

SOUTH AFRICA / JUDGMENT

Sitali v Minister of Police (1798/2017) [2022] ZAECMHC 20 (2 August 2022)

[2022] ZAECMHC 20**COURT**

Eastern Cape High Court, Mthatha

BEFORE

Z M Nhlangulela

CASE / FILE NUMBER

1798/2017

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 1798/2017

HEARD ON: 14/06/2022

DELIVERED ON: 02/08/2022

TRYISHILE SITALI

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

NHLANGULELA DJP

- [1] At the commencement of the trial I made an order, based on the application by both parties in terms of rule 33 (4) of the Uniform Rules of Court, separating the hearing of the issue of liability from that of quantum. Accordingly, this judgment addresses the issue of liability only.
- [2] The issues, as identified by the parties in the pre-trial minute, are whether:
- (a) the police had a legal duty to protect the interest (safety to person and property) of the plaintiff and the members of his family.

- (b) that duty was omitted by the police.
 - (c) if it was omitted, the defendant is liable to pay damages.
- [3] The broad issues identified above do not narrow down the real issues for trial. In what appears as an attempt to narrow down the trial issues, a further pre-trial minute reflects concessions that on 11 August 2017 the plaintiff's wife was found dead with gunshot wounds, the homestead of the plaintiff was gutted by fire and that a motor vehicle of the plaintiff was gutted by fire. These concessions do not meaningfully truncate the issues for trial that are foreshadowed in the plaintiff's particulars of claim in which it is alleged inter alia that on 11 August 2016 the plaintiff's wife and children were attacked whilst at their homestead by a group of community members who were led by three adult men: Mazaza Matoyo, Oliver Mazwana and Toto Sogaxa. As a result of that attack the plaintiff's homestead was destroyed by fire and his wife was shot at with a firearm(s) and burnt to death. Before the incident took place, the plaintiff warned the police about the impending attack but they, negligently, omitted in their legal duty of crime prevention to take such steps as would prevent the attack from occurring.
- [4] A close examination of the defendant's plea reveals the following:
- (a) A report of the plaintiff, made telephonically to Centane Police Station on 11 August 2016 concerning a shooting incident at his homestead, was received by the police members.
 - (b) On arrival at the homestead, the police:
 - (i) noticed a crowd of members of the community near the homestead.
 - (ii) received a report from the plaintiff that Mazaza, Oliver and Toto had fired gunshots and thereafter escaped into the nearby bushes in which a search was made, but in vain.
 - (iii) the members of the community displayed no sign of violence and aggression towards the plaintiff and members of plaintiff's family.
 - (iv) arrested the plaintiff on a suspicion that he was guilty of possessing a firearm, found in his homestead, without a licence, and there and then removed him from his homestead to Centane Police Station where he was charged and detained in a police cell for the purpose of standing trial in due course.
 - (c) after having evacuated the homestead and locking up the plaintiff into the police cell, received a report that the plaintiff's homestead was engulfed in fire.
- [5] In my understanding of the defendant's plea the basis of her plea is that the members of the police of Centane who attended to the homestead of the plaintiff before and after it was set on fire did not act negligently and carelessly. Instead, they "conducted themselves and performed their duties in a reasonable manner."

[6] The facts and the circumstances of this matter emerge from the evidence that was led. On the one side, the plaintiff testified together with his son, Abulele Sitali. On the other side two police officers, Mr Vukile Matinise and Mr Mbuyiseli George testified on behalf of the defendant.

