IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 962/2021

In the matter between:

LUBABALO GUNTU Plaintiff

And

MINISTER OF POLICE Defendant

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

.... DATE .... SIGNATURE

JUDGMENT

NONCEMBU J:

Introduction

[1] The plaintiff instituted the current action against the Minister of Police (the defendant), wherein he seeks damages arising out of his arrest, detention and assault by the members of the police on 26 March 2021. The vicarious liability of the defendant was admitted in the matter.[1]

[2] It is also common cause that the plaintiff was arrested, shot at and detained by members of the police on 26 January 2021. The only issue outstanding is the lawfulness or not of the said arrest, detention and assault.

[3] Prior to the commencement of the trial, the parties agreed on the separation of issues in terms of Rule 33(4), which agreement was subsequently made an order of this court. Therefore, the issue of liability and quantum were separated, and the matter proceeded on liability only, with the issue of quantum postponed *sine die*. Also, by virtue of the admissions made by the defendant on the pleadings, it was agreed between the parties that the defendant bore the onus of proof and the duty to begin.

The Pleadings

[4] At the commencement of the trial, the defendant handed into court an amended plea which was admitted by consent. In the initial plea the assault and the unlawfulness of the arrest were disputed by the defendant. The amended

[1] See pre-trial minute dated 26 July 2022.

plea conceded both the arrest, detention and the assault of the plaintiff by the police. According to the amended plea however, the said assault, arrest and detention were not wrongful and unlawful due to the following reasons:

(a) The arrest was in terms of section 40(1) of the Criminal Procedure Act,[2] in that the plaintiff had committed a schedule 1 offence - he broke the lock-down Regulations by being on the streets after 21h00 in circumstances where he was prohibited from being outdoors; and he pointed a firearm at the police;

(b) the purpose of the detention was to allow the police to investigate the firearm used by the plaintiff, to verify the plaintiff's address, and to ensure that the plaintiff was taken to appear in court;

(c) the plaintiff was shot because he pointed a firearm at the police, and as such the police had to defend themselves. In the circumstances therefore, the shooting was justifiable.

The Evidence

[5] The defendant led the evidence of two witnesses, Sergeant Babi (Babi) and

Constable Sonamzi (Sonamzi). Nothing much turns on the evidence of Sgt Babi because he was not the arresting officer on the day in question, and on his evidence, he did not see much of what happened immediately prior and during

[2] Act 51 of 1977.

the arrest of the plaintiff.

[6] The salient features of his evidence were that he was on duty, working the night shift on the day in question. His duties included doing patrols around the Butterworth city centre in his patrol vehicle (Nissan motor vehicle). He was together with Sergeant Mbangatha who was his crew member on the day. This was during the National State of Disaster period, and as such there was a curfew which prohibited persons and vehicles from being outdoors between certain hours
of the night until the following morning.[3]

[7] Whilst he was busy with his patrols near Fingoland Mall, Babi saw a golf vehicle which failed to stop when he tried to stop it. He gave chase to the said vehicle, and when it continued to speed away, he called for back-up. He suspected
that the vehicle was involved in a kidnapping because it was overloaded with passengers.

[8] Constable Sonamzi responded to the call for back-up, and together with his crew, joined Babi in the chase. They managed to stop the golf vehicle near Mzantsi locality. Babi’s vehicle stopped in the front whilst Sonamzi stopped

[3] In terms of the National Disaster Regulations.

behind the vehicle in question. Babi took a while to alight from his vehicle, as a result he did not see what transpired after the vehicle had stopped. He only heard Sonamzi shouting ‘drop the gun, drop the gun’, after which he heard gunshots. He did not see who was firing the shots, but later learnt that the plaintiff had been injured during the shooting.

[9] Sonamzi testified that he was doing patrols around Butterworth with Constable Mbelekane when he received a call for back-up from sergeant Babi around 2 am on the day in question. He proceeded to the scene and joined the chase where a suspicious golf vehicle was refusing to stop. The golf suddenly stopped, applying dead breaks, and he stopped behind it, whilst Babi stopped on the right side slightly in front of the golf. Sonamzi’s car lights were directly on the golf vehicle.

[10] The plaintiff alighted from the rear passenger seat on the left hand side of the golf vehicle and pointed a firearm at Sonamzi and his crew. They alighted from their vehicle and fired several shots at the plaintiff to defend themselves, as their lives were in danger. On seeing that they were shooting at him, the plaintiff threw the firearm on the side. At that point Sonamzi called on his colleagues to stop shooting. From his firearm he fired three shots and his colleagues fired several shots as well. The plaintiff was struck on the arm and on the left upper hip or waist area. Sonamzi couldn’t say whether or not he was

the one who struck the plaintiff, but confirmed that the plaintiff did not fire any shots at them (the police).

