

SOUTH AFRICA / JUDGMENT

Samorah v Minister of Police (81324/2017) [2024] ZAGPPHC 766 (31 July 2024) [2024] ZAGPPHC 766

COURT

North Gauteng High Court, Pretoria

BEFORE

Matthys

CASE / FILE NUMBER

81324/2017

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE 81324/2017

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE:

31 July 2024

SIGNATURE

IN THE MATTER
BETWEEN:

NKOSI DOCTOR
SAMORAH
PLAINTIFF
and
MINISTER OF
POLICE
DEFENDANT
Heard 14 and 15 May 2024
Reserved 30 May 2024
Delivered 31 July 2024

JUDGMENT

MATTHYS AJ

Introduction

[1] This is an opposed action for delictual damages. The plaintiff (Mr Doctor Samorah Nkosi[1]) instituted the action against the defendant (The Minister of Police[2]) for damages in an amount of R5 million. The parties agreed for the adjudication of the merits and quantum to be separated[3]. Hence, only the merits are the subject of this judgment.

[2] It is the plaintiff's pleaded case, that on 24 August 2016 and at Extension [...], H[...] W[...], Emalahleni District, Mpumalanga Province, an unknown member of the South African Police Service (SAPS) Vosman police station, who acted within the course and scope of employment, wrongfully caused him bodily harm, by shooting him with a rubber bullet in his right eye[4].

[3] The defendant pleaded the following, in its amended plea: -

3.1 That on the 24th day of August 2016 at or along M[...] P[...] Street between extension 1[...]/H[...] and Phase 4 intersection and also Phase 4 residential area, starting from about 02H00 in the morning, a group of unknown persons and/or community members engaged in public violence and/or an unlawful and/or illegal protest of blockading the roads with burning tyres/ rocks and/or unknown objects and making the demands to be employed at Kusile Power Station, Balmoral, Mpumalanga at Emalahleni.

3.2 The other incidences of public violence and/or an unlawful and/or illegal protest action spread to H[...]; Extensions 0[...]; 0[...] and 0[...]. [My emphasis]

3.3 During the aforesaid engagement in public violence and/or unlawful and/or illegal protest action, the unknown persons and/or unknown community members were throwing stones indiscriminately at passing motorists and/or persons who were on their way to their respective workplaces and also assaulting and robbing them of their belongings i.e. Money, cell phone/s; bank cards

3.4 The following private motor vehicles were damaged by the said group of people who were engaged in the aforesaid illegal and/or unlawful protest: 3.4.1 A 22-seater bus 515 CDI Mercedes Benz with registration number and letters H[...] 9[...] M[]; 3.4.2 A 22-seater Mercedes Benz with registration numbers and letters E[...] 9[...] E[...] G[]; 3.4.3 A bus with registration numbers and letters F[...] 0[...] M[] which was driven by one Mafika Jabulane Nkosi; 3.4.4 A Ford Bantam bakkie with registration number and letters D[...] 1[...] M[] driven by one Mokoyi Paulos Nkuna; and 3.4.5 A white Corsa bakkie with registration numbers and letters D[...] 3[...] G[] being driven by one Lucky Zwane.

3.5 The drivers of the aforesaid motor vehicles which were damaged, laid criminal complaints at Vosman Police Station.

3.6 Ultimately, the stakeholders managed to enter into negotiations which culminated in ending the unlawful and/or illegal protest peacefully with no incidence of further public violence and the said group of people dispersed peacefully.

3.7 It is specifically denied that the member of SAPS Vosman in a police uniform, unlawfully and wrongfully shot the Plaintiff with rubber bullet on the right eye on the 24th day of August 2016 and the Plaintiff is therefore put to the proof. [My emphasis]

[4] In the succeeding paragraphs of the plea, the defendant denies the plaintiff's allegations, nonetheless, pleads "that the defendant does not have any knowledge of the allegations by the plaintiff and once the alleged incident has been identified, established and investigated, the defendant may be in a position to plead to the allegations and may consider amending its plea accordingly"[5] . [My emphasis]

The Probative Material

[5] The following probative material were presented during the trial. Oral evidence by Doctor Samorah Nkosi (plaintiff); Oupa Nkosi (plaintiff's brother); Lt.Col. Lesiba Bokey Aphane and Sgt.Sibusiso Speelman Skosana.The real evidence exhibit 1 (a sketch drawn by Oupa Nkosi) and the documentary evidence exhibits A to G contained in the trial bundle and referred to during the trial, also forms part of the record.

Summary of the evidence

[6] The following salient facts went unchallenged. From the early hours of the morning on 24 August 2016, wide spread protest and public

violence occurred along M[...] P[...] Street between extension 1[...] H[...] and the Phase 4 intersection and also at the Phase 4 residential area, which protest spread to H[...] Extensions 0[]; 0[] and 0[]. As a result, Lt. Col. Lesiba Aphane[6] (the relief station commander at the Vosman Police station) received criminal complaints from members of the public affected by the ongoing public violence.

[7] Around 02h00 that morning, Lt.Col. Aphane attended to M[...] P[...] Street, where he observed a group of about 150 community members blocking the main road with burning tyres. He also observed a number of motor vehicles which were damaged by the protesters at the scene.

[8] The Lt. Col assessed the circumstances and saw the need to call for assistance, from the public order police unit. He returned to the Vosman police station, where he waited for the public order police members. Members of the KwaMhlanga public order police unit, reported to Lt. Col Aphane around 7h30 on the day. Lt. Col Aphane told the public order police members, to attend to the protest at M[...] P[...] Street, where after he went off duty. Lt. Col Aphane testified that he has no knowledge of the circumstances under which the plaintiff was injured and therefore he was unable to comment thereon. He agreed that the docket comprising the plaintiff's

complaint leveled against the police, was registered at the Vosman Police Station on 1 September 2016.

[9] Sgt Sibusiso Skosana is one of the KwaMhlanga public order police members, who attended to the protest on the day. He testified that he was a passenger in an armoured vehicle (referred to as a Nyala) which was driven by a colleague David Ntuli[7]. They were accompanied by twelve other members of their unit, who traveled in two mini busses. He testified that because he no longer has independent knowledge of the events of the day in question, he refreshed his memory, with the contents of the IRIS[8] reporting records, in order to inform his testimony during the trial. He did not depose to a statement after the incident in question.

[10] He testified that according to the reporting records, his unit members arrived at M[...] P[...] Street around 8h00 and left from there at 16h50. It is his evidence that as far as his recollection goes, his unit members arrived at M[...] P[...] Street, when the protest already subsided. They patrolled and cleaned the main road and there was no need to utilize rubber bullets, where they were. It is his evidence that according to what is recorded in the reporting records, his unit Nyala, left the M[...] P[...] Street area around 13h00 to KwaMhlanga. He was not aware of any other Nyala that was in the area.

[11] Sgt Skosana was unable to account for the protest action and the involvement of the police, at the various extensions of the H[...] area. He testified that he did not know the area well, but more so, his unit confined themselves only to the immediate vicinity of M[...] P[...] Street. According to his evidence, there is no reference made in the reporting records he perused, regarding a shooting incident during which a member of the public was injured by the police.

- [12] His testimony was, that the reporting records shows, that the Secunda public order police unit, under the command of a certain W/O Mash, also attended to the protest in the broader area. According to his evidence, the Secunda public order police unit, attended to the protest in the area from 10H15 the day, as recorded in the reporting records. Sgt Skosana was unable to account for the conduct of the Secunda public order police unit, in relation to the protest action.
- [13] Further it was pointed out during the trial, that Sgt Skosana's colleague David Ntuli, on 2 October 2016, deposed to an affidavit exhibit G, for purposes of investigation by the Independent Police Investigative Directorate (ipid), regarding the case reported by the plaintiff, under Vosman Police Station Cas nr 13/09/2016.
- [14] The evidence is that the plaintiff and his brother (Oupa Nkosi) resided at neighbouring premises at extension 1 H[...]. Around 7h45 the morning of 24 August 2016, Oupa Nkosi and others travelled in a vehicle to work, when they were forced to turn back home, as the protesters blocked the road, about 1 km from where they reside. Upon his return home, Oupa Nkosi went to the plaintiff's house and requested the plaintiff to assist him to dig a pit toilet in his yard.
- [15] Subsequently, the plaintiff and Oupa Nkosi started to dig the pit toilet in Oupa Nkosi's back yard. Whilst digging, they became aware of a noise caused by an armoured police vehicle (they referred to as a Hippo) approaching. They also heard people screaming and shots being fired in the area. They moved from the back yard to the front of the yard, around the house in different directions, to see what the commotion was about.
- [16] Oupa Nkosi testified, that from where he was, he initially saw a female police officer who was protruding the top of the armoured vehicle firing a shot. The female officer then descended into the vehicle. Shortly thereafter, a male police officer appeared at the top of the armoured vehicle and fired a shot towards his yard. It was at this stage, when the plaintiff came around the front corner of the house, that he was struck by a rubber bullet to his right eye.
- [17] The plaintiff was assisted by Oupa Nkosi and others, where after he was transported to the local H[...] Clinic by his brother Mxolisi Nkosi. Having been attended to at the clinic, he was referred to the Witbank Government Hospital, for further medical attention.
- [18] According to the contents of the medical records, the plaintiff was admitted in the Witbank Government Hospital, from 24 to 30 August 2016, with a history of having been shot by the police to his right eye.

