**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case no: 454/19

In the matter between:

**THABANG PHAKULA** **APPELLANT**

and

**MINISTER OF SAFETY AND SECURITY** **RESPONDENT**

**Neutral citation:** *Phakula v Minister of Safety and Security* (Case no 454/19) [2020] ZASCA 109 (23 September 2020)

**Coram:** PETSE DP, MOCUMIE, and DLODLO JJA and EKSTEEN and POYO-DLWATI AJJA

**Heard**: 17 August 2020

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The time and date for hand down are deemed to be at 10h00 on 23 September 2020.

**Summary:** Delict – claim for damages – arrest without warrant – use of force to effect arrest and allegedly prevent appellant from fleeing – whether shooting, arrest and detention lawful – shooting, arrest, detention and assault inextricably linked –

separation of issues inappropriate – matter remitted to the high court for retrial on all issues before a different judge.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside.

3 The matter is remitted to the high court, differently constituted, for re-trial on all the issues.

## JUDGMENT

**Mocumie JA (Petse DP, Dlodlo JJA and Eksteen and Poyo-Dlwati AJJA concurring)**

[1] This is an appeal against the judgment of Tuchten J sitting in the Gauteng Division of the High Court, Pretoria (the high court), in terms of which the high court dismissed the claims of Mr Thabang Phakula, the appellant (the plaintiff), for his unlawful shooting, arrest and detention, and assault by members of the South African Police Services (SAPS), who were under the executive authority of the Minister of Safety and Security, the respondent (the defendant). The third to tenth defendants were the police officers. For convenience, the parties will be referred to as in the high court. The appeal is with the leave of the high court.

[2] On 26 October 2010, at around 18h30 or 19h00, the plaintiff was shot by members of a special task force of more than six police officers, on the allegation

that he was part of an armed gang that had conspired to commit robbery with aggravating circumstances at the private residence of Mr Mahomed Ameen Bhamjee (Mr Bhamjee) in Die Heuwel, Witbank. The plaintiff was arrested and detained from that date. He appeared in the regional court on charges of attempted murder and robbery with aggravating circumstances. On 11 November 2011 he was found not guilty and discharged due to lack of evidence. By then, the plaintiff had been in custody for some 11 months pending the finalisation of his trial.

[3] As a consequence of the shooting, the plaintiff was left with multiple wounds in both his legs and shoulder, disfigured and physically impaired. He also lost two teeth. As a result of the injuries sustained, the plaintiff was found to be medically unfit to resume work as an army officer in the South African National Defence Force. He subsequently instituted action proceedings against the defendant in which he claimed damages arising from the shooting incident and for his subsequent arrest, assault and detention.

[4] The particulars of claim alleged that on 26 October 2010 the members of SAPS went into the street and fired shots at the plaintiff and, as a result, he sustained multiple gunshot wounds in both his legs and shoulder. It is further alleged that:

‘4 During the arrest of the [plaintiff], while lying on the ground and in full view of the SAPS members, [one of the police officers] [viciously] kicked the [plaintiff] all over his body and face . . . The arrest was unlawful in that it did not comply with the provisions of the criminal law of the Republic of South Africa relating to arrests without a warrant of arrest and it violated [the plaintiff’s] right as contained in Sections 12 and 35 of the Constitution Act 108 of 1996.

5 Subsequent to the arrest the [plaintiff] was unlawfully detained with aggravating circumstances at Klipfontein Police Station at the instance of the aforesaid members of the

South African Police Services. For two (2) months before being transferred to Paxton prison. The detention was with aggravating circumstances in that the Plaintiff was injured and kept in detention for more than ten (10) months without receiving proper medical attention of his choice.'

[5] In its amended plea the defendant alleged:

'3.3 When confronted by the police, some of the robbers opened fire towards the police which prompted the police to open fire in return.

3.4 Plaintiff attempted to flee from the scene. In an attempt to arrest him and in the circumstances where it was clear that the [plaintiff] could not be arrested without the use of force, the fourth defendant fired several shots towards [the] plaintiff in order to prevent him from fleeing

3.5 The fourth defendant believed on reasonable grounds:

3.5.1 that the use of force was immediately necessary because the offence for which the plaintiff was sought to be arrested was in progress and was of a forcible and serious nature and involved the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm because the suspects referred to above were heavily armed with inter alia firearms

3.6 In the alternative to the above, the fourth defendant believed that the force was immediately necessary for the purpose of protecting himself and other defendants who were at the scene from imminent or future death or grievous bodily harm that could have been caused by the [plaintiff] and his fellow robbers

3.7 Further alternatively, there was a substantial risk that the [plaintiff] would have caused imminent or future death or grievous bodily harm if the arrest was delayed.'

