

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 426/2013

In the application between:-

ANTI ELSIE KUNENE

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT BY: MOLOI, J

HEARD ON: 12 NOVEMBER 2015

DELIVERED ON: 26 NOVEMBER 2015

- [1] This is a delictual claim of a 22 year old female for damages arising out of her being shot by a member of the police service on 18 July 2011 at Ezenzeleni township, Warden. She was rendered a

paraplegic as a result and she was 18 years old at the time of the shooting. She is suing the Minister of Safety and Security vicariously for compensation for the damages suffered. This judgment is on the merits alone having agreed to deal with the merits first and the quantum, if need be, later.

- [2] On 18 July 2011 the members of the Public Order Policing Unit were deployed to Ezenzeleni township, Warden, to control the residents that were protesting the failure to deliver services by particularly the municipality. A home of one counsellor, Mr Zwane, was set alight in the process. The plaintiff was one of the protestors and did not see the police officer who shot her. The defendant denies that a member of the police service shot at and injured the plaintiff.

- [3] On the day in question and at dusk between 7 and 8 pm the plaintiff left her home to go join the other protestors at the community hall in the township. She was in the company of her friends, Phindile and Tshidi Mokoena. It was a cold and dark night. They joined a group of singing and toy-toying people where tyres were burning. Suddenly four police officers in full uniform appeared. She heard them saying "shoot these dogs." The crowd dispersed and ran away in different directions. The police officers were carrying long fire-arms. She and her friends ran towards a church and hid in it. At the church she, Thabo Mokoena, Ndome Tshabalala, Yster and Tona sought refuge.

They remained there for a few minutes and decided to run away towards their respective homes.

- [4] As she was running, and near a corner of the street, she felt something striking her from the back and she fell to the ground. The others in her group kept on running leaving her behind. She tried to get up but she could not. Thabo and Ndome realized she had fallen down and came back to help her. She saw a police officer nearby and asked him for help but he simply walked past her. When Ndome and Thabo got to her they decided to call Siphamandla who stays at a house near the corner to help. Siphamandla came and they carried the plaintiff into his house and called an ambulance. The plaintiff was injured on her back. She did not know what struck her. She knew the people she saw were police because they were wearing police uniforms and had long fire-arms. Visibility was good. She did not know who shot her but only the police were there armed with fire-arms. She was taken to Harrismith hospital and later transferred to Pelonomi Hospital in Bloemfontein where she was detained for a month for treatment. She is paralyzed from her waist down as the bullet struck her spinal cord, pierced the lung and kidneys. During the day when she was at home the police officers went past and fired rubber bullets and she picked up one spent rubber bullet on her premises.

- [5] In cross-examination she stated that during the day the police officers were carrying the same type of fire-arms she saw that night. She did not know how a normal bullet looked like but she picked up a rubber bullet at her home during the day. The group they joined at the hall was big. When the police officers said "shoot the dogs" they were referring to them i.e. she and the group near the tyre fire. As they were running away from the fire nothing happened and nobody chased after them. She did not know who shot her. It was pointed out to her that in a statement she made to IPID on 18 October 2011 she did not say she saw the police officers but only a group of people. She did not know the pistols the police were issued with were tested against the three cartridges found at the scene and they were negative. She did not know rubber bullets could cause the injuries she sustained.
- [6] Tshidi Mokoena was called as the next witness and she confirmed having been with Phindile when they went to the plaintiff's home earlier in the day. She confirmed that she, Phindile and the plaintiff left the plaintiff's home when they saw smoke whirling around and heard voices. It was a tyre that was burning and a group of people were standing around the fire. She confirmed police in uniform appeared and said "shoot these dogs" and she ran away in a different direction and never saw the plaintiff again that evening. In cross-examination she confirmed the night was very cold and dark, that approximately 20 people were around the burning tyre when police officers came and said they must shoot the dogs, that police were

also wearing woollen hats with police insignia and that at the scene the police did not shoot. She saw the long guns, the police officers were carrying. She saw three of them.

- [7] Thabo Mokoena testified that he saw the plaintiff at the tyre fire and fled with her when the police said they must shoot the dogs. The police were wearing the police uniform. He ran with the plaintiff to hide at the church for some time. When they left the church he saw the police and started running. The police chased them carrying long guns. He heard a gunshot going off. He looked back and saw the plaintiff was lying down on the ground. They went back to assist the plaintiff and a policeman appeared and he went to hide in a nearby shack. In cross-examination he stated that he met the plaintiff alone at the place where approximately 40 people were singing when police appeared for the first time. There were some police patrolling in police vehicles and some on foot. He did not know how many policemen were in the vicinity. There is a high mast light near the hall and this lit up the area. There were four people hiding in the church. When they left the church he saw police on foot chasing them. He heard a gunshot. He and Ndomi tried to assist the plaintiff as she could not move. The plaintiff was taken to Siphamandla's home and an ambulance was called.

