

IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSCAAL PROVINCIAL DIVISION)

CASE NO: 21464/2006

DATE: 5/2/2009

NOT REPORTABLE

IN THE MATTER BETWEEN

ERIC BONGINKOSI MDLETSHE

PLAINTIFF

AND

MINISTER OF SAFETY AND SECURITY

DEFENDANT

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JUDGMENT

PRINSLOO, J

[1] The plaintiff claims damages from the defendant based on alleged unlawful actions by police officers acting within the course and scope of their employment with the defendant.

[2] In the trial which came before me, Mr Smit appeared for the plaintiff, and Ms Moloisane for the defendant.

Introduction

[3] Two claims are formulated in the summons:

Claim A flows from an incident on 4 September 2005 when police officers allegedly "unlawfully assaulted the plaintiff by shooting him four times". In the particulars of claim reference is made to two gunshot wounds to the stomach, one gunshot wound to the upper left leg and one gunshot wound to the right foot. The plaintiff claims an amount of R1 395 329,88 as damages occasioned by the *sequelae* of these injuries. The damages include alleged loss of income.

Claim B is for payment of an amount of R500 000,00 based on the alleged unlawful arrest without a warrant of the plaintiff by police officers following the same incident of 4 September 2005. There is also an allegation that the plaintiff was unlawfully detained in police custody for a period of two weeks.

[4] It is common cause that the plaintiff complied with the formalities prescribed by section 2 of Act 40 of 2002 by giving proper notice before instituting action.

[5] At the commencement of the proceedings, both parties, jointly, applied for an order in terms of Rule 33(4) in terms of which the question of *quantum* was separated for later adjudication.

[6] As to claim A, the defendant pleads as follows:

"Save to state that the plaintiff sustained gunshot wounds caused by shots discharged from the service firearm of the member of the South African Police Service ('SAPS'), the remainder of the allegations herein contained is denied, and the plaintiff is put to the proof thereof. The defendant further avers the following:

- 3.1 the plaintiff was one of the persons alleged to have attempted to rob Mr Ngwako Daniel Kgwale of his minibus;
- 3.2 Captain M Motileng and other members of the SAPS fired warning shots in an attempt to prevent the plaintiff and the persons aforesaid from fleeing from the alleged scene of crime;
- 3.3 the plaintiff threatened to shoot the members of the SAPS;
- 3.4 the plaintiff attacked Inspector J J Botha and wrestled with him, causing a shot to be discharged;
- 3.5 in the premises the force used was reasonable, necessary and justified."

[7] As to claim B, the defendant, in his plea, admits that the plaintiff was arrested without a warrant on 4 September 2005 by police officers acting within the course and scope of their employment, and further pleads as follows:

"14.1 The plaintiff and other persons were alleged to have committed an offence of robbery of an undisclosed amount of money and attempted robbery of a minibus;

14.2 Inspector J J Botha and other members of the SAPS, being peace-officers as defined in the Criminal Procedure Act, 51 of 1977 ('the CPA'), arrested the plaintiff in terms of section 40(1)(b) of the CPA;

14.3 when Inspector J J Botha and other members of the SAPS acted as aforesaid, they had a *bona fide* belief on reasonable grounds that the plaintiff and the other persons had committed the crime of robbery and attempted robbery as set out in Schedule 1 of the CPA;

14.4 in the premises, the arrest of the plaintiff was justified in terms of the provisions of section 40(1)(b) of the CPA."

[8] As to the alleged unlawful detention, the defendant pleads that the plaintiff was admitted to Kalafong hospital for medical treatment, and that he was not detained as alleged.

- [9] It is common cause that the plaintiff was released on bail shortly after he was discharged from hospital. The criminal charges against the plaintiff and his co-accused were later withdrawn.

