

SOUTH AFRICA / JUDGMENT

Engelbrecht v City of Tshwane Metropolitan Municipality [2023] ZAGPPHC 350; A85/2021 (4 May 2023) [2023] ZAGPPHC 350

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa, Steinberg, V. Tlhapi

CASE / FILE NUMBER

A85/2021

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appeal Case Number: A85/2021

Case number:75626/16

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES/NO

2023

04/05/23

In the matters between: -

REINO MARIUS ENGELBRECHT APPELLANT

AND

THE CITY OF TSHWANE

METROPOLITAN MUNICIPLITY RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on 2023.

BAQWA J

[1] The issue in this appeal is the dismissal of the appellant's claim for damages as a result of injuries sustained during an alleged incident at or near Bronkhorstspuit on 18 September 2018 when a metro police officer in the employ of the respondent, Officer Maphatsoe, allegedly unlawfully and wrongfully assaulted the appellant by hitting him with fists and shooting him in the legs with his service fire-arm. The trial proceeded before a single judge, Gumbi AJ on 22 October 2020 and judgment was delivered on 29 December

2020. The appellant's claim was dismissed with costs.

[2] Leave to appeal to this court was granted by Gumbi AJ on 24 February 2021.

The Law

[3] The version presented by the parties before the court a quo was mutually destructive and court was called upon to decide the matter based on inherent probabilities.

[4] By operation of law and through the admission in the pre-trial minutes, the onus of alleging and proving an excuse or justification

for the alleged assault rested with the defendant.

[5] In *Baring Eiendomme Bpk vs. Roux*[1] the Supreme Court of Appeal adopted the following passage in *National Employer' General Insurance Co Ltd vs. Jagers*[2] ".....where there are two mutually destructive stories [the plaintiff] can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false and mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test plaintiff allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities of the case and, if the probabilities favours the plaintiff then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case, more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that the evidence is true and that his defendant's version is false."

Respondent's Pleaded Case

[6] The plaintiff's amended particulars of claim state as follows:

“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 Lehlogonolo Daniel Mapatshoe, unlawfully and wrongfully assaulted the plaintiff by hitting the plaintiff by hitting the plaintiff with his fists and shooting the plaintiff in his leg, which bullet also penetrated his 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.....”

[7] In his amended plea the defendant states:

7.1 That officer Mapatshoe 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

7.2 In the alternative, that officer Mapatshoe acted in self defence

7.3 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.

7.4 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 or harm.

In the court below

[8] Officer Mapatshoe, a constable in the metro police testified that on 18 December 2014 he, together with Constable Maisela were on crime prevention patrol at the Shoprite Complex, Bronkhorstspuit when he noticed a Ford Ranger driven by the plaintiff approaching from the opposite direction at high speed. A collision occurred between plaintiff’s vehicle and the patrol vehicle. When Mapatshoe went to investigate, plaintiff failed to stop and sped off. A chase ensued which resulted in plaintiff colliding with yet another motor vehicle. He again failed to stop and Mapatshoe pursued him until he managed to stop plaintiff by blocking him at the intersection of Kruger Street and Charl Cilliers Street.

[9] The Ford Ranger came to a stop and Mapatshoe requested plaintiff exit the vehicle but instead the plaintiff tried to engage the reverse gear as a result of which Mapatshoe grabbed the keys through the open window.

[10] An altercation ensued which involved fighting for the service pistol which was holstered on Mapatshoe’s right. He stepped back and avoided being disarmed.

[11] The plaintiff again tried to disarm Mapatshoe and another altercation ensued until his service firearm accidentally discharged injuring plaintiff who fell to the ground

[12] Mapatshoe denied during cross-examination that he intentionally shot the plaintiff. He also denied that he went back about 2 or 3 metres before allegedly firing a shot.

- [13] Office Maisela largely corroborated the circumstances surrounding the first and second collision and he denied that plaintiff was shot as described by him. He confirmed Mapatshoe's version that his service firearm had accidentally discharged during the altercation.

The Plaintiff Case

- [14] The plaintiff testified that on 18 September 2014 he was the driver of a Ford Ranger bakkie when he collided with a Metro Police vehicle. Both vehicles came to a standstill with both drivers' windows open. The driver of the Metro police vehicle swore at him and in that process leaned to his left as if to take out his service firearm.
- [15] Fearing for his life he turned left into the street in the direction of the Caltex garage and left again into Church Street when another motor vehicle exited the service station and the vehicles collided. Still fearing for his life he pulled off towards Bronkhorstspuit Police Station when he was blocked by officer Mapatshoe at 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. He only retaliated after a third strike was made. Officer Mapatshoe continued the assault and he hit back.
- [16] The driver took two to three steps backwards, took out his firearm and shot the plaintiff in the leg. The plaintiff was next to his bakkie when the shot was fired and it penetrated from his left leg through to his right leg. He eventually passed out and someone, who later turned out to be Johan Scheepers, his attorney, put a business card in his pocket and said he witnessed the incident.
- [17] During cross examination he denied that he made an attempt to disarm Officer Mapatshoe. He maintained he fled because he was fearing for his life.
- [18] Johan Scheepers testified that he is an attorney in Bronkhorstspuit and plaintiff's attorney of record. On the day in question he was in his office when he heard the sound of the siren. Upon walking to his front door he saw a stationary bakkie and a Metro vehicle. He was about 110 metres from the scene. He observed an exchange of fists between the drivers of the two vehicles. He thought the fight was over and was walking to his office when he heard the sound of a gunshot. He turned and saw the officer with his hands at approximately 45 degrees' angle towards the ground. The bakkie driver had fallen down.
- [19] The plaintiff came to see him a few months later and he referred him to his correspondent in Pretoria.

Before this Court

- [20] The applicant has argued that the court below erred in finding officer Mapatshoe acted in self-defence instead of finding that

officer Mapatshoe unlawfully assaulted the plaintiff by shooting him and hitting him with his fists under circumstances where he was not justified to do so.

[21] In support of his submission he refers to Mapatshoe's version under cross-examination when he testified that he and the plaintiff were standing face to face with their arms outstretched fighting for the pistol when the shot was accidentally discharged. He contends that the court below ought to have found that it was impossible for the bullet to have penetrated through the left and right leg of the plaintiff as bullet holes depicted on photographs presented by the appellant during the trial.

[22] Regarding the position of the bullet holes this is what the court below had to say

" 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."

[23] It is common cause that no expert witness was called by the plaintiff regarding the trajectory of the bullet and to explain the angle at which it was fired. It is therefore difficult to fault the reasoning of the court below in this regard. It would be speculative for any lay person (including the court below and the plaintiff) to draw conclusions regarding matters which are in the domain of ballistic experts. The photographs introduced as evidence cannot in the circumstances constitute conclusive evidence.

[24] The respondent contended that the photographs were nothing more than pictures of projectile holes or entrance and exit wounds. The respondent contended further that due to the movement of the participants during a tussle of the nature described by the witnesses, the probability cannot be excluded that the projectile penetrated the appellant's leg as depicted but no admissible evidence was presented regarding the conclusions drawn by the appellant and or his witnesses and /or appellant's legal representative which was admissible and could be accepted or admitted by the court below.

[25] I accept that the mobility of the scene and the participants was such that the court below was not in a position where it could exclude the possibility that the wounds could have been inflicted during the physical altercation or scuffle for the possession of the firearm and not from a deliberate act on the part of officer Mapatshoe.

[26] The unfortunate position regarding the evidence of the plaintiff is that his 'star witness' Johan Scheepers did not see the shooting incident. He was under the impression that the scuffle had ended and he was walking back to his office when he heard the sound of a shot. The plaintiff was then left as a single witness regarding the manner in which the shooting occurred. Scheepers failed to corroborate the evidence of the plaintiff in this regard.

