



**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: 4016/2015

In the matter between:

DESIREE NICOLEEN JOHANNAH KOK

Plaintiff

and

THE MINISTER OF POLICE

1st Defendant

GERRYBOLDY JIM

2nd Defendant

GERT WITTLES

3rd Defendant

JUDGMENT BY: REINDERS, J

DELIVERED ON: 20 APRIL 2018

- [1] In the early hours of 25 December 2014 in the rural town Jacobsdal Mrs Desiree Nicoleen Johanna Kok (“the plaintiff”) sustained gunshot wounds (“the shooting incident”). She issued summons claiming damages from the defendants for the alleged wrongful and unlawful assault on her (being shot three times) by police

officers acting within the course and scope of their duties as members of the first defendant, resulting in the injuries sustained by her. At the commencement of the proceedings I was informed by the parties that they only sought a determination on the merits as contained in paragraphs 5 (as amended), 6 and 7 of the plaintiff's Amended Particulars of Claim and the corresponding paragraphs of the defendants' plea. I granted same in terms of Rule 33(4) and the trial proceeded only in respect thereof.

- [2] The first defendant is the Minister of Police and the second and third defendants are Constables Gerrybaldy Jim ("Jim") and Gert Wittles ("Wittles") respectively. It is not disputed that they acted in the course and scope of their duties as employees of the first defendant, but it is denied that the assault was unlawful and wrongful. The defendants pleaded that the result of the plaintiff being shot and injured was "accidental and/or in private/self-defence." In the alternative it is pleaded that the plaintiff consented to be subjected to the risk of injury. In a further alternative to the latter it is pleaded that the plaintiff was negligent and/or contributed to the injuries she sustained.
- [3] The background to this action involves two families. The Kok family ("the Koks") comprise *inter alia* the plaintiff, her two sons (Shane and Shaun), her brother Mr Norman Oliphant ("Norman") and her mother Mrs Caroline Oliphant. Mrs Deka Monyeki, her brother Derick, her son Lasi and other family members belong to the Monyeki family ("the Monyekis"). It is common cause that Wittles, Jim and Mosadi attended to resolving a reported fight between members of the two families at 118 Potele Street, the residence of

the Monyekis. A sketch plan of the latter depicting amongst other buildings and structures in the yard, gates and a washing line, was handed in by agreement as “Exhibit B1” (“the sketch”). Witnesses indicated their positions in the yard at various stages of the incident where applicable.

- [4] In presenting her case the plaintiff testified and called her mother, brother and Mr Jeremy Morris (“Jeremy”). The relevant aspects of their evidences can be summarised as below:
- [5] The plaintiff testified that a quarrel ensued between herself and Mrs Monyeki at a tavern, resulting in further fights between members of the two families. Of importance is the fact that she was hit by Derick with a knob kerie on the head. As Norman was upset about this assault, he wanted to enquire why Derick had assaulted his sister and went to the premises. She was under the influence of liquor but not drunk. Norman and Shaun stood with her outside the gate as Wittles and Jim alighted, addressing the two families.
- [6] The Monyekis tendered their version of the quarrel, but the police did not listen to plaintiff’s account. Norman said this was unfair. Hereupon he ran into the yard and she followed him in an attempt to convince him to rather leave the premises. She had a narrow ladies’ belt in her right hand. It was shortly after 04h00 and the street lights and lights of the house provided visibility. Norman stood at the door of the house, with her behind him. She heard firearms being cocked and saw Jim and Wittles pointing their firearms at Norman. As she turned around she observed Jim 4-5 m right in front of her. She demonstrated that she raised her arms at the side of her body,

her open hands about shoulder height exclaiming: “Wat nou?”. She observed him firing as he was right in front of her and saw that her left ring finger was hanging loosely. It started to ache and the belt fell from her hand. As she turned around she was shot twice in quick succession by Wittles, first in her buttock, and then in her hip. She said: “Hier skiet hulle my weer”. Wittles was standing about 2-3 m away from her. She explained that she was shot in her left buttock and hip, one entering and exiting, the other located in her buttock for a year whereafter it was surgically removed.

- [7] After being shot she leaned against the pole of the washing line. She observed Wittles and Jim pointing firearms at her mother (who had in the meantime entered the yard) and Norman. As the latter two were busy retreating out of the premises, she limped towards them. Norman assisted her to sit down in the road until the arrival of an ambulance which took her to hospital.