- [8] Sphamandla Dlamini was sleeping at approximately 9pm on 18 July 2011 when he heard a female voice screaming for help outside his

home. He woke up people in the house and heard a male voice calling his name. Through the window he saw a female person lying down on the ground. He went out and found Ndomi who asked him to help. He also realized that it was the plaintiff lying on the ground and that the plaintiff was his schoolmate. He and Ndomi took the plaintiff into his house as she could not walk. He saw the plaintiff's back bleeding and tried to stop the blood. He called an ambulance. Through the window he saw a police vehicle outside and saw one policeman looking where there was blood near gate and drove off. Later an ambulance arrived and took the plaintiff away. He asked Ndomi what happened and he said the police shot at them. In cross-examination he stated he asked what happened before the police van arrived. He did not know what the police were looking for. He did not know at which place the plaintiff was shot. The plaintiff said to him she did not know who shot her. He would, however, expect her to say the police shot her. The plaintiff was crying though she could readily talk. That closed the case for the plaintiff.

- [9] The defence called first Vusisizwe Makhubu, a constable attached to the Public Order Policing Unit of the South African Police Services at Bethlehem. He testified that on 18 July 2011 he was deployed to Ezenzeleni township at Warden together with seven others as there was an unrest there. Their duty was to restore peace and order. They were issued with stungrenades, cs gas, batons, shotguns, rubber bullets and a video camera. CS Gas (teargas) is released through shotguns and also canisters that are thrown at the crowd. They also

have shields to protect themselves if objects are thrown at them. A shotgun is long and must be handled with both hands. He described how they work. The 9mm parabellum pistols that are officially issued may not be used as they are lethal and use live ammunition. He was entrusted to operate the video camera and he remained in the police armoured vehicle (the Nyala) and recorded the scenario as they moved around through barricaded streets of the township. Besides the Nyala there were also police vans and a combi (Vito). He had replayed the video he took at the commencement of the hearing. The IPID took all their firearms for ballistic testing and none had been fired on the day in question. No report of shooting was reported on the night. No live ammunition was used on the night. The cross-examination related to procedures that the police follow in the handling of guns and reports.

- [10] The next witness was Jan Karel Nieuwenhuisen, a Warrant Officer in the South African Police Service attached to the Forensic Science Laboratory in Pretoria. He and Sibiya filed reports regarding the analysis of the guns sent to them as well as the cartridges picked up. The results were negative. Seeketsa Gideon Khumalo, a Warrant Officer in the South African Police Services at Bethlehem was at Zenzeleni, Warden on 18 July 2011. He was the record keeper and made notes simultaneously with the happenings. He was in a different Nyala than the one Makhubu was in. Nobody used live ammunition otherwise he would have recorded it. He only knew about a person shot when IPID made investigations some weeks after the

incident. All the issued fire-arms were taken for analysis but the report was negative. In cross-examination he said there were no foot patrols made on 18 July 2011. It was pointed out that Makhubu confirmed that there were foot patrols and he could not answer.

- [11] The plaintiff's case is that she was unlawfully assaulted by an unidentified member of the South African Police Service by firing a shot that hit her on her back resulting in her being rendered paraplegic. This incident took place at Ezenzeleni township at Warden on 18 July 2011. The members of the South African Police Service were deployed there to combat the protest of the residents relating to non-delivery of services by the authorities. The police officers even stopped the protesters to further attack the house of counselor Zwane which was vandalized earlier on the day. The police officers were provided with shotguns from which rubber bullets could be fired as well as teargas canisters and shields to protect themselves when objects were hurled at them. In addition they had the standard issues of 9mm parabellum pistols which can only be issued to members of the Police Service and the Defence Force and are not available to the general public. The members of the Police Service were accordingly acting within the scope and in the course of their duties as employees of the defendant and, as such, the defendant, being their employer, is liable for damages suffered by the plaintiff.

- [12] The damage suffered by the plaintiff was caused when she and her friends went to join a group of protesters at a place where a tyre was burning. Members of the Police Service got there and said "shoot the dogs." The protesters ran away in different directions and the plaintiff with others sought refuge in a nearby church. No shooting or pursuit took place at that stage. After hiding at the church for a while, the group decided to leave with a view of each going to their respective homes. In that process they saw a member/s of the police Services coming from the opposite direction. The group then turned around and ran away from the Police members. Whilst so running away, the plaintiff was struck by something on her back and she fell to the ground. One of the police members who was nearby ignored the pleas for help by the plaintiff. The members of the plaintiff's group, Thabo Mokoena and Ndomi, realized the plaintiff was hurt and needed help. As they were running away Thabo Mokoena had seen a long gun being lifted by one police member and heard a shot being fired. They called for help from Sphamandla Dlamini who stayed near the corner where the plaintiff was injured. The plaintiff was taken into Dlamini's house and the ambulance was called. Ndomi and Thabo told Dlamini the police had shot and injured the plaintiff. Whilst waiting for the ambulance a police van arrived at the scene. The lone driver got out of the vehicle and inspected the place where the plaintiff had fallen and where her blood was, and left. That is the evidence of the plaintiff as corroborated by the witnesses on her behalf. Nobody can say, however, which police member shot the plaintiff but there were no other people at the scene except the members of the Police Services.

