

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	YES
(3) REVISED.	
21/02/2012	
DATE	SIGNATURE

Case No: 54731/2009

Date heard: 08/02/2012

Date of judgment: 22/02/2012

In the matter between:

Anthony Church Makitla

PLAINTIFF

and

SBV Services (Pty) Ltd

1st DEFENDANT

Alex Noko Shiko

2nd DEFENDANT

Mpho Thomas Mokoena

3rd DEFENDANT

Mxolisi George Magagula

4th DEFENDANT

Sylvester

5th DEFENDANT

JUDGMENT

DU PLESSIS J:

This action was initially instituted against five defendants. The matter proceeded to trial. At the end of the plaintiff's case the fifth defendant was absolved from the instance. He plays no further part in the proceedings.

The plaintiff contends that the second to fourth defendants, acting in the course and scope of their employment with the first defendant ("SBV") unlawfully caused him humiliation, shock, distress fear and anxiety. He claims damages in the sum of R988 320. He does not pertinently allege fault (negligence or intent) on the part of the defendants. It is, however, common cause that the plaintiff's claim is based on the *actio iniuriarum*. Accordingly, the plaintiff also had to prove that the defendants committed the acts complained of with the intent of injuring the plaintiff's personality rights.

By agreement the issues were separated such that the trial before this court proceeded only for the determination of the issues raised by paragraphs 1 to 7 of the particulars of claim. In broad terms these paragraphs relate to what is generally called 'the merits' of the claim. The other issues were postponed *sine die* for later determination if necessary.

The plaintiff gave evidence and called Captain Makgoba of the South African Police Service (SAPS) to testify on his behalf. The second, third and fourth defendants gave evidence and the defendants further called Inspector Van der Westhuizen and a Mr Hattingh as witnesses. The latter is a training officer employed by SBV.

There are differences between the respective witnesses' accounts of the relevant events. The core facts are not in issue, however. What follows is a summary of the core facts. Where material facts are in dispute, I shall indicate that.

SBV conducts the business of transporting cash in armoured vehicles. On 11 April 2008 the second defendant ("Shiko") was the driver of such an armoured vehicle ("the truck"). The third and fourth defendants were the crew on the truck. I shall refer to them respectively as "Mokoena" and "Magagula". On the day in question the three defendants had to transport cash from Pretoria to Soshanguve/Mabopane where they were to service automatic teller machines ("ATM's"). From there they were to transport cash to Hammanskraal. The erstwhile fifth defendant was a bank employee who travelled in the truck to assist with the servicing of ATM's.

The SAPS received information that the truck was to be held up and robbed on the Zoutpan road to Hammanskraal. A task team of officers from the SAPS Crime Intelligence unit was set up. The team, consisting of about six members were instructed, each in a separate private car, to keep the truck under surveillance and to follow it from Pretoria to a geographical point from where the SAPS Task Force were to take over the operation. The police suspected that somebody in the truck might be cooperating with the would-be robbers. Accordingly, the surveillance operation was to be done covertly: the people in the truck were not to know that they were being watched and followed. Each member of the task team was issued with a R5 rifle and a bullet proof vest. They were instructed also to carry their handguns and surveillance equipment such as cameras.

The plaintiff, a captain in the SAPS and attached to the Crime Intelligence unit, was a member of the task team. On the day he drove a Toyota Runnex.

He wore a woollen cap referred to as a "beany" and under his lumber jacket he wore his bullet proof vest. He carried his handgun on his waist and the R5 was in the car between the driver's seat and the door. He had his camera with him.

The task team kept the truck under surveillance through the Pretoria central business district but soon lost contact with it in the morning traffic. The plaintiff, familiar with that area, volunteered to proceed to Soshanguve/Mabopane to see if he could find the truck servicing ATM's there. Inspector Van der Westhuizen, in command of the task team, told the plaintiff and another team member, Captain Makgoba to proceed to Soshanguve for that purpose and to keep in contact with the rest of the team.

The truck went to the Soshanguve Plaza where it served an ATM. From there it went to a BP filling station for the same purpose.

The second to fourth defendants testified that they noticed the Runnex while at the Soshanguve Plaza. While not alarmed yet, they decided to be on the lookout for it. At the BP station they saw the Runnex driving past again. One of the crew members saw that he was talking on a cellular telephone. These actions heightened the crew's suspicion. As the truck proceeded to the next service point, Shiko contacted the SBV base, informed them of the situation and asked them to check the registration number of the Runnex.

The plaintiff said that he did not go to the Plaza and that the crew could not have seen him there. He said that he saw the truck again for the first time at the BP station. Captain Makgoba also said that the plaintiff made contact with

her telling her that he had seen the truck at the BP station. She, however, said that the Plaza is close to the BP station, and she did not deny that the plaintiff had been at the Plaza. The plaintiff also denied that the crew saw him at the BP station albeit that he saw the truck there.

