

SOUTH AFRICA / JUDGMENT

Nkosi and Another v Minister of Police and Another (A10/2021) [2021] ZAMPMHC 33 (24 November 2021) [2021] ZAMPMHC 33

COURT

Middelburg High Court, Mpumalanga

BEFORE

J Mtimunye, M.T Mankge, S.S Mphahlele

CASE / FILE NUMBER

A10/2021

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REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
MPUMALANGA
DIVISION, MIDDELBURG (LOCAL SEAT)
APPEAL
NO A10/2021
REPORTABLE: YES/NO
OF INTEREST TO OTHER
JUDGES: YES/NO
24 November 2021

IN THE MATTER
BETWEEN:

ASHWELL SFISO
NKOSI
FIRST APPELLANT
TRYPHINA
NDWANDWE
SECOND APPELLANT
AND
MINISTER OF
POLICE
FIRST RESPONDENT
SERGEANT
KGOMO
SECOND RESPONDENT

JUDGMENT

MTIMUNYE AJ:

INTRODUCTION:

- [1] This is an appeal against the judgment of the court a quo's dismissal of the first appellant's claim for unlawful shooting and the second appellants' unlawful arrest and assault. The appeal is with the leave of the trial court (a quo). The main issue for determination is whether the court a quo was correct in dismissing the claims. The appeal was opposed by the respondents. The appeal was argued virtually by the parties' legal representatives before the full bench of this court.

BACKGROUND**FACTS:**

- [2] The two Appellants instituted separate actions that were ultimately consolidated by the order of the court a quo. The matters proceeded on merits only. The salient facts of these matters are common cause: on the 14th of June 2017 at around 15:00 at Hlalanikahle location, Witbank, Sergeant Kgomo and Mabane approached the appellants to arrest them for robbery and assault. The first Appellant was shot and injured by Sergeant Kgomo using his official firearm. The first Appellant produced a knife before the shooting.
- [3] The medical records indicated that the bullet went into the first Appellant's left leg from behind. The second Appellant was arrested without a warrant and detained for longer than permitted by Section 50 of the Criminal Procedure Act, 51 of 1977, before her appearance in court. The second Appellant also alleges that she was assaulted. The assault on the second appellant was admitted by the respondents in the pre-trial document dated 18 October 2018. The court a quo granted the withdrawal of that admission on application from the bar by the respondents' legal representative at the end of their case.

THE EVIDENCE:

- [4] Both Appellants did not testify in the proceedings. The respondent presented the testimony of two police officers about the shooting. Sergeant Kgomo briefly testified as follows: he and constable Mabane went to the appellant's place. He introduced himself; the reason for his visit and informed the first appellant that he was under arrest. The first appellant was aggressive and wanted to walk away. He grabbed him trying to put him in the police van. They struggled. The first appellant resisted and took out a knife. He took out his firearm and fired two shots in succession pointing on the legs of the first appellant. He felt threatened that the first appellant wanted to stab him. The first appellant ran away. He went back and told the second appellant that he was arresting her for her role in assaulting the complainant and also to induce the first appellant to come to the police station. The second

appellant did not resist. He denied that he assaulted her.

- [5] Constable Mabane corroborated Kgomo's evidence. He further confirmed that the first appellant refused to be arrested and he pulled out a knife and went towards Kgomo. Kgomo pulled out a firearm and fired two shots. The first appellant ran away. That was the respondents' case. The appellants applied for an absolution that was refused. They closed their case without leading any evidence.

GROUND OF APPEAL:

- [6] At issue in this appeal was whether the trial judge was correct in:

- A. dismissing first appellant's claims for wrongful shooting.
- B. dismissing the second Appellant's claim of for unlawful arrest and assault.
- C. withdrawing the respondents' admission.

The court will now deal with each aspect separately

- A. Dismissing the first applicant's claim for wrongful shooting.

- [7] The first appellant argued that the court a quo was wrong in finding that the respondent discharged the onus on them. The first appellant was shot from behind as per the medical evidence. Sergeant Kgomo testified that he was facing the first appellant when he fired the shots. Constable Mabane tried to justify the shooting from behind by saying maybe first appellant twisted his leg. The respondents on the other hand argued that the police were protecting themselves on the imminent attack from the first appellant. The first appellant did not testify and thereby challenge the evidence led on behalf of the respondents.

