

SOUTH AFRICA / JUDGMENT

# Maleke v Minister of Police (3989/2021) [2023] ZAFSHC 448 (16 November 2023)

**[2023] ZAFSHC 448****COURT**

Free State High Court, Bloemfontein

**BEFORE**

Loubser

**CASE / FILE NUMBER**

3989/2021

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**Source record****IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Reportable: YES/NO****Of****Interest to other Judges: YES/NO****Circulate****to Magistrates: YES/NO****Case****number: 3989/2021****In****the matter between:**LIZE  
MALEKE  
Plaintiff  
and  
MINISTER  
OF POLICE  
Defendant**CORAM:**LOUBSER, J  
HEARD**ON:**

3 &amp; 4 OCTOBER 2023

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**JUDGEMENT****BY: LOUBSER, J****DELIVERED ON: 16 NOVEMBER 2023**

- [1] The plaintiff in this matter issued summons against the defendant for the payment of R400 000.00 damages following a shooting incident on 13 March 2021 at Bethlehem. It is alleged in the particulars of claim that on that date, members of the South African Police Service wrongfully and unlawfully assaulted the plaintiff by spraying pepper spray in his eyes and shooting him in his left leg.
- [2] In his plea, the defendant admitted that the plaintiff was shot in the leg by a police constable, but denied that the shooting was wrongful and unlawful. It was pleaded that the policeman shot the plaintiff in self-defence when the plaintiff attacked him with a knife and a stick whilst he was on duty.
- [3] The ensuing trial was heard by this court. Two witnesses were called in support of the plaintiff's case, and the defendant presented the evidence of three witnesses. The plaintiff himself was the first witness. He testified that he was 34 years old and that he does piece jobs for a living, like washing cars. Earlier on the day in question, he came across a police informer by the name of Themba. Themba then pointed him with a firearm and said they were looking for him. He, the plaintiff, then ran away to his grandmother's place. While he was with his grandmother, he received a call from his wife, who was at their home at the time. She told the plaintiff that the police were looking for him, he testified.
- [4] Upon receiving this news, the plaintiff set off to the house of his friend Fusi. There he took a stick, and he and Fusi then proceeded in the direction of his house where the police were looking for him. He took the stick because it was already dark and there was loadshedding. On the way to his house, the plaintiff and Fusi first went to a shebeen where the plaintiff bought a six pack Corona beer. They proceeded further on their journey to the house of the plaintiff, he told the court.
- [5] While they were still walking, a white police vehicle suddenly appeared around a corner with the lights on in their direction. The vehicle then stopped and the same police informer, Themba, alighted from the vehicle and sprayed the plaintiff with pepper spray in his eyes. At the same time, a policeman by the name of Mofokeng alighted from the right side of the vehicle and immediately started to fire shots at the plaintiff. The first two shots missed him, but the third hit him in his left upper leg, the plaintiff testified. When the shots were fired, he was running backwards away from the policeman because he realized that they wanted to kill him, he told the court. He was only 3 to 4 metres away from Mofokeng when he was hit by the

bullet.

- [6] The plaintiff further testified that when he was hit by the bullet, he fell with his forehead on the ground. He could not move and one of Mofokeng or Themba pushed him with a leg on the head to see if he was still alive. The two of them then got into the vehicle and left. Soon thereafter an ambulance arrived and took him to the hospital. When the shooting happened, Fusi was a distance behind him, the plaintiff said. When he was hit by the bullet, Fusi ran away.
- [7] In cross examination the following transpired: The stick or kerie that the plaintiff took from Fusi's house, was actually his, and it was about a metre long. He also took a knife at Fusi's house, which was a fixed blade knife about 20cm long. He took the knife for his protection. He carried it in a holder or a pouch on his waist. He carried the kerie in his right hand. His left arm was covered by a blanket. When he was shot, he did not have the knife in his hand. In his left hand he was holding a beer. He was not attacking Mofokeng with the knife. The six pack beer fell on the ground when he was shot. The plaintiff further denied that he would not have fallen on his face while running backwards when he was shot.
- [8] The plaintiff further confirmed that he was arrested this year for the theft of stock. In 2021 the police wanted him for stock theft. When the incident happened, the police were looking for him in connection with stock theft, although he did not know it at the time. During the incident, he did not take the knife out of its holder or pouch.
- [9] Responding to questions from the court, the plaintiff said that he was not under the influence of liquor when the incident happened. The holder or pouch is of the kind that can be clipped close. It was clipped close when he left Fusi's house. If the knife was found on the ground where the incident happened, he does not know how it got there. It surprises him, he said.
- [10] The plaintiff then called Fusi Mhlambi to testify for him. He told the court that on the day in question, the plaintiff arrived at his place saying that his wife called him when he was at his grandmother, informing that the police were looking for him. He then gave the plaintiff's kerie and blanket to him, which items he had left there on an earlier occasion. The two of them then left for the plaintiff's house. It was about 7.30 – 8 pm. They first walked to a tavern, where plaintiff bought a six pack Corona beer. They then continued walking to the plaintiff's house, but on the way a vehicle, white in colour, came from the front. At that stage plaintiff was walking in front, because he, the witness, had paused to urinate. A person alighted from the vehicle saying "here are they". He sprayed the plaintiff with something like pepper spray in the eyes.
- [11] According to the witness, someone then alighted from the driver's side, holding a firearm. This person shot in the direction of the plaintiff, and the witness saw dust on the ground. The witness then ran away. When the vehicle arrived, the plaintiff had a blanket, the kerie and the Coronas in his possession. He did not see the plaintiff attacking the driver of the vehicle or his passenger. When the plaintiff was sprayed, he stumbled backwards and then he was shot.

