

SOUTH AFRICA / JUDGMENT

Katekani v Minister of Police (452/2019)

[2020] ZAMPMBHC 45 (28 September 2020)

[2020] ZAMPMBHC 45**COURT**

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

452/2019

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER 452/2019

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

28/09 /2020

MAKAMU KATEKANI

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

JUDGMENT

GREYLING-COETZER AJ

- [1] This matter was dealt with during the National Lockdown, and accordingly in terms of the applicable Practice Directive issued by the Judge President of this Division. The hearing was conducted on a virtual platform. The evidence was similarly adduced virtually through a video feed.

- [2] This is a matter that concerns a claim for damages in respect of injuries sustained by the plaintiff on 20 September 2018 at New Forest, Thulamahashe, Mpumalanga Province. The claim was instituted against the Minister of Police and founded on the alleged unlawful assault, without just cause, by members of the South Africa Police Service.
- [3] At the commencement of the proceedings the court was informed that the parties agreed on a separation of quantum and merits, and only sought a determination on the merits. All issues relating to quantum would thus stand over for later determination. I am accordingly only required to rule on the merits of the plaintiff's claim against the defendant.
- [4] The plaintiff's particulars of claim (as amended) sets out that the plaintiff was:
- "...unlawfully assaulted and shot at with rubber bullets without just cause by members of the South African Police Service The members of the SAPS realised that the plaintiff was injured after the incident and left him bleeding and got into their vehicle and left the scene despite having realised that he was bleeding. ... At all material times hereto there was no reasonable suspicion on the part of the members of SAPS that the plaintiff has committed any offence or at the least a danger to society."*
- [5] In its plea (as amended) the defendant denies that the plaintiff was unlawfully assaulted as averred, and pleads as follows:-
- "(a) On/or about 20 September 2018 and at or near New Forest, Thulamahashe, members of the Public Order Policing Unit which is a branch from the South African Police Services were called to attend to a scene of public violence where members of the community were protesting.*
- (b) The said plaintiff and other members of the community were burning tyres and throwing rocks at community members as well as at the police. Vehicles and members of the community were unable to move around because of the plaintiff and other members who were blockading the road by burning tyres and putting rocks on the road.
- (c) The defendant pleads further that the protestors were burning tyres, looting shops, intimidating residents and blocking the roads.
- (d) The defendant pleads that in order to protect the interest of the members of the community as well as the property of the members of the community, the members of the defendant had to disperse the crowd by firing rubber bullets. The plaintiff and other members were not at or near Jackson's Tavern as alleged in the particulars claim.
- (e) The defendant denies that it member assaulted the plaintiff and the plaintiff is put to the proof thereof.
- (f) The defendant denies that its members fired shots at the plaintiff, and the plaintiff is put to the proof thereof.
- (g) The defendant denies that the plaintiff sustained injuries as a direct consequence of him being shot by rubber bullets and therefore the plaintiff is put to the proof thereof."

[6] The defendant pleaded further at Ad paragraph 5 of its plea (as amended) as follows:-

“The plaintiff and other members of the community were in contravention of the Definition of Public Violence. ‘Public violence’ consists in the unlawful and intentional commission by a number of people acting in concert, of acts of sufficiently serious dimension which are intended violently to disrupt the public peace or security or to invade the rights of others.”[1]

- (a) The members of the defendant fired the rubber bullets in order to disperse the crowd of protestors who were blocking the roads, burning tyres, intimidating fellow residents and looting the shops;
- (b) The members of the defendant only fired the rubber bullets to the direction of the protestors who were committing acts of illegality as already mentioned above;
- (c) The firing of rubber bullets was used as a last resort by the members of the defendant when the crown of protestors refused to desist from their unlawful conduct;
- (d) The defendant pleads the necessary precautions were taken prior to the firing of rubber bullets, numerous warnings had been given to the protestors to desist with the unlawful acts;
- (e) The defendant pleads further that the rubber bullets were directed to those protestors that were committing acts of illegality.”

[7] The plaintiff’s case is that whilst sharing a beer with a friend, Mr Patrick Ndlovu at Jackson’s Tavern, and on 20 September 2018 at approximately 20h00, members of the defendant arrived at Jackson’s Tavern, causing all the patrons to flee. The plaintiff did not flee, as he did not have any reason to do so because he did nothing wrong, nor was he in possession of anything illegal. The members of the defendant were dressed in full police uniform and asked the plaintiff why he did not run away. The plaintiff respondent that he did nothing wrong. One of the members of the defendant took the plaintiff’s beer and smashed it.

