

SOUTH AFRICA / JUDGMENT

Isaac v Minister of Safety and Security and Another; Prince v Minister of Safety and Security and Another (56288/2008;56285/2008) [2015] ZAGPPHC 825 (7 December 2015)

[2015] ZAGPPHC 825

COURT

North Gauteng High Court, Pretoria

BEFORE

MD MOHLAMONYANE

CASE / FILE NUMBER

56288/2008;56285/2008

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IN THE
HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case No: 56288/2008
7/12/2015
NOT REPORTABLE
NOT OF INTEREST
TO OTHER JUDGES

DATE: 7/12/2015
In the matter

between: MOTAUNG
RANTLOPI
ISAAC Plaintiff
and
MINISTER OF
SAFETY AND
SECURITY First
Defendant
MESHACK
MOKWENA
Second
Defendant

Case No: 56285/2008
MOTAUNG
BOLETA
PRINCE Plaintiff
[

JUDGMENT

MOHLAMONYANE AJ:

- [1] Under case number 56285/2008 Boleta Prince Motaung (“Prince”) is suing the Minister of Safety and Security (now Minister of Police) and under case number 56288/2008 Rantlopi Isaac Motaung (“Isaac”) is also suing the Minister of Safety and Security. Each of the Plaintiffs is claiming damages totalling R2 million as a result of the alleged assault by an officer of the First Defendant on each of the cases, viz., Constable Sefiwa Meshack Mokwena (“Mokwena”), who is cited as the Second Defendant in both cases. Reference to the two Plaintiffs by their first names is not intended to belittle them.
- [2] At the commencement of the trial on 10 February 2015 the parties requested that the two cases be consolidated for convenience purposes. An order to that effect was given by this Court. An application for separation of merits and quantum was granted by this Court. Consequently, the issue of quantum was postponed sine die.
- [3] The two Plaintiffs, viz., Isaac and Prince are siblings who reside in Kgobokwane village, near Dennilton, in the Limpopo Province. The incident that led to these lawsuits arose on the same date and place.

SALIENT FACTUAL BACKGROUND:

- [4] On 16 May 2007 Isaac and Prince were at Isaac’s so-called “spaza” shop (“the shop”) at the village of Kgobokwane. At about 11h45 or thereabout, a police combi vehicle, stopped outside the yard of the shop. According to Mokwena, there were about ten or so police officers inside the combi. Mokwena and a colleague of his, Constable Masemola (“Masemola”) alighted and went to the shop. The purpose of their visit was, according to Mokwena, to search for dagga in the shop pursuant to information given by a police informer.
- [5] At the shop the two police officers introduced themselves as police officers. They then requested to search the premises and both Isaac and Prince allowed them to do so. Upon searching, Masemola found a plastic bag full of dagga. He asked “what is this” to which Masemola apparently did not receive an answer. At that stage Isaac, who was closer to the two officers, made an attempt to flee the scene. Mokwena stopped him. Isaac then started to fight Mokwena and both exchanged some blows. Isaac then bolted from the scene and Mokwena pursued him.