- [12] In cross-examination the witness testified that he heard only one shot. Responding to further questions, he confirmed what he said in his evidence in chief. The plaintiff's case was thereafter closed.
- [13] The first witness for the defendant was Sergeant Phatshoane Letaoana, a crime scene technician, photographer, forensic field worker and fingerprint expert with 13 years experience at the SAPS criminal record centre, Bethlehem. He visited the scene of the shooting at approximately 11 pm on the same evening. On the scene he collected 3 cartridge cases, and at the police station the firearm concerned. He also found a knife on the ground and a wooden stick, which items he did not collect because the Independent Police Investigative Directorate (IPID) was dealing with the matter. He took photographs of the scene and handed in a photo album with a key he had compiled. The points he photographed were pointed out to him.
- [14] The following appears from the photographs and the key thereto: The point where the plaintiff allegedly drew the knife, is a short distance from where an empty cartridge was found. This is the point where the first shot was allegedly fired. On the way to the place where the plaintiff fell to the ground after being shot, a second empty cartridge was found. This is allegedly the point where the second shot were fired. This point is very near to the point where the plaintiff fell. The point where the plaintiff fell, is in close proximity to the points where the kerie and the knife were found. Also in close proximity is the point where the third cartridge was found. The distance from the point where the plaintiff allegedly first drew the knife, is 42 metres away from where the abovementioned points in close proximity are indicated. The distance from where the third shot was fired to the point where the plaintiff fell, is indicated as 4.4 metres.
- [15] The cross-examination on this witness did not take the matter any further.
- [16] The next witness who testified for the defendant, was constable Watson Mofokeng. He is based at the SAPS stock theft unit at Fouriesburg. On about 11 March he and an officer went to look for a man by the name of Lucky, who was implicated in an incident of stock theft. It later transpired that Lucky is the plaintiff in the present matter. They did not find him at his shack, only his girlfriend Maditaba. The witness and a warrant officer went back to the shack on two occasions the following day, without any success. On 13 March 2021 the witness, accompanied by an informer by the name of Themba Maropale, came across Lucky about 7.30 pm in a street. Lucky was pointed out to him by Themba who was with him in the vehicle. There was loadshedding at the time. The witness testified that he then immediately stopped the vehicle, keeping the headlights on. He and Themba got out of the vehicle. Lucky then headed in the direction of Themba, screaming "here is the dog who sells us to the police, I was looking for him". Lucky was holding a knife in his right hand and a stick in his left hand. Themba took out pepper spray and
- sprayed Lucky with it.

[17] After Lucky was sprayed, he kept on approaching Themba, and he chased Themba, who had run around the vehicle to where the witness was standing. Lucky then charged at the witness, saying that the witness must shoot him, because he is going to stab him. The witness testified that he then retreated away from the vehicle, telling Lucky to stop what he wanted to do. Lucky, however, still charged at the witness, who then fired a shot in the air. This warning shot did not deter Lucky, who kept on coming. The witness then turned around and started running away, with Lucky chasing after him. After running a distance, the witness looked over his shoulder and he saw that Lucky was now close to him. The witness then fired a second shot in the air, and ordered Lucky to stand still, but Lucky kept on coming. The witness then ran again, but found that Lucky was now too close to him. It is then that he turned around and fired a shot in the direction of Lucky, hitting him in the thigh. The witness then called his commander and the police station, saying that he had shot somebody, and they must summon an ambulance.

[18] Returning to the spraying incident, constable Mofokeng told the court that Themba did not spray the plaintiff

directly in his eyes. He only sprayed in the direction of the plaintiff and below his chin to the rest of his lower body. He added

that the plaintiff did not make a case against him after the incident. Only the police did, but he was not prosecuted.

[19] In cross-examination the witness was referred to the preamble of a statement he afterwards made to the police, which stated “stabbed with knife”. The witness confirmed that he saw that inscription at a later stage, and he requested constable Nhlapo, who took down his statement, to correct those words because he was not stabbed. Apparently she did not correct it. The witness testified that he also made another statement, which was handed in as exhibit “B”. In this statement he merely denied that he ever withdrew the case against the plaintiff after indicating that he had forgiven the plaintiff. He signed the withdrawal statement without knowing what he was signing.

[20] The witness further denied that his statement was correct where he said that the plaintiff only pulled out his knife after he had chased Themba around the vehicle. He already had the knife in his hand before he was sprayed with the pepper spray.

