

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 23/8/025

CASE NO: 22302/2003

UNREPORTABLE

In the matter between:

STEVEN SITHOLE

PLAINTIFF

and

MINISTER OF SAFETY & SECURITY
INSPECTOR ADOLF JOHANNES HANSEN
CAPTAIN PHOSONE

1^{5T} DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

JUDGMENT

MABUSE AJ: [1] On the 29th August 2003, the Plaintiff issued summons against the Defendants. In the first claim, the Plaintiff claims payment of a sum of R5, 100.000.00 whereas on the said claim, he claims a sum of R200000,00.

[2] At the beginning of the trial, the Court made an order in terms of Rule 33(4) that the merits of the matter be separated from quantum and that the trial should only proceed on the merits of the Plaintiffs two

/2 claims

claims.

[3] The Plaintiff's claims arise from an incident that took place at or near Soshanguve on the 4th day of September 2002. According to the evidence of the Plaintiff, on that particular day around 05h05 in the morning, he was a passenger in a taxi kombi that was travelling in the Soutpan Road to Pretoria. There were other passengers in this particular motor vehicle but he was only able to remember the driver, two youngsters and a lady. It was dark. At a certain stage while they were travelling their driver attempted to overtake another taxi kombi that was driving ahead of them. He could not overtake this taxi because, instead of slowing down and allowing their kombi to overtake, the driver of the other kombi, a Mr Godfrey Magadane, accelerated. I will refer to him hereinafter as Godfrey. So he drove behind Godfrey's kombi for some distance.

[4] Suddenly, Godfrey's kombi got completely out of the road and their driver Mr Molatlhegi Mfolo, proceeded straight. I shall refer to him hereinafter as Molathlegi. As they were travelling that Godfrey's kombi suddenly overtook their taxi and cut in front of their taxi and both motor vehicles came to a stand still.

[5] Two youngsters alighted from their kombi and walked to the other kombi. At this stage, Godfrey had opened the driver's door of his motor vehicle. On their arrival, the two youngsters manhandled Godfrey and assaulted him. He heard Molatlhegi scream to the two youngsters and said "Leave him."

[6] He got out of the motor vehicle and walked to Godfrey's kombi with the intention of separating or stopping the fight. While he was walking, he heard a gunshot and fled. While he was fleeing he was shot. He crawled to a white Policeman. A black Policewoman subsequently arrived on the scene. The black policewoman unzipped his trousers and a spent bullet fell from his trousers. When the bullet hit him he was between the two motor vehicles. As a consequence of the said shooting, the Plaintiff sustained certain bodily injuries. He was taken to GaRankuwa Hospital for medical treatment by the Police who then kept him under Police guard. On his release from hospital, he was detained at Atteridgeville Police Station for four days. He was never told why he was detained. He appeared at Soshanguve Magistrate Court several times until on 14 February 2003 when, at the request of the State, the charge against him was withdrawn. The incidence in which he was shot occurred at 05h05. It was still dark at this stage. There are no streetlights where the shooting incidence took place. Under cross-examination, he denied that he assaulted Godfrey and that he was part of the people who assaulted Godfrey. He was adamant that at the time he heard the first shot, he was walking to Godfrey's motor vehicle and was not yet there. He stood by his evidence that Molatlhegi sat in his taxi at all times when the two youngsters manhandled Godfrey.

[7] The Plaintiff called Mr Molatlhegi Mfola. He testified that on the morning of the 4th September 2002, he was the driver of motor vehicle in which the Plaintiff and several other people were passengers. His motor vehicle was a taxi and he was transporting these passengers to

Pretoria. He was driving in or next to Soshanguve, in the main Soutpan Road to Pretoria road. As he was driving in that road and in the direction of Pretoria there was, ahead of his motor vehicle, another motor vehicle that was also driving in the same direction as his. As this other motor vehicle was moving slowly, he accelerated and tried to overtake it. The driver of the motor vehicle in front instead, increased the speed of his motor vehicle and as a result he could not overtake. He managed, at a certain point however, to overtake Godfrey's motor vehicle. He drove for some distance ahead of the other motor vehicle.

A distance ahead of his motor vehicle, there was a stop sign. In anticipation of having to stop at the stop sign, he reduced the speed of his motor vehicle. As he did this, Godfrey's motor vehicle behind him got chance and overtook his motor vehicle. As soon as this other motor vehicle passed his, it drove across the path of his motor vehicle and stopped in front of it. When he tried to pass or to find a way to pass, Godfrey's motor vehicle blocked his way.

[8] He stopped. As he stopped, his motor vehicle sliding door opened. Some people alighted from his motor vehicle and walked to the motor vehicle in front. When they arrived at the motor vehicle in front, they took that driver out of his motor vehicle. The driver of the other motor vehicle in front was Godfrey Magadani. He had himself opened the door of his motor vehicle. Shortly thereafter, a Police motor vehicle arrived on the scene and a Policeman and Police woman got out. One of them started shooting. He screamed to the Police not to shoot. Twice he screamed "do not shoot, do not shoot".

The Police woman also screamed "do not shoot, do not shoot". The Policeman, however continued to shoot notwithstanding. A few minutes thereafter, the shooting stopped. He got out of his motor vehicle and walked to the Police. He asked them why they started to fire without having warned the people with a siren that they were Police. The female Police asked him what was going on and he explained. When she asked the driver of that other motor vehicle, Godfrey, what was going on, he kept quiet. The female Police told him to drive away, but while he was walking to his motor vehicle, the male Policeman came rushing and told him that he was going nowhere. He asked the male Policeman why he was not supposed to drive away but the Policeman told him that somebody had been shot. An argument ensued between him and the Policeman. As a consequence of this argument, he never was able to drive away. According to him, the Policeman told him that where a person has been shot, statements must be obtained and the matter must be referred to Court. The Policeman called other Police from Soshanguve. After the other Police had arrived on the scene, they held a meeting aside. As they were holding a meeting there, another Police van arrived with more Policemen who joined those at the meeting. A short while later, they despatched one Policeman to him. This Policeman started searching him. This Policeman took him to a Police van. When he asked why he was being taken to a Police van he was told that he was under arrest because he had earlier tried to hijack another motor vehicle. He asked the Policeman how possible was it for him to hijack another motor vehicle while such other motor vehicle blocked his path. The policeman told him that he was speaking

nonsense and ordered him to get into the Police van.

[9] He saw three people get out of his motor vehicle. He was concerned with the other motor vehicle. He did not see how the Plaintiff was shot. He did not see the Plaintiff assault Godfrey or try to hijack his kombi. After the shots had been fired, he did not see the Plaintiff as he(Plaintiff) had fled into the bush. It was after the Plaintiff had returned from the bush that he realised that he (the Plaintiff) had been shot in buttocks. The Plaintiff was taken away from the scene by an ambulance. He did not know the Plaintiff before this event. He appeared in Soshanguve Regional Court as the Plaintiff's co-accused on a charge of robbery. He attended Court thrice before the case against them was withdrawn at Court. This concluded the Plaintiff's case.

[10] The Second Defendant testified that on the morning of the 3/4 September 2002 and in the area of Soshanguve, and while he was in the company of Captain Phosone, they were doing patrol duty. Around 05h15, they came to Mabopane-Soutpan T junction. At that time, it was still dark. He parked their motor vehicle on the western side of the road and faced east. They both remained sitting inside the motor vehicle. As they were waiting there, there were motor vehicles that travelled from North to South. He saw how a red minibus stopped in front of another minibus. Both these motor vehicles stopped on the surface of the tarred road. Suddenly some people came from the red minibus and walked the other minibus. The red minibus is the one that had been driven by Molatlhegi, while the other minibus is the one that was driven by

Godfrey. He could see all this because the headlights of his motor vehicle were on and fixed on these two motor vehicles. Molatlhegi was very **agitated** while Godfrey remained at his motor vehicle. He saw how six men punched and kicked Godfrey. When he saw this happen, he jumped out of his motor vehicle and screamed that they were Policemen and ordered the six men to stop assaulting Godfrey. These people then left Godfrey and fled.

[11] He screamed" **Polisie. Polisie. staan** but the people continued to flee. He gave chase. While he was chasing them, he fired five times on the ground. The other member was just behind him when he shot five times on the ground. Even after he had fired five times on the ground, the people kept on fleeing. He focussed on one of them, followed him up into the bush. He screamed to this person to stop but this person refused to stop and kept on fleeing. At this stage he had his pistol in his right hand. When he was between 25 -30 paces from this person, he fired a shot at him. He heard this person scream that he had been shot. The person that he shot is one of the people who assaulted the driver of the other motor vehicle, Godfrey. A lot of motor vehicle hijacks take place in this area and around that particular time.

