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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

NOT REPORTABLE

Case no: 384/2021

In the matter between:

XOLANI PATRICK LINGANI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

Govindjee J

Background

[1] The after-effects of the Covid-19 pandemic continue to be experienced. Courts are still seized with matters emanating from the global events which resulted in a state of national lockdown coupled with emergency regulations that impacted on the lives of all South Africans.

[2] The plaintiff's action for damages is one such example. He alleges that a rubber bullet, fired wrongfully and unlawfully by an employee of the defendant, struck and injured his left thigh on 2 April 2020. The defendant (the Minister) denies that any of his employees shot the plaintiff as alleged. It is convenient to summarise the Minister's pleaded version of the events as follows:

- The incident took place five days after the level 5 lockdown;
- In terms of the applicable regulations, an enforcement officer was empowered to order persons at a gathering to disperse immediately, and to take appropriate action, including arrest and detention, if they failed to do so;
- The plaintiff had gathered in public despite the provision in the regulations;
- The police officers, who were enforcement officers, arrived at the place where the plaintiff and other persons had gathered unlawfully and asked the plaintiff and other persons to disperse a few times;
- When they refused to cooperate, the police officers fired warning shots with rubber bullets away from the plaintiff and other persons;
- In the event that the members of the defendant shot the plaintiff, which is denied, the shooting of the plaintiff with rubber bullets by the members of the defendant was lawful in the circumstances.

[3] The defendant admits that it has a duty of care to the plaintiff and members of the public not to cause undue harm and to safeguard their constitutional rights in the exercise of their duties. It also admits the contents of the hospital records attached to the plaintiff's particulars of claim. This court condoned the plaintiff's non-compliance with ss 3 and 4 of the Institution of Legal Proceedings Against Certain Organs of

State Act, 2002¹ on 10 May 2022. Six months later, an order of court endorsed the parties' agreement that the issue of liability be separated from quantum. The matter proceeded on that basis and turns on the evidence.

Was the plaintiff struck by a rubber bullet fired by an employee of the defendant?

[4] The probabilities are overwhelming that the plaintiff was struck and injured by a rubber bullet fired by an employee of the defendant, as pleaded by the plaintiff. This accords with the evidence of the plaintiff, who heard three shots being fired at the time of the incident. He later discovered what he described as a one-centimetre round hole, approximately 1,5 centimetre's deep, above and behind or to the side of his left knee. Having realised that he had been shot and injured, the plaintiff telephoned his daughter, who did not live with him, to take him to the hospital. Although painful, the injury was seemingly not serious enough for immediate hospital treatment. In the absence of available transportation, the plaintiff decided that a visit to the hospital the following day would suffice. He consumed some pain tablets and slept. The following day, he received ointment for the wound, which was then bandaged.

[5] That the plaintiff was shot is supported by the evidence of his son (M[...]), who was aged 15 at the time of the incident. M[...] had been in the home when he heard three shots being fired. He had been with his father earlier in the day and there had been nothing amiss. After he heard the shots being fired, he observed the plaintiff, who had 'some' blood seeping from his left thigh. He also saw the hole described by the plaintiff, and confirmed that this had been bandaged, and that the plaintiff had taken some painkillers that day.

[6] There is no reason to disbelieve the crux of the plaintiff's version, as supported by his son. Both testified honestly, and credibly, according to what they recalled from the day of the incident. Importantly, there is also independent support for their evidence. Dr Ndzabela, a doctor working at Cecilia Makiwane Hospital,

¹ Act 40 of 2002.

testified that she had examined the plaintiff at 11h40 on 3 April 2020, the day after the incident. The plaintiff was able to walk without a limp but mentioned that he had pain in the region of his left thigh. The injury was not assessed as serious at the time of examination. The plaintiff informed the doctor that he had been injured by a rubber bullet fired by a policeman and complained of pain on the left side of his thigh. A head-to-toe examination was conducted. Dr Ndzabela observed an abrasion on the lateral aspect of the plaintiff's left thigh. The abrasion was of the kind that occurs when part of the skin is removed, coupled with swelling around the area. The wound was approximately four centimetres by four centimetres. There was no bleeding and the skin had been bruised, not penetrated, according to what was observed. The doctor's evidence was that there may previously have been some bleeding given the nature of the abrasion and considering that the skin was not 'intact'. There was also no underlying fracture. It sufficed for the doctor to administer Panado for the pain, to clean the wound with saline, dress it and administer an anti-tetanus vaccination, to prevent infection, before the plaintiff was discharged. In the doctor's opinion, what was observed was consistent with a non-serious injury caused by a rubber bullet, from which the plaintiff should have been able to recover fully within five to seven days. This evidence was not seriously challenged during cross-examination.