[6] Pursuant to the defendant's plea, the plaintiff amended his particulars of claim to read:

‘3 **Claim A**

3.1 On the 26th October 2010 at about 20h05 and at Woltemade street Die Heuwel, Witbank, Mpumalanga Province, the [plaintiff] was unlawfully shot several times and assaulted by GERT PETER KOCK DE KLERK a member of the South African Police.

3.2 As a result of the aforesaid multiple gunshot[s] the [plaintiff] sustained the following severe gunshot wounds:

3.2.1 on the left lateral proximal lower leg

3.2.2 on the left distal thigh

3.2.3 on the right medial mid-thigh and right hip

3.2.4 further gunshot wounds on the right lateral and posterior proximal arm.

3.3 As a result of the aforesaid assault the [plaintiff] sustained the following injuries:

3.3.1 Broken tooth on the left lower jaw

3.3.2 Broken tooth on the right lower jaw.

4 Particulars of the nature and extent of these injuries sustained by the [plaintiff] were set out in the Medico Legal report of [Dr] A [Tony] Birrel.

5 The aforesaid GERT PETER DE KOCK was at all material times acting in his capacity as member of the South African Police Services and he was acting within the course and scope of his duties.

6 As a result of the gunshot wounds sustained by the [plaintiff]:

6.1 He was hospitalized at Witbank Hospital from 26th October [to] 14th December 2010.

6.2 Suffered loss of income

6.3 Will suffer loss of income

6.4 Has been disfigured and disabled

6.5 Will undergo further medical treatment

6.6 Suffered loss of amenities of life

6.7 Particulars appear from the report of Dr BIRREL and Dr LEON.

. . .

9 The [respondent] is vicariously responsible and liable for the damages sustained by the [plaintiff] in consequence of the actions by the fourth defendant.

10 **Claim B**

10.1 On the 26th October 2010 at 20h05 the aforesaid defendants at Woltemade Street, Die Heuwel, Mpumalanga, *arrested the first plaintiff without a warrant of arrest*. Subsequently the first plaintiff was taken to Witbank Hospital under the guard of the aforesaid defendants.

10.2 Thereafter at the instance of the aforesaid police official. *The plaintiff was detained at Klipfontein Police Station and subsequently at Paxton Prison from the 14th December to 11th November 2011 – for thirteen [13] months without bail*.

10.3 On 11th November 2011 the plaintiff appeared in the magistrate of Witbank on the count of: house robbery and attempted murder, he pleaded not guilty and was found not guilty on all counts and was discharged by Witbank magistrate court.

. . .

10.5 The aforesaid police officials were at all material times acting within the and scope of his employment.

10.6 The [respondent] is vicariously responsible and liable for the damages sustained by the plaintiff.

. . .

**Claim C**

10.8 The plaintiff has as a result of the aforesaid *unlawful detention, assault and unlawful arrest* carried out by the aforesaid police officials on the 26th of the October 2010 suffered general damages.

10.8.1 The aforesaid police officers were at all material times acting in their capacity as police officers in the services of the South African Police and were acting within the course and scope of their duties.' (Emphasis added.)

Pleadings were closed without further ado.

[7] At the commencement of the trial, the parties agreed to a separation of issues in terms of rule 33(4) of the Uniform Rules. The high court then ruled that the issue of whether the police had acted lawfully in shooting the plaintiff would be determined first and that the trial on all the other issues arising in the case would be postponed for later determination. In other words, the unlawfulness or otherwise of the shooting was separated from the other issues in dispute. The trial thereafter ran on the footing that the defendant accepted that it bore the onus to prove that its members were justified in shooting the plaintiff.

[8] At the end of the hearing, the high court found against the plaintiff and held that '[i]t was clear both objectively and to the plaintiff subjectively that an attempt to arrest the plaintiff was being made. Despite that, the plaintiff fled. The plaintiff could not be arrested except by use of force . . . If De Klerk had not shot him, the plaintiff would probably have escaped into the veld and the night, as the other three gang members did.' It granted the following order:

'The plaintiff's action must fail. I make the following order:

There will be judgment for the defendant against the plaintiff, with costs.'

Although not crisply set out in the notice of appeal, correctly construed, this is the finding by which the plaintiff is aggrieved and in relation to which the trial court granted him leave to appeal to this Court.