[13] On the other hand, the evidence of the defendant is that on 18 July 2011 members of the Public Order Policing Unit, CIG and CPU were deployed to quell the protests in Ezenzeleni township where streets were barricaded with various objects, protesters singing and toy-toying and even attacked a house of Councillor Zwane which was left badly damaged. Over and above their service pistols they were issued with shotguns to fire rubber bullets to disperse the protesters, teargas canisters and shields to protect themselves if objects were hurled at them. They may not use live ammunition in the circumstances as those could be lethal. The witnesses were in Nyalas all the time, one operating the video camera if it was daytime and another recording the event as he saw them or reported to him by police radio communication. They never left the Nyalas they used. There were other police members patrolling the streets in police vans some on foot and would report to the recording officer. They never had a report of a shooting where a person was injured. At the scene where the plaintiff was injured three used cartridges which must have been fired from standard police pistols, the 9mm parabellum, were found. All the thirty five members of the Public Order Policing Unit had to give their official weapons to IPID for ballistic comparison with the bullets found and none matched. The bullet shells (used cartridges) are of the type that is strictly issued to members of the South African Police Service or Defence force exclusively and no members of the public can acquire them. Therefore, no members of the police fired a shot that injured the plaintiff.

[14] The facts that are common cause are the following: On 18 July 2011 the residents of Ezenzeleni township, Warden, were protesting against the poor service delivery by the authorities (the municipality); streets were barricaded by placing objects on them, tyres were burnt, people were gathering in groups singing and toy-toying; the house of councillor Zwane was set alight; the violence continued between 17h00 and 24h00 according to the Incident Book forming part of the Report by the Commander; people were dispersed; Units of the South African Police Services, i.e. the Public Order Police unit, the CIG and CPU, were deployed to restore order and to police the situation; the units used 8 vehicles to patrol and 17 foot patrols; the Public Order Police Unit were issued with shotguns and rubber bullets in addition to their service pistols and were in clearly marked police uniforms; the plaintiff was injured by being shot; the plaintiff was taken to the hospital for treatment and is paraplegic as a result of the shooting; the plaintiff does not know who shot her, no other people than the police were at the scene where the plaintiff was shot; the police witnesses were not at the scene where the plaintiff was shot, constable Makhubu was in one Nyala and Warrant officer Khumalo was in another Nyala both away from the scene where the plaintiff was shot; three spent cartridges of police pistols were found at the scene where the plaintiff was shot; the cartridges were taken for ballistic analyses and did not match any of the pistols of the members of the Public Order Policing Unit and the bullets issued to

the police and the South African National Defence Force exclusively and are not for sale to the general public.

[15] The onus is on the plaintiff to prove that she was shot by a member of the South African Police Service as a result she sustained injuries and that the conduct of the police was unlawful. The plaintiff was part of the protesters and as such she was exercising her right to protest what she deemed as failure by the authorities to perform their mandate. She also had a right to associate with the other residents. If she was injured while exercising her rights, any conduct by the police resulting in her suffering injuries will and must be unlawful. There is no evidence that the plaintiff was engaged in unlawful or criminal activity at the time of her shooting. That she sustained injuries that rendered her paraplegic is not disputed. What remains therefore, is who caused her the injuries she sustained.

[16] To answer that question, in the circumstances of this case, will require inferences to be made in the absence of direct evidence as to who shot the plaintiff. The inference that the court must draw must be the most plausible and obvious one of the many that may be drawn: AA Onderlinge Assuransie Assosiasie Bpk v De Beer, 1982(2) SA 603 (A) at 614 where the following was stated at H:

“Wat oorbly is uiters karige omstandigheidsgetuienis. Die vraag is of die getuienis sodanig is dat daar bevind kan word dat die eiseres daarin geslaag het om op 'n oorwig van waarskynlikhede te bewys dat Kleinbooi

Moloi nalatig was. Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandighedsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyd indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand-liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings"

The plaintiff asks the court to find that she was shot by a member of the Police Service on the night in question. That inference is, according to her evidence, the most obvious one (mees voor-die-hand-liggende) because no other people than the police were at the scene; after she was shot she saw a police member who even refused to give her assistance; after she was taken into Dlamini's house, a police vehicle arrived at the scene, stopped where she was shot, a member of the Police alighted from the vehicle, and inspected the pool of blood where she was lying whereafter he drove away.

