

SOUTH AFRICA / JUDGMENT

Mlota v Minister of Police (65577/12)

[2014] ZAGPPHC 311 (26 May 2014)

[2014] ZAGPPHC 311**COURT**

North Gauteng High Court, Pretoria

BEFORE

R M Keightley

CASE / FILE NUMBER

65577/12

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Source record**IN****THE GAUTENG HIGH COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****Case****No.: 65577/12****Date:**

26 May 2014

Not

reportable

Not

of interest to other judges

In

the matter between:

KLEINBOOI

MATTHEWS

MLOTA.....Applicant

AND

MINISTER

OF

POLICE.....Respondent

JUDGMENT

KEIGHTLEY, AJ

INTRODUCTION

[1] The plaintiff in this matter, Mr Kleinbooi Matthews Mlota, claims damages from the defendant, the Minister of Police, for the

plaintiff's alleged wrongful and unlawful assault by a member of the South African police service.

[2] By agreement between the parties the merits and quantum have been separated. I am required to rule only on the merits of the claim.

[3] The plaintiff's particulars of claim, as amended, state that he was "wrongfully and unlawfully assaulted by a member of the South African Police Service, whose identity is to the plaintiff unknown, in that he shot the plaintiff, inter alia, in his face."

[4] In his plea, as amended, the defendant denied that the plaintiff had been wrongfully and unlawfully assaulted as averred, and pleaded as follows in this regard:

[4.1] "Defendant pleads that from the 13th of November 2009 to the 14th of November 2009 there were riotous protests by residents from the Kwa Thema residential area and that the Public Order Police unit (here in after referred to as "POPS") and other units were deployed to the area.

[4.2] Defendant pleads the roads in the area were blocked with burning tyres and rocks and private and state property was damaged and destroy it by the riotous public.

[4.3] Defendant pleads that on 14 November 2009, whilst on patrol, a police vehicle carrying members of POPS came under attack from members of the public who threw stones and petrol bombs at said police vehicle.

[4.4] Defendant pleads that the POPS members' lives were in danger and in an attempt to contain the situation, to protect themselves and

the state vehicle and to restore order in the area, the POPS members fired rubber bullets into the protesting crowd.

[4.5] Defendant pleads that plaintiff was amongst the protesting crowd, and was observed with injuries.

[4.6] Defendant bears no knowledge of how the plaintiff sustained his injuries."

[5] The defendant further admitted that the plaintiff suffered injuries to his face, but pleaded that he had no knowledge of the nature, extent and cause of the injuries.

- [6] As I will indicate in more detail when I discuss the evidence led at the trial, the factual case presented by the plaintiff is that he was shot by rubber bullets fired by an unknown member of the police while the plaintiff was sitting in the yard of a spaza shop situated at the corner of September and Masibeni Streets in Kwa Thema on the afternoon of 14 November 2009. He avers that he was not part of any protest action, and that he was sitting with a friend, Mr Dubula, enjoying drinks when the incident occurred.
- [7] The plaintiff's case is that two members of the police chased a group of protesters into the yard where he and Mr Dubula were sitting. The police officers were on foot at the time. Shortly thereafter, one of the police officers took up a position at a pillar at the entrance to the yard, took aim at the plaintiff with his firearm and fired at him.
- [8] Therefore, the plaintiff's case is that he was deliberately and intentionally, rather than accidentally, negligently or recklessly,
- shot by a member of the South African police service. The plaintiff confirmed this in his evidence before the court.
- [9] On the pleadings and on the basis of the evidence led at the trial, the following facts are common cause:
- [9.1] The incident in question occurred on 14 November 2009 at the corner of September and Masibeni Streets, Kwa Thema, where the spaza shop is situated.
- [9.2] Service delivery protests took place in Extensions Two and Three, and an area known as Barcelona in Kwa Thema over the two-day period from 13 to 14 November 2009.
- [9.3] Units from the Public Order Policing Unit ("POPS") were deployed to the area to deal with the unrest.
- [9.4] During the course of these activities the police fired rubber bullets at protestors.
- [9.5] Plaintiff was shot by rubber bullets and sustained four injuries, including injuries to his right eye, which was later medically removed as a result of the injury.
- [10] The exact circumstances of the shooting are placed in dispute. The defendant denies that any member of the police fired shots from outside the armoured police vehicle, commonly known as a Nyala, at the time and place in question. Accordingly, the defendant disputes the plaintiff's version that he was deliberately shot by a police member who was on foot and outside the Nyala at the time.

