

SOUTH AFRICA / JUDGMENT

Modise v Minister of Safety and Security (18346/14) [2021] ZAGPPHC 561 (2 September 2021) [2021] ZAGPPHC 561

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

18346/14

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 18346/14

DATE:

2 September 2021

ROSE

MMEMME KEDISALETSE

MODISE

Plaintiff

V

THE

MINISTER OF SAFETY AND

SECURITY

Defendant

JUDGMENT**MABUSE J**

[1] By the combined summons issued by the Registrar of this Court, the Plaintiff, Ms Rose Mmemme Kedisaletse Modise, an adult female of Maumong Village in Rustenburg, claims payment of money from the Defendant, the Minister of Police.

[2] The Plaintiff's cause of action arose on 21 June 2013, at or near Randfontein, Taxi Rank, Gauteng, when she was shot once with a firearm on her right shoulder blade. As a result of the said gunshot, she sustained some injuries, described as follows in paragraph 9 of her particulars of claim:

2.1 a gunshot to her head;

2.2 a fracture of the skull;

2.3 emotional shock;

2.4 hemiplegia on the right side;

2.5 a bullet lodged in the Plaintiff's back and cannot be removed.

[3] According to the particulars of claim ("the POC"), the Plaintiff, who was a pedestrian at the material time, was struck by a stray bullet in cross-fire. It is alleged in the POC that the aforementioned incident was caused by the negligence of members of the South African Police who were negligent in one or more or all of the following respects:

3.1 they failed to give adequate alternative any warning of their intention to fire;

3.2 they opened fire when it was both dangerous and inopportune to do so;

3.3 they opened fire in the presence of members of the general public which included the Plaintiff;

3.4 they opened fire under circumstances when use of deadly force was contra indicated;

3.5 they discharged their firearms without appreciating the direction in which they were firing;

3.6 they failed to avoid the incident when through the exercise of reasonable care and skill they both could and should have done so.

It is alleged that, based on the foregoing, the members of the South African Police acted both wrongfully and unlawfully.

[4] In the alternative, the Plaintiff pleads that at all material times and by virtue of the particular relationship between the parties and the facts as set out supra, the Defendant and its employees, more specifically members of the South African Police Services, owed a legal duty to the Plaintiff:

4.1 to take all reasonable and necessary steps to prevent injury or harm being caused to the Plaintiff;

4.2 to take all reasonable and necessary steps to avoid the occurrence of incident complained of and more specifically to avoid members of the South African Police Services opening fire in the midst of general public and the Plaintiff.

[5] The Defendant defends the Plaintiff's action. For that purpose, the Defendant has delivered a plea in which he has denied the allegations made against the members of the South African Police Services or has not knowledge of same.

[6] In terms of the law, the Plaintiff must not only make the allegations contained in the POC but must also prove them. This principle was put clearly in the case of Pillay v Krishna and Another 1946 AD 946 where the Court stated, inter alia, that:

"He who asserts proves and not he who denies since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that denial is absolute."

This means that the onus rests on the Plaintiff to prove what she has alleged in the POC. The Defendant, having denied the averments contained in the POC, does not have any duty in law to prove his denial.

[7] Two witnesses testified in this action, the Plaintiff, who gave evidence about the incident in which she was shot and Mr. Thomas Frederick Hermanus Wolmarans ("Mr Wolmarans") who had been called as a witness for his expertise in, inter alia, firearms and bullets.

[8] Ms Modise told the Court that on 21 June 2013 she was shot near Randfontein Taxi Rank where there was a shooting incidence. She was from Randfontein CBD where she had gone to do some shopping. First she went to Randfontein Police Station where she went to certify some documents and thereafter walked to the taxi rank to catch a taxi home. While she was walking she heard a sound. She had no idea of that sound nor did she know its source. At that time she was walking in the company of a strange woman she was assisting to carry her luggage or parcels.

[9] She saw a Policewoman standing on the left hand side of the street known as Pollack Street. This is a one-way street that runs from South to North. She also saw another Policeman standing next to a ramp. It never dawned on her that the Police and robbers were shooting at each other.

[10] The woman in her company decided to take a different direction. She, the Plaintiff, decided to walk into the gate of the premises where she was. There was a house in the premises she wanted to walk into. That house has since been demolished. At that time the house was surrounded by a concrete wall. The concrete wall is no more. It has now been replaced by a palisade fence.

[11] As she was in the process of walking into those premises, she was shot on the right shoulder blade. She fell face down as a result of being struck by a bullet. Now, may I pause here to place it on record that on Monday 30 August 2021, the Court went for an inspection in loco at the scene of the incident. There the Plaintiff showed the Court where she was when she was shot and where she fell, following

the gunshot. The pointing out was in line with a copy of the Google map that had been prepared to demonstrate where she was shot.

[12] The bullet is still lodged in her body. She was advised by the medical doctors that it could not be removed as that may result in a deadly situation for her.

