

SOUTH AFRICA / JUDGMENT

Moepi v Minister of Police (36025/2014) [2017] ZAGPJHC 446 (20 September 2017) [2017] ZAGPJHC 446

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

36025/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 36025/2014

In the matter between

THAMSANQA MOEPI PLAINTIFF

and

MINISTER OF POLICE DEFENDANT

J U D G M E N T

VAN OOSTEN J:

Introduction

- [1] In this action the plaintiff claims damages from the defendant in respect of an alleged assault as well as malicious arrest and detention. At the commencement of the trial and as agreed between the parties, I ordered a separation of the issues relating to merits and quantum and the matter proceeded on the merits only.

- [2] It is common cause between the parties that the plaintiff was shot by Constable Ngoveni, who acted within the course and scope of his employment with the defendant, during an incident at the Jabulani Engen 1plus café/shop (the shop), on 9 March 2014, between approximately 00h30 and 00h45, which caused an injury to the plaintiff's left lower neck. The defendant having pleaded justification for the shooting bears the onus of proof in regard thereto and in accordance

with the duty to begin, called the following three witnesses to testify: Cnst Ngoveni, who I have already referred to, Sgt Morotolo,

the investigating officer in the criminal case of assault and robbery which was opened and investigated against the plaintiff, and Oupa Monakhisi, who was in the shop at the time of the incident and the complainant in the criminal case. The defendant was the only witness to testify on his own behalf. In addition, video footage obtained from a number of strategically located CCTV security cameras in the shop, showing the essential actions and movements of the dramatis personae during the scene from various angles, was made available, as well as slide photographs of the video footage in regard to specific events.

Factual context

- [3] On the date and time of the incident Monakhisi was standing in the queue in front of a Nedbank ATM, which was situated inside the shop, intending to withdraw cash. The plaintiff was right in front of him attempting to withdraw cash from the ATM. The ATM however declined the transaction and the plaintiff moved sideways in order to allow Monakhisi access to the ATM. Monakhisi stepped forward and withdrew R300.00 in cash. The plaintiff moved towards Monakhisi and started fighting with him accusing him of having taken the plaintiff's money. In the ensuing attack on Monakhisi the plaintiff removed his Nokia cell phone, his Capitec bank card and two R50 notes from his possession. The plaintiff instantly became extremely aggressive and violent causing pandemonium, resulting in cold drink cans, packets of chips and other items being thrown onto the floor. People who were in the shop, came to Monakhisi's assistance and attempted to restrain and calm the plaintiff down, but to no avail. The police were called. Monakhisi decided not to become involved in a fight with the plaintiff and suspected that the plaintiff was 'very drunk'. Two policemen arrived. The fighting advanced to the frying section of the shop. A shot was fired by one of the policemen at the plaintiff, who was holding a mesh basket filled with potato chips and boiling oil (I will retain the reference thereto during the trial, as a container). An ambulance arrived on the scene to transport the plaintiff to hospital. The plaintiff was searched and Monakhisi's robbed items were found in his possession, which he was told could only be handed back to him later at the police station. Those items were in fact returned to him a few days after the incident at the police station.
- [4] Cnst Ngoveni and his colleague, Cnst Khoza, were on patrol duties that morning in the vicinity of the Jabulani Engen filling station, when they were alerted to a fight inside the shop by a petrol attendant. They proceeded to the filling station premises and observed 'a

commotion' in that cold drink cans were thrown out of the shop and terrified people making their way out of the shop. Ngoveni entered the shop and observed a shop attendant jumping over the counter into the shop area at the frying section and running in his direction. He realised that people were in danger and drew his firearm. He then noticed a man on the floor at the frying section, who was kicking with his legs. Another man, who it is now known was the plaintiff, was next to him and trying to fight with the man on the ground. Ngoveni tried to reprimand and stop the plaintiff but the plaintiff approached him intending to attack him with the container, filled with chips and boiling hot oil, in his hand. In an attempt to defend himself and to stop the plaintiff from proceeding with the attack, he aimed and fired a shot at the plaintiff which caused him to fall down. Having ascertained the nature of the gunshot wound in the plaintiff's neck, he summoned paramedics to attend to the plaintiff at the scene. Ngoveni confirmed that the plaintiff was searched and that Monakhisi's robbed items were found in

his possession.

- [5] Sergeant Morotolo testified in regard to the criminal case against the plaintiff which, for some reason, was never finalised. This matter was remanded while she was testifying at the request of the plaintiff, for the purpose of obtaining discovery of a police docket in Jabulani CAS 430/03/2014. The plaintiff subsequently brought an application to compel a reply to the plaintiff's notice in terms of rule 35(3), in response to which an affidavit on behalf of the defendant was filed to the effect that the required docket could not be found anywhere. As a result the application was removed from the roll but the defendant was ordered to pay the costs of the application. Nothing turns on the interlocutory procedure and I therefore do not consider it necessary to deal any further with the evidence of Sgt Morotolo.
- [6] Lastly, I turn to deal with the plaintiff's version. He confirmed that he was at the Nedbank ATM intending to withdraw cash in order to buy more liquor. He was standing at the ATM and his friend Bongani, next to him. While busy with the cash withdrawal

transaction, Monakhisi came closer to him and started interfering and swore at him. He cancelled the transaction, stood aside and allowed Monakhisi to proceed with his transaction. Monakhisi persisted in making insulting remarks and swore at him. He went up to Monakhisi, pushed him away and a fight ensued. Monakhisi left the shop and the fighting shortly thereafter resumed with a man, wearing a Kaizer Chief's sweater, (referred to as perpetrator 2) who accused him of having robbed his friend. The fighting eventually reached the frying section of the shop. Monakhisi and his friend approached him and they started kicking him. He grabbed hold of cold drink cans and hurled them at his assailants. He overpowered one of them who fell to the floor. He turned and took hold of the container from the frying counter area. When he turned back a bullet struck him and he lost consciousness which he regained only the next morning.

- [7] The plaintiff conceded that he was drunk, that he was aggressive and that his hyper-activity caused the ensuing chaos. He was moreover unable to comment when it was put to him in cross-examination that he was unstoppable.

The credibility of the witnesses

[8] I accept the evidence of Monakhisi and Cnst Ngoveni. They corroborated one another and their version is consistent with and

corroborated by the video footage.

[9] The plaintiff was an unsatisfactory witness. His version as to the events at the ATM is contradicted by the video footage. The evidence on behalf of the defendant concerning the robbery of Monakhisi, was not challenged. The plaintiff, in any event, admitted the assault and robbery in a written statement made to the police after his arrest. The robbery cannot in any way be reconciled with the version of the plaintiff. I have already referred to the concessions made by the plaintiff in cross-examination. I accordingly reject his evidence as false.

The video footage

[10] It is necessary to briefly summarise the salient events as depicted on the video footage. It indeed shows the plaintiff's

aggressive interference and initiating a fight with Monakhisi, who was standing in front of the ATM. In the rage that followed the plaintiff violently averts any attempt by others to calm him down. He remains all the way through on the attack which eventually ends up at the frying section. There the plaintiff overpowers perpetrator 2, who is pushed down on the floor. A number of bystanders interfere and Monakhisi joins in, in an attempt to calm him down. The plaintiff is unstoppable and proceeds to randomly fling punches at those around him and hurl cold drink bottles and other items he had grabbed from a nearby fridge and the frying counter at Monakhisi, who was on the run as well as at perpetrator 2, who is on the ground. He proceeds to attack perpetrator 2 by trampling on him with his feet and repeatedly hitting him with objects while he was still on the ground. Monakhisi kicks at him but in return is punched by the plaintiff. Monakhisi runs away. The plaintiff then turns to what looks like a smallish fridge next to him in an attempt to grab something from it but is unable to obtain anything. A female employee jumps over the counter. Having grabbed the container from the deep fryer area the plaintiff aims it at perpetrator 2, who was still on the floor. Cnst Ngoveni is on the approach towards him and the plaintiff turns to face him, holding the container clenched in his right hand, at shoulder height, clearly in a forward striking motion to attack Ngoveni, by either hitting him with or throwing the container at him. Ngoveni then fires a shot at the plaintiff and he falls down.

