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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No:63901/2021

(1) Reportable: No

(2) Of interest to other judges: No

(3) Revised: Yes

Signature:

Date: 06 November 2024

In the matter between:

Z[...] N[...] obo C[...] N[...]

Plaintiff

And

The Minister of Police

Defendant

JUDGMENT

LESO A.J

INTRODUCTION

1. The plaintiff claims damages in her representative capacity as a natural parent of a minor, C[...] N[...] against the Minister of Police as a result of a gunshot injury suffered by the minor. The plaintiff's claim is premised on vicarious liability as she claims that C[...]’s gunshot injuries after the Police officer fired two warning shots to disperse the crowd that was protesting.

BACKGROUND

2. The plaintiff's claim is pursuant to an incident of protest action by community members on 24 July 2020 at or near No:2251 Ramaphosa Squatter Camp, extension 5 Boksburg, Gauteng. The plaintiff alleges that her minor child was shot by the members of the South African Police when they were acting within the course and scope of their employment.
3. The plaintiff claims that the members of the South African Police force unlawfully and negligently, discharged a firearm/projectiles in the direction of the minor and the community and in so doing, they acted negligently and unlawfully in that they should have known of the presence of the child and that the child could be struck by the bullet so discharged from the said firearm.
4. The plaintiff claims that the members of the defendant were negligent in one or more or all of the following conducts:
 - 4.1 by discharging a firearm without establishing whether it was safe and/or opportune to do so at the time and under the circumstances;
 - 4.2 by failing to take necessary steps and precautions to prevent the discharge of the firearm, when, at that stage, it posed danger to the Plaintiff's minor child; and other people within the vicinity;
 - 4.3 by failing to avoid shooting and injuring the minor child, by the exercise of reasonable care and skill, the police members could and should have done;

4.4 by pointing a firearm towards the direction of the minor child when it was inappropriate; and not opportune for such.

5. The defendant defended the action and denied liability on the basis that C[...] was not shot by the members of the defendant. The defendant pleaded the existence of a vicarious relationship with its employees and denied all other allegations in the plaintiff's claim. In the amended plea the defendant contends that that there is no causal link between the bullet that is alleged to have struck the minor to the firearm of the defendant and that there is no objective evidence connecting the police officer(s) to the firing of the gun and the injuries sustained by the child as there were different number of role players such as members of the public or members of the Johannesburg Metropolitan Police Department(JMPD) who are not in the employ of the defendant.
6. The parties agreed that the trial will proceed on determination of liability on merits only.

THE MERITS

Plaintiff's case

7. The plaintiff and her husband Mandisi Mariot Mzekwa gave evidence supporting the plaintiff's claim as outlined in the background.
8. Z[...] N[...] testified as follows: on 20 July 2020 she was sleeping when the community members were protesting in the street next to her house. She heard a sound of a firearm shot around 6:00 am and at about 8:00 am she heard a second shot. Her child C[...] ran inside the house and woke her up crying. He informed her that the police shot him. She stood up and noticed that the child was bleeding and he asked him to lie on the bed to assess the wound. Whilst she was assessing the child her husband and her father entered the house and they informed her that her husband was shot. She informed them that the child was also shot. Her father got furious and instructed them to go outside in the street and confront the police officers about the shooting incident

9. The witness said that they only found the members of the South African Police outside the yard and the Johannesburg Metro police(JMPD) arrived later when they were inside the police van going to the Hospital. She said that the police officers tried to call an ambulance for them but it did not arrive and later they were transported to Bertha Gxowa Hospital by the police officers using a police van. The police officers left them at the hospital but they could not be assisted in the Hospital due to the high volume of Covid-19 patients. An ambulance was used to transport them to Charlotte Maxeke Hospital where the child and the father were admitted and discharged the same day. She does not know what happened with the case she opened on behalf of C[...] because she lost her cellphone after leaving the police station that day. Plaintiff did not agree with the proposition by the defence that C[...] was not shot by the members of the South African Police Service. She confirmed that she did not see the child being shot but there were no other law enforcement officers except SAPS officials at the scene.

Mandisi Mzekwa's Evidence

10. The witness testified as follows: on 24 July 2020 he used a taxi from work to his home. He alighted before his destination because there was a protest by the community members on the road next to his house. From the taxi, he went straight to his yard after passing the crowd that was protesting next to his yard. In the yard, C[...] was coming out of the toilet which was next to the gate and he instructed him to go to the house as he was still trying to close the gate. He saw a white South African Police Service van with blue lamps, blue stripes and yellow lines coming from the corner going straight to the crowd that was picketing on the street 3 meters away from his gate. The crowd got furious when they saw the police van coming straight to them and they tried to stop the van by moving closer to it and throwing stones at the police van.
11. The witness testified that he heard a gunshot sound and when he lifted his head he saw a police van reversing slowly and a police officer opening a door holding a gun. His legs felt numb and he noticed that he was shot and he was bleeding.