The evidence

- [10] The only witness who testified on behalf of the plaintiff was himself.
- [11] According to the plaintiff he lives in Alexandra township near Johannesburg with his wife and some children.
- [12] His wife also has other children living with family in the Brits district at a place called Jericho.
- [13] On the evening of 3 September 2005 the plaintiff drove alone in his white Mazda to visit the children in Jericho and give them some money. When he got there it was already fairly late and he did not stay for any length of time.
- [14] What the plaintiff did do, however, was to accept a suggestion by another family member, one May Mpepo, to go to a "stokvel" near Jericho. He said he "wanted to drink a bit".
- [15] The plaintiff and May got to the stokvel at about 22:00 and set about drinking. They left the stokvel rather late, at about 01:00. He wanted to get home in

Alexandra because he, himself, had organised a stokvel for the next day. In Alexandra he runs a restaurant and tavern and, significantly, also a taxi service.

[16] The plaintiff testified that May would do the driving because he, the plaintiff, was not in a position to drive. At a certain point he directed May to follow a taxi which he thought was heading in the general direction of Pretoria. In the back seat one Kile was another passenger in the car. He was evidently a friend of May.

[17] The plaintiff dozed off, but at a certain point May woke him up pointing out that the taxi driver was trying to block the road. According to the plaintiff he saw the taxi swerving from left to right preventing May from overtaking. Under cross-examination the plaintiff could not give a satisfactory explanation as to why May wanted to overtake the taxi if the very idea was for May to follow the taxi for guidance as to how to get to Pretoria.

Nevertheless, they managed to overtake the taxi whereafter the plaintiff directed May to stop in front of the taxi so that he could "argue" with the taxi driver. The latter made a U-turn and headed back to Brits.

[18] Later, on their way to Pretoria, May was directed to stop so that the plaintiff could attend to his biological needs next to the road. While this was in progress, the same taxi came from behind and passed the stationary vehicle of the plaintiff, again heading for Pretoria. On the plaintiff's instructions, they followed the taxi

and when the latter turned into a Caltex garage in Van der Hoff Road on the outskirts of Pretoria, the plaintiff directed May to follow the taxi. At the garage premises he found the taxi parked but there was no driver in sight. On the plaintiff's own version he was keen to get hold of the taxi driver to find out why he misbehaved earlier on when they were trying to overtake him. On the plaintiff's own version he was the aggressor and the taxi driver did everything possible to avoid him. On his own version he also shouted abuse on the garage premises. He says he was actively searching for the taxi driver and he started shouting and screaming.

[19] At a passage way between the garage premises and another building he was shouting words like "shit" and suddenly people shouted back calling for help because they were being hi-jacked. He decided to go back to the car. He heard people running and he heard shooting. He ran to his car and got into the driver's seat after telling May to move over. He says he got shot in the right side, fell into the car, tried to push the car into gear, and fell into the passenger seat on the other side of May. He says the car moved, but he does not know how. He also does not know whether he was hit by another bullet at that stage. He later heard that the car had been in an accident. He was shot in the foot at one stage when he tried to roll under the car to hide away. He was unarmed.

[20] He says he woke up in hospital where he was kept for three to four weeks. After his discharge he was released on bail.

- [21] There are photographs in a bundle, exhibit "B", showing the motor car and also beer bottles inside the car. This was evidence of liquor that had been consumed for sustenance during the activities of the evening.
- [22] The plaintiff was subjected to extensive cross-examination by Ms Moloisane. He made a very bad impression as a witness. He was evasive. He was unduly repetitive in his evidence. After a simple question he would make a long speech.
- [23] As I already pointed out, he could not explain why they would wish to overtake the taxi, if the idea was to follow this vehicle for general guidance as to how to get to Pretoria. His explanation that the taxi was slowing down was unconvincing. It is also inherently improbable that the taxi driver, who was alone in his vehicle, would, without any reason, attempt to quarrel with three occupants, unknown to him, in another vehicle, late at night. No reason whatsoever was advanced for the alleged efforts by the taxi driver to push them from the road when they tried to overtake him. The fact that the taxi driver made a U-turn and left the scene, and later turned in at the garage to avoid the plaintiff and his colleagues, bears testimony to the more realistic conclusion that the taxi driver did not instigate any aggressive actions from his side.
- [24] Under cross-examination, the plaintiff could also not adequately explain why, once they had managed to overtake the taxi, they did not simply proceed on their

way but chose to stop in order to confront the taxi driver. The same applies to the decision of the plaintiff to follow the taxi driver into the garage premises in order to confront him.

- [25] The weight of the evidence suggests that the plaintiff and his fellow travellers indeed attempted to hi-jack the taxi driver or rob him of his vehicle. The fact that the plaintiff and his fellow travellers followed the taxi driver into the garage premises and that the police witnesses, who testified, stated that the security guard reported to them that the plaintiff and his colleagues were trying to hi-jack the Combi, lends credence to such a conclusion. Another pointer, in my view, towards such a conclusion, is the fact that the plaintiff and his colleagues fled from the scene despite warning shots being fired by the police who ordered them to stop.

Although the taxi driver did not give evidence, because he could not be traced, according to Ms Moloisane, his statement was contained in a bundle which was handed in by agreement. It was agreed at the pre-trial conference that these statements (there are a number of others) and the other documents in the bundle are what they purport to be, although the correctness was not admitted by either party. The statement of the taxi driver was put to the plaintiff in cross-examination. According to that statement an attempt was made by the plaintiff and his colleagues to deprive the taxi driver of his taxi, not only at the garage but also during the altercation along the way to which the plaintiff himself referred.

Similar allegations appear from statements of police witnesses appearing in the document bundle, exhibit "A". These witnesses did not testify, but their statements were analysed by counsel for the plaintiff, when he cross-examined some of the defendant's witnesses. The taxi driver's statement was also analysed in this fashion.

I am alive to the fact that these statements did not constitute proper evidence before me, but, in the circumstances, and given the fact that they were placed before the court by agreement and analysed in cross-examination, I consider this evidence as corroboration for my conclusion, *supra*, on the probabilities, that the plaintiff and his colleagues attempted to rob or hi-jack the Combi.

- [26] The evidence of the plaintiff that he fled the scene without knowing who his pursuers were and without realising that it was the police is equally unconvincing and inherently improbable. The police officers testified that the area was well lit and that they were in full uniform. They shouted orders for the plaintiff and his colleagues to stop and fired warning shots. The evidence of the plaintiff, *supra*, that he fled, knowing that he was being pursued, but without knowing who was chasing him, is so improbable that it cannot be accepted. Moreover, the plaintiff failed to offer a plausible explanation for his decision to flee the scene given his testimony that he was innocent of any wrongdoing.

[27] The shooting of the plaintiff, on which his damages claim is based, took place more than one kilometre from the garage while he was fleeing the scene in his motor vehicle. Details of that incident are graphically illustrated by the uncontested evidence of Inspector Botha and reservist Constable Van der Merwe, to which reference will be made hereunder.

[28] When the plaintiff was cross-examined and confronted with the version of Botha and Van der Merwe, he offered hardly any resistance: he did not know who shot him. He could not deny that he was not hit by any of the bullets fired at the garage. He may have been pursued by the police, but did not hear the siren neither did he see the blue lights on the police vehicle. He did not hear the order to remain seated in the car after he had lost control during the effort to evade the police. He could not explain why the taxi driver would make a false statement and lay a false charge against him. He could not explain why Botha and Van der Merwe would falsely implicate him.

[29] In short, I found the plaintiff to be an utterly unsatisfactory and untruthful witness.

[30] The first witness on behalf of the defendant was Captain Michael Motileng. He is a police captain at Hercules police station with nineteen years experience.

- [31] On 4 September 2005 at approximately 05:00 he was on duty at the Hercules police station as relief commander, Client Service Centre.
- [32] At approximately 05:00, while he was busy at the station, the witness saw the security man, Philemon Chauke, running into the station and saying that three black men were trying to rob a taxi driver at the Caltex garage next door.
- [33] The witness rushed to the garage with his colleagues Manaka, Gomba and Mogotlane. He saw three black men running towards the white Mazda parked near the side of the road. The taxi driver came running towards him stating that the three men are the would-be robbers of the taxi.
- [34] The witness pulled out his service pistol and fired three shots into the ground in an effort to persuade the culprits to stop, but they did not do so.
- [35] He, and his colleagues, were clearly visible and they were dressed in full uniform.
- [36] The culprits were already in the car when the witness fired the three shots. They drove away. As they drove away more shots were fired, also by his colleagues, in an attempt to hit the tyres of the car. The three men drove away at high speed, in a westerly direction towards Brits.

- [37] Later that morning, the plaintiff was brought back to the station after having been arrested.
- [38] Botha and Van der Merwe were his colleagues. The day before they had been posted to do patrol duty on this particular night. The radio control centre is based in Silverton. Complaints are sent to Silverton radio and from there relayed to the personnel in the patrol cars.
- [39] In cross-examination the witness said that Chauke reported that the perpetrators were trying to hi-jack the Combi.
- [40] As I indicated earlier, the witness, in cross-examination, was confronted with a "discrepancy" between the statements of two of his police colleagues, Mogotlane and Gomba, which statements were in the bundle to which I referred: Mogotlane said that he saw the three perpetrators, one at the white Mazda car, and two at the Combi, with one already inside the Combi in the driver's seat. This was before they fled. Gomba said that one was at the white Mazda and the other two were both inside the Combi. Nothing turns on this. As I indicated, this evidence, circumstantial as it may be, lends corroboration to the most reasonable inference on the probabilities, namely that the plaintiff and his colleagues were trying to rob or hi-jack the Combi.

- [41] As I indicated, the witness was also cross-examined about the statement made by the taxi driver and placed in the document bundle.
- [42] I considered this captain to be a truthful and satisfactory witness. He was only doing his job. He received the report from both the taxi driver and the security guard that the plaintiff and his colleagues were trying to hi-jack the Combi. What he saw on the scene upon his arrival, supported this conclusion.
- [43] The next defence witness was Maquka Frans Manaba. He is a sergeant in the South African Police, stationed at Hercules. He has seventeen years experience and has been a sergeant for ten years. He was on duty at Hercules police station at approximately 05:00 on 4 September 2005.
- [44] While he was on his way to the charge-office, he saw a colleague running out of the charge-office. He was informed that a hi-jacking was taking place at the garage. He drove there in a police van and saw his colleagues shooting at the white Mazda. The Mazda drove away. More of his colleagues had run to the scene. The car drove in a westerly direction towards Brits. He followed the car but lost it. He contacted radio control at Silverton and went back to the station. When he spoke to radio Silverton he told them about the attempted hi-jacking and he gave a description of the car and the direction in which it had fled. Radio Silverton relayed the information to all patrolling vehicles.

[45] Back at the station he also met the taxi owner and took a statement from him. He testified about the contents of the statement. The statement was recorded after he had communicated in Northern Sotho with the taxi driver. There were no misunderstandings.

[46] In cross-examination he stated that after taking the statement of the taxi driver, the plaintiff and a fellow perpetrator were brought to the station after they had been arrested. The third suspect may have run away. He was also cross-examined about the statement of the taxi driver *inter alia* where the latter said "Ek het niemand toestemming gegee om my te probeer roof nie." He testified that it was an attempted robbery which failed.

[47] He was also cross-examined about the statement in the bundle which was made by police officer Gomba. The fourth paragraph, dealt with in cross-examination, reads as follows:

"Then the suspects then alighted the taxi and ran to the Mazda and climbed. They then drove away and crashed with a street pole and two of them climbed off and ran. I then chased one and I arrested him at corner Tuin and Van der Hoff Street."

This seems to explain why Botha and Van der Merwe only found two of the culprits in the car before they arrested them. The witness also testified that after the crash into the street pole, the Mazda reversed and drove away quickly.

It drove in a westerly direction towards Brits. This was also a satisfactory witness.

[48] The next defence witness was Inspector Josias Johannes Botha of the SAP Hercules. He has sixteen and a half years experience in the police, nine of which as an inspector.

[49] On 4 September 2005 at approximately 05:30 he was on duty in the patrol vehicle in the Hercules area. With him was reservist Constable Van der Merwe.