[7] The evidence by the plaintiff, M[...] and Dr Ndzabela is such that there can be little doubt that the plaintiff was injured in the manner described in the evidence, as a result of a rubber bullet fired by an employee of the defendant. As will become evident, that assessment is supported when considering the evidence led on behalf of the Minister. Both witnesses who testified on behalf of the Minister admitted that two shots had been fired during an incident that occurred in close proximity to the plaintiff. One of the police officials who fired a shot even admits having done so in the general direction of the plaintiff. On the probabilities, one of the warning shots fired was directed towards the plaintiff and struck his left leg, whether directly or via a ricochet, causing injury.

[8] That disposes of the Minister's first basis for defending the matter. As will become apparent, the Minister's alternative plea, namely that the shooting was justified, fails based on an assessment of the evidence led on behalf of the Minister.

Was the shooting lawful in the circumstances?

[9] Sergeant Lubishe (Lubishe) had been one of approximately ten police officials patrolling Mdantsane on the day in question. Three carried shotguns with rubber bullets while the others carried pistols containing live rounds. He observed the plaintiff, who was known to him, and a female drinking a soft drink in the vicinity of a so-called 'container spaza shop' (the shop), as well as four young men who were nearby. Other than concern about the implementation of lockdown regulations, the scene was calm. Lubishe knew some of the civilians he observed and, seated by the door of the police minibus, exited first through the sliding door. His evidence was that he had the situation under control. He conversed with the plaintiff and the plaintiff's companion briefly and requested them to disperse. They ignored him and continued consuming their soft drinks. Lubishe then turned his attention to the other people, who were standing in front of the shop at that stage. He intended to ask them to disperse before returning to deal with the plaintiff and his companion. As he did so he heard two shots being fired and saw everyone disperse.

[10] Of significance was Lubishe's testimony as to the protocol to be followed by the police when confronted with such situations. His testimony clarifies what is expected of members of the police when they seek to control and disperse a crowd of people. Lubishe confirmed that police officials were trained to speak to the people and, if a request to disperse was ignored, to issue a warning before taking any further action. The warning would inform those concerned that they would be arrested if they remained uncooperative.

[11] Lubishe's intention had been to issue such a warning in response to having been ignored by those in attendance. Significantly, he explained that there had simply been no time to warn the plaintiff and his companion in accordance with the established protocol and training. This was as a result of the actions of his colleague(s) who had seemingly exited the vehicle and fired the shots as Lubishe was preparing to confront the four young men at the shop. This is fatal to the Minister's case.

[12] Lubishe's immediate reaction in the aftermath of the shooting was to ask his fellow members whether anybody had been shot, to which they replied that the shots had been fired on the ground in the opposite direction to where the civilians were located. Lubishe had understandably not observed the direction the shots were fired. His back was towards his colleagues and the plaintiff at that stage, so that he also could not offer evidence to gainsay that the plaintiff had been hit with one of the rubber bullets fired. When he turned around to face the vehicle, he observed that three officers, all carrying shotguns, had also exited the vehicle. He could only rely on the word of his colleagues in support of the Minister's version that the shots been fired into the ground away from the plaintiff's direction. He conceded that more than two shots might have been fired if this had occurred simultaneously. From his perspective, the situation had been under control and he would have issued the arrest warning to the plaintiff had his colleague(s) not intervened. What caused them to do so was unbeknown to him and he was surprised when he realised what had occurred.

[13] Much of Lubishe's evidence was supported, broadly speaking, by Sergeant Fani (Fani), the Minister's final witness. There are some minor discrepancies. While both agreed that Lubishe had exited the police vehicle, through its sliding door, Fani testified that four other members of the police, including himself, had also stepped out. It must be accepted, based on the testimony of Lubishe, that three of these four, including Fani, carried shotguns with rubber bullets. Even on Fani's version of events, two members had discharged their weapons. The reason for this was explained by Fani. Lubishe had spoken to the plaintiff and the others within the earshot of Fani and their colleagues. Lubishe had repeated an instruction to disperse, which had been ignored. Fani's reason for the shooting was explained as follows:

'Because they were supposed to have left there, I then fired a warning shot [five metres to the left side of the complainant and his companion on the ground, down] ... it is when you try to move people from the place that they are in at the time ... we followed the words uttered by Sergeant Lubishe...'

[14] In essence, Fani, and at least one of his colleagues who was also carrying a shotgun, had taken the view that there had been enough talk. Despite acknowledging that he had heard Lubishe warn those present that they would be arrested if they failed to adhere, he, and the unidentified colleague, had decided to shoot, rather than effect an arrest. The reason for this, he explained, was that the police '*must be listened to*'. Moreover, he had done so in the direction of the plaintiff, but some five metres to his side.