Captain Makgoba said that, when the plaintiff made contact with her, she in turn contacted Van der Westhuizen who instructed the task team members to proceed to where the truck was.

From the BP station the truck proceeded to the nearby Pick and Pay mall. The plaintiff went into the parking lot of the mall where he stopped in a parking bay. He testified that he saw the truck coming into the parking lot and proceeding to an ATM behind him. A short while later the truck drove past him and as it continued, the plaintiff took a photograph of the truck. According to the plaintiff, the truck then stopped and reversed towards him. In the meantime Captain Makgoba, who remained in contact with the plaintiff, had also entered the parking lot and she parked some distance from where the plaintiff was. She also saw the truck stopping and going back towards the plaintiff. Realising that he had been compromised, she told the plaintiff, who was still in contact with her, to withdraw.

Magagula testified that, as they entered the parking lot, they first drove through it, as they usually did, to make sure that it was safe. They saw the Runnex in the parking lot and decided not to service the ATM but rather to continue on their route. They drove past the Runnex, stopped next to it and

Mokoena looked at the driver. Mokoena confirmed this and said that the plaintiff was just sitting in the Runnex drinking water. They decided to drive on. As they did so, Magagula saw the plaintiff taking a photograph of them and Mokoena saw him talking on his cell phone. Magagula alerted the rest of the crew. Magagula said, and this was later confirmed by Hattingh, that they had been trained to regard people taking photographs and talking on cellular telephones as suspicious. The crew decided to confront the plaintiff and Shiko drove around and then stopped the truck next to but somewhat to the front of the Runnex.

The plaintiff testified that, after the truck had stopped, he saw a man armed with a rifle get out and approach the Runnex. A second man got out, also armed, and went and stood in front of the Runnex. The first man, the plaintiff said, came and stood next to the driver's door and ordered the plaintiff to open the window. The man then aggressively ordered the plaintiff out of the Runnex telling him to keep his hands where the man could see them. The plaintiff said that he told the man (Magagula as it turned out) that he was a policeman and that he (plaintiff) was armed with a pistol and a rifle. As the plaintiff got out of the Runnex, his rifle, he said, fell out. Magagula picked it up and told the plaintiff to kneel. At this stage, the plaintiff said, he opened his jacket to expose the bullet proof vest. He also produced his police identity card and his identity book. Magagula told him to lie down, facing the ground, and put his foot on the plaintiff's neck. Makgoba, in broad terms, confirmed the plaintiff's evidence in this regard. She, however, had no clear view of events as the Runnex was between her and where the plaintiff and Magagula were.

Magagulq said that when he asked the plaintiff why the latter was taking photos, the plaintiff denied that he had done so. Increasingly suspicious, Magagula instructed the plaintiff to open the door of the Runnex keeping his hands where Magagula could see them. When the plaintiff got out, Magagula saw the R5 and the plaintiff's pistol. Magagula confirmed that the plaintiff tried to explain and said that he was a policeman. Trained not to accept such explanations at face value, Magagula told the plaintiff to lie face down. He denied that he put his foot on the plaintiff, adding that by so doing he would have been exposed literally to shooting himself in the foot. Magagula confirmed that he saw the plaintiff's police identification but also said the being robbed by purported police officers was not uncommon. He further said that his intention was to have the plaintiff's explanation verified while the latter was lying on the ground. He told Shiko to call the base and to ask them in turn to call the police. Mokoena, who went and stood to the front of the Runnex confirmed Magagula's evidence, adding that he (Mokoena) took the R5 from the Runnex. He too did not believe the plaintiff's assertion that he was a policeman. Shiko said that he had all the while been keeping the SBV base informed.

It is not in issue that Shiko then fired a number of shots into the left tyres of the Runnex.

The plaintiff's version is that he heard Mokoena shouting "shoot". Five to seven shots were fired. According to the plaintiff, he heard some of the shots hitting the ground around him and he felt pieces of gravel on his face. Makgoba

saw that the shots were being fired from the truck. She also saw the Runnex "going down" and realised that its tyres had been shot out.

The defendants explained the shooting as follows. Mokoena saw a silver BMW car speeding into the parking lot. He thought that it was on its way to assist the plaintiff. It is common, Mokoena said, for BMW's to be used in cash in transit robberies. Mokoena alerted Shiko who immediately drove the truck in a half circle around the Runnex so as to keep the truck between the BMW and the Runnex, Mokoena, Magagula and the plaintiff. At the end of the half circle Shiko turned the truck so as to stand to the left of the Runnex, facing in the same direction. From the truck Shiko fired a number of warning shots into the tyres of the Runnex. The BMW turned around and sped out of the parking lot. Shiko explained, and this was later confirmed by Hattingh, that he had been trained, when firing warning shots in a public place, to aim at an object that would absorb the shots. He used the left hand tyres of the Runnex for that purpose. The defendants denied that the shots were fired in the plaintiff's direction, pointing out that Magagula was standing next to the plaintiff.