[8] Three of the members of the defendant grabbed the plaintiff by his belt and pulled him around, and ultimately took him outside, where the plaintiff was shot four times on his upper body and once on his finger, by member of the defendant. From aforesaid it is clear that the plaintiff’s case is that he was intentionally shot by members of the defendant.

[9] The following is common cause on the pleadings and based on the evidence which was led at trial:-

9.1 The plaintiff is Katekani Makamu and the defendant is the Minister of Police.

9.2 The court has jurisdiction to preside over this matter.

9.3 The incident occurred on 20 September 2018 at New Forest, Thulamahashe, Mpumalanga Province.

9.4 A protest took place in the area of New Forest, Thulamahashe, on the day of the incident (20 September 2018).

9.5 Members from the Public Order Policing Unit (POPS) were deployed to the area in order to deal with the unrest.

9.6 During the course of these activities, the members of the defendant fired rubber bullets at the protestors.

[10] The circumstances of the shooting incident are in dispute. The defendant denies that any member of the SAPS fired shots at any other persons but the crowd of protestors, and therefore disputes the plaintiff's version that he was intentionally shot by members of the defendant at the Jackson's Tavern.

[11] It was submitted by counsel for the plaintiff that it is trite law that every infringement of the bodily integrity of another is prima facie unlawful, and it is for the plaintiff to establish the fact of physical interference. Once infringement is proved, the onus rests on the wrongdoer to provide some ground(s) of justification.[2]

[12] As discussed by Keightley AJ (as she then was) in the matter of *Mlota v Minister of Police*[3] a distinction is in our law drawn between the overall onus or burden of proof, and the evidentiary burden:

"[12]The evidentiary burden is often loosely, and confusingly, also referred to as 'the onus of proof'. The frequently cited dictum of the Appellate Division in Pillay v Krishna explains the distinction as follows:-

"In my opinion, the only correct use of the word 'onus' is that which I believe to be its true and original sense (see FD 31.22) namely the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be and not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent."[4]

[13] Only the first of these concepts represents the onus in its true sense.[5] In this sense, the onus determines which party will fail on a given issue, if, after hearing all the evidence, the court is left in doubt.[6] In other words, it is the duty resting on a particular litigant of finally satisfying the court that he or she is entitled to succeed in his or her claim or defence. This "overall onus" never shifts from the party on whom it originally rests. On the other hand, the burden of adducing evidence in rebuttal may shift during the course of the case, depending on the proof furnished by the one party or the other.[7]"

- [13] The general principles applicable in delict cases where the claim relates to a delict affecting the bodily integrity of the claimant, and where the pleadings include confession and avoidance, such as an admission of assault with the avoidance of self-defense, set out in *Mabaso v Felix* (supra). Thus the defendant bears the overall onus of proving his or her ground of justification for the otherwise unlawful conduct. The plaintiff is to prove merely the nature of his harm and the defendant's share in causing the harm, to trigger aforesaid.
- [14] It is trite that pleadings define the issues to enable the other party to know what case he or she is required to meet and parties are for this reason limited to their pleadings. Per Rule 18(4) of the Uniform Rules of Court it is required of a plaintiff to set out a concise statement of the material facts upon which the pleader relies for his claim, defence or answer. It is not permissible for a party to plead once set of facts and then attempt to canvass another at trial. [8].
- [15] In the present matter the issue raised by the plaintiff is that he was unlawfully assaulted and shot without just cause. The real issue raised by the plaintiff in his case is that he was not only intentionally, but also deliberately shot by an unknown member of the defendant. Whilst the particulars of claim avers merely an unlawful assault (shot with rubber bullets without cause), without specifying the deliberate nature of the assault, throughout the trial the plaintiff's case has rested on a deliberate shooting by members of the defendant. In his evidence before court, the plaintiff confirmed that he was pulled out of Jackson's Tavern by his belt, where after he was shot, and notwithstanding the members of the defendant noticing the bleeding, the plaintiff was left there with no assistance being provided.
- [16] It was not pleaded by the plaintiff that in the alternative he was negligently or recklessly shot by members of the defendant. Nor did the plaintiff place any evidence before the court to sustain an alternative claim of negligent or recklessness. The plaintiff's evidence was directed at establishing that members of the defendant entered Jackson's Tavern, and after a verbal exchange, pulled him out of the tavern by his belt and shot him with rubber bullets. This was the case that the defendant was called upon to meet.
- [17] The defendant's plea is not in the strict sense that of a confession and avoidance. The defendant does not admit the shooting and pleads self-defence or any other ground of justification. The defendant denies the allegations levied by the plaintiff. The defendant does however plead facts in justification of the use of rubber bullets on the day in question.
- [18] From the pleadings, as supported by the evidence placed before court, the key issue in dispute is whether, the plaintiff was deliberately shot by members of the defendant as he claims, or not. Thus, the grounds for justification of the utilisation of rubber bullets is currently irrelevant.
- [19] In application of the principles set out above this is so as it first stands to be adjudicated whether based on the evidence, the plaintiff is able to show that he was deliberately shot by the members of the defendant. If the plaintiff fails in showing that he was deliberately shot, the plaintiff will not overcome the onus of establishing the nature of his harm and the role