[13] As explained earlier, Mr Wolmarans had come to testify as an expert witness. He had prepared a report about the scene where the incident took place. His report was handed in without any objection from the Defendant. Mr Wolmarans of TFH Wolmarans, is an independent Forensic Ballistic Expert. That he was such an expert, was not in dispute. In his report, which was not made under oath, he states that on 21 October 2020 he was requested to peruse the Police Docket in Randfontein CAS 440/06/2013 regarding all ballistic relevant matters and to examine and comment on the probability that the Plaintiff was injured by a bullet fired from a 9mm x 19mm caliber pistol similar to the calibre firearm used by the South African Police Service.

[14] He was further requested, on 29 October 2020, to consult with Dr C Liebenberg of EMR Eugene Marais Radiology for further information regarding the CT scan conducted on 12 October 2020 at 11h52 on the Plaintiff. Several segments of the CT scan were examined in his presence. Dr Liebenberg measured the length and diameter of the metallic object shown on the scan and thereafter made a report to him.

[15] Two 9mm x 19mm bullets were shown to Dr Liebenberg. It was then agreed between Mr Wolmarans and Dr Liebenberg that there was a similarity between the object depicted on the CT scan and the bullets. Based on such similarities, shape and general characteristics of the FMJ which stands for Full Metal Jacket, it was more consistent with Full Metal Jacket.

[16] Mr Wolmarans also gave evidence based on the ballistic reports compiled by Pariksha Govender marked LAB14189/2013(2) and Randfontein Case 440/06/2013 dated 16 August 2020 and another ballistic report by Mashia Phillip Maponya. Basically, the evidence that he gave was a repetition, as I indicated earlier, of what already appeared in the Police Case Docket. In general, his evidence did not serve a useful purpose and this is because it was not primary evidence. He was interpreting the information that had been captured in the docket. I must assume that he visited the scene of the incident because in paragraph 24 of his report he recorded that:

“24 Police photos 23 and 24 depicts (sic) the exhibits that were retrieved in Railway Road, however, it can be observed that there is a prefab concrete wall on the right hand (eastern) side of the road. This wall have the following effect”

24.1 the wall will create a barrier between the Plaintiff and the persons who fired the shots. It is my opinion that it is highly unlikely that she was shot from this position where the exhibits were found in Railway Road, if she was at point 'L' (Annexure 'D')."

He also recorded the following in paragraphs 37 and 38 of his report:

"37 That not all police officers who were involved in the operation of firearms were sent for ballistic comparison with the fired cartridge cases marked 'DD', 'EE', 'N', 'M', 'X', and the bullets.

38 However, it is my opinion that the five cartridge cases marked 'DD', 'EE', 'N', 'M' and 'X' were possibly fired by the perpetrators who hijacked the police vehicle. The possibility that it could have been fired by police officers cannot be excluded (all the police firearms were not tested)."

This prompted Ms Pretorius to submit that the evidence of Mr Wolmarans was inconclusive.

- [17] Upon Ms Maritz informing the Court that she would lead no further evidence, Ms Pretorius immediately applied for absolution from the instance. Ms Pretorius argued that on the conspectus of the entire Plaintiff's evidence, it was not necessary that the Defendant's witnesses should testify. Referring to Ms Maritz's opening address, she remarked that there was no evidence by the Plaintiff that the police kept on shooting even after the perpetrators or robbers had left the scene, and furthermore, that there was no evidence by the Plaintiff that it was at that stage unnecessary for the police to keep on shooting.
- [18] Furthermore, she submitted that the evidence of Mr Wolmarans was unhelpful to the Court. His evidence, so continued Ms Pretorius, was inconclusive. In her application for absolution from the instance, she found support in the judgment of *Gordon Lloyd Page's & Associates v Riviera and Another* 2001(1) SA 88 (SCA).
- [19] On the other hand, Ms Maritz relied on the testimony of the Plaintiff and of Mr Wolmarans. She seemed to attach much importance to the evidence of the Plaintiff that she saw a policewoman standing at a certain spot next to a block of flats and furthermore, on the Plaintiff's further evidence that she saw another policeman standing at a certain point next to a stop sign or ramp. On an inspection in loco the Plaintiff pointed out the various points where the police offices were standing.
- [20] Ms Maritz also attached high premium on the evidence of Mr Wolmarans.
- [21] The starting point is that whether or not to grant an application for absolution from the instance, is entirely within the discretion of the Court. When absolution from the instance is sought at the close of the Plaintiff's case, the test is whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might find for the Plaintiff. This principle was annunciated by the Court in *Gascoyne v Paul and Hunter* 1917 TPD 170, 173 when the Court had the following to say:

"At the close of the case for the Plaintiff, therefore, the question which arises for consideration of the Court is, is there evidence

upon which a reasonable man might find for the Plaintiff?”

