

SOUTH AFRICA / JUDGMENT

Nkoane v Minister of Police (3920/2020) [2023] ZAFSHC 33 (30 January 2023)

[2023] ZAFSHC 33**COURT**

Free State High Court, Bloemfontein

BEFORE

N.S. Daniso

CASE / FILE NUMBER

3920/2020

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Source record**FLYNOTES:**

POLICE RUBBER BULLETS

DELICT

– Necessity – Rubber bullets – Plaintiff struck
in eye – Police contending that riotous crowd
throwing

stones and other missiles – Contending that justified to
restore public order and also to protect life and
property –

Police should have foreseen injury in residential area – Not
adhering to rule not to shoot at head
or at person running away –
Conduct wrongful and unlawful.

IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 3920/2020

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

TINNY
GENEVA
NKOANE
Plaintiff
And
MINISTER
OF
POLICE
Defendant
HEARD

ON:

6,7 & 9 SEPTEMBER 2022
WRITTEN
HEADS OF ARGUMENT DELIVERED ON 15, 21 & 22 SEPTEMBER 2022

JUDGMENT

BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 30 January 2023.

[1] In this matter, the plaintiff claims an amount of R1.7 million as damages from the defendant resulting from the injuries she sustained after she was shot in the left eye with a rubber bullet on 15 August

2019. The plaintiff alleges that she was shot by the members of the South African Police Services ("the police") there and then acting within the course and scope of their employment with the defendant.

[2] Before the commencement of the trial, an inspection in loco was held at the instance of the parties and on the basis that it would enable the court to follow the oral evidence in relation to the scene where the shooting incident took place according to the plaintiff and where the police discharged the rubber bullets

according to the defendant. Various points were noted to wit: the point where the plaintiff was walking immediately before she was injured and the point where the police discharged rubber bullets including the location of these points to each other. The distances between these points were not measured, instead it was agreed between the parties that evidence will be led in that regard.

[3] The only issue that I have to determine is in respect of the merits only. The parties have agreed to separate the issues relating to the merits and quantum.

[4] It is common cause that immediately before the plaintiff was injured, a violent protest had erupted in the vicinity of the plaintiff's residence and in order to disperse the riotous crowd, the police discharged stun grenades and also fired rubber bullets at the crowd. It is also

indisputable that at all material times hereto the police were acting within their scope and scope as employees of the defendant. The plaintiff's claim is asserted in the alternative. It is the plaintiff's case that the police are guilty of breaching their duty to protect her, to ensure that no harm befell her and that their conduct did not endanger her physical wellbeing or life by unjustifiably shooting her. In the particulars of claim, the plaintiff alleges that:

"4.1. On the 15th of August 2019, there was community unrest at Section T, Botshabelo.

4.2. At about 07:15 on the morning of the 15th of August 2019, the plaintiff was walking to a shop to buy bread in Section T, Botshabelo. The plaintiff was dressed in her school uniform.

4.3. Whilst walking in the street, the plaintiff was approached by a police armoured vehicle and was shot on the left eye ("the affected eye") with a rubber bullet by members of the South African Police Service who were in that vehicle and who, at that time were attempting to restore the public order to pursue the community members involved in the unrest..."

[5] In the alternative, the plaintiff accuses the police of negligent and wrongful discharge of rubber bullets in the direction of the plaintiff and in so doing, the plaintiff sustained an injury to her left eye which resulted in the loss of her eye. The police should have foreseen:

"10.1

The presence of the plaintiff at the scene of the shooting;

10.2 That the plaintiff could be struck by a rubber bullet or projectile so discharged if same was discharged in the plaintiff's direction; and

10.3 That the plaintiff could be seriously injured if struck by the rubber bullet or the projectile."[1]

[6] The defendant has denied liability and has also pleaded alternative defences namely that, the plaintiff's injuries were not as a consequence of the rubber bullets fired by the police and in the event of this being proven, the defendant avers that the plaintiff was part of the riotous crowd which was throwing stones and other missiles at the police. She sustained the injury when the police fired rubber bullets at that crowd to ward off the attack on the police and their Nyala. The police's actions were thus justified, they acted to restore public order and also to protect life and property.

[7] At the pre-trial hearing the parties agreed that the only issues to be determined by the trial court was the lawfulness of the defendant's actions and whether the defendant is liable for damages as a result.

[8] The plaintiff gave evidence in support of her claim and also called Mr Tshediso Stanely Moneri as a witness.