THE

ISSUES

[11] It is trite, as counsel for the plaintiff submitted, that every infringement of bodily integrity is prima facie unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification.[1]

[12] Our law draws a distinction between the overall onus or burden of proof, and the evidentiary burden. 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 (cf D 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.”[2] (emphasis added)

[13] Only the first of these concepts represents the onus in its true sense.[3] In this sense, the onus determines which party will fail on a given issue if, after hearing all of the evidence, the court is left in doubt.[4] 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.[5] This “overall onus” never shifts from the party on whom it originally rested. 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.[6] The onus, in its true sense, is determined by the pleadings and the substantive law.

[14] In *Mabaso v Felix*[7] the Appellate Division laid down the general principles that apply in cases involving delicts affecting the bodily integrity of the claimant, and in circumstances where the defendant raises a defence or ground of justification, such as self-defence. The court held that in such cases, ordinarily the defendant bears the overall onus of proving his or her justification for the otherwise unlawful conduct. It is not for the plaintiff (who, in a delictual action, normally bears the overall onus of proof) to negative the defendant’s ground of justification, unless the particular pleadings in the case place this onus on the plaintiff.[8] The court cited *Wigmore*[9] in this regard as follows:

“... so that the plaintiff is put to prove merely the nature of his harm, and the defendant’s share in causing it; and the other circumstances, which, if they existed leave him without a claim, are put upon the defendant to prove.” (emphasis added)

[15] The well-known and long-established principles of pleading are encapsulated in Rule 18(4) of the Uniform Rules of Court.[10] The Rule requires every pleading to contain “a concise statement of the material facts upon which the pleader relies for his claim, defence or answer”. It is the pleadings that define the issues so as to enable the other party to know what case he or she is required to meet,[11] and parties are thus limited to their pleadings; a party cannot direct the attention of the other party to one issue in the pleadings

and then attempt to canvass another at the trial.[12] A court is required to determine what the real and substantial issues are between the parties and to decide the case on these issues.[13]

[16] Applying these principles to the present case, it is evident that 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 police. While the particulars of claim aver merely a “wrongful and unlawful assault”, without specifying the deliberate nature of the assault, throughout the trial, plaintiff’s case has rested on a deliberate shooting by the police. In his testimony to the court, the plaintiff confirmed that his case was that he was deliberately shot by a police officer while sitting in the yard of the spaza shop.

[17] The plaintiff did not plead, in the alternative, that he was negligently or recklessly shot by the police.[14] Nor did the plaintiff place any evidence before the court to sustain an alternative claim of this nature. The plaintiff’s

evidence was directed at establishing that a police officer stood at the entrance to the yard, aimed directly at him, and shot him with rubber bullets.

[18] In the circumstances, this is the case that the defendant was called on to meet.

[19] The defendant’s plea is not in the form of a confession and avoidance; he does not admit the shooting and plead self-defence or any other ground of justification. On the contrary, the defendant denies the alleged wrongful and unlawful assault by

shooting as pleaded in the particulars of claim. The defendant pleads that he has no knowledge of how the plaintiff sustained the injuries. Despite these denials, the defendant does plead facts that point in the direction of a justification for the shooting.

[20] It strikes me that the pleadings by both parties are not as clear as perhaps they could have been. However, from the pleadings, taken together with the manner in which the plaintiff’s case was presented in court, it is evident that the substantial issue in dispute between the parties in this particular case is whether or not the plaintiff was, as he claims, deliberately shot by a police officer.

[21] This is the case pleaded and advanced by the plaintiff, and he bears the onus of satisfying the court on this issue. Indeed, counsel for the plaintiff accepted in his submissions to the court that if I am unable, on the evidence, to accept the plaintiff’s version of events in this regard, then that will be the end of the matter, and I must rule against him.

[22] It seems to me that in light of the real and substantive issue in dispute in this case, the question of whether any ground of justification exists has little material role to play. This is because:

[22.1] In the first instance, and for the reasons set out above, if, on the evidence, the plaintiff is unable to show that he was deliberately shot by the police, then he will fail in meeting the onus he bears of establishing the nature of his harm and the role of the defendant in causing it.