- [8] Section 49 of the Criminal Procedure Act, 51 of 1977 ("CPA"), regulates the use of force, which police and private persons may employ in order to arrest suspects who offer resistance or flee. Section 49 (2) provides as follows:

"If any arrestor attempts to arrest a suspect and the suspect resist the attempt, or flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to the suspect, only if he or she believes on reasonable grounds –

- (a) That the force is immediately necessary for the purpose of protecting the arrestor. . . from imminent or future death or grievous bodily harm;
- (b)
- (c)"

- [9] It is indeed correct that the onus was on the respondent to prove on the balance of probabilities that Sergeant Kgomo was justified in shooting the first appellant. Sergeant Kgomo and Sergeant Mabane both testified that the first respondent was not only resisting arrest, but he took out a knife.
- [10] Sergeant Kgomo was facing an imminent danger on his life and had to act in that situation. They both justify the reason for the shooting. The first appellant already knew the reason why they were there. They did explain why they were arresting him. He did not only resist getting inside the police van, but he also produced a knife.
- [11] The police did not know that he had an intention of taking out a weapon and what he was going to do with it. The evidence that the first appellant took out the knife before an officer who was trying to arrest him remain uncontested.
- [12] The police officers were justified in defending themselves. On the evidence presented the court a quo's finding is justified. There was no evidence presented to show that the police exceeded the grounds of justification. The trial court was correct that Sergeant Kgomo was justified in firing the shots as he did, towards the legs of the first appellant.

A. Dismissing the second Appellant's claim of for unlawful arrest and assault.

- [13] The requirements for a lawful arrest without a warrant are set out in section 40(1)(a) and (b) of the CPA:

‘(1) A peace officer may without warrant arrest any person –

- (a) who commits or attempts any offence in his presence;
- (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;’

- [14] Sergeant Kgomo stated three reasons for arresting the second appellant. Firstly, he testified that he arrested her because the complainant opened a case of assault against her. Secondly that, he was afraid that she might also run away like the first appellant. And lastly that, maybe the first appellant would come to the police station.
- [15] The appellants' legal representative overemphasized the third reason that sergeant Kgomo arrested the second appellant so that the first appellant would come to the police station as if it was the only and main reason for the arrest. As already mentioned above in paragraph 13, that was not the only reason that was mentioned by Sergeant Kgomo in his testimony.
- [16] This court is aware of what the court in *Hurley, Minister of Law and Order v Hurley* [1986] ZASCA 53; 1986 (3) SA 568 (A) (Hurley). stated to wit:

“An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.” *Id* at 589E-F.

Sergeant Kgomo did prove to the court that his opinion was justified in finding that the second appellant had committed a schedule 1 offence and also that he was justified in being afraid that she might run away as well. The court a quo was justified in its finding that there was evidence under oath that the second appellant committed a schedule 1 offence. The police did exercise their discretion properly.

C. withdrawing the respondents' admission from the bar.

[17] The appellants' legal representative argued that the court was wrong in allowing the respondents' legal representative to withdraw the admission of the assault from the bar. The admission on the pre-trial document dated 18 October 2018 did not only pertain exclusively to the assault; it was an all-encompassing question regarding a number of issues. On page 74 of the pre-trial minutes the following question was asked:

"Does the defendant concede that on the 14th of June 2017 at about 15:00 the plaintiff was (a) arrested(b) detained (c) assaulted and (d) and the plaintiffs' husband was shot by the second defendant from behind?"

The answer was "agree".

[18] A further pre-trial meeting was held on 21 September 2020 where the very same question was asked to the respondents on page 89 par 30. The response was

"Not admi (sic), Ndwandwe was arrested and detained, but not unlawfully assaulted. Nkosi not unlawfully shot arrested on 15 November 2017".

[19] This court agrees with the respondents' legal representative that the appellants knew as early as of 21 September 2020 that the respondents denied the admission of assault. The appellants cannot be said to be prejudiced in my view.

[20] In any event, if the question that follows in this pre-trial is also considered, this question strengthens the court a quo's finding on the admission. The question that follows in the pre-trial of 18 October 2018 reads as follows:

"Does the Defendant admit that there was no justification for arresting the Plaintiff and that the arrest, detention and assault was unlawful?"

The answer to this question is "As per Docket"

[21] The evidence in terms of the docket, is that one of the two police officers, evidently refute the assault of the second plaintiff. The evidence in the docket was also repeated in court through the evidence of both the police officers.

[22] It is trite that a judicial admission of fact is conclusive, rendering it unnecessary for the other party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party, making it to adduce evidence to contradict it. This is also established in section 15 of the Civil Proceedings Evidence Act, 25 of 1965, it provides as follows:

“It shall not be necessary for any party in any civil proceedings to prove, nor shall it be competent for any such party to disprove, any fact admitted on the record of such proceedings”.

[23] What is however clear in casu is that when the question was asked again in the second pre-trial meeting of 21 September 2020, the answer from the respondent was to the negative this time around. It is also clear from the minutes of this pre-trial meeting on record that, both parties in confirmation, continued to sign the said pre-trial minutes meaning there were no issues with the answer provided by the respondent.