- [6] Isaac stopped at the gate of his parental home. He picked up stones and bottles which he hurled at Mokwena. The stones and bottles struck Mokwena on his legs. Prince, who emerged from a different direction, joined Isaac to hurl stones at Mokwena. The stones struck Mokwena. Mokwena reprimanded them to cease to throw stones at him. Mokwena warned them he would take steps against them. He actually warned them that he would shoot at Isaac and Prince. Both siblings did not desist from pelting Mokwena with stones. When realising that his life was in danger he fired two warning shots into the air which did not scare them. Both Isaac and Prince persisted to pelt Mokwena with stones.
- [7] Mokwena then fired towards the legs of Isaac and Prince. A bullet struck Isaac on his buttocks. Another bullet struck Prince on his left leg.
- [8] Mokwena had chased after the fleeing Isaac in order to arrest him for the possession of dagga which was found in the shop. After Isaac was shot at, he got into the yard of his parental home. Mokwena went for him, grabbed and handcuffed him. The police vehicle arrived at that scene and Isaac was placed inside the police vehicle. As Isaac was injured, the police headed towards the hospital so that Isaac can receive medical attention.
- [9] Along the way, Isaac, who was sitting next to Mokwena jumped and bit off a piece of Mokwena's ear which he then spat. Isaac then remarked "I have now marked you". The incident worried Mokwena. Both were admitted at hospital. Mokwena was later transferred to Medforum hospital in Pretoria where he was admitted for two to three months. He underwent two operations on his ear.
- [10] The version of Isaac is to the effect that he is a hawker who sells fruit and vegetables and live chickens at his shop. He stated that he recalled the date in question, viz., 16 May 2007 clearly. On the day he was with his brother Prince, who was helping out at the shop. Suddenly a police combi stopped near the shop and about six of the police officers alighted. The officers requested to search inside the shop. He allowed them to enter and three of the officers entered inside the shop. Whilst the officers were searching he and his brother remained outside together with the officers who did not enter the shop. The three police officers who had entered came out and were having nothing in their possession.
- [11] Mokwena had stood with Prince with whom he had started a conversation which was within earshot of Isaac. According to Isaac Mokwena inquired from Prince as to why his lips were reddish to which Prince responded that he was born like that. Mokwena would then tell Prince he was a liar, he was smoking dagga. Mokwena there and there started beating Prince with open hands. Isaac asked the other officers why Prince was being beaten up and he was also beaten up with open hands by Mokwena. Isaac thereupon fled the scene. He fled to his own home and proceeded to his parental home. Isaac further states that Prince was following him.
- [12] Upon Prince entering their maternal home, Isaac closed the gate. The police officers remained on the opposite side of the gate whereupon Isaac and Prince moved away from the gate for a distance of about nine (9) metres. Three police officers had arrived already. There

were flower-like trees along the fence. One officer climbed at the corner of the fence. Mokwena also climbed over the fence closer to the gate. Isaac told the Court he looked down, saw a small stone which he picked up and hurled it towards the gate. According to him the stone struck the trees. Both officers climbed off. He further stated that all three of them were firing shots. He says he started getting frightened as he feared gunfire. The police officers fired several times and Isaac heard Prince saying that he was shot. He says the officers fired eight times and Prince was struck by the seventh shot and he (Isaac) was struck by the eighth shot.

- [13] Prince ran into the house. Isaac turned and followed him. He took a few steps and then fell to the ground. Two police officers broken the gate and entered the premises. The police officers went to look for Prince but could not find him. They returned, handcuffed Isaac and carried him to the combi which had stopped at the gate. He sat with Mokwena behind the driver's seat. When Isaac was groaning in pain Mokwena told him he was causing noise and slapped him twice across his face. Isaac kept silent for a while. When Mokwena looked aside Isaac bit his ear from which he cut a piece with his teeth and spit it to the floor bed of the combi. The other occupants were astonished and became stone silent. Isaac and Mokwena were both taken to the local hospital.
- [14] The evidence of Prince was almost similar to the evidence of his younger brother Isaac. For purposes of this judgment I need not go into details. Suffice to mention that it is common cause that Prince was struck by a bullet on his left leg whilst Isaac was struck on his buttock.
- [15] On behalf of the Minister a defence in accordance with the provisions of section 40(1)(h) of the Criminal Procedure Act, no 51 of 1977 ("the CPA") was raised. It is necessary to quote the section in full. It reads as follows:

"40(1) A peace officer may without warrant arrest any person-

- (h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition".
- [16] The defence raised is that when he fired the shots, the Second Defendant was defending himself. Before I venture to decide whether the Second Defendant was lawfully defending himself or not, I propose to deal with the requirements for self-defence. I do so hereunder.