[12] Under cross-examination, he testified that he shot the Plaintiff intentionally because he wanted to arrest him. He assumed that the Plaintiff was a member of a group of people who were attempting to hijack a motor vehicle. He could see what was happening at the two

/8 kombis

kombis that had stopped on the other side of the road because he had parked his motor vehicle in such a way that he was facing east. At the same time, the lights of his motor vehicle were on. The Plaintiff took part in Godfrey's assault. He could not say what precisely took place at the motor vehicle. It was put to him that the other motor vehicle was not hijacked. Although their motor vehicle had a siren, he did not use it. He shot the Plaintiff as that was the only way in which he could arrest him.

[13] GODFREY MAGADANE, testified that at the time of the incidence he was staying at 154 BLOCK HH, Soshanguve. On the 4th September 2002 around 05h15, he was the driver of a taxi, motor vehicle CMS 403 GP. He was driving the said motor vehicle in the Soutpan Road towards Pretoria and there were two strange passengers in his motor vehicle. It was still dark. While he was proceeding in the road, he saw the lights of another motor vehicle coming from behind his motor vehicle. That other motor vehicle caught up with his and tried to overtake him. This other motor vehicle never succeeded in overtaking him but instead forced his motor vehicle out of the road. After driving his motor vehicle off the road, this other motor vehicle drove across his path and stopped with the result that his motor vehicle could not proceed any further. Some of the passengers in the other motor vehicle, opened the door of his kombi, alighted from that kombi and came up to his motor vehicle. They opened the door of his motor vehicle and started assaulting him. He screamed. A Police motor vehicle arrived on the scene. He identified the road in which the incidence took place in certain photographs which had been handed in as exhibits. They were handed in as exhibits B1-10

motor vehicles were close to a stop sign.

[14] He did not count the people who came to his motor vehicle. He did not know the driver of the other motor vehicle. In fact he knew none of the people who accosted him. He was assaulted and taken out of his motor vehicle by those people. He was assaulted with fists and sometimes kicked. As a consequence of the assault, he was injured. He went to Court to testify and was never called as a witness. He is aware that the charges against the Plaintiff and the driver of the other kombi, Molatlhegi, were withdrawn. At the time of the incidence, he thought that he was being hijacked.

[15] Under cross-examination he testified that while some of the passengers from the other motor vehicle were assaulting him, the Police arrived on the scene. When the Police arrived on the scene, the people who were assaulting him fled. At first he testified that the people who were assaulting him, fled before the Police fired. He later testified that the people fled when the Police fired. He did not see the Molatlhegi come out of his motor vehicle. He only noticed after he had heard gunshots that the Police had arrived on the scene. As he was being accosted, he did not see the Police arrive. When it was put to him that he was never hijacked nor assaulted, he said that he did not know what could have happened if the Police had not arrived on the scene.

[16] The third and last witness the defendants called was Captain Phosone, a member of the South African Police Services, at the time

stationed at Soshanguve Police Station. She testified that on the morning of the 4th September 2002, at about 05h15, she was in the company of Inspector Adolph Johannes Hansen. They were doing patrol duties in a State vehicle. When they approached a 1. junction, she saw that there was a red kombi that had stopped in front of another kombi. Seemingly both motor vehicles were travelling towards Pretoria. Their motor vehicle came from the west, turned to their left, faced north and parked. They noticed a blue kombi at which there were five male persons who were assaulting a person who was on the driver's side of the blue kombi. They then screamed " Police, Police." She then heard shots. They approached the blue kombi. The people then dispersed. She saw a person who was walking towards the red kombi. After sometime her colleague came with somebody she called a suspect. The suspect was injured somewhere on his buttocks. This suspect was the Plaintiff in the matter. They called for further Police reinforcement which arrived duly. The place where the incident took place was dark. She thought that people were hijacking the driver. In cross-examination when it was put to her that the Plaintiff was not one of the people who assaulted the driver of the blue kombi, she testified that he saw him come from the scene. On a question by the Court, she testified that after turning left at a T - junction and faced north, their motor vehicle parked on the left side of the road and remained facing north. The statement that she made after the incident was handed into Court as exhibit "C". This concluded the defence case.

[17] Regarding the Plaintiff's first claim, that the Plaintiff was shot at by the second Defendant on the 4th September 2002 and at or near

Soshanguve is not in dispute. That as a result of being shot the Plaintiff sustained a serious bodily injury is also not in dispute. What is however in dispute is whether or not the shooting was unlawful, whether or not the circumstances at the time of the shooting justified the shooting. The burden of proof is on the second defendant to allege and prove the circumstances which entitled him to act as he did. The **Minister of Law & Order v Monti 1995(1) S.A. 35 A on p 40** " In my view, the defendant clearly admitted assault and pleaded the special defence of justification, namely that the policemen's fear and necessity to maintain law and order and arrest wrongdoers caused him to shoot. This is a true case of confession and avoidance, in which the onus of proving the avoidance ordinarily rests on the defendant". In this case, the Defendant's special . defence of justification to Plaintiff's first claim is contained in paragraph 6.2 of the amended Plea.