of the defendant in causing it. If it is found that the plaintiff was deliberately shot by the members of defendant, then there can be no question of any legal justification for the defendant's action.

- [20] The plaintiff testified first and confirmed that he resides at Stand 55, New Forest, Thulamahashe, Mpumalanga Province. On the day in question, being 20 September 2018, he was at Jackson's Tavern in New Forest.
- [21] At this tavern he played a game of pool, where after he bought a beer, which he shared with his friend, Mr Patrick Ndlovu. At approximately 20h00, members of the defendant arrived at the tavern, and the other people in the tavern ran away. The plaintiff did not run away because he did nothing wrong.
- [22] The plaintiff further testified that the members of the defendant took his beer and smashed it. Three members of the defendant grabbed the plaintiff by his belt and pulled him out of the tavern. In total there were five members of the defendant, of which one was a female. The members of the defendant were dressed in full police uniform.
- [23] The plaintiff testified that he was then shot by a member of the defendant on his upper body and on his finger. The plaintiff showed the members of the defendant his injuries and that he was bleeding, where after one member of the defendant replied "shit" and left the scene.
- [24] A couple of minutes later Mr Patrick Ndlovu came out of the tavern, where after the plaintiff and Mr Patrick Ndlovu called another friend, who then drove both of them to the local clinic for medical assistance. The plaintiff was later transferred to Tintswalo Hospital for further medical treatment.
- [25] Under cross-examination the plaintiff confirmed that a community protest was underway at approximately 20h00 at New Forest, Thulamahashe, which he saw from a distance. He further testified that he also overheard, in a taxi, that the protestors barricaded the road with stones.
- [26] The plaintiff further confirmed that the burning of tyres and barricading of the roads are not allowed and/or lawful. When protestors conduct themselves in such a manner or in a violent manner, the SAPS could intervene and restore the order, for which purpose they may use rubber bullets. The plaintiff however denied that he was involved in the protest.
- [27] The plaintiff also conceded that rubber bullets are used to disburse crowds, and that it would be strange that rubber bullets would be shot at the tavern. The plaintiff further indicated, that there was a female bartender who was inside the tavern who might have witnessed the events, but she was not called as a witness.
- [28] On the plaintiff's version he was deliberately shot by the members of the defendant after being pulled out of Jackson's Tavern, and although there was a protest action taking place in the vicinity at the time, he was not involved therein.

