

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION, MAHIKENG)**

CASE NO: 1626/2017

In the matter between:

KARABELO SERAPELO

PLAINTIFF

and

MINISTER OF POLICE

DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* e-mail. The date and time for hand-down is deemed to be 10h00AM on 01 March 2024.

JUDGMENT

MOAGI AJ:

Introduction

- [1] The Plaintiff claims patrimonial damages against the Defendant for the injuries he sustained on the eye, after he was hit by a rubber bullet, which was fired by a member of the South African Police Services (*“police officer”*).
- [2] The Defendant conceded the shooting incident but denied liability to the Plaintiff’s claim and pleaded that the rubber bullet was shot to disperse the protesters.
- [3] At the commencement of the trial, Counsel for the Plaintiff moved an application to separate merits and quantum in terms of Rule 33(4) of the uniform Rules of Court, which application I granted. The trial proceeded on determination of liability on merits only.

The pleadings

- [4] For the purpose of determining the merits of this matter, I deem it prudent to quote the following relevant paragraphs from the particulars of claim. The Plaintiff stated that:

“4. On or around 27 February 2016, at Setlagole Village, Mahikeng, North West Province Plaintiff was shot with a rubber bullet on his eye by the South African Police of Madibogo Station...whose

identities are unknown.

5. *On the day in question, there were protesters around the village and one store was burned down. The police had a confrontational situation with the community members who were protesting. The police retaliated by shooting people who were protesting with rubber bullets.*
6. *The Plaintiff was passing not far from where the riots were taking place when he was shot on his eye wrongfully and negligently by members of the South African Police Services of Madibogo stationed at Madibogo village, whose identities are unknown to him.*
7. *At all material times, the Plaintiff was never part of the people who were protesting around the village and he was just a passerby when he was shot on his eye wrongfully and negligently by the police officers.*
11. *The Police officials who shot the Plaintiff failed to act in a manner a reasonable person would have acted under the circumstances and as such acted wrongfully and negligently.*
12. *The police were negligent when they shot at the Plaintiff as at the time of the shooting, the Plaintiff did not pose any threat to the said police officials or anyone else and he was not even part of the group that was demonstrating around the village.* (Emphasis underlined).

[5] The Defendant pleaded in paragraph 3 of his plea that:

“Ad paragraph 4

Save to admit that the Plaintiff was shot as stated, the bullet was not

intended for the Plaintiff for same was released to disperse the mob [that] was protesting, hence the Plaintiff was arrested for public violence and released to his injuries.”

Issues to be determined

- [6] This court was required to determine, whether the police officer who shot the Plaintiff with a rubber bullet acted negligently and thus wrongfully?
- [7] Whether the police officer was justified to fire the rubber bullet which injured the Plaintiff?

The evidence for the Plaintiff

- [8] The Plaintiff and his mother (Ms Serapelo) testified in support of the Plaintiff's delictual claim.

Examination-in-chief

- [9] The Plaintiff, testified that, on 27 February 2016, in the afternoon, he was at Kgathu section in Setlagole village where he resides. His mother (Ms Mother) requested him to go to a place known as RDP section in Setlagole village (**“RDP section”**), to give money to Thabiso’s mother. He was accompanied by his three friends at the time he left his place of residence.
- [10] He was aware that there were violent protests in Setlagole village on 26 February 2016. He however indicated that, on 27 February 2016, the situation was contained and he did not observe any violent protests along the way to the RDP section.

- [11] Upon entering the RDP section and whilst walking nearby one shop, he saw a group people standing next to a shop. There were also police officers within the vicinity of the shop. When he reached the crossroad near the shop, he heard two (2) shots fired and saw people running away from the police officers.
- [12] He also ran and realised that, he had been injured on his eye by a rubber bullet which was fired by the police officers. He then ran to Thabiso's residential place.
- [13] Thabiso's mother approached the police officer who shot the Plaintiff, twenty minutes after the Plaintiff arrived at Thabiso's residence. The Plaintiff insisted that he did not participate in the protest.