- [19] The clinical findings noted in the medico-legal report form J88, is that the plaintiff's right eye was swollen and bleeding, with a round foreign body in the socket of the eye. The diagnosis noted is that the plaintiff's right eye globe ruptured. A procedure described in the medical records as right eye evisceration and ball implant, was conducted on the plaintiff on 26 August 2016. The plaintiff reported the incident at the Vosman police station on 1 September 2016.

Evaluation and Findings -merits

- [20] It is trite that the pleadings should define the ambit of the dispute between the parties[9]. In spite of the trite principle on the purpose of pleadings stated, attention need to be drawn to the defendant's plea, in which both a denial as well as non-admissions of the plaintiff's allegations are outlined[10].
- [21] There is a fundamental difference between the defendant pleading, that the allegations made by the plaintiff are denied, as opposed to the plea, that the defendant has no knowledge of the allegations pleaded. In the case of a positive/specific denial, the defendant understands the allegation, has knowledge of the facts, but disputes that they are true. Conversely, with a non- admission, the defendant has no knowledge of the allegation and thereby contends, that he can neither admit nor deny it.
- [22] In *Standard Bank Factors Limited v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C)[11] the Western Cape Court, had this to say about this distinction: -
- "To my mind, there is a clear notional distinction between these two stances. A plaintiff faced with a positive denial must anticipate and prepare for the leading by the defendant of rebuttal evidence which contradicts the allegations he has made. A plaintiff faced with a non-admission need not anticipate and prepare to meet contradictory evidence to be adduced by the defendant. Indeed, there is authority for the proposition that he need not even anticipate a limited challenge by way of cross-examination... while that may conceivably be going too far... I think, with respect, that it is undoubtably correct insofar as a plea of non-admission... because of a lack of knowledge, will not entitle the defendant to contradict the plaintiff's averments by leading evidence to the contrary at the trial, because a defendant who does not know something cannot competently put up a different version because he has already pleaded that he has no version to put up" [My emphasis]*
- [23] The evidence by Lt. Col Aphane and Sgt Skosana are formal in nature and it is clear from their respective testimony, that they were unable to present evidence in rebuttal of the version presented by the plaintiff. The defendant's witnesses, bear no knowledge of the circumstances under which the plaintiff sustained the injury to his right eye and therefore it was not prudent for the defendant to plead that it is "specifically denied that the member of SAPS Vosman in a police uniform, unlawfully and wrongfully shot the Plaintiff with rubber bullet on the right eye on the 24th day of August 2016 and the Plaintiff is therefore put to the proof".

- [24] The two defence witnesses' testimony is however in accordance with the plea of a non-admission, in that they were unable to admit or deny the plaintiff's allegations. It is from this vantage point, that I do not deem it necessary to note credibility findings, regarding the defendant's two witnesses and I accept their respective factual testimony as they presented it.
- [25] In this matter the onus rest upon the plaintiff to prove his case on a balance of probabilities. In the seminal decision *Miller v Minister of Pensions*[12] Denning J held: -
- 'If the acceptable evidence is such that I can safely say 'I think that it is more probable than not' the burden is discharged,
- but if the probabilities are equal, it is not.'
- [26] Primarily what is required of this court, is to determine whether the injury sustained by the plaintiff on the particular day, was caused by a member of the SAPS. In this regard the entire body of evidence is of paramount importance.
- [27] In order to arrive at a conclusion on the issue to be decided, I take due regard of the credibility and reliability of the witnesses, as well as the general probabilities of the case. I also considered that the facts of this case have an extensive history and that all the witnesses had to testify on aspects which occurred some eight years ago. Therefore, I deem it logical to leave room in my assessment of the evidence, for imperfect recollection of immaterial detail.
- [28] Both the plaintiff and Oupa Nkosi, made a favourable impression in the witness box. They presented their testimony in an independent and unrehearsed manner. As was expected, there were nuanced differences in their evidence, however I find that the differences pointed out during cross- examination, are not material to the issue to be decided and therefore, it does not justify the rejection of the witnesses' evidence as a whole[13]. The differences in the two witnesses' testimony is in accordance with their observance of the events on the day from diverse vantage points and it is typical of imperfect recollection, after eight years, since the incident occurred in 2016. The differences referred to, point away from the plaintiff and his brother, intentionally presenting a concocted version.
- [29] I considered that the plaintiff and his brother corroborated each other in material respects, with regards to the location where the shooting occurred, the events leading up to and subsequent to the plaintiff's injury sustained. Further thereto, the unchallenged medical evidence proves, that "a round foreign body" (akin to the rubber bullet produced by the defendant's witness during the trial) was found to be lodged in the socket of the plaintiff's right eye, which evidence I find consistent with the evidence for the plaintiff.

