

SOUTH AFRICA / JUDGMENT

Sigqoko v Minister of Police (2159/2019)

[2024] ZAECMKHC 148 (22 May 2024)

[2024] ZAECMKHC 148**COURT**

Eastern Cape High Court, Makhanda

BEFORE

M Makaula

CASE / FILE NUMBER

2159/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE

DIVISION, MAKHANDA)

CASE

NO: 2159/2019

In the matter between:

ANDISILE

SIGQOKO

Plaintiff

and

THE MINISTER OF

POLICE

Defendant

JUDGMENT

MAKAULA J:

A.

Introduction

[1] The plaintiff issued summons against the defendant alleging the following in relevant parts:

“The

facts:

4. On or about 3 November 2018 and at or near Molteno in the Eastern Cape the plaintiff was unlawfully assaulted by members of the South African Police Service (“SAPS”) whose full and further particulars are unknown to the plaintiff who shot him with a firearm on his left foot.
5. At all times material hereto the said SAPS members were acting within the course and scope of their employment as policemen of the South African Police Service.

Sequelae

6. As a consequence of the said assault the plaintiff sustained injuries, namely,-
 - 6.1. fracture of the 4th and 5th metatarsals;
 - 6.2 tissue loss of the 4th phalange; and
 - 6.3 traumatic amputation of the 4th toe
 7. He also experienced severe pain and suffering at the time and has also lost amenities of life.”
- [2] The defendant pleaded as follows to the plaintiff’s particulars of claim;

“3. AD PARAGRAPH 4 THEREOF

3.1 The defendant denies the allegations contained in that paragraph.

3.2 The defendant pleads that:

3.2.1 On 3rd November 2018, members of South African Police Service (“SAPC”) were involved in a stop and search operation at Hayiya Street, Old Location in Molteno at about 20h00 in the evening;

3.2.2 During the course of such a stop and search operation, members of the SAPS were attacked by stone-throwing youths who struck one member of the SAPS with a stone and also damaged a police bus (“State property”) that such members were travelling in;

3.2.3 Members of the SAPS that were involved in that operation had to use minimum force which was reasonable in the circumstances to protect State property and themselves from such attacks whilst also trying to arrest those involved in such stone-throwing.

3.2.4 The actions of the members of the SAPS police against any such stone-throwing youths were justified by way of necessity as the conduct of such stone-throwing youths posed a threat/danger to the lives of such members of the SAPS and damage to State property;

3.2.5 The Defendant specifically denies that the plaintiff was shot by members of the SAPS at all on that day or any other day;

3.2.6 In the alternative, and only in the event that this Honorable Court finds that the plaintiff was indeed shot at by members of the SAPS, the defendant pleads that the members of the SAPS were acting in self-defence and out of necessity to prevent harm to themselves and the State property.

3.3 In the event that the plaintiff was part of a group of youths that were attacking the police and posing danger to member of the SAPS and State property, the actions of the police were therefore justified by necessity in those circumstances and further justified in terms of Section 205(3) of the Constitution of the Republic of Soth Africa, 1996, Section 13(1) and (3) of the South African Police Service Act 68 of 1995 read with Police Standing Orders on crowd management”.

[3] As per order dated 22 September 2022 merits were separated from quantum in terms of Section 33(4) of the Uniform Rules of Court. Before me, were the merits of the matter. In other words, whether the defendant is liable for the injuries sustained by the plaintiff.

[4] Only the evidence of the plaintiff was led and he thereafter closed his case. The defendant applied for absolution from the instance which was opposed by the defendant.

B. The evidence

[5] The crux of the evidence of the plaintiff is that on that day he was from work proceeding to his place of residence. They were building a house in Molteno. He worked for a Zimbabwean national with his friend Vuyani. They accompanied their employer to a taxi and proceeded to their respective places of residence. He left Vuyani at his house and proceeded to where he was staying. As he was approaching an intersection, he saw a group of children, being chased by police, running towards him. He heard several gunshots. On seeing them, he turned and ran towards the direction he came from. After a short distance, he started to lose balance on his left foot. He looked back and noticed that he was running alone in the street. He did not know what happened to the children and the police who were running after him. He testified that it was already dark, between 19h00 and 20h00 when he came across the children being chased. He could see them through the streetlights. He assumed it was the police who were shooting because he saw a police Quantum motor vehicle with police branding.

[6] He realized that he was injured on the left foot. He went home and inspected the wound. He discovered that he had sustained a fracture of the 4th toe on his left foot to an extent that it was hanging by its skin. He treated the wound by bandaging his toe and slept. On Sunday he continued nursing his wound. He could not bear the pain and visited Molteno hospital on Monday.

[7] He was detained in hospital for a day and was transferred to Komani hospital. He spent one night in Komani hospital and was transferred back to Molteno hospital the following day. After seven days he was taken to Komani hospital. His 4th toe was amputated. He was transferred back to Molteno hospital after the operation. He remained recuperating at the Molteno hospital for thirty days after which he was discharged.