- [17] Regarding the incident of the 18 July 2011 the Independent Police Investigating Directorate (then the Independent Complaints' Directorate) opened an investigation docket for Attempted Murder by use of a fire-arm. The docket was opened by Piet Joseph Kunene and the victim was indicated as Mapaseka Kunene (the plaintiff). The directorate is the body that investigates offences committed by the members of the Police Service and not the general public who report matters to the South African Police Services. The incident relates to the 18th July 2011 at Warden. The Pre Hospital Report of where the plaintiff was taken by Thabo Tsotetsi, a paramedic, states the

History/Complaint as “Gunshot wound chest, arm and back” and refers to Kunene of Ezenzeleni.

- [18] The onus is throughout on the plaintiff to prove wrongful conduct on the part of the defendant and never shifts: Naude NO v Transvaal Boot & Shoe Manufacturing Co. 1938 AD 379 at 399. But once the plaintiff has proved the wrongful conduct by the defendant in this case by convincing the court that the inference she prefers and wants the court to draw, is the most obvious (plausible) of all the other possible inferences, the defendant would have the evidentiary burden to justify the assault on the plaintiff: Mugwena and Another v Minister of Safety and Security, 2006 (4) SA 150 (SCA). See also Ntsala and Others v Mutual & Federal Insurance Co. Ltd 1996 (2) SA 184 (T) at 190 E-F where Els J put it in the following words:

“I am satisfied that the *onus* rests throughout on the plaintiff to prove negligence on the part of the defendant. Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary: he must tell the remainder of the story, or take the risk that judgment be given against him.”

- [19] In response the defendant's evidence is a denial of the police shooting and injuring the plaintiff. To substantiate the denial, the evidence of Constable Makhubu was led. He was not at the scene where the plaintiff was shot. His task was to record the events on a video machine. His video machine cannot work at night. He was

sitting in a Nyala that was parked elsewhere. He did not see the plaintiff that night. The evidence of Warrant Officer Khumalo was that he was also in another Nyala somewhere in Ezenzeleni township. His task was to record the happenings of the day which he saw personally or were relayed to him through radio or other means. He was nowhere near the place where the plaintiff was shot. Warrant Officer Niewenhuys is a ballistic expert in Pretoria. He received the three spent cartridges (casings) for comparison with the thirty five service pistols issued to members of Public Order Policing Unit and they proved negative. He confirmed, however, that the three cartridges (casings) found at the scene where the plaintiff was allegedly shot can only be issued and used by the members of the South African Police Services or the South African National Defence Force. There is no evidence that the latter was involved in the operations of the day but there is evidence that there were two other units of the South African Police Service involved, namely the CIG and the CPU. There is no evidence that the service pistols of the members of the CIG and the CPU were also sent for comparison with the cartridges (casings) found at the scene where the plaintiff was shot.

- [20] It was contended on behalf of the defendant that there is no *nexus* between the conduct of the police and the damage caused to the plaintiff. The *onus* on the plaintiff is discharged if on a preponderance of probabilities she can prove that she was shot on the night in question and that the only people that had fire arms at the scene

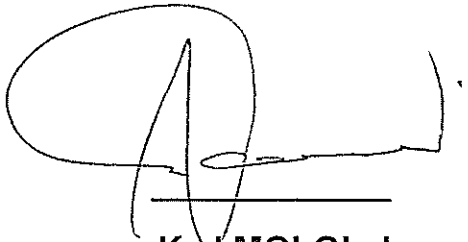
were members of the Police Service and these gave chase to them and had threatened to shoot earlier. In Cooper and Another v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) at 1026 E-F Zulman JA stated

"It is not incumbent upon the party who bears the onus of proving... to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn."

Plausible and probable mean "most likely," "acceptable," "suitable," "credible" in the light of the proven facts. If the test is applied to the set of facts in this case, one cannot escape the inference that it is the police that shot the plaintiff on the night of the 18th July 2011 as a consequence of which she is rendered a paraplegic. The conclusion is inescapable, especially in view of lack of another side of the story by the defendant but a mere denial.

- [21] The liability of the Minister of Safety and Security will arise if any member of the police service causes damage to a person in circumstances that cannot be justified. If the plaintiff was shot by a member of the CIG or the CPU, the Minister will still be liable, because they are also units of the South African Police Service.

[22] In the premises I find that the defendant is liable for the damages caused to the plaintiff. The costs order will be held in abeyance until quantum is determined.


K. J MOLOI. J

On behalf of the plaintiff:

Adv. SNELLENBURG

Instructed by:

HONEY ATTORNEYS

BLOEMFONTEIN

On behalf of the defendant:

Adv. NORMAN SC

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STATE ATTORNEY

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