

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **1886/2020**

Before the Hon. Justice Slingers
Hearing: **12 February 2025**
Judgment Delivered: **19 March 2025**

In the matter between:

C[...] F[...] G[...]

Plaintiff

and

FIDELITY SECURITY SERVICES

Defendant

This judgment is handed down electronically by circulation to the parties' legal representatives' email addresses. The date of hand-down is deemed to be 19 March 2025.

JUDGMENT

SLINGERS J

INTRODUCTION

[1] On 7 February 2018 and at or near Glasogie street, Avian Park, Worcester the plaintiff sustained a gunshot wound which caused him to suffer damages.

During January 2020 the plaintiff instituted action proceedings against the defendant for payment of his damages. By agreement between the parties and in accordance with Rule 33(4) the merits of the plaintiff's claim and the issue of liability was separated from the quantum of the plaintiff's claim. This judgment pertains to the merits of the plaintiff's claim and the issue of liability.

[2] The plaintiff alleges that he was wrongfully shot by Sipato Faku (**'Faku'**), who at all relevant times was acting in the course and scope of his employment with the defendant.¹ In pleading to the plaintiff's case, the defendant admitted that Faku fired a shot using the firearm issued to him by the defendant and that at all relevant times Faku acted in the course and scope of his employment with the defendant.²

[3] The defendant denied that the plaintiff was unlawfully shot by Faku.

[4] Below is an excerpt from the plaintiff's updated pre-trial minute filed in respect of the merits of the matter dated 1 February 2023. The updated pre-trial minute was signed by both the plaintiff's and defendant's legal representatives.

'10.1 Does the Defendant admit that, on or about 7 February 2018, it and/or its employee/s shot the Plaintiff, at or near Glasogie Street, Avion Park Worcester. (sic)

10.1.1 Defendant's reply: This is denied.

10.2 Does the Defendant admit that the Plaintiff was unlawfully shot by the Defendant and/or its employees.

10.2.1 Defendant's reply: This is denied.'

[5] It is clear from the defendant's plea and the above excerpt that the defendant denied that the plaintiff was shot and furthermore denied that the plaintiff was shot by one of its employees.³

¹ Paragraphs 3 and 4 of the plaintiff's particulars of claim

² Paragraphs 3 and 4 of the defendant's plea

³ See also paragraphs 5.1 to 5.3 of the defendant's heads of argument.

- [6] The trial in respect of the merits of the plaintiff's claim commenced on 21 May 2024.

THE EVIDENCE

- [7] The plaintiff called numerous witnesses to testify on his behalf. Amongst these witnesses was Erika Stemmet (**'Stemmet'**). She testified that she is a clinical and neuropsychological psychologist. She testified that the plaintiff presents with symptoms of post-traumatic stress disorder (**'PTSD'**) and depression.
- [8] The overwhelming majority of Stemmet's evidence was irrelevant to the question of liability and more befitting to the issue of quantum. Stemmet testified how the plaintiff reacts to certain types of gunshots, his social functioning, his current living circumstances, his experiences of chronic pain, his qualifications and skill set and how he has adjusted to his current situation.
- [9] Stemmet testified that the plaintiff's PTSD could impact on the manner in which he testified about the incident in court in that he could become emotional and avoidant as he may not want to talk about the incident. However, when the plaintiff testified, the court was left with the impression that he was eager to have his day in court and that he displayed no reluctance to talk about the incident.
- [10] The plaintiff also called Hannes Beukman to testify in support of his case. He testified that he is a sergeant in the South African Police Services (**'SAPS'**) and that he is stationed at Worcester. He was on duty on the day of the incident and was called to the scene of the shooting incident where he encountered the plaintiff. He testified that the plaintiff informed him that he was shot by a Fidelity Fund security officer.

