

SOUTH AFRICA / JUDGMENT

Nelson v Schutte (78540/14) [2017] ZAGPPHC 212 (25 May 2017)

[2017] ZAGPPHC 212

COURT

North Gauteng High Court, Pretoria

BEFORE

C R Jansen

CASE / FILE NUMBER

78540/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

25

May 2017:

CASE

NO: 78540/14

Reportable:

No

Of

interest to other judges: No

Revised.

In the

matter between:

JACO

NELSON Plaintiff

and

ANDRE

JACQUES

SCHUTTE Defendant

JUDGMENT

C R JANSEN, AJ

[1] In the evening of 13 December 2012, approximately between 20h00 and 20h30, a series of events took place along the N 12 highway on the outskirts of Benoni on Paul Kruger Avenue which ended up in the defendant shooting the plaintiff. The plaintiff was shot in the left abdomen and the bullet passed through his abdomen and then settled close to his spinal cord. Among other injuries sustained, the plaintiff lost his left kidney as a result of the incident.

[2] The plaintiff subsequently issued summons against the defendant in which he claimed damages under a range of headings based on unlawful shooting. For purposes of the trial before me, the issues of liability and quantum were separated.

[3] The plaintiff's claim was based on the premise that the shooting constituted an unlawful assault. The defendant, in turn, denied that the shooting was unlawful and pleaded that he acted in self-defence. That the shot was fired intentionally was not in dispute.

[4] The events of the evening of 13 December 2012 were most unfortunate and are testimony to the levels of stress and aggression

unfortunately displayed by many South Africans on our roads. What was supposed to be an ordinary evening in the period approaching the Christmas season ended in a most unfortunate and avoidable tragedy.

[5] The plaintiff, a qualified technician, and three of his apprentice colleagues were returning from a social year-end function. The defendant, in turn, was returning from his work at his dental laboratory together with his wife.

[6] The broad outline of the events is more or less common cause. However, the evidence in respect of the detail was contradictory in many respects. This can be expected from the nature of this case, where the fine line to be drawn between who was the aggressor and who the defender is not always easy to discern from the

facts.

[7] The plaintiff testified himself and also called the passenger in his vehicle's front seat, one Mr Eric Mentz. Both the defendant and his wife testified on behalf of the defendant.

[8] As can be expected in a matter like this, there would be vastly different versions in respect of detail. This is often not any

indication of untruthfulness, but a natural consequence of the fact that events happen quickly, people have differing vantage points of observation and a fair measure of natural and understandable reconstruction takes place afterwards.

- [9] In this case, however, it was quite clear that both the plaintiff and the defendant were not entirely truthful when it came to the detail of the events. I will deal with their evidence in more detail below. I mention this at the outset, as the golden thread that runs through this case is that it is extremely difficult to make any findings the one way or the other as far as the events are concerned. In the final instance, I am forced to make certain conclusions based, not on hard evidence, but rather on what I assess the probabilities were that evening.
- [10] In addition to the difficulties in making confident assertions in respect of the detail, the series of events makes it difficult to judge which party should have defused the tensions at different stages and whose actions were more culpable as the events unfolded.

Again, I am forced to make extremely difficult value judgments.

- [11] Thirdly, the difficulties were exacerbated by the fact that no forensic evidence was presented to the court. In this type of matter, where serious disputes arose as to the distance between the parties at the time of the shooting as well as the trajectory of the bullet, one would have expected some attempt by the parties, especially the plaintiff, to have obtained evidence in respect of the gunshot residue in the clothing of the plaintiff as well as more precise evidence in respect of the trajectory of the bullet through the abdomen of the plaintiff.
- [12] I commence by analysing the evidence of the plaintiff, and will, to the extent required, comment on such evidence as well as the related evidence of the other witnesses.
- [13] It is not in dispute that the plaintiff and his three apprentice colleagues were at a year-end function where alcohol was consumed.

The social event lasted from three o'clock in the afternoon until they left at eight in the evening.

- [14] When initially asked how much alcohol he had consumed, the plaintiff answered that he had consumed one or two beers. In cross-examination,

this changed to two or three beers.

- [15] As the evidence unfolded, one got the distinct impression that the plaintiff was seriously understating the amount of alcohol that he consumed. In any event, even assuming that his alcohol consumption was relatively little, it is clear that the alcohol consumption seriously affected his behaviour that evening and that this was a contributory factor to the events as they unfolded.
- [16] The plaintiff and his colleagues left the social event at around 8 o'clock and proceeded along the N12 highway in the direction of Springs. At some point they were travelling in the right hand lane passing vehicles in the slower lane to their left.
- [17] At this stage, according to the plaintiff, a person in a Toyota bakkie came charging down the right hand lane and flashed his lights in the rear view mirror of the plaintiff.