[21] The third and last witness called by the defendant was Themba Mngomezulu. He testified that he was an informer of the SAPS and stationed at Bethlehem. On the evening of 13 March 2021 he was with constable Mofokeng in a vehicle, because Mofokeng wanted him to identify the suspect Lucky to him. They came across Lucky in a street, and he said to Mofokeng this is Lucky. They stopped and both alighted from the vehicle. Lucky approached them and said “yes, I have been looking for you police dogs”, and he further said “you, Themba, you continuously report us to the police”. When Lucky spoke those words, he was approaching them and pulled out a knife. He came to the witness first to fight him. The witness took out pepper spray and sprayed in the direction of Lucky, who was some 3 – 4 metres away, he

testified.

- [22] The witness then ran around the vehicle, and Lucky changed direction and chased after Mofokeng, who then shot in the air. Mofokeng then ran for a distance with Lucky in pursuit. Mofokeng then fired a second shot in the air. When Mofokeng fired the third shot, they were already far away and it was dark. The witness heard something like a cry, and went to look what was happening. He found Lucky bleeding on the ground and holding his leg.
- [23] Themba concluded his evidence in chief by saying that it is not true that he had threatened Lucky earlier with a firearm. He also testified that he did not alight and just spray Lucky. Lucky was not backtracking when he was shot. He was also armed with a kirie apart from the knife.
- [24] In cross-examination the witness confirmed that the plaintiff was not shot close to the vehicle. It happened a distance away in the dark. He also confirmed that the plaintiff was accompanied by another unknown person when they approached the vehicle. He knows Fusi, and that other person was not Fusi. He thought at the time that Lucky was going to attack him, because he had the kirie in his left hand and the knife in his right hand. The six pack beers fell on the ground when the plaintiff was chasing Mofokeng.
- [25] Now, having regard to all the evidence presented in this case, it is clear that the court is confronted with two mutually destructive versions. The version advanced by the plaintiff is that he was assaulted by the two people in the vehicle, while their version is that they were attacked by the plaintiff and that they were acting in self-defence. How a court will deal with such a situation, was aptly explained by Eksteen, AJP, as he then was, in the full bench decision of *National Employers' General Insurance v Jagers*[1] as follows:
- [26] "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and correct and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected... If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."
- [27] In the present case, it is not only the probabilities that play a conclusive role, but the factual evidence clearly shows where the truth lies. Here I specifically refer to the evidence of Sergeant Letoama, the crime scene technician who visited the scene on the same night. His evidence and what he found on the scene was not contested at all. He found an empty cartridge a short distance from the place where the plaintiff allegedly drew his knife. He found a second cartridge a distance away near the place where the plaintiff fell to the ground. At the place where the plaintiff fell, he found the third cartridge in very close

proximity to the place where he found the knife and the kerie on the ground. The distance from where the plaintiff first drew the knife to the spot where the plaintiff fell and where the cartridge, the kerie and the knife were found, is indicated as a distance of 42 metres.

- [28] If the plaintiff's version reflected the truth, all three the cartridges would have been at the same place, namely the place where Mofokeng and Themba alighted from their vehicle. To put it differently, what Sergeant Letaoama found on the scene, fits the version of Mofokeng and Themba like a glove. It is clear to this court, even beyond a reasonable doubt, that Mofokeng and Themba were attacked by the plaintiff, and that Mofokeng tried to get away from the vehicle, firing a second warning shot in the air in the process. At the place where he eventually shot the plaintiff, the plaintiff was in close proximity and still armed with the kerie and the knife. I have no hesitation in rejecting the plaintiff's version as false.
- [29] Even the probabilities of the matter favour the version of Mofokeng and Themba. Firstly, it is highly improbable that Mofokeng would have fired three shots in succession at the plaintiff the moment he alighted from the vehicle, without any reason to do so. Secondly, I find it highly improbable that the plaintiff would fall on his face after being shot while he was retreating at speed away from Mofokeng. Thirdly, it is improbable that the plaintiff's knife fell on the ground while it was in a pouch that was clipped close. The probabilities are that the knife was in the plaintiff's hand when he was struck by the bullet, as Mofokeng had testified.
- [30] The last question is whether it can be said that Mofokeng exceeded the limits of self-defence when he fired the shot at the plaintiff. I think not. The knife that was found on the scene, is a big knife and without any doubt a very dangerous weapon. That knife could easily have killed Mofokeng. Moreover, it was dark at the time and the plaintiff kept on chasing Mofokeng despite two warning shots that were fired by Mofokeng in the process. Lastly, Mofokeng fired at the lower body of the plaintiff, and not the upper body, where the shot could have caused fatal consequences.
- [31] In the premises, the plaintiff cannot succeed. The following order is made:

1. The plaintiff's action is dismissed with costs.

P. J. LOUBSER, J

For the plaintiff: Adv. C. Zietsman Instructed by: Loubser van der Walt Inc., Pretoria c/o Jacobs Fourie Inc., Bloemfontein For the Defendant: Adv. S. F. Sibisi Instructed by: The State Attorney Bloemfontein

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(4) SA 432 at 440 D-G

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Prepared on 13 October 2026 · Esheria