[7] It is common cause that the incident that led to the damage for which the delictual claim has been made took place on 11 August 2016 and at the homestead of the plaintiff which is situated at Sigangala Administrative Area, Centane. The plaintiff, his wife, and three children were in occupation of the homestead. Upon waking-up from a nap he found his homestead was being invaded by Mazaza, Oliver, Toto and a crowd of people. On eye contact, Mazaza drew out a firearm and uttered the words: "You dog, the shops have been closed because of you." Without any engagement on the subject matter that the

plaintiff understood to be a reference to the local shops, the plaintiff heard two gunshots. The firearm held by Mazaza was pointed

at the plaintiff at the time. Mazaza's attempt to fire a shot was frustrated by malfunctioning of the gun mechanism that enabled the plaintiff to run into the house calling for a spear to be given to him. Having been given a spear by his wife and daughter, who were screaming to raise alarm, he went back outside to confront the invaders as they were still charging towards him. The plaintiff observed Toto dropping a firearm to the ground which he (the plaintiff) picked up, whereupon the three assailants retreated, and

making threats that they will come back for him later on. He saw the three men getting into their vehicle, that had been parked in front of the gate, and driving up the road.

[8] Acting on the threats, the plaintiff telephoned one Captain Dlulisa (Mr), a local policeman, asking for police intervention. The plaintiff was advised to telephone the police at Centane Police Station as Captain Dlulisa was at Qoboqobo, a place that was far away for him to arrange for immediate police intervention. The plaintiff did so, albeit through Captain Dlulisa's wife to whom the plaintiff had given information that the presence of the police at his homestead was sought in order to protect him, the family and homestead against threats that a fresh attack was going to be launched by the assailants. The crowd of the people also posed threat to the plaintiff. The plaintiff told the court that the crowd of people carrying axes, bush-knives and sticks had remained into the precincts of the homestead until the police arrived. On that occasion, the plaintiff saw Mr Matinise, a policeman, parking a police vehicle at the gate of his homestead, alighting therefrom, pointing two firearms towards the crowd of people and ordering them to move away from the homestead. Having rushed to the place where the police vehicles were parked, the plaintiff was directed to Ms Ntakana, a policewoman, who took him into a double-cab police vehicle and asked him to make a statement. The plaintiff told Ntakana about the attack that was launched at his homestead by the three men, who had left the scene, together with the crowd of people. He also told Ntakana and Matinise about the firearm of Toto that he had picked-up

which he later on placed next to the fence of the homestead. Mr Matinise sent one Mr Langwana to fetch the firearm from the fence;

whereupon the plaintiff was instructed to get into the police vehicle for a trip to Centane so that a statement about the firearm that he had possessed unlawfully could be made. The plaintiff expressed reluctance to leave the home for the reason, which he gave to Matinise, that his absence from the homestead would pose a danger to the safety of his wife and children as the three men would return to launch a further attack based on the threat that they had made. However, the order that the plaintiff must leave his homestead would be the last word of the police, which the plaintiff duly complied with. On arrival at Centane Police Station the plaintiff was locked-up in a police cell. On the next day news were broken to the plaintiff by one Ms Malovu, a policewoman, that his homestead and possessions were destroyed by arsonists; and that his wife was shot at and her body was charred.

- [9] Under cross-examination the plaintiff denied that his wife had refused an offer made by the police to remove her from the homestead to a place of safety; the crowd of people were not armed and that they did not enter the precincts of his homestead; and that he did not give a report to Matinise that the crowd of people had invaded his homestead.
- [10] Abulele confirmed the version of his father that the members of the community did enter the premises of the homestead, and did so being in possession of weapons. He told the court that he was standing next to the Tarven together with his mother, and siblings: Yonela (and her baby), Abongile and Imenge when he saw the noisy crowd. He again observed that as soon as it got dark, after the plaintiff had been removed from the homestead, the crowd of people had remained on the road adjacent to the homestead making a noise and uttering expletives. At that juncture a motor vehicle arrived, stopped on the same road and its door was opened. Suddenly, a noise made by the crowd came closer to the homestead. Fearing the looming invasion, he and his siblings managed to run into the nearly bushes leaving their mother in the homestead. Whilst hiding in the bushes he saw his mother's body burning as she was moving towards the water tanks of the homestead. He and his siblings ultimately ran further to their aunt's place which is situated at the nearby village.
- [11] Abulele denied that Mr George advised his mother to go to a place of safety. However, he admitted the fact that a firearm that the plaintiff had possessed was recovered from the fence and handed over to the police.
- [12] The evidence adduced by Matinise is that he together with George, Ntakana and Mr Sihlali were doing patrol duties in Centane town when Constable Dlulisa (Ms), who was in the charge office of the police station, informed him telephonically that the plaintiff required police intervention at his homestead where he was being attacked by shooting. He told the court that, in response, they drove a distance of about 50 kms to reach the plaintiff's homestead at about 5 pm where they found a crowd of people on the road together with the plaintiff leaning against an unlicensed firearm. Some of the people were standing, and others sitting down at a distance of 20 metres away from the plaintiff. According to him all