[15] Lubishe had control of the scene and the ranking officer, Sergeant Sophethe, was not called to testify. The likely inference to be drawn is that Fani and his colleague took the law into their own hands. Neither Fani nor Lubishe tried to suggest that the situation warranted departure from the normal protocol. Indeed, Lubishe's testimony, in particular, puts paid to any such suggestion. Fani seems to have taken umbrage on behalf of Lubishe and fired a shot in the direction of the plaintiff. Lubishe's evidence that he had heard that the shots were fired away from the civilians was contradicted by Fani. Although he maintained that the shot he fired had not struck the plaintiff, Fani had clearly aimed in the general direction of the plaintiff, but five metres to his left. He had heard one other shot but could not explain which of his colleagues had fired it. He conceded that the plaintiff may have been struck by a ricocheted bullet fired by one of his colleagues.

[16] Even accepting that the shot fired by Fani was five metres to the side and, therefore, did not strike the plaintiff, there is no evidence as to the outcome of the second shot, accepting for present purposes that only two shots were fired. Neither Constable Ngonki nor Constable Njuza, the two other members carrying shotguns, were called to testify. In the circumstances, the probabilities favour the plaintiff's version that it was the second shot, fired in his direction, that struck him, either directly or as a ricochet, and caused him the injuries described.

[17] Given the crux of the accepted, material evidence, it is unnecessary to devote any attention to peripheral issues such as the gender of the plaintiff's soft drink-drinking companion, whether the shop was on his property or not and whether he had been shot inside or outside his yard. The plaintiff's credibility has been positively assessed and his events regarding the shooting is broadly consistent with the

established facts. Considering the evidence in its entirety, the plaintiff has made out his case.

[18] This was hardly the kind of gathering that might have justified deviation from basic forms of acceptable policing, even allowing some measure of latitude given the recent onset of the pandemic. The Minister's employees violated their own protocol and acted in heavy-handed fashion absent any justification for doing so. The conduct of those present on the day, including the plaintiff in particular, should have been met with a proper warning of arrest, followed by further police action if necessary in the event of further disobedience. A reasonable person in the position of the Minister's employees would have proceeded in that manner.² By acting as they did, the police failed to warn the plaintiff of the severity of the situation and opened fire without justification. There was no proper explanation offered by the Minister regarding that decision. The senior officer never testified and of the three persons on the scene and carrying shotguns with rubber bullets, only Fani testified. Even if a warning shot had been necessary, this, by definition, ought to have been fired safely away from the civilians on the scene. The inescapable inference, even accepting that Fani's shot had been fired wide of the plaintiff, was that one of the other two fired their weapon in a manner that resulted in the plaintiff being struck by an errant rubber bullet. This was completely unjustified, so that the alternative defence offered by the Minister must fail. In the circumstances, the shooting of the plaintiff has been proved to be wrongful and negligent. It caused the harm suffered by the plaintiff, for which the Minister is held liable.

Costs

[19] It has been held that where a plaintiff has been successful in a trial in the High Court which has proceeded on a separated issue the costs occasioned by the trial, irrespective of the ultimate outcome in respect of the remaining issues, are occasioned by the position taken by the defendant and that the defendant should accordingly bear the costs of that trial.³ This is the rule which would generally be

² *Kruger v Coetzee* 1996 (2) SA 428 (A) at 430E–F.

³ *Mkhwanazi v Van der Walt* [1995] ZASCA 4; 1995 (4) SA 589 (A) at 595F.

followed where a trial court exercises its discretion in respect of the costs occasioned by a trial on a separated issue.⁴ In the present matter, however, I am unable to assess the probable quantum of damages which may eventually be awarded. The evidence confirms that the plaintiff was not hospitalised as a result of his injuries, although he did receive treatment for his injuries the day after the incident. The doctor's evidence was that he should have recovered fully within a week. Based on the available evidence, there is a real possibility that the quantum of damages which may be awarded will fall within the jurisdiction of the Magistrates' Court.⁵ In the circumstances, and following *Mpukane v Minister of Correctional Services*, I consider it appropriate for the costs occasioned by the trial on the merits to be reserved for adjudication by the court called upon to determine the quantum of the plaintiff's damages.

Order

[20] The following order is issued:

1. The defendant is liable to the plaintiff for such damages as the plaintiff is able to prove for the harm caused to him as a result of the wrongful and negligent conduct of the employees of the defendant on 2 April 2020.
2. The costs occasioned by the trial in respect of the separated issue of liability are reserved.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 29 November 2023 and 21 October 2024

⁴ *Mpukane v Minister of Correctional Services* [2017] ZAECPHC 57 paras 25 and following.

⁵ *Ibid.*

Delivered: 05 December 2024

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