C[...] was next to him but after the first shot he started screaming and he ran to the house. His father-in-law came to lift him and took him to the house where they found C[...] lying injured on the bed. The plaintiff informed them that the child was shot by the police and his father-in-law got upset and told them to go outside and confront the police about the shooting incident. They found the police officers who were standing next to their yard but they could not talk to them because community members who had also gathered around were making noise.

12. The witness said that when they were on the other side of the road confronting the police about the shooting incident he could not hear the response of the police officers as he was in pain and the crowd was making noise. He said that an ambulance was organized by the police but they were transported to Bertha Gxowe(Germiston) Hospital by the police officers using a police van because the ambulance did not arrive. He did not know how he got shot and he could not confirm whether there was a link between the shots fired and the injuries they sustained but he confirmed that the members of the police were the only law enforcement officials on the scene at the time the incident happened. He did not agree with the defense that they were not shot by the members of the defendant by adding that he saw the police officer taking out a gun and pointing out to the community that the Johannesburg Metro Police arrived at the scene when they were taken to hospital. He did know what happened to the case which was opened by the plaintiff on behalf of C[...].

Defendant's case

13. The defense called Constable Mutsiri and Constable Motodella to testify in their defense. I will only deal with the evidence of Mutsiri because the other witness testified mostly about the case opened by C[...]’s father.
14. Mutsiri testified that he has been working as a Constable at Brakpan Police Station since 2017. he was with his colleague when he noticed that there was a protest on the street when they were driving to attend to a complaint at 7h55. When he was about to drive over the hump, after passing a traffic circle he saw

the protesters carrying weapons and stones entering the road aggressively and throwing stones toward his van. He immediately took his firearm and fired two warning shots while he was in the van because he wanted the crowd to disperse. He stopped his motor vehicle trying and reversed because the protesters refused to disperse. He did not reverse before shooting because he did not want to bump the people behind.

15. The witness did not accept that C[...] was shot by the members of the South African Police Service by adding that there were other police officers from other different sectors at the scene. When the court asked him whether he knew where the bullet ended after he fired the two shots he answered that he did not know. He said that everything happened fast but he was able to apply his mind. Mutsiri indicated that at the time he was still new so he did not know the procedures to follow after the shooting incident but he went to the police station to write a report and he informed his superiors who visited the scene to check the cartridges but they could not find them as the scene was cleared already.

ISSUES FOR DETERMINATION

16. Whether the members of the defendant are liable for the damages suffered by the minor on 24 July 2020.

ANALYSIS OF EVIDENCE

17. Section 1 of the State Liability Act provides for the liability of the State in cases of unlawful acts or omissions act of a police officer or another public servant, that result in loss or injury to individuals while performing their duties. The existence of a legal duty by the defendant in terms of section 1 of the State Liability Act¹ is not in dispute. The only issue for determination is the alleged negligence on the part of the police official.

¹ See section 1 of the State Liability Act No. No. 20 of 1957 and section 3 of the Judicial Matters Amendment Act No. 8 of 2017.

18. The plaintiff bears the onus of proving that the defense was negligent in their actions or non-action on 24 July 2020. In *National Employers' General v Jagers*² the court held that *'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 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.'*
19. The plaintiff called two witnesses who gave consistent and corroborative evidence relating to the presence of the police officers at the time of the shooting and immediately after the shooting incident. The witness gave a full description of the police motor vehicles that were on the scene and the description of the police uniform that the police members at the scene were wearing. I do not accept the other law enforcement officials who fired the shot that injured the child except the police member.
20. The plaintiff relies on the breach of duty of care that the members of SAPS discharged a firearm without establishing whether it was safe and/or opportune to do so at the time and under the circumstances and by failing to take necessary steps and precautions to prevent the discharge of the firearm, when, at that stage, it posed danger to the plaintiff's child and other people within the vicinity and the

² See *National Employers' General 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.

particularity relating to the allegations of negligence was be fully set from paragraphs 7 to 10 of the plaintiff's particulars of claim.

21. In *Kruger v Coetzee*³ Holmes JA found that “*the existence of negligence or culpa arises if a diligent paterfamilias in the position of the defendant-*
 - (i) *would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;*
 - (ii) *would take reasonable steps to guard against such occurrences; and*
 - (iii) *the defendant failed to take such steps.*”
22. During trial the defense witness conceded that he was on duty when he fired two warning shots to disperse the protesting community which was approaching the police van and throwing stones towards the police. Section 205 (3) of the Constitution of the Republic of South Africa defines the functions of the police to include: preventing, combating and investigating crime, maintaining public order, protecting and securing the inhabitants of the Republic and their property, and upholding and enforcing the law.
23. The matter before the court presents the issue of whether the police officer acted in self-defense or out of necessity when he fired shots towards a group of protesters who were approaching a police van and throwing stones at the police. It is undisputed that the protesters were armed; however, the central question remains whether the officer fired in response to an imminent threat of harm or whether his actions were motivated by a different justification, such as an effort to disperse the crowd.
24. The question is thus whether in the particular circumstances, the defendant took appropriate steps to avoid injury to the community. Upon reviewing the evidence, it is clear that the police officer fired shots to disperse the mob, rather than in direct response to an imminent threat or danger to his life or the lives of others.

