaintiff "*fell on her right ankle and hit (illegible) her forehead on the ground.*"

² *Malahe v Minister of Safety and Security and Others* 1999 (1) SA 528 (SCA).

³ Page 3 of the trial bundle.

- [25] It is also important to point out that the defendant's version that the rubber bullets used by the police on that day have no power to cause such injuries let alone render a person unconscious were not controverted by evidence to the contrary. The onus is on the plaintiff to prove that the injuries she sustained were caused by the effects of being shot by a rubber bullet.
- [26] Even if I were to be charitable and accept that despite these shortcomings in the plaintiff's evidence she might have been shot with a rubber bullet, her assertion that she was not part of the protest does not assist her case because on her own version, she left the sanctity of her home fully aware of the riotous nature of the protest. She chose to go and place herself in that volatile situation just for the sake of satisfying her curiosity to this end, I am aligning myself with the conclusions in *Lehlela v Minister of Police*⁴ where it was held that by placing herself in the area of protest the plaintiff voluntarily assumed risk of being injured.
- [27] The plaintiff's reliance on *Nkoane v Minister of Police*⁵ is in my view unsound. As opposed to the facts of this matter, the accepted evidence in *Nkoane*, was that *Nkoane* was not a bystander caught in the midst of a violent protest. She was shot on her way to the shop about 400 meters away from where the protest was taking place and by the police who had chased the protesters into her residential area.
- [28] In conclusion, I find that having regard to the facts of this matter the plaintiff has not succeeded in proving that the injuries she sustained on 20 January 2020 are attributable to the conduct of the police. It thus follows that no liability can be imputed to the defendant. The claim has to fail.
- [29] I make the following order:

⁴ (13151/2014) [2022] ZAWCHC 235; [2023] 1 ALL SA 438 (WCC).

⁵ Delivered by this court on 30 January 2023 under case number (3920/2020) [2023] ZAFSHC 33.

ORDER

1. The plaintiff's claim is dismissed with costs.

The Honourable Justice
2023-12-08
N.S. Daniso

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the plaintiff:

Instructed by:

Adv. L. LER. Pohl SC

Honey Attorneys

BLOEMFONTEIN

Counsel on behalf of the defendant:

Instructed by:

Adv. T. Ntoane

Office of the State attorney

BLOEMFONTEIN