[22.2] On the other hand, if I find that the plaintiff was deliberately shot by the police, then there can be no question of any legal justification for the defendant's action. In other words, if plaintiff's version of events is established, then it is self-evident that police conduct of that nature and in those circumstances cannot be justified on any legal grounds. Counsel for the defendant accepted as much.

[23] In the circumstances, in my view, the key issue in this case is whether the evidence establishes that plaintiff was injured by a police officer, who deliberately aimed and fired rubber bullets at him. However, to the extent that the question of justification by the defendant for the plaintiff's injury may be relevant, I deal with this aspect later in my judgment.

EVIDENCE FOR THE PLAINTIFF

[24] The plaintiff, Mr Mlota, testified first. The relevant aspects of his evidence may be summarised as follows.

[25] The plaintiff was at work on the morning of 14 November 2009. It was a Saturday and he took a taxi back to Kwa Thema at approximately 1 pm. He went to pick up his friend, Mr Dubula, who also stays in September Street, and they proceeded to the spaza shop owned by a Mr Madikizela. The purpose of them going to the shop was to enjoy some drinks together during the afternoon. The plaintiff had with him a bottle of Klipdrift brandy that he had purchased while he was at work. The spaza shop is situated on the corner of September and Masibeni Street. The entrance to the yard of the shop is on September Street. There is a wide gate at the entrance flanked by cement brick pillars and a wall on each side. At the time of the incident a shack stood behind the wall and next to the spaza shop in the yard.

[26] The plaintiff and Mr Dubula borrowed two glasses from Mr Madikizela on their arrival and proceeded to sit on the two in plastic crates in front of the shack, but behind the wall of the yard, to enjoy their drinks. The gate to the yard was open. The plaintiff sat with his back to the front wall of the shack, facing September Street, while Mr Dubula sat opposite, facing the plaintiff, with his back to September Street. They were positioned towards the right-hand side of the shack, assuming that one is looking towards the shack from September Street.

[27] After they had been enjoying their drinks for approximately 30 minutes, the plaintiff noticed some, what he described as "boys",

running into the yard through the open gate. They ran into the gap between the shop. They were pursued by one police officer on foot, whereafter a second police officer arrived on the scene. The second police officer took up a position at the left hand pillar of the open gateway. According to the plaintiff this police officer cocked his weapon, pointed it towards the plaintiff, who was still sitting on his crate at the time, and shot at him. The plaintiff told the court that this police officer did not say anything before he fired the shots. He was in police uniform with a police cap, but the plaintiff was unable to recognise him. The plaintiff refused assistance from members of POPS who wanted to take him to an ambulance as this would have entailed him climbing very high up

into a Nyala. Instead, a constable Zulu, from the Kwa Thema police station later assisted him by taking him to an ambulance, which transported him to hospital.

- [28] The plaintiff testified that he was never part of any protest action. He indicated that he lived in a section of the area that enjoys full municipal services and therefore there was no need for him to join in any service delivery protests. He was adamant that he was seated on his crate when he was shot and sustained his injuries.
- [29] There are a number of aspects of the plaintiff's evidence that warrant specific attention. The first is that the plaintiff confirmed under cross-examination that he was not shot by accident, and that the police officer in question deliberately fired rubber bullets at him. The plaintiff also denied that he was shot by rubber bullets fired from a Nyala. He testified that the police officer was on foot and not in a vehicle when he shot him. He also told the court that he knew nothing about the police firing from inside a Nyala to disperse a crowd of protesters. In fact, the plaintiff said in his evidence that he did not hear any residents singing, toy-toying, or protesting at the time of the incident. He heard no shots being fired prior to the police officer shooting him and he did not hear the sound of any petrol bombs exploding. The plaintiff said that he did not see a crowd of protesters numbering approximately 1000 as claimed by the defendant. He testified that at the time of the incident the situation in the area was quiet and whatever earlier protests there may have been had abated. He also told the court that there was no Nyala present when he was shot, and that he had only seen such a vehicle at the scene earlier, when it was putting out some smouldering tyres. He testified that he had seen a few people standing around watching this.
- [30] The final aspect of the plaintiff's evidence that bears highlighting is his response to the written statement made under oath to the police by Mr Dubula. I will deal with this statement in more detail later. Suffice to say at this stage that the statement gives a very different version as to how the shooting occurred. Under cross-examination, when faced with this written statement, the plaintiff testified that the version contained in this statement was incorrect.
- [31] On the plaintiff's version, therefore, he was deliberately shot by a police officer who was in pursuit of a group of youngsters in circumstances where no protest action was taking place in the vicinity at the time, and in circumstances where he could not have been mistaken for being one of the people whom the police were pursuing.
- [32] The second witness to testify for the plaintiff was the shop owner, Mr Madikizela. Mr Madikizela confirmed the plaintiff's version to the effect that he and Mr Dubula had spent some time in the yard of the shop drinking on the day in question. He also confirmed the plaintiff's version as to where he and Mr Dubula had been seated at the time of the incident. Mr Madikizela was adamant in his testimony that he had seen the police officer shooting the plaintiff. However, his version of the incident differs in certain material respects from the version put forward by the plaintiff.

- [33] In the first instance, Mr Madikizela recalled in his testimony that the plaintiff and Mr Dubula had arrived at his shop at approximately 11 am on 14 November 2009. On his version they had been drinking for some 2 to 3 hours before the shooting incident occurred. When pressed on this issue in cross-examination Mr Madikizela indicated that he had definitely witnessed the shooting incident and that is only difficulty was one of timing. As to the shooting incident itself, Mr Madikizela's testimony was to the effect that the police officer who fired the shot was standing at the right-hand pillar of the gateway at the time. This is different to the version of both the plaintiff, and as I will indicate below, Mr Dubula, who in their testimony placed the shooter at the left-hand pillar. This is a significant disparity in that Mr Madikizela's version would have placed the police officer within only a few metres from the plaintiff when he allegedly fired the shots.
- [34] In addition, Mr Madikizela testified that this police officer was not alone at the time of the shooting. He told the court that a second police officer was standing with the first police officer, and also holding his gun in an aiming position, when the first officer fired at the plaintiff. The plaintiff made no mention in his testimony of two police officers taking aim at him. On his evidence the policeman who shot him was on his own at the time, the other police officer having disappeared in pursuit of the people who had run into the yard.
- [35] On Mr Madikizela's evidence protest action was ongoing at the time that the plaintiff was shot. He testified that shortly before the incident the police were shooting at protesters further down the street. Mr Madikizela said that he had seen the protesters in Masibeni Street. He did not count how many protesters they were but that he saw five or six. He also said under cross-examination that he does not know the number of protesters involved because he was busy in his shop at the time. He testified that he heard shots being fired further away and these shots then advanced towards the intersection between September and Masibeni streets. According to Mr Madikizela, at the time that he heard these shots the plaintiff and Mr Dubula were already in the yard of his shop drinking. Mr Madikizela told the court that when he came out onto the verandah of his shop (which overlooks the area where the plaintiff was sitting), he saw protesters running away from the police, who were shooting at them. It is then that some of the protesters ran into the yard of the shop, followed by the two police officers. He witnessed the shooting of the plaintiff from the verandah.
- [36] It is clear from Mr Madikizela's version of events that at the time the plaintiff was shot there was considerable protest action taking place in the near vicinity, and that the people who fled into the yard had been dispersed as a result of action taken against the protestors by the police. It is difficult to reconcile this with the plaintiff's version that he heard and saw no protest action at the time that he was shot.
- [37] The third witness to testify for the plaintiff was Mr Dubula. Mr Dubula confirmed the plaintiff's version to the effect that he and plaintiff were seated on crates in front of the shack next to the shop on the day in question. He confirmed that the plaintiff was seated facing September Street and he, Mr Dubula, was sitting opposite him with his back to the street. He

told the court that although he was not certain of the time at which they arrived at the shop, he estimated it was around 2 pm and that the plaintiff was shot approximately 30 minutes later.

