

SOUTH AFRICA / JUDGMENT

Xuma v Minister of Police (2484/2021)

[2024] ZAFSHC 124 (25 April 2024)

[2024] ZAFSHC 124**COURT**

Free State High Court, Bloemfontein

BEFORE

Gusha, AJ

CASE / FILE NUMBER

2484/2021

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IN
THE
HIGH
COURT
OF
SOUTH
AFRICA
FREE
STATE
DIVISION,
BLOEMFONTEIN

Reportable:

YES/NO
Of
Interest to other Judges: YES/NO
Circulate
to Magistrates: YES/NO
Case
no. 2484/2021
In

the matter between:

SIYASANGA
OKO XUMA
Plaintiff
And
MINISTER
OF POLICE
Defendant
HEARD

ON: 28
FEBRUARY;
1
AND
3
MARCH;
13,
14,
15
JUNE
2023 AND 16-17
JANUARY 2024. HEADS
FILED ON 02 FEBRUARY 2024 AND 12 FEBRUARY 2024.

JUDGMENT

BY: GUSHA, AJ

DELIVERED ON: 25 APRIL 2024

- [1] In this action the plaintiff claims damages in the amount of R1 150 000.00 arising from an incident wherein he lost his right eye as a result of an alleged shooting at the instance of members of the South African Police Service (the police) there and then acting within the course and scope of their employment with the defendant.
- [2] It is the plaintiff's pleaded case that on the 21st June 2020 in Bronville Welkom, he was shot with a rubber bullet in his right eye, allegedly by an unidentified police officer. He avers that the injury he sustained was wrongful and was caused by the sole and exclusive negligence of one or more of the employees of the defendant.[1]
- [3] For its part the defendant denies that its employees shot the plaintiff as alleged.[2] Subsequent to the plaintiff testifying, the defendant brought a successful application in terms of Rule 28 (1) to amend its plea. [3] The amendment had the effect that during trial, the defendant pleaded in the alternative that in the event that the court finds that the plaintiff was shot by employees of the defendant the plaintiff;
- (a) voluntarily assumed the risk of injury; knew or alternatively foresaw that rubber bullets would be fired by employees of the defendants on the day of the incident;
 - (b) knew the risks involved in him not taking reasonable steps to avoid being struck by a rubber bullet in the circumstances that prevailed at the time (the risk being that he could be seriously injured by a rubber bullet);a
 - (c) appreciated the extent and ambit of the risk of harm; and
 - (d) by his conduct or omission, consented to the risk of being injured.

- [4] The parties agreed to separate the issues and defer quantum for later adjudication. Accordingly this court is solely called upon to adjudicate the merits of this matter.
- [5] In support of his claim the plaintiff, in addition to his evidence, proffered the evidence of Messers Mohlabane Modise and Zinikele Tappur who were both in the presence of the plaintiff at the time of the alleged incident. In addition to the viva voce evidence the following exhibits were tendered during the trial;
- (a) Exhibit A (photographs mainly depicting Mr Modise's house, the plaintiff and where his location at the time of the alleged shooting)[4]
 - (b) Exhibit B (manually drawn up sketch of the scene)[5]
 - (c) Exhibit C (Google Map)[6]
 - (d) Exhibit D (J88 detailing the injury sustained by the plaintiff)[7]
 - (e) Exhibit E (Plaintiffs statement)[8]
 - (f) Exhibits F and G (Maps)[9]
 - (g) Exhibits H1-H6 (SAPS video footage displayed in court which in essence depicted the events as they played out at the scene, noteworthy from the footage is that there were clearly at least 2 Nyala's at the scene, during one of the video's shown in court
 - (h) Exhibit I (blue rubber bullets displayed in court).
- [6] The defendant proffered the evidence of 2 witnesses; Warrant Officers Francois Schutte and Joseph Booï who are both employees of the defendant and were on duty and present at the scene in their official capacity.
- [7] I pause here to make the following remarks; at the tail-end of these proceedings, the defendant brought an application to tender the evidence of an expert witness. The plaintiff opposed this application on the basis that the expert report was out of time having only been delivered on the 2nd June 2023 at which point the plaintiff's case was already closed. I dismissed the application. In dismissing the application I was fortified by the fact that no application for condonation was brought by the plaintiff.[10] It needs no restating that such applications are not there for the mere taking, it is an indulgence that a litigant seeks from the court. Furthermore, I was fortified by the following remarks in Mokhethi and another v MEC for Health, Gauteng 927522/2011) [2013] ZAGPJHC 227

