

SOUTH AFRICA / JUDGMENT

Nengwekhulu and Others v Minister of Police (428/2016) [2019] ZALMPTHC 2 (19 September 2019)

[2019] ZALMPTHC 2

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

428/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

(1)

REPORTABLE:

NO/YES

(2)

OF

INTEREST TO OTHER JUDGES: NO/YES

CASE

NUMBER: 428/2016

19/9/2019

KHWARA

NENGWEKHULU

PLAINTIFF

AND

MINISTER

OF

POLICE

DEFENDANT

JUDGEMENT

AML PHATUDI J

Introduction

- [1] The plaintiff claims damages he allegedly sustained when his business known as Talifhani Eating House and Liquor Store (Talifhani) got burnt by protesters at Vuwani, Limpopo Province on 31 August 2015[1]. The plaintiff's claim is based on the defendant's alleged failure or omission to take appropriate action to prevent the protestors from burning Talifhani notwithstanding his request for its protection. He holds the defendant liable.
- [2] The defendant denies liability. A special plea on locus standi is, above denial on liability, pleaded. The initial hearing on special plea was heard by Kgomo J. No order in respect of the special plea was made. The matter was instead referred to judicial pre-trial. Two judicial pre-trials were held in an open court and on record. It was during the second and last judicial pre-trial where it was directed that the special plea be determined during trial.

Factual

background

- [3] The plaintiff, an emeritus Colonel, left South African Police Services in 2012. He then leased a liquor outlet business from Yvonne Edzisani Makuya, the executrix in her late husband's estate. The business was known as Talifhani Liquor Restaurant[2].
- [4] The plaintiff was one of the executive members of Vuwani Demarcation Task Team that was in favour of demarcating Makhado Municipality. The demarcation would bring about Vuwani being incorporated in the newly formed municipality for Vhembe District. The newly formed municipality would be called- Collins Chabane. Some members of Vuwani community and surrounding and those affected by the demarcation, became unhappy about the decision. Their unhappiness led to demonstrations that turned ugly. The roads were barricaded by burning tyres. Demonstrations after demonstrations day in-day out, malicious damage to public property including torching of school buildings hit the headlines.
- [5] The plaintiff testified that he and four other executive members of Vuwani Demarcation Task Team, approached Vuwani SAPS and requested them to protect their lives and houses including his business, Talifhani. That was done around April or May
2015. He remembers that Colonel Mongwe and Colonel Voll Graaff were at the meeting held specifically to hand in a list of people who needed police protection because of threats that circulated of damaging their properties.

- [6] Colonel Mongwe (Mongwe) testified that on 17 July 2015, the plaintiff indicated at a meeting that he and other 4 peoples' houses and lives were said to have been targeted by Pro Makhado Task team(these are said to be members of the community who are against the demarcation). He verified the threats. He recommended that static police guards be posted at the houses of the plaintiff and those mentioned. The police, above the posted static guards, constantly patrolled at irregular interval, at the said houses and other key points within Vuwani town with effect from 29 July 2019.
- [7] Mongwe denied having ever received any message from the plaintiff or anyone else, information regarding the threat to damage the plaintiff's business at any given time from April up to and including the day it was torched.[3]He said that the police did all in their powers to protect the houses that were said to have been targeted, including the plaintiff's house. He further testified that if he knew that the plaintiff's business was targeted, he would have deployed static guard at plaintiff's business- Talifhani. He in fact did not even know that Talifhani belonged to the plaintiff.
- [8] The police constantly patrolled Vuwani area, its CBD and key points with a view to protect lives of members of the community and properties, both public and private. Unfortunately, schools, shops, and houses around Mashau to Pietboy, all under Vuwani Township, were damaged and some torched. All this, he testified, was as a result of a battle between Pro-Makhado and Vuwani Demarcation Task Teams and its members.
- [9] Nlitsheni Gloria Sikhwivhilu, Lieutenant Colonel in the Public Order policing, SAPS, was an operational commander of Public Order Policing Unit in Vuwani at the time of the unrests. Her work was to foresee to it that all key points in and around Vuwani CBD, Mashau and Masiya areas are protected. She, under cross-examination, testified that she never received a message issued or circulated to protect the plaintiff's business. The order received was to protect the plaintiff's house. The static police were deployed to keep guard on the houses of people who were targeted. She remembered seeing static police at plaintiff's house when she did her routine chores patrolling around the area. She testified further under cross-examination that had she received such information, she would have mobilised individuals to protect the plaintiff's business in the manner the plaintiff's house was protected.
- [10] Colonel H.H. Voll Graaff who was the station commander at Vuwani Police Station at the time of unrests, corroborated Mongwe and Sikhwivhilu in as far as the testimony that there was never a request from the plaintiff for the protection of his business Talifhani was concerned. All he knew was that 5 people requested protection for their houses. Static policing was effected at all the houses of the people who specifically requested for protection including the plaintiff's house. He testified that he received no information from the plaintiff that he had a business that had to be protected during Vuwani unrest. He denied the plaintiff's version put to him that he (the plaintiff) requested protection for his business, Talifhani, at a meeting they held with the plaintiff.