- [38] In his evidence in chief Mr Dubula initially described the incident as having occurred when two or three people fled from the police into the yard of the shop. He told the court that the police arrived from the street and started shooting. Some of the police entered the yard in pursuit of the fleeing protesters. Under cross-examination he was questioned as to whether he had heard gunshots outside of the yard prior to the plaintiff being shot. He answered that he had. Later under cross-examination he contradicted this evidence by stating that the only gunshots he heard with those directed at the plaintiff inside the yard. It was impossible for Mr Dubula satisfactorily to reconcile these two contradictory versions of events during his testimony.
- [39] Unfortunately, there were further material contradictions in the evidence given by Mr Dubula. Critically, he first stated that he had not seen the police officer firing at the plaintiff, as the police officer was behind him and out of his line of sight. Later in his testimony, however, he contradicted himself by saying that he had indeed seen the police officer shooting the plaintiff and that the police officer had been standing at the left-hand pillar of the gateway at the time. (Incidentally, this is also where the plaintiff placed the shooter in is evidence). He tried to explain the contradiction in his own evidence by saying that although the police officer was behind him he wasn't directly behind him at the time.
- [40] Perhaps the most damning contradiction in Mr Dubula's testimony relates to a written statement that he made under oath to the police approximately one month after the shooting incident. In this statement Mr Dubula described what happened as follows:
- “During that time while we were drinking, there were people, residents of Ext 3 and Barcelona section busy toy-toying, singing and chanting for service delivery. Suddenly a police truck emerged and people started running away in different direction. The police in the truck started shooting at the people using rubber bullets and unfortunately my friend whom I was sitting with was mistakenly shot by the said police as they were trying to disperse the unruly crowd.” (emphasis added)*
- [41] It is evident that the version given in Mr Dubula's written statement is materially at odds with the version he gave under oath in court, and with the version given by the plaintiff. In his written statement he describes the shooting as having been accidental, and as having occurred when police in a vehicle were shooting at protesters. This cannot be reconciled with his oral testimony in which he stated that he had seen a police officer on foot deliberately shooting at the plaintiff while he and the plaintiff were sitting in the yard of the shop enjoying their afternoon drinks.

[42] Of even greater curiosity is the fact that when pressed under cross-examination Mr Dubula did not dispute the veracity of what was recorded in his written statement. In fact, he expressly stated that the paragraph in question was a correct statement of the events as told to the police and that the police had been correctly recorded it. He denied, however, that he had come to give his evidence at the trial with the deliberate intention of misleading the court.

[43] In other respects Mr Dubula also gave a version of events that differed from that given by the plaintiff. For example, Mr Dubula

testified that when he and the plaintiff arrived at the shop he had seen a Nyala vehicle parked on the side of the road near the

intersection between September and Masibeni streets, and that police officers were busy putting out a fire in the street on foot. Both the plaintiff and Mr Madikizela gave evidence that the vehicle itself was being used to put out the fire. Mr Dubula also testified that when the police came into the yard they kicked in two doors of the shack. The plaintiff made no mention of anything like this having occurred in his testimony.

THE APPLICATION FOR ABSOLUTION AND THE DEFENDANT'S EVIDENCE

[44] At the close of the plaintiff's case it was apparent to counsel for both parties that there were difficulties with the evidence presented by the plaintiff. Counsel for the defendant put to each of the plaintiff's witnesses that their versions were so contradictory that they could only have been fabricated in an attempt falsely to bolster plaintiff's claim for damages. Counsel for the plaintiff professed not to be surprised when counsel for the defendant applied for absolution from the instance at the close of the plaintiff's case. Nonetheless, he opposed the application, and for reasons I gave separately, I refused absolution.

[45] Defendant then led the evidence of Constable Rikhotso. He testified that he had been deployed as a member of the POPS in Kwa Thema on the 14 November 2009. From 12h30 on that day to 16h30 they were busy dealing with violent protest action taking place in Extensions Two and Three, as well as the Barcelona section of the township. The POPS was called in because the situation had got out of hand, and there was a need to restore order. On an assessment of the situation, the decision was made that they should use the armoured Nyala vehicles, rather than ordinary "soft top" vehicles.

[46] The protest action was accompanied on 14 November 2009 by looting of foreign owned shops and individuals being robbed. From 12h30 onwards, the police drove all around the trouble spots trying to restore order.

[47] According to Constable Rikhotso, at approximately 16h30 they came across a group of about 1000 protesters at the intersection of September and Masibeni streets. At this stage there were around 10 members of the unit in one Nyala as the other Nyala had broken down.