[18] The Plaintiff denied that he was part of the people who assaulted Godfrey, the driver of the other motor vehicle. He was adamant that, at the time he heard the first shot, he was still walking to the other motor vehicle in order to intervene. He fled when he heard the first shot. As he was fleeing, he was shot from behind. His evidence at this point seems to agree with the evidence of Inspector Hansen. He was adamant that Molatlhegi was always in his motor vehicle. Is it not possible that he was part of the people who were assaulting Godfrey. The Plaintiff did not see the Police motor vehicle arrive. He does not know whether it was always on the scene or next to the scene. Before he heard the shots, he never received any warning that the Police were on the scene. However, the driver of the motor vehicle in which the Plaintiff was a passenger saw the

Police vehicle arrive. According to him, the Police motor vehicle arrived on the scene while the assault was already on. This evidence confirms the evidence of Captain Phosone who testified that when their motor vehicle arrived at the T-junction, she saw a group of people at the blue kombi and that they were assaulting a person who was sitting on the driver's seat. This is also the evidence of Godfrey Magadane and he repeated it under cross-examination.

[19] This evidence contradicts the evidence of the second Defendant. According to the second Defendant, he and Inspector Phosone arrived at the T-Junction or scene of the event before the two kombis arrived. He parked the State motor vehicle in such a way that it faced east, in other words directly opposite to where the two kombis would come to stop and where the perceived hijack would take place. His version differs completely from Captain Phoshone's. Captain Phoshone testified that after they had turned left at the T -junction they faced north and parked their motor vehicle. At no stage did it face east. If the evidence of Captain Phoshone is anything to go by, then it means that Inspector Hansen had no clear view of the events at the motor vehicles. As there were no street lights in the area or any form of lighting, Inspector Hansen was too hasty to shoot. He totally misread the situation. He shot in the dark. In the circumstances he was always going to shoot a wrong person. At the same time, Inspector Hansen testified that he parked their motor vehicle in such a way that it faced east and that its head lights were on. Even at the time the other motor vehicles arrived on the scene the head lights were on. The Plaintiff's witness testified that the Police started shooting without any warning. He himself screamed to them not

to shoot and thereafter questioned them why they shot without any warning. He testified that even the Policewoman shouted to Hansen not to shoot. This evidence was never denied in cross-examination. It was never put to the witness that the Police warned the people on the scene. In fact Hansen's version was never put to this witness. The material differences between the evidence of Hansen and Phosone were never explained. The Police motor vehicle had a siren. The siren was in a working condition. The court does not understand why this siren was not used to warn the assailants of Godfrey, if the evidence of Hansen is anything to go by.

[20] I also find the evidence of Godfrey Magadane to be inconsistent in some parts. At one instance, he testified that when the Police motor vehicle arrived on the scene, the assault on him was already in progress. He repeated this evidence under cross-examination. It turned out later that he was not certain about the time the Police motor vehicle arrived on the scene. He only became aware that the Police had arrived on the scene after hearing the gun shots. He further testified at first that the people who were assaulting him fled before the arrival of the Police on the scene. Later he changed his evidence and testified that the people who were assaulting him fled the scene when the Police arrived. When it was put to him that he could never have been hijacked he responded by saying that he did not know what could have happened if the Police had not arrived on the scene.

[21] The Court rejects the defendants' version and accepts the plaintiff's. The Court finds that the Second Defendant failed to establish that he was

justified to shoot as he did. The Second Defendant was too hasty to use his firearm and failed in the circumstances, to read and understand the situation before he fired at the Plaintiff. The Court finds that the Second Defendant shot the Plaintiff unlawfully.

