

SOUTH AFRICA / JUDGMENT

Bidvest Protea Coin Security (Pty) Ltd v Mabena (A10/2020) [2023] ZAMPMHC 22 (2 June 2023)

[2023] ZAMPMHC 22

COURT

Middelburg High Court, Mpumalanga

BEFORE

Mankge, Mphahlele, Vukeya

CASE / FILE NUMBER

A10/2020

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION,

MIDDELBURG LOCAL SEAT

Case

Number A10/2020

In the matter between:

BIDVEST PROTEA COIN
SECURITY (PTY) LTD
APPELLANT

And

MANDLA WELLEM
MABENA
RESPONDENT

In

re:

MANDLA WELLEM
MABENA
PLAINTIF
And
BIDVEST PROTEA COIN
SECURITY (PTY) LTD
DEFENDANT

JUDGMENT

CORAM: MPHAHLELE, DJP, MANKGE J, VUKEYA J

HEARD ON: 17 MARCH 2023

JUDGMENT

BY: MANKGE J

DELIVERED ON: 02 JUNE 2023

Introduction

- [1] This is an appeal arising from the judgment of this court by our brother Brauckmann AJ. The appellant was an unsuccessful respondent in the court a quo.
- [2] The trial court granted an order where the appellant was found 100% liable to the respondent for all such damages as he may prove, or agreed upon between the parties to have been suffered by the respondent by reason of the wrongful shooting and the injury of the respondent by the appellant's security officers on 4 April 2016. As well as costs of the action.
- [3] The claim pertained to an alleged shooting by the security officers of the appellant upon the respondent, whilst the said officers were performing duties within the cause and scope of employment with the appellant.
- [4] The appeal is predicated on few aspect of alleged misdirection on the part of the presiding judge, with regard to his approach in assessing the submissions that were presented and the evidence that he considered for the purposes of trial.
- [5] In this appeal the appellant filed together with its appeal an application for condonation of the late filing of the appeal, this application was not opposed by the respondent. The respondent only asked that this court should grant them costs for the condonation application. The application for condonation was therefore granted outright by this court, and I need not elaborate further on this point.

The parties

- [6] Appellant is Bidvest Protea Coin (Pty) Ltd, conducting business within the security sector. Respondent is an adult male who was at the time of incident, employed as an F&L Operator at Shanduka Coal Mine at Middelburg. He was one of the striking employees on the day of incident.

The dispute between the parties

- [7] The dispute to be adjudicated before the court a quo was the alleged wrongfully, unlawfully and intentionally, alternatively; negligently fired gunshot to the striking employees and seriously injuring the respondent with a rubber bullet on his left eye.
- [8] The appellant pleaded the denial of the claim, and further in the alternative pleaded that the employees of the appellant were faced with a situation of sudden and unexpected emergency and had to make use of rubber bullets to protect the lives of the people whom the respondent as part of the violent strike force endangered, and that this approach adopted by the employees of the appellant was reasonable in the circumstances. The appellant further pleaded an alternative to their plea, that, and in the event the court found that the shooting has occurred as alleged that the respondent contributed to the said incident.

The judgment of the court a quo

- [9] The trial court accepted the respondent's version which is that: the respondent came across a security guard in the bush, who pointed the gun at him and shot him, as the most probable version. With regard to the appellant's version the court found that it called three witnesses and none of them have witnessed the shooting in the bush. The court went further to highlight that the defence of necessity was disclosed in the opening address. Also that the appellant bore the onus to prove that its conduct on the relevant day was justifiable.
- [10] The trial court drew a negative inference from the appellant's failure to call the bearers of the so-called paintball guns and drivers of the vehicles. The trial court further found that the appellant raised a defence that was not pleaded in its plea. The court also highlighted the fact that, it however allowed the appellant's legal representative to cross-examine the witnesses according to the agreed issues.
- [11] The trial judge further made certain remarks which I consider noteworthy in his judgment, the trial judge stated that he should not have allowed such cross-questioning on the witnesses.

Grounds of Appeal

- [12] The appellant relies on the three main grounds of appeal: "That the court erred in failing to make the following factual and legal findings:

"12.1 by finding that the appellant could not rely on the defense of necessity;

"12.2 by finding that even in the event of the appellant being allowed to raise a defense of necessity that the defense is not suitable;

'12.3 by finding that the respondent was shot at point blank by the appellant's security personnel when such a finding is not supported by the evidence.

Discussion

[13] When an appeal is lodged against a trial court's finding of fact, the appeal court takes into account that the court a quo was in a more favourable position than itself to form a judgment because it was able to observe witnesses during their questioning and was absorbed in the atmosphere of the trial from start to finish. Therefore, the appeal court assumes that the trial court's findings were correct, and will normally accept those findings unless there is some indication that a mistake was made (See: Schmidt and Rademeyer Law of Evidence)

[14] In my view the abovementioned and the following words of De Klerk J in *Buchner and Another v Johannesburg Consolidated Investment Co Ltd*[1] : fits perfectly well to the nub of this appeal.

"the necessity, when pleading material facts does not have its origin in Rule 18 of the Uniform Rules of Court. It is fundamental to the judicial process that the facts have to be established. The court on the established facts, then applies the rule of law and draws conclusions as regards the rights and obligations of the parties and gives judgment".

A summons which propounds the plaintiff's own conclusions and opinions instead of material fact is defective. Such summons does not set out a cause of action. It would be wrong if a court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinizing the facts upon which the opinion is based".

[15] The underlined portion in *Buchner* (above) will be in the center of this judgment. In this appeal the appellant is standing on one leg only, which is a defense of necessity, it is the same leg it also stood firmly on in the trial of this matter. Adv Boot SC for the appellant argued that the defence of 'sudden emergency' which appears in the appellant's plea, was establishing material facts and that, there was no need for the appellant to mention 'defense of necessity' in its plea, therefore (so he argued) the appellant disclosed its defence substratum as required in Rule 22(2). He contends also in his heads of arguments that the appellant and the respondent "agreed" prior to the commencement of the trial to request the court to specifically consider the issue of necessity, and that on the basis of this, the appeal should succeed.

[16] The trial court in its judgment found that the appellant failed to plead necessity in its plea.

[17] The record of the trial proceedings reflects that the appellant at 7.3.1 of its plea, and in the alternative pleaded only 'sudden and unexpected emergency' and in the further alternative pleaded that the respondent negligently contributed to the said incident.

[18] The record reflects also for some peculiar reasons, that at the start of the trial the counsel for the appellant placed on record that "there was an agreement between the legal representatives", that the issues to be determined by the trial court were:

‘18.1 was the plaintiff injured by the employees of the defendant. If the answer is yes, the court has got to determine whether the projectile that injured the plaintiff, whether it was fired under the circumstances of necessity?

‘18.2 if the answer is yes that is the end of the matter. If the answer is no, then the court has got to decide whether the plaintiff was a joint wrongdoer and contributed to his own injuries?

‘18.3 If the answer is no, he succeeds with his full claim. If the answer is yes, the court has got to determine the degree of. . .”

- [19] From the record it is not clear what caused to appellant’s legal representative (the appellant, not being a party who was dominus litis) to even be the one taking the lead in this aspect. It is interesting to note that Adv Boot SC in his submissions before us, he supports his argument of the agreement between the parties, by referring this court to page 215 of the record, and state that Adv Mkhize agreed to this. Where the record is reflecting at line 10 of Page 215 that Adv Mkhize states that “he agrees”.
- [20] When the trail of this ‘so called agreement’ is followed properly, what Adv Boot SC is regarding as an agreement between the parties, do not seem to be aligned with his proposition. The answer by Adv Mkhize “I do agree, M’Lord” do not seem to be an answer whether the parties agree to Adv Boot’s proposition on the issues to be determined by the trial court. Let me then for context purposed highpoint what appears on the record.
- [21] Immediately after Adv Boot SC have addressed the court about how he is proposing the trial should proceed, the court then engaged the legal representatives about the heads of arguments, and soon after the topic on the heads of arguments he then address the court about his jaw operation, that: “the court will just have to indicate if he is not clear in his speech”. After which the court asked Adv Mkhize “Do you agree? Adv Mkhize responds to this question by agreeing as mentioned above.
- [22] It is not clear on what Adv Mkhize SC was really agreeing on as from the record there were two other topics that were raised by Adv Boot SC, it was the topic of the heads of arguments and the question of his jaw operation. Adv Mkhize repeatedly denied during his submissions before us that there was an agreement between him and Adv Boot. This denial is in my view considerable when looked against what was being discussed immediately before Adv Mkhize replied that he agrees. He might have been agreeing to the issue of heads of arguments, or he might have been agreeing to the fact that Adv Boot might need to be told to repeat himself because of his jaw challenge. What is however clear from the record is that Adv Mkhize SC was either not concentrating or he was just in a rush for matter to start, the presiding judge even commented at para?? That “I like the fact that you agree on everything”.

[23] I therefore find the submission by the appellant's counsel on the 'agreement reached' not to be fully supported by the record of the proceedings. This issue remains blurred, therefore, the case law and the argument put forward by the appellant on this point cannot assist the appellant's cause, as the record reflects something different as shown above.

