

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 2251/2011

In the matter between:

LUVERN CARMEN AMBRAAL

Plaintiff

and

THE MINISTER OF POLICE

First Defendant

CONSTABLE RYAN ALEXANDRA

Second Defendant

JUDGMENT

REVELAS J:

[1] During the early hours of Friday, 05 June 2010, at about 01:30, the plaintiff (*"Luvern Ambraal"*, or *"Ambraal"*) and the second defendant (*"Ryan Alexandra"*, or *"Alexandra"*) were both shot and injured during an incident which occurred in Bloemendal, Bethalsdorp. Both were the respective drivers of two vehicles, the one, driven by Alexandra, in hot pursuit of the other, driven by Ambraal, when the shooting occurred.

[2] Following this incident, Ambraal instituted an action for damages against the defendants. Her first claim is against the first defendant

and premised on the averment that the shooting was an intentional assault on her, committed by Alexandra. Her second claim, in the alternative, is against Alexandra and premised on the averment that the shooting was negligent in the circumstances.

[3] By the agreement between the parties an order was made in terms of Uniform Court Rule 33(4) wherein the issues pertaining to the merits and the defences (inclusive of *volenti non fit iniuria* and apportionment) are to be determined separately from the questions pertaining to quantum, if any should arise, which are to be postponed for determination at a later date.

[4] Several facts were common cause, or not in dispute in this matter and, to a large degree, the versions of Ambraal and Alexandra coincided with each other. It was not in dispute that on the evening in question, Ambraal and Inspector Hela ("*Hela*") were part of a road traffic task team in the Bethelsdorp area, manning a roadblock. Both Ambraal and Hela are traffic officers and were usually stationed in Queenstown where they reside. At the relevant time they were deployed in Port Elizabeth for the duration of the World Soccer Cup Series hosted in South Africa. The purpose of the roadblock set up by the traffic officers that night was to assess vehicle fitness and identify

persons who were found driving under the influence of alcohol, arrest them and take them to the Bethelsdorp Police Station.

[5] Ambraal, as the driver assisted by Hela, was tasked with ferrying such persons from the roadblock to the police station. As it turned out, there was only one such case. For the purpose just mentioned, and their general transport requirements while on duty, Ambraal was allocated a vehicle rented by the traffic department for the duration of the World Cup. This vehicle, a white Polo, was therefore not an official vehicle and had no markings to indicate that it was under the control of traffic officials.

[6] The two traffic officers were unfamiliar with Port Elizabeth and its surrounding areas and suburbs, which includes Bethelsdorp. At the relevant time they were stationed in Struandale. On the night in question both officers wore blue standard traffic officer uniforms with jackets made of a bright reflective lime green material, bearing the usual words and signage found on traffic officers' uniforms. These jackets were highly visible. They also wore standard blue caps usually worn by traffic officers. Both were armed with 9mm Glock pistols and were issued with ammunition the morning before the incident.

The Plaintiff's Case

[7] Both Ambraal and Hela testified during the trial and their version was the following: After completing their duties at the roadblock, Ambraal and Hela decided to drive to the Stanford Road filling station, also near the Bethelsdorp Police Station, to purchase some refreshments. On their way there, they noticed the driver of a dark blue Ford Focus crossing a three-way stop street, without stopping. They decided to pull up next to the Ford and question its driver and assess his sobriety. Ambraal flickered the headlights of the Polo, blew its horn and Hela gestured at the driver with his hand outside the window to pull over. Both vehicles stopped almost immediately thereafter. It is in dispute as to how the Ford was brought to a standstill. Hela got out of the Polo and approached the Polo. Alexandra had also immediately got out of the Ford and walked towards the Polo, brandishing his firearm. That was common cause. Also common cause was that Hela, upon seeing that the driver of the Ford (Alexandra) had a firearm in his hand, immediately jumped back into the Polo and urged Ambraal to give chase, since the man who got out of the Ford was armed. Ambraal then sped off, her intention being to get away as soon as possible. Alexandra got into his Ford and

pursued the Polo. A veritable car chase was in progress. Both vehicles reached speeds of 160 to 180 kilometres per hour.