the people in the crowd exhibited calmness, were unarmed and doing nothing untoward. He then approached the plaintiff to find out what was happening. Upon being informed that Mazaza, Oliver and Toto had fired gunshots at the plaintiff, Matinise came to the conclusion that a docket of attempted murder would be opened against the three men. As regards the fact that the plaintiff was found in possession of an unlicensed firearm, he took a decision that the plaintiff must be arrested and charged criminally. He further decided that in so far as the wife would remain in the homestead whilst the plaintiff was in police custody, the wife should be offered an alternative of a safe accommodation away from the plaintiff's homestead. But the offer that was made by George was rejected by the plaintiff's wife.

- [13] Matinise stated further that he proceeded to the people, spoke to them and discovered that the reason for their presence on the road was that some gunshots that emanated in the vicinity of the plaintiff's homestead made them eager to know what had happened to warrant gunfire. The people were afraid to talk to the plaintiff as he was carrying a firearm. During the conversation with the people, Captain Dlulisa and a local man arrived on a motor vehicle and persuaded the members of the community to disperse. Thereafter, at about 6:20 pm, the police left the plaintiff's homestead with the plaintiff being under arrest.
- [14] Matinise testified further that before reaching the police station, he drove towards Kei River on a search for Mazaza, Oliver and Toto. When that search bore no fruits, he decided to patrol the area, but still without finding the whereabouts of the suspects. However, upon receipt of Captain Dlulisa's telephone message that the homestead was engulfed in fire, Matinise dropped off the plaintiff in the police cell and returned to the plaintiff's homestead, which he indeed found to be engulfed in fire. He could only summon the Fire Brigade Unit from East London to extinguish the fire. However, the long-time that the Brigade took to reach the homestead was enough for the fire to destroy the entire homestead.
- [15] Under cross-examination it emerged for the first time that Matinise was not informed about the details of the three assailants that had subjected the plaintiff under attack. Yet Captain Dlulisa did provide Ms Ntakana with the requisites details. As a result, Matinise and his co-members could not conduct a meaningful search for Mazaza, Oliver and Toto. The search for and patrol that were allegedly conducted in the area of Kei River seem not to have been properly informed as Matinise had not conducted consultations in an effective manner. Matinise was unable to provide a search plan for the suspects when asked if any was made. The alleged search near the bushes was not fleshed out by the witness. The registration particulars of the get-away vehicle of the suspects were unknown because investigation for them was not conducted. The usual method of circulating the particulars of the vehicle to the circles of the police to find the location of the vehicle was not done. The witness could not give the addresses of suspects that were allegedly communicated to him by Constable Dlulisa. According to the witness the trips that he allegedly undertook to search for the culprits did not involve the plaintiff despite the fact that he was available at the back of the police vehicle for consultation. Yet the suspects and the plaintiff were known that they were living in the same village.

