(1) REPORTABLE : ~~YES~~ / NO

(2) INTEREST TO THE JUDGES : ~~YES~~ / NO

(3) REVISED

06/07/2017

DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

CASE NO: 547/2015

BEFORE THE HONOURABLE MR JUSTICE AML PHATUDI

In the matter between:

LUFUNO MURAVHA **APPLLICANT**

AND

MINISTER OF POLICE **RESPONDENT**

JUDGMENT

Introduction

[1] The plaintiff claims against the defendant patrimonial damages allegedly occasioned by rubber bullet(s) fired by an unidentified member(s) of the defendant[1]. The rubber bullet(s) allegedly shot, hit the Plaintiff on his chick. He, as a result thereof, sustained some injuries.

[2] I, at the commencement of the trial, ordered, as agreed between parties, separation of determination of liability from quantification of any damages sustained by the appellants as envisaged in terms of Rule 33 (4) of the Uniform Rules of this Court. It was further agreed that the determination of quantum be postponed *sine die*.

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[1] The Minister is sued nominally as the political head of South African Police Services

[3] The plaintiff opted to lead the evidence of his two witnesses in his quest to prove that the unidentified member(s) of the South African Police Service[2] who, when shooting at him as aforesaid, did so with the necessary intent alternatively negligently while acting in their course and scope of the defendant's employment. Their option is further premised by his reliance on the defendant's 'duty of care'[3] to the plaintiff. In essence, more reliance was on the defendant's negligence. In cases of reliance on the defendant's negligence, the defendant no longer has a duty to prove the defence of justification as it could not raise such a defence against a claim of negligence. The plaintiff is obligated to prove the element of negligence in order to succeed.[4]

[4] The defendant led two witnesses in its quest to rebut the plaintiff's evidence that the firing of rubber bullet(s) was necessary and justified under the circumstances. The onus, on the other hand, rests on the police to prove on a preponderance of possibilities that the shooting of the plaintiff was justifiable.[5] This accord the principles set out in Mabaso v Felix[6] that 'in an action for damages affecting the plaintiff, it is fair and accords with experience common sense that the defendant should ordinarily bear the onus of proving the excuse or justification. However, where the defendant has expressly pleaded justification it necessitates the plaintiff to disprove such defence, and then the Plaintiff has to bear the onus.'[7] In Shabalala v Metrorail[8] the court held that the onus to prove negligence rests squarely on the plaintiff and requires more than merely proving that harm to others was reasonably foreseeable and that a reasonable person would probably have taken measures to avert the risk of such harm. It is on those bases that the plaintiff accepted to lead evidence first.

FACTS

[5] I find it prudent to first set out what the plaintiff asserts in his particulars of claim. He pleaded that the 'policemen [were] negligent in one or more of the following respects:

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[2] The evidence demonstrated that the police allegedly caused damage were under Public Order Police Unit, being one of the departments of the defendants.

[3] This duty is often referred to as 'the legal duty' and vice versa

[4] City of Johannesburg Metropolitan Council v Ngobeni (314/11) [2012] ZASCA 55 (30 March 2012) para [52]

[5] Magwena v Min of safety and security 303/03/ZASCA 29/11/2005)

[6] 1981(3) SA 865 (A)

[7] Khumalo and others v Holomisa 2002 (5) SA 401 (CC).

[8]

4.1 He failed to determine the identity of the plaintiff before firing him;

4.2 He failed to exercise necessary care and skill when given the circumstances he both could and should have done so;

4.3 He failed to avoid the incident when by taking reasonable and proper care when he could and should have done so;

4.4 He failed to give a warning shot and/or shots when he could and should have done so;

4.5 He failed to establish whether it was necessary to open fire on the plaintiff given the circumstances when he could and should have done so.'[9]

[6] The plaintiff testified that on the 08 August 2014, there was unrest in and around the surrounding villages at Phadzhima Dzumba-Thoho, Limpopo Province. He had a motor car scrapyard workshop and cash loan business operating at the workshop premises situated at Phadzhima-Madzhadzhani, Limpopo Province. He kept a number of people's motor vehicles brought for repairs at the workshop premises. He at or around 19h30 saw a group of people come running and screaming into his workshop. He stopped what he was doing and went to "push" the said people out of his workshop. While "pushing" the people out of his workshop, a big police Motor vehicle (Nyala) appeared. It stopped in front of the workshop. Two police alighted, stood on the ground and pointed their firearms towards the said people who came running into his workshop. The police fired shots towards the people. He was hit by one rubber bullet. He informed Netshituka who was with him that he had been shot at. Netshituka informed the police what they just did. The police then said "sorry". They thereafter board inside Nyala and drove off.

[7] He conceded during cross-examination that the police would not have easily differentiated him from the strikers or people who came running into his workshop because he was approximately 4 meters behind those people. He however, denied to have been part of the people who pelted the police with stones.

[8] Samuel Netshituka (Netshituka), who was with the plaintiff at the time of the incident, corroborated the plaintiff's evidence in as far as the number of protesters who came running into the workshop. He testified

[9] Quoted verbatim from Plaintiff's Particulars of Claim.

that he was assisting the plaintiff to "push out" those who ran into the workshop when a big police motor vehicle (Nyala) came and became stationary alongside the plaintiff's workshop gate. The said Nyala was approximately 150 meters away from the workshop as opposed to 200 meters as testified to by the plaintiff. He as well estimated the distance between the protesters who were in the yard and them to have been approximately 4 meters when they were "pushing them out of the yard".

[9] Captain Milingoni Mudau (Mudau) testified in rebuttal to the plaintiff's version that she and six other Public Order Police (POPS) (she referred that as a 'section') were in a big marked police motor vehicle (Nyala) with the words "Public Order Policing". They received a call to restore order at Phadzhima. They were informed that protesters are heading to Ms Mampa's residence and SAPS satellite office. They went to the area. They found the road being blockaded with big stones, big blocks of wood/trees, burning tyres and other objects. On their arrival at the villages, a number of protesters started to pelt stones at them.

[10] She used a loud speaker to inform the protesters who they were and their purpose being to restore order. She ordered them to disperse. The protesters resisted. She ordered her section to use "Illuminating Para"[10] to illuminate light within the circumference of the area they were at because it was already dark. Protesters started to 'run' off while others pelted stones at them. They proceeded driving towards Mampa's residence. They, at the off ramp on their way to Mampa's residence, found the road blockaded with a scrap of a motor vehicle, big stones and other objects. They used Nyala's scraper affixed to its front to remove some of the stones and the scrap of a motor vehicle off the road. The situation became worse. Protesters pelted stones at them. She ordered her section to use "stan-granade"[11] to disperse protesters. That did not yield any fruit. Protesters pelted more stones at them. She ultimately ordered her section to use "rubber bullets" at the protesters, because their lives were in danger. They managed to remove the objects used to blockade the road and manage to proceed to Mampa's place.

[11] It is common cause: (i) that there was an uprising within Phadzhima; (ii) the plaintiff and the members of SAPS Public Order

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Policing were at Phadzhima village on the evening of 08 October 2014; (iii) the police made use of rubber bullet(s)[12] to shoot at the protesters and (iv) the plaintiff got shot at resulting in him sustaining certain injuries.

ISSUES TO BE DETERMINED

[12] The issues to be determined are (a) whether 'the *sequelae* of the injuries sustained by the plaintiff can be attributed to the negligent conduct of the defendant's employees; and (b) whether the defendant has justified the shooting of the plaintiff'[13].

THE LAW

[13] Negligence (culpa) is when a person fails to act (commission or omission) with the necessary care expected of a reasonable person in his/her position would have acted in the circumstances. Olivier JA penned in Mukheiber v Raath and Another that 'in our law, the standard of conduct expected from all members of society is that of the *bonus paterfamilias*, [that is] the reasonable man or woman in the position of the defendant.' [14]

EVALUATION

[14] As indicated earlier, the plaintiff's injuries were occasioned by the shooting of rubber bullet(s) by the defendant's employees. The plaintiff testified that he was not one of the protesters on the day in question. The said protesters were in fact lying down in a surrender position and he and his friend were standing on their feet. On the other hand the defendant avers that the plaintiff was one of the protesters who pelted stones at them at the off-ramp, if not one of them, he was among those who were pelting stones at them. Apparently the off-ramp referred to is within the vicinity of the plaintiff's workshop. This constitutes the plaintiff's "say so'" as opposed to that of the defendant.

[15] The plaintiff's counsel submitted both in his heads of argument and in court that the defendant owed the plaintiff a legal duty and/or duty of care to 'take all reasonable and necessary steps to prevent injury or harm being caused to the plaintiff. He further submits that the defendant failed to take all reasonable and necessary steps to avoid the occurrence of the incident.'[15]

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[12] Specialised weapons permitted in terms of Regulations Gathering Act
[13] Plaintiff's heads of argument-para 5
[14] 1999 (3) SA 1065 para [31]. The underlined is the Latin terminology.
[15] The submission accords with what the plaintiff pleaded in his particulars of claim

[16] In rebuttal thereto, the defendant's counsel submitted that the firing of rubber bullet(s) was necessary, proportionate and justified under the circumstances of the day and that the plaintiff placed himself in a dangerous situation.

[17] It is clear that the two versions are destructive to one another. The court in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell Et CIE & Others*[16] stated that to come to a conclusion on disputed issues a court must make findings on:

(a) Credibility of various factual witnesses;

(b) Their reliability; and

(c) The probabilities.[17]

[18] In *Dreyer and Another NNo v AXZS Industries*[18] the court indicated that 'on a proper approach a court should also have regard to the probabilities inherent in the respective conflicting versions.' The conflicting versions are, as the plaintiff testified, that at the time he, in the company of Netshituka, was warding off the protesters, the protesters lied down in surrender position. He and his friend remained standing at the time of shooting. The defendant's version is that the protesters were pelting stones at them (police).

[19] Plaintiff testified that he was in his yard when police stopped by the main road, where they alighted and short at him. The Police were ± 150 metres away from where he was. The protesters he was warding off had lied down. He remained standing. They, however, were about 4 metres off the protesters who ran into his workshop yard. The second witness, Netshituka, testified that the police were 200 metres away from where they were standing. He, Netshituka, said to the police after the shooting: "You shot at a wrong person". They responded by saying: "Eish, sorry".

[20] It is trite that a distance of 100 metres is normally equated with the length of a rugby/football field. If the equation is correct, in my view, it is improbable for a person standing at one end of a rugby/football field to

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[16] 2003 (1) SA 11 SCA

[17] SFM v Martell op cit para [5]

[18] 2006 (5) SA 548 SCA para [30]

be in a position to talk to another who is on the other end of the field without raising their voices. Even if the voices are raised, it is improbable for the said people to communicate in the manner described by the plaintiff and Netshituka in their testimony. It is further inherently improbable for a person, standing at a distance of approximately 150-200 metres at night to (a) see the police alight a motor vehicle and point a firearm at him and (b) to communicate with such a persons by informing them that they just shot at a wrong person who in turn replied to say "Eish we are sorry". The evidence showed that the area was not well lit. The police were forced to use illuminating para to enable them to see where the protesters were.

[21] Contrary to the plaintiff's version, the defendant's employees testified that at the time they were at the intersection and or off-ramp trying to remove a scrap of a motor vehicle used by the protesters to blockade the road by the protesters, a group of protesters who were in that vicinity, pelted stones at them. They, finding themselves in danger occasioned by the pelting of stones at them, used rubber bullets to ward off the protesters as ordered by Captain Mudau. They managed to ward off the said protesters off the area. Warrant Officer Tshikukuvhe firmly testified even under cross examination that they only shot at a group that was pelting stones at them. He was confronted with a question as to whether he would have differentiated the by-standers from protesters at the time when they used rubber bullets. He testified that the group they shot at was the one that pelted stones at them. He saw the group because the "Illuminating para" had iluminated light that enabled them to see the direction from which the stones were pelted. He said that it would practically be impossible to differentiate innocent by-standers standing 4 metres behind protesters from the protesters. He remained firm that the shots were directed towards the group that was throwing stones at them only and not innocent people.

[22] Captain Mudau and Warrant officer Tshikukuvhe corroborated each other on facts which point towards probabilities which in my view, tips the scale heavily in the defendant's favour as opposed to the plaintiff's unexplained or improbable facts I already have alluded to. Captain Mudau emphatically denied to have communicated with any protester or a by-stander at any given time between 19h00 (start) 23h00(ending). She testified that they were only contacted via radio by

police officers from the Police Station while they were still patrolling around 23h00 that there was someone who alleged to have been shot at by a rubber bullet. She and Warrant Officer Tshikukuvhe impressed on me when testifying that they inferred that the person who was shot at, if any, was one of the protesters who pelted stones at them when they were removing a wrack motor vehicle that was used to blockade the road. They removed the said wrack with a scraper attached to the front part of Nyala. The defendant version is, in my view, more probable than that of the plaintiff. In fact, the plaintiff's version is improbable. Put differently; when all factors are equipoised, probabilities prevail in favour of the defendant. (**See SFW Group v Martell,** *(See Christelis NO and Others v Meyer NO and others [2016] JOL 33585 (SCA)).*

CONCLUSION

[23] In conclusion, the plaintiff failed to prove the defendant's employees' negligence on a balance of probabilities or that a reasonable police with a duty (i) to maintain public order, (ii) to protect and secure the citizens of the Republic, (iii) to protect property and (iv) to uphold and enforce the law- would have probably taken measures to avert the risk of such harm. (See Shabalala v Metrorail)

[24] It is trite that costs follow the event. The defendant succeeds with his defence and is thus entitled to its costs.

[25] I in the result make the following order

ORDER

The plaintiff's claim is dismissed with costs

AML PHATUDI

JUDGE OF THE HIGH COURT