- [29] The second witness to testify on behalf of the plaintiff was Mr Patrick Ndlovu. He confirmed the plaintiff's version to the effect that they were at Jackson's Tavern, drinking beer. He went to the toilet, which is situated outside the tavern, but within the perimeter fence. Whilst at the toilet he heard a voice telling him to put his hands up, where after he was shot by a member of the defendant in the buttock. After being shot, he was instructed to exit the toilet. Upon leaving the toilet he found the plaintiff at the gate. He testified that he did not witness what caused the injuries to the plaintiff, and he denied any knowledge of a protest action on the day in question.
- [30] From Mr Patrick Ndlovu's evidence, the following stands to be highlighted, he could not corroborate the plaintiff's version on what transpired in the tavern, nor did he see members of the defendant entering the tavern and shoot the plaintiff as alleged by the plaintiff. He also did not see the patrons of the tavern running away. He testified that he himself had instituted a claim against the SAPS in the Pretoria High Court, which matter was finalised in his favour.
- [31] The defendant led the evidence of Captain Malope, who testified that he was a Captain in the SAPS, stationed at Hazyview Police Station. He is also a member of the Public Order Police Unit (POPS).
- [32] On the day in question and at approximately 17h00, he received a complaint from his Superior regarding a service delivery protest at New Forest, Thulamahashe. On that day he was the commander of the crew who consisted of ten officers, including himself. They attended to New Forest and arrived at approximately 19h30, when they found protestors blocking the road with trees and big rocks, burning tyres and barricading the road.
- [33] Upon their arrival they attempted to warn the protestors to remove the objects and to disperse, but the protestors failed to do so and commenced throwing stones at them and continued to block the road. Pursuant to aforesaid, Captain Malope and his crew fired rubber bullet rounds at the crowd in an attempt to disperse the crowd of protestors. He further testified that by law, when they are confronted with violent protestors, they are allowed to use rubber bullets in order to restore the public order.
- [34] He confirmed that according to him, no protestor nor any members of the defendant was injured that day. He does not know the plaintiff or anything related to the plaintiff's injuries, and none of his crew attended Jackson's Tavern on the day.
- [35] During cross-examination Captain Malope confirmed that there were approximately 150 protestors, and that members of the defendant have exclusive use of rubber bullets. He confirmed that there was no operation or raid at Jackson's Tavern or within the area surrounding the tavern area. It was put to him that since he did not go to the tavern on the day in question, he could not deny the possibility that other members of the defendant were present at the tavern, which he denied. He indicated that all the members under his supervision never left the scene. All of them were controlling the situation at the protest.

- [36] The second witness called on behalf of the defendant was Warrant Officer Mokgope, who testified that he is in the employment of the defendant, stationed at Mhala Police Station.
- [37] He confirmed that on the day in question he was a relief Station Commander and received a report about the community protest at New Forest, Thulamahashe, from the Station Commissioner. He dispatched Constable Mgiba and Constable Khoza to verify the reports. Constable Mgiba reported back to Warrant Officer Mokgope that the protestors indeed barricaded the road with stones and motorists were therefore unable to pass. The matter was there after reported to POPS (Hazyview). Warrant Officer Mokgope later received a report from Constable Mgiba that POPS (Hazyview) had arrived on the scene.
- [38] During cross-examination, some time was spent on the entries in the SAP10. In light of the evidence by the plaintiff, this issue is irrelevant.
- [39] The third and last witness called by the defendant was Constable Mgiba. He confirmed that he is a Constable at Mhala Police Station in Thulamahashe. He further confirmed receiving a report from Warrant Officer Mokgope of a community protest at New Forest in Thulamahashe on the day in question. He testified that on his arrival at the scene, he found the roads to be barricaded and protestors being present on the scene. He further testified that POPS, under the command of Captain Malope, arrived at approximately 20h00, and whilst they were attempting to remove objects from the road, they were pelted with stones by the protestors. He confirmed that POPS then retaliated by firing rubber bullets at the crowd of protestors. He does not recall that any member of the defendant attended Jackson's Tavern.
- [40] Similarly, during cross-examination, he was confronted with the SAP10 entries, and he confirmed that to his knowledge, no member of the defendant attended Jackson's Tavern, nor was any member of the defendant despatched to raid the tavern. He confirmed that the tavern is visible from where the protestors were gathering, even though it was night time.
- [41] As the plaintiff proved his case? There can be no question that the plaintiff was injured by rubber bullets fired by the members of the defendant. This is plain from the evidence, and the fact that only the members of the defendant were using rubber bullets on the day and at the time and vicinity in question. However, even if I accept this as a proven fact, it is not sufficient for the plaintiff to meet the onus resting on him.
- [42] The key issue remains whether the evidence established that, on the probabilities, the rubber bullets were deliberately fired by a member of the defendant, who aimed and shot at the plaintiff at Jackson's Tavern.
- [43] Notwithstanding being well aware of the defendant's version, the plaintiff did not testify in respect of the protest action taking place in the vicinity at the time. This issue was only conceded to during cross-examination. Furthermore, the plaintiff's version does not offer any explanation as to why members of the defendant would have proceeded to Jackson's Tavern, singled out the plaintiff, pulled him out of the tavern and deliberately fire at him

(what we can only assume as being at close range) with rubber bullets, for no reason. When the aforesaid proposition was put to the plaintiff, it was merely denied by the plaintiff. In order for me to accept the plaintiff's version as probable, I would have to accept that members of the defendant deliberately shot at the plaintiff with rubber bullets, at close range, for no explicable reason. I have difficulty regarding this as probable.