Cross-examination

- [14] During cross examination, the Plaintiff was unable to provide a proper account of where he was standing or walking at the time he was hit by a rubber bullet.
- [15] He indicated that, he was emerging behind the shop when he saw the police officers and the members of the public. He was walking towards the crossroad from behind the shop when he heard the two shots. He later indicated that he was at the crossroad when he heard the two shots.
- [16] It was put to the Plaintiff that, his evidence in chief contradicted the allegations contained in paragraph 5 of the particulars of claim. The Plaintiff insisted that, at the time he was sent to Thabiso's mother, there were no protests at Setlagole Village.

[17] The Plaintiff did not dispute the Defendant's version which was put to him that, the rubber bullet was not intended for him; that such rubber bullet was directed at the members of the community who were pelting stones at the police officers and fire fighters.

The evidence of the Plaintiff's mother

[18] The Plaintiff's mother conceded that she did not witness the above shooting incident save to confirm that on the day in question she did cause the Plaintiff to go to Thabiso's mother. The Plaintiff was accompanied by his three friends at the time he left his premises.

Evidence for the Defendant

Examination in chief

[19] Sergeant Funde testified that she was appointed as a police officer in 2009 and elevated to a public order policing unit in 2016. She was trained in public order policing and crowd management.

[20] On 27 February 2016, she reported at work in Vryburg. She and her colleagues were later deployed to patrol and monitor Setlagole village following violent protests which occurred on 26 February 2016.

[21] At around 17H00, she received a call from Constable Majole who instructed her (Sergeant Funde) and Constable Leshotho to escort emergency fire service personnel ("**fire fighters**") to one shop, reported to be burning at RDP section. They did not know what caused the fire.

- [22] At the time they (Sergeant Funde, Constable Leshotho and fire fighters) arrived at the aforementioned shop, she saw a group of people (estimated to be roughly 50 people) in the yard of one Reconstruction and Development Program ("**RDP**") house, which was situated across the street of the shop. The people were just standing in the yard and doing nothing which warranted any action from her and Constable Leshotho.
- [23] The fire fighters commenced to extinguish the fire and the group of people who were standing opposite the shop, started to advance towards the shop and pelted stones at them. She then went to their vehicle which was parked about 9 meters from the shop building, to take a muzzleloader gun.
- [24] She explained that she loaded two rubber bullets and shot twice towards the direction of the crowd at 45 degrees angle. The crowd then retreated.
- [25] She testified that, she fired the rubber bullets to protect herself, her colleagues, and the fire fighters as she believed their lives were in danger.
- [26] After the crowd had dispersed, she was approached by an elderly woman who informed her that the Plaintiff was hit by a rubber bullet.

Cross-examination

- [27] During cross-examination, Sergeant Funde insisted that, there were no protest action at the time they arrived at the shop.
- [28] Sergeant Funde was confronted about the content of paragraph 5 of the

particulars of claim which only stated that, the reason she fired the rubber bullets was to disperse the crowd and not protect herself. Further that, the sworn statement which she deposed to after the shooting incident did not indicate that she fired the rubber bullet in self-defence or because their lives were in danger. The sworn statement merely stated that she fired the rubber bullets to disperse the members of the community.

[29] In response, Sergeant Funde insisted that, she fired the rubber bullet towards the members of the community who were pelting the stones towards them and she believed that their lives were in danger.

[30] It was put to Sergeant Funde that, she did not comply with the standing order on public order policing and crowd management, in that, she was not wearing protective clothing, she did not address the crowd she saw when they arrived at the shop, she resolved to utilise the muzzleloader gun in a residential area without considering the risk of harming innocent members of the community, she did not fire a warning shot prior to shooting at the protesters and did not seek approval from her Commander prior to shooting the rubber bullet.

[31] Sergeant Funde indicated that, she did not put on protective clothing as there was no protest action at the RDP section. She indicated that the protest action occurred around the N18 route. She went to the shop to accompany the fire fighters. She did not address the group of people she saw outside the shop as they did not demonstrate any violent demeanour warranting any attention from her and her crew member.

[32] She testified that, the rounds of the muzzleloader gun has 2 balls which split to different directions if fired. She insisted that the muzzleloader

gun was the appropriate method to disperse the crowd compared to live ammunition and tear gas.