"It is further trite law that the rules regarding expert notices are to be complied with not necessarily in sequence. It is not for the defendant to wait and see if the plaintiff is going to call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its own benefit".[11]

[8] Lastly on this aspect, in my view the defendant adopted a hum and haw approach as evinced firstly by the amendment of the pleadings at the stage when same was effected and now seeking to tender the evidence of its expert witness without so much as seeking an indulgence from this court. Unfortunately for the defendant, that strategy, if that ever was, redounded to its own disadvantage.

[9] I now turn to deal, succinctly, with the germane facts in this case. The plaintiff testified that on the day in question he drove to Mr Modise's property, situated at Hani Park Bronville Welkom,[12] in a vehicle the two were supposed to effect repairs on. On the said day he discerned that there was an extant protest action in the area, some distance from Mr Modise's property. At Mr Modise's property and whilst working on the vehicle outside in the yard, he saw two police Nyalas[13] driving up and down. He also observed that some of the protesters would place stones and rocks on Erfdeel Road and that whenever a Nyala would approach, the protesters would scatter and run away.

[10] At some point, prior to being injured, he observed some youths standing near Mr Modise's house, some lying under shrubs close to the trench in the passage between the houses[14], and others running from Erfdeel Road into the passage. He continued to go about his business.

[11]

Whilst working on the vehicle, he heard children screaming and crying, when he turned to check what the noise was about, he felt something strike and enter his right eye and immediately water came out of it. He was taken into the house and eventually taken to the hospital for medical treatment. During and after treatment, the medical personnel informed him that a blueish marble shaped rubber bullet that was lodged in his right eye cavity was removed. Same was shown to him, he was however not permitted to take it home.

[12] After his discharge Mr Modise provided him with 2 identical rubber bullets which were later displayed in court during the trial.

[13] Mr Madise testified and largely supported the evidence of the plaintiff with regards to the presence of the plaintiff at his home and the reasons therefor. He testified further that whilst they were working on the vehicle, he heard a shot and looked towards Erfdeel Road in order to ascertain and observed an armed police officer in the Nyala with his weapon aimed at the protesters standing about near his house. Shortly thereafter a second shot rang and he observed the plaintiff falling and realised that the plaintiff was injured in his eye. He took the plaintiff to hospital and after the incident, in fact on the same day, he picked up 2 rubber bullets, one in his yard and the second outside his gate.

[14] Mr Tappur testified and largely also supported the version of both the plaintiff and Mr Modise with regards to the circumstances leading up to the plaintiff's injury. He testified that he was not involved with the vehicle as he busied himself with his laundry. Whilst doing his laundry he observed a Nyala patrolling up and down the main road and some protesters

(children as he called them) pelted the Nyala with stones. As and when the Nyala would approach, the protesters would disperse and run in different directions, with some running towards the passage and some towards Mr Modise's gate. At some stage the Nyala came to a standstill and that is when he heard shots being fired from the Nyala towards the protesters who were in the passage and towards those who stood about near Mr Modise's gate. After the first shot was fired, he reprimanded the protesters who were near the gate and at that stage he then heard a second shot ring. It is his evidence that he could observe all of this as the Nyala was at a standstill and its door open. He further observed that the police officer who fired the shots was an African male. Subsequent to the second shot, he observed the plaintiff fall to the ground and he then realised that the plaintiff was injured and he observed that the latter was bleeding and some watery substance oozed from his right eye. Mr Modise later took the plaintiff to hospital.