- [16] When Matinise was asked as to why a decision to conduct patrols in the area of Sigangala was not done in order to prevent the suspects from re-launching attacks at the plaintiff's homestead he gave unsatisfactory answers. He said that the police did not have sufficient manpower to conduct patrols in Centane. He also said that the reason for not patrolling the area was because there were no proven threats to plaintiff's safety in existence to justify that exercise. He also gave the explanation that since George had offered safe accommodation to the plaintiff's wife there was no need for the police to be answerable for the consequences of the refusal of the offer.
- [17] George testified that he did not interview the plaintiff at any stage. According to him, he and Matinise found the plaintiff shouting at the community members. The community members were not violent at all. George spoke only to the wife of the plaintiff about a need for her to be placed at a place of safety for the reason that Mazaza, Oliver and Toto wanted to shoot and kill the plaintiff. But the offer was refused. On return to the police station the docket on the criminal charge of unlawful possession of a firearm was opened against the plaintiff. Thereafter, he and his colleagues returned to the plaintiff's homestead and found it burning and the plaintiff's wife dead. When asked about a search for Mazaza, Oliver and Toto he stated that the search was deferred to the investigators for consideration. As regard the time lines for his actions on 11 August 2016 he told the court that he and the members of his group reached the plaintiff's homestead at 5:30 pm; returned to the police station at 6:20 pm; and that upon receiving information about the destruction of the homestead, they got back to the homestead at 7 pm. According to George the unlicensed firearm was found near the fence of the plaintiff's homestead.
- [18] The evidence of the witnesses is mutually destructive on some material respects such as the reason why the police visited the homestead of the plaintiff, what the plaintiff was found doing in the village, whether the police responded to the plaintiff's complaint, and what the preventive measures were taken to anticipate the attack against the plaintiff's homestead, his wife and children. An assessment of the credibility of the witnesses became necessary.
- [19] The evidence of the plaintiff is straight forward in my view, and it is confirmed by Abulele. There is no need to repeat that evidence. I accept that Mazaza, Oliver and Toto together with some community members entered into the homestead of the plaintiff in his presence, his wife, Abulele, Yonela and her baby and Imange. They pointed guns at the plaintiff and fired shots threatening to kill him therewith as they were unhappy about local issues concerning business operations. The three assailants had a crowd of people behind them who had made common cause with the assailants. The members of the community were also armed with weapons that were brandished openly whilst they were inside and outside the precincts of the homestead. Part of the crowd

was on/near and around the road that was adjacent to the homestead. Thwarted by gunshots that did not land on the plaintiff, the

malfunctioning of Mazaza's firearm, the defensive efforts of the plaintiff using a spear and an unlicensed firearm that Toto had dropped to the ground and picked up by the plaintiff; and the telephone made by the plaintiff openly to summon the police for

intervention purposes the attack ceased, albeit temporarily as Mazaza, Oliver and Toto issued threats that they would re-launch the attack. Those three leading assailants drove-off in a motor vehicle leaving the crowd of people camping near the homestead.

[20] The reason advanced by Matinise that he did not have information that the three identified assailants had issued a warning that they would re-launch the attack is improbable, given that Captain Dlulisa who was accessible to Mr Matinise at the Police Station told Ms Ntakana that Mazaza, Oliver and Toto were mentioned by names as the people who had put the plaintiff under attack. Therefore, the reason for the police trip to the plaintiff's homestead would not have been missed by Matinise. In any event, as a policeman he would be expected to enquire from Captain Dlulisa what the complaint of the plaintiff was that required a police response at Sigangala Administration Area that was situated at a distance of 50-55 kms away from the police station. In my opinion Matinise was disingenuous in expecting this Court to believe that he did not know that he and his colleagues had been called upon to arrest and take into police custody the three assailants who had invaded the homestead of the plaintiff in order to prevent the deadly attack. The evidence that it was sufficient for the police to merely arrest and remove the plaintiff from his homestead on the face of deadly actions and threats made by the three men in company of a crowd of people, and without ensuring that the wife and children of the plaintiff together with the homestead were given protection, is outrageous in my view.

