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

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
Case no: **5711/2019**

In the matter between:

XOLANI THOKOZANE DLAMINI Plaintiff

and

CONFIGEN CLOSE CORPORATIONS t/a ZERO TOLERANCE SECURITY Defendant
Registration number: 2010/160277/23

CORAM: PJJ ZIETSMAN AJ

HEARD ON: 14 NOVEMBER 2023

DELIVERED ON: 30 NOVEMBER 2023

Introduction

[1] The Plaintiff instituted action against the defendant for damages suffered by him as a result of a gunshot wound to his right upper arm and subsequent psychological shock and trauma.

[2] The Plaintiff's pleaded case is that on 23 October 2017 a security official in the employ of the defendant unlawfully and wrongfully assaulted him on the QuaQua campus of the University of the Free State, by shooting him in his right upper arm.

The issues

[3] Although the matter came before me only in respect of the merits of the plaintiff's claim, it was not clear from the court file which of the allegations in the particulars of claim ought to be adjudicated separately.

[4] Accordingly, on the first day of the trial I made an order that the issues outlined in paragraphs 1 to 6 of the plaintiff's particulars of claim, together with the corresponding allegations in the defendant's plea be separated out in terms of Rule 33(4) of the Uniform Rules of Court and that the remainder of the issues stands over for later adjudication.

[5] It is further apposite to point out that prior to the matter having been set down, the Defendant's attorneys withdrew as attorney of record however the notice of set down was duly served on the defendant and notwithstanding the defendant was in default of appearance at the trial. The matter thus proceeded in the Defendant's absence.

[6] The issues for determination are thus:

6.1 The *locus standi* of the plaintiff;
6.2 The incident;
6.3 Whether an employee of the defendant shot the plaintiff;
6.4 If it is found that the defendant shot the plaintiff whether such action was lawful.

The evidence

[7] Two witnesses, to wit the Plaintiff – Mr Xolani Dlamini – and Mr Mpho Radebe testified during the trial.

[8] It is the Plaintiff's testimony that during October 2017 he was a BA Education student of the University of the Free State at its Qwa Qwa campus.

[9] During the evening of 23 October 2017 the Plaintiff and Radebe studied at the library until approximately 24:00, at which time they decided to make their way back to their residence.

[10] They were aware of the “fees must fall” student protests on campus but did not participate in same.

[11] As they were walking back to their residence the Plaintiff saw a group of protesting students and security personnel of the Defendant, who, according to him, was deployed by the University to deal with the protests on campus.

[12] According to the Plaintiff, he recognised the Defendants’ employees from the camouflage uniforms that they were wearing, but despite the Court’s questions is this regard he could not point out or identify any specific identification marks on the uniforms which would link the security officers with employment by the Defendant.

[13] As the Plaintiff was walking towards his residence he all of a sudden heard gunshots and the next moment is was chaos. People started running and that was when the Plaintiff realised that Radebe had fallen to the ground.

[14] The Plaintiff tried to help Radebe, but he felt a jerking sensation in his right arm.

[15] Other persons attended to Radebe and the Plaintiff decided to run to the nearby female residence to seek help. It was there that he realised that something was stuck in his arm, that he had been shot with live ammunition and that Radebe was bleeding on the right side of his body.

[16] The Plaintiff testified further that the security company blocked the main entrance and exit gate to the campus. At around 01:00 to 02:00 the plaintiff and Radebe was transported to the entrance gate where members of South African Police Services (SAPS), who was also present on the scene, called an ambulance to take them to hospital.

[17] The Plaintiff's evidence is that he made an assault charge with the SAPS, but he was later informed that the prosecuting authorities refused to prosecute the matter.

[18] The Plaintiff also testified that a bullet was removed from his arm and he was told that it was sent for testing.

[19] Mr Radebe's evidence corroborated the evidence of the Plaintiff in all material aspects.

[20] He, too, testified on more than one occasion that he only heard gun shots whereafter he fell to the ground.

[21] Thereafter, he was taken to the nearby female residence – residence B – and it was there where he realised that he had been shot with live ammunition because he struggled to breath. He further testified that while he was in the female residence he could hear the security officers shooting at the protesters.

[22] Like the plaintiff, Radebe also laid an assault charge and he later received a letter from the SAPS that informed him that the case had been "nullified". However, the said letter was not admitted into evidence.

Discussion

[23] The onus rest on the Plaintiff to prove that he was shot by an employee of the Defendant.

[24] However, there is no direct evidence that an employee of the Defendant pulled the trigger and shot the Plaintiff.

[25] The high water mark of the Plaintiff's evidence is that he "heard gunshots" and realised at the female residence that he had been shot with live ammunition.

[26] Radebe also only heard gunshots and later realised that he was shot with live ammunition.

[27] Thus, the Plaintiff's case has to be decided on circumstantial evidence.

[28] But the case is not without difficulty.

[29] First, there is no credible evidence that the persons dressed in camouflage uniform were employed by the Defendant.

[30] Second, neither the Plaintiff nor Radebe testified that the security officers were armed.

[31] It raises the question whether, on the bases of inferential reasoning, a finding in favour of the Plaintiff can be made.

[32] *Macleod v Rens*[1] was an action for damages in consequence of bodily injuries sustained by a plaintiff in an accident involving a motor car driven by defendant where there was no direct evidence as to the accident. The issue of the defendant's negligence had to be decided on circumstantial evidence. Erasmus J held, at p 1047F that:

> "[Inferential reasoning] involves consideration of the sufficiency of the evidence seen in the light of the rules of law and logic relating to indirect evidential material.
>
> In all civil trials
>
> '(t)he enquiry then is where, on all the evidence, the balance of probability lies. If it is substantially in favour of the party bearing the *onus* on the pleadings he succeeds; if not, he fails.'
> (*Dictum* in *Klaassen v Benjamin* 1941 TPD 80 at 87, referred to in *Arthur v Bezuidenhout (supra* at 574H).)"

[33] Erasmus J went on to explain that the court must first identify the proven facts and although the relevant evidence might encompass not only concrete or physical facts, but also such other relevant facts which are notorious and not

[1] 1997 (3) SA 1039 (E).

merely the result of personal observation. The facts so found then forms the basis for the consideration of the probabilities.

[34] In *De Wett and Another v President Versekeringsmaatskappy Bpk*[2] the court distinguish between presumptions and inferences thus:

> “In regard to the submission of plaintiff's counsel, the remarks of Lord WRIGHT in *Caswell v Powell Duffