

SOUTH AFRICA / JUDGMENT

Bhembe v Minister of Police (4327/2018) [2020] ZAMPMHC 1 (16 January 2020)

[2020] ZAMPMHC 1**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Ratshibvumo

CASE / FILE NUMBER

4327/2018

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Source record**THE****HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION, MIDDELBURG LOCAL SEAT****CASE****NO: 4327 / 2018****In**

the matter between:

SANDILE
STEVE
BHEMBE PLAINTIFF
And
MINISTER
OF
POLICE DEFENDANT
J U D G M E N T

RATSHIBVUMO AJ:

1.
Introduction.
This
is a claim for damages, loss of earnings and medical expenses against
the Minister of Police (the Defendant) following an incident
in which
the Plaintiff was shot and injured by a member of the South African
Police Services (SAPS) – the Defendant’s
employee, on 27
January 2017. The Defendant disputes liability pleading that its
employee acted in self-defence.

2.The
celebration for passing matric examinations went as planned for the
Grade 12 learners, but did not end well for the Plaintiff

and his friend Mr. Petros Rabothata (Mr. Rabothata). Once the celebrations were over on 27 January 2017 around 10 pm, the two walked to Donkey's place. All they wanted there was to buy Dagwood sandwich, but they did not reach their destination. For before they reached Donkey's place, the Plaintiff laid down bleeding from a gunshot wound inflicted on his stomach by an off duty police officer, Cpt Thubana. Circumstances surrounding the shooting are subject of dispute. It however transpired that Cpt Thubana had not completed the firearm competency test to possess a hand gun; yet he was issued with one.

3. Issues for determination: The court is to determine if the Defendant is liable for injuries caused to the Plaintiff. This entails a finding on whether the Plaintiff robbed, or attempted to rob Cpt Thobane, whether Cpt Thobane acted in self-defence and whether the acts by Cpt Thobane can be attributed to the Minister of Police.

4. The parties agreed to separate merits from the quantum pursuant to Rule 33 (4). The court endorsed the agreement and as such, the trial was limited to liability (merits) alone

5. Case for the

Plaintiff:

Sandile Bhembe: He is the Plaintiff. He testified that on 27 January 2017, he had just returned from a party in which he and others celebrated having passed Grade 12. Then, he was 21 years old. It was between 9 and 10 pm and it was dark when he decided to go and purchase a Dagwood sandwich at a place known as Donkey's, in Vlaaglate in Mpumalanga. He walked to Donkey's place alongside his friend Mr. Rabothata. As they walked, he felt that Mr. Rabothata's had a hard instrument around his waist. He demanded to know what it was and it turned out to be an instrument that looked like a firearm. The two of them started arguing on whether it was a real firearm or not. It was at this stage that they came across a man well known to him and the local community as a police officer nicknamed "painter man"

(mapenndane) – Cpt Thubana. At that stage, he was not on duty and was not wearing a police uniform.

6.Cpt

Thubana instructed them to drop down what they were carrying and Mr. Rabothata dropped the instrument to the ground. Cpt Thubana picked up the instrument and hit it with his own firearm. Mr. Rabothata then said to him, “let us go, this is a police officer.”

It

was at that stage that he felt a bullet hit him from the left side of the stomach and exited from his right. He then fell to the ground.

Mr. Rabothata ran away while Cpt Thubana walked away leaving him alone. A short while later, Mr. Rabothata returned and helped him to walk to the main road so they could seek help. Another off duty police officer came driving and took the Plaintiff to the hospital where he received medical help. He denied having attacked Cpt Thubana or tried to rob him.

7.A

statement by Ms. Mbuyane, an employee of the Independent Police Investigative Directorate (IPID) was handed in by agreement between the parties as Exhibit A. Of importance in this statement is the fact that she approached Cpt Thubana to obtain a firearm permit and he indicated that he did not have one yet. Of further relevance is the fact that she obtained his SAPS 96 which is also attached as part of the docket (Exhibit B) at pages 63 – 66. The SAP 96 reflects the following important facts regarding

the training of Cpt
Thubana:

a)

On 29 July 2016, he underwent training on “maintenance shooting shotgun” at the SAPS Training Institution and the result was “passed.”

b)

On 29 July 2016 he underwent training regarding maintenance shooting handgun and the result was “uncompleted.”

c)

On 29 July 2016 he underwent training on “maintenance shooting rifle” at the SAPS Training institution and the result was “failed.”

8.

Case for the

Defendant:

Collen

Mcedi Thubana: He

is a police captain in the SAPS. He testified that on the date of the incident he was walking on the side of the road when

he came across

two boys. When he was about two meters away from them, one of the two (who turned out to be the Plaintiff) stamped

the ground with his foot

noisily prompting him to shout at the boy, "[W]hat are you doing?" The said boy took two steps

walking further before

turning, at which stage he realised the boy was carrying something;

although he could not see what it was.

He then shouted that the boy

should drop what he was carrying. He immediately grabbed the said boy by the collar of his clothes

while his other hand was carrying his

police issued firearm – a handgun. At that stage, a firearm got

discharged causing

an injury to the Plaintiff.

9.

Part of his evidence is

to the effect that the Plaintiff proceeded to point that unknown

object at him after he was told to drop

it, and demanded money from

him. It was at this stage that he fired a shot and the object fell to

the ground. It turned out to

be a toy gun. He then proceeded to the

local police station where he reported the incident and laid a charge

of attempted robbery

against the Plaintiff.

10.

Under cross

examination, he confirmed that a shot went off without him having to pull a trigger. This meant that he did not mean

to shoot, but he

could not explain how a shot was discharged. He was aware of the

records contained in the SAP 96 and did not agree

with the content to

the effect that he did not complete a training in handgun maintenance

shooting since he had successfully completed

it. He however could not

produce any evidence to the contrary as he tried to obtain proof of

his training from his employer in

preparation of this trial; and

nothing was made available to him.

11.

With this evidence,

case for the Defendant was closed.

12.

Common facts

It is common cause that the Plaintiff was injured as a result of gun shot after a bullet was discharged from Cpt Thubana's police issued handgun. When the incident took place, Cpt Thubana was off duty and not in police uniform. The Plaintiff and his friend were in possession of a toy gun shortly before he was injured.

13.

Disputed facts

There is dispute as to whether the Plaintiff pointed a toy gun at Cpt Thubana and demanded money shortly before he was injured.

There is dispute on how the Plaintiff got injured? Was it as a result of accidental discharge while he and Cpt Thubana struggled or it was as a result of being shot at deliberately. In essence, the court has to determine if Cpt Thubana acted in self-defence.

Lastly,

there is dispute as to whether Cpt Thubana completed and passed a training in handgun maintenance shooting.

14.

Evaluation of evidence.

The

contention that Cpt Thubana acted in self-defence does not even get support from his own version of events. Although he claims that the

Plaintiff pointed him with an object and demanded money, this did not prompt him to shoot as an act in self-defence. All he did, according

to his version was to grab the Plaintiff and they started to struggle and in the process, a firearm got discharged.

For this reason, this argument stands to be rejected as not being supported by the facts.

15.

Besides not being

supported by facts, the allegation that the Plaintiff attempted to rob Cpt Thubana simply does not fit into the sequence of events. Cpt

Thubana testified that the Plaintiff stamped his foot noisily next to him and he reacted by asking, "what are you doing?" He

then shouted at the Plaintiff to drop the object he was carrying which at that stage he did not know what

it was, and he immediately

grabbed him by his clothes and then they started to wrestle which caused his firearm to be discharged.

The demand for money with the unknown object pointed at him sounds like a separate incident as there is no clear explanation as to the stage at which it happened.

16.

That leaves the version

presented by the Plaintiff as the only probable alternative version on how he was injured. It is probable that it was after the firearm had been dropped that Cpt Thubana fired a shot. The behaviour by Cpt Thubana after injuring the Plaintiff depicts him as a person who did not care what happens to the injured Plaintiff after he was shot. He failed to attend to him, to call for medical help or even to take him to the hospital, preferring to rather drive himself to the police station where he was to lay a charge against him.

17.

As for the version that Cpt Thubana did not complete a training on maintenance shooting handgun, evidence was produced in the form of SAPS 96 which was made available to him before the trial date. Cpt Thubana could not rebut this evidence. I am of the view that the Plaintiff managed to prove it on balance of probabilities that Cpt Thubana failed to complete the necessary training.

18.

Defendant's
vicarious liability

Undisputed

evidence is that Cpt Thubana was off duty and not even in police uniform when this incident took place. This raises a question on how

his employer can be vicarious liable while its employee was off duty.

As a general rule, the Defendant would be

vicariously liable if Cpt

Thubana was acting within the scope of his employment or furthering his employer's interests. Vicarious

liability is imposed on

innocent employers by a rule of delictual law. As noted in *Ess*

Kay Electronics Pty Ltd and another v First National Bank of Southern Africa Ltd,^[1]

the rule in its most simple form is that the liability arises when an

employee commits a delict within the course of such employee's

employment. The foundational formulation of the rule is to be found in *Mkize v*

Martens^[2].

The dictum

in question goes on to warn that an act done solely for the

employee's own interests and purposes, and outside his authority, is

not done in the course of employment even if done during such employment.

19.

In *Minister*

of Safety and Security v Luiters^[3],

the court took cognisance of a standing national police order that provides,
“[W]hen a member is required to perform duties in a neighbourhood or in circumstances perilous to life; he shall be adequately armed for self-preservation or the protection of life and property. He must not, where necessary, hesitate to make use of his arm.”

This was interpreted by court to mean that an off duty member of the SAPS could, at any time place himself on duty when an offence has been committed. If the court accepts that there was an attempted robbery on Cpt Thubana, it would mean that he then placed himself on duty in terms of this standing order.

20.

The submissions on behalf of the Defendant suggesting that the Defendant cannot be held liable because Cpt Thubana was off duty cannot be accepted. His reliance on the *Booyesen v Minister of Safety & Security*[4] and *Nkuna v Minister of Police*[5]

appear to be misplaced in my view. In *Booyesen* a member of the SAPS could not have placed himself on duty because the delict involved him using his service firearm to resolve his

private love life which is not part of his duties as a police officer. Equally, in *Nkuna* the police officer could not have placed himself on duty because the delict involved a road rage incident between him and another motorist. A police officer can only put himself on duty to execute that which his employer hired him to do, which is to fight crime. When a crime is committed irrespective of whether it is perpetrated against a member of a public or the said officer himself, an act to fight that crime is in line with his mandate as a police officer, and as such he can put himself on duty even when off duty.

21.

Over and above the reasoning above, the Defendant's liability stands to be found on reasons that it should have foreseen that in issuing Cpt Thubana with a firearm while he had not successfully completed the necessary training in handguns, it placed the members of the public at great risk. In *Shozi v Minister of Safety & Security*[6], the court held the Minister of Safety and Security vicariously liable

when an off duty police officer shot and injured members of the public while under the influence of alcohol, when it transpired that like in casu, such member was issued with a firearm while he had not successfully completed a training in firearms.

22.

I find that it was indeed reasonably foreseeable that by arming an untrained police officer with a firearm, innocent citizens could be harmed. This should explain why Cpt Thubana could not explain how a firearm got discharged while in his hand. This conduct on its own attracts liability.

23.

I therefore make the

following order:

23.1

The Defendant is ordered to pay the plaintiffs' all proven or agreed damages suffered as a result of being shot by Cpt Thubana on 27 January 2017.

23.2 The

Defendant is ordered to pay the costs.

TV RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT
FOR

THE PLAINTIFF : MR. DP DU PREEZ
INSTRUCTED

BY : DP DU PREEZ ATTORNEYS

C/O

DRIKUS LOMBARD ATTORNEYS

MIDDELBURG

FOR

THE DEFENDANT : ADV. KK MALOMA

INTRUSCTED

BY: KARIEN SCHUTTE ATTORNEYS MIDDELBURG

DATE

HEARD : 26, 27 & 29 NOVEMBER 2019

JUDGMENT

DELIVERED : 16 JANUARY 2020

[1] 2001 (1) SA 1214 (SCA) at para 7.

[2] 1914 AD 382 at 390.

[3]

[2006] ZASCA 11; 2006 (4) SA 160 (SCA) para 11.

[4] 2018 (2) SACR 607 (CC).

[5] (627/2018) [2019] ZAMPMBHC 5 (15 October 2019).

[6]

[2016] JOL 34975 (KZD).

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