In his evidence the plaintiff denied the existence of the BMW. In cross examination it was put to the defendants that there was no BMW. In response to a request for further particulars for purpose of the trial the plaintiff, however, pertinently admitted that one of the team members, Inspector Maseko drove into the parking lot in a silver BMW.

It is not in issue that soon after the shooting SBV representatives and police from the nearby Rietgat police station arrived on the scene. They had been alerted by the SBV base, who had in turn been alerted by Shiko. Van der Westhuizen also arrived. The plaintiff was taken to the Rietgat police station where the situation was sorted out.

The credibility of witnesses is not central to the issues. There are, however, a few differences that call for an observation as to credibility.

The plaintiff denied that he ever was at the Soshanguve Plaza and accordingly that the defendants could have seen him there. The defendants were adamant that they saw him there for the first time. In view of later events there is no doubt that at some stage the defendants observed the Runnex following them. To the extent necessary, I prefer the defendants' evidence. Magagula and Mokoena in particular were impressive witnesses: They came across as well-trained men who knew exactly what they were doing and who went about their business without fuss. I have no hesitation in accepting Shiko's evidence too but purely on demeanour he was less impressive than the other two defendants. It is in the context of all the evidence improbable that the defendants were lying about the fact that they saw the Runnex at the Plaza: They simply had no reason to lie about that. I find, therefore, that the defendants saw the plaintiff for the first time at or near the Plaza and before they had gone to the BP station.

The plaintiff's denial that the defendants saw him at the BP station makes no sense. He saw them and there simply is no reason why they would not have seen him.

The plaintiff's evidence that Magagula put his foot on his back is in view of Magagula's explanation that it would have been dangerous for him to do so, improbable. I hold that the plaintiff's evidence in this regard was a transparent attempt to create an atmosphere of callousness on the part of the defendants. Callousness on the part of the defendants is not borne out by their conduct throughout the incident.

In view of the plaintiff's admission that Maseko drove into the parking lot with a BMW, his evidence that there was no such event is untrue.

The plaintiff's evidence that the shots were fired in his direction is improbable. Magagula was standing right next to him and Mokoena was not far from them. In the circumstances, it is improbable that Shiko would have fired in that direction. Shiko's actions when the BMW was seen are those of a well-trained man who knew exactly what he was doing. I find it probable that, in accordance with his training, Shiko aimed the shots into the Runnex. It is not in issue that the left hand tyres of the Runnex had indeed been shot out.

The first question is whether the defendants acted unlawfully. What this court must determine is whether, having regard to our constitutional norms, public and legal policy require that the defendants be held liable for their actions on the day (*Le Roux and Others v Dey* 2011 (3) SA 241 (CC) at 315 para. 122).

The defendants were engaged in a notoriously dangerous job where pre-emptive action could mean the difference between life and death. The plaintiff, in turn was engaged in a lawful activity that entailed covertly following and watching the truck. As it turned out, the second to fourth defendants observed the plaintiff following them, speaking on his cellular telephone and photographing them. They did not know and could not know that he was doing so lawfully. In the circumstances the plaintiff's actions caused reasonable suspicion on the part of the defendants and it called for pre-emptive action. The entry of the BMW into the parking lot heightened these suspicions and the need for swift and effective pre-emptive action.

On a conspectus of all the evidence I am of the view that the relevant defendants' actions constituted an appropriate and reasonable response to the plaintiff's suspicious conduct coupled with the entry of the BMW into the parking lot.

Taking full account thereof that the plaintiff was engaged in lawful work, I nevertheless conclude that public and legal policy does not regard it as reasonable that the defendants be held liable for infringements of the plaintiff's personality rights. In this regard it must be borne in mind that the plaintiff was knowingly, in the public interest, engaged in dangerous work. In my view the convictions of society do not require that he be compensated for having been frightened in the course of duty.

I conclude that the defendants did not act unlawfully.

Some may reason that the defendants' actions were not an appropriate reaction to lawful but suspicious conduct but rather a reaction to a danger that did not really exist. Such reasoning will lead thereto that the defendants' actions constituted putative self defence and that, because the plaintiff acted lawfully, the defendants acted unlawfully. On that basis the defendants can in my view still not be held liable because they did not act with the required intent to injure the plaintiff. The defendants' actions were aimed at dealing with a suspicious situation that could, from their point of view, have been dangerous to the point of life threatening. Their intent was to defuse the situation. The evidence shows that they were not acting with the intent to injure the plaintiff's personality rights. I am constrained to add, in view of the dangerous and probably thankless work that the second to fourth defendants do, that they went about their business effectively and with commendable accuracy and constraint.

In the result the following order is made:

The plaintiff's claim is dismissed with costs.



B.R. du Plessis

Judge of the High Court

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