REQUIREMENTS FOR SELF-DEFENCE:

- [17] In *Trainor S*, [2003] 1 All SA 435 (SCA) the requirements for self-defence were discussed. The Court considered whether there were any alternative methods or means at the disposal of the defending party to ward off the impending assault. [at 436-437].
- [18] In *Snyders v Louw* [2008] JOL 22625 (C) a judgment of the Full Bench of the High Court, Cape of Good Hope, the Court stated the test to be applied in order to establish self-defence. [at 15].

see also: *S v Dwyili* [2008] ZAFSHC, [at par. 21].

DID THE POLICE OFFICERS HAVE A RIGHT TO GO TO THE PLAINTIFF'S SHOP?

[19] As stated above, Mokwena and his colleagues went to the shop to search for dagga. Dagga is a dependence producing drug which is prohibited by law in South Africa. If Isaac concedes that upon their arrival at the shop the police officers greeted them, then one can reasonably infer that the police officers had not come there to fight anybody. I conclude that the police officers had a right to go to that shop and were authorised by law to arrest any person found in possession of dagga.

THE ENSUING FIGHT:

[20] According to Isaac the aggressor was Mokwena who started by slapping Prince and later slapping him (Isaac) who then fled the scene. It is highly incongruent for Isaac to suggest that it was Mokwena who was the aggressor. If, on his version, dagga was not found, was there a reason for Mokwena to slap Prince whilst accusing him of being a liar who smokes dagga? I can, on the facts and circumstances, not find a cogent reason for Mokwena to do that. In my view, it was highly unlikely that Mokwena would have behaved in that manner.

[21] What I find plausible is that Isaac and Prince fled the scene after dagga was found in the shop for fear of being arrested. I am fortified in my view by the continued aggression shown by both Isaac and Prince at their home, which onslaught was led by Isaac. When asked as to whom he directed the stone, he was at pains to tell. According to Isaac, Mokwena was the one climbing over the fence next to the gate. The established facts point to the situation that the stone was aimed at Mokwena and no other person. Isaac stated that he wanted to scare the two officers from climbing over the fence. According to Mokwena Isaac pelted him with stones and bottles and was joined by Prince. The purpose of pelting the officers with stones and bottles was to stop them from entering the yard of their home to effect arrest. In so doing both were resisting arrests. The version of Isaac that he picked up one stone is not reasonably probably true. It seems that Isaac and Prince showed bravery. Their conduct was far from conduct

of persons who were scared. The facts reveal that Isaac started to pelt the officers with stones before the officers could fire any shots.

[22] Thereafter Mokwena reprimanded them to stop pelting him with stones. They persisted. He warned them again and told them if they continue to do that he would fire shots at them. Isaac and Prince did not desist from their behaviour. Mokwena, realising that his life was in danger, fired warning shots into the air. They did not stop as they did not become scared. I must say, in passing, that indeed the behaviour of Isaac and Prince would have endangered the life of Mokwena in the sense that in such circumstances, members of the community might become intolerant and aggressive towards police officers. The risk of being attacked by the community members was high.

[23] “A person is justified in killing in self-defence not only when he fears that his life is in danger but also when he fears grievous bodily harm”.

see: S V Jackson, 1963(2) SA626 (AD) at 626 B-C.

[24] In the circumstances Mokwena found himself in, he had no other alternative method of warding off the attack than to shoot at both Plaintiffs.

[25] Counsel for the Plaintiffs argued that a single stone was not posing any danger to Mokwena. I disagree and reject the version that only a single stone was hurled by Isaac. He submitted further that police officers were just trigger happy and just fired at people who were going about their business. I am unable to agree with this assertion for the reasons already given. Isaac’s aggressive stance is perpetuated inside the combi when he bit off a piece of Mokwena’s ear. Mokwena had handcuffed him and there was no reason for Mokwena to slap Isaac inside the combi. I reject Isaac’s contention that Mokwena slapped him. It is argued further that there was no attack by the two Plaintiffs because they were running away from an attack by the police officers. I have already found that there was no attack by the police officers at the shop. It is argued further that the shooting incident happened at the Plaintiffs’ parental home where they thought they would be safe. In my view, if the Plaintiffs were scared they would have run inside their parents’ house to hide themselves. They seemed not scared of anything.