- [11] Issues to be determined are (i) whether the plaintiff had requested the police to protect his business-Talifhani- during or around July 2015 Vuwani unrests and if so, (ii) whether the Minister of Police is vicariously liable to the plaintiff's damages caused by the police's failure or omission to protect the plaintiff business-Talifhani- during Vuwani unrests and lastly, (iii) whether the plaintiff had locus standi to claim such damages.

The Law

- [12] It is trite law that a person or an entity can be held liable for an omission to act if a legal duty existed at the time of the omission to act to prevent damages. '[I]n order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss'[4]. Put differently, an omission to act give rise to liability only when the law imposes a duty to act and the defendant is in breach of that duty. The state is liable for the failure to perform the duties imposed upon it by the Constitution of the Republic of South Africa and laws of the country.
- [13] Section 12[5] of the Constitution of the Republic of South Africa Act (Constitution) provides for freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources. Sections 205[6] of the Constitution requires of the police to prevent and combat crime and to maintain public order for the protection of the inhabitants of the Republic and their properties.
- [14] Any wilful failure or omission to perform the above functions leads to delictual liability. The test for negligence applies. That being: Did the police act reasonably in trying to take steps to prevent such damage? (See Minister of Safety and Security v Carmechelle 2004(3) SA305 (SCA))

Locus standi

- [15] I find it apposite to first determine the issue on locus standi. Locus standi concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted.
- [16] Counsel for the plaintiff submits that the point can only find operation to the determination of the plaintiff's loss of income and not whether or not the plaintiff has a standing in law to claim damages he sustained because of the police's omission to protect his business-Talifhani. In rebuttal thereto, the defendant's counsel submits that the plaintiff is not the owner of Talifhani. He submits that the plaintiff leased the premises from the owner. He opines that the liquor licence is not transferrable and no one can operate a liquor store without a valid trading licence, of which the plaintiff does not have. The owner is not a party to the pleadings. Thus the plaintiff has no standing in law to claim damages in respect of Talifhani. He submits that his claim must thus be dismissed for lack of locus standi in judicio.