- [48] Constable Rikhotso testified that the Nyala initially drove through the crowd of protesters who were situated along the sides of the road. Constable Rikhotso indicated that at this stage the crowd were burning tyres and throwing some stones, but that the level of violence was not yet significant. Thereafter, they did a U-turn in the vehicle on the playground in September Street and drove back towards the crowd. The protesters had now moved into the road and the level of violence had increased. According to Constable Rikhotso the protesters were throwing petrol bombs as well as stones. He told the court that even though the Nyala is an armoured vehicle, petrol bombs create a realistic danger for the occupants. The Nyala was driving towards the protesters who were in front of the vehicle. In order to disperse the crowd and to quell the violence the police started shooting rubber bullet rounds from inside the Nyala towards the crowd.
- [49] Constable Rikhotso told the court that the crowds dispersed in a matter of seconds after the rubber bullet rounds were fired. He stated that the police immediately ceased fire once the crowd dispersed. Constable Rikhotso saw a group of protesters running into the yard of the shop. He stated that he did not see anyone shooting at the protesters when they fled into the yard, although he conceded that it was possible that somebody in the vehicle may have fired shots in the direction of those who fled. According to Constable Rikhotso, from inside the Nyala he saw a man bleeding. The man was sitting in front of the shack in the yard of the shop. When the Nyala stopped, Constable Rikhotso was the first member to alight from the vehicle. He told the Constable of the unit about the bleeding man and he escorted the Constable to him. He confirms that the bleeding man in question was the plaintiff.
- [50] Constable Rikhotso did concede under cross-examination, albeit somewhat reluctantly, that the rubber bullet that injured the plaintiff must have been fired by the police. However, he was adamant in his testimony that the police fired no shots once the crowd dispersed. He was also adamant that the police only fired from inside the Nyala, and that no shots were fired by the police after they alighted from the Nyala.
- [51] The defendant elected not to call any other witnesses in support of the defence.

HAS THE PLAINTIFF ESTABLISHED HIS CASE?

- [52] There can be no question that the plaintiff was injured by rubber bullets fired by the police. This is plain from the evidence, not least of which is the fact that only the police were using rubber bullets on the day, and at the time and place in question.
- [53] However, for reasons that I have set out earlier, even if I accept this as a proven fact, it is not sufficient for plaintiff to meet the onus resting on him. As I have indicated, the key issue remains whether the evidence establishes that, on the probabilities, the rubber bullets were deliberately fired by a police officer, who aimed and shot at the plaintiff from the entrance to the yard.

- [54] In my discussion of the evidence presented by the witnesses on behalf of the plaintiff, I have already pointed to various inconsistencies in their testimonies, both when compared to the testimony of the other witnesses, as well as internal inconsistencies in the testimony of each witness.
- [55] Counsel for the plaintiff acknowledged that there were credibility issues and other difficulties with the plaintiff's witnesses. However, he submitted that these were not material. He submitted that if one paid specific attention to the evidence of the plaintiff, in particular, as well as the evidence of the defendant, there was sufficient credible evidence for me to find that the plaintiff had established his case.
- [56] I am unable to agree with counsel for the plaintiff's submissions in this regard for various reasons.
- [57] In the first place, the plaintiff's evidence itself was by no means problem-free. Most materially, he testified that there was no protest action taking place in September and Masibeni streets at the time. This is patently at odds with all the other evidence presented to the court, including the evidence of the other two witnesses for the plaintiff. This blatant untruth fundamentally taints the overall credibility of the plaintiff and his version of events.
- [58] Furthermore, the plaintiff's version does not offer any explanation for why a police officer would have aimed and fired at the plaintiff deliberately while the plaintiff was simply sitting and relaxing in the yard. The plaintiff confirmed that he could not have been mistaken for one of the youths that had fled from the police into the yard. He also confirmed that the police officer was not under any danger when he fired at the plaintiff. When counsel for the defendant put to the plaintiff that his version depicted very strange behaviour on the part of the police officer concerned, the plaintiff simply responded by saying that this is what happened.
- [59] In order for me to accept plaintiff's version as probable, I would have to accept that a police officer deliberately fired rubber bullets at the plaintiff at close range for no explicable reason. I have difficulty regarding this as credible or probable or probable.
- [60] Apart from the plaintiff's version, there are also major problems of credibility and inconsistency in the evidence of the two remaining witnesses for the plaintiff. I have already highlighted these difficulties in summarising their evidence.