[33] She did not call her commander prior to shooting the rubber bullet, as the crowd was merely 47 paces away from where they were stationed and she had to act immediately in order to protect their lives and state property.

Analysis of the evidence

[34] It is trite that, every infringement of bodily integrity is *prima facie unlawful* and once the infringement is proved, the onus rests on the wrongdoer (the Defendant) to prove a ground of justification.¹

[35] In *Mabaso v Felix*² stated 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”.

[36] The Plaintiff *in casu*, bore the onus of proof that, the police officer who fired the rubber bullet was negligent³ and acted wrongfully.

¹ *Noor Moghamat Isaacs v Centre Guards CC* [2004] 1 All SA 221 (C) at para 7, citing *Mabaso v Felix* 1981 (3) SA 865 (A) 873E – 874E.

² *Mabaso v Felix, supra*

³ *City of Johannesburg Metropolitan Council v Ngobeni* (314/11) [2012] ZASCA 55 (30 March 2012) para [52]

[37] It is common cause that the Plaintiff was injured on the eye by a rubber bullet which was fired by Sergeant Funde on 27 February 2016, who was acting within the cause and scope of her employment.

[38] The Plaintiff's case as pleaded in the particulars of claim is that *"The police had a confrontational situation with the community members who were protesting. The police retaliated by shooting the people who were protesting with rubber bullets. The Plaintiff was passing not far from where the riots were taking place when he was shot on his eye, wrongfully and negligently by the South African Police Services. Further that the Plaintiff did not pose any threat to the police officials or anyone else and he was not even part of the group that was demonstrated around the village"*.

It was further contended in the heads of arguments filed on behalf of the Plaintiff that, the version of Sergeant Funde contradicted the Defendant's pleaded case in that:

"The plea as it stands does not allege that the crowd was engaged in a wrongful conduct, any injury sustained by a member of the Defendant or the circumstances under which the Plaintiff was shot. The Defendant is only raising the issue of justification and grounds why the Plaintiff was shot during trial. The evidence of Sgt Funde did not give any evidence of attack or eminent attack on her life or any other legal interest by the Plaintiff. Sgt Funde as a trained Public Order Police exercised little or no duty of care to herself and her colleagues by not following her protocol on crowd management. She failed to attend the scene with proper combative clothing and she failed to call her commander of her situation when she arrived at the scene. She ought to have anticipated that the crowd she found just idling, could have been responsible for the shop being burnt and had she followed protocol, back up could have arrived timeously and the need for excessive force would not have arisen."

[39] The Defendant case is that, the police officer was justified to fire the rubber bullet on the day in question as the members of the community pelted stones at the police officers and the fire fighters. The rubber bullet was directed towards the protesters and not the Plaintiff.

[40] The version of the Plaintiff and Defendant are destructive to one another. The court in Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others⁴ held that when a Court is faced with two conflicting versions, the Court must make findings on the following: -

- “(a) the credibility of the various factual witnesses;*
- (b) their reliability; and*
- (c) the probabilities.*

As to (a), the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as: -

- (i) the witness' candour and demeanour in the witness box,*
- (ii) his bias, latent and blatant,*
- (iii) internal contradictions in his evidence,*
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions,*
- (v) the probability or improbability of particular aspects of his version,*
- (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had

⁴ (4/01) [2002] ZASCA 98 (6 September 2002) at paragraph [5], pp 4-5.

to experience or observe the event in question and (i) the quality, integrity and independence of his recall thereof.

*As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case which will doubtless be the rare one, occurs when the Court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. **But when all factors are equipoised, probabilities prevail.**" Emphasis underlined.*

[41] In this matter, the grounds of negligence relied upon by the Plaintiff relates mostly to the police officer's failure (omission) to take certain steps prior to firing the rubber bullet which eventually injured the Plaintiff.