[50] Over the radio came a report about a hi-jacking and armed robbery near the police station. They were told to be on the look out for a white Mazda 323 with two occupants and one rear light not burning. They were in the Gardens area when the report was received.

[51] They travelled to the nearest anticipated exit route for the perpetrators, namely the Daspoort Tunnel in Bremer Street. The vehicle they were driving was a marked police Volkswagen Citi Golf.

[52] As they approached Deborah Street he saw a white vehicle approaching in Deborah Street from east to west. They turned around and approached the Deborah Street intersection along Bremer Street from north to south. This means that the white vehicle was approaching from the left. The white car did not stop

at the stop street when entering the intersection and, in fact, swerved sharply towards the police vehicle causing the witness to take evasive action. The car fitted the description received on the radio. The car careered on down Deborah Street in a westerly direction with the witness and Constable Van der Merwe in hot pursuit. The blue lights and siren of the police car were activated. When they moved in next to the white car the driver of the latter tried to push them off the road. Two black men were occupying the white car.

[53] The witness and Van der Merwe fired warning shots and shots at the tyres of the Mazda. They were travelling at high speed. At the end of Deborah Street where it made a sharp bend to the right, the driver of the Mazda lost control and collided with a wire fence with the left side of the car coming to rest against the fence. The witness stopped, alighted from the police car and shouted at the occupants to remain in the car and put their hands outside through the window. The witness was in full uniform.

[54] Despite the warning the driver (later turning out to be the plaintiff) jumped out. He had his right hand under his jacket in the vicinity of his left armpit. He said in Afrikaans that he was going to shoot the witness and Van der Merwe. The passenger was still in the car. The witness shot a warning shot through the open door of the Mazda. The bullet hole can be seen on photos 43 and 44 of exhibit "B". Despite this the plaintiff rushed towards the witness. He still had his hand under his jacket and said that he was going to shoot the witness. The witness then

shot the plaintiff through his upper leg. The plaintiff ran away with the witness in pursuit. The witness fired a warning shot. The plaintiff fell down. It appears, although the witness did not say so, that this warning shot ricocheted and hit the plaintiff in the foot.

The witness grabbed the plaintiff with his right hand, holding his weapon in the left hand. A tussle ensued. The plaintiff grabbed the weapon in the left hand of the witness. During the wrestling process a shot went off which hit the plaintiff in his side on the right. The witness then for the first time realised that the plaintiff was unarmed. The plaintiff was arrested and handcuffed.

[55] Van der Merwe occupied himself with the passenger.

[56] The witness contacted the ambulance. Thereafter they took the two arrested persons to the police station whereupon the ambulance arrived. The ambulance officer, on inspecting the plaintiff, pointed out an old healed wound on the left side of the plaintiff. The shot that went off during their wrestling entered the plaintiff on the right side and the exit wound was on the left.

[57] The witness was cross-examined on the version as he had related it to the court. He made an excellent impression. He ultimately shot the plaintiff because of the perceived danger in which he found himself. Van der Merwe was also in danger and the same applied to members of the public who stayed next to the road. He

acted in accordance with his training. Before the first shot through the leg, the plaintiff disobeyed his repeated orders to stand still. Instead, the plaintiff shouted that he was going to shoot the witness and he rushed towards the witness with his hand under his jacket.

[58] The witness said four shots were fired: one through the door, one through the leg, the warning shot (which evidently ricocheted into the foot) and the shot that went off during the wrestling.

[59] The witness identified the plaintiff as the person he arrested on that particular night. This was obviously not disputed.

[60] The witness testified that the arrest took place approximately 1.2 to 1.4 kilometres from the garage.

[61] Of particular importance is the fact that no opposing or contesting version was put to the witness during cross-examination. His evidence must therefore be accepted. See *Small v Smith* 1954 3 SA 434 (SWA). In any event, the witness made such a good impression that I have no hesitation in accepting his evidence.

[62] Reservist Constable Hendrikus Johannes van der Merwe was an equally impressive witness. He helps out as a reservist police constable at SAP Hercules.