- [15] Albeit all the witnesses were extensively taken through cross examination, the evidence as presented by the plaintiff and his other witnesses was not seriously taken issue with. Save to quibble with the number of the Nyalas on the scene and the conduct of the protesters, the evidence for the plaintiff was left largely uncontroverted. What is, perhaps, illuminating is that throughout the cross examination, at no stage did counsel for the defendant put to the witnesses that none of the servants of the defendant were responsible for the injuries the plaintiff sustained. Instead much was made of the fact that the plaintiff and, indeed, his witnesses knew or ought to have known that during a protest action police officers use rubber bullets.
- [16] The above was the sum total of the plaintiff's evidence. I now turn to deal with the evidence led for the defendant.
- [17] Warrant officer Schutte, a police officer with some 36 years of experience and at the time stationed at the Public Order Policing Unit (POP) and a reservist commander, succinctly testified that on the day of the protest he (as the driver) and his crew were deployed to Bronville to conduct crowd management services as there was an extant protest action. As part of his crew were Captain Dlamini, Warrant Officer Gerber and Sergeant Skosana. Upon their arrival they remained stationed at the 4-way stop. A while later, a crowd emerged and barricaded the road and pelted them with stones. He and Captain Dlamini threw stun grenades at the crowd who dispersed in different directions. Subsequent to this, they remained stationed at the 4-way stop. Approximately 2 hours later they observed a crowd who were attacking[15] a municipal garbage truck. Captain Dlamini fired rubber bullets at this crowd. A few minutes later Sergeant Skosana fired 6 14mm CS[16] rounds at the crowd who once more dispersed in different directions.
- [18] Noteworthy of his evidence is that from the moment of their arrival in Bronville, their Nyala remained stationary at the 4-way stop which intersects at Erfdeel Road. Differently put, their Nyala was nowhere near Mr Modise's home.

- [19] During cross examination, Warrant officer Schutte conceded that owing to the locale their Nyala was at, he did not witness the incident involving the plaintiff. When shown the blueish rubber bullets entered into evidence, he readily admitted that same were fired from a 12-gauge Muster shotgun issued to and used by police officers. He however could not say with certainty whether those shown to him were fired on the day by the police. He proffered that same could have easily have been ascertained via a reconciliation of the SAPS 15[17] and incident registration information system (IRIS) report.
- [20] Warrant officer Booï testified that he is a police officer with 33 years' experience also attached to the POP unit. He largely supported the evidence of Schutte with regards to when and why they went to Bronville. He further supported the evidence of Schutte with regards to the action they took when some of the protesters threw stones at their Nyala and barricaded the road. Where there is some divergence in their evidence, contrary to Schutte, Booï testified in cross examination that at some point he observed a second Nyala on the scene. What is also noteworthy of his evidence is that he identified the officer in the video footage aiming a rifle at the protesters as Sergeant Ramatheletse. He distinctly recalled that rubber bullets were fired by Captain Dlamini and one Warrant Officer Tshwane both from Schutte's crew.
- [21] During the trial the court had occasion to view video footage of the scene as well as the goings on the day. The footage shown greatly assisted the court in understanding the evidence led. I however hasten to add that in none of the footage shown in court does one ever discern the alleged shooting of the plaintiff. What one however sees are the protesters on Erfdeel Road, the debris on said road, 2 Nyalas driving up and down on said road as well as a number of police officers, some of whom are armed with rifles.
- [22] From the evidence proffered as well as the video footage, it is clear that on that fateful day 2 Nyalas were on the scene. From the footage shown, I could clearly discern 2 separate Nyalas and an African male police officer, who was later identified as warrant officer Towa engaging with the crowd. As per the evidence he was not part of Warrant Officer Schutte's crew nor did he at any stage during that day ride in the Nyala driven by Schutte.
- [23] At the point when Towa engaged with the crowd, I could not discern any stone throwing or active barricading of the road, save for the protesters shouting and howling, I could not at this point, and I daresay beyond, discern any conduct which had the effect of endangering life and limb. Whilst the protesters are being addressed by Towa, the first shot is fired by an unidentified police officer, the crowd disperses, thereafter a second shot is fired, it is only at this stage that I observed that some in crowd threw stones at the police officers and then a 3rd shot was fired.
- [24] It is also noteworthy that neither Towa, Ramatheletse, Tshwane nor any of the other police officers who were in the second Nyala and thus on the scene were called to testify.