- [17] The majority judgment penned by Schreiner JA in *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) indicated that a lawful possessor with a contract with the owner may have locus standi to sue for wrongful damage or where property is destroyed. An owner and possessor will seek damage for their respective different interest.
- [18] The plaintiff concluded a lease agreement with one Edzisani Yvonne Makuya. Makuya is the lessor who let to the plaintiff as the lessee, a liquor outlet known as Talifhani Liquor Restaurant. The lease agreement is not contested. Contestation is only on the liquor licence. The liquor licence is not the subject of the matter before court. What is before court is the allegation that the police failed to protect the property from which Talifhani is being operated at.
- [19] The lease of the property creates the plaintiff's direct and substantial interest in the property from which Talifhani is being operated at. The plaintiff, in my view, has locus standi to prosecute the claim in as far as he has an interest in the matter which prompted him to request, as alleged, for protection of Talifhani, if he ever did. In *Smith v Saipem* 1974 (4) SA 918(A) the court held that an owner and/or a bona fide possessor may claim damages under the Aquilian action for their respective different interest in the damaged property. (See as well- *Groenewald Lubbe Incorporated v Bronwen Fick* A278/2013ZAGPHC-unreported)
- [20] The court in *Refrigerated Transport (Edms) Bpk v Mainline Carrier (Edms) BPK* 1983 (3) SA 121 (A) accepted that the extension of the Aquilian remedy to a claimant who was not the owner of the property in question was premised on the presale of the dual attributes of possession of, and risk bearing responsibility by the claimant in respect of the property in question.
- [21] The plaintiff's real interest in this matter is in respect of the movables or business implements and his monetary claim he alleges to have suffered damages occasioned by the damage of the immovable property from which the business operated. I cannot agree more with the plaintiff's counsel who submitted that the claim is against the defendant's alleged failure to protect the property, Talifhani and not the claim in respect of the immovable property where Talifhani is being operated at. Considering the principle set out in *Smith v Saipem*, I am of the view that the plaintiff has the necessary locus standi to prosecute the claim. The defendant's point in limine on locus standi stands to be dismissed.

Liability

- [22] I now turn to the main issue, being whether the plaintiff requested the police to protect him, his house and Talifhani during July 2015 Vuwani unrests. If so, did the police fail to afford such protection? If the police failed to afford such protection, did the plaintiff suffer any damage?

- [23] Plaintiff testified that he told Mongwe and Voll Graaff around April or May 2015 that his life, house and business Talifhani were in danger and targeted by members of the community who are against Vuwani being incorporated within Collins Chabane Municipality. He testified that they (Mongwe and Voll Graaff) assured him of keeping his house and business on guard.
- [24] Mongwe and Voll Graaff denied ever being asked to keep Talifhani on a list of properties that needs to be on guard. They both testified that they did not know of the plaintiff's business. They only became aware that Talifhani belonged to the plaintiff after it had been torched. Mongwe, Voll Graaff and Sikhwivhilu testified that had they been asked or requested to keep guard on the plaintiff's business, static guard would have been deployed at Talifhani. They all confirm that static guard were deployed at plaintiff's house as agreed to. All they knew to keep guard on was among others, plaintiff's house. They complied. Mongwe and Sikhwivhilu testified that they personally would, at irregular intervals as part of their routine duty, drive pass the plaintiff's house. They would always find a static guard at his house. They remained firm that the plaintiff's house was at all material times under static guard.
- [25] It is clear that there are disputes of facts arising from the testimonies of the plaintiff and that of the defendant's

witnesses. The plaintiff's version is destructive to that of the defendant. The court in Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others[7] stated that to come to a conclusion on disputed issues a court must make a finding on (i) credibility of various factual witness, (ii) their reliability and (iii) the probabilities. In Dreyer and Another NNO v AXZS Industries[8] the court indicated that "on a proper approach a court should also have regard to the probabilities inherent in the respective conflicting versions"

- [26] A disputed fact that creates conflicting versions is, as per plaintiff testimony, that he informed the police, to wit, Mongwe and Voll Graaff either during April / May 2015 (as per his viva voce evidence) or 17 July 2015 (as pleaded), that his house, business and houses of other four to five executive members of Vuwani Demarcation Task Team were targeted for destruction. These are the executive members of the people who are for the establishment of the forth municipality- Collins Chabane- in the Vhembe District. In conflict thereto, the defendant's witnesses deny having ever been informed of Talifhani as one of the targeted properties, let alone the knowledge that it belonged to the plaintiff.
- [27] The plaintiff, who was assertive on his version when testifying in chief, could not remember when riddled with questions during cross examination the actual date during April/May 2015 on which he informed the police of his request for protection of the business

Talifhani. Further questions left the plaintiff with a dropped jaw. He at some stage remained mum. The plaintiff failed to lead any extrinsic evidence to corroborate his version. He was with other executive members and representatives of Vuwani Demarcation Task Team at a meeting allegedly held with Mongwe and Voll Graaff when requesting the police to protect their properties. None of the said executive members was called to corroborate the plaintiff's version.