[11] He placed the plaintiff under arrest, explained his constitutional rights, and took him to the police station where he was detained. According to him the reasons for detaining the plaintiff were - so that they could verify his address as he had committed a serious offence (pointing of a firearm); he had breached the Covid-19 Regulations; they wanted to verify his addr and they wanted to ensure that he appears in court. Sonamzi took the firearm and placed it in the SAP 13 register. He could not say whether or not the plaintiff did appear in court, or if his address was ever verified, as he believed that that was the function of the investigating officer. He also had no knowledge of the whereabouts of the firearm at the time of trial.

[12] At the close of the defendant's case, Mr Tsipa, for the plaintiff, applied for judgment in favour of the plaintiff without leading any evidence for the plaintiff or closing the plaintiff's case. The application was premised on a proposition similar to that of absolution from the instance as provided for in terms of Rule 39 (6) of the Uniform Rules of Court.

[13] This Rule provides that a defendant may apply for absolution from the instance in instances where, at the close of the plaintiff's case, the evidence led is such that no court, applying its mind reasonably to such evidence, could find for the plaintiff.[4] The contention by Mr Tsipa was that the defendant had failed to discharge the onus resting on it on the matter and therefore the plaintiff was entitled to judgment in his favour. I asked both parties to address me on whether such a proposition can be applicable in circumstances where the defendant bore the onus of proof. Both parties addressed me, I am indebted to Mr Tsipa for the extensive heads submitted in this regard.

[14] It turns out there is a plethora of authorities in this regard, with its origins stemming from an old case of 1908.[5]According to the authorities I was referred to, this application is similar to that of absolution from the instance where the plaintiff has failed to discharge its onus at the close of its case. Describing this principle, Nkosi AJ stated the following in *Pather v Minister of Police*[6]:

> '31.1…Plaintiff is entitled to apply for judgment at the close of the Defendant's case without leading evidence and without closing its case. It was submitted on her behalf that the test to be applied is similar to that of absolution from the instance where a Plaintiff has not discharged its onus. It was further submitted that if a Defendant upon whom the onus of proof rests has failed to lead such evidence in discharge of that onus to the effect that a reasonable man could have not come to the conclusion that it might be accepted, the court would be entitled to give judgment for the Plaintiff.

[4] See *Claude Neon Lights (SA) Ltd v Daniel* [1976] 4 ALL SA 387 (A).
[5] *Siko v Zonsa* 1908 (T) 1013.
[6] (14512/13) [2016] ZAGPPHC 215 (31 March 2016) at para 31.1 – 31.3. See also *Moeng v Minister of Police* (CIVAPP3/2016[2016] ZANWHC 49 (30 June 2016).

31.2 This proposition of an application for judgment, where the Defendant bore the onus and before the Plaintiff closing its case or leading evidence, was introduced in the old case of **Siko v Zonsa** 1908 (T) 1013 where the court held that it would be a useless (exercise) waste of time to proceed with the matter further.

31.3 The **Siko** case was confirmed as an applicable principle in the case of **Hodgkinson v Fourie 1930** (TPD) 740 at page 743 where it was held as follows: "At the close of the case of the one side upon whom the onus lies, the question which the judicial officer has to put to himself is: Is there evidence on which a reasonable man might find for that side".'

[15] On the strength of these authorities, I am persuaded that the aforementioned principle is applicable to the current matter. The question that remains therefore is whether or not the defendant has discharged the onus resting upon it of establishing a *prima facie* defence to the plaintiff's claim. Put differently, the question is whether or not the evidence tendered by the defendant is such that a court, applying its mind to such evidence reasonably, could find for the defendant.[7]

Analysis

[16] In its amended plea, the defendant contends that the reason for the arrest of the plaintiff was because the police had a reasonable suspicion that he had committed a schedule 1 offence. What is quite striking in this regard however, is that none of the offences the plaintiff was suspected to have committed fall

[7] See *Claud Neon Lights (SA) Ltd v Daniel* [1976] 4 ALL SA 387 (A).

under schedule 1. The listed offences include contravening the Covid -19 Regulations, an offence for which an admission of guilt was fixed, and for which the plaintiff was given a notice to appear in court, and pointing of a firearm.

[17] I pause here to mention that the manner in which the amended plea is formulated makes it somewhat difficult for one to follow. This notwithstanding, it does specifically state, after listing the suspected offences allegedly committed by the plaintiff, that he was arrested for suspicion of having committed a schedule 1 offence, which falls under section 40(1) of the Criminal Procedure Act.[8]I have already mentioned that none of the listed offences fall under schedule 1.

[18] Babi could not give any useful evidence with regards to why the plaintiff was arrested because he allegedly did not see what had transpired leading to the arrest of the plaintiff, a statement which on its own I find quite circumspect. His evidence is that he remained in his vehicle even after having heard shots fired because he was looking for his phone. He did not see where the plaintiff was shot or the firearm which was allegedly pointed by the plaintiff at the police.

[19] All the while he was the main person who was chasing the vehicle the plaintiff was a passenger in, and the one who called for back-up in the chase,

[8] Act 51 of 1977.

and yet, when the vehicle was stopped he seemed to have other more pressing things to do than focus on the vehicle he had been chasing and its passengers. This I find highly improbable.

[20] The only evidence this court has is the uncorroborated version of Sonamzi. No reasons were advanced as to why his crew member and the other police officers at the scene, who were also allegedly pointed with a firearm by the plaintiff, and who also fired shots at the plaintiff, were not called to corroborate Sonamzi's evidence. It begs mention that Sonamzi was by far the most evasive and unimpressive witness under cross examination. He would not answer straightforward questions, requiring that they be repeated over and over, and taking long pauses before he could even answer. Some questions he did not answer altogether.

[21] His version is that when they alighted from their vehicle the plaintiff was already out and pointing his firearm at them. There was no time to fire a warning shot or do anything because their lives were in danger, hence he fired at the plaintiff. This is contrary to Babi's evidence, who testified that before hearing the gun shots, he heard Sonamzi say 'put the gun down, put the gun down', which he believed was directed at the plaintiff, although he never saw the plaintiff carrying a gun. When confronted with this evidence during cross-examination, Sonamzi's response was that he was telling his colleagues to stop shooting after seeing that the plaintiff had dropped his gun. He gives no further

explanation why he had to shoot the plaintiff three times, when oh his own version, the plaintiff dropped the firearm on seeing that the police were shooting at him.

[22] The plaintiff's version is that he never had or saw a firearm, nor pointed one at the police on the day in question. If one takes Sonamzi's evidence, that when they alighted from their vehicle, the plaintiff was already pointing them with a firearm, the relevant question becomes: can it be said in the circumstances that their lives were in imminent danger and that there was nothing else they could do except to shoot at the plaintiff. Further taking into account that Sonamzi alone shot the plaintiff three times and he couldn't even say the number of times his colleagues fired at the plaintiff, yet in all that time the plaintiff didn't fire a single shot at them. Also taking into account Babi's evidence, who told the court that he heard Sonamzi tell the plaintiff to drop the gun prior to hearing the gunshots, coupled with Sonamzi's evidence that the plaintiff dropped the gun when they started shooting at him, and he had to tell his colleagues to stop shooting. The answer to the latter question can only be in the negative.

[20] With the poor quality of the evidence tendered in this matter, at this point I have difficulty even with accepting that a firearm was indeed recovered at the scene on the day in question, given that the only evidence before this court in that regard is the say so of Sonamzi, whose credibility I find quite questionable.

[21] From the aforementioned, it is clear that the police officers cannot be afforded the protection enjoyed by one who acts in private defence. They have failed to establish *prima facie*, on a balance of probabilities that there was an unlawful attack which was imminent on their lives, leaving them with no option but to use lethal force on the plaintiff.

[22] Mr Mzileni for the defendant, sought to argue that the police were empowered to use force in effecting the arrest of the plaintiff in terms of section 49(2) of the Criminal Procedure Act as amended[9]. What this argument loses sight of is that that was not the pleaded defence nor the evidence tendered by the witnesses. According to the plea and the evidence of Sonamzi, the plaintiff was shot because he pointed a firearm at the police, not because he was resisting arrest. There is no evidence that there was any attempt to arrest the plaintiff which the plaintiff, being aware of, tried to resist.

[23] Even if one was to accept that the police officers used force in order to effect an arrest as contemplated in the aforementioned provisions, this would still not afford the police any protection as the said provisions are very clear that the force used must be reasonably necessary and proportionate in the circumstances to overcome the resistance or to prevent the suspect from fleeing. That was clearly not the case in the present matter.

[9] Act 51 of 1977, as amended by the Judicial Matters Amendment Act, 1998.

[24] It appears from the docket which was only presented to court on the day of the trial, that although the plaintiff was taken to court, the matter was never enrolled and therefore the plaintiff never appeared before a magistrate in court. The reason the matter was never enrolled appears from the investigation diary of the docket, where the prosecutor is enquiring as to who of the five suspects who were in the vehicle pointed the police with a firearm. This I presume is because, in all the statements filed, including that of Sonamzi, none of the police officers mention that the plaintiff was the person who pointed them with a firearm. The statements indicate that all five occupants were arrested, and yet only the plaintiff was registered on the docket and taken to court.

[25] The version of the plaintiff is that he was arrested for failing to confine himself indoors during curfew, and he only learnt a day before the trial commenced that he was also charged for pointing a firearm. The SAP 14 attached to the docket is also not helpful in this regard because it is illegible and therefore one cannot tell who the detainee was and for what reason he/she was detained. It is also worth noting that the plaintiff was never charged with unlawful possession of a firearm.

[26] It is trite that the defendant bears the onus establishing the lawfulness of both the arrest and the detention on a balance of probabilities.[10] The action is based on the constitutional infraction of section 12(1) (a), in that every individual has a right not to have their liberty arbitrarily deprived unreasonably and unjustifiably, or without just cause.[11]

[26] I have stated elsewhere in this judgment that whilst the defendant's amended plea is not so well formulated, what is clear therefrom is that the plaintiff was arrested because the police believed that he had committed a schedule 1 offence. This was further supported by the evidence tendered before court. I have also mentioned that none of the offences with which the plaintiff was charged fell under schedule 1. It follows therefore that the jurisdictional requirements for an arrest without a warrant in terms of section 40 (1)(b)) of the Criminal Procedure Act were not met in this matter.

[27] In addition, the poor quality of the evidence that was tendered by the two police officers who testified in this matter exacerbates the situation even further. In fact, the only with the evidence pertaining to the arrest and detention before this court is that of Sonamzi, because Babi did everything in his powers to disassociate himself with the activities at the scene of arrest, such that his evidence could be of no assistance to this court, except to create the contradictions already referred to above.

---

[10] See *Minister of Law and Order & Others v Hurley & Another*, 1986 (3) SA 568 (A) at 589 E - F and *Minister van Wet & Order v Matshoba*, 1990 (1) SA 280 (A) at 284 E - H and 286 B - C.

[11] See *Zealand v Minister of Justice and Constitutional Development & Another*, 2008 (4) SA 458 (CC) at paras 24, 25 and 35.

[28] Having failed to meet the jurisdictional requirements for an arrest without a warrant, it follows that I can find no justification for the police arresting the plaintiff without a warrant. With that, it follows that it cannot be said that the subsequent detention of the plaintiff was lawful. Given all the above, coupled with the poor quality of the evidence tendered by the defendant's witnesses, I cannot find that the defendant has discharged the onus resting on it of establishing on a balance of probabilities that they have a prima *facie defence* to the plaintiff's claim.

[29 Given the poor nature of the police evidence, the contradictions and inconsistencies inherent therein, I even find it questionable if the plaintiff ever pointed any firearm at the police. Especially in light of the fact that Babi, the initial chaser and initial suspicion formulator never even saw the firearm in question. The firearm was never presented in court, in fact, even the docket handed to court during the trial did not have a copy of the SAP 13 register to indicate the presence of the said firearm.

[30] None of the witness statements in the docket, including that of Sonamzi, mention the plaintiff as the person who pointed them with a firearm, hence the matter could not even be enrolled in court. I can therefore find no justification for the police shooting the plaintiff on the day in question.

[31] Having stated all the above, I cannot find that any reasonable court can find for the defendant in this matter. Under these circumstances, it is therefore unnecessary for the plaintiff to lead any evidence or even close their case in the matter. Accordingly, judgment is granted in favour of the plaintiff.

[32] On the issue of costs, Mr Tsatsi argued that a punitive cost order be awarded to display the court's displeasure at the conduct of the defendant. In particular, in not settling the matter timeously and thereby causing unnecessary delay and costs. I am, however, not persuaded that a punitive cost order is warranted on the facts of this matter. I find it of no consequence that the defendant amended their plea on the doorstep of the trial, or that they did not settle the matter timeously. They followed the matter through to trial following on their instructions, to show that the plea was not merely intended to delay the matter, but to actually challenge it at trial. The plaintiff also amended its particulars of claim as late as July 2022 in the matter. I find no reason why costs should not follow the result.

Order

[33] In the premise, the following order is made:

(a) The defendant is held liable for 100% of any proved damages incurred by the plaintiff as a result of his arrest, detention, and assault by the members of the defendant on 26 January 2021.

(b) The defendant is ordered to pay the plaintiff's costs of this action.

____

V P NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES

-

Counsel for the Plaintiff : *N/A*

Attorneys for the Plaintiff : Y Tsipa Attorneys

C/O Makali Attorneys Inc

No. 23 Deliville Road

Mthatha

Counsel for the Defendant : *S Mzileni*

Instructed by : Office of the State Attorney

Mthatha

Date of hearing : 04 August 2022

Date judgment delivered : 08 September 2022