- [9] It was the plaintiff's evidence that at the time of the incident she was a scholar aged 17 years old. Between 7h20 and 7h30 she left home to buy bread at tuckshop located within the same street as her home. She was dressed in her school uniform as she was supposed to go to school on that day.
- [10] She was about ten meters away from home when she saw a group of about ten community members running towards her. She did not know why they were running so she continued walking then moments later, she heard a sound of a gunshot. She immediately fell down. Her eyes burned, blood was streaming down her face and she thought she could have been shot.
- [11] Four police officers dressed in police uniform came and stood next to her for about ten minutes. She cried and asked for help but they simply walked away, got into a police armoured vehicle ("Nyala") and drove off.
- [12] Moneri and Ms Ntombizodwa Zanele came to assist her by taking her home. An ambulance was called but it could not reach her home as the road was barricaded as a result, she was taken to where the ambulance was waiting at another section of the township. The ambulance ferried her to Pelonomi hospital on the next morning she was transferred to National Hospital where he left eye was removed.
- [13] Under cross-examination, she denied of having being part of the unrest. She stated that she did not even know there was an unrest.
- [14] It was her testimony that she did not see the police shooting at her as they were probably behind the running protesters. The first time that she saw them was after she had fallen to the ground injured and bleeding.
- [15] She was adamant that she was shot by the police because immediately after she heard the sound of a gunshot she fell down injured and bleeding. The police then came and stood next to her. Later, she saw the rubber bullet at her feet and she was able to recognize it because she had been previously shot with a rubber bullet. Furthermore, the doctor who examined her after she was injured[2] confirmed that the injury was caused by a rubber bullet and that if it was live ammunition, she would have died.
- [16] It was put to her that there were discrepancies in her version in that, in her particulars of claim she alleged that the police approached her travelling in the Nyala and shot her whereas in her testimony, she told the court that she only saw the police after she had fallen down injured. Similarly, in her statement to the police taken shortly after the incident[3] she mentioned having been admitted at Botshabelo hospital from the day of the incident until discharged on 18 August 2019 whereas she testified that she was also admitted at Pelonomi and later at National hospital.

- [17] The plaintiff's response was that she did not see the police or their Nyala before she was shot and with regard to what is stated in the statement, she was only 17 years old when she deposed to the statement and it was never read back to her to confirm its contents.
- [18] Moneri testified that it was about 6 and 7 in the morning when he was woken up by a commotion of police Nyalas driving up and down in their area. He was walking towards the soccer field to see what was taking place when he saw a group of people running towards him being chased by the police. The police were firing at them with big guns. After the group had passed he found himself facing the police he then ran into Monate tavern and hid behind the wall facing the street.
- [19] From his hiding place, he observed the plaintiff in her school uniform walking down the street and before he could speak to her, he saw her falling to the ground. The police kept on advancing towards her and when their Nyala approached they climbed into it and left.
- [20] When he saw that the plaintiff was holding her face and bleeding, her went over to help. He realized that she had been shot with a rubber bullet. It was laying at her feet covered in blood. He knows what a rubber bullet looks like because he had been previously shot with a rubber bullet. He then took her home with the assistance of other community members. The ambulance that was called could not access the street to the plaintiff's home as it had been barricaded by the protesters. The plaintiff had to be carried to the ambulance at another section of the township.
- [21] During cross-examination, he stated that the place where the plaintiff was shot is about 8 meters from where he was hiding. He was able to see her and her surroundings because he was by the fence facing the street. He could also clearly see the police when they approached in the plaintiff's opposite direction firing at the running protesters and subsequently shooting the plaintiff on the face.
- [22] He concluded his evidence by stating that the plaintiff was shot by the police, they were the only ones who had firearms and shooting at people.
- [23] The defendant's version was relayed by four members of the Public Order Policing unit of the South African Police Services ("POP") viz: Captain Khanu Benjamin Maboe, warrant officer Morake William Rapudingoana, warrant officer John Kgaelele, and sergeant Thapelo Chere Motsoeneng. Their experience and service in the police respectively, ranged between 15 and 36 years.
- [24] Maboe is the unit commander of POP in Selosetsha. He testified that around 4:15 the police went to the soccer field situated next to the main road in Botshabelo, the Jasmin Makgothu Highway ("the highway") to provide protection to the Municipality officials who were under attack from a group of violent protesters. The unrest had erupted following the dismantling and removal of incomplete shacks that were erected in the soccer field. Stones and other missiles were thrown at the Municipality's officials, their vehicles including the police.