ALLEGED CONTRADICTIONS IN THE VERSION OF THE SECOND DEFENDANT:

[26] As to whether Isaac or Prince allowed the police officers to search or not is immaterial. What is material is that a search was conducted. Another alleged contradiction pointed out was what Mokwena mentioned in his warning statement and what he testified upon in this Court regarding the refusal by Isaac that they should search. In my view, this does not amount to a contradiction which is material to the decision of the case. Furthermore, that the Plaintiffs jumped over fences whilst fleeing is neither here nor there. In his own version Isaac fled to his own home and exited the premises through a small gate and got into another house of the neighbours. He crossed the street and then got into his parental home. It should be remembered that he did this whilst in flight and a witness might be genuinely mistaken that he was jumping over fences, when he was not.

[27] It is argued further on behalf of the Plaintiffs that they feared for their lives when they were running away as they were not armed. The question of whether they were armed (presumably with firearms) or not, does not feature in this case. The critical issue is whether Mokwena used reasonable force to avert the attack upon him.

[28] In S v Loubser, 1977(4) SA 546 quoting Minister of Justice and Others v Tsose, 1950(3) SA 88(T) a Full Bench decision of this Division, Malan J (as he then was) stated the following:

“Does the peace officer act at his peril in arresting a person under sub-sec.

- (a) or is it sufficient that at the time of arrest he should merely perceive conduct or the omission of acts which prima facie constitute a crime? I am of opinion that the latter view is the correct one. If a peace officer, as a result of observations, honestly and reasonably comes to the conclusion that a crime is being committed he may act upon such opinion or belief even though in subsequent proceedings whether civil or criminal it is not proved that a crime was in fact committed. Moreover, in order to justify the apprehension and to determine whether or not a crime is being committed, the arrestor should not be confined to what he perceives at the time of arrest but may import into his decision the antecedent conduct of the arrested person as well as his knowledge of all the relevant surrounding circumstances and thus supplement what is perceived by him. He is not obliged to delve into the mental attitude or the mental processes or reservations of the person arrested. It is sufficient, in my opinion, if he acts upon facts capable of ascertainment and conveyed to him through one or more of his senses. If facts are present which are apparent to the arrestor and which, reasonably interpreted, lead to the inference that a crime is in the course of being perpetrated, the arrestor is protected". (at 549 C-D) also 549H)

Compare: S V Dwyili (A9/2008) [2008] ZAFSHC144(6November 2008 at par. 21).

- [29] The police officers, especially Mokwena, had a right to arrest Isaac and Prince, without a warrant whom he believed were committing an offence in his presence in terms of section 40(1) (a) of the CPA.
- [30] I had, to the best of my ability, endeavoured to place myself in the shoes of the attacked person (Mokwena) at the critical moment and I kept in mind that Mokwena probably had only a few seconds in which to make a decision which was of vital importance to him.

cf: Criminal Law, 2nd ed, by C. R. Snyman, at 106.

- [31] The onus rested on the Defendants to prove that the shooting was justified. I observed all the witnesses who testified. I must point out that both Plaintiffs were not impressive witnesses. In places, particularly Isaac, was unduly embellishing his evidence. He appeared to me not an honest witness. I accordingly reject the versions of both Plaintiffs.
- [32] On the contrary, I accept the evidence of the Second Defendant (Mokwena) who was forthright in his testimony. I therefore find that the Defendants have discharged the onus resting upon them that the shooting was justified and the Second Defendant has acted lawfully.

- [33] In the result I make the following order:

33.1 In case number 56285/2008 the Plaintiff's claim is dismissed with costs.

33.2 In case number 56288/2008 the Plaintiff's claim is dismissed with costs.

MD MOHLAMONYANE

[Acting Judge of the High Court of

South Africa,

Gauteng Division, Pretoria]

APPEARANCES:

For the Plaintiffs (both cases): Adv L. T. Leballo

Instructed by Mphela & Associates

PRETORIA

For the Defendants (both cases): Adv A. Moja

Instructed by State Attorney

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