- [8] During cross-examination it was put to the plaintiff by Mr Mene on behalf of the defendants that the shooting occurred at the back of the yard close to the fence (marked as “shooting” on the sketch). This was denied by her. She made two pink markings indicating that she was at the door at the corner of the house and not at the back of the yard when the shooting occurred. The version of the defendants was that the Koks were a group of 9-10 people at the gate, armed with knives, pangas, rocks and a hammer. The group were chasing Wittles to the back of the yard, he warned them that he was a policer officer and armed and would protect himself. Somebody uttered the words: “Ek soek daai gun”, another :“Ek het nog nie ‘n polisieman dood gemaak nie vandag wil ek een

doodmaak". Plaintiff said to the group: "Julle vat te lank om hierdie persoon dood te maak" (collectively hereinlater referred to as "the comments"). He fired a warning shot in the air. It was put to her that when Wittles attempted to fire a second warning shot "you stabbed him and a fire shot went off, that is how you got shot". Hereafter Norman hit Wittles with a hammer on his chest, causing him to fall backwards and one of the group said that he is dead. Everyone ran out of the yard. It was put to the plaintiff that the cartridge found was that of Wittles' firearm, and that no cartridge were found from Jim's firearm. The plaintiff responded that what she knows is that three shots were fired at her body.

- [9] Plaintiff denied in totality being part of a group in the yard, which was armed as indicated by the police, persisting that it was only herself and Norman in the yard. No chasing of Wittles took place. No warning shots were fired. None of the utterances occurred. She was unarmed and was a distance from Wittles, she only turned after having been already shot in her hand. Plaintiff admitted that the police had the right to intervene, but maintained that it was never necessary for them to "physically step in".
- [10] Mr Oliphant testified that he received a phone call from the plaintiff that she had been assaulted by Derick with a knob kerie. Since he wanted to establish from Derick the reason for this assault, he entered the premises. He did not know where plaintiff was at that stage. He stood at the corner of the main house at the door, leaning with his head against the wall. Within a second he heard the plaintiff shout that she had been shot. He did not see or hear shots due to the commotion, and for the same reason heard no conversation

between the police and plaintiff. He saw his mother and went to assist her as he was concerned and wanted to attend to her. He saw his sister limping out of the yard.

- [11] The comments at the shooting scene were denied by him during cross-examination. He denied being part of a group, chasing Wittles or that warning shots were fired. He never saw weapons at the scene or any weapons in possession of plaintiff. He had a hammer in his possession that slipped out of his pants, but he handed it to the police. He did not bang on the door with a hammer, nor did he observe at the time of the shooting, any firearms being pointed at him as he was facing the door. Same were however pointed at him and his mother when they were leaving the yard. He insisted that they did not pose any threat to the police.
- [12] The 62 year old Mrs Oliphant testified that she was at her home when she was informed by two girls about her daughter being assaulted. Upon her arrival at the premises, she entered and stood at the trees indicated on the sketch. She saw Jim and Wittles at the corner of the house. She heard three shots, but thought it was crackers. Plaintiff was shaking her hand saying that she had been shot, but the witness thought that it was a joke. Having observed blood on the pants of the plaintiff, she became weak. Norman went to her (Mrs Oliphant) to assist, and as they were retreating Wittles and Jim were aiming their weapons at them. She observed only Norman, the plaintiff and the police in the yard. During cross-examination she insisted that she heard 3 shots and not 2. She agreed that Norman had a hammer, but insisted that he handed it over to the police. The plaintiff was admitted to hospital with

wounds in her hand, hip and groin. One bullet was stuck in her buttock. Upon discharge of her daughter she took care of her.