- [25] In my view the failure to call Warrant Officer Towa or any of the defendant's employees deployed the second Nyala to testify about the movement, activities and role played by the second Nyala is material, and fatal to the version that none of its employees fired the shot which ultimately injured the plaintiff. No explanation was furnished by the defendant for this failure. Accordingly in view of the importance and, or, clarity of this or these witness(es) might have provided the court, I must as a matter of course draw an adverse inference from the failure to call them.[18]
- [26] In view of the foregoing, it is my considered view that on a balance of probabilities, the most plausible inference to draw, in the absence of direct evidence, is that the plaintiff was struck in the eye by a rubber bullet fired by one of the police officers on the scene. This finding is fortified by the fact that at no stage during the proceedings did the defendant imply that the injury sustained by the plaintiff may have been caused by something else. Not even the statement put to the plaintiff, that regard being had to the distance between Mr Modise's house and Erfdeel Road, as postulated by the plaintiff, it was improbable that the plaintiff would have been hit by a rubber bullet, was sufficient to redeem the defendant's case on this aspect. The difficulty the defendant faces with the statement put to the plaintiff is that it did not proffer any expert opinion on this aspect so as to assist the court to arrive at the conclusion it sought to make.[19]
- [27] In view of the conclusion I reach above, I now turn to determine whether the actions of the employees of the defendant were wrongful. It is established law that not every act or omission resulting in harm is actionable, in order to attract liability, the act or omission, by another, resulting in loss or damages must be wrongful.[20] It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.[21]
- [28] In instances of harm resulting from positive conduct, such conduct is *prima facie* wrongful. To say that conduct is "prima facie wrongful" means that to prove the fact of conduct alone is sufficient, absent indications to the contrary, to establish wrongfulness. In other words, wrongfulness need not be positively established by the plaintiff; wrongfulness is presumed, but may be rebutted by the defendant.[22]
- [29] In the present matter the facts are predicated on a positive act by the police; the shooting; which resulted in the plaintiff losing his right eye resulting in the infringement of his bodily integrity. The onus accordingly shifts to the defendant to rebut the presumption of wrongfulness. As stated earlier in this judgment, the defendant belatedly introduced the defence that the plaintiff was volens. It thus bore the onus to prove same. Whether the plaintiff in any particular set of facts was volens is a subjective fact based enquiry.[23]

[30] In relying on the afore-mentioned defence, the defendant has to prove that the plaintiff was aware of the risk of injury that notwithstanding he voluntarily undertook the risk.[24] Differently put, essentially what must be proved is that the plaintiff had knowledge of the risk involved, appreciated same and

lastly consented to the risk. It has been held however that, "knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent." [25]

[31]

In an endeavour to discharge the afore-mentioned onus the defendant's truncated submission is that the plaintiff was volens in that he knew that there was a protest action in the area, accepted and appreciated the risks associated therewith. Furthermore he expected rubber bullets to be fired on that day as police often used same during protest actions, he just did not expect same to reach where he was at the time. After the first short rang, instead of falling to the ground and or taking cover, like some of the protesters did, the plaintiff instead stood up to see what was going on.

[32] In support of these submissions the Counsel for the defendant relied on and referred me to *Lehlela v Minister of Police* [2023] 1 All SA 438 (WCC) a matter in which the plaintiff also lost an eye as a result of being shot by police with a rubber bullet .In my view this case is distinguishable from the matter before this court, in *Lehlela* on the proven facts, the court found that it was inconceivable that the plaintiff would not have heard shots being fired before leaving her home around 6.45am. On the established facts and inherent probabilities the crowd was far from docile as she claimed when she entered the area. While I accept that she would not willingly have proceeded to walk directly into the heart of the protest, on the probabilities she passed at least alongside the she passed at least alongside the protesters at a time when their assault on the SAPS members was well underway. In the present matter the plaintiff was nowhere near the protest, he was in a private property minding his own business, therein lies the difficulty for the defendant. I simply cannot agree with the submission by Counsel for the defendant that in the present matter the fact that the plaintiff was not part of the protest is of no moment, in my view that is the crux of the matter.

[33] A further difficulty that the defendant is faced with is that this defence as alluded to elsewhere in this judgment was raised belatedly. The plaintiff was not confronted with same thus the court did not have the benefit of his response thereto. In any event the defendant did not lead evidence to discharge the onus. I understand the defendant's argument to be that I must infer consent from the conduct of the plaintiff on the day; not taking cover when the first shot was fired. Albeit the plaintiff was aware of the protest and knew that rubber bullets are often fired during a protest, he was not prodded on whether he knew or ought to have known that same would be fired in his direction. I am not persuaded that on the proved facts the probabilities in this case favour such inference being drawn. At the risk of repetition, the defendant's tallest hurdle is that "knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent."

- [34] In my view the defendant did not discharge the onus, there is no evidence before this court that the plaintiff knew or even foresaw the risk that rubber bullets would be fired in his direction. This really in my view, is where it all ends with regards to the seminal requirements of consent the defendant ought to have met.
- [35] In the circumstances of this case I am satisfied that the actions of the police officer(s) were conclusively wrongful. I am however not persuaded that when the shots were fired the police specifically aimed at the defendant. If anything, regard being had to the fact that the protesters were fleeing in the direction of inhabited and unwallled dwellings[26], I am of the considered view that the police officers who fired the rubber bullets acted with total disregard for the safety of the community members who were not part of the protest, and their conduct was thus negligent.
- [36] The test for negligence is whether a reasonable person in the defendant's position would have reasonably foreseen harm befalling the plaintiff as a result of his conduct, and would have taken reasonable steps to prevent the harm. If so, the question is whether he took reasonable steps to avert the harm that ultimately occurred. The onus rests upon the plaintiff to prove negligence on the part of the defendant on a balance of probabilities.[27] The reasonableness of such conduct is assessed objectively. [28]
- [37] In the present matter the Kruger test would find application as follows;
- (a) the plaintiff must prove that a reasonable police official in the position of the defendant's employee would have foreseen the reasonable possibility that their conduct would injure the plaintiff; if so
 - (b) would take reasonable steps to guard against such occurrence; and
 - (c) the defendant's employee failed to take such steps.
- [38] This incident happened on a Sunday afternoon. In this regard the evidence before this court evince that the police officers who fired rubber bullets did so knowing very well that the area of the protest was in close proximity to residential dwellings. All of this leads one to only one plausible inference being drawn; the police officers should have foreseen, that in firing rubber bullets as they did and where they did, the real risk was that innocent bystanders could be injured by the rubber bullets. In these circumstances they ought to have sounded the necessary warnings so that those who participated in the protest, and innocent bystanders were aware that rubber bullets would now be fired. Certainly, in the footage that I viewed and the evidence led in court, no such warnings were sounded. In any event from the footage viewed, I am not at all persuaded that firing rubber bullets was the only measure available to the police to quell the situation. The footage clearly shows that every time the police fired tear smoke, the protesters dispersed. In my view the police could have employed less bellicose measures to control the crowd, as they had been doing prior the shooting incident. Warrant Officer Schutte testified that the use of shot guns during crowd management is a last resort. Nothing I saw in the video footage warranted the use of this last

resort, instead what I saw was the typical raucous behaviour of protesters; barricading roads and occasionally throwing stones at the police. To quell the situation, the police could have diverted traffic, dispersed the crowd by using tear smoke, as they did, and maintained their presence in the area until the situation normalised. In my view there was no justification to fire rubber bullets in broad-daylight and in close proximity to a residential area.