- [11] He identified the gate shift mechanism (**'pennetjie'**) which the plaintiff had with him, and which was found at the scene. He testified that no firearm was found on the scene.
- [12] During cross examination Beukman testified that Avian Park was not an area that was plagued by crime and gang activities. However, the area is currently plagued by gang activity which started to increase in 2020/2022. He also testified that the cigarette vehicles would be escorted by security.
- [13] He testified that Faku was arrested and his warning statement was taken by sergeant Mgidwa.⁴
- [14] Danny Romario Franco Van Zyl testified (**'Van Zyl'**) testified that he is currently 28 years old and that he was 18 years old at the time of the incident. He resides in Avian Park, Worcester. The highest grade he passed was grade 11.
- [15] He knows the plaintiff and knows him from Avian Park, where he resides. He knows the plaintiff as *Barbie*.
- [16] On the day of the incident Van Zyl was on his way to his home to fetch his work uniform. He met the plaintiff on the corners of Tinktinkie and Glasogie streets. He testified that the plaintiff told him that the people in the cigarette van who had passed them thinks he has a firearm. During cross examination, Van Zyl testified that the plaintiff did not give any explanation or reasons why he believed they thought he a firearm.
- [17] While Van Zyl was speaking with the plaintiff a guard dressed in the defendant's uniform with the defendant's badge approached them. The guard spoke English and instructed Van Zyl to lay down, which he did with his hands extended out in front of him. It is common cause that the guard was Faku.

⁴ I do not deal with the other evidence presented as it was not relevant to the final decision made herein

After instructing Van Zyl to lie down, Faku pointed his firearm at the plaintiff and shot him in the stomach. The plaintiff fell down after he was shot.

- [18] Van Zyl testified that Faku did not ask the plaintiff any questions before he discharged a single shot. He saw the plaintiff getting shot in his stomach. After the plaintiff was shot the Fidelity security van arrived on the scene and the driver got out. The driver asked Faku '*where did you shoot him?*' and Faku responded by stating '*I shot him in the stomach.*'
- [19] Thereafter, both Fako and the driver got into their vehicle and drove away.
- [20] Van Zyl testified that he saw the plaintiff play with the "pennetjie" with his fingers when he met with him before the incident.
- [21] During cross examination Van Zyl testified that there was gang activity in Avian Park during 2018 and that there were lots of gang related incidents.
- [22] The plaintiff still had the "pennetjie" in his hands when Faku approached them. During cross examination, he testified that the plaintiff had both the "pennetjie" and a cigarette in his hands. Unlike Van Zyl, the plaintiff did not lay down on the ground but stood up.
- [23] The plaintiff testified that he is currently 23 years old but at the time of the incident he was 16 years old. At the time of the incident he resided in Avian Park, Worcester, where he continues to reside. The highest grade he passed was grade 9.
- [24] He testified that on 7 February 2018 he was shot by a Fidelity security guard at the corners of Glasogje and Tinktinkie streets.
- [25] The plaintiff who was diagnosed with ADHD took the "pennetjie" with him when he left his home earlier the day. He played with it while he was walking as it had a calming effect on him. He put the "pennetjie" in his right-hand side

under his shirt but it hurt him as he walked so he shifted it to the front of his shirt.

- [26] He encountered Van Zyl on the corners of Glasogie and Tinktinkie streets and they started talking with the plaintiff sitting on his hunches. He noticed that the cigarette vehicle which was without the Fidelity security vehicle. He found this strange as the cigarette vehicle is always accompanied by the Fidelity security vehicle. He commented on this to Van Zyl. The plaintiff testified that during the time he was speaking with Van Zyl he put the “pennetjie” into his pocket but it fell out so he put it by his right-hand side under his shirt.
- [27] The plaintiff was sitting on his hunches on the corner. While the plaintiff was speaking with Van Zyl he heard footsteps approach from his left side, from the direction of Tinktinkie street towards Glasogie street. The plaintiff got off his hunches and turned around to see who was approaching.
- [28] He saw the Fidelity security guard holding a long firearm. The guard spoke English to Van Zyl and instructed him to lay on the ground. At this stage Faku pointed the firearm at the plaintiff, which was a huge shock for him. Faku instructed the plaintiff to lift his hands up but because he was in shock he was unable to comply and reacted by gesturing to Faku to wait and to show him that they were not gangsters. He wanted to show Faku the “pennetjie”. The plaintiff demonstrated an action of taking something out of his right-hand side with his left arm. He lowered his left arm and left his right arm in the air. As he lowered his left arm, Faku shot him. The plaintiff does not know whether Faku said anything else.
- [29] The plaintiff was shot through his arm and his left side. He felt warm where he was shot and fell backwards after he was shot. Afterwards the Fidelity security vehicle stopped. The driver exited the vehicle and asked Faku where he shot the plaintiff.
- [30] The plaintiff was transported by ambulance to hospital.