[63] He corroborated the evidence of Inspector Botha in all respects. I consider it unnecessary to repeat all his evidence.

[64] He confirmed the fact that Botha shouted at the plaintiff and his passenger to stay in the car and stick their hands out of the window. He confirmed that the plaintiff opened the door, jumped out and shouted that he was going to shoot them. He confirmed that the plaintiff had his hand under his jacket. He confirmed that Botha first fired a warning shot into the open door, that the plaintiff repeated his threat that he would shoot the policeman, that he rushed towards Botha and even ignored a warning shot which this witness fired into the ground. He confirmed that Botha thereupon shot the plaintiff in the leg.

[65] The witness then concentrated on the passenger and arrested him. This witness also observed the wrestling on the ground between Botha and the plaintiff whereupon a shot went off. He also observed that the plaintiff ran away after Botha shot him in the leg and that Botha thereafter fired a warning shot.

[66] The witness also gave clear evidence about the wounds sustained by the plaintiff. It was in the leg, the side and the foot. There were three entry wounds and one exit wound in the torso where he had been shot in the side. The witness also testified about the old wound pointed out by the paramedic at the police station.

[67] Again, no opposing or dissenting version was put to this witness in cross-examination. The same remarks apply as those I made in this regard about Inspector Botha's testimony.

Closing remarks and conclusions

[68] Section 49 of the Criminal Procedure Act, 51 of 1977, deals with the use of force in effecting an arrest.

[69] For purposes of this section "arrestor" means any person authorised under this Act to arrest or to assist in arresting a suspect. This includes the witnesses Botha and Van der Merwe.

"Suspect" means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence. This was clearly the case from the point of view of Botha and Van der Merwe.

[70] Section 49(2) reads as follows:

"If any arrestor attempts to arrest a suspect and a suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect

from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm."

[71] In my view, the proviso in the subsection, dealing with the use of deadly force, is, strictly speaking, not applicable, because Botha only shot the plaintiff in the leg to prevent him from attacking Botha and Van der Merwe as illustrated when the evidence was summarised. The shot hitting the plaintiff in the side went off accidentally during the wrestling. The shot in the foot appears to have been from a ricochet bullet intended as a warning shot and can, in any event, not be described as "deadly force".

[72] Even if the proviso was applicable, I am of the view that the actions of Van der Merwe and Botha, in terms of their uncontested evidence, fell inside the ambit of the proviso.

[73] The defence that the force used was reasonable, necessary and justified in the circumstances, was properly pleaded. In my view this defence ought to be upheld. I cannot see how any court can criticise Inspector Botha for his actions in these particular circumstances. His evidence is uncontested and falls to be accepted.

[74] As to the arrest without a warrant, the defendant, quite properly, pleaded his reliance on the provisions of section 40(1)(b) of the Criminal Procedure Act. I have quoted extracts from the plea.

[75] Section 40(1)(b) reads as follows:

"A peace-officer may without warrant arrest any person-

...

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."

Robbery or attempted robbery is an offence referred to in Schedule 1.

[76] After Botha and Van der Merwe were warned by radio control that the perpetrators had committed an armed robbery and hi-jacking, and after observing the actions of the fleeing plaintiff and his passenger, and his actions in threatening to shoot them, Botha and Van der Merwe acted well within the confines of section 40(1)(b) in effecting the arrest.

[77] If the arrest was lawful, it is difficult to see how the subsequent detention would have been unlawful. In any event, it was properly pleaded that the plaintiff was not detained as alleged but hospitalised under police protection. He was released on bail shortly after his discharge from hospital. In my view it is understandable and justifiable that the plaintiff was hospitalised under police guard as an awaiting trial prisoner.

[78] The defences offered by the defendant have been properly pleaded and proved. In my view the action cannot succeed.

The order

[79] I make the following order: The plaintiff's claim is dismissed with costs.

W R C PRINSLOO  
JUDGE OF THE HIGH COURT

HEARD ON:

FOR THE PLAINTIFF:

INSTRUCTED BY:

FOR THE DEFENDANT:

INSTRUCTED BY: