

SOUTH AFRICA / JUDGMENT

Vinger v Minister of Safety and Security (33574/11) [2020]

ZAGPPHC 714 (23 November 2020)

[2020] ZAGPPHC 714

COURT

North Gauteng High Court, Pretoria

BEFORE

MH Mabena

CASE / FILE NUMBER

33574/11

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(NORTH
GAUTENG, PRETORIA)
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.
11/11/2020
CASE
NUMBER: 33574/11

In the matter between: MDANESE
ERNEST
VINGER
PLAINTIFF
and
MINISTER
OF SAFETY AND SECURITY
DEFENDANT

JUDGMENT

MABENA AJ:

1.

The Plaintiff in this action claims for damages based on injuries he suffered as a result of being shot on the right knee by a member of the Defendant. The Plaintiff as set out in the amended particulars of claim, seeks damages in the sum of R3 400 000.00 (Three million and four hundred thousand Rands) made up as follows:

1.1 General damages in respect of pain and suffering arising

R350 000.00

1.2 General damages in respect of deprivation of freedom and impairment of dignity and loss of income.

R250 000.00

1.3 Past and future loss of income.

R1 800 000.00

1.4 Special damaged in respect of future psychological counselling for emotional shock and future medical expenses.

R1 000 000.00

2.

In the particulars of claim, the plaintiff avers that:

2.1 On 21 November 2010 and at Extension 6, Soshanguve, while he was standing at the gate of this premises, a shot was fired at him by a member of the Defendant. He sustained gunshot wound on the right knee and, as a result thereof;

2.1.1 He was hospitalised for two months at George Mokgari Hospital. This rendered him incapable of walking for a period of 3 months;

2.1.2 At all material times he was employed as security guard at Tighget Security Services. He lost his employment as he was unable to render services to his employer.

3.

The Plaintiff alleges that this shooting was unlawful because the member of the Defendant discharged the fire arm which resulted in the Plaintiff sustaining a gunshot wound, did not suspected the latter of having committed any offence.

4.

THE DEFENDANT'S PLEA:

4.1 On behalf of the Defendant, it is pleaded that a member of the Defendant allegedly discharged his firearm in self defence, due to a threat of an unlawful attack that was directed at him and the property of the Defendant.

4.2 That the action of the member was no more harmful than necessary to ward off that alleged attack.

5.

ADMISSIONS MADE ON BEHALF OF THE DEFENDANT

The Defendant admits that:

5.1 A shooting incident occurred on 21 November 2010 at 13h30 at Soshanguve Extension 6;

5.2 A member of the defendant discharged a firearm in order to protect his life and the property of the state;

5.3 That the shot in question was fired by the member of the Defendant with the express purpose to protect his own life and the life's of his crew, as well as protection of the property of the Defendant;

5.4 Alternatively

A firearm was discharged in a state of necessity, due to an alleged unlawful attack on his bodily integrity and property of the Defendant and that the attack was no more harmful than necessary to ward off the attack.

6.

COMMON CAUSE FACTORS

It is common cause and the parties agree that:

6.1 A shot was fired;

6.2 By a member in the employ of the South African Police Services;

6.3 The shot was fired by the member with the express purpose of protecting his own life and the life's of his crew, as well as protection of the property of the Defendant.

7.

At the commencement of the trial, the parties, by agreement, moved for an order of separation of merits and quantum. I considered same and granted the order.

8.

I also heard and considered argument on the question of Onus and the right to begin. I considered same and ordered that the Onus rest on the Defendant to prove the grounds of justification of the assault and consequently, bears the right to begin.

Evidence led by the Defendant.

8.1 CONSTABLE SHOSHA

8.1.1 Briefly, Constable Shosha testified that he is a member of Defendant and that he was on duty as driver in the official police van with Constable Lehomo as a member of his crew, on the date in question.

8.1.2 They were patrolling at Ext 6, an informal settlement in Soshanguve, with instructions to arrest people who were found gambling and drinking alcohol in public.

8.1.3 His evidence on the material issues is that, they found a group of men gambling. They confiscated the gambling board, and destroyed the plastic structure that was used as a shade by the suspected gamblers. A group of suspected gamblers who had initially ran away, returned to the scene bearing stones and iron bars threatening to attack Constable Shosha and his colleague.

8.1.4 Both him and Lehomo retreated to the police vehicle.

8.1.5 On their return to the police vehicle, a group, about 6 meters away from him, started throwing stones at the police vehicle.