- [18] The plaintiff attempted to move towards the lane on his left hand side, but first had to wait for the vehicles in that lane to pass and for a space to open for him. At the same time, the driver in the Toyota bakkie moved into the left hand lane, passed the plaintiff and then swerved in front of him. During this last manoeuvre, the bumpers of the vehicles made contact. The two vehicles then stopped on the right hand shoulder of the highway.
- [19] According to the plaintiff, he then got out of the vehicle and hurled verbal abuse at the defendant. He also places the witness, Mentz, outside the vehicle at this stage, but places all the other apprentices inside the vehicle, although he acknowledges that he was focussing in front of him and not really concentrating on what was happening at the back of him.
- [20] The defendant also got out of his bakkie and moved some distance towards the plaintiff. At this stage, the plaintiff was unarmed.
- [21] Up to this point, the evidence is to a large extent common cause. The only difference is that the defendant gave evidence to the effect that all the people in the Mazda vehicle got out and stormed towards him. This appears to be an exaggeration of the

facts.

- [22] Mentz's evidence was to the effect that they all got out of the vehicle and were all hurling verbal abuse at the plaintiff. They however did not storm the defendant.
- [23] Initially, during cross-examination of the plaintiff, it was stated on behalf of the defendant that the plaintiff was moving perilously close and extremely aggressively towards the defendant. The defendant's later evidence was also that the abuse continued for a considerable time and also ended in the plaintiff pushing the defendant with his hands.
- [24] From Mentz's evidence, it is clear that the verbal abuse was a continuing event and that it came from various quarters from the plaintiff's Mazda, including the plaintiff and some of the other apprentices.
- [25] At this point in time, there is no evidence of any outward aggression by the defendant.
- [26] The defendant's version of events up to this point was that he was travelling along the highway and, when he wanted to move into the right hand lane, he misjudged his distance and that this resulted in the bumpers making contact. This completely innocent spin that he attempted to give to the events was not convincing.
- [27] There are a number of aspects of the defendant's evidence in this regard that were highly unsatisfactory. The defendant kept on trying to explain why he was possibly putting his lights on and off. He first suggested that it may have been because of the fact that he was putting on his lights as the sun was setting. Later, he testified that it may just have been as a sign to indicate that he wanted to pass. He also could not remember whether he was travelling in the right hand lane or in the lane left of the right hand lane.

- [28] The general demeanour of the defendant was good in the witness box but it was clear that he attempted to explain things which he need not have explained, had his version been entirely true. In this regard, as I stated above, he was, with the plaintiff, equally guilty of giving an unreasonable gloss to his evidence.
- [29] For purposes of this matter, I can assume that the defendant did in fact flash his lights out of impatience or rudeness and did pass the plaintiff's vehicle in an unreasonably reckless manner.
- [30] However, once the defendant got out on the first occasion, he was clearly not showing any aggression and his evidence that he only wished to exchange vehicle and personal information can be accepted. The plaintiff, on the other hand, was clearly not interested in exchanging any vehicle and personal information at that stage as he was required by law to do.
- [31] It is at this point when the events went from bad to worse. The defendant, who accepted that he was the guilty party as far as this relatively less serious accident is concerned, should simply have retreated and informed the plaintiff that he was proceeding to the police station where he would report the accident. Instead, he returned to his vehicle, took out his firearm, which was located in between the two front seats, and then moved back towards the plaintiff and the other persons at the Mazda.
- [32] The defendant says that he did not point his firearm directly at the plaintiff and Mentz, whereas the plaintiff and Mentz testified that he was clearly pointing his firearm at them and told them to get into their car. According to plaintiff and Mentz, defendant was also moving his firearm, pointing it from one person to another.
- [33] Mentz's evidence in this regard was quite clear and, although there are a number of aspects of Mentz's evidence that lack detail and are inaccurate, my assessment of Mentz was that he was an honest witness and, although not entirely independent from an objective point of view, certainly did not make himself guilty of trying to bolster the case of the plaintiff.
- [34] Mentz's evidence differed from that of the plaintiff on so many extremely important issues and this makes it clear that they most certainly did not collude in the preparation of their evidence and also that Mentz did not play down the central problem of the plaintiff's case, namely, the levels of aggression which he displayed. Under these circumstances, I have no difficulty relying on the evidence of Mentz where there are otherwise differences.
- [35] For obvious reasons, the plaintiff and his passengers retreated back into their vehicle as it was clear that this incident had now been escalated to a level far more serious than what it had been. What was, at most, a scuffle and exchange of verbal abuse, had become a potentially life threatening situation.