- [13] According to Morris he was illegally buying liquor (a beer) from a shanty in the yard before the police arrived. He hid behind the outside toilet. Observing the plaintiff and Norman standing outside the gate, he then saw Norman running in with the plaintiff behind him. He heard a gunshot being fired, followed by the plaintiff exclaiming that she had been shot. He then ran around to the other corner of the toilet, and saw Wittles fire a shot. He did not know if Wittles fired at the plaintiff or at Norman. The plaintiff never moved closer to Wittles and Jim. Norman handed over a hammer to the police. Plaintiff had a belt around her hand which he later picked up at the scene and returned to her. He saw only Norman, the plaintiff and 3 policemen in the yard.
- [14] In cross-examination he denied that he was part of a group that ran into the yard or chased Wittles. He heard 3 gun shots but only witnessed the one being fired by Wittles. Jeremy confirmed the position of the plaintiff as indicated by her at the time when the shooting took place. He saw the plaintiff leaning against a washing line pole after having been shot.
- [15] Warrant Officer Tulani Sibiya ("Sibiya"), Wittles, Warrant Officer Hermanus Herbst ("Herbst") and Jim were called to testify for the Defendants.

- [16] According to Herbst he arrived at the scene at 08:00 and took over from Brooks as Investigating Officer. He received the firearm of Wittles and one empty cartridge. Brooks informed him that a shot was apparently fired by Jim, and requested him to smell Jim's firearm for gun powder which would be indicative thereof that a shot was fired. He did not smell any. Brooks told him that there had to be two more empty cartridges at the scene, but they could not find any. He did not find any weapons at the scene. Weapons were handed to him by Brooks, whereafter he personally recorded it into the SAP13 register ("Exhibit A5"). These included knives, pangas ("kapmes"), a hammer and a stone. He did not know where the weapons were found or from whom it had been confiscated. Herbst confirmed that on the day of the incident, he took a photo ("Exhibit A18") of Wittles' hand, indicating a blue mark and fresh blood. He did not see who inflicted the wound to Wittles. On the following day he also took a photo of a blue mark on the left shoulder of Wittles ("Exhibit A18"). Likewise he could not testify how the bruise was sustained.
- [17] Sibiya is an expert in ballistic related cases. It is common cause that he received two pistols and one fired cartridge case to examine, one pistol the duty weapon of Wittles, the other of Jim. The cartridge was fired by the pistol of Wittles. He could not tell if any shots were fired from Jim's weapon as no empty cartridges were handed in.
- [18] Wittles testified that upon his arrival at the premises, he tried to intervene between the families. He was armed with a firearm and pepper spray and wore a bullet proof vest. He identified the plaintiff,

Shaun and Norman. On his arrival the Koks were outside the gate and the Monyekis, of whom he could identify Derick, were inside. He addressed both families. The Monyekis gave their co-operation but the Koks, who were drunk, left the premises after a while, swearing and shouting. He suspected that they would return again and told his colleagues Jim and Mosadi to hang around. Initially there were 8-10 people, but "more people" returned after 10-15 minutes, armed with knob keries, pangas, bottle heads and stones. Plaintiff was armed with a knife. Shaun threatened to kill Jim when off duty. Norman took out a hammer from his jacket and wanted to hit him therewith, but avoided being struck therewith. He did not take the hammer then as Norman could have broken his arm. At the same time Norman ran into the yard and the rest of the Koks also, whilst the Monyekis ran into their house and shut the door. He grabbed Norman from behind, reprimanding him. Whilst doing so he was chased to the back of the yard by the plaintiff armed with a knife, Norman with a hammer, Shaun with a panga and an unknown male with a panga. There he realised that the fence was high and it would be dangerous for him to climb over in an attempt to escape, thereby turning his back on his chasers. He instructed them to seize fighting, and said: "Ek is 'n polisiebeampte en het 'n vuurwapen". They still advanced and he fired a warning shot in the air - yet they advanced. One said: "Ek soek die gun", another: "Ek het nog nooit 'n polisieman doodgemaak nie". Realising that his life was in danger, he attempted a second warning shot. His firearm was pointed at 45 degrees, and lifting his right hand plaintiff stabbed him on his hand. A shot went off, and immediately Norman hit him with the hammer on his chest, causing him to fall on his back. Someone said: "Ons het nou die fokken

polisieman". He believed he was dead when he fell, but started running out of the yard. At no stage did he shoot at anyone directly. Herbst photographed his hand and chest, but he did not complete a J88 form in respect of the injuries.