8.1.6 He instructed his colleague, Constable Lehomo to call for backup.

8.1.7 He attempted to arrest one of the men for suspected gambling. He was then surrounded by a group of about 14 men, who hurled insults at him and his colleague.

8.1.8 These men wanted to surround him, brandishing iron bars and stones, and swearing at him, he feared for his life

8.1.9 During the struggle with the men he sought to arrest, he then felt one of these men grab his official firearm, which was contained in the holster, on the right side of his waist. He then pulled out his fire arm and pointed it at 45 degrees angle aimed to the ground, and fired a shot.

8.1.10 He testified that he did not aim the firearm at anybody in particular. He alleged that, the idea was to scare the group away so that he can take cover into the police vehicle.

8.1.11 He denied that he shot at the Plaintiff directly.

8.1.12 He finally, after the incident proceeded to lay charge of assault common, malicious damage to property and interference with a police

officer's duty, against the suspected gamblers at the police station, shortly after the incident.

9.

9.1 TESTIMONY OF CONSTABLE LEHOMO

9.1.1 She confirms that she was a crew member in the company of constable Shosha.

9.1.2 She testified that she is the one who called for backup when the vehicle and the vehicle was being stoned by members of the community.

9.1.3 She testified inter alia, that:

9.1.3.1 The bakkie was pelted with stones before the gunshot was fired.

9.1.3.2 She alighted from the vehicle only after she heard the gunshot.

9.1.3.3 It took about 4 minutes from when Shosha instructed her to call for backup to when she heard the gunshot go off it was 4 minutes.

9.2 TESTIMONY OF SGT NKGWATAU

Sergeant Nkgwatau arrived at the scene after the shooting incident. His evidence does not impact on the contentious issue in this matter.

Evidence led by the Plaintiff.

9.3 MDANESE ERNEST VINGER:

The Plaintiff's evidence can be summarised as follows: The Plaintiff testified that:

9.3.1 On 21 November 2010 the Plaintiff returned from work. He went home to deliver his belongings and he then proceeded to a place known as Ext 6, to a tavern known as James Tavern.

9.3.2 He arrived at the tavern and ordered one 750ml of Hansa beverage. He started drinking the alcohol. He was in the company of one Frans.

9.3.3 Whilst halfway on the second bottle of alcohol, two police vans appeared in the street.

9.3.4 At the same time there was a group of men who were busy gambling next to the adjacent property. These men, upon sight of the police vans, fled the scene in different directions. The police van stopped and confiscated the gambling board, on which the boys were gambling on, destroyed it and drove away.

9.3.5 These men then returned to the gambling scene and brought along another gambling board. After a short while, a police van returned once more to the scene. These men dispersed and ran in different directions again.

9.3.6 The Plaintiff then said he became curious. He stood up from where he was seated, walked up to the front gate to witness what was happening. When he approached the gate, he saw indeed that the men were running away from the police. He stopped at the gate and looked on.

9.3.7 A police officer alighted from the police van, produced a firearm and shot at him point blank on his right knee.

9.3.8 He fell on the ground and he saw a member of the Defendant walking towards him.

9.3.9 He then heard noise of people yelling whilst he was still in that position on the ground, another male police officer came to him.

9.3.10 He was then assisted into the police vehicle. He was taken to George Mokgari Hospital in Ga Rankuwa.

9.3.11 He testified that he did not know why the police officer shot at him.

9.3.12 He testified that he did not pose any threat to the police officer.

9.3.13 He also testified that he did not form part of the group of men who were suspected of gambling on that day.

10.

The evidence of Constable Shosha and Sergeant Nkwatau follow each other so closely, to inspire a conclusion it was contrived and rehearsed, in order to justify the shooting. The evidence bears the following:

10.1 It contradicts common cause factors and proven facts.

10.2 It is calculated to sustain a defence of selfdefence notwithstanding the evidence of constable Shosha that, when he fired the shot, his firearm was pointed at 45 degree angle and aimed at the ground.

10.3 It ignores that the bullet penetrated the Plaintiff in the front part of his right knee. This is consistent with the plaintiff's evidence that he was standing in the gate facing the police when all the men were running for cover. So he was facing the shooter.

10.4 His back was not turned to constable Shosha when the shot was fired. Like the rest of the man who were running away , hence the bullet penetrated in the front part of the knee.