[42] The test for negligence was addressed in *Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-F* where the proper approach for establishing the existence, or otherwise, of negligence was formulated by Holmes JA as follows:

"For the purposes of liability culpa arises if—

(a) a diligens paterfamilias in the position of the Defendant—

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss;

(ii) would take reasonable steps to guard against such occurrence; and

(b) *the Defendant failed to take such steps.*”

[43] In *Shabalala v Metrorail [2007] SCA 157 (RSA)*, Scott JA held that:

“

[7] *It is now well-established that a negligent omission, unless wrongful, will not give rise to delictual liability. The failure to take reasonable steps to prevent foreseeable harm to another will result in liability only if the failure is wrongful. It is the reasonableness or otherwise of imposing liability for such a negligent failure that will determine whether it is to be regarded as wrongful. See eg Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd **2006 (3) SA 138** (SCA) para 11. If it is reasonable to do so, the Defendant will be said to have owed the injured party a legal duty to act without negligence; that is to say, to take such steps as may have been reasonable to avert the harm”.*

[44] Counsel for the Plaintiff contended that, Sergeant Funde should have *“anticipated that, the crowd she found just idling, were responsible for the burnt shop had she followed protocol, back up could have arrived timeously and the need for excessive force would not have arisen”.*

[45] Sergeant Funde’s uncontroverted version is that, when they arrived at the shop, the group of people she saw near the shop, was just standing and did not display violent behaviour which warranted any action from the police officers. This was corroborated by the evidence of the Plaintiff that, there were no violent protests when he left his home, until he arrived near the shop, at the RDP section.

[46] Apparent from the evidence before this court is that, the violent protest commenced when the two police officers were already at the shop and the fire fighters were in the process of extinguishing the fire at the shop.

[47] The Plaintiff’s Counsel further contended that, Sergeant Funde ought to have fired a warning shots in the air prior to firing the rubber bullet at the

direction of the protesters. Sergeant Funde provided a plausible explanation that, she fired rubber bullet towards the crowd at 45-degree angle as the prevailing circumstances required immediate action, emphasising that their lives were in danger. It should be noted that the crowd was estimated to be 47 paces away from the shop and had advanced towards the shop, whilst pelting stones at the two police officers and the fire fighters.

[48] The Plaintiff did not dispute that, the community members were pelting stones at the police officers and that their lives were in danger. The Plaintiff in the particulars of claim stated that, there was: *a confrontational situation between the community and the police officers*".

[49] The Plaintiff struggled to indicate where he was at the time the rubber bullet was fired. He indicated that he was emerging from behind the shop when he heard the gun shot. This version is improbable as the people who were pelting the stones were in front of the shop, across the street.

[50] The Plaintiff further indicated that he was at the crossroad when he heard the gun shot. The Plaintiff did not dispute that, Sergeant Funde fired the rubber bullet towards the members of the public who were pelting the stones towards them. Further, that Sargent Funde pointed the muzzleloader gun at a 45-degree angle.

[51] Having regard to the manner in which the protest erupted, I am not persuaded that the Plaintiff has proven negligence on the part of the Defendant. In my view, the explanation proffered by Sergeant Funde is plausible under the circumstance, that there was no other reasonable measures that Sergeant Funde could have taken to prevent the harm

suffered by the Plaintiff.

[52] It was emphasised in Kruger v Coetzee⁵ that the reasonable foreseeability of harm, by itself, does not require action to be taken to avert it. Action to avert reasonably foreseeable harm is required only if, in the particular circumstances, the person concerned ought reasonably to have acted.

[53] Sargent Funde's uncontested evidence is that, she did not intend to shoot the Plaintiff and that the reason for firing the rubber bullets was to disperse the violent crowd and to protect their lives. It was not the Plaintiff's evidence, nor was it suggested that the firing of a warning shot in the air was a requirement of the protocol on public order policing.

[54] I agree with Counsel for the Plaintiff that, there is a constitutional and public law duty on the state to protect its citizens and the State is liable for the failure to perform that duty, unless it can be shown that there is compelling reason to deviate from that principle.⁶

[55] In the context of delictual damages, the test for determining wrongfulness or otherwise of an omission to act is as restated in Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA):

“Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the Defendant is under a legal duty

⁵ *supra* at 430F - G

⁶ Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA) para 43

to act positively to prevent the harm suffered by the Plaintiff. The test is one of reasonableness. A Defendant is under a legal duty to act positively to prevent harm to the Plaintiff if it is reasonable to expect of the Defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the Defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and in considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.' (emphasis underlines)

[56] Having regard to the circumstances in which the events unfolded on that fateful day, it appears that the police officers and the fire fighters were the victims of an attack by members of the public. I find that the Plaintiff has failed to establish that police officers omitted to discharge a legal duty towards him, within the context of the facts of this case.

[57] I cannot find on the evidence before me that the police officer was negligent in firing the rubber bullets.

[58] The uncontroverted evidence which I find to be credible is that, Sergeant Funde and her colleagues were requested to escort the firefighters to a shop which was reported to be burning. It is not known what caused the fire. At the time the police officers arrived at shop, Sergeant Funde saw a group of people standing in another yard, opposite the shop, some 47 meters away from the shop. The group of people she saw, did not display violent behaviour which warranted further attention from the police officers. The same group of people later advanced towards the shop and pelted stones at the two police officers and the fire fighters. Sergeant Funde went to the motor vehicle to get a muzzleloader gun and immediately fired two rubber bullets towards the protesters in order

to protect their lives and state property.

[59] Considering the circumstances of this case, viewed objectively, I am not persuaded that the Plaintiff has proven negligence and wrongfulness on the part of the Defendant.

[60] The Defendant bore the onus to prove that the shooting of the rubber bullets directed towards the violent members of the community was justified.

[61] Counsel for the Plaintiff contended that:

“the plea as it stands does not allege that the crowd was engaged in a wrongful conduct, any injury sustained by a member of the Defendant or the circumstances under which the Plaintiff was shot. The Defendant is only raising the issue of justification and grounds why the Plaintiff was shot, during trial”.

[62] In this matter, the Defendant did not make reference to the words justification in his plea, but he detailed the basis upon which the rubber bullet was fired. This was further detailed in the sworn statement deposed to by Sergeant Funde on 27 February 2016 and reiterated during trial.

[63] I agree with Counsel of the Plaintiff that the purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a Plaintiff to plead a particular case and seek to establish a different case at the trial.

[64] The issue of justification was dealt with by Counsel for Defendant during trial and in the heads of arguments filed on behalf of the Defendant.

Counsel for the Plaintiff made detailed submissions in rebuttal to the defence of justification raised on behalf of the Defendant.

[65] The evidence presented before this Court is that the police acted in pursuance of their duty to protect themselves from violent action muted by the protesters who pelted stones to the police officers and the fire fighters. In my view, the evidence of Sergeant Funde justified the reason why the rubber bullets were fired towards the protesters.

[66] Even if it can be argued that Sergeant Funde ought to have foreseen the danger in firing a rubber bullet towards the crowd in such close proximity to her, she did indicate that, she pointed the firearm towards the ground at a 45-degree angle and according to her the rubber bullet was the most reasonable intervention compared to utilising teargas or live ammunition.

[67] It was suggested to Sergeant Funde that, she ought to have fired a warning shot first prior to firing the rubber bullets towards the protesters. In response, she indicated that she needed to do something urgently given the proximity in relation to the violent crowd.

[68] The most probable explanation for the Plaintiff's injury on the evidence presented before this court is that, he was unfortunately hit by a rubber bullet which was aimed at the violent members of the public, who pelted stones at the police officers and the fire fighters.

Conclusion

[69] In view of the circumstances which led to the shooting of the rubber bullets, I am satisfied that the Defendant has demonstrated that the police officer's conduct was justified and hence was not wrongful.

[70] The Plaintiff failed to prove that the Defendant's employees were negligent.

[71] The plaintiff in instituting action to recover delictual remedies, sought to enforce his Constitutionally guaranteed right not to be exposed to harm. I can see no plausible reason to add salt to the wound and grant a cost order against the Plaintiff who was injured by the police officers in the process of dispersing protesters. In the circumstances, each party must bear their own costs.

ORDER:

[72] I make the following order: -

[a] The Plaintiff's claim is dismissed;

[b] Each party to pay its own costs.

M S MOAGI
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Counsel for the Plaintiff: Adv O. Ntsamai

Counsel for the Defendant: Adv O. Monnahela

Dates of hearing: 02 & 03 October 2023

Heads of Argument filed: 09 & 10 October 2023

Date of judgment: 01 March 2024