

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

NOT REPORTABLE

CASE NO: 520/07

Delivered on : 19/09/19

In the matter between:

ZANOXOLO NOMGEJO

Plaintiff

And

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

NHLANGULELA DJP

[1] The plaintiff, an adult male, instituted an action against the defendant claiming compensation in the sum of R2,4 million for damages arising out of an alleged assault by two policemen who served as the employees of the Department of Safety and Security, and over whom the defendant is vicariously liable in his capacity as the political head of the Department.

[2] The action is defended.

[3] By reason that the issues of the *merits* and *quantum* were separated in terms of Rule 33 (4) of the rules of the High Courts, the Court is called upon to answer the question whether the defendant is liable to pay for the damages. .

[4] The plaintiff's claim is founded on the cause of action which is set out in paragraph 3 of the particulars of claim, namely:

"3.1 On or about 7 October 2006 at Tsolo in town within the area of jurisdiction of the above Honourable Court the members of South African Police whose identity are unknown to the plaintiff unlawfully and wrongfully gunshot the plaintiff at his arm at the back without justifiable cause or reason."

[5] The plaintiff's plea reads:

"Ad paragraph 3

Defendant has no knowledge of the allegations but denies them as if specifically traversed and deponent is put to proof. In amplification, defendant states that no criminal charges were ever laid against any member of the police services in Tsolo or anywhere in connection with the alleged shooting, neither was there any report made to the police in connection therewith."

[6] The purpose of pleading is *inter alia* to set the parameters within which the proceedings will be conducted and evidence admitted or excluded – see: *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107. In this case the pleadings raise an issue whether the plaintiff was assaulted by the police. The pleadings do not take the enquiry beyond that issue.

[7] The evidence adduced by the plaintiff and his witness, Mr Mawethu Samela, show the following: On 07 October 2007 the plaintiff attended work at Ali's Place, Tsolo, a business that makes planks out of wood. There was a grocery shop at the nearby known as Queen's Rose Supermarket. At about 6 pm, whilst walking near the Supermarket building he heard a noise emanating from behind him. Immediately thereafter he saw a man running past him and being followed by two policemen wearing police uniforms at a distance of approximately 12 meters. Each of the policemen was wielding a firearm pointed towards the direction of the plaintiff. As he turned his back to the police to proceed on his way, he heard gunshots and felled to

the ground. The plaintiff was approached by the same policemen, still wielding firearms, who instructed him to stand up, but he failed. At that moment the plaintiff realised that he had been injured on the upper part of the left arm which he attributed to a gunshot. The policeman then put their firearms to their waists and called other police using a two-way police radio. Upon arrival of the police van the two policemen instructed the plaintiff to climb onto the back of the van. The plaintiff was again unable to even rise and stand up on the ground. The police later on summoned an ambulance to the scene of shooting that transported the plaintiff to Ngcolosi Hospital, Tsolo. He was later transferred to Mandela Hospital, Mthatha as it had been found by the nursing staff that a bullet lodged into his body was difficult to remove. On 17 October 2006, he was transferred from Mandela to Bedford Hospital, Mthatha. He was detained there until he was discharged on February 2007. The plaintiff was wheel-chair bound until December 2006.

[8] The plaintiff testified further that whilst he was detained at Bedford Hospital, two men visited him. They had brought food and R200,00 for him. During their conversation the two men asked the plaintiff if he knew the identity of the two policemen who had assaulted him by shooting on 07 October 2006. With the benefit of prior advice given by the nursing staff the plaintiff answered that he was unable to identify his assailants. According to the plaintiff his safety would have been compromised had he revealed the identity of the assailants to the visitors.

[9] Mr Samela testified that on 07 October 2006 he was employed by Ambulance Emergency Services, Mthatha. During the evening of the same date he received an instruction from the employer to rush to a scene of shooting at Tsolo, near Queen's Rose Supermarket. Indeed he and two other colleagues of his drove to Tsolo. On arrival there they found the members of the police present together with the plaintiff who was lying on the ground injured. They took the plaintiff onto a wooden stretcher and lifted him into the ambulance as he was not able to move unassisted. Thereafter, they took the plaintiff to Ngcolosi Hospital.