[9] Before identifying the issues for determination in this appeal, I set out a brief exposition of the evidence adduced in the high court. Three witnesses testified on behalf of the defendant. Warrant Officer (W/O) De Klerk was the main witness. According to him, there was a robbery underway. One of the robbers was shot dead inside the house. Three others fled. The plaintiff fled over the front palisade fence into the street. W/O De Klerk testified that he believed that if he did not shoot the plaintiff, the latter would not only evade arrest but also pose a danger to other persons.

[10] The plaintiff testified that he was walking in the street, after getting lost, when he was shot from the balcony of a house in the same street. The shooters had, shortly before he was shot, shouted something to him in Afrikaans which he did not understand. As he fell to the ground, one police officer fired a shot at the ground and the bullet ricocheted and hit him in his hip. After the shooting, the police officers and Mr Bhamjee repeatedly kicked him as he lay on the ground. He suffered multiple gunshot wounds and broken teeth. He told the police that he was on his way to visit his girlfriend who was a student at UNISA at that time. They took his backpack that contained his clothes and toiletries. They also seized his cell phone. As a result, he could not call his then girlfriend who could have confirmed that he had been communicating with her from the time he left Witbank, from where he had travelled, up to the point immediately before he was shot. The high court, whilst accepting that the plaintiff had sustained more than the three gunshot wounds in his legs as admitted by W/O De Klerk, criticised the plaintiff on several aspects of his evidence and labelled him a poor witness.

[11] The question which the high court ultimately answered was whether the police, in trying to prevent the plaintiff from fleeing, had any justification based on

reasonable grounds to shoot the plaintiff. And, as already indicated, it ruled in favour of the defendant.

[12] Before this Court, the plaintiff raised the following issues for determination on appeal:

'(a) whether the shooting by the members of the defendant was necessary, reasonable and complied with s 49(2) of the Criminal Procedure Act 51 of 1977 as amended by s 7 of the Judicial Matters Second Amendment Act 122 of 1998;

(b) whether the trial court erred in finding that the plaintiff may have sustained other injuries in the house during the shooting;

(c) whether the trial court erred in rejecting the plaintiff's version that the other police who were on the balcony fired shots at him;

(d) whether the high court erred in finding that the plaintiff bore the onus to prove that the injuries he sustained were caused by the bullets fired by the other police officers; and

(e) whether the high court was correct in finding that the shooting of the plaintiff by W/O De Klerk was justified.'

[13] Whether a separation occurs at the instance of the court or on application by the parties, it must be an issue which arises from the pleadings.[1] It is trite that the whole purpose of pleadings is to define the issues between the parties, to confine the evidence of the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being disadvantaged by the introduction of matters not fairly ascertainable from the pleadings. In other words, a party should know in advance, in broad outline, the case they will have to meet at

[1] *First Rand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6; 2018 (5) SA 300 (SCA).

the trial.[2] In light of the outcome of this appeal, I need say no more than that the plaintiff's particulars of claim are not a model of good draftsmanship and clarity.

[14] As alluded to earlier, an agreement was reached between the parties on the extent of the separated issues. The high court, too, did not provide any elucidation as to why this course was taken, save to state, in its judgment that '[w]hen the trial was called before me, counsel asked for a separation of issues. . . I ruled that the issue of whether the police had acted unlawfully in shooting the plaintiff be determined first and that the trial of all other issues arising in the case would be postponed for later determination, if necessary'.

[15] Reverting to the pleadings in conjunction with the separation of issues, it is the formulation of the plaintiff's claim in the pleadings that we must look at to determine the scope of the separated issues. In his particulars of claim, the plaintiff alleged that he was shot and assaulted by the police officers. These allegations are imprecise and not even the subsequent amendment overcame the shortcomings in the particulars of claim. For instance, the fact that the plaintiff was shot in the street on his way to visit his girlfriend and not as one of the robbers that had committed the armed robbery, only came up during the hearing. Claim B refers to arrest and detention without any specificity. Claim C for instance encapsulates all three claims despite their distinct nature especially when it comes to having to prove them. Counsel for the plaintiff did not seek any amendment to the pleadings. A court is empowered during the hearing of a matter, at any stage before judgment, to grant leave to amend any pleading or document on appropriate terms. The court may also permit an amendment during the hearing of an appeal where no real prejudice would

[2] Rule 18(3) Uniform Rules of Court. See also *Erasmus Superior Court Practice* (RS 11, 2019) at D1-234.

be occasioned by it. The test is whether the issues sought to be introduced by the amendment have been fully canvassed at the trial.[3] Counsel for the plaintiff was asked in this Court if he could point to any reference to such details and he could not. For this reason, it is necessary to point to exactly what I say is insufficient for purposes of pleading.