[39] In view of the conspectus of the evidence before me, I am satisfied that there is a causal nexus between the shooting and the injury sustained by the plaintiff. The wrongful conduct of the employees of the defendant was the most probable cause of the injury[29]. This much is skillfully conceded by Counsel for the defendant.[30] In *Minister of safety and security v Van Duivenboden* 2002

(6) SA 431 (SCA) at 25 the court held that;

"A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics."

[40] In conclusion, on a conspectus of the evidence I am satisfied that the plaintiff has, on a balance of probabilities, passed muster of the onus.

[41] Accordingly I make the following orders;

1. The defendant is liable for 100% of the plaintiffs' proven or agreed damages.
2. The defendant is ordered to pay the costs which costs shall include the cost of 1 counsel.
3. The determination of quantum is postponed sine die.

NG GUSHA, AJ

On behalf of the plaintiff Adv. HJ Van Der Merwe Instructed by: Honey Attorneys

BLOEMFONTEIN On behalf of the defendant: Adv. M Mazibuko Instructed by: Office of the State Attorney BLOEMFONTEIN

[1] Plaintiff's amended index: trial bundle pages 4-13.

[2] Ibid at pages 28-32.

[3] 28. Amendment of pleadings and documents (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

[3] 28. Amendment of pleadings and documents

- (1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- [4] Plaintiff's Trial Bundle, pp 73-90.
- [5] Ibid at p.91
- [6] Ibid at p.92
- [7] Ibid at p.66
- [8] Ibid p.70
- [9] Essentially the same maps depicting the scene and the relevant area in Bronville, in colour, extracted from Google maps.
- [10] 36. Inspections, examinations and expert testimony ... 9) (a) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless- (i) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and (ii) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor: Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A (6) and
- (7) or as directed by a case management judge.
- [10] 36. Inspections, examinations and expert testimony
- ... 9)
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- (ii) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A (6) and

(7) or as directed by a case management judge.

[11] See also *Van den Berg v Land and Agricultural Development Bank of SA and Others* (1995/2016)

[2023] ZAFSHC 336 (21 August 2023).

[12] Point A on Exhibit F and G.

[13] The colloquial name for an RG-12 4X4 Armoured personnel carrier used by the South African Police Service

[14] Point C on Exhibit G (the property depicted on point C was not there at the time of the incident).

[15] When prompted on this, he clarified that the crowd pelted the truck with stones and tried to stop it.

[16] He explained this to be tear smoke.

[17] A report by the shift commander indicating all members who reported on duty on any given day, where they were stationed and those who were absent and the reasons for their absence.

[18] *Tshishonga v Minister of Justice and Constitutional Development and Another* 2007

(4) SA 135 (LC) at para 112.

[19] In *McGregor and another v MEG Health, Western Cape*¹⁹ the court held that '...The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and [be] admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.'

[19] In *McGregor and another v MEG Health, Western Cape*¹⁹ the court held that

'...The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and [be] admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is

necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.'

[20] Alex Roux v Ryand Karel Hattingh (636/11)

[2012] ZASCA132 (27 September 2012) at para 25. See also Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006

(1) SA 461 (SCA) para 12.

[21] Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng [2014] ZACC 28 at para 20.

[22] Ibid at para 22.

[23] Santam Insurance Co. Ltd v Vorster 1973

(4) 1973 SA 764 (A).

[24] Waring and Gil/ow Ltd v Sherbome 1904 TS 340 at 344.

[25] Ibid.

[26] Video footage viewed evince that those yards which were enclosed were so enclosed with palisade fence (colloquially called devil's fork) and others with wire fence.

[27] Sardi v Standard and General Insurance 1977

(3) SA 776 (A). See also Lalmiah v Road Accident Fund (734/2021)

[2023] ZAFSHC 348 (1 September 2023) at para 8.

[28] Kruger v Carlton Paper of SA (Pty) Ltd 2002

(2) SA 335 (SCA), Kruger v Coetzee 1966

(2) SA 428(A) at 430 E-F, Pitzer v Eskom [2012] ZASCA 44 (SCA) para 24.

[29] Plaintiff's heads of argument para 11

[30] Defendant's heads of argument para 5.

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