

SOUTH AFRICA / JUDGMENT

Engelbrecht v City of Tshwane Metropolitan Municipality (75626/2016) [2020] ZAGPPHC 776 (29 December 2020) [2020] ZAGPPHC 776

COURT

North Gauteng High Court, Pretoria

BEFORE

Gumbi

CASE / FILE NUMBER

75626/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: NO.

(3)

REVISED: NO.

CASE

NO: 75626/2016

In

the matter between:

R

M ENGELBRECHT

Plaintiff

and

THE

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

GUMBI, AJ

1. The plaintiff's claim is predicated upon the fact that on 18 September 2014 and at or near Bronkhorstspuit, a member of the City of Tshwane's Metro Police Officer, known as Norman Lehlhoganolo Daniel Mapatshoe ("Officer Mapatshoe"), unlawfully and wrongfully assaulted the plaintiff by hitting him with his fists and shooting the plaintiff in his left leg, which bullet also penetrated to his right leg.[1]
2. At the commencement of the trial the parties agreed that only the defendant's liability be dealt with and the question of plaintiff's quantum claim be dealt with later. I made a ruling in terms of Rule 33[2] that merits and quantum be separated and that this Court deal with the issue of whether or not the defendant is delictually liable to compensate the plaintiff for the damages that he purportedly suffered in consequence of the assault by the defendant.[3] The defendant denied liability and raised the following defences in its amended plea:
 - 2.1 That Officer Mapatshoe's firearm was accidentally discharged during a physical altercation between him and the plaintiff, which discharge caused injuries to the plaintiff's leg. Officer Mapatshoe had no intention to injure or harm the plaintiff;
 - 2.2 In the alternative, that Officer Mapatshoe acted in self-defence;
 - 2.3 In the further alternative, that Officer Mapatshoe acted out of necessity to effect a lawful arrest, alternatively to prevent an escape from a lawful arrest;
 - 2.4 In the further alternative, that the plaintiff was fully aware of the risks in relation to his conduct, but despite this knowledge and whilst appreciating these risks, he nevertheless continued with his attempts to prevent, resist or escape the investigation and possible arrest and, in doing so, consented to be subjected to the risk of injury and harm.[4]
3. The plaintiff's amended particulars of claim express the following:

"3. On or about the 18 September 2014 at or near Bronkhorstspuit, a member of the City of Tshwane's Metro Police Officers, known as Norman Lehlhoganolo Daniel Mapatshoe, unlawfully and wrongfully assaulted the plaintiff by hitting the plaintiff with his fists and shooting the plaintiff in his left leg, which bullet also penetrated to his right leg.
5. The aforesaid assault took place in a public space and within sight of members of the public.
6. As a direct result of the aforesaid assault, the plaintiff suffered severe injuries, specifically but not limited to:
 - 6.1 a gunshot wound to the lower limb;
 - 6.2 pain and suffering from the bodily injuries he sustained as a result

of the assault;

6.3 psychological shock and trauma;

7. As a direct result of the assault and injuries sustained by the plaintiff, the plaintiff:

7.1 received medical treatment and will, in future, receive future medical treatment;

7.2 suffered a loss of amenities of life and will, in future, suffer future loss of amenities of life;

7.3 endured pain, suffering and discomfort and will, in future, endure further pain suffering and discomfort;

7.4 suffered a loss of income and will, in future, suffer a future loss of income.”

4. The defendant sought certain admissions in terms of Rule 37[5] to which plaintiff agreed to.

5. The defendant’s amended particulars of claim avers the following:[6]

6. Resultant therefrom, it is abundantly clear that the two collisions as expressed above are common cause. It is also common cause from the pleadings, and evident during trial that the plaintiff was shot by Officer Mapatshoe. What is, however not common cause is the circumstances or the manner in which such shot was fired. What is also in dispute is the conduct of both the plaintiff and Officer Mapatshoe at the Shoprite Centre, Bronkhorstspuit, viz. whether the plaintiff’s alleged fearing for his life was in consequence of the fact that Officer Mapatshoe leaned to his right as if he was taking out his firearm.

SUMMARY OF EVIDENCE

7. The onus of proof relates to the facts and not legal issues. It relates to those issues, as crystallised by the pleadings.[7]

8. After the pleadings, the onus of proof is clearly on the defendant. It is a true case of confession and avoidance, in which the onus of proving the avoidance ordinarily rests upon the defendant.

9. There is another reason why, at any rate in delicts affecting the plaintiff’s personality and bodily integrity, the onus of proving excuse or justification, such as self-defence, should be placed on the defendant: usually the circumstances so excusing or justifying his wrongdoing are peculiarly within his own and not the plaintiff’s knowledge.[8]

Witness Officer Mapatshoe

10. He is a Constable in the Metro Police and commenced working in December 2013. On 18 December 2014 he together with Constable Maisela were conducting a patrol and crime prevention at the Shoprite Complex, Bronkhorstspuit.