- [25] In order to control and disperse the riotous crowd, the police discharged stun grenades and also fired rubber bullets at the crowd. The crowd was relentless, they continued with their attack causing the police and the Municipality's officials to abandon the site. The police retreated and went to stand guard at the highway however, the situation became volatile and he realized that they needed backup. At that time, they were only fifteen and travelling in four soft tops "Kombis" and sedans.
- [26] He mobilized more police officers and also requested Nyalas as their stone resistant as compared to the soft tops. Around 6 and 6h15 respectively, backup arrived from Thaba Nchu with two Nyalas and from Bloemfontein with more Kombis.
- [27] One Nyala remained where Maboe was posted and the second one went to stand guard next to the Reahola complex.
- [28] Soon thereafter, the driver of the second Nyala, Rapadingoana called for assistance stating that their Nyala was stuck in a ditch next to the soccer field while pursuing the protesters. He also reported that they were under attack, the protesters were taking advantage that the Nyala was stuck and pelting them with stones. One of the Kombis went over to assist while Moboe and the remaining officers went to attend to a complaint about protesters vandalizing a school.
- [29] Under cross-examination he stated that the spot where the Nyala was stuck was about four hundred
- (400) meters away from the residential area.
- [30] It was his testimony that when the police fired rubber bullets the protesters ran into the residential area. He has no knowledge whether there are police officers who chased after the protesters into the residential area, particularly next to Monate tavern.
- [31] He further stated that no injuries were reported to him on that day, he only found out about the plaintiff's incident when he was contacted by an officer from the Independent Police Investigative Directorate (IPID) who was investigating the circumstances surrounding the plaintiff's shooting.
- [32] He was asked about the shooting incident involving one of the officers, sergeant Thabiso Edward Letsili. He was one of the officer involved in this operation and in his warning statement[4] he admits that the police went into the township travelling in a Nyala and that he had alighted from the Nyala and chased after a man that he had observed throwing stones at the Nyala. Whilst chasing this man, he shot him on the head with a rubber bullet and arrested him.

- [33] His response was that the golden rule regarding the use of rubber bullets is that, the shot must be aimed at the lower part of the body never at the head and definitely not at a person who is running away because the main aim of the police is to restore order. Furthermore, according to police protocol, any injuries resulting from incidents involving the police should have been reported to him over the radio and he must in turn report to IPID.
- [34] The next witness called was Rapudingoana, the driver of the Nyala that was stuck in the ditch. It was his testimony that the Nyala got stuck while they were chasing the protesters and when the protesters realized that the Nyala was stuck, they returned and threw stones. To ward off the attack, the police alighted from the Nyala and discharged stunt grenades and also fired rubber bullets at the crowd.
- [35] The backup arrived in a Kombi and found the protesters still pelting stones. He does not remember what happened afterwards as he concentrated on extracting the Nyala from the ditch and when he ultimately succeeded he drove the Nyala back to the highway. None of the officers who were in the Nyala went into the residential area. He did not see the officers who came with the Kombi going into the residential area.
- [36] In cross-examination he told the court that he does not know the distance between the township and the area where the Nyala was stuck.
- [37] Kgaelele was in the Nyala that was driven by Rapudingoane. On arrival at the highway they found a group of protesters pelting stones at the vehicles passing by. They (the police) pursued the protesters in the Nyala but it got stuck in a ditch. The protesters returned and pelted stones at them, they exited the Nyala and fired rubber bullets at the protesters with the assistance of the backup.
- [38] He told the court that after the Nyala was extricated, they drove back to the highway. He does know where the Kombi or its occupants went and he also does not remember whether some of the officers who came with the Kombi went into the township or not.
- [39] The last witness to be called was Motsoeneng. He is one of the seven officers who came with the Kombi. He confirmed that when his crew arrived at the spot where the Nyala was stuck they found the protesters throwing stones at the Nyala and barricading the road. Four of them alighted from the Kombi, it then drove to the police station while they remained and assisted their colleagues by firing rubber bullets at the crowd which was repeatedly advancing the Nyala and throwing stones. After the Nyala was extricated all the police officers boarded the Nyala and went back to the highway.
- [40] He also did not see any police officer going into the residential area. He also did not hear of any injuries.
- [41] Thus is in short the summary of the evidence before this court and in addition to the parties' viva voce evidence, documents marked as Exhibit "A5", "A26" and "A242" were also handed in as evidence.

[42] After all the evidence had been proffered, the issues which remained to be determined are whether the plaintiff's injury resulted from being shot by the police and if the court finds that indeed the plaintiff was shot by the police as alleged, a further question is whether there is a basis of justification as pleaded by the defendant.

