

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 52325/2012

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

2024

In the matters between:-

SIBUSISO MOTAUNG

PLAINTIFF

And

FIDELITY SECURITY SERVICES

DEFENDANT

JUDGMENT

BAQWA, J

Introduction

- [1] The plaintiff seeks order for delictual damages arising from his having been shot in the left eye by a rubber bullet which led to the eye being surgically removed.

Background

- [2] The facts are succinctly outlined in the pleadings where the particulars of claim state that:

- “4. On 21 September 2009 at approximately 15h30 the Plaintiff was wrongfully and unlawfully assaulted by a security guard whose identity is unknown to the Plaintiff, by shooting him with a rubber bullet.
5. The Plaintiff was hit in his left eye with the said rubber bullet that caused destruction of his eye to the extent that it had to be surgically removed.
6. At all relevant times the aforementioned security guard was acting within the cause and scope of his employment with the Defendant.”

- [3] The particulars of claim plead in the alternative that:

“9. Alternatively

9.1 ...

9.2 The injury aforesaid was sustained as a result of the negligence of the security guard who was negligent in one or more of the following aspects:

9.2.1 He fired the rubber bullet in the direction of the Plaintiff without regard to the safety of the Plaintiff. “

[4] The Defendant denies that the Plaintiff was shot with a rubber bullet fired by a security officer in the employ of the Defendant and in the event this court finds that the Plaintiff was shot by a security officer in its employ denies that the security officer was acting in the course and scope of his employment with the Defendant.

[5] In amplification of its denial the Defendant pleads as follows:

“6.5 In terms of paragraph 7(1) of the Code of Conduct for Security Service Providers of 2003 promulgated in terms of section 28 of the Private Security Industry Regulations Act 56 of 2001.

‘A security service provider must, within his or her ability, render all reasonable assistance and co-operation to the members and employees of the Security Services to enable them to perform any function which they may lawfully perform.’

- 6.6 As the defendant is a registered security service provider, the SAPS officers dealing with the protests and riots called upon the defendant’s Security Services to enable them to perform any function, namely to maintain law and order and to get the protestors who had obstructed and blockaded the main road between Standerton and Leandra, to disperse.
- 6.7 The defendant’s security officers complied with their legal duty to render all reasonable assistance and co-operation to the South African Police Services and in so doing subjected themselves to the command, management and control of the South African Police Services.
- 6.8 At all relevant times when the defendant’s security officers were rendering assistance to the SAPS officers and were deployed by the SAPS, they worked under the management and control of the SAPS officers, and not the defendant.

6.9 At all material times when the defendant's security officers were working with the SAPS, they were acting within the course and scope of their deployment by the SAPS."

The Law

[6] It is trite that the object of pleadings is to define the issues: see *Minister of Agriculture and Land Affairs v De Klerk*¹.

[7] The purpose and importance of pleadings was further elucidated in *Knox D'Arcy AE and Another and Agricultural Development Bank of South Africa*² where it was said "It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet."

[8] It is also trite that the elements of the assault upon which the Plaintiff bases his claim are causation, namely the causing of the violation of a person's bodily integrity; wrongfulness and intent which may be direct or in the form of negligence.

[9] Put differently, an assault occurs when one person intentionally and unlawfully causes physical harm or injury to another.

¹ 2014 (1) SA 212 SCA at 223 G-H

² [2013] 3 All SA 404 (SCA) at para (35)

[10] In a case where vicarious liability is relied upon such as the present, the Plaintiff must prove that the perpetrator was employed by the Defendant and that a delict was committed against the Plaintiff and lastly that when he did so he was acting within the course and scope of his employment at the relevant time.

See *Neethling Potgieter & Visser, Law of Delict*³.

Evidence

[11] The Plaintiff tendered oral testimony at the trial and he called Patrick “Wanda” Dladla (Wanda) as his witness.

[12] He testified that on 21 September 2009 he was in the company of Wanda when they went to board a taxi to the Standerton township. The taxi pick-up point was at or near the Early Bird Farm factory. He walked past the strikers and protestors standing in front of the Early Bird factory.

[13] They proceeded to a position near the police van which was across the road from where the protestors were. He was not aware of the reasons for the protest as he was not participating in it. There was a road between the protestors and the police van and Fidelity Security officers stood in front of the Early Bird factory. He stated that the protestors were

³ 4th ed (Butterworths 2001) 374-9

approximately about 15 metres away and that he did not see them throwing stones. They were singing and chanting freedom songs.

[14] The Plaintiff stated that the police officers were about three metres away from him and that the police were outnumbered by the security guards. The police were armed with service pistols whilst the security guards were armed with shotguns.

[15] He testified that he heard a gunshot and then dropped to the ground whereafter he touched his eye and realised that he was injured. Other people were also lying on the ground.

[16] The Plaintiff was taken to a clinic and thereafter to Ermelo Hospital where his eye was surgically removed. According to the Plaintiff the police did not fire any shots and that they merely acted as observers. The Fidelity Security guards were dressed in grey uniforms.

[17] Wanda confirmed that he was with the Plaintiff at the time of the incident. He also confirmed that they were standing on the side of the road where a police van was stationed together with the police officers. The protestors were across the road from them in front of the Early Bird factory. The Plaintiff was next to him also waiting for a taxi to go home.

[18] He further stated that the protestors were singing songs and chanting but threw no stones, nor did they barricade roads or burn objects. According to him shots were fired five times. The police officials near him had service pistols and the Fidelity Security guards had shotguns.

[19] Wanda stated that the Plaintiff and three others were injured as a result of the shots fired. When he found the Plaintiff, the Plaintiff was holding two hands in front of his eye.

[20] Wanda provided an affidavit to the police which was signed before a Commissioner of Oath. He confirmed that in the affidavit he stated that the protestors threw stones. He did not see who shot the Plaintiff but he saw that Fidelity Security officers were shooting towards the place where the Plaintiff was standing.

Analysis

[21] Notably, the Defendant did not tender any evidence at the trial even though it disputes the Plaintiff's version that the Plaintiff was hit in the eye with a rubber bullet. The Defendant merely argues that no evidence was presented by the Plaintiff that the Defendant or one of its security officer shot a rubber bullet using a rifle and that the rubber bullet caused the injury to Plaintiff's eyes. This submission is made despite the

uncontradicted direct evidence by both the Plaintiff and Wanda that the Fidelity Security officers were shooting towards the place where the Plaintiff was standing.

[22] The Defendant submits that no hospital record or any other documents were placed before this court to show that it was a rubber bullet that injured the Plaintiff's eye.

[23] It is common cause that at the commencement of the trial this court ordered that the trial proceeds regarding the issue of liability only and that the quantum issue be postponed *sine die* in terms of Rule 33(4) of the Uniform Rules of Court.

[24] Absent any evidence contradicting the testimony that Fidelity Security guards shot in the direction of the Plaintiff, that the Plaintiff fell down and that when he rose from the ground he was bleeding from the eye, the submission by the Defendant is not sustainable.

[25] It is trite that the test applicable in civil trials is proof on a balance of probabilities. The evidence of the Plaintiff or Wanda was not challenged in material respects under cross-examination. Nor was any version of the Defendant put to either the Plaintiff or Wanda to gainsay their evidence regarding the circumstance under which the Plaintiff was shot. Further,

no version was put on behalf of the Defendant to either witness as to how Plaintiff's injury could have occurred contrary to their version.

[26] The Defendant further submits that no evidence was presented about where the individual who shot the Plaintiff was standing or which of 5 to 10 security officers it could have been that pulled the trigger.

[27] This action has been brought on the basis of vicarious liability, the requirements of which have already been dealt with above. It is common cause that the Fidelity officers were employees of the Defendant when the events narrated above occurred. The evidence demonstrates that the police officers were merely observers and that they were not directing the actions of the security guards. No evidence has been led to confirm their deployment by the Police on the date in question. There is absolutely no evidence in this regard be it from the South African Police side or from the Defendant's side. The only inference that the court can draw is that there was no such deployment.

[28] The mere reference by the Defendant to the provisions of paragraph 7(1) of the Code of Conduct for Security Services Providers of 2003 in its plea and argument does not exonerate the Defendant from vicarious liability.

[29] The Constitutional Court has held that the test for vicarious liability on the part of the employer:

“requires a court to ask whether there is a sufficiently close connection between the wrongful conduct on the wrongdoer’s employment ... (the) pivotal enquiry is therefore whether there was a close connection between the wrongful conduct of the (employees) and the nature of their employment.”

See *F v Minister of Safety and Security*⁴; *K v Minister of Safety and Security*⁵.

[30] Even if it were to be assumed that the Fidelity Security officers were called upon to render assistance to members of the SAPS (regarding which there is not a thread of evidence), this would not imply that the Defendant is not vicariously liable for their acts. The test in this regard is who is most closely connected to the act of wrongdoing in having shot the Plaintiff.

See *Midway to Engineering & Construction Services v Transnet Bpk*⁶.

⁴ 2012 (1) SA 536 (CC) at para [50]

⁵ 2005 (6) SA 419 (CC) at para [44]

⁶ 1998 (3) SA 17 (SCA) at 23 H-I

[31] In light of the above facts and the law it is patently clear that on a balance of probabilities the Defendant is vicariously liable for the acts of the security guards in its employ in having shot the Plaintiff.

Costs

[32] The Defendant submits that the evidence presented does not constitute an unlawful assault for the reason that there is no evidence to suggest that the Plaintiff was injured as a result of a rubber bullet as pleaded and there is no evidence that the Plaintiff was intentionally injured.

The implausibility of the submission is evident from the submission itself. The nature of the projectile utilised by the shooter(s) is irrelevant to the issue of causation of the injury. Further, negligence in the form of *dolus eventualis* is sufficient to constitute delict on which the action is based.

[33] The above submission together with the fact that the Defendant elected not to call any witness to gainsay the evidence that the Plaintiff was shot by a security officer of the Defendant and that no explanation was forthcoming for the failure on the Defendant's part to call any witnesses calls for an adverse inference to be drawn against it. The inference is that the defence sought to be put up was baseless and that the Defendant had

acted unreasonably in its conduct of the litigation thereby bringing about unwarranted expenses to the Plaintiff.

[34] In the result, the following order ensues:

34.1 The Defendant is liable to the Plaintiff for 100% of his proven or agreed damages arising out of the Plaintiff having been shot with a projectile or rubber bullet on 21 September 2009.

34.2 The Defendant is ordered to pay the costs of the action on the scale as between attorney and client which shall include costs of senior counsel.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 14 November 2023

Date of judgment: January 2024

Appearance

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