



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ☒ YES/NO
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES/NO
(3)	REVISED
DATE:	13/9/2018
SIGNATURE:	<i>[Handwritten Signature]</i>

Case No. 10618/2016

In the matter between:

MNGOMEZULU, KUSA RICHARD

PLAINTIFF

And

MINISTER OF POLICE

DEFENDANT

JUDGMENT

1. The plaintiff has sued the defendant for damages. It is the case for the plaintiff that on 12 July 2014 and during a service delivery protest, he was shot in the hand by one of the defendant's employees.
2. The parties applied at the commencement of the trial for an order separating the issues of liability and the quantum of damages. I granted the order sought and the trial proceeded for the determination of liability with the issue of the quantum of damages postponed *sine die*.
3. The defendant had raised a special plea of non-compliance with the provisions of section 3 (2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. This plea was however formally abandoned.
4. The facts of the case are largely common cause. On 12 July 2014 and in the area of Freedom Park near the Golden Highway in Gauteng, approximately 1500 members of the Freedom Park community, of which the plaintiff was one, decided to protest against the fact that they had been without electricity for four days.
5. The community marched and eventually reached the intersection of the Golden Highway where it runs from Johannesburg in the North to Vereeniging in the South. Freedom Park is on the Western side of the intersection and Eldorado Park on the Eastern side. The community entered into the intersection and blocked it for traffic travelling in all directions.

6. The plaintiff testified that the march was peaceful and that nothing untoward was afoot. While standing somewhere near the middle (and to the side) of the crowd, he heard gunshots behind him. He turned around and raised his hands when he saw a policeman pointing a shotgun at him. He began to move backwards with his hands still raised and it was then that the policeman fired, hitting him in the hand and causing a large number of "pellets" to lodge in his hand. He was injured and ran to the nearby fire-station where he was assisted. He was only able to go to the hospital the next day as no ambulances or taxis could enter the area because of the protest. He afterward also reported the matter at the Eldorado police station.
7. Warrant Officer Manaswe ("Manaswe") and Constable Godi ("Godi") testified on behalf of the defendant. They were police officers of 27 and 10 years standing respectively, both attached to the Public Order Policing Unit and having attended the scene of the protest on the day in question.
8. Their evidence was that their unit was the only police unit on the scene. They, together with their commanding officer Colonel Hine had tried to calm the situation and had even arranged for a local Councilor to try and talk to the community. The situation became progressively more unstable. The Councilor was taken away for his safety and the community had begun throwing stones at motorists driving on the Golden Highway. Colonel Hine had tried to make a final attempt to talk to the community but had to abandon this for his own safety.

9. Colonel Hine had then given the order to use a stun grenade which was done. This did not have the desired effect of causing the community to disperse and so they police then resorted to firing rubber bullets. Before any rubber bullets were fired, the police which included both Manaswe and Godi lined up to one side. This was done so as to prevent police officers being caught in any crossfire.
10. After the community was finally dispersed the officers reported all the ammunition used. On the day in question all that had been issued to the police had been stun grenades as well as rubber bullets. This is what was used.
11. All the while events were unfolding, Manaswe had been in radio contact with his base and had been reporting developments. This communication is all recorded and then put into what is called an "iris" report. The report was tendered into evidence and corroborated the events as testified to by Manaswe and Godi and in particular listed the ammunition used.
12. Both Manaswe and Godi were adamant that the only ammunition used on the day had been the stun grenade and rubber bullets. They denied that they had been issued with "pellet" ammunition or that it was used by them. Manaswe testified that the use of "pellet" ammunition had been discontinued some 10 years before the incident. Godi testified that in his 10 years' service in the unit he had never used such ammunition and had only ever seen and used it during training when he was at college in 2007.

13. The “iris” report¹ recorded the use of the stun grenade and the rubber bullets. No other ammunition is recorded as having been used.
14. The court is faced with two mutually exclusive and destructive versions. If the plaintiff’s evidence is accepted, then the police must have used “pellet” ammunition and shot him. Conversely if the police did not use “pellet” ammunition then it is not they who shot him. The onus² is on the plaintiff to show on a balance of probability that it was the police that shot him with “pellet” ammunition.
15. In these circumstances, the test to be applied is that set out in by Eksteen JP in *National Employers’ General v Jagers*,³ as follows:

‘It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of

¹ Part of the res gestae – see *The South African Law of Evidence* 2nd edition, Zeffert & Paizes, LexisNexis 2009 at page 461

² *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 575

³ *National Employers’ General Insurance v Jagers* 1984 (4) SA 437 (E) at 440D. See also *Stellenbosch Farmers’ Winery Group Ltd v Martell et cie* 2003 (1) SA 1 (SCA) para 5 and *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 558E-G.

a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

16. The plaintiff's evidence was that he was in the crowd and that a policeman approached him from behind. For this to have occurred, the policeman would have had to walk through the crowd, on his own, with his weapon raised in order to have confronted the plaintiff in the manner he testified. Even if I were to accept the plaintiff's evidence that the protest was peaceful, it is unlikely that no-one would have alerted the plaintiff or for that matter anyone else to the presence of a policeman brandishing a weapon. Were the protest peaceful, this would have been sufficiently unusual so as to have provoked some reaction from bystanders especially if the plaintiff had been shot in the manner he said.
17. The evidence of both Manaswe and Godi was that the rubber bullets that were used would have caused bruising – "left a black mark" and would not have broken the skin. Furthermore if "pellet" ammunition had been used on the plaintiff at the range he said, it would have blown his hand off and not injured him as he testified.
18. Besides the evidence of Manaswe and Godi, the plaintiff himself testified that he was not able to leave the area to go for medical treatment until the next day because transport in the area was disrupted because of the protest. Had the protest been peaceful, there would have

been no reason for either ambulances or taxis to avoid operating in the vicinity. The protest was as a probability not peaceful.

19. On consideration of the respective versions and the evidence as a whole, I find ~~that~~ the plaintiff's version improbable and that of Manaswe and Godi probable. If the plaintiff was indeed shot with "pellet" ammunition, it was not by the police on 12 July 2014.

20. In the circumstances I make the following order:

20.1 The plaintiff's claim is dismissed with costs.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

HEARD ON: 12 SEPTEMBER 2018

JUDGMENT DELIVERED ON: 13 SEPTEMBER 2018

COUNSEL FOR THE PLAINTIFF: ADV. R BOTHA

INSTRUCTED BY: TALANE INC.

REFERENCE: MR B MALAMLELA

COUNSEL FOR THE DEFENDANT: ADV. N NHAMURAVATA

INSTRUCTED BY: THE STATE ATTORNEY

REFERENCE: MS B MOKGOHLOA