³ See *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F and

The officer's testimony and the surrounding circumstances indicate that his primary intent was not to protect himself from an immediate threat of harm but rather to control the situation by using force to disperse the crowd. While the protesters may have been armed, there is no credible evidence to suggest that the officer was at any point in imminent danger of being attacked. There is no evidence to the effect that the protesters, despite being armed, posed an immediate threat to the officer or his colleagues at the moment the shots were fired.

25. The use of force, particularly the discharge of firearms, is only justifiable under circumstances where there is an imminent threat to life or serious bodily harm. The mere approach of an armed group does not, by itself, constitute an immediate and pressing danger that would warrant the use of lethal force. The evidence indicates that the officer could have taken alternative measures to manage the situation, such as retreating to a safer position as he did after firing the shots. He could have called for reinforcements or used non-lethal means to disperse the crowd.
26. In this case, the officer's actions appear to be driven by an intent to break up the protest rather than by a reasonable belief that his life was in immediate danger. The decision to fire shots without clear necessity, particularly in a scenario where less lethal means could have been employed, suggests a disregard for the proportionality and reasonableness required in such situations.
27. The evidence presented in this case, while indicating that the protesters were armed and approaching the police van, does not support the claim that the officer was acting in response to an imminent danger. Rather, the officer's decision to fire shots seems to have been an attempt to disperse the crowd, which, in the absence of a clear and present threat to life, constitutes an improper and disproportionate use of force. Therefore, the court finds that the officer's actions were not justified by self-defense or the avoidance of imminent danger, but were instead the result of a negligent and excessive response to the situation.

28. Furthermore, the witness's concession that he could not account for where the bullets landed is particularly concerning. Firing blindly into a crowd, with no control or knowledge of where the projectiles would land, is not only reckless but grossly negligent. Such conduct endangers not only the lives and safety of individuals within the community but also undermines the principle of proportionality and accountability in the use of force by law enforcement or security personnel.
29. In *Shabalala v Metrorail* [2007] SCA 157 (RSA), Scott JA held that: *'It is now well-established that a negligent omission, unless wrongful, will not give rise to delictual liability. The failure to take reasonable steps to prevent foreseeable harm to another will result in liability only if the failure is wrongful'*. The South African Police Act 68 of 1995 developed and implemented Standing Order 262 on Crowd Management and The National Municipal Policing Standard for Crowd Management. Standing Order No. 262, clearly and coherently, states that the use of force must be avoided at all costs and members deployed for the operation must display the highest degree of tolerance. The use of force and dispersal of crowds must comply with the requirements of section 9 (1) and (2) of the SAPS Act. The standing order further puts in place the procedure(s) to be followed by the police if negotiations fail in a public gathering which exposes the lives of people and property to danger. At the same time, the standing order also prescribes the requirements that are to be followed by the police if the use of force becomes unavoidable. Consequently, the actions of the police officer under the circumstances were unlawful.
30. The fact that the witness, a member of the defense team, could not provide any adequate explanation as to where the bullets ended up, coupled with the reckless nature of the action itself, leaves this court with no alternative but to find that the actions taken were a clear instance of gross negligence. The defendant's member failed to exercise reasonable caution, failed to follow established protocols for using warning shots, and, as a result, put innocent lives at risk.
31. In light of the above, it is clear that the defendant acted with negligence on the day in question. The witness's testimony not only confirms the occurrence of the incident but also substantiates the claim that the conduct was far below the

standard of care required in such a scenario. Therefore, the defense of denial is insufficient, and the evidence of negligent conduct stands unrefuted.

CONCLUSION

32. Based on the facts presented, the court finds that the actions of the defendant's witness on the day in question were grossly negligent. The defense's bare denial fails to counteract the weight of the admission that the witness fired blindly into the crowd, unable to account for where the bullets landed. As a result, the court holds the defendant accountable for the negligent actions taken during the protest.
33. The child was harmed by members of the South African Police Services when they unlawfully and negligently fired shots during the protest.

COSTS

34. The only submission made in respect of the costs by the plaintiff was that costs should not follow the results, no further submission was made as to why the court should award costs at this stage.

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

ORDER

1. The defendant is liable for the plaintiff's proven or agreed damages.
2. Quantum is postponed sine die.
3. Costs are costs in the course.

J.T Leso
Acting judge of the High Court of South Africa
Gauteng Division, Pretoria

Date of Hearing: 31 July 2024

Date of Judgment: 22 November 2024

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