[24] The principle as set out in section 15 of Act 25 of 1965 is that, it is not necessary to adduce evidence to prove admitted facts. In the court a quo the respondent proceeded to conduct his case in line with their case as stated in the pre-trial minutes of 21 September 2020. The decision of what evidence to adduce at the trial followed this format.

[25] I am of the considered view that the court a quo’s consideration of this point is supported by the SCA decision in the matter of Spearhead Property Holdings Ltd v E & D Motors 2010 (2) SA 1 SCA. The court at 15H – 16A stated the following: “It is equally trite that since the pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties and, provided no possible prejudice can be caused to either, to decide the case on those real issues” (my emphasis)

[26] The trial proceeded before the court a quo on 09 November 2020, (a month and some days after the second pre-trial conference). The negative answer that was given on the second pre-trial was raised as an issue only after the close of the respondents’ case.

[27] In terms of the record that was furnished to us, there is no evidence that the appellant attempted to investigate this issue or take it up with the respondents. In this regard I find the view that was adopted by the court a quo consistent with well-defined principle in Alphenie Investment (Pty) Ltd v Greenetops (Pty) Ltd 1975 (1) SA 161 T at 161H-162A (which I also find instructive in such circumstances):

“The court is inclined to look benevolently at pleadings, . . . , so that justice need not yield to technicalities. Such a view was expressed, inter alia in Ondendaal v Van Oudtshoorn, 1968 (3) SA 433 (T) at 436D. Nevertheless, the issues as defined by the pleadings must not be lost sight of and a party cannot rely on causes of action or on defences which were not put in issue and were consequently not fully investigated.” (my emphasis)

- [28] The court a quo supported its conclusion on this issue of the pre-trial admission. I am of the view that the court did not misdirect itself by holding that the admission was not made intentionally but per incuriarum, the analysis in para 15- 19 supra also supports the court a quo's view in this regard.
- [29] In the circumstances the judge a quo found correctly and properly reasoned the point on admission. Accordingly, I am of the view that there is no case made out by the appellants for the appeal to be upheld on this point.
- [30] The onus to establish assault, and damages related thereto, rested on the second appellant. It should be remembered that both police officers testified that they did not assault her as she was cooperative and there was no reason for them to assault her. It was incumbent on the second appellant having heard their evidence to refute it by testifying and showing who amongst the two police officers assaulted her and how she was assaulted.
- [31] The plaintiff's claim on assault is found at paragraph 5.4 of her particulars of claim it avers the following:

'5.4

On the 14th of June 2017, the second defendant assaulted the plaintiff with his open hands, by hitting her in the face."

Against this claim is the defendant's plea at para 'ad paragraph 5.4

'paragraph 5,4

The defendant denies that he slapped the plaintiff, he in fact did not use force against the plaintiff but merely put her into the police van. She did not resist and was small in stature thus no force was used, she was slightly pushed into the van. The plaintiff had no injuries neither did she complain of any injuries",

[32] Also the plaintiff at para 6.1 allege as follows:

'6.1

The second defendant's conduct was wrongful, and negligent and unlawful in that, he assaulted the plaintiff, without being provoked and with no just cause to employ violence"

The defendant pleads as follows to this claim

'Ad paragraph 6.1

The second defendant did not assault the plaintiff and the claim that he did is false and disingenuous"

- [33] In the record of the proceedings there is no indication that the second appellant invoked the provisions of Rule 25 (1). The second appellant did not file any replication regarding this claim by the respondents in their plea.

- [34] The defendant led evidence of two police officers, to support their denial; they both testified that the second plaintiff was never assaulted.
- [35] The court a quo's premised its finding on the second appellant's assault claim by concluding that the second appellant relied on an admission that was made during the first pre-trial conference. I have dealt with the issue of this admission already, and based on my conclusion on this point as set out in paragraph above, I am of the considered view that the judge a quo found correctly in dismissing the second appellant's claim of assault.
- [36] There is no counter-appeal on the second plaintiff's detention. For this reason, this court will not express any view on it.
- [37] Consequently, it is this court's finding that both appellants have failed to make out a case that the court a quo misdirected and/or found incorrectly in its whole judgment dated 2 December 2020, and both the appellants' appeals are dismissed

with costs.

[38] In the result, I propose the following order:

The appeal is hereby dismissed with costs.

J. Mtimunye

Acting Judge of the High Court

Mpumalanga Division, Middelburg local Seat

I agree

M.T Mankge

Judge of the High Court

Mpumalanga Division, Middelburg Local Seat

I agree, and it is so ordered

S.S MPHAHLELE

Deputy Judge President of the High Court

For the appellant: Adv BP Geach SC and Adv Kerhrahm

Instructed by: Routes & Van Rensburg Inc

C/O Birmans Inc

For the respondent: Adv Mfazi and Adv Madileng

Instructed by: State Attorney, Pretoria

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