11. When they were patrolling, he noticed a Ford Ranger approaching from the opposite direction at a high speed. It is now common cause that such Ford Ranger was driven by the plaintiff. A collision occurred where he went to investigate but the plaintiff failed to stop and sped off. It is the same accident that has been referred to in paragraph 1 of the admissions sought by the defendant in terms of Rule 37[9] to which the plaintiff responded affirmatively.
12. A chase ensued in consequence of the plaintiff's failure to stop which resulted in a second collision. It is the collision that has been referred to in paragraph 4 of the admissions sought by the defendant in terms of Rule 37.[10]
13. Officer Mapatshoe pursued the plaintiff until he managed to stop him at the intersection of Kruger Street and Charl Cilliers Street by blocking him. The Ford Ranger driven by the plaintiff came to a standstill and he requested the plaintiff to exit the vehicle but instead the plaintiff tried to reverse as a result of which he grabbed the keys through the open window.
14. It is immediately after that incident (the taking of the keys) that an altercation commenced. Such altercation involved fighting for his service pistol which was holstered on his right hand, but he managed to step back and avoid being disarmed.
15. The plaintiff once again tried to disarm Officer Mapatshoe and an altercation continued up until his service firearm was accidentally discharged, and the plaintiff fell to the ground.
16. During cross-examination by Advocate Fourie, on behalf of the plaintiff, he denied that he intentionally shot the plaintiff. He persisted with the fact that the firearm was accidentally discharged during such altercation, when they were in a standing position. He further denies that he went back for about 2 to 3 metres before he allegedly fired a shot.
17. He was further subjected to an extensive cross-examination, at times he would get emotional lambasting counsel not to interject while he was still explaining. Some inconsistencies were pointed out between his evidence and his statement as foreshadowed in terms of the plaintiff's heads of argument:

"5.5 He testified that there were two attempts to take his firearm. He testified that on the first attempt he took out his pistol and cocked it with the intent to fire a warning shot, but he decided that it was not right and then put it back to his holster. He then testified that there was a second attempt to take his pistol and then this is when the shot went off."

5.6 When cross-examined about his statement indicates that he only allegedly cocked his pistol on the second attempt, he was unable to explain this inconsistency."

18. He was cross-examined further about the location of bullet holes that penetrated the plaintiff from his left right through to the right leg when in fact such altercation took place in a standing position (when they were face to face with the plaintiff).

Witness Officer Maisela

19. Officer Maisela testified that at all material times relevant

thereto, he was in the company of Officer Mapatshoe. He largely corroborates the circumstances surrounding the first and second collisions as alluded to by Officer Mapatshoe. The balance of his evidence was predicated upon the fact that at the time when the shot was fired he was in conversation with the passenger in the plaintiff's car. He further denied the fact that the plaintiff was shot as described by him and confirms Officer Mapatshoe's version that his service firearm had accidentally discharged during the altercation.

Witness Ngomo

20. His evidence relates to matters that have been admitted and are not in contention, and thus there is no need to be detained by the substantive merits of his testimony.

Warrant Officer Marais

21. On 18 September 2014 he received a complaint of a shooting incident in Kruger Street. He went to investigate and found a Metro Police vehicle at the intersection which had blocked a Ford Ranger bakkie.
22. The passenger of the Ford Ranger bakkie told him that they were pulled off by the Metro Police and that the plaintiff was shot by the Metro Police. Constable Maisela told him about the previous collision and that the plaintiff and Officer Mapatshoe were involved in a scuffle for possession of the service pistol when the service pistol was accidentally discharged.

Witness Constable Kube

23. Constable Kube's testimony was in relation to the disputed contents of the plaintiff's warning statement. I provisionally allowed such statement as evidence as there was a dispute about its authenticity and the plaintiff disavowed not only its contents but also the manner in which it was obtained.
24. Such statement is contained in Exhibit X9.[11] Pages 28 to 32 of Exhibit X9 relate to the procedure that has to be observed in interviewing a suspect. In truth, it is the statement of Constable Kube as opposed to that of a suspect, being the plaintiff. Annexed to such affidavit (the procedure for interviewing a suspect) is a statement by the suspect. That is to me the basis upon which this matter ought to be considered.
25. Although I observed inconsistencies highlighted by Mr Fourie with regard to the statement, which I wholeheartedly endorse, I in any event believed that those were technical objections to less than perfect procedural steps which should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their real merits. It is in consequence of such belief and assertion, that I provisionally accepted the statement as evidence, and I do accordingly now accept it as part of the evidence that needs to be considered in properly adjudicating this matter.