[43] The onus is on the plaintiff to prove that the injury she sustained which ultimately resulted in her losing her left eye was caused by the police on a balance of probabilities.

[44] The parties have presented mutually destructive versions with regard to the circumstances under which the plaintiff was injured. So, in *National Employers General Insurance v Jagers*[5] and *Stellenbosch Farmers' Winery Group Ltd & Another v Martell Et Cie & Others*[6] the courts highlighted the technique to be adopted by a court to resolve factual disputes as follows:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses;

(b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case,

which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[45] Applying this technique to the germane facts, the plaintiff gave a detailed account of how, where and in what manner she sustained the gunshot injury. The plaintiff was an honest witness. She conceded that she did not see the police shooting at her. All she was able to tell the court is that, after seeing a group of people running towards her she heard a sound of a gunshot. Moments later she felt an object striking her on the face, she fell down in excruciating pain and also noticed that she was bleeding. Whilst still on the ground, the police came to hover above her then left and a rubber bullet was next to her feet.

[46] While I accept that there were certain contradictions between the plaintiff's oral evidence and the documentary evidence including the particulars of claim in relation to whether the police approached her in a Nyala before she was shot or after and how many days and which hospitals she was hospitalized after the incident: I do not consider these discrepancies material to warrant the rejection her evidence in toto. Evidence is not required to perfect but truthful, in fact the minor discrepancies show honesty in the sense that the evidence has not be tailored to suit the circumstances of the case.

[47] I am satisfied that the plaintiff's evidence can be relied upon as the truth of what occurred on that day. Her evidence is also corroborated by:

47.1 Moneri. He saw the police chasing shooting at the protesters which prompted him to go and hide in the yard of Monate tavern. Whilst there he saw the plaintiff being shot by the police. It does not end there, after the plaintiff fell he also saw the police approaching her and after they left, he found a rubber bullet covered in blood next to the plaintiff;

47.2 The J88 medical report, exhibit "A5": it states that the plaintiff was "shot with a rubber bullet in the eye (left) this morning"; and

47.3 The warning statement by sergeant Letsili, exhibit "A242": it is admitted that on the day of the incident the police entered the residential area and one of the protesters was shot in head with a rubber bullet.

[48] The plaintiff's version fits in with the objective facts. I have found no reason to reject it. No evidence has been tendered to gainsay the plaintiff's version that the object that caused her the injury was a police rubber bullet.

[49] On the other side, it was expected of the defendant's witnesses to adduce evidence to prove that the plaintiff was not shot at the street of her home as she alleged but at the site where the Nyala was stuck and the police shot her in retaliation for stoning the police and their Nyala.

[50] None of the witnesses testified to that effect, Maboe told the court that he remained on the highway and later went to attend to a complaint about a school being vandalized. He was adamant that he had no knowledge about the incident involving the plaintiff's shooting. I find that it is quite peculiar that as a unit commander Maboe would have no knowledge about the plaintiff's incident including the other shooting incident involving Letsili who was an officer under his command.

[51] As regards, Rapudingoane he first testified well when he was giving direct evidence stating how he was able to see the protesters throwing stones at the Nyala and that even went out of the Nyala to discharge stunt grenades and rubber bullets at the protesters however, during cross-examination his demeanour was that of a person who could not admit or deny seeing the police chasing the protesters all the way to the township. His other version was that he did not see the police going to the township because he was concentrating on extricating the Nyala from the ditch. Same as Kgaolele and Motsoeneng, when their versions on this aspect

were tested under cross-examination, their responses were also that they could not recall if the police went to the township and they also did not see that happening. It is important to note that on the available facts, Motsoeneng was in the same crew as Letsili. They were the backup crew that travelled from Bloemfontein.