[19] During cross-examination by Mrs Stanton on behalf of the plaintiff, she confronted Wittles with his affidavit deposed to on the day of the incident. Therein he stated that he fired the first warning shot after the comments were uttered. In his evidence-in-chief he testified that the first warning shot was fired as the group approached, and the second shot was fired after the comments. According to him he was emotionally upset after the incident, which might have caused the discrepancy. He conceded that he did not make mention of an assault by Derick in his statement. Wittles conceded that he was armed with a firearm and pepper spray, but replied that he did not use the latter as it was usually blocked. He did not call for any back up. He did not arrest anyone as they were outnumbered and he was taught "never to provoke a situation". Jim and Mosadi were also present at the premises. He never requested the assistance of his colleagues and conceded that he could have called them for assistance. It is standing procedure that they should defend one another.

[20] It is not denied by Wittles that the plaintiff did not have any gunshot wounds when she entered the premises. When put to him that he could not deny that the plaintiff was shot three times and sustained four wounds, he responded that he heard on the police radio that the plaintiff had been shot 3 times. According to him he fired two warning shots and there were no other firearms apart from that of

the police, but he “can confirm that his firearm could have shot” the plaintiff. His explanation to the question posed to him how the plaintiff sustained 3 gunshot wounds, was: “Ek het gehoor as ‘n koeël ‘n vleiswond is en nie in been, kon dit gedraai het”. When it was put to him that the shots that were fired by him hit the plaintiff, he replied: “Nee ek weet nie waar dit vandaan kon kom nie.” He conceded that it was not necessary to fire in protection of the Moneykis as they were already in the safety of their house.

[21] Jim testified that he arrived at the Monyeki residence wearing a bullet proof vest, armed with a gun and pepper spray. He found a group outside at the gate. They were armed. He knew some of them. Shane, Shaun, the plaintiff and a friend of Shaun called Sloki. They were between 8 and 10 people. After a while they returned and Norman was with them. Shaun started swearing at them, and threatened to kill him when off duty. He saw a hammer with Norman. He saw people with pangas and other weapons but could not identify who had what. Whilst talking to Norman, he ran past them into the yard, followed by the rest of his group. He and Mosadi were at the corner of the house and did not want to go to the back of the yard as it was dark. He heard Wittles saying: “Ek is ‘n polisieman, stop julle”, followed by a gun shot and someone saying: “Ek is geskiet.” People came running out of the yard and he also ran out.

[22] In cross-examination he was confronted with his sworn statement wherein he declared “we then draw (sic) our firearms as we were caught in a corner and it was dark”. He explained that he referred to himself and Mosadi who were standing at the corner of the

house. He insisted that he did not fire any shots and that he still had 15 rounds in the magazine when it was handed to Brooks. He heard two gun shots. Jim conceded that it was not necessary to fire in protection of the Monyekis as they were in the safety of their house. He conceded that he could control the group by warning them without shooting.

[23] The defendants closed their case.

[24] It is trite that every infringement of bodily integrity is *prima facie* unlawful. Once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification.

See: ***Mabaso v Felix 1981 (3) SA 865 (A)*** at 873 E-874E,
cited with approval in ***Noor Moghamat Isaacs v Centre Guards CC [2004] All SA 221 (C)*** at para [7];

Malahe and Others v Minister of Safety and Security and Others 1999 (1) SA 528 (SCA) at 533 J – 534 A, 540 F-H.

[25] The parties presented conflicting versions of the shooting incident that occurred. In resolving a factual dispute, I am guided by the principles laid down in ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SCA 11*** at 14-15 para [5]:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.”

[26] I am mindful of minor discrepancies between the evidence tendered by the plaintiff and her affidavits, as well as the testimonies of Norman and Mrs Oliphant. So for example was plaintiff confronted with the fight in the tavern over a chair and that

she omitted to mention in court some remarks of a “grootmanhouding” towards Norman as stated in one of her affidavits. In my view these were not material. The plaintiff made a satisfactory impression on me in the witness stand and I found her to be adamant when testifying regarding the shooting incident. She and her witnesses corroborated one another in the material aspects on what transpired during the critical time of the shooting. Her version explains how she sustained four gun shot wounds (one shot causing two wounds, namely an entry and exit wound). Sibiya and Herbst made favourable impressions on me, although neither had knowledge of the shooting incident itself. Wittles and Jim made less favourable impressions on me. For the reasons stated herein later I conclude that Wittles’ and Jim’s versions are improbable.