[8] Hela and Ambraal heard a gunshot being fired soon after they drove off. At that point she believed that they were going to be killed by whoever was following them. She described how she lowered herself below the steering wheel, peeping over the dashboard while speeding in a zig zag fashion to avoid being shot. She just wanted to get to Struandale where she and Hela were based. As they reached Uitenhage Road a second bullet was fired and Ambraal realized she was struck in the head. She then instructed Hela to return fire. He fired two shots at the Ford leaning out the passenger window. It is common cause that one of the bullets fired by Hela hit Alexandra in the jaw and penetrated his lip.

The Defendant's Case

[9] Alexandra and one of his passengers, Eugene Jacobs, testified on behalf of the defendants. Alexandra was not on duty on the evening in question. He and his girlfriend had gone out for dinner and to see a film at Greenacres. Thereafter, whilst still with his girlfriend, Alexandra received a phone call from a family member, the husband of

his cousin, Eugene Jacobs. The latter required transport from Bloemendal (the area where Ambraal caused Alexandra to stop) to Arcadia. Alexandra dropped his girlfriend at home and fetched Jacobs. The latter's brother, Vivian and two other men wanted a lift as well. All five men got into the Ford with Alexandra driving. While still in Bloemendal, at the stop street in question, Alexandra did not stop because, according to him, Bloemendal is a high risk area as far as criminal activity is concerned.

[10] Alexandra admitted that the traffic officers flickered the lights of the Polo, but did not hear them hoot. He denied that Hela gestured that he stop and pull over onto the gravel. Alexandra testified that the driver of the Polo tried to push him off the road, forcing him to stop and then parked right in front of him, preventing him from passing. As the passenger of the Polo alighted turning sideways, Alexandra said he saw a firearm in the man's (Hela's) hand. He did not however, notice that Hela, was wearing a traffic officer's uniform. He believed that the persons in the Polo were intent on hijacking his vehicle. He testified that he accordingly took his service pistol, approached the Polo and shouted "*Police! Police!*". He then took out his firearm from its holster and fired two warning shots.

[11] When the Polo sped off, Alexandra decided that he would follow it. He said the reason for his pursuit of the Polo was to obtain its registration number and alert the Police Radio Control Centre of, what he perceived as an attempted hijacking. Piet Jonkers and Eugene Jacobs, two of the five occupants of the Ford, managed to record the registration number.

[12] Alexandra disputed Ambraal's evidence that he fired the first bullet in this incident. Alexandra's evidence is that it was only once he was struck by a bullet in his jaw, when they were travelling on Uitenhage Road that he decided to retaliate to protect those in his vehicle and then fired at the Polo. According to him, he was unable to phone the Police Radio Control Centre because his cellphone fell out of his hand when he was shot in the lip, and could in any event not speak on the phone, due to his injury. In the photographs depicting the Polo's rear after the shooting incident, one can see two openings in the shattered glass, diametrically spaced and each directly behind the two front seats of the Polo.

[13] Of the four passengers in Alexandra's Ford, only one, namely Eugene Jacobs, testified during the trial. Eugene's brother (Vivian

Jacobs), Piet Jonkers and Pom Rautenbach were the other passengers. All four passengers who were in the Ford that night made police statements regarding the incident. The testimony of Rautenbach, if called, would not have assisted either party's case since he stated he "*became drunk*" and slept through the whole episode. When they arrived at Mercantile Hospital where Alexaandra was admitted, the other passengers woke Rautenbach up from his deep sleep. The two Jacobs brothers and Piet Jonkers corroborated Alexandra's version that the first shots were fired from the Polo.

The Evidence

[14] The most important question raised was whether Hela fired the first shot or not. During cross-examination of Hela it was even suggested that Hela, and not Alexandra may have shot Ambraal. I may just digress here to point out that such a scenario was not supported by the evidence presented.

[15] Another question relevant to the evaluation of the conduct of the persons involved, is whether Hela had a firearm in his hand when he got out of the Polo. Hela insisted that his firearm remained in its holster. Alexandra was adamant that Hela had a firearm, but

curiously, that he did not notice what Hela was wearing. Both Piet Jonkers and Eugene Jacobs said in their statements that they noticed that Hela was wearing reflective clothing and that Hela had *"something in his hand"* when he got out of the vehicle.