- [52] It is my considered view that these witnesses' lack of candour affected their credibility.
- [53] Also on the probabilities, evidence is either probable or not. It is highly improbable that the plaintiff would have been shot by someone else other than the police. As correctly pointed out by Moneri no one else was discharging rubber bullets on that day and at the time the plaintiff was injured except the police.
- [54] The defendant's attempt to circumvent the truth did not end there. Having regard to the agreement between the parties at the Rule 37[7] pre-trial conference the fact that the plaintiff was shot by the police was conceded. What remained to be determined was the issue relating the lawfulness of the defendant's actions. Instead, at the trial and during cross-examination of the plaintiff the defendant summersaulted and re-introduced the defence disputing that the police were responsible for shooting.
- [55] According to the defendant's counsel Ms Macakati, the defendant is entitled to have the matter to be still decided on the pleadings despite the terms of the agreement concluded in terms of rule 37.
- [56] I disagree, a deviation from the provisions of rule 37 is plainly bad, it would also defeat the whole purpose of the provisions of rule 37 which are meant to facilitate and expedite the handling of a trial by eliminating any preliminary issues that may delay the trial.
- [57] The are submissions made by the defendant on this aspect need to be addressed. In the heads of argument,[8] the following is stated:
- "9. In addition, the Honourable Justice Daniso enquired on the second day of the trial whether the issue of the shooting and or shooting incident by the members of the police occurred is an issue in dispute. The Defendant responded in the affirmative and although this aspect was not formulated in the Rule 37 conference minutes, it is an aspect in dispute on the pleadings.*
10. It is so that this issue in dispute ought to have also found its way into the pre-trial minute, whose primary purpose is to narrow the issues as formulated in the pleadings. However, this was an omission and the court is nonetheless implored to take into consideration as this is an important aspect for the Defendant's case and in light of the defendant's evidence.
11. The court was referred to paragraph 4.1. read together with paragraph 5.1 of the Defendants' plea.
12. That this aspect did not find its way into the pre-trial minutes is by no means or form a concession that the Defendant accepted that its employees are responsible for the plaintiff's injury..."

- [58] The defendant's contentions herein are based on a gross distortion of the factual events which took place in court and at the pre-trial hearing. Counsel for the defendant has deliberately avoided to state that the court's enquiry on whether the issue relating to the plaintiff's shooting was in dispute was a result of the cross-examination of the plaintiff in terms of which the veracity of the plaintiff's evidence that she was shot by the police was challenged, despite the fact that the defendant had conceded this aspect at the pre-trial conference.
- [59] It is equally misleading to state that the disputed issue "did not find its way into the pre-trial minute." In paragraph 14 of the minutes of the pre-trial it is distinctly recorded that:

"14. ISSUES TO BE DETERMINED BY THE TRIAL COURT

The issues in dispute are the following:

14.1 ...

14.2 Whether the defendant's action was lawful

14.3 Whether the defendant is liable for damages

14.4 Whether Plaintiff suffered any damages, and the nature and extent of such damages."

- [60] Having regard to the facts that that I have alluded to above, I conclude that the evidence tendered by the defendant does not accord with the probabilities and it is merely a fabrication solely invented to suit the circumstances of the case. I cannot rely on such evidence, the defendant's version is accordingly rejected as false.
- [61] For these reasons above, I am inclined to decide the disputed issues in favour of the plaintiff. I conclude that the plaintiff has proven on a balance of probabilities that she was shot by the police with the result that she sustained an eye injury.
- [62] It is tested law that an infringement of bodily integrity is prima facie unlawful. The onus rests on the defendant to prove that the plaintiff's shooting was justified.[9]
- [63] On the available facts, the defendant's assertion that the police's actions were justified simply on the basis that they were aimed at protecting life and property from the riotous group which was stoning the police is untenable because on the accepted evidence, the plaintiff was not part of the riotous group.
- [64] That aside, the reasonable person in the position of the police would have foreseen that by chasing and firing at a fleeing group of protesters in a residential area for that matter, there was a reasonable possibility of injuring the plaintiff. The police should have taken steps to guard against that occurrence. They failed to do so and, if they had taken the measures to avoid injuring the plaintiff namely, by complying with their protocol and also the general rule which prohibits the police from shooting a person in the head let alone when the person is running away the injury sustained by the plaintiff could have been avoided.

[65] I am not persuaded that the defendant has discharged the onus of proving that the police actions were justified. I find that their conduct was wrongful and unlawful consequently, the defendant is vicariously liable for the injuries sustained by the plaintiff.

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

1. Judgment is granted in favour of the plaintiff on the merits with costs.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the plaintiff: Adv. M.S. Mazibuko

Instructed by: Mokhomo Attorneys

BLOEMFONTEIN

Counsel on behalf of the defendants: Adv. I. Macakati

Instructed by: Office of the State attorney

[1] Paras 4 to 10 of the plaintiff's particulars of claim.

[2] Exhibit "A5" is a copy of the J88 medical report.

[3] Exhibit "A26."

[4] Exhibit "A242".

[5] 1984 (4) SA 437 at 440 D – G.

[6] 2003 (1) SA 11 at 14 1 – 15E at [5].

[7] Of the Uniform Rules.

[8] Page 7 at paras 9 to 12.

[9] Benson & Simpson v Robinson 1917 WLD 126.

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