The plaintiff's case

26. The plaintiff testified that on 18 September 2014 he was the driver of the Ford Ranger bakkie on his way out of the parking area at Shoprite Centre, Bronkhorstspuit. The bakkie which he was driving collided with a Metro Police vehicle. Both vehicles came to a standstill and both drivers' windows were open. The driver of the Metro vehicle swore at him and in that process leaned to his left as if he was taking out his service firearm. Fearing for his life he turned left into the street in the direction of the Caltex Garage, left again at the Caltex Service Station into Church Street, when another motor vehicle came out of the service station and the vehicles collided. Still fearing for his life he pulled off towards Bronkhorstspuit Police Station and he was blocked by Officer Mapatshoe in the intersection of Kruger Street and Charl Cilliers Streets. The driver of the Metro Police vehicle pulled him out of the vehicle and immediately hit him twice with a fist in the face. He only retaliated after a third strike was made.
27. Officer Mapatshoe continued to assault him and he retaliated by hitting back. During such altercation, the driver took two to three steps backwards; took out his firearm and shot the plaintiff in the leg. The plaintiff was right next to his bakkie when such shot was fired and it penetrated from his left leg through to his right leg. He eventually passed out and someone put a business card in his pocket and said he had witnessed the incident.
28. During cross-examination he denied that he made an attempt to disarm Officer Mapatshoe. He maintained that he sped off as he was fearing for his life. He also denied the contents of his statement when inconsistencies were pointed out.[12]

Witness Johan Scheepers

29. He testified that he is an attorney in Bronkhorstspuit and the plaintiff's attorney of record. On the afternoon of 18 September 2014 he was working in his office, situated on the corner of Charl Cilliers and Kruger Streets. He heard a siren and realised that the activities which caused the siren were moving towards the direction of his office. He walked to the front door and saw a stationary bakkie and a Metro vehicle. Such Metro vehicle had blocked the bakkie. His office is approximately 100 or 110 metres from where he observed such activities. Immediately after all the vehicles had stopped all the occupants came out of their respective cars. He observed an exchange of fists between the driver of the Metro Police vehicle and the bakkie. After such an exchange, he thought that the fight was over and he turned around and walked back towards his office, but he heard a shot, looked back and saw the officer standing with his hands at an approximately 45 degree angle towards the ground. The driver of the bakkie, being the plaintiff fell down.
30. The plaintiff came to see him a couple of months later and he advised the plaintiff that he will not be able to assist the plaintiff with litigation. He referred the plaintiff to his correspondent in Pretoria.

Issues to be decided

31. Firstly, this Court has to decide whether the defendant should be held liable for the injuries sustained by the plaintiff as a result of a shot that was allegedly fired by Officer Mapatshoe and being hit with the fists. Secondly, whether the defences raised by the defendant are sustainable.

Applicable law (necessity, self-defence)

32. The common denominator of these defences is the philosophy that the infliction of harm upon another may be justified if it is the prize of averting some other harm, whether to the victim himself or to the third party. Whether it is justified in a particular case will depend on many considerations. Proportionality, in the sense of a preponderance of avoided over inflicted harm, is a traditional postulate of necessity, although not a defence. But both present the same ultimate issue: did the defendant act reasonably in all circumstances? The enquiry is factual, and since the issue is wrongfulness, not fault, the test is objective. Thus the question is not whether the defendant believed his conduct to be justified, but whether the law considers it so. This, in turn, depends on whether it was a reasonable response for the defendant to make to the situation, judged objectively and even with hindsight, although not with regard to the defendant's resources, motives and circumstances, for no test can be applied in a vacuum.[13]
33. If the test is satisfied the defendant escapes liability because he acted lawfully in a situation of necessity or defence. If the test is not satisfied the defendant cannot invoke the necessity or defence to justify his conduct, which therefore remains wrongful.
34. The basis for distinguishing between necessity and defence is found in the nature of the evil sought to be avoided, its source, and who suffers by its avoidance. If the evil or its threat is imminent and unlawful, and emanates from him who is harmed by averting it, the case is one of self-defence (self-defence if the person threatened also inflicts harm) otherwise it is a case of necessity, which therefore embraces all other situations where harm is inflicted to avoid greater harm and the characteristics of defence are not present. The significance of the distinction between necessity and self-defence is that the requirements of defence are less stringent than those of necessity. Although both exert objective reasonableness from the actor, defence starts with the prejudice in his favour because his victim asked for it by making the initial attack, whether upon the actor himself (self-defence) or upon the innocent third party (defence of another). Thus the weighing of the interests protected against the interests infringed to ensure that the former merits at least as much social legal recognition as the latter, which necessity demands before conferring its imprimatur, is not generally required by self-defence, although even defence will baulk at a disparity so gross as to offend one's sense of propriety.