- [30] I further find that the evidence presented for the defendant provides a ring of truth to the plaintiff's averments, in that it is more than coincidental that the SAPS attended to the area due to the wide spread protest on the day. I find it highly improbable that the plaintiff would have been so daring, to level false charges against the police, if there was no truth to his evidence.
- [31] Further thereto, the fact that the two police officers who testified for the defendant do not have knowledge of the incident experienced by the plaintiff, cannot justifiably detract from the veracity of the evidence for the plaintiff. Regard being had to the evidence by Sgt Skosana, that the Secunda public order police unit, was from 10h15 the morning, also in attendance in the area where the wide spread protest (in H[...] Extensions 01; 02 and 03) occurred, I find that the plaintiff's evidence is not farfetched, but highly probable.
- [32] In my considered view, the absence of evidence by any of the Secunda public order police members, regarding their activities and role in relation to the protest action on the day, is fatal to the contention for the defendant, that none of its employees fired the shot which injured the plaintiff. In the absence of evidence in rebuttal of the evidence for the plaintiff, I find that the plaintiff's version of the events is true.
- [33] I find that the evidence prove that the plaintiff was shot, where he was in his brother's yard at Extension [...] H[...], by a SAPS member, with a rubber bullet, that caused the injury to his right eye. Having made the latter mentioned finding, the conduct by the SAPS member, is prima facie wrongful[14]. Further thereto, in the absence of any countervailing evidence, I find that it is conclusively proved that the police conduct was wrongful.
- [34] Considered the accepted evidence by the plaintiff, that he was shot in his brother's yard, a plausible inference to be drawn is, that the police officer should have foreseen, that in firing rubber bullets where they were, a real risk was that innocent members of the public (the plaintiff) could be injured by the rubber bullets. The police officer's conduct was negligent.
- [35] In conclusion, on a conspectus of the entire body of evidence, I am satisfied that the plaintiff's case is overwhelmingly favoured by the general probabilities of the case and that he discharged the onus that rest on him. Accordingly, I make the following order.
- a. The defendant is liable for 100% of the plaintiff's proven or agreed damages.
 - b. The defendant is ordered to pay the costs on Scale A
 - c. The determination of quantum is postponed sine die.

JUDGE (ACTING) OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

On behalf of the Plaintiff: Adv Tshimangadzo Netshiozwi

On behalf of the Defendant: ADV N Mohlala

- [1] An adult male born 4 April 1983
- [2] Cited in vicarious/official capacity as the Minister of cabinet of the Republic of South Africa, responsible for the conduct of members of the South African Police Service (SAPS)
- [3] Rule 33(4)
- [4] Paragraphs 4 and 5 of the particulars of claim
- [5] Paragraphs 4-7 of the amended plea
- [6] Written statement by Lt. Col Aphane exhibit E
- [7] Written statement by David Ntuli exhibit G
- [8] Incidence Registration Information System
- [9] Pleadings: must ensure that both parties know what the points of issue between them are, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent. -Becks Theory and Principles of Pleadings in Civil Actions (2002) 44 Also see Osman Tyres and Spares CC AND Another v ADT Security (Pty) Ltd (1174/2018)[2020] ZASCA 33 (3 April 2020)
- [10] Paragraph 3.7 and 4-7 of the amended plea
- [11] at 417I-418C
- [12] [1947] 2 All ER 372 (KB) at 373 cited in Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 157 D
- [13] The differences related to the presence of a female police officer on top of the armoured vehicle; the whereabouts of Mxolisi's car and Mxolisi before the plaintiff was transported to the clinic; also, the exact time of the morning the shooting occurred.
- [14] Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng (CCT 185/13) [2014] ZACC 28 at para 22

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