

SOUTH AFRICA / JUDGMENT

Maphoto v Minister of Safety and Security (269/14) [2017] ZAGPPHC 103 (29 March 2017) [2017] ZAGPPHC 103

COURT

North Gauteng High Court, Pretoria

BEFORE

Petersen

CASE / FILE NUMBER

269/14

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA

DATE:	29/3/17 CASE NO: 269/14
REPORTABLE:	NO OF INTEREST TO OTHER JUDGES: .NO In
the matter between:	ANISTA RAMADIMETJA MAPHOTO Plaintiff and THE MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

PETERSEN AJ:

INTRODUCTION

[1] The plaintiff instituted action against the defendant for damages arising from the alleged unlawful, intentional alternatively

negligent act/s or omissions by the police when shots were fired at the plaintiff's vehicle in which she was travelling on 12 January 2011 on Mananga Road (R571) toward the N4 to Komatipoort.

[2] It is common cause that that the plaintiff, Mrs Anista Madimetja Maphoto, was travelling in a Toyota bakkie along Mananga Road towards the N4 freeway to Komatipoort on 12 January 2011. The road is known for its use by vehicle theft and hijacking syndicates to move vehicles illegally across the border to Mozambique through adjoining farms. Warrant Officer JH Smith, whilst on duty acting within the course and scope of his employment with the defendant, fired four shots at the vehicle of the Mrs Maphoto as she drove the vehicle. Mrs Maphoto sustained no physical injuries but the wheels of her vehicle were damaged.

THE

ISSUES

[3] It remains in dispute whether Warrant Officer Smith acted unlawfully when he shot at Mrs Maphoto's vehicle; was negligent when he shot at the vehicle; and whether he acted with the intention to injure Mrs Maphoto when he shot at the vehicle.

THE EVIDENCE

[4] The Toyota bakkie in which Mrs Maphoto was travelling is known to be the subject of theft and hijackings. Warrant Officer Smith and his colleague Warrant Officer Nel upon seeing the vehicle approach from the opposite direction with a conspicuous Limpopo registration plate in Mpumalanga decided to turn and follow the vehicle. The evidence of Mrs Maphoto and Warrant Officer Smith evidence is in conflict on the sequence of events of that fateful evening. It is in conflict on whether Mrs Maphoto's vehicle had stopped on the side of the road in compliance with the blue light and siren used by Warrant Officers Smith and Nel who alighted and approached the vehicle armed with an R5 rifle and 9mm pistol respectively and then pulled off and sped away at high speed; or whether there was one incident where Mrs Maphoto was followed by a vehicle with blue lights driving on its bright lights at a speed which could not have exceeded 80km/h.

[5] Warrant Officer Smith claims that the plaintiff's vehicle was travelling at a speed they could not keep up with. When he realised

that they were about 3km from the N4 freeway/R571 T-junction and a high speed chase on the N4 could result in injuries, he decided to shoot at the wheels of the vehicle with the RS rifle with the sole intention of stopping the vehicle before it could enter the N4. He fired four (4) shots at the wheels of the vehicle, two (2) at the right front wheel and two (2) at the left front wheel. The vehicle drove for 300m metres after the shots were fired and came to a standstill on the side of the road as both front tyres were shot out. They stopped behind the vehicle and approached it in similar fashion to the first stop. Notwithstanding an instruction to the occupant/s to alight from the bakkie nobody emerged. Warrant Officer Nel opened the right door and found the plaintiff in the vehicle. When Warrant Officer Nel asked the plaintiff why she had sped off after they had pulled her over she explained that she had seen on television how people were hijacked by the police and that is why she tried to get away from them. The vehicle was inspected and there was nothing amiss with it. It is his evidence that if he wanted to stop the driver he would have shot straight through the back window at the driver and not the tyres. Warrant Officer Smith persisted in his evidence in chief and was not swayed under cross examination that the sole reason for following the vehicle was to stop it and verify the identity of the vehicle through its vehicle identification number (VIN number) and not to effect an arrest. He denies that he was negligent in any way.