Although Mr Madikizela claims to have witnessed the incident, in his version the police officer was standing at a completely different

spot when he fired at the plaintiff. In addition, on his testimony there were two police officers aiming at the plaintiff,

although only one fired. This is materially at odds with what the plaintiff testified. In the circumstances, I cannot accept Mr Madikizela's evidence as credible. I do not believe that he saw the plaintiff being deliberately shot by a police officer standing at the entrance to the yard.

[61] As far as Mr Dubula is concerned, his testimony was characterized by a number of material inconsistencies: he contradicted his own evidence that he had not seen a police officer shooting the plaintiff, by later asserting that he had witnessed the shooting;

most significantly, he did not dispute that his written version given under oath to the police, which indicated that the plaintiff had been shot accidentally, was correct. It is not possible for me to accord any credibility to Mr Dubula's evidence. As with Mr Madikizela, I do not believe that he saw the plaintiff being shot deliberately by a police officer standing at the entrance to the yard.

[62] If I add to the mix, as counsel for the plaintiff suggested I should do, the evidence of the defendant, this still does not assist the plaintiff's case. On the evidence of Constable Rikhotso, the police fired rubber bullets at the intersection of September and Masibeni streets at protesting crowds. There were at least 10 police officers in the Nyala vehicle firing in different directions from inside the vehicle through "shooting holes" at the time. They used rubber rounds, with each "bullet" consisting of two rubber balls being fired in one shot. The rubber rounds were fired from pump action shot guns. As I indicated earlier, Constable Rikhotso testified that the police did not fire any shots from outside the Nyala. He was not seriously challenged on these material aspects of his evidence under cross-examination.

[63] In my view, the credible aspects of plaintiff's evidence, taken together with the evidence for the defendant do not support the plaintiff's case that he was deliberately shot by a police officer standing at the entrance to the yard where the plaintiff was sitting. 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 crossfire of the police firing on the protestors.

[64] In view of the fact that plaintiff's case rests on a deliberate shooting by the police, I am unable to find that he has succeeded in establishing the case that he pleaded.

[65] One aspect of the case remains to be considered. It is this: despite the failings in the plaintiff's case, does the fact that the evidence indicates that it was a rubber bullet fired by police (albeit in circumstances different to those averred by the plaintiff) nonetheless provide plaintiff with a basis for succeeding in his claim?

[66] I have already indicated that, in my view, plaintiff's onus depends on the case that he pleaded and if he fails to establish his case on the probabilities, then he should be found not to have satisfied the onus resting on him. As counsel for the plaintiff conceded, this should be the end of the matter. In the circumstances, the question of whether the defendant has established a ground of justification does not arise.

[67] However, even if I am wrong in this, and even if the facts I have found to have been established can be held to give rise to an onus on the part of the defendant to justify its shooting of rubber bullets, I am satisfied that the defendant has done so in this case.

[68] The following evidence of Constable Rikhotso is relevant in this regard:

[68.1] there was widespread protest action at the time in Kwa Thema involving violent conduct;

[68.2] the POPS was dispatched to restore order and Constable Rikhotso was part of the unit that went into the area on 14 November 2009;

[68.3] the violent conduct included burning tyres; throwing stones; petrol bombing of police vehicles; looting of foreign shops; private individuals being robbed; and burning of vehicles;

[68.4] a vehicle was burned at the intersection of September and Masibeni streets the previous day, and on the 14 November the other activities listed above continued;

[68.5] at the time of the incident, a crowd of approximately 1000 protestors had gathered in the intersection, they were throwing stones, burning tyres and throwing petrol bombs at the police in the Nyala;

[68.6] even though the police were in an armoured vehicle, petrol bombs pose a threat to the safety of the occupants in light of the fact that they can cause the fuel in the vehicle to catch fire;

[68.7] the police in the Nyala fired rubber bullets into the crowd of protestors to disperse them in an effort to restore order;

[68.8] the police were only issued with rubber bullet rounds, as this was the maximum force deemed to be appropriate for the situation they were facing;

[68.9] the rubber bullets were fired with a view to dispersing the protestors and breaking up the violent activities only;

[68.10] the police also fired to avert the danger they were in from the petrol bombs;

[68.11] the firing of the rubber bullet rounds from the Nyala at the intersection of September and Masibeni streets happened very quickly, it was all over in a matter of seconds;

[68.12] the police ceased firing immediately the crowd dispersed;

[68.13] no shots were fired after the police members alighted from the Nyala;

[68.14] Constable Rikhotso did not see any shots being fired in pursuit of any fleeing protestors, although he conceded that it would have been possible for someone to fire without Constable Rikhotso seeing him or her doing so;

[68.15] he testified that the police action took place in accordance with police training and it was the only solution to deal with the situation that the police were facing;

[68.16] Constable Rikhotso did not see the plaintiff in the crowd, but he saw him after the firing ceased (while Constable Rikhotso was still in the Nyala), when the plaintiff was observed sitting in front of the shack in the yard of the spaza shop.