- [28] It is common cause that the plaintiff, Mongwe and Voll Graaff met. The date of the meeting is, in my view, not of any significance. Of importance is whether Talifhani was one of the properties the plaintiff enlisted for which he required the police protection for or not. It is further common cause that Mongwe, Voll Graaff, Sikhwivhilu and the plaintiff knew each other very well even before the incident. They were colleagues until the plaintiff left his workplace or took pension.
- [29] The plaintiff was riddled with questions during cross examination to an extent of almost contradicting himself. He, on the verge of being paralysed, stated that he could not recall the date. He was left wanting to a point where counsel for the defendant said that "the plaintiff keeps changing his testimony because he feels the pinching of the shoes". That being so, he was, in my view, an untruthful witness. The plaintiff's version is riddled with improbabilities. It is improbable that Mongwe and Voll Graaff, who knew the plaintiff as their former colleague, would have ignored the plaintiff's request if they knew that the business-Talifhani belonged to the plaintiff. They knew each other as former colleagues and on a personal level. Mongwe testified that he only knew that Talifhani was under the plaintiff's management after it had already been damaged. I am unable to find him a credible witness in the plaintiff.
- [30] Mongwe, Voll Graaff and Sikhwivhilu, unshakeably testified that the plaintiff never placed a request for the protection of Talifhani on their table. They firmly testified that the only request put on their table was the protection of the plaintiff's house and houses belonging to the other representatives of Vuwani Demarcation Task Team. They obliged to the plaintiff's request. They posted static police to keep guard of his house. They testified that they, at irregular intervals, patrolled by the plaintiff's house. The plaintiff's house was protected and never torched or damaged throughout the Vuwani unrest. I find their testimonies to be more credible than that of the plaintiff.
- [31] The defendant's version is, in my view, more probable than that of the plaintiff. In fact, the plaintiff's version is improbable. Put differently; when all factors are equipoised, probabilities prevail in favour of the defendant.

Conclusion

- [32] In conclusion, the plaintiff failed to prove on the balance of probabilities that he requested the police to keep Talifhani on guard during Vuwani unrests. The plaintiff further failed to prove the defendant's negligence or that a reasonable police with a duty

(i) to maintain public order, (ii) to protect and secure the citizens of the Republic, (iii) to protect property and (iv) to uphold and enforce the law- would have probably taken measures to avert the risk of such harm on a balance of probabilities. What is left is for the dismissal of the plaintiff's claim.

[33] It is trite that costs follow the event. The plaintiff succeeded with his opposition of the locus standi point in limine. Equally, the defendant succeeds with his defence. In my view, no party should be mulcted with costs.

[34] I in the result make the following order

ORDER

34.1 The defendant's point in limine on locus standi is dismissed

34.2 The plaintiff's claim is dismissed.

34.3 There shall be no order as to costs

AML PHATUDI

JUDGE OF THE HIGH COURT

For the Plaintiff:

Adv. AC Diamond

Instructed by Kern & Dekker Inc

Thohoyandou

For the Defendant:

Adv. S Mathabathe

Instructed by State Attorney

[1] The date is as per uncontested amendment of the particulars of claim made from the bar during trial proceedings

[2] As described in the lease agreement

[3] 31 August 2015

[4] Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v ASASA 2006 (1) SA 461 (SCA); [2006] 1 All SA 6; [2005] ZASCA 73 para 12.

[5] Everyone has the right to freedom and security of the person, which includes the right — (a) ... (b) ... (c) to be free from all forms of violence from either public or private sources; (d) ... (e) ...

[5] Everyone has the right to freedom and security of the person, which includes the right —

- (a) ...
 - (b) ...
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) ...
 - (e) ...
- [6] Section 205(3): The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.
- [7] 2003 (1) SA 11 SCA
- [8] 2006 (5) SA 548 SCA para [30]
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