- [6] Mrs Maphoto, a teacher by profession, claims that at around 20h00pm about 10km from the N4, her cellular phone rang. She moved slightly to the left of the road to collect her phone but did not stop. At this stage she did not notice anything around except the fields along the road and two motor vehicles subsequently approaching from the front. She spoke on her cellular phone and continued driving, when a vehicle suddenly appeared behind her with its bright lights which disturbed her. She diverted the glare with her rear view mirror whilst the vehicle was not far behind her. She explained to the person she was talking to what was happening, who in turn told her to phone when she got home to confirm if she was fine. At this stage she saw blue lights, with the vehicle remaining behind her, coming up close and then moving back again. She continued driving as she did not want to stop on the unlit the rural road, fearing that she feared may be hijacked in similar fashion to a friend who had been hijacked two weeks earlier by persons using blue lights. She was travelling at 80km/h because of animals that could enter the road at any stage. Besides the blue light of the vehicle she did not notice anything else about it. She decided to drive on as she knew there were two garages along the road where she believed it would be safe to stop. Before reaching the N4 not far from where she had seen the vehicle behind her, she suddenly heard sounds, akin to stones hitting the bakkie. The vehicle lost power as it would no longer accelerate and she stopped the vehicle on the side of the road. Two white males emerged on either side of her vehicle with big firearms pointed inside her vehicle through the untinted, smash and grab treated windows. The unidentified males spoke simultaneously, instructing her to get out of the vehicle; she was pulled from the vehicle and at that stage noticed that they were police officers as the one of the left side of the vehicle was wearing a T-shirt with small police emblem on the pocket. She also observed that the vehicle

which had pursued her was a police vehicle with a canopy marked Lebombo Border. Mrs Maphoto consulted a Psychologist who booked her off work for three months and referred her to a Psychiatrist. She has had flashbacks of the incident and has moved from Lydenburgh where was teaching to be close to family on the advice of her Psychiatrist.

ONUS

- [7] The defendant bears the onus of justifying the lawfulness of the shooting by Warrant Officer Smith. Whilst the defendant had the duty to begin to justify the lawfulness of the shooting the plaintiff still bears the onus of proving that the actus reus of Warrant Smith was negligent. The plaintiff's onus in proving negligence must be considered against the test set out in *Kruger v Coetzee* [1], where the Court held that: "For the purposes of liability culpa arises if - (a) a diligens paterfamilias in the position of the defendant - (I) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps. This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the

facts

and results of other cases."

THE DEFENCE

- [8] The defendant did not plead section 49(2) of the Criminal Procedure Act, Act 51 of 1977 as a defence, where deadly force would have to be justified to effect the arrest of a fleeing suspect. Warrant Officer Smith's evidence likewise does not raise the defence as he was adamant that his intention was to verify the identity of the motor vehicle and not to effect an arrest. The sole intention of shooting at the wheels of the plaintiff's vehicle, in turn, was to stop the vehicle to prevent any potential harm to other road users. The defence of section 49(2) of Act 51 of 1977 was raised by Counsel for the plaintiff and formed the basis of submissions both at an application for absolution at the end of the case for the defendant and at the close of the trial.
- [9] The defendant had not pleaded reliance on section 49(2) of Act 51 of
1977. It is my considered view that section 49(2) accordingly finds no applicability in the determination of the issues in dispute. The matter considered in its totality rather calls for a value judgment which is to be premised on the test for negligence set out in *Kruger supra*.

THE CONFLICTING VERSIONS

[10] The court is faced with two mutually destructive versions. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell ET Cie*[2] Nienaber JA described the technique generally employed by the courts in resolving factual disputes which I am enjoined to employ as follows:

"The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his own version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it."