[22] Regarding plaintiff's second claim, the duty rests on defendants to prove the grounds of justification. **MINISTER OF JUSTICE v HOFMEYER 1993 3 S.A. 131.A at p153d-e** Hoexter JA stated that:

" The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are prima facie unlawful. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction"

Again on this point, in the case of **During v Boesak and another 1990 3 S.A. 661 A** at p673g-h, Grosskopff stated, in the course of his judgment that:

" Wat ek hier veral will beklemtoon is die beginselstandpunt dat, as in saak van beleid, dit reg en billik is dat in persoon wat inbreuk maak op die vryheid van die individual die bewyslas behoort te dra om te bewys dat sy optrede regmatig is. Aangesien die ligging van die bewyslas tot groot hoogte deur beleidsoorwegings bepaal word(sien die passasie uit Wigmore hierbo) is Hurley se saak sterk gesag daarvoor dat ook by inbreuke op ander fundamentele regte, dws op die vryheid van die individu in 'n breër sin, die bewyslas om die regmatigheid van sy optrede te bewys behoort te rus op die persoon wat die inbreuk maak".

[23] It is not in dispute that the Plaintiff was arrested and detained on the 4th September 2002. It is equally not in dispute that, subsequent to his arrest and detention, the Plaintiff was charged under case no SSH998/02 at Soshanguve Magistrate Court with the offence of robbery and that after he had made several Court appearances, the charge against him was withdrawn by the State on 14 February 2003. Suffice to mention that the charge has never been revived since it was withdrawn on 14 February 2003. As in respect of the first claim, once the arrest is admitted, the duty rests on defendant to prove any grounds of justification.

[24] There exists no genuine basis for the 2nd defendant's arrest of the plaintiff and Molatlhegi. It would seem that they were arrested simply on the basis that the plaintiff had become incapacitated by a bullet from the second defendant's fire arm and, in respect of Molatlhegi, he did not flee when the other people fled. Moreover he dared blame the Police for arriving on the scene and firing on the people without any warning. Now, in the further analysis of the evidence, the probabilities exist that the second defendant was not, because of the darkness at the scene of the incidence, in a favourable and good position to properly assess the situation on the scene. All the witnesses testified that at the time the fight took place, it was dark. None of the defendant's witnesses testified or placed any evidence before the court that, although it was dark, they were in a position to dearly observe events as they unfolded at the scene. In the circumstances, the court is bound to make a decision of the basis of the evidence it has before it. That evidence is that it was dark at the material time the second defendant fired. Even the headlights of the Police motor vehicle could not assist the second defendant because,

while the lights were on, the motor vehicle was facing away from the two motor vehicles. Captain's Phoshone's evidence seems to be as clear as crystal on this point and the court accepts it. The evidence as a whole does not exclusively suggest that Godfrey was being hijacked. There is on record no evidence whatsoever by the defendants that, while Godfrey was being assaulted, one or some of the people who were accosting him or who were with those who were accosting him got into or tried to get into his motor vehicle. There is also no evidence that someone tried to drive away with it. Another problem with the defendant's evidence is that when the fight at Godfrey's motor vehicle started, at least according to the evidence of Molatlhegi and Captain Phoshone, both the second witness and captain Phoshone were not at the scene. They obviously did not know what the fight was all about. They obviously did not know from which of the two motor vehicles Godfrey came from. In the premises, the inference that they, the second and third defendants, came to that the plaintiff was being hijacked, seems to be far fetched and without any genuine basis whatsoever. The fact that someone was being assaulted could not, objectively, be convincing enough that someone was being hijacked.

Now in **BLOCH v RING 1914TPD 106 or 109 De VILLIERS J.P.** stated that:

" Now, as was layed down in Van Wyk v Viljoen(for S.C. 76), for an action for false imprisonment or illegal arrest to lie it is not necessarily that the defendant should act maliciously; it is sufficient that the arrest should be illegal. If he does act maliciously, that will be an element in the estimation

of the damages; but the mere false imprisonment or illegal arrest gives a right to action to the person arrested."

Finally on this point in **SHOBA v MINISTER OF JUSTICE 1982(2) S.A. (KPA) 554 at p 559** the Court stated that:

"Onregmatige vryheidsberowing word egter as uitsondering behandel weens onder meer hoe waarde wat die howe aan die vryheid van die individu heg. Sodanige eiser hoef nie skuld aan die kant van die verweerder te bewys nie. Hy moet bewys dat hy van sy vryheid beroof is deur die verweerder of sy werknemers en dat dit wederegtelik was. Die las rus op die verweerder om regverdiging te bewys vir die vryheidsberowing."

(23) For the same reasons that the Court found in respect of the Plaintiff's first claim, the Court has invariably to come to a conclusion that there was no legal justification for the Plaintiff's arrest and subsequent detention and prosecution. Accordingly the Court finds, on the merits, that the Plaintiff's arrest on the 4th September 2002 and subsequent prosecution were unlawful.

On the merits the Court grants the Plaintiff's first and second claims, with costs.



MABUSE A. J.