Plea of self Defence

- [27] The appellant argued that the court below erred in interpreting the respondent's pleaded case as one of self-defence as the pleaded defence did not include intentional shooting of the plaintiff but rather an accidental discharge of the firearm during a physical altercation.
- [28] I agree with this criticism of the reasoning of the court below. It was never the defendant's version that he acted in self-defence by shooting the plaintiff; It was never the defendant's version that he drew his firearm and shot down or fired a warning shot and it was not the defendant's version that because of plaintiff aggression, the officer deemed it necessary to apply force by shooting the plaintiff.
- [29] In *Matlou vs. Makhubedu*[3] the plaintiff was intentionally shot in the back as he fled the police in order to effect a arrest. In the circumstances the court below erred in its reasoning and conclusion at paragraph 41 to 43 of the judgment.
- [30] Besides applying principles extracted from the *Matlou* decision in an incorrect manner, the court below ought to have considered that its conclusion regarding self-defence was not supported by the testimony of the respondent.

What is impact of the error of the court below

- [31] Having considered the wrong application of *Matlou* in the present case, this court has to weigh the impact thereof on this appeal. In my view the misapplication of *Matlou* is of no moment because this court has to consider the probabilities along with the evidence tendered by the respondent.

Context

- [32] The probabilities must be weighed within the context of the chronological sequence of events of the day in question. From the

time of his collision with the Metro Police vehicle and thereafter fleeing the scene of the accident, the appellant made himself a fugitive from justice, he did not want to be apprehended; The second collision confirmed this intention as he once more fled the second scene of an accident.

- [33] Within minutes, the appellant was potentially liable to face a minimum of four counts of reckless driving and unlawfully escaping a scene of an accident. It was only the tenacity of Officer Mapatshoe that stood in his way, hence the scuffle after Mapatshoe had removed his car keys, but he was still prepared to resist arrest.
- [34] Evidently, Officer Mapatshoe wanted to hold him accountable for his actions but the appellant had other ideas.

- [35] Had Mapatshoe had any intention to shoot the plaintiff he would have had ample opportunity to shoot him to stop his escape. Mapatshoe did not take such drastic action. Why would a constable shoot a private citizen after he had blocked his motor vehicle and disabled him from fleeing by removing his keys from the Ford Ranger.
- [36] It is clear from a reading of respondent's amended plea which stated that it was the plaintiff who was executing an unlawful attack on the defendant. It is couched as follows:
- "3.2.2 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 discharged of the firearm was necessary in the circumstances to repel the unlawful attack."
- [37] The events prior the physical altercation between the plaintiff and officer Mapatshoe confirm the reasonable apprehension held by the officer and lead to the only inference that could be drawn as who the aggressor was, namely, the plaintiff.
- [38] The only conclusion this court can come to having regard to the facts, the arguments, the pleadings and the authorities referred to is that the court below did not misdirect itself in finding that the plaintiff was in a position to avert the incident had he simply stopped at the Shoprite Centre, Bronkhorstspuit after he collided with the vehicle driven by officer Mapatshoe. The court below was correct in finding that there was insufficient corroboration of the plaintiff's version of the manner in which the shooting occurred. The witness Johan Scheepers did not see how the shooting occurred.
- [39] The court below found that the appellant was the author of his own misfortune in the manner he conducted himself on the day in question as opposed to Officer Mapatshoe who merely sought to uphold the law as a result of the unlawful acts that unfolded right in front of his eyes. I cannot disagree with this conclusion of the court below.

[40] In the result I propose that the following order be made.

Order

[41] The appeal is dismissed with costs including costs of counsel.

JUDGE SELBY BAQWA

JUDGE OF THE HIGH COURT

I agree

ACTING JUDGE STEINBERG

I agree and it is so ordered

JUDGE V. TLHAPI

Date of hearing: 18 January 2023

Date of judgment: May 2023

Appearance

On behalf of the Applicants Adv M.P Fourie mfourie@gkchambers.co.za Instructed by JOHAN SCHEEPERS ATTORNEYS On behalf of the Respondents Adv JG VanDder Merwe Instructed by PRINSLOO WHITEHEAD MADALANE ATTORNEYS

[1] 2001

(1) ALL SA 399 (SCA) para 6.

[2] 1984

(4) 437 (A) at 44 OE-44IA.

[3] 1978

(1) SA 946 (A).

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