[16] It is also important for determination of this case is, whether Alexandra made it known to the traffic officers that he was a policeman. Hela and Ambraal said they never heard Alexandra shout *"Police! Police!"* when he walked towards their vehicle. Alexandra was adamant that he had uttered these words loudly and, to bolster this statement, he testified that he was a shooting range instructor and as part of his duties he had to shout and communicate clearly with his colleagues. He added that he had a carrying voice.

[17] None of Alexandra's passengers, who in their statements, corroborated his version in all material respects, mentioned that Alexandra uttered these words. Alexandra did not make a statement to the police, but when his version was traversed during cross-examination, he omitted to mention it again. Counsel for Ambraal put to him that his omission was an indication that he did not shout out the warning as he said during his evidence in chief.

[18] In my view, if Hela had heard these words, he would not have been as shocked as he alleged he was, and he would certainly have told Ambraal if he thought the driver of the Ford was a policeman. In all likelihood, she would then not have sped away in the manner she did.

[19] There were also mutually exclusive versions as to how the traffic officers managed to get Alexandra to stop his Ford. According to Alexandra and Jacobs, the driver of the white Polo tried to push the Ford off the road, overtook it, forced it to stop and then cut off its progress by parking in front of it, coercing him to stop. This account suggests that the approach was aggressive, certainly as far as Alexandra was concerned. On the other hand, Ambraal and Hela described a more civil scenario wherein the driver of the Ford was persuaded to pull over and stop on the gravel with gestures by Hela and flickering of headlights and hooting. Ambraal and Hela also testified that they did not hear any warning shots. They believed they were directly shot at.

Analysis

[20] Since the Polo had no markings on it and given the area and time of night, it may have been reasonable for Alexandra to suspect that the occupants of the Polo were up to no good. It is also likely that Alexandra was angered by the manner in which Ambraal coerced him to stop and he went on the offensive.

[21] In evaluating the evidence regarding the events preceding the car chase, it must be borne in mind that neither Ambraal nor Hela never spoke to Alexandra. Hela immediately jumped back into the safety of the Polo when Alexandra approached him. Alexandra, at that point, had the upper hand in the situation. In my view, he overreacted by following the Polo. There was no evidence presented which would support a finding that Ambraal and Hela behaved in a manner that required Alexandra to use force against them. Alexandra was armed and clearly did not fear them. They feared him and therefore they fled. That was a reasonable inference in the circumstances.

[22] Counsel for Ambraal emphasized the fact that Vivian Jacobs had stated in his statement that the shots were fired after the registration

number and been taken down when they were *"in the vicinity of the fire station"*. The inference sought to be drawn was that Alexandra's testimony about the reason for chasing the Polo, i.e. to secure registration number, was untrue, since the pursuit of the Polo continued onto Uitenhage Road when it was no longer justified. It was submitted that the defendants' failure to lead the evidence of Vivian Jacobs, meant that the inference least favourable to the defendants' case, must be accepted. That submission is properly made and I respectfully agree with it.

[23] The two symmetrically opposite openings in the glass rear window of the Polo, as shown in the photograph (referred to hereinbefore) Alexandra's version that he fired only in the direction of the Polo, has to be discounted. The symmetrical spacing of the openings in the glass pane of the Polo suggests that the bullets were discharged from Alexandra's firearm with measured accuracy. This tends to support the proposition that Alexandra was uninjured, rather than injured, when he fired shots at the Polo, and that he probably fired the first shot.

[24] In addition, Alexandra was an evasive witness who qualified many of his answers with the words *"as ek reg kan onthou"*,

suggesting an attempt to avoid giving straight answers to certain questions. He was also an impatient witness, given to avoiding answering questions by simply stating that he did not understand the question. Attempts to clarify such questions were to no avail. I gained a strong impression that he deliberately did not pay any attention to questions he regarded as detrimental to his version. I do bear in mind that Alexander's version was corroborated by Eugene Jacobs and the affidavits deposed to by the latter, Piet Jonkers and Vivian Jacobs. Yet, it must be noted that the affidavits, or rather police statements, were taken during a police investigation into possible charges of attempted murder against Alexandra.

[25] Ambraal and Hela, save for a few "*modest discrepancies*" (as put by counsel for Ambraal), closely corroborated each other and they did not give the impression that they were untruthful about the events of that night.

