

SOUTH AFRICA / JUDGMENT

Ncedani v Minister of Police (14324/07)

[2012] ZAWCHC 129 (1 February 2012)

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COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

14324/07

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 14324/07

Before: The Hon Mr Justice Binns-Ward

In the matter between:

VICTOR NCEDANIApplicant

and

THE MINISTER OF POLICERespondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL DELIVERED: 1 FEBRUARY 2012

BINNS-WARD J:

- [1] The plaintiff has applied for leave to appeal against most of the judgment dismissing his claim for compensation for damages allegedly sustained as consequence of his having been shot and injured by a police officer, and having allegedly been unlawfully arrested and detained, as well as for having allegedly been maliciously prosecuted. On my reading of the application, the only part of the judgment which does not appear to be impugned is the dismissal of the claim arising out of the arrest and detention of the plaintiff on a warrant authorised by a magistrate.

- [2] The pertinent factual circumstances are described in the principal judgment handed down on 13 December 2011. They do not require repetition. The application for leave to appeal does not rest on any contention that this court misdirected itself on the applicable principles of law. It is directed against this court's factual findings; and more particularly, at the court's weighting of the evidence in arriving at them.
- [3] Leave to appeal should be granted only if the court is persuaded that there is a reasonable prospect that another court might find that the court against whose judgment it is sought to appeal was wrong or misdirected in a material respect. The object of the requirement that an appeal may be prosecuted only with leave is to avoid the court system being burdened with appeals which do not enjoy reasonable prospects of success. In considering the prospects of success, the court faced with determining an application for leave should have in mind the basic principles applicable to the decision of appeals. In the context of the current matter, in which -because the case fell to be decided on the mutually conflicting evidence of two witnesses - the issue of credibility was ultimately decisive, a particularly pertinent principle is the one which holds that, except where it is clearly shown by an appellant that the trial court was misdirected on a question of fact, an appellate court will be reluctant to interfere with the trial court's factual findings. For the reasons set out below I have not been persuaded that the plaintiff enjoys a reasonable prospect of success on appeal.
- [4] As set out in the principal judgment, the proper approach to the determination of the case in the face of the mutually contradictory versions of the events with which the court was presented was that set out in the authority cited at para 24 of the judgment. There was no contention by the plaintiff's counsel that this court was wrong in adopting that approach. If the version of Cst. Mongo is accepted, as it was, it follows that the defendant must be held to have discharged the onus in the respects in which he was burdened with the onus of proof.
- [5] I turn now to address the individual grounds of the application, commencing with those set out in sub-paragraphs 1.1 to 1.13 of the application.
- [6] The issues raised in sub-paragraphs 1.1 to 1.3 go the credibility findings made in respect of Cst. Mongo's evidence at the trial. These were amply reasoned in the principal judgment. Suffice it to say that, as appears from the judgment, I was astute to the imperfections in Mongo's evidence, but found them to be either immaterial, or to have been adequately explained. In his argument of the application for leave to appeal, the plaintiffs counsel appeared to regard the most serious weakness in Mongo's evidence to have been what he contended was a conflict between her evidence at the criminal trial as to a confrontation between herself and the plaintiff about the arrest of the persons confined in the police van and her evidence before this court that the first time she became aware of the plaintiff was when he grabbed at her hand and that no words were exchanged between them. It will be

recalled that the record of proceedings at the criminal trial had been mislaid, and that all that there was to go on as to what had transpired there was the evidence of the plaintiff's defence counsel assisted by a copy of his heads of argument in an application for a discharge of the plaintiff at the end of the state's case. Cst Mongo denied the correctness of counsel's written submissions in the relevant respects.

