Case Number 698/91 /al

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF LAW AND ORDER Appellant

and

PETROS MTHEMBU Respondent

CORAM: BOTHA, VAN HEERDEN, NESTADT, GOLDSTONE JJA

et KRIEGLER AJA

DATE OF HEARING: 7 SEPTEMBER 1993

REASONS FOR JUDGMENT

KRIEGLER AJA/.....

KRIEGLER AJA:

The determination of this appeal turned on a narrow factual issue. Therefore, having heard counsel for the appellant, and being unpersuaded that the court a quo had erred, the appeal was there and then dismissed with costs. In accordance with the intimation at the time the reasons for the order are now furnished.

The appeal was directed at an award of damages for bodily injury made in favour of the respondent against the appellant by Hugo J in the Durban and Coast Local Division. The respondent's case was that his right eye had been blinded by a shotgun pellet fired by a policeman. His particulars of claim advanced a variety of grounds for holding the appellant liable for the damages he had allegedly suffered in consequence. The plea in turn joined issue on various bases. The evidence adduced at the trial therefore ranged fairly wide. But

ultimately the essential facts were largely common cause and the real issues within a narrow compass.

The evidence established that the respondent had sustained the injury alleged on the afternoon of Saturday 15 November 1986 at Currie's Fountain sports stadium in Durban. He had attended the annual general meeting of a national trade union in the stadium that day. Many thousands of members had come from far and wide and when the meeting ended at approximately 4 p.m. the crowd started dispersing. Some were served a meal inside the stadium while others started streaming out. Whether some or all of the latter were heading for buses parked along the lane outside the stadium or whether they were intent on causing havoc in an area beyond the buses remained unresolved at the trial. What was common cause though was that they were confronted by a contingent of six policemen under the command of a Constable Meeker. He had

been instructed to monitor the crowd unobtrusively from a distance and to report anything untoward to his superior by radio. A task-force was standing by to lend reinforcements within a few minutes if required. The conduct of a section of the crowd emerging from the stadium led Meeker to believe he had to intervene without delay. Whether that opinion was well-founded and whether the action he took was justified remained hotly contested to the end. The trial judge did not arrive at any conclusion in that regard.

Nor was it necessary for him to do so. The respondent's primary cause of action was that the policeman who shot him had acted unlawfully and intentionally or negligently. The crux of the appellant's defence was that the firing of the particular shot had been justified. More particularly it was contended that the respondent had been shot lawfully, either because he had been

involved in hurling stones and other projectiles at the police or because others in his vicinity had been doing so. In either event, so the appellant contended, such shots as had been fired by the police had been discharged lawfully in the reasonable and necessary exercise of their duty to maintain law and order.

The trial judge held (i) that the onus to justify the shooting of the respondent rested on the appellant, and (ii) that such onus had not been discharged. On appeal it was conceded on the appellant's behalf that the finding as to the incidence of the onus was correct. (The concession was rightly made - see Mabaso v Felix 1981 (3) SA 865 (A) 876E.) The factual finding was challenged however. The view I take of the matter renders it unnecessary to detail the various submissions made in support of the argument.

The appellant's case stood or fell with

Meeker's evidence, which established that it must have been he who had fired the shot that injured the respondent. Yet, according to Meeker, he had not fired any shot which could possibly have struck a person standing in the vicinity of the stadium entrance. He was adamant that, while in an area some 80 metres to the south of the entrance, he had fired four shots, three to the east and one to the south. He had not been threatened by anyone to the north of him, had no reason to fire in that direction and had not done so. It follows that if the respondent had been to the north of Meeker at the time, there was no evidence to justify his being shot.

And the evidence indeed established as a preponderant probability that the respondent had been hit while standing near the stadium entrance. His evidence as to his movements after the meeting had ended was not seriously challenged, nor is

there any reason to doubt it: As a shop-steward of the trade union he had been deputed to assist in serving members who wanted to eat before departing. While he was engaged in that task at a point inside the stadium a teargas canister fell nearby; he dropped his ladle, ran for the exit and managed to push his way through the crowd milling there; he emerged, peeped round a bus parked just to the south of the exit, saw some police activity further down the lane and was then hit in the eye.

In the final analysis, therefore, the bulk of what had been in contention on the pleadings and most of the evidence at the trial eventually proved irrelevant or of peripheral importance only. The shot Meeker fired which injured the respondent to the north of him - on his own showing - had not been legally justified. A suggestion (advanced for the first time in argument on behalf of the appellant in this court) that the offending pellet

may have ricocheted in a northerly direction, was speculative, inherently improbable and can be disregarded. The conclusion is ineluctable that the respondent, an innocent onlooker, was shot while standing in a quarter from which Meeker had sensed no danger and which he had had no reason to direct any fire.

The trial court's conclusion that the appellant was liable to compensate the respondent for the damages he suffered as a result of the loss of vision in his eye was therefore correct.

J.C. KRIEGLER

ACTING JUDGE OF APPEAL

BOTHA]

VAN HEERDEN] AGREED

NESTADT]

GOLDSTONE]