[10] Cross examination of the plaintiff and Mr Samela, aimed only at discrediting their evidence, would prove to be an exercise in futility simply because there was no contradictory version to pursue. Instead the version of the plaintiff was bolstered by the fact that his injuries were attributed to shooting and the unassailable account

given by Mr Samela that the police and their official motor vehicle were present at the scene of shooting. Questions put to Mr Samela pertaining to his attendance at the scene and the presence of the plaintiff there, which were answered affirmatively, only served to corroborate the plaintiff's evidence. Suffice it to say that the plaintiff and Mr Samela were not shaken under cross examination.

[11] Mr Peter Nxitywa testified on behalf of the defendant about three rifles and 108 live rounds of ammunition that were shown in the Occurrence Book (the OB) to have been issued out to some unidentified members of the Department who were attached to Tsolo Police Station on 07 October 2006. The OB also reflected that the same number of firearms and ammunition were returned without having been used. But Mr Nxitywa did not tell the Court why those weapons had to be issued, and the details of the project for which they had been issued were not given. Mr Nxitywa was not present at Tsolo Police Station on 07 October 2006. It is not hard to see that the plaintiff would never have been able to report the incident at the Police Station on 07 October 2006. To that extent his evidence with regard to the recordings in the OB was an attempt to show that the shooting incident in which the plaintiff was involved did not exist and that, if it did, it was never reported to the police. Such evidence may safely be rejected as irrelevant and unreliable. It also fails on probabilities in that the person present at the Station on 07 October 2006 and with knowledge of the reasons why the entries were made in the OB did not testify. On the test of credibility, reliability and probabilities as adumbrated in the case of *Stellenbosch Farmers' Winery Group Ltd and And Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14I-15E the evidence of the plaintiff together with Mr Samela is more probable. However, this finding does not in itself decide the case.

[12] Since assault is a delict, the plaintiff has *onus* to prove that he sustained harm; the defendant's conduct is wrongful; there is a causal connection between the conduct and plaintiff's harm; and that there is fault or blameworthiness on the part of the defendant. I deal with these elements hereinbelow.

[13] The evidence tendered on behalf of the defendant that there was no shooting incident reported to Tsolo Police Station on 07 October 2006 does not contradict the

proved facts that the plaintiff was shot at and injured by the police of Tsolo near Queen's Rose Supermarket, Tsolo. The identity of plaintiff's assailants is also proved by evidence that two armed male persons wearing police uniforms with matching insignia on it, committed the assault; a police radio was used by those officials to call for police re-enforcement; and that a motor vehicle of a description fitting that used by the police of Tsolo everyday was present at the scene of shooting. Such evidence is sufficient proof that the members of Tsolo Police Station injured the plaintiff. By parity of reasoning a causal connection between the conduct of the police and plaintiff's harm is established by the reliable facts. It bears mentioning as well that the conduct of the police officials is the proximate cause of the harm caused to the plaintiff. The provisions of s 205 (3) of the Constitution, 1996 enjoins all members of the Department of Safety and Security, including those who injured the plaintiff, to protect and secure the inhabitants of the Republic, including the plaintiff. An unjustified breach of this police duty is unlawful/wrongful. Fault for the wrongful conduct in this case can only be attributed to the two policemen who injured the plaintiff. This position is confirmed by the Constitutional Court in *K v Minister of Safety And Security* 2005 (6) SA 419 (CC) at 443, para. 52.

[14] Consequently, the plaintiff has discharged *onus* of proof that the defendant is vicariously liable to compensate the plaintiff for the damages he suffered due to the wrongful conduct of the police officials of Tsolo that they committed with *animus injuriandi*. See the case of *Mhlongo And Another N.O. v Minister of Police* 1978 (2) SA 551 (A) at 567E-G; and *K v Minister of Safety And Security*, *supra*, where the application of the provisions of s 2 (1) of the State Liability Act No. 20 of 1957 is endorsed. The relevant provisions of s 2 read as follows:

- “(1) Any claim against the State which would, if that claim had arisen against a person, be a ground of an action in any competent Court, shall be cognizable by such Court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State, acting in his capacity and within the scope of his authority as such servant.
- (2) In any or other proceedings instituted by virtue of the provisions of section 1, the executive

authority of the department concerned must be cited as nominal defendant or respondent.”

[15] The costs incurred in the determination of the issue of liability must be paid by the defendant.

[16] In the result the following order shall issue:

1. **The defendant be and is hereby held liable to pay such amount of damages as may be proved for the wrongful shooting of the plaintiff at Tsolo on 07 October 2006.**
2. **The trial costs incurred in determining the issue of liability, including all reserved costs, shall be paid by the defendant.**

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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