[27] It can be safely accepted that on 25 December 2014 the plaintiff got injured at the time when the second and third defendants, in the course of their employment with the first defendant, went to a premises in Jacobsdal to attempt a restoral of peace between the plaintiff’s family and the family of the Monyekis.

[28] According to the plaintiff she was shot three times and sustained four bullet wounds as described by her during her evidence in chief. The evidence of her mother confirms the existence of the wounds. I may add that Wittles testified that directly after the incident he heard on the police radio that the plaintiff had been shot three times. That she sustained four wounds had neither been contested in cross-examination, nor in testimony by any of the defendants. I am satisfied that plaintiff’s evidence regarding the injuries sustained is to be accepted by me.

[29] The defendants on the other hand aver that she got injured in circumstances which in essence boils down thereto that they acted either in self defence or in defence of the Monyekis.

[30] To be successful with such a defence it is incumbent on the defendants to proof an unlawful attack, reasonable grounds for believing that the defendant was in physical danger and that the force used was in the particular circumstances necessary to repel the attack and commensurate with the plaintiff's aggression.

See: ***Sv Makwanyane 1995 (3) SA 391 (CC)*** at para [138].
Mabaso v Felix supra.

[31] Perhaps it is appropriate to point out that provocation may mitigate damages but it obviously does not justify an assault.

See: ***Winterbach v Masters 1989 (1) SA 922 (ECD)*** at 925 I

[32] Both Wittles and Jim during cross-examination testified that at the time of the shooting (on their own versions) the necessity to protect the Monyekis lapsed as they were safely in their house. The only circumstances therefore in which the defendants would be able to justify the use of the force of shooting were in the event of self-defence.

[33] On the version of the defendants there is no explanation why the plaintiff sustained the wounds. In fact, none of the defendants aver that they shot at the plaintiff on purpose to protect themselves.

Wittles at best testified that he fired a warning shot into the air and that a second shot went off at a time when he was attempting to lift his firearm when plaintiff stabbed him in his right hand with a knife. Assuming that the second shot struck the plaintiff it still does not explain the four gunshot wounds. The witness did not testify that the second gun shot struck the plaintiff although he conceded that the second shot could have struck her.

The uncertainty of the witness concerns me. It is reasonable to assume that had it struck her, he would have noticed it as they were in close proximity. It is reasonable to assume that had he shot her in these circumstances, the shot would have had the effect to stop her attack and one would in probabilities have expected her at least to have cried in agony and that he would have noticed it. Even Jim testified that he heard the plaintiff saying: "Ek is geskiet."

[34] On the evidence of the defendants there is no explanation of how the plaintiff therefore sustained four gunshot wounds. The onus is on the defendants to prove on a balance of probabilities why it was necessary to shoot and that the force used was necessary to repel the attack. The evidence of the defendants falls short in this regard. I may add that the plaintiff's evidence do explain the circumstances under which she sustained these particular injuries.

[35] I accept that the defendants on the evening went to restore peace. I bear in mind that the incident took place not at plaintiff's property but at the property of the Monyeki's. The plaintiff and her family members in attendance at the gate of the Monyeki's were in all probabilities aggressive. The defendants being trained police officers are to deal with circumstances like these to the best of their

ability. They went there not only armed, but also in possession of pepper spray. When they left, only the plaintiff (who is a women), sustained three gun shots without the defendants being able to account for each one of those shots. They simply cannot explain how she sustained the wounds.

[36] In the circumstances I cannot find that the defendants have proven self defence, nor that any of the other defences pleaded have been proven. There is no reason why costs should not follow suit.

I make the following order:

1. It is declared that the defendants assaulted the plaintiff on the morning of the 25 December 2014 and that defendants are jointly and severally liable for such damages as the plaintiff may prove.
2. The defendants are to pay the costs jointly and severally.
3. The case is postponed to the Rule 37 (8) civil pre-trial court roll of 14 May 2018 to deal with the remainder of the issues which stood over for later determination.

C REINDERS, J

On behalf of Plaintiff:

Adv A. Stanton
Instructed by:

Hugo Mathewson & Oosthuizen Inc.
c/o Van Wyk & Preller Attorneys
Bloemfontein

On behalf of Defendants: Adv. B.S. Mene
Instructed by:
State Attorneys
Bloemfontein