The Court proceeded and put the test in another way. It had the following to say:

“The question therefore is, at the close of the case for the Plaintiff was there a prima facie case against the Defendant In other words, was there such evidence before Court upon which a reasonable man might, not should, give judgment against” the Defendant. This principle was followed and applied in R v Shein 1925 AD 6 at p. 9. This was a judgment by Innes CJ. It was also followed in Claude Neon Lights (SA) Ltd v Daniel 1976(4) SA 403 [A.D.], 409 G-H.

[22] Therefore, when the Defendant applies, at the end of the Plaintiff’s case, for absolution from the instance, the Court:

“Must bring to bear upon the evidence not his own but the judgment of a reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could, arrive. This is the process of reasoning which, however, difficult its exercise, the law enjoins upon the judicial officer.” In this regard see Myburgh v Kelly EDL 202 at 206.

[23] Finally, I need to turn my attention to the judgment I was referred to by Ms Pretorius and in which she relied in support of her application for absolution from the instance. That is the judgment of Gordon Lloyd Page and Associates supra. Ms Pretorius quoted the following paragraph:

“that in order to survive absolution a Plaintiff had to make out a prima facie case in the sense that there was evidence relating to all the elements of the claim because, without such evidence, no Court could find for the Plaintiff.”

[24] I now turn to analyse the evidence of the Plaintiff. The Plaintiff does not know who shot her. This she had also conceded. This means that she could not testify that it was the Police who shot her. Ms Maritz seemed to rely on the evidence of the Plaintiff that the Plaintiff saw a policewoman standing at a certain point next to a block of flats. But the Plaintiff did not see this woman shot her with a gun. She did not say why this woman was standing there. The Plaintiff’s evidence does not go beyond seeing this woman standing there.

[25] Now, it was the duty of the Plaintiff to produce evidence on the conduct of the Policewoman which justified a reasonable inference that the policewoman shot her or could reasonably have shot her. In the absence of such evidence the Plaintiff must produce objective facts upon which a reasonable inference can be drawn that the policewoman shot her. The Plaintiff’s evidence does not satisfy such requirements. Any finding by this Court that the policewoman shot the Plaintiff will be pure speculation. Ms Maritz urged us to indulge in speculation. The Court must immediately draw a distinction between inferences and assumptions. This was emphasized by the Court in S v Naik 1969 (2) SA 231 (N) 234:

“If the Court, on the evidence before it, were to come to that conclusion, it would be making an assumption rather than drawing an

inference, for the facts necessary for the drawing of an inference are lacking.”

We will be entering the realm of circumstantial evidence if we find that the policewoman shot the Plaintiff. Still, no objective

facts

exist to allow this Court to reach that conclusion. In the English case of *Caswell v Powell Duffryn Ass Colliers Ltd* 1940 AC 152 169; 1939 (3) ALL ER 722 733, Lord Wright distinguished between inference and conjecture or speculation:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... but if there are no positive facts from which the inference can be made, the method of inference fails and what is left is mere speculation.”

[26] It is highly unlikely that a policewoman could have stood there where the Plaintiff’s testimony put her if, as the Plaintiff testified, people were running around into different directions, possibly trying to flee the shooting that took place in the area; and furthermore, a shooting duel between the police and the robbers was taking place in Station or Railway Street.

[27] Not much is said or testified about the policeman who was near a stop sign in Station or Railway Street. Still it was never testified that he did anything.

[28] Mr Wolmarans’ evidence, as I have already found, is not very helpful. It must be recalled that he had been asked to peruse the police docket regarding all ballistic relevant matters and to examine and comment on the probability that the Plaintiff was injured by a bullet “fired from a 9mm x 19mm calibre pistol similar to the calibre firearm used by the Police”. So he went about perusing the police docket and interviewing Dr Liebenberg and thereafter expressed his opinion. In conclusion he admitted that his evidence was inconclusive. His evidence would also be weakened by the fact that he did not rely on the original evidence.

[29] In the premises I find that the Plaintiff has not produced the requisite prima facie case against the Defendant. Contrary to Ms Maritz’s opening address I also find that there is no proof of shooting or

proof of unnecessary shooting by the Police while the robbers were not at the scene.

[30] About costs, Ms Pretorius informed the Court that the Defendant was prepared to abandon costs against the Plaintiff. In my view, it was a wise idea because, and as Ms Pretorius observed, the Plaintiff would not be able, in a million years, to pay the Defendant’s costs. This proposition of the Defendant abandoning costs was welcomed by Ms Maritz.

[31] The order that I make herein is as follows:

1. The application for absolution from the instance is hereby granted.

2. Absolution from the instance is hereby ordered.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

Adv S Maritz

Instructed by:

Spruyt Incorporated

Counsel for the Defendant:

Adv LA Pretorius

Instructed by:

The State Attorney

Date heard by Mabuse J:

30 August 2021 – 1 September 2021

Date of Judgment:

2 September 2021

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Prepared on 23 October 2026 · Esheria