- [36] Considering the circumstances at the time, and the doubt that I express about the defendant's evidence that he was assaulted at that point, I have no hesitation to find that the use of the firearm as a deterrent, and the pointing of the firearm at the plaintiff and Mentz was a complete overreaction to the situation and was a direct cause of what followed.
- [37] The common cause evidence was that the defendant then drove away from the incident and one can accept that, had nothing further happened, he would have proceeded to the police station and reported the accident. He clearly had no intentions of furthering any of the conflict at that stage. To the extent that this was a matter that ended up in a clash of egos, the defendant had obviously had the better end of the outcome and nothing would have happened had it not been for the plaintiff's reaction to that first incident.
- [38] The events at the first incident clearly enraged the plaintiff. Again, if one considers the extent thereof, it strengthens one's suspicion that the plaintiff had consumed considerably more alcohol than what he testified to. His actions became increasingly irrational, extremely dangerous and eventually almost suicidal.
- [39] The plaintiff then, from the first incident on the N1 2, pursued the defendant in chase. The defendant testified that he was driving normally towards the Daveyton off-ramp when he saw the Mazda vehicle following him and at times driving next to him. Again, he seems to have understated the real facts.
- [40] At this stage, Mentz was busy phoning the police and actually made contact with them. He wanted to report the behaviour of the defendant. The police advised Mentz that they should keep a safe distance and that they had a police presence some distance in front and would be able to stop the vehicle at that point.
- [41] The defendant's wife was also busy attempting to phone the police but could not get through. They similarly wanted to report the behaviour of the other party.
- [42] The defendant attempted in his evidence to downplay the seriousness of the chase. There clearly was a high speed chase. It was described as such by the plaintiff as well as by Mentz. Mentz could not say exactly at what speed they were travelling but from the evidence it would appear that he estimated their speed to be between 120 and 140 kilometres per hour, possibly even more.
- [43] It is clear that the plaintiff started a vehicle chase that endangered his own life, the lives of his passengers as well as the lives of all other road users in his immediate vicinity.
- [44] The next critical moment in these events concerns what happened immediately before the Mazda and the bakkie became involved in a second, and this time a very serious, accident.
- [45] What is apparent from the evidence is that the vehicles got off the highway at the Daveyton off-ramp and proceeded along Paul Kruger/ Kingsway Avenue. At that stage they were already in a built up area where there were intermittent stop streets and robots.

- [46] The plaintiff and Mentz testified that the defendant suddenly slammed on his brakes and that they, in the Mazda, smashed into him, in the Toyota. From their evidence they would suggest that the defendant did so intentionally.
- [47] The defendant testified that he had not slowed down and that the Mazda simply rammed into his bakkie.
- [48] It is in respect of this incident that it is extremely difficult to make any finding the one way or the other.
- [49] There are strong probabilities in favour of suggesting that the defendant slammed on his brakes knowing that there may very well be an accident and that the Mazda would be no match for his considerably bigger bakkie.
- [50] However, it is difficult to make that finding on the preponderance of probabilities. The plaintiff was clearly driving at an excessive speed and in the built up area the vehicles would, from time to time, have slowed down and sped up. The defendant's evidence in this regard is not completely inconsistent with what might be probable under those circumstances.
- [51] What happens next is also in dispute in certain critical aspects. The plaintiff said that he got out of his vehicle and although he moved very quickly towards the vehicle of the defendant, he did not intend assaulting him. He testified that the defendant simply got out of his vehicle and coldly shot him from a distance.
- [52] The defendant testified that, when he got out of his vehicle, the plaintiff came rushing to him in a state of extreme aggression and jumped on him. It was only when the plaintiff was on top of him that he discharged the firearm. He obviously got out of his vehicle with his firearm.
- [53] Mentz testified that the plaintiff got out of his vehicle and ran towards the defendant. To Mentz it was very clear that the plaintiff intended assaulting the defendant. The evidence as a whole, including the evidence of Mentz as to the extreme levels of aggression showed by the plaintiff inside the vehicle prior to the accident as well as thereafter, makes it relatively easy to find that the plaintiff clearly intended to assault the defendant. Considering the proximity of the vehicles at that stage, the time period from the plaintiff alighting from his vehicle to being more or less where the defendant was would have been a very short period of time.
- [54] Whether the plaintiff was some distance away from the defendant or already on top of the defendant is probably neither here nor there. It was very clear that he was intending to assault the defendant, and the assault was imminent.
- [55] The question remains as to why the defendant got out of his bakkie. The defendant says that he thought his vehicle was seriously damaged and did not know whether he would have been able to drive further.

[56] Again, the evidence of the defendant in this regard is not satisfactory. A person who would have been as frightened as he testified he was would have remained in his vehicle and would have attempted to leave the scene.