[69] Most of this evidence was not placed in dispute during the course of cross-examination. In particular, the existence of a violent protest by a large group of protestors in the intersection at the time that the plaintiff was shot was not disputed (despite plaintiff himself testifying that all was quiet at the time, counsel for the plaintiff conceded that this version should be

rejected and that it had to be accepted that there was protest action at the time). The evidence that the police only fired from inside the Nyala was also not placed in dispute, nor was it placed in dispute that it was necessary and appropriate to use rubber bullet rounds to deal with the situation.

- [70] Counsel for the plaintiff cross-examined Constable Rikhotso on his testimony that rubber bullets were only used to disperse the crowds, and not to arrest people. There were entries in the police occurrence book for that day to indicate that arrests had been made using rubber bullets. However, in re-examination, Constable Rikhotso confirmed that the police had not made any arrests as a result of the incident at the intersection of September and Masibeni streets. It is also common cause that the plaintiff was never arrested.
- [71] In my view, the evidence presented to court demonstrates that the police fired rubber bullets from inside the Nyala vehicle to disperse violent protestors, that they did so for a short period of time, and that they ceased firing once the objective of dispersing the crowd was achieved. The police acted in pursuance of their duty to protect the community from violent action of this nature, and in order to defend themselves from the threat of petrol bombs. The evidence also indicates that the actions of the police were proportionate to the danger posed by the protestors to the community and to the police.
- [72] The most probable explanation for the plaintiff's injury on the evidence is that either he was part of the protest action, or, alternatively he had the misfortune of being caught in the crossfire of the volley of rubber rounds fired by the police. In view of the circumstances that existed at the time, I am satisfied that the defendant has demonstrated that the police's conduct in firing the rubber rounds, and hence the injury resulting therefrom, was justified and hence was not wrongful or unlawful.
- [73] For all of the above reasons, I find that the plaintiff has failed to establish that he was injured as a result of an unlawful and wrongful assault by a police officer. Unfortunately, this means that his claim must fail.

ORDER

[74] I make the following order:

[74.1]The plaintiff's claim is dismissed.

[74.2]The plaintiff is directed to pay the defendant's cost.

R M KEIGHTLEY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING : 13-15 MAY 2014

DATE OF JUDGMENT : 26 MAY 2014

PLAINTIFF'S COUNSEL : J H VDB LUBBE

INSTRUCTED B : NEIL DIPPENAAR ATTORNEYS

DEFENDANT'S COUNSEL : S J COETZEE

INSTRUCTED BY : STATE ATTORNEY PRETORIA

[1] Noor Moghamat Isaacs v Centre Guards CC

[2004] 1 All SA 221 (C) at para 7, citing Mabaso v Felix 1981

(3) SA 865 (A) 873E – 874E; Malahe and Others v Minister of Safety and Security and Others [1998] ZASCA 64; 1999

(1) SA 528 (SCA) 533J – 534A, 540F – H.

[2] 1946 AD 946 AD 952

[3] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 543 (A) at 378-9

[4] Hoffman & Paizes The South African Law of Evidence (2nd) p128-130

[5] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, above

[6] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, above, citing Brand v Minister of Justice 1959 (4) SA 712 (A) at 715 and Marine and Trade Insurance Co Ltd v Van der Schyff 1972 (3) SA 543 (A) at 548

[7] Above

[8] At 873F-874B

[9] Wigmore Evidence (3ed) vol IX para 2486, cited at 873C-D

[10] Mabaso v Felix, above at 874H-875A

[11] Benson and Simpson v Robinson 1917 WLD 126 and the other cases cited in Farlam et al Erasmus Superior Court Practice (Rev Service 43) B1-129 n9

[12] Imprefed v (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107G-H

[13] Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198; Shill v Milner 1937 AD 101 at 105

[14] Unlike the situation in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, above.

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