[24] The record in actual fact establish that, for the first time and out of the blue the defence of necessity (which was previously withheld by the appellant and of which only the appellant had exclusive knowledge of, and which could not have been known to either the plaintiff and or Adv Mkhize SC) was brought from the bar during the opening address.

[25] It is important that Adv Boot's choice of words should be single-out when this was placed before the trial court. His words were

"was the plaintiff injured by the employees of the defendant. If the answer is yes, the court has got to determine whether the projectile

that injured the plaintiff, whether it was fired under the circumstances of necessity?

[26] The underlined portion is not addressing the appellant's material facts upon which the appellants relied upon in its pleas which was "a situation of sudden and unexpected emergency" if the two meant one and the same thing according to Adv Boot SC own understanding, I am of the view that this would have been argued in that way in the trial court, and or before this court, but clearly that was not the case in both courts.

[26] The 'situation of sudden and unexpected emergency' in my view remained a fact that the appellant needed to prove, the same goes for 'necessity', if it had been properly pleaded there would have been a need to be prove it, on the part of the pleader. In my humbly view the two are the facts which served to establish the appellant's cause of action, and excluding any evidence required to prove them. And it can be seen from the entire record that the appellant did not even came close to meeting this. The presiding judge address this meticulously in his judgment, and in my view this is one more reason why the appellant's application stands to fail.

[27] The question which begs for an answer is that, if necessity was the appellant's view from the onset, why didn't the client give that as an initial instruction to the counsel, so that same can be pleaded as opposed to it being submitted as an opening address.

[28] This defence of necessity that was now forthcoming from the appellant's counsel was within the appellant exclusive knowledge (it would seem), them being the ones with video footage of the day of incident, amongst other things. This was neither previously pleaded nor reasonable ascertainable from respondent counsel's side.

- [29] It would seem from the record of the proceedings that, the parties had a pre-trial conference two months before the trial, even though the minutes of that conference was not filed. The filed minutes are for the conference which was held very early in the process. When these pre-trial minutes was considered by this court it would seem the defense of necessity was also not discussed between the parties. There was also no application for the amendment of the plea, until the trial started and ended.
- [30] In my view, an amendment of the plea was imperative to promote the effectiveness of the process and trial. If Rule 28 (1) was invoked the allegation of the defence of necessity could have easily found its way to trial, not to wait to, “request” the trial court to consider it from the bar. From the papers attached it is clear that Rule 28 application was never considered by the appellant and therefore did not take place.
- [31] The amendment in my view could have assisted in the proper ventilation of the dispute between the parties, and to determine the real issues between them. Pleadings must be clear and concise as to the material facts (Rule 18(4)). The appellant at the very last stage and only during opening address declared the real state of affairs, only then it called its defence for what it was, “Necessity”.
- [32] Rule 18(4) is clear that “. . . shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim
- . . . with sufficient particularity to enable the opposite party to reply . . .” (Secretary for Finance v Esselman[2] 1988
- (1) SA 590 SWA @ 597 G-H
- [33] Looking at the appellant’s plea it is not clear what prevented the appellant to call its defence for what it was and by its real name. If the appellant’s counsel argues that the defence of necessity was pleaded substratum, this defence was obviously not clear enough in the appellant’s plea, it therefore failed to pass “clear and concise” muster.
- [34] Defence of necessity is well known and is used quite often in pleadings in this country. In my view when such defence is pleaded there should be no ambiguity, as the question to be decided by a court would be whether a state of necessity really existed or not. If the defence is ambiguous this will lead to a further ambiguity in that the other party will proceed to trial without replying to the defence, like it happened in casu.
- [35] It is also my firm view that when there is an allegation of the defence of necessity, this must be properly investigated by a court, starting from the plea of necessity itself, to the reply by the other party right up to the evidence led to support this defence. If the defence is pleaded in a clear and concise manner this will in my considered view, allow the court to do due diligence to the investigation whether the state of necessity at the time of incident existed or not.