- [7] The relevant section of the written submissions of counsel at the criminal trial (exh. F) went as follows:
11. Constable Mongo gave evidence. She testified that, after the arrest of two members of the public who were drunk she, Cst Masala and three members of the CPF climbed back into the van.
 12. Cst Masala tried to start the vehicle but three men prevented him from doing so.
 13. She tried to call for back up but a member of the public, but not the accused, prevented her from* doing so. She pushed him away and called for back up. She then looked for Masala and realised that he was missing.
 14. She then went to the back of the van. There were lots of people. Her gun was still in her holster.
 15. She was afraid that her gun would not be safe if she kept it in her holster, so she took it out and tried to pass through the crowd.
 16. The accused then tried to block her and asked her why she was arresting these people.
 17. At that stage she was at the back of the van and the firearm was in her right hand. She then "reckoned" that the accused may want to grab her firearm and decided to hold it with both hands.
 18. At this stage he did, according to her, grab hold of the barrel and a struggle ensued. She realised that there was a bullet in the barrel. She did not know why he wanted to take the gun from her and decided to squeeze the trigger.
 19. He fell in front of her and she then put the gun back in her holster. She testified that it must have been the bullet from her gun that hit him "because the gun was facing in his direction".
- [8] Cst. Mongo denied the correctness of the last sentence in paragraph 14 of counsel's written submissions and stated that she had not given the evidence suggested by it. She also denied that paragraphs 16 and 17 correctly reflected the evidence she had given at the criminal trial. With regard to paragraph 16, she stated that its content reflected the content of the plaintiff's instructions to his lawyer, and not the evidence given by herself at the trial. My note of this part of Mongo's evidence reflects that she said '7 never spoke to him' and I contemporaneously recorded in parentheses on the court's copy of exh. F 'quite vehemently expressed.

[9] Mongo's evidence was not upset in cross-examination in this respect. I had to assess the evidence of the witness on the basis of her performance in the witness box, and not on the basis of written submissions made by counsel seeking to criticise her credibility at a trial held more than four years earlier. Of far greater significance in the greater picture were the conflicts between the evidence of the plaintiff in the trial before me and the statements he had made in terms of s 115 of the Criminal Procedure Act, which was the only part of the record in the criminal proceedings which had survived, a copy having been put in at pp. 70-71 of exh A. The relevant part of that statement went as follows (spelling and grammatical errors faithfully reproduced):

3.1. On May 6, 2005 at about 19:30 I was walking past a Shabeen in Emms Drive Athlone, an area in the Jurisdiction of above Honorable Court.

3.2. I was on my way home and saw Police Officials outside the Shebeen Fighting with people on the pavement. They Arrested two people.

3.41 I moved closer to see what was going on. Family of the arrested persons was talking to the Police, even after the Police got into their vehicle to leave. The Policeman and woman got out the vehicle again. By this time, many people were gathered around the area. I remonstrated with the Police woman.

3.5 I saw the Police Woman taking out her firearm, heard a shot go off and fell to the ground. Realizing that I was Shot.

(The underlined wording was added to the typewritten statement in longhand - at what stage this happened is not clear.)

I described and discussed the plaintiff's contradiction of that statement in his evidence before me at para 28 of the principal judgment. Mr Visser, the plaintiff's counsel at all stages of the criminal trial, confirmed in his evidence that the s 115 statement had been handed in on the plaintiff's behalf. He gave no indication that the plaintiff had ever sought to distance himself from its content during the criminal proceedings.

10] Sub-paragraphs 1.4 to 1.8 of the application for leave to appeal are directed at this [court's treatment of the evidence of Cst. Masala, and in particular that part of it that was summarised at paragraph 12 of the principal judgment. The plaintiff's counsel submitted that I should have found that Masala had seen more than he claimed to have done and that his evidence that he had not seen the material events supported the inference that Cst. Mongo's evidence, with which Masala - so the argument went - did not

wish to become involved, was a fabrication. In my view there is no reasonable prospect of an appeal court being persuaded that my treatment of Masala's evidence was misdirected. It was not in dispute that at the time the plaintiff was shot by Mongo, Masala was engaged in a chase after the person who had stolen and made off with the ignition key of the police vehicle of which Masala had charge. Masala had no reason to be aware of Mongo's precise whereabouts while he chased after the key-thief. He had exited, the vehicle via the driver's door to commence the chase

leaving Mongo seated in the front passenger seat. I thus had no reason to disbelieve his evidence that the first he knew of the shooting incident was as he heard the report of the gunshot and noticed the crowd scattering.