[21] Acting in negligent avoidance of knowing the reason for police presence at the homestead Matinise inexplicably decided to focus attention on the unlicensed firearm for which he ordered the arrest of the plaintiff. Equally outrageous is the evidence of Matinise that he knew of no threats and the crowd of people he encountered in the village posed no threat to the safety of the plaintiff and his family. Had he wanted to know about the threats he would have spoken to Ms Ntakana who interviewed the plaintiff on his directives. The close proximity that Matinise claimed to have existed between him and George when George was speaking to the plaintiff's wife makes his version astounding. According to Matinise, although he was present with Mr George at the homestead he did not talk to the wife of the plaintiff about the issue of her safety. Yet the discussions on the issue of safety would have taken place in close proximity of George. And conveniently so, George told the court that he was the person in charge of the crime scene so that the responsibility to account for the policing error committed at the plaintiff's homestead was defused. In any event, the allegations that a search was conducted near the bushes and in the area of the River; Matinise spoke to Captain Dlulisa about the addresses of the suspects and that George offered safe accommodation to the plaintiff's wife are sufficient to dispel any misunderstanding that may have been caused to Matinise and George that they had a legal duty to protect the plaintiff and his properties against criminal attacks.

- [22] The evidence of Matinise and George concerning plaintiff's possession of an unlicensed firearm does not tally. Matinise testified that upon arrival at the scene he found the plaintiff standing on the road and leaning against the firearm. George told the court the firearm was recovered inside the premises of the homestead and placed near the fence. This is a material contradiction in the sense that Matinise sought justification for having focussed on unlawful possession of the firearm in order to undermine the seriousness of the attack against the plaintiff that warranted attention in my view. So these witnesses misled the court. The evidence that a search for the three suspects was made is untrue. It escapes me how the search for people who were well-known to the plaintiff, not the police, could have been pursued so far away without consulting the plaintiff.
- [23] Matinise could not have conducted a search for the assailants between 8 pm and 10 pm because according to him he returned to the police station at 7 pm to lock-up the plaintiff in the police cell. He having returned to the homestead before 8 pm to inspect the fire damage at the homestead, he would not have had time to conduct a search and conduct patrol in the area of Kei River.
- [24] The evidence of George that the plaintiff shouted at the crowd using vulgar language was never put to the plaintiff. Neither was it confirmed by Matinise. The allegation made by George that the police had an action plan for an appropriate response to the looming second attack was disingenuous because he was unable to show it when asked to do so. He also failed dismally to give the name and address of the safe accommodation that he offered to the wife of the plaintiff; which suggested that the police were never prepared for a successful intervention.
- [25] In argument it was submitted on behalf of the defendant that the evidence of Mr Matinise and Mr George was reliable and consistent in all respects by reason that the police reacted quickly to the plaintiff's report that he was under attack; the community members were not violent nor threatening on the day and dispersed when ordered to do so; the plaintiff had to be arrested for possession of an unlicensed firearm; the plaintiff's wife was offered a place of safety; the plaintiff never requested that the police attend to his wife's safety when he was at the police station. To the extent that I have analysed the credibility of the witnesses I do not agree with these submissions. The approach to the conflicting versions in compliance with the test as stated in the case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA), leads me to a finding that on the disputed issues the defendant's witnesses are not credible, their evidence is unreliable and their version of events is not probable. Therefore, the evidence of the plaintiff and his son is the credible version of events that unfolded on 11 August 2016.
- [26] On another front, the attack is launched against the pleadings of the plaintiff; it being submitted that the material facts that there was a threat that required the attention of the police was not pleaded. As a result, the plaintiff's case that the defendant breached a duty of care towards the plaintiff cannot be upheld. I do not agree with this attack because on the proved facts there was an invasion into the homestead by Mazaza, Oliver and Toto with a

mob behind them, followed by the departure of those three assailants on the word that they would come back to the homestead to finish off what they had already started. George acknowledged the existence of a threat. However, the police failed to provide an appropriate response despite knowledge of the threats. The issue that a threat existed was pleaded by the plaintiff in the particulars of claim. It was also fleshed out

in the evidence when the plaintiff and Abulele testified.