- [44] The plaintiff could not provide a reasonable explanation as to why, if the female bar tender at Jackson's Tavern potentially witnessed these events, she was not called as a witness for the plaintiff.
- [45] Apart from the plaintiff's version, the evidence of Mr Patrick Ndlovu does not assist the plaintiff, other than confirming that they shared a beer at Jackson's Tavern before Mr Patrick Ndlovu went to the toilet, and thereafter having also been shot in the buttock by a member of the defendant and finding the plaintiff injured.
- [46] In my view, the credible aspects of the plaintiff's evidence, taken together with the evidence by the defendant, do not support the plaintiff's case that he was deliberately shot by members of the defendant, who entered Jackson's Tavern, pulled the plaintiff out by his belt and fired at him with the rubber bullets. On the contrary, it seems to me that the evidence indicates that in all likelihood, the plaintiff was either part of the protest action, or he was caught in the cross-fire of the members of the defendant in firing at the protestors.
- [47] In view of the fact that the plaintiff's case rests on a deliberate shooting by the members of the defendant, I am unable to find that the plaintiff had succeeded in establishing the case that he pleaded.
- [48] In the circumstances the question of whether the defendant has established a ground of justification does not arise. Even if I am wrong in this instance, and even if the facts I found to have been established can be held to give rise to an onus on the part of the defendant to justify the shooting of rubber bullets, I am satisfied that the defendant has done so in this case.
- [49] The evidence of Captain Malope is relevant in this respect and his testimony that there was a protest action at New Forest, Thulamahashe, which involved violent conduct such as the pelting of stones at POPS and the barricading of the roads. POPS was despatched to restore public order and Captain Malope was in charge of the unit despatched to the protest area. The violent conduct included the burning of tyres, the throwing of stones and the barricading the road. Upon attending the scene, a crowd of approximately 150 protestors had gathered, were throwing stones at members of the defendant, burning tyres and barricading the road. Members of the defendant fired rubber bullets into the crowd of protestors in an attempt to disperse the crowd and to restore public order.

- [50] Aforesaid evidence was not placed in dispute during the course of cross-examination. In particular, the protest action (which was admitted by the plaintiff to have taken place in the vicinity), the nature of the protest and the fact that rubber bullets were lawfully utilised to disperse the crowd of protestors, were similarly not disputed.
- [51] In my view the evidence presented to court demonstrates that the members of the defendant fired rubber bullets to disperse the protestors. The members of the defendant acted in the pursuance of their duty to protect the community from violent action of this nature, and in order to defend themselves from the crowd of protestors throwing stones at them.
- [52] The evidence also indicates that the actions of the members of the defendant were proportionate to the damage to the community and to the members of the defendant as imposed by the protestors. The most probable explanation for the plaintiff's injuries, on the evidence, is that either he was part of the protest action, alternatively that he had the misfortune of being caught in the cross-fire of the rubber bullet rounds being fired. In light of the circumstances that existed at the time, I am satisfied that the defendant has demonstrated that the members of the defendant's conduct in firing the rubber bullets, and hence the injury of the plaintiff resulting therefrom, was justified and not wrongful and/or unlawful.
- [53] Having concluded as aforesaid, the following order is made:-

1 The plaintiff's claim is dismissed.

2 The plaintiff is directed to pay the defendant's costs.

DATE OF HEARING: 3 AUGUST 2020

DATE OF JUDGMENT: 28 SEPTEMBER 2020

JUDGMENT

HANDED DOWN ELECTRONICALLY

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[1] CR Snyman, Criminal Law, 5th Ed p321

- [2] Moghamat v Centre Guards CC [2004] 1 All SA 221 (C). See also Mabaso v Felix 1981 (3) SA 865 (A) at 873E – 874E; Malahe and Others v Minister of Safety and Security and Others [1998] ZASCA 64; 1999
- (1) SA 528 (SCA) at 533J – 534A and 540F – 540H
- [3] (65577/12) [2014] ZAGPPHC 311 (26 May 2014)
- [4] 1946 AD 946 at 952
- [5] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 543 (A)
- [6] Hoffman & Paizes, The South African Law of Evidence, 2nd Ed at par 128 - 130
- [7] See South Cape Corporation (supra) wherein Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (3) SA 543 (A) at 548 was cited
- [8] Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (T) at 107G - H
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