C. The Legal Position

- [8] In terms of Rule 39(6) of the Uniform Rules of Court, the defendant may at the close of plaintiff's case apply for absolution from the instance. The test for absolution from the instance is long established. It dates back in *Gascoyne v Paul and Hunter*[1], where De Villiers JP formulated the test as follows:

"At the close of the case for the plaintiff, therefore, the question which arises for consideration of the court is, is there evidence

upon which a reasonable man might found for the plaintiff?... The question therefore is, at the close of the case for the plaintiff was there a prima facie against the defendant Hunter; in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against Hunter.?"

The test was followed for decades in numerous matters. In *Gorden Lloyd Page and Associates v Rivera and Another*[2], the SCA said the following:

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neone Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:

"...(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul 1917 TDP 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T)."

D.

Analysis

- [9] In deciding whether absolution from instance should be granted at the close of the plaintiff's case it must be assumed that in the absence of very special consideration, such as the inherent unacceptability of the evidence adduced the evidence is true[3]. Furthermore questions of credibility should not normally be investigated at this stage of the proceedings except "where the witness as have palpably broken down, and where it is clear that what they stated is not true.[4]"
- [10] As aforesaid the plaintiff is the only witness who testified. His evidence was poor, full of contradictions, and improbabilities to an extent of being labelled untrue. Initially, the plaintiff testified that Vuyani remained behind at his place of residence while he proceeded to his own. However, he changed to say, after being shot he proceeded to his house which he shared with Vuyani and found him present. Moreover, he introduced new evidence as he was testifying, and under cross-examination. In his evidence in chief he said after leaving at his house (Vuyani) he walked alone

until he came across the children who were chased by the police. He later changed to say he had met his smoking friends (six of them) and they shared a cigarette. That was next to a certain church and not far from where the incident occurred.

[11] When asked how he sustained the wound, the plaintiff testified that on seeing the children and the police running towards him, he turned and ran away. He had not sustained the injury at that time. After running a shot distance, it is then that he was shot on his toe while facing away from the police. He was shot from behind.

He could not explain how, only his toe got injured. When asked how he concluded that it was a gunshot injury, he said there was a hole on his shoe. Further, on a different day he found a spent cartridge case next to the house where he was shot at, hence he concluded that it was a gunshot wound.

[12] What the plaintiff said about where he found the cartridge case is improbable. The reason being that he said the cartridge was exactly at the spot where he was when he was shot, presumably by the police who were far behind him. It would not have been possible for the spent cartridge to have been there because when ejected from the firearm it does not fall far away from where the shooter is standing. This further speaks to a possibility that it may have been picked up from where the police were shooting and left where he found it. He, under questioning, alleged that he took the shoe he was wearing to the police. The court was not told what happened to both the spent cartridge case and the shoe except to say he gave the shoe to the police.

[13] The plaintiff testified that it was not long, after he parted ways with his smoking partners, (who he had not mentioned in his evidence in chief) when he came across the children. However, when he turned and ran away, they were no longer next to the church. Even the police and children disappeared shortly after he ran away from them. Suddenly he was alone in the street. That is highly improbable. Based on these contradictions and improbabilities, this is one of those cases where credibility may be taken into account even at the stage of the proceedings.

[14] The plaintiff was in two hospitals for a period of more than a month. He however, failed to produce proof that he had been admitted in hospital for that long. He even failed to call Vuyani to corroborate how he was injured or about the alleged bullet hole in the shoe. This should be seen in the backdrop of the particulars of claim as reflected in paragraph 2 above. In paragraph 6 of his particulars of claim, the plaintiff states that he sustained at least two or more serious injuries on his left foot. However, when being asked by Mr McConachie his counsel, he insisted that he only sustained a fractured toe.

[15] Of crucial importance is that the plaintiff testified that, he only heard gunshots before he turned. He did not see who was shooting. He assumed it was the police because he saw a Quantum minibus with police branding. He did not know why they were shooting and towards whom. He categorically stated that he did not see and did not know who shot him. He further conceded that he told the doctor that the wound was caused by a bullet. That finding did not come from the doctor.

[16] The issues raised above are critical to the elements of the plaintiff's claim. They are lacking and it can never be said that the plaintiff made out a prima facie case to which the defendant has to respond.

Consequently, I make the following order.

1. Absolution from the instance is granted with costs.

M MAKAULA

JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff

: Adv McConachie

Instructed by

: McCALLUM ATTORNEYS

Fidelity Building, 87 High Street

MAKHANDA

For the Defendant : Adv Mgidlana

Instructed by

: WHITESIDES ATTORNEYS

53 African Street

Date heard

: 20 May 2024

Judgment delivered : 22 May 2024

[1] 1917 TPD 170 at 173

[2] 2001 (1) SA 88 and para 2

[3] Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 (E) at 527 C-D

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- [4] Erasmus: Superior Court Practice, 2nd Edition; Van Loggerenberg D-531 and authorities, add cited therein
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