35. The remarkable difference between necessity and self-defence rests on the policy consideration that, whereas the victim of necessity is innocent, the victim of defence is himself an unlawful aggressor, in some degree unworthy of the law's protection. The victim's own turpitude is therefore the key to the differential treatment, an important criteria when deciding whether a particular situation is of necessity or defence.[14]
36. In *Matlou v Makhubedu*[15]
- this matter concerns the plaintiff who was shot in the back by a policeman in the course of arresting him on a charge of contravening section 36 of Act 62 of 1955 (being found in possession of goods suspected of having been stolen). To the plaintiff's action against the policeman for damages for assault the policeman pleaded the statutory defence contained in section 37(1) of the Criminal Procedure Act 56 of 1955. The section provides in essence that the killing of a person in the course of lawfully attempting to arrest him is deemed to be justifiable homicide where:
- 36.1 the deceased committed or was on reasonable grounds suspected of having committed an offence mentioned in the first schedule to the Act; and
- 36.2 the deceased fled or resisted arrest and could not be arrested or prevented from escaping by any means other than killing him.
37. The Appellate Division held that:
- 37.1 although section 37(a) dealt expressly only with intentional killing in the course of effecting an arrest, it had to be construed as including intentional wounding for that purpose;
- 37.2 where the circumstances specified in section 37(1) were present there was no further requirement that the intentional causing of death had to be weighed against the seriousness of the offence involved;
- 37.3 in determining, for the purpose of section 37(1), whether other means (including the use of lesser force) would have sufficed to apprehend the fugitive, each case had to be considered on its own merits.
- 37.4 where circumstances permitted, an overall warning should first be given, followed by a warning shot into the ground or air, and finally the arrester should try to shoot the fugitive in the legs; (my emphasis)
- 37.5 the onus of establishing the special defence based on section 37(1) in a civil case such as the present one, where a defendant admitted the assault and sought to justify it, rested upon the defendant.
38. In casu, the plaintiff was involved in the first collision and proceeded to the second collision and ended up being blocked by Officer Mapatshoe at the intersection of Charl Cilliers and Kruger Streets. The plaintiff avers that he was going to Bronkhorstspuit Police Station, and he could not stop as he was fearing for his life. There is no evidence to that effect, that the

plaintiff was heading to Bronkhorstspuit Police Station. One can only speculate. Had the plaintiff not been blocked one does not know how many more collisions/accidents he would have caused thereby putting other people (lives) in danger. I am of the view that at some point in time, the plaintiff had to be stopped.

39. Officer Mapatshoe, at the time when the chase ensued, had a reasonable ground for suspecting that the plaintiff had committed the offence of driving under the influence of alcohol and/or the offence of negligent and reckless driving in his presence.[16]
40. If the plaintiff had stopped, as he alleges in paragraph 5 of his amended particulars of claim (the aforesaid assault took place in a public place and within the sight of members of the public), it was unlikely that the second collision would have happened and most probably, he would not have been shot.
41. The plaintiff further alludes to the fact that when the altercation ensued between him and Officer Mapatshoe, Officer Mapatshoe “drew his firearm and shot down, but he shot me on my left lower leg, then I fell down”. [17] Such is consistent with Matlou’s case; where circumstances permitted, an overall warning should first be given, followed by a warning shot into the ground or air, and finally the arrester should try to shoot the fugitive in the legs.
42. On the plaintiff’s own version, Officer Mapatshoe did exactly that, by shooting down as opposed to aiming a firearm at him.
43. This brings me to a conclusion that “This remarkable difference between necessity and defence rests upon policy consideration that, whereas the victim of necessity is innocent, the victim of self-defence is himself an unlawful aggressor, in some degree unworthy of the law’s protection” – I find that Officer Mapatshoe acted in self-defence.
44. I find Officer Mapatshoe’s evidence to be most probable than that of the plaintiff. In truth, Johan Scheepers’ evidence did not assist the plaintiff at all as firstly, he did not see the actual shooting (or the discharge of the firearm) which forms the subject-matter of this case and secondly his evidence cannot be corroborated by all the witnesses, including the plaintiff. By way of example, he testified that as soon as all the vehicles stopped at the intersection of Charl Cilliers and Kruger Streets, all the occupants of the vehicles came out. That is a material discrepancy. There are two possibilities:
 - 44.1 Either he did not see the activities that were happening there;
 - 44.2 If he did see, he saw an opportunity to launch a civil claim.
45. He is in any event the attorney of record of the plaintiff – he has a direct interest in the outcome of this litigation.
46. All the witnesses of the defendant were reliable. Even in some instances inconsistencies were pointed out during cross-examination, those inconsistencies were not material in negating their testimony.

47. In the matter of Sewmungal and Another, NNO v Regent Cinema[18] the following was stated:

“In approaching this particular type of problem, it is not wrong for a court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he had been seen and heard by a court. An incautious answer in cross-examination may change the whole complexion of a case. Considerations such as these may have influenced Schreiner J, when he observed in Butterworth v Butterworth, 1943 WLD 127 at page 131, that –

‘in litigation as in less serious forms of adventure one may have a reasonable chance of winning though the odds may be against one’.”

48. Based on this dictum I find that the inconsistencies identified in the statement cannot change the foundational basis upon which this case is to be considered.