EVALUATION

[11] As to the credibility, reliability and probabilities of the matter inherent in the evidence of the two factual witnesses on the sequence of events, Warrant Officer Smith made a favourable impression on the court as opposed to Mrs Maphoto. Upon a careful preponderance of the totality of the evidence, I can find no cogent reason why he would be untruthful about having stopped the plaintiff on two occasions as opposed to one on the plaintiff's version. This view is supported by the evidence of Warrant Officer Smith that they were unable to keep up with the vehicle of the plaintiff as it sped off at the first occasion and Mrs Maphotos' own evidence that the vehicle she saw behind her would move in close and then move back again. It is for this reason that it is highly unlikely on her version that she was travelling at a constant speed of 80km/h and when one considers her evidence that she was concerned that her pursuers could be hijackers. It is more likely that on Warrant Officers Smith's evidence that the plaintiff was travelling at high speed. The plaintiff confirms seeing the blue light of the vehicle behind her, but inexplicably did not hear the siren. The reason put forward for this is that the radio in her vehicle was on and loud. It is questionable why the plaintiff

would keep her radio on loud and engage in conversation with a friend, incidentally at the same time that Warrant Officer Smith

testifies the vehicle was pulled off the first time. The plaintiff on her evidence was prompted to drive on because of her knowledge of a robbery incident involving her friend and blue lights two weeks earlier. If that were the case, there appears nothing amiss with what the plaintiff did, considering the widespread knowledge of incidents involving the use of blue lights by unscrupulous criminals. The concern, however, is the plaintiff's attempt at downplaying her role in the unfortunate events of that evening. The plaintiff's evidence shows that she was not aware that shots were either fired at her or her vehicle. At most she heard what sounded like stones hitting her vehicle. The discovery that shots were fired at her two front wheels which were both shot out was made after she alighted from her vehicle. The damage to her wheels is common cause. On the alleged emotional shock and trauma suffered by the plaintiff, I cannot find any causal link to her ex post facto discovery of the damage to her wheels caused by the shooting. I accordingly find that the probabilities on the sequence of events

favour the evidence of Warrant Officer Smith and consequently the defendant.

[12] The acceptance of Warrant Officer Smith's evidence on the sequence of events is not the end of the enquiry as this court is still enjoined to consider the test for negligence set out in Kruger supra, in so far as it relates to the damage to the vehicle of the plaintiff. With the benefit of hindsight, damage was caused to

the vehicle of the plaintiff, which Warrant Officer Smith, a reasonable experienced police officer, using an RS rifle should have

foreseen. The question is whether Warrant Officer Smith should have taken reasonable steps to avoid the shooting and if such steps on the peculiar facts of the matter can said to have been reasonably available, but he failed to take them, rendering the defendant liable for the patrimonial damages to the vehicle of the plaintiff. Warrant Officer Smith's evidence is that he decided to shoot at the wheels to bring the plaintiff's vehicle to a standstill, so as to avoid any injury to life or limb on the upcoming N4 freeway. Warrant Officer Smith had radio contact. The opportunity to contact colleagues to assist with a roadblock was not unrealistic. The fact that he was able to shoot out the front wheels on either side of the plaintiff's vehicle shows that catching up with the vehicle was not unrealistic either. The likelihood of the vehicle of the plaintiff overturning at high speed once the wheels had been shot out should likewise have been considered. I accordingly find that on the test for negligence Warrant Officer Smith's actions in shooting at the vehicle of the plaintiff, was negligent.

RESULT

[13] In the result the plaintiff's action for damages to her vehicle succeeds. The plaintiff's action for past medical expenses, future medical expenses, past loss of income and future loss of earnings and general damages fails.

ORDER

[14] Judgment is granted in favour of the plaintiff on the merits of the action for patrimonial damages to her motor vehicle. The

determination of the quantum of the damages is postponed sine die.

[15] The defendant is ordered to pay the costs of plaintiff, including costs of Counsel.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Adv. AC Gobetz

Instructed by Pieter Nel Inc

On behalf of the Defendant: Advocate DD Mosoma

Instructed by THE STATE ATTORNEY, PRETORIA

DATE HEARD: 18 October 2016

DATE Of JUDGMENT: 29 March 2017

[1] 1966 (2) SA 428 (A) at 430 E-H

[2] 2003 (1) SA 11 (SCA) at 141-J - 15A-D

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