[26] Shooting at the occupants of the Polo was unjustified, on the facts of this case. Two of Alexandra's passengers had already secured the registration number of the vehicle. There was accordingly no justification for a continued pursuit of the Polo after reaching Uitenhage Road, nor for firing shots. Alexandra could also not

reasonably have believed that his life was in danger. His testimony that he followed the Polo merely for purposes of obtaining its registration number, is not even borne out by his plea. Therein the purpose of the pursuit was stated as being an attempt to affect an arrest and that the force employed (the shots fired) was proportionate for that purpose.

[27] The defendants' version that Hela was brandishing a firearm can only be accepted if I reject Hela's evidence that he never removed his firearm from its holster when he got out of the car. Firstly, Ambraal corroborates his version. Secondly, Hela and Ambraal's evidence as a whole had the ring of truth about it. A third consideration is that, in his initial plea Alexandra pleaded that Hela *"alighted from the vehicle" brandishing an object in his hand "which appeared to be a firearm"*. In his later amended plea this was changed to *"alighted from the vehicle brandishing a firearm, (alternatively brandishing an object in his hand which appeared to be a firearm)"*. Counsel for Ambraal submitted, correctly in my view, that if it were indeed the defendants' case all along that Hela brandished a firearm, his plea would have reflected that without qualification, from the outset.

Volenti Non Fit Iniuria

[28] This defence, which ought to be applied with great caution¹ can only succeed if a defendant is able to prove that the plaintiff had knowledge of, appreciated the extent of, and consented to the risks attached to the act(s) of that defendant. It cannot be disputed that Ambraal and Hela were on duty and wore reflective clothing. Neither of them consented to being shot, least of all Ambraal. The defendants did not prove any of the elements that would constitute the defence in question. Accordingly, the defence of *volenti non fit iniuria* must fail.

Contributory Negligence

[29] It was submitted that Alexandra had no reasonable grounds to suspect that Hela and Ambraal were attempting to hijack or rob him. Given that they were driving in an unmarked vehicle such a belief was not unreasonable. This fact is relevant to the events that followed that night because in retrospect, there was no need for a confrontation of the kind witnessed that night if Ambraal and Hela were in a proper, marked traffic vehicle. That however, did not justify Alexandra's willful conduct. The two traffic officers were on duty dressed in uniform. They

¹ *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 765 (A) at 777 and *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 (1) SA 412 (A) at 421.

were entirely justified in pulling Alexandra off the road. The first thing Hela and Ambraal did when they sensed danger was to flee. They believed that they were going to die. In the circumstances this belief was not unfounded. In my view, there was no contributory negligence on Ambraal's part.

Conclusion

[30] Alexandra testified that he had excellent eyesight. He was accompanied by at least four adult men, even though one was asleep. With the headlights of the Ford shining onto the rear of the Polo, its registration number must have been relatively easy to secure and once that was done here was no need for further pursuit, let alone a need to shoot at occupants of that vehicle. Even if Hela fired the first shot, which I do not believe happened, there was still no need for Alexandra to retaliate. Alexandra acted irresponsibly and intemperately. He thus endangered the lives of his own passengers and could have killed Ambraal if his bullet had not lodged itself in her skull. The subsequent continued pursuit of the Polo and the firing of shots at its occupants, struck me as acts of aggression or bravado, rather than an exercise to obtain the Polo's registration number. The shooting was therefore unjustifiable in the circumstances.

[31] Alexandra stated that he acted in his capacity as a police officer on that evening. This was not disputed. The first defendant did not plead that Alexandra was acting on a frolic of his own it. Accordingly, the first defendant is vicariously liable for the unlawful and negligent actions of Alexandra on the evening in question.

[32] For all the aforesaid reasons the first defendant is liable to pay for the damages suffered by the plaintiff.

[33] Order

1. The first defendant is liable to compensate the plaintiff for such damages as the plaintiff may prove she had suffered during the shooting incident that occurred on 5 July 2010.
2. The first defendant is to pay the plaintiff's costs of suit.

E REVELAS
Judge of the High Court

Appearances:

For the plaintiff, Adv S H Cole instructed by Ngqakayi & Ngqakayi Inc, Port Elizabeth (Ref.: DJM/ub/CIV1942/10)

For the defendants, Adv C Mey instructed by The State Attorney, Port Elizabeth (Ref.: Mr Lategan 1245/2011/B)

Date heard: 05 May 2016, 06 May 2016 and 16 May 2016

Date delivered: 12 July 2016