[16] When consideration is given to the defendant's plea, despite the insufficiency of the allegations by the plaintiff, it is clear that the one issue that the high court separated from others, ie whether the members of the defendant were justified in shooting the plaintiff, was inextricably interwoven with the arrest and the assault to such a degree that it was impractical to make a determination on the separated issue without any reference to the arrest and the assault.

[17] Counsel for the defendant implored this Court to decide the appeal on the assumption that the arrest was lawful as, according to him, the plaintiff was part of the gang that attempted to commit the armed robbery. So too counsel for the plaintiff implored this Court to assume that the arrest was unlawful, but for a different reason: that the plaintiff was never in the house. The fallacy with the assumption advocated by each counsel is that first, the issue of arrest is not before this Court. Nor was it before the high court. Second, to make such an assumption would be to bind the next court, when it has to determine the outstanding issues.

[18] As alluded to above, in its judgment the high court accepted that W/O De Klerk and his colleagues were absolved by s 49(2) of the Criminal Procedure Act 51 of 1977 which empowers or permits an arrestor to lawfully use force to arrest a

[3] *LAWSA* 3 ed para 379. See also the cases cited therein.

suspect and the suspect resists the attempt, or flees, or resists the attempt and flees. But in the light of the conclusion to which I have come, it is not desirable to delve into that aspect.

[19] It is unfortunately necessary to say something about the separation of the issues that was sanctioned by the high court, at the request of the parties. Most recently, in *Nature's Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality*,[4] this Court was once more constrained to remind practitioners and judicial officers that:

'This Court has cautioned repeatedly against the inappropriate separation of ill-defined issues which do not serve the goal of enhancing the convenient and expeditious disposal of litigation. In *Denel* the court foresaw the danger of disputes arising from imprecise articulation of orders made under rule 33(4). It set out guidelines which litigants would be well advised to heed when seeking separation of issues under the rule and stated:

"Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. *It should not be assumed that the result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. And even where the issues are discreet, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing particularly when there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.* But, where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so, it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order as to avoid confusion. The ambit of terms like the "merits" and the "quantum" is often thought by all the parties to be self-evident at the outset of the trial, but, in my

[4] *Nature's Choice Farms (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] ZASCA 20; [2020] 3 All SA 57 (SCA) para 16.

experience, it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, the trial Court should ensure that the issues are circumscribed with clarity and precision."' (Emphasis added.)

[20] As this case demonstrates, it is never advisable to separate issues as a general rule. Ill-considered separation of issues often result in a wastage of scarce resources as has been witnessed in this case. Legal representatives and judicial officers alike must reflect carefully before seeking and ordering a separation of issues to avoid mishaps of the kind that happened in this case. Failure to do so may have the unfortunate consequence that the expeditious finalisation of the case is delayed. The adage that justice delayed is justice denied readily comes to mind in circumstances such as we have seen in this case. Here the interests of the litigants have not been served as they will have to now start all over again.

[21] The conclusion to which I have come renders it unnecessary for now to consider the versions presented in the high court. Had the separation of the issues not been ordered, the trial would have commenced with evidence being led by both parties to determine first and foremost whether or not the arrest was lawful. Then the rest of the issues including the assault and detention, substantiated by medical evidence would flow naturally therefrom to assist the court to come to a proper conclusion on whether the police officers were justified in shooting the plaintiff. But as is apparent from its judgment, the order that the high court granted brought an end to the whole action encompassing three claims when the two of those claims were not before it. On this basis alone, the appeal ought to succeed only for the matter to be reheard.

[22] For all the foregoing reasons, the course adopted in the high court was, in the light of the peculiar circumstances of this case, inappropriate. The high court should simply have heard all the evidence on all the claims as would have been tendered by the parties and thereafter determine all the issues before it. That would also have meant that the high court would not have fallen into the trap, as it did, of making factual findings on one leg instead of all three legs of the plaintiff's claim. This Court is therefore bound to remit the matter to the high court for a determination of all the issues in one trial.

[23] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside.

3 The matter is remitted to the high court, differently constituted, for re-trial on all the issues.

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B C MOCUMIE

JUDGE OF APPEAL

APPEARANCES

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|---|---|
| For appellant: | M J Letsoalo |
| Instructed by: | A J Masingi Attorneys, Pretoria |
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