10.5 Constable Shosha testified that he fired that shot at a 45 degree angle into the ground. However, none of the men who surrounded him sustained a bullet injury despite his proximity to them. This is highly improbable.

11.

The Plaintiffs evidence is clear as to the position where he was standing when he observed the commotion that was taking place before and after the shooting incident by a member of the Defendant and a group of suspected gamblers. His evidence of the shooting is consistent with the facts. There is no reason to doubt his testimony. It accords with the evidence that he was shot while standing at the gate of the premises aforesaid. He was not posing any threat to any members of the Defendant.

12.

Therefore I reject the evidence of the Defendant out of hand. The Defendant, failed to discharge the onus which rest on him to prove justification of the assault.

13.

Be that as it may, the following issues on selfdefence and the defence of necessity further presents difficulties to the Defendant.

13.1 The requirements for selfdefence or private defence are, inter alia, as follows

- (a) The attack must consist of a human act;
- (b) The attack must be wrongful, in that it must threaten or violate a legally protected interest without justification;

13.2 The defendant, in the closing argument, conceded the sustainability of the defence of self defence. The defendant conceded that the defence was unsustainable because there's no evidence that the shot that was fired by a member of the Defendant, was actually aimed at the attacker, in this case, the Plaintiff as required in law.

13.3 Constable Shosha testified that he pointed the fire arm on the ground at±: 45 degree.

13.4 Clearly the shot that was fired was not aimed at the Plaintiff. And also Plaintiff was not part of the group of suspected gamblers whom, as evidenced, surrounded constable Shosha.

13.5 In the circumstances, the defence of selfdefence was correctly conceded and abandoned during argument by counsel for the Defendant.

13.6 However, this defence has its own intricacies. Further analysis of the evidence of the witnesses in respect of the evidence that relates to selfdefence, pales into insignificance in the light of the concession made on this Defendant. Doing so will amount to an exercise in futility.

13.7 Upon concession on the defence of selfdefence by the Defendant, the defendant sought to rely on the alternative defence of necessity. which defence was introduced by the Defendant in the amended Defendant's plea.

14.

14.1 Except for naming the Defence of Necessity in the amended plea, the Defendant did not plead any material facts required and essential, in the plea of necessity as traversed below.

14.2 Rule 22 of the Uniform Rules of Court prescribes the following, in regard to pleading that a Defendant:

" Shall in his plea either admit, or deny or confess and avoid all the material facts alleged in the combined summons... or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all the material facts upon which he relies".

14.3 With regard to the defence of necessity, the material facts that requires to be pleaded implies some positive averments. In light v Minister of Safety and Security (469/2009)

[2019] ZAECBHC 21 (29 October 2019) at para 22, Makaula J explains,

"When a plea is a simple denial there is usually no necessity for the defendant to plead or state any facts, as the defendant is based on negating the plaintiff's allegations. The necessity to state the material facts to be relied on does, however, arise when the denial implies some positive allegation on which the defendant intends to rest the defence"

14.4 In casu, the Defendant failed, inter alia to allege and prove positive averments of justification, in line with the onus that rests upon it in either selfdefence or defence of necessity. Both these defences requires positive allegations on those the Defendant intends to rest the defence.

14.5 In the circumstances, I'm of the view that no onus is discharged by the Defendant in respect of the defence of selfdefence or the defence of necessity. Therefore the shooting by a member of the Defendant on the Plaintiff was unlawful.

14.6 The Defendant failed to discharge the onus in respect of justification on either selfdefence or necessity.

15.

Regard being had of the above, the Defendant is liable to pay 100% of the plaintiff's proven or agreed damages.

In the result the following order is made:

1. Judgment is granted in favour of the Plaintiff against the Defendant.
2. The Defendant is ordered to pay 100% of the plaintiff's proven or agreed damages.
3. The defendant is ordered to pay the Plaintiff's costs on a party and party scale.

MH MABENA

ACTING JUDGE

NORTH GAUTENG HIGH COURT PRETORIA

ATTORNEYS FOR PLAINTIFF

236 Paul Kruger Street

5th Floor, Suite 510512

Standard Bank Chambers

PRETORIA

Adv K.K Kekana

ATTORNEYS FOR DEFENDANT

The Sate Attorneys

Salu Building

255 Schoeman Street

CNR. And ries and Schoeman Street

Adv M Botma

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Prepared on 10 October 2026 · Esheria