- [36] When the defence is clearly defined this has a benefit of assisting the court in assessing what really happened vis-a-vis what the defendant may have thought or perceived at the time.
- [37] The failure to be clear and concise on this issue, striped the respondent an important opportunity of a replying to such a defence. Even though I do not agree with the trial court in its approach, of accepting the issue at the opening address stage, I however agree with the trial court's ultimate finding on the issue of necessity.
- [38] As mentioned above the knowledge on a defence of necessity was within the purview of the appellant from the beginning or at the very least when the appellant viewed the visual recordings of the day of incident. Therefore, I am of the considered view that it was the responsibility of the appellant to declare such defence with certainty in the pleadings, and not wait for the counsel to attempt to do so from the bar.
- [39] An 'afterthought' defence of necessity that was raised at the start of the trial, is found to be a desperate attempt by the appellant to save its case. It can easily be described as an attempt to ambush the respondent on the last minute of the day.
- [40] I need to pause and mention that this court was requested for physical appearance to enable this court to watch a video recording of the day of incident. The parties were requested by the panel in a form of a directive to motivate why the appeal court should seat to view the video recordings which had already been considered by a trial court. The panel resolved to allow the viewing of these recordings in the name of doing justice to the hearing, however until this very moment of writing this judgment the panel was not clear why this court was caused to watch these video recordings. What the panel however agree on after being caused to watch this video recording is that, the trial court summarized everything properly. The summary, the analyzation of the factual matrix and the ultimate conclusion by the trial court cannot be faltered.
- [41] By way of example, in a video recording the appellant's huge harvester is seen approaching the place where the striking employees were standing, (the respondent was in the same spot), the respondent (Mr. Mabhena) is further seen running away from the approaching harvester towards the bushes. He is not seen after that incident. The next time the respondent appears on the video is when he is being assisted (apparently already injured). So in my view, the persistence on the part of the parties for this video recording to be watched by the appeal court, caused the appeal court to also conclude that (A), the trial court dealt and captured the events of the day meticulously and further found correctly in its reasoning and conclusion, (B), that the defence of necessity would have probably be met with difficulties looking at the events as they unfold in the video recording.
- [42] It is also so that the appellant did not call any witness who testified about the area where the respondent went to after running

away from the harvester, the appellant's submission was that the appellant witness was not a South African citizen and that he was nowhere to be found. But it remains that the trial court has not had the benefit of the appellant's witnesses who were at the exact spot where the respondent was when he sustained the injury. All the court heard was from the respondent

witnesses who testified that they saw when and how the respondent was shot by the appellant's security officer.

[43] The court did not have the benefit of hearing how the appellant's employee acted before the shooting, what warnings (if any) he gave to the respondent, what evasive actions (if any) he took to avoid the incident, why in his view it was impossible to avoid the shooting. In my view the inability by the appellant to call any of the witnesses who were armed, or even the drivers of the vehicles (appellant's harvester included) as corrected suggested by the trial court was indeed fatal.

[44] It can be deduced from the trial court's judgment that the court was alive to the fact that it was confronted with two irreconcilable versions, and on disputed issues the trial court made findings on the credibility of factual witnesses, their reliability and the probabilities. The trial conclusions also looked at external subsidiary factors such as 'what was pleaded'. (SEE: *Stellebosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others*[3] 2003

(1) SA 11 (SCA).

[45] Looking at the video footage I am in doubt whether the defence of sudden emergency (as pleaded) would have succeeded even. From the video footage it is not clear how the appellant's plea of sudden emergency would have been sustained. By way of example how they would have succeeded in persuading the trial court that they found themselves in a sudden emergency, (when the striking workers started throwing stones at the direction of the harvester).

[46] I say the above, for the following reason: In the video footage the harvester is seen approaching the striking workers at an alarming speed, only when the harvester is approaching, the striking workers are seen picking up stones and throwing them towards the harvester. From this illustration it becomes clear that the striking workers are the ones who were rather at a state of sudden emergency, which was obviously created by this huge harvester that was approaching them, not the other way around. I will however not comment beyond this on the defence of necessity. Therefore, the conclusion by the trial court should stand, even on this base alone.

Conclusion

[47] In the absence of direct evidence from the appellant's employees, and in view of the fact that the evidence of the plaintiff was accepted as seen in the trial court's judgment, the only reasonable inference on the totality of the facts is the one arrived at by the trial court.

[48] In the results I find that the reasoning adopted by the trial court in arriving at the conclusion set out and explain the findings which underlie the orders (except for the proviso made above on the issue of necessity). The appeal lies not against the reasoning of the trial court. It lies against the orders of the court. In this instance the orders are found to be correct for the reasons mentioned above.

[49] I therefore propose the following order:

The appeal is dismissed with costs, such costs to include the costs of Condonation application

Mankge MT

Judge

Mpumalanga Division of the High Court

I agree.

Vukeya LD

I agree and it is so ordered

Mphahlele SS

Deputy Judge President

For the Appellant: Adv Boot SC

For the defence: Adv Mkhize SC

[1] 1995

(1) SA 215 @ 216 H-J

[2] 1988

(1) SA 590 SWA @ 597 G-H

[3] 2003

(1) SA 11 SCA

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