- [31] It was put to the plaintiff during cross-examination that earlier that day he lifted his shirt and showed the Fidelity security officers a firearm under his shirt. The plaintiff denied that he had a firearm as alleged and testified that he does not possess any firearms.
- [32] The plaintiff closed his case after he testified.
- [33] The defendant called Ashwin Jack (**'Jack'**) to testify on its behalf. Jack testified that he is employed as a security guard and that he has been employed as a security guard since 2010. During 2018 he was employed as a security officer with Fidelity security in the Worcester area as an armed escort. Fidelity security was contracted by British American Tobacco to escort their vehicles and to ensure their safety as there were plenty of attacks on them in the form of robbery and high jacking. The British American Tobacco vehicles would not only deliver good but would also pick up cash by the vehicles.
- [34] Jack was the driver of the security vehicle and was partnered with Faku who had the designation of crew member. It was protocol to have two-armed security personnel on the security vehicle at all times.
- [35] Jack testified that on the day in question he observed a young man walk pass their security vehicle. He saw something in the shape of a firearm. He knew that Avian Park was plagued by gangsterism but they had developed an understanding with the gangs in that they would not bother the gangs and the gangs would not bother them.
- [36] The young man they saw walked pass them and lifted his T shirt. Jack testified that he saw a black firearm in the front of the young man's pants, by his stomach.
- [37] Their Fidelity security vehicle together with the British American Tobacco vehicle moved on to a second location where they saw the same young man,

whom he had seen earlier with a firearm, on the street corner. This time he was with another person. This was suspicious to Jack and his partner.

[38] As a result of their suspicions, Faku and Jack decided to instruct the British American Tobacco delivery vehicle to leave the area and not to get out of their delivery vehicle. Furthermore, Faku proposed that he walk alongside the Fidelity security vehicle which would proceed at a slow speed until they passed the two men on the street corner whereafter, Faku would climb back into the Fidelity security van. It is common cause that the two men on the corner were the plaintiff and Van Zyl. Jack proceeded to drive at a very slow speed with Faku walking on the left back side of the vehicle on the pavement. When they approached the stop street, Jack heard Faku instruct the two men to lay on the ground. Shortly thereafter he heard a shot discharged. Jack stopped the Fidelity security vehicle, got out and walked around the back the vehicle to the left side thereof.

[39] Jack testified that he asked Faku if he was shot. Faku responded by saying that *'this guy wanted to shoot us.'* He was referring to the plaintiff. Jack went back to their vehicle and radioed head office to send the police and ambulance. While he was on the radio a crowd of community members gathered. This crowd was threatening and intimidating them and Faku and Jack decided to get into their vehicle and drive away.

[40] Jack was permanently assigned to the security vehicle but Faku moved between different security vehicles. After the incident, Jack worked approximately a further 5 times with Faku, who was still employed with Fidelity security but worked in other areas.

[41] Jack testified that he no longer has any contact with Faku. When he was informed that the date for hearing the case was approaching he asked around but did not have any contact with Faku. When Jack was asked if he knows whether Faku was still employed with Fidelity security, he replied that he does not have that information.

[42] During cross examination Jack testified that after the shooting incident the matter was investigated internally which involved taking of statements from both himself and Faku. These were in addition to the statements taken by the police. Jack does not know the outcome of the investigation. He gave his statement to the internal investigators on the same day when the internal investigators came to Worcester police station.

[43] When the shot went off, Faku was at the back left side of the vehicle and Jack was in front in the driver's seat. The shooting occurred behind him and he did not see it happen.

[44] They did not consider Van Zyl a threat but they did consider the plaintiff a threat as they saw him with a weapon earlier that day.

DISCUSSION

[45] It is trite that an infringement of bodily integrity is *prima facie* unlawful and once is established, the onus shifts to the defendant to establish a ground of justification for the infringement.⁵ Thus, it is for the plaintiff to allege and prove the bodily infringement and for the defendant to justify it.⁶

[46] It is clear from the evidence presented by both the plaintiff and the defendant that the plaintiff was shot by Faku. It is clear from the cross examination of the plaintiff's witnesses as well as the evidence presented in the defendant's case that the defendant did not dispute that the plaintiff was shot by Faku.⁷ In light hereof it is not clear why the defendant's plea denied that Faku had shot the plaintiff.

[47] As the plaintiff established the bodily infringement the onus shifted to the defendant to show that the shooting was justified and that it was not unlawful.

⁵ *Moghamat v Centre Guards CC* [2004] 1 All SA 221 (C); *Mabaso v Felix* 1981 (3) SA 865 (A)

⁶ *Bennet v Minister of Police* 1980 (3) SA 24 (C)

⁷ It was never put to Van Zyl nor to the plaintiff that he was not shot by Faku.

[48] The defendant did not call Faku to testify in support of its defence. The court is told, via the evidence of Jack that Jack asked around but had no contact with Faku and that he did not know if Faku was still employed by the defendant. The court is not told who, when or where Jack asked around.

[49] In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*⁸ it was held that:

‘where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts unfavourable to him should be drawn would depend on the facts peculiar to the case where the question arises.’

[50] In *Just Names Properties II CC & Another v Fourie & Others* 2007 (3) SA. 1 (W) the court held that:

‘In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her non-appearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision...’

[51] Similarly, in this case there were issues which called out for Faku to testify. After all it appears common cause from the *vive voce* evidence that Faku is the person who shot the plaintiff. It follows that he is the person to explain why he did so and who could furnish an exculpatory explanation, if any, therefore. The court was also not satisfactorily informed why Faku was not called as a witness. No evidence was presented in respect of what steps, if any were taken by the defendant to call Faku as a witness. It may even be that he remains employed with the defendant.

⁸1979 (1) SA 621 (A)

[52] It is clear from Jack's evidence that he did not witness Faku shooting the plaintiff. Jack's evidence that Faku told him that the plaintiff wanted to shoot them is hearsay evidence. There was no application to have that hearsay admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act. Therefore, the court cannot have any regard thereto.

[53] In the absence of Faku testifying, the court is left with questions in respect of his mindset when he shot the plaintiff and whether or not he intended to shoot the plaintiff. The court does not know whether Faku shared Jack's suspicion of the plaintiff whether he also saw a black firearm and whether he echoed his sentiments concerning the gang activity in Avian Park at the time of the incident.

[54] After evaluating Jack's evidence together with the defendant's failure to call Faku as a witness and the failure to explain why Faku was not called as a witness it cannot be said that the defendant discharged its onus to show that its infringement of the plaintiff's bodily integrity by shooting him was justified.

[55] As indicated above, I am of the view that it was unnecessary to call Stemmet as a witness at this stage. Therefore, I am not inclined to allow the costs incurred in respect of her preparation for and attendance at court.

[56] Shortly before the commencement of the trial the plaintiff served a notice in terms of Rule 35(3), requesting further and better discovery from the defendant. The defendant was unable to comply with the request for further and better discovery as a result of the late service thereof.

[57] In the circumstances, I make the following order:

- (i) the defendant is held liable for the plaintiff's damages, the quantum whereof is yet to be established, arising from his shooting on 7 February 2018;

- (ii) the costs of Stemmet in respect of her preparation for and attendance at court will be for the plaintiff's account;
- (iii) the costs incurred in respect of preparing and presenting Dr Plasket's report at trial which was received as exhibit shall be borne by the defendant;
- (iv) the costs incurred in respect of the late filing of the Rule 35(3) notice shall be borne by the plaintiff;
- (v) save for the costs set out in paragraph (ii) and (iv) above, the costs shall be borne by the defendant on Scale B.

SLINGERS J