[27] The wrongful conduct of omissions on the part of Matinise and George is actionable if, as stated in the case of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B, it evokes moral indignation, and the legal convictions of the community require that it should be regarded as unlawful. In the circumstances of this case, the convictions of the community is informed by the norms and values of our society underlining our 1996 Constitutional dispensation. Since the nature of omissions in this case implicate breach of the plaintiff's constitutionally protected rights to human dignity, to life and to his security the defendant as an organ of state had a legal duty to protect the plaintiff. The failure on the part of Matinise, George and their colleagues to take reasonable steps to prevent the assailants from attacking the plaintiff takes the enquiry to the question whether a reasonable person in their position would foresee that the failure to prevent Mazaza, Oliver and Toto from returning to the homestead as threatened would possibly result in harm to the plaintiff, but still failed to take reasonable preventive steps.

[28] It is timely for the court to decide if the negligent omissions on the part of Matinise and George render the defendant liable for the damages as claimed by the plaintiff. In determining liability the plaintiff is not required to prove that the wrongful conduct of the policemen amount to fault. The court has to apply the classical test as adumbrated in the case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. It reads:

"For the purposes of liability culpa arises if -

- (a) a diligens paterfamilias in the position of the defendant-
- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps."

[29] Nugent JA in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441 states that the inquiry of factual causation engaged in to establish negligence is not finally determinative of the issue of liability without proof that such negligence was a cause of the plaintiff's loss. In amplification, the learned Judge of the Supreme Court of Appeal sated as follows in para 24:

“In International Shipping Co. (Pty) Ltd v Bentley at it was pointed out by Corbett JA that causation involved two distinct enquiries. The first enquiry is whether the wrongful conduct was a factual cause of the loss. The second is whether in law it ought to be regarded as a cause. Regarding the first enquiry he said the following:

“The enquiry as to factual causation is generally conducted by applying the so-called “but-for” test, which is designed to determine whether a postulated cause can be identified as a cause sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; inter alia, if it would not have ensued.”

- [30] In this case the causal connection between police negligent omissions and the loss suffered does exist if one has regard to the fact that had the police intervened in an appropriate manner in which the police normally do when confronted with the task of preventing a commission of crime, the loss would not have occurred. Had the police formulated and implemented a clear plan of action the loss could have been prevented. A search for Mazaza, Oliver and Toto was, on the facts, never done. The police witnesses did not engage the community members meaningfully. It seems to me that the police abandoned the reason for which they were summoned to the plaintiff’s homestead; thus exposed him, his wife, children and properties to the loss that was ultimately incurred. In the present case had the policemen conducted search and patrols in and around the homestead of the plaintiff in anticipation of the return of Mazaza, Oliver and Toto the damage would never have occurred. The claim, made ex-post facto, that lack of capacity on the part of the police of Centane failed the defendant falls to be rejected.
- [31] The facts and circumstances of this case demonstrate that the causal link between the wrongful conduct of the police and the loss caused by it is sufficiently close to justify the conclusion that the defendant is on the balance of all probability liable to compensate the plaintiff for the losses he incurred on 11 August 2016.
- [32] On the consideration of the facts and circumstances of this case, the defendant has been proved to be vicariously liable for the negligence of the employees of the SAPS. The costs of the trial on the determination of the issue of liability must be paid by the defendant.
- [33] In the result the following order shall issue:
1. The defendant is held vicariously liable to pay the plaintiff such sum of damages as may be proved at the trial dealing with a determination of the issue of quantum.
 2. The defendant shall pay plaintiff’s costs of suit to date of hereof.

3. The defendant shall pay interest on the aforesaid costs at the current prescribed legal rate of interest from date of allocatur or agreement to date of payment thereof.
4. The hearing on the issue of quantum is postponed sine die.

Z M NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA.

Attorney for the applicant : Adv. M. Jozana

Instructed by

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: The State Attorney

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