49. Just like in many instances unreasonable delay almost inevitably

leads to injustice. Witnesses’ memories fade, and some evidence is irretrievably lost. By way of example, the

plaintiff could not locate his passenger in circumstances where he could have helped him to advance his claim. Unlike Johan

Scheepers, his passenger would have been in a position to tell the story as it happened. This incident happened six years ago, to expect viz, Constable Kube to know the precise nature and content of the plaintiff’s statement is with respect, a breach too far.

Maxim volenti non fit iniuria

50. This maxim embodies the principle which, when confined within the right limits, is both just and equitable. A man who consents to suffer an injury can as a general rule have no right to complain. He who, knowing and realising a danger, voluntarily agrees to undergo it, has only himself to thank for the consequences. But like so many other maximums, the one under consideration needs to be employed cautiously and with circumspection.

51. The principle is clear; the difficulty lies in the appreciation

of it, in deciding, in other words, under the circumstances of each particular case whether the injured man was volens to undertake the risk. A consideration of the grounds upon which the doctrine rests, and for the cases in which its scope has been discussed, leads to the conclusion that in order to render the maximum applicable it must be clearly shown that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation and consent, these are the essential elements; but knowledge does not invariably imply appreciation, and both together are necessarily equivalent to consent. The requirements for establishing consent or voluntary assumption of risk as a ground for such justification are the following:

51.1 The plaintiff must have had knowledge of the harm or risk involved in the defendant's conduct, as well as the nature and the full extent thereof. This is also referred to as informed consent;

51.2 Knowledge of the harm or risk involved is not sufficient. The plaintiff must also have appreciated the nature and extent of the harm and the risk involved;

51.3 Knowledge and appreciation will not suffice, the maxim is not scienti non fit iniuria but volenti non fit iniuria. The plaintiff must also have consented to the infliction of the harm or assumed the risk implicit in the defendant's conduct. Consent and assumption of the risk imply that the plaintiff intended his or her rights to be limited, for the purpose of infliction of the specific harm or exposure to the hazardous conduct of the defendant. The plaintiff must therefore not only have consented to or assumed the physical harm and risk involved, but also the legal risk of injury;

51.4 The defendant's conduct must have fallen within the limits of consent should the conduct violate the terms of the consent, the defence falls away;

51.5 The consent must extend to all the consequences which may arise out of the conduct. However it is possible to give conditional consent for example that a manuscript be shown to someone for approval prior to publication;

51.6 The consent must have been freely given and the risk voluntarily assumed. Whether consent has been freely given, and the risk voluntarily assumed, depends entirely on the particular circumstances of a case and, in particular, on the moral economic pressures restricting the plaintiff's freedom of choice;

51.7 Consent or voluntarily assumption or risk is of course a defence only in respect of injuries and harm caused by the materialisation of the risk which was subjectively foreseen, appreciated and assumed by the plaintiff. If one exposes one's self to dangerous or negligent conduct one does not necessarily assume all the risk attached to it. In *Vorster v Santam Insurance Co Ltd*[19] Marais J observed:

"The volens may relate to specific, separable parts of the risk or danger and not to others."

He continued:

"If it were proved that the plaintiff was fully volens in respect of one of these factors of danger but the cause of the injury arose from an element not covered by the volens, the defence or volenti non fit iniuria would not succeed, in other words the required legal consent must have been directed to that particular danger factor which in the event caused the damage; if not, the volens defence fails."

52. The requirements for the defence of volenti non fit iniuria are not restricted to the subjective requisites of knowledge, appreciation and consent or assumption of risk. One's freedom of will and capacity to regulate unilaterally the extent of one's rights are not absolute.

53. Consent or assumption of risk is a unilateral legal act whereby a plaintiff waives or restricts his or her rights in respect of certain harmful conduct by the defendant. In order to constitute a legal act, the will and intention of the consenting party must be manifested by external conduct.
54. Consent and assumption of a risk is a legal act. The execution of a legal act requires in principle that the actor must have the legal capacity to perform a juristic act.
55. Because consent is a unilateral act, one may revoke it at any reasonable time.
56. Officer Mapatshoe has already testified that at the time of the incident he had been a police officer for less than a year. During his testimony he would from time to time refer to the fact that he was inexperienced, thus not to be blamed wholeheartedly for certain actions. It cannot be said that the plaintiff consented

or voluntarily assumed the risk which was subjectively foreseen, appreciated and assumed, if one has to consider the circumstances

under which the alleged shot was fired (or incidentally discharged). An experienced police official would have handled the same situation differently. It does not follow as a matter of course that when one is pursued by the police officer(s) (especially for being suspected of having committing a crime such as negligent driving) that you will be shot. Because I have already found that Officer Mapatshoe acted in self-defence, I do not need to dwell much on this defence.

FINDINGS

57. Consequently, I make the following findings:

57.1 The plaintiff was in a position to avert the damages he suffered had he simply stopped at the Shoprite Centre, Bronkhorstspuit after he collided with the car driven by Officer Mapatshoe;

57.2 During such incident, the plaintiff concedes in his amended particulars of claim that such assault took place in a public space and within sight of members of the public;

57.3 If Officer Mapatshoe wanted to shoot him as he wants this Court to believe, he could have done so at the first reasonable opportunity, being after he was blocked when the plaintiff was still in the car;

57.4 On the plaintiff's own version, the shot was fired (alternatively incidentally discharged) only after the altercation. The nature of the allegations and the extent of it could not be corroborated by his witnesses. Thus, one is left with no choice but to speculate on whether or not the actions of Officer Mapatshoe were intentional and the position of the bullet holes could not be confirmed by an expert;

57.5 The plaintiff was the author of his own misfortune and he was himself an unlawful aggressor, in some degree unworthy of the law's protection;

57.6 Consonant with Matlou's matter and the plaintiff's statement, Officer Mapatshoe's discharge of his firearm happened in circumstances where it was pointed into the ground (such is not consistent with the conduct of a person who wants to kill another).

57.7 Officer Mapatshoe acted in self-defence

ORDER

58. In the result, the following order is made:

58.1 The plaintiff's claim is dismissed with costs.

GUMBI AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

Plaintiff's Counsel

: Advocate Marc Fourie

Plaintiff's Attorneys

: Johann Scheepers Attorneys

Defendant's Counsel

: Advocate Johan Van Der Merwe

Defendant's Attorneys

: Adam Prinsloo Inc

Date of hearing

: 20 October 2020

Date of judgment

: 29 Decemeber 2020

[1] Plaintiff's Amended Particulars of Claim, page 4, para 3

[2] Rule 33 of the Uniform Rules of Court

[3] Plaintiff's Amended Particulars of Claim, page 6, para 8.1 to 8.4

[4] Defendant's Heads of Argument, page 3, para 5.1 to 5.4

[5] Of the Uniform Rules of Court which are briefly as follows: "1. Does the plaintiff admit that he was the driver of a Ford Ranger light delivery vehicle with registration number and letters SBX 660 GP on the 18th of September 2014, directly preceding the incident referred to in paragraph 3 of his particulars of claim? If not, who was the driver of the said vehicle at the

time, full particulars in respect of the name, surname, identity number, residential address and place of employment are required. 2. Does the plaintiff admit that the Ford Ranger light delivery vehicle referred to above collided with a Metro Police vehicle with registration number and letters YCM 132 GP near the entrance of Shoprite, Bronkhorstspuit prior to the incident to which the plaintiff refers in paragraph 3 of his particulars of claim? 4. Does the plaintiff admit that the Ford Ranger referred to above collided with a vehicle with registration number and letters YMC 198 GP in the vicinity of Caltex Service Station, Bronkhorstspuit, prior to the incident to which the plaintiff refers in paragraph 3 of his particulars of claim?"

[5] Of the Uniform Rules of Court which are briefly as follows:

"1. Does the plaintiff admit that he was the driver of a Ford Ranger light delivery vehicle with registration number and letters SBX 660 GP on the 18th of September 2014, directly preceding the incident referred to in paragraph 3 of his particulars of claim? If not, who was the driver of the said vehicle at the time, full particulars in respect of the name, surname, identity number, residential address and place of employment are required.

2. Does the plaintiff admit that the Ford Ranger light delivery vehicle referred to above collided with a Metro Police vehicle with registration number and letters YCM 132 GP near the entrance of Shoprite, Bronkhorstspuit prior to the incident to which the plaintiff refers in paragraph 3 of his particulars of claim?
4. Does the plaintiff admit that the Ford Ranger referred to above collided with a vehicle with registration number and letters YMC 198 GP in the vicinity of Caltex Service Station, Bronkhorstspuit, prior to the incident to which the plaintiff refers in paragraph 3 of his particulars of claim?"

[6] The defendant's amended particulars of claim, page 12, para 3.1 to 3.1.4 "3.1 The defendant admits that: 3.1.1 The incident on the 18th September 2014 at or near Bronkhorstspuit during which a physical altercation occurred between a member of the City of Tshwane Metropolitan Police ("the Officer") and the plaintiff; 3.1.2 the said incident was preceded by: 3.1.2.1 a collision between motor vehicle with registration numbers and letters SBX 660 GP driven by the plaintiff at the time (the plaintiff's vehicle), and a Metro Police vehicle with registration numbers and letters YCM 132 GP; 3.1.2.2 a further collision between the plaintiff's vehicle and a vehicle with registration number and letters YMC 198 GP; 3.1.2.3 members of the defendant, including the Officer, chasing the plaintiff's vehicle, driven by the plaintiff, who failed to stop at either of the accident scenes in the said Metro Police vehicle; 3.1.2.4 members of the defendant, including the Officer, blocking the plaintiff's vehicle with the said Metro Police vehicle; 3.1.3 During the physical altercation the Officer's service firearm was accidentally discharged and the plaintiff was shot in the lower limb; 3.1.4 At all material times hereto the Officer was employed by the defendant and acting within the course and scope of his employment."

[6] The defendant's amended particulars of claim, page 12, para 3.1 to 3.1.4

"3.1 The defendant admits that:

3.1.1 The incident on the 18th September 2014 at or near Bronkhorstspuit during which a physical altercation occurred between a member of the City of Tshwane Metropolitan Police ("the Officer") and the plaintiff;

3.1.2 the said incident was preceded by:

3.1.2.1 a collision between motor vehicle with registration numbers and letters SBX 660 GP driven by the plaintiff at the time (the plaintiff's vehicle), and a Metro Police vehicle with registration numbers and letters YCM 132 GP;

3.1.2.2 a further collision between the plaintiff's vehicle and a vehicle with registration number and letters YMC 198 GP;

3.1.2.3 members of the defendant, including the Officer, chasing the plaintiff's vehicle, driven by the plaintiff, who failed to stop at either of the accident scenes in the said Metro Police vehicle;

3.1.2.4 members of the defendant, including the Officer, blocking the plaintiff's vehicle with the said Metro Police vehicle;

3.1.3 During the physical altercation the Officer's service firearm was accidentally discharged and the plaintiff was shot in the lower limb;

3.1.4 At all material times hereto the Officer was employed by the defendant and acting within the course and scope of his employment."

[7] The defendant's amended particulars of claim, page 14, para 3.2.1 which provides: "3.2.1 The firearm was discharged accidentally during a physical altercation with the plaintiff, which altercation was instigated by and followed through by the plaintiff; 3.2.2 In the alternative to 3.2.1 above the defendant pleads that the officer acted in self-defence whereas: 3.2.2.1 the plaintiff was executing an unlawful attack on the officer; 3.2.2.2 the Officer had reasonable grounds for believing that he was in physical danger; 3.2.2.3 the force applied by the Officer, which excludes the accidental discharge of the firearm, was necessary in the circumstances to repel the unlawful attack by the plaintiff and was commensurate with the plaintiff's aggression; 3.2.3 In the further alternative to what has been pleaded in 3.2.1 and 3.2.2 above the defendant pleads that the Officer acted out of necessity to effect a lawful arrest, alternatively to prevent an escape from a lawful arrest whereas: 3.2.3.1 the Officer had reasonable grounds for suspecting that the plaintiff had committed the offence of driving under the influence of alcohol and/or the offence of negligent and reckless driving in his presence

and/or has failed to stop at two accident scenes on which grounds the member was by law entitled to arrest the plaintiff; 3.2.3.2 the Officer attempted to arrest the plaintiff in a manner prescribed by the law; 3.2.3.3 the plaintiff attempted to prevent, resist or escape the lawful arrest;

3.2.3.4 the force applied by the officer was reasonably necessary to bring about the arrest. 3.2.4 In the further alternative to what has been pleaded in 3.2.1 and 3.2.3 above the defendant pleads as follows: 3.2.4.1 The plaintiff at all material times had knowledge of the following: 3.2.4.1.1 that he brought his vehicle into collision with a Metro Police vehicle with registration number and letters YCM 132 GP shortly prior to the accident in question; 3.2.4.1.2 that he brought his vehicle into collision with a vehicle with registration number and letters YMC 198 GP shortly prior to the accident in question; 3.2.4.1.3 that the defendant, duly represented by inter alia the Officer, chased him in order to investigate and attend to one or more of the collisions referred to above and effect an arrest if necessary; 3.2.4.1.4

that chasing away from the defendant was in the circumstances unlawful and exposed the plaintiff to risks; 3.2.4.1.5 that assaulting the Officer was in the circumstances unlawful and exposed the plaintiff to risks; 3.2.4.1.6 that attempting to disarm the Officer was in the circumstances unlawful and exposed the plaintiff to risks; 3.2.4.1.7 that the possibility existed of sustaining injuries and harm in the circumstances as a result of his aforesaid conduct. 3.2.4.2 The plaintiff was thus fully aware of the risks involved in his attempt to prevent, resist or escape the investigation and potential arrest, his assault of the Officer as well as his attempt to disarm

the Officer; 3.2.4.3 Despite the knowledge and whilst appreciating these risks the plaintiff nevertheless continued with his attempt to prevent, resist or escape the investigation and possible arrest, his assault of the

Officer as well as his attempt to disarm the Officer; 3.2.4.4 The plaintiff thereby consented to be subjected to the risk of injury and harm and in the premises the defendant is not liable for any loss or damages suffered by the plaintiff.”

[7] The defendant’s amended particulars of claim, page 14, para 3.2.1 which provides:

“3.2.1 The firearm was discharged accidentally during a physical altercation with the plaintiff, which altercation was instigated by and followed through by the plaintiff;

3.2.2 In the alternative to 3.2.1 above the defendant pleads that the officer acted in self-defence whereas:

3.2.2.1 the plaintiff was executing an unlawful attack on the officer;

3.2.2.2 the Officer had reasonable grounds for believing that he was in physical danger;

3.2.2.3 the force applied by the Officer, which excludes the accidental discharge of the firearm, was necessary in the circumstances to repel the unlawful attack by the plaintiff and was commensurate with the plaintiff’s aggression;

3.2.3 In the further alternative to what has been pleaded in 3.2.1 and 3.2.2 above the defendant pleads that the Officer acted out of necessity to effect a lawful arrest, alternatively to prevent an escape from a lawful arrest whereas:

3.2.3.1 the Officer had reasonable grounds for suspecting that the plaintiff had committed the offence of driving under the influence of alcohol and/or the offence of negligent and reckless driving in his presence

and/or has failed to stop at two accident scenes on which grounds the member was by law entitled to arrest the plaintiff;

3.2.3.2 the Officer attempted to arrest the plaintiff in a manner prescribed by the law;

3.2.3.3 the plaintiff attempted to prevent, resist or escape the lawful arrest;

3.2.3.4 the force applied by the officer was reasonably necessary to bring about the arrest.

3.2.4 In the further alternative to what has been pleaded in 3.2.1 and 3.2.3 above the defendant pleads as follows:

3.2.4.1 The plaintiff at all material times had knowledge of the following:

3.2.4.1.1 that he brought his vehicle into collision with a Metro Police vehicle with registration number and letters YCM 132 GP shortly prior to the accident in question;

3.2.4.1.2 that he brought his vehicle into collision with a vehicle with registration number and letters YMC 198 GP shortly prior to the accident in question;

3.2.4.1.3 that the defendant, duly represented by inter alia the Officer, chased him in order to investigate and attend to one or more of the collisions referred to above and effect an arrest if necessary;

3.2.4.1.4

that chasing away from the defendant was in the circumstances unlawful and exposed the plaintiff to risks;

3.2.4.1.5 that assaulting the Officer was in the circumstances unlawful and exposed the plaintiff to risks;

3.2.4.1.6 that attempting to disarm the Officer was in the circumstances unlawful and exposed the plaintiff to risks;

3.2.4.1.7 that the possibility existed of sustaining injuries and harm in the circumstances as a result of his aforesaid conduct.

3.2.4.2 The plaintiff was thus fully aware of the risks involved in his attempt to prevent, resist or escape the investigation and potential arrest, his assault of the Officer as well as his attempt to disarm

the Officer;

3.2.4.3 Despite the knowledge and whilst appreciating these risks the plaintiff nevertheless continued with his attempt to prevent, resist or escape the investigation and possible arrest, his assault of the

Officer as well as his attempt to disarm the Officer;

3.2.4.4 The plaintiff thereby consented to be subjected to the risk of injury and harm and in the premises the defendant is not liable for any loss or damages suffered by the plaintiff.”

[8] The Law of Delict, Boberg, Vol 1, Aquilian Liability, page 648

[9] Rule 37 of the Uniform Rules of Court

[10] Rule 37 of the Uniform Rules of Court

[11] Page 28-39

[12] Defendant’s Heads of Argument, page 9, para 7.31: “7.31 He identified the following discrepancies/defects in the statement: 7.31.1 It states that he started to argue with the driver of the Metro vehicle after the collision at the Shoprite parking area. He maintains that the driver first swore at him; 7.31.2 He disputes that he ever said that other people (bystanders) started to intervene and that caused him to drive off to the police station; 7.31.3 He misses detail which he did convey to the police officer, for example that the driver of the Metro vehicle grabbed the keys from his bakkie at the Charl Cilliers/Kruger intersection and the chronology of the fist fight; 7.31.4 The statement does not reflect what happened on the day in question and is therefore not the truth.”

[12] Defendant’s Heads of Argument, page 9, para 7.31:

“7.31 He identified the following discrepancies/defects in the statement:

7.31.1 It states that he started to argue with the driver of the Metro vehicle after the collision at the Shoprite parking area. He maintains that the driver first swore at him;

7.31.2 He disputes that he ever said that other people (bystanders) started to intervene and that caused him to drive off to the police station;

7.31.3 He misses detail which he did convey to the police officer, for example that the driver of the Metro vehicle grabbed the keys from his bakkie at the Charl Cilliers/Kruger intersection and the chronology of the fist fight;

7.31.4 The statement does not reflect what happened on the day in question and is therefore not the truth.”

[13] The Law of Delict, Boberg, Vol 1, Aquilian Liability, page 787-788

[14] The Law of Delict, Boberg (Ibid), page 789

[15] 1978 (1) SA 946 (A)

[16] Defendant's Amended Particulars of Claim, page 15, para 3.2.3.1

[17] Exhibit X9, page 34

[18] 1977 (1) SA 814 (N) at 819A-C

[19] 1973 (4) SA 764 (A)

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Prepared on 10 October 2026 · Esheria