[57] The second scene cannot be viewed in isolation. The defendant knew that the plaintiff and his co-passengers were unarmed and probably also knew that they were simply in a very vile mood and probably influenced by liquor.

[58] I believe, to some extent, simply relying on my sense of probabilities, that the defendant got out of the vehicle believing

that he would again be able to simply settle the score by pointing the firearm at the plaintiff. After all, he knew that the plaintiff

was unarmed and had clearly shown at the first incident on the freeway that he had the good sense of not taking his fists to a gun fight.

[59] However, that is not what ensued. The second incident played out very differently than the first one did. At that stage, the plaintiff was clearly in a state of complete rage. He attacked the defendant only with his bare hands and his verbal abuse.

[60] I believe the defendant underestimated what would have happened at that point. One of the reasons for his underestimation, probably and ironically, relates to the fact that he was not assaulted at the first incident.

[61] Once it became clear to the defendant that he was going to be seriously assaulted by the plaintiff, things obviously took an even further tragic turn. At that stage, the defendant was left with very limited choices. A person in such an enraged state as the plaintiff was, can easily inflict fatal wounds by bashing a person's head against the vehicle or against the tarmac, or could start using some object in the vicinity to bash somebody's head in.

[62] It is at this stage of events where the principles of self-defence come into play. The defendant, although he used a weapon that easily averted the attack and caused serious injuries, had no other weapon with which he could defend himself at that stage when it became apparent that plaintiff was attacking him. Defendant had misjudged the plaintiff's state of mind. By the time he realised how enraged the plaintiff was, it was too late to take any evasive steps.

[63] I have considered the facts and the reasoning in cases such as *Mabaso v Felix*[1], *Minister of Law and Order v Milne*[2], *Minister of Safety and Security v Ntamo*[3], *Mugwena v Minister of Safety and Security*[4] and *Ntsomi v Minister of Law and Order*[5] A person discharging a fire arm clearly has a considerable onus to show that it was justified. At the same time, a court cannot adopt an armchair approach to someone who faced a serious assault.

- [64] I should note at this stage that the plaintiff and the defendant are of similar build. They would appear to be in the region, as testified by the plaintiff in respect of himself, of 1,75 metres tall and they weigh in the region of 75 to 80 kilograms.
- [65] I therefore find that, at the time of the second incident, I cannot find that the defendant acted in cold blood by slamming on the brakes, getting out of his vehicle and then shooting the plaintiff in cold blood. Rather, I believe this to have been the impression which the plaintiff had of the events. The plaintiff's evidence in this regard is clearly subjective.
- [66] Once the attack by the plaintiff on the defendant had commenced, the defendant was entitled to use the only real weapon of defence he had at his disposal. In this case, it was his revolver. Objectively, the defendant was in serious danger at the time. There certainly was no time to shoot a warning shot. Plaintiff was running towards defendant and was probably already in contact with him.
- [67] Defendant also only discharged one shot. Although it would appear from Mentz' evidence that he still showed some aggression towards Mentz after the shot, that did not last more than a moment and, once Mentz had shown that he was not aggressive, the defendant allowed Mentz to move towards the plaintiff where he was lying on the road surface.
- [68] I am, therefore, compelled to find that the shot fired by the defendant was in fact done in self-defence and, as a result, was lawful.
- [69] This leaves the issue of costs to be decided. I believe this is an appropriate matter where a court should show its disapproval with the actions of the defendant who was by no means innocent in the escalation of events that day.
- [70] The defendant's actions at the first incident, by taking out his firearm and pointing it at the plaintiff and Mentz, were clearly

excessive and contributed to the occurrence of further events. The way he drove, also caused the first incident. Although the plaintiff

was guilty of hurling abuse and adopting a threatening posture when he should have been exchanging vehicle details in a civilised manner, the defendant remained responsible to defuse the situation, and not to escalate it[6]. As a result, I do not intend granting the defendant costs in this matter.

[71] Under the circumstances, I make the following order:

1. The plaintiff's claim is dismissed.
2. There is no order in respect of costs.

C R JANSEN AJ

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 7 and 8 March 2017

Date of judgment: 25 May 2011

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[1] 1981(3) SA 865 (A).

[2] 1998(1) SA 289 (W).

[3] 2003(1) SA 547 (SCA).

[4] 2006(4) SA 150 (SCA).

[5] 1990(1) SA 512 (C).

[6] This is the type of case that illustrates the need to develop the defence of contributory intent. See R Ahmed, Contributory Intent as a Defence limiting Delictual liability, PEU, Vol 17 no 4, 2014. This issue was however not pleaded or ventilated at all in this case.

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