The law

[11] As justification for the shooting of the plaintiff the defendant in its main defence relies on self-defence as well as the protection of others. The requirements for a successful reliance on private defence are, first, that there was an attack, second, upon a legally protected interest and, third, that the attack was unlawful (Jonathan Burchell Principles of Criminal Law 122). In *R v Attwood* 1946 AD 331 at 340 it was held that the means of self-defence in regard to an unlawful attack must not be excessive in relation to the danger

and that the means used must be the only or least dangerous whereby the danger could be avoided. The defender is entitled not only to defend himself but also others from the threatened danger (*R v Patel* 1959 (3) SA 121 (A)).

[12] In deciding whether a defender acted reasonably in the circumstances, an arm-chair approach should be avoided and the exigencies of a situation must be taken into consideration. In *Union Government (Minister of Railways & Harbours) v Buur* 1914 AD 273 at 286, Innes JA (as he then was) put it thus:

‘Men faced in moments of crisis with a choice of alternatives, are not to be judged as if they had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position.’

(See also *R v Zikalala* 1953 (2) SA 568 (A) 572)

[13] In *S v Steyn* 2010 SACR 411 (SCA) para [19] it was held, in regard to private defence:

‘Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as ‘one may not shoot to kill another who attacks you with a flyswatter’. As Prof J Burchell has correctly explained ‘... modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property’. Factors relevant to the decision in this regard include the following (the list is by no means exhaustive):

- the relationship between the parties
- their respective ages, gender and physical strengths
- the location of the incident
- the nature, severity and persistence of the attack
- the nature of any weapon used in the attack
- the nature and severity of any injury or harm likely to be sustained in the attack
- the means available to avert the attack

- the nature of the means used to offer defence
- the nature and extent of the harm likely to be caused by the defence.'

The law applied to the facts

[14] The question arising is whether Ngoveni acted reasonably in warding off the plaintiff's attack. The plaintiff's conduct I have alluded to, clearly constituted an imminent attack on Ngoveni, by attempting to hit him with or throw the container at him, thereby intending to cause him personal injury. The plaintiff's conduct constituted a danger not only directly to Ngoveni, but also indirectly to others, including perpetrator 2, who was lying helplessly on the floor. Ngoveni was a police officer in duty bound to protect others. Had he waited any longer Ngoveni surely would have become the victim of the plaintiff's attack. It must have been clear to Ngoveni that, right from the outset, others were in danger when upon his arrival at the shop, people were making their escape from the shop, cold drink cans were flying around and once inside, observing an employee jumping over the counter in order to escape the possible consequences of the plaintiff's aggressive conduct.

[15] Counsel for the plaintiff with meticulous reference to the time-frame of the events, sought to criticise Ngoveni for not resorting to alternative measures in order to avoid shooting the plaintiff. The approach adopted is fundamentally flawed: a robust approach is called for 'not seeking to measure with nice intellectual calipers the precise bounds of self-defence' (S v Ntuli 1975 (1) SA 429 (A) 437E). It could not have been expected from Ngoveni to wait for the possible assistance of his colleague who was some distanced

behind him, or, to first verbally reprimand the plaintiff or, for that matter, to aim at the plaintiff's legs, being the

alternatives put forward by counsel for the plaintiff, as the gravity of the attack was imminent and some form of restraint required in order to protect the safety of others in the shop. Put differently, there was neither time nor opportunity for him to have acted

differently (Cf Coetzee v Fourie and Another 2004 (6) SA 485 (SCA)).

[16] In conclusion, I find that Ngoveni was justified not only in protecting himself but also others against the unlawful imminent

attack of the plaintiff. It follows that the defendant's defence of self-defence must be upheld.

[17] No case has been made out and no arguments were advanced in regard to the alleged malicious arrest and detention.

Order

[18] In the result I make the following order:

1. The plaintiff's claim is dismissed.

2. The plaintiff shall pay the costs of the action including the costs reserved on 25 November 2016.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

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DATES OF HEARING 23,

24, 25 NOVEMBER 2016; 27 MARCH 2017; 18 & 19 SEPTEMBER 2017

DATE OF JUDGMENT 20

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