- [11] In paragraphs 1.9-1.11 of the application for leave to appeal it is contended that this court erred in a relevant respect by not drawing an adverse inference against the defendant for not having called the community police forum members who had been sitting on the rear seat of the police vehicle to give evidence. I must confess to having considerable difficulty in understanding the point sought to be made on the plaintiff's behalf in this regard. As stated in the application for leave to appeal itself (at para 1.10), 'According to both Const. Masala and Const. Mongo the CPF members were in the back of the double cab van when the incident occurred. Hence it follows that they would not have been able to witness the shooting incident' Why the defendant should therefore have been expected to call them as witnesses escapes me. The point advanced in paragraph 1.11 of the application finds no foundation in the evidence. The affidavits supposedly made by the CPF members were not canvassed in the evidence at the trial. The plaintiff's counsel conceded that I could not properly have had" regard to them.
- [12] Turning then to sub-paragraphs 1.12 and 1.13 of the application. There was no cogent criticism of this court's finding that the opinion evidence on the issue of tattooing was neutralised by the inability of the parties to adduce the evidence of the medical doctors who had seen the plaintiff on his admission to hospital. The contention in para 1.12 of the application that the court erred in failing 'to consider and therefore make a finding that [the admitting doctors] after having examined [the plaintiff] shortly after the incident....would likely have observed tattooing is refuted by the content of the principal judgment. Paragraphs 14-23 of the judgment show that the issue was thoroughly considered. The evidence of Dr Dempers about the failure, more often than not, of treating clinicians to make full and appropriate notes on points of forensic significance, coupled with the common cause evidence about the likely obscuring effect of the particularly dark complexion of the plaintiff, as well as the fact that the effect of tattooing in the 40-60cm distance range - which is the outer extremity of distance between barrel and target at which the effect would occur - would be less marked, all combined to make entirely unsafe any finding that had tattooing been present (as this court would have expected on the version given by Mongo), its presence probably would have been recorded by the treating doctors. On the contrary, the effect of all this evidence was that even if there had been tattooing present, the medical practitioners could easily have overlooked it, alternatively that even if they had observed it, it would not have been unusual for them not to have recorded the observation in their notes. All of this was considered and fully reasoned in the principal judgment in support of the conclusion that the evidence on the presence or absence of tattooing on the plaintiff's skin was inconclusive and thus neutral in its effect on the determination of the case. I should

mention that it was not suggested either at the trial, or in the application for leave to appeal that either party should have been faulted for a failure or inability to adduce the direct evidence of any of the relevant medical practitioners. (The suggestion in para 1.12 of the notice of application for leave to appeal that this court should have made a finding about observations by a certain Dr Bondurchein finds no foundation in the evidence. The documentary evidence reflects clinical notes concerning an examination by Dr Parsons as the treating clinician at the GF Jooste Hospital, to which the plaintiff was initially admitted after the shooting incident, and by Dr Du Plooy at the Groote Schuur Hospital, to which he was shortly thereafter transferred. Dr Bondurchein's name came into the evidence only because the referral report from GF Jooste Hospital was addressed to a person by that name at Groote Schuur Hospital. It was not clear on the hospital notes whether Dr Bondurchein in fact ever examined the plaintiff.)

- [13] There is no reasonable prospect whatsoever, in my assessment, that another court might be persuaded that I was wrong or misdirected in the criticisms directed in the principal judgment at the plaintiff's evidence. On grounds of substance, rather than demeanour, a material qualitative difference is reflected between the plaintiff and Cst Mongo as witnesses on the reasoned analysis of the evidence. I am not persuaded that there is any reasonable prospect that another court might find otherwise.
- [14] Dealing now with paragraph 2 of the application for leave to appeal, I am not persuaded that another court might find that Cst. Mongo could have dealt with the situation using a lesser 'level of force'. The accepted evidence was that the plaintiff attempted to wrestle the firearm from Mongo's grasp, and that Mongo apprehended that he was succeeding in this objective and feared that the weapon would be turned on her. The plaintiffs counsel argued that Mongo should have kicked the plaintiffs feet out from under him, or shouted for assistance. In the prevailing circumstances these are armchair criticisms of Mongo's conduct. The evidence does not suggest that Mongo would be physically capable of subduing the plaintiff, not does it afford any support for the suggestion that shouting for assistance would have effectively addressed the exigencies of the life and death struggle in which Mongo reasonably perceived herself to be engaged.
- [15] It follows from the reasons already given in rejecting the grounds advanced in paragraphs 1 and 2 of the notice of application that the ground set out in paragraph 3 does not require discussion.
- [16] Although the defendant did not seek a costs order against the plaintiff in respect of the trial, the defendant's counsel indicated that his instructions were that the defendant's generosity had been exhausted, and that a costs order was sought in the event that the application for leave to appeal was dismissed. The application for leave to appeal is therefore dismissed with costs. \\

A.G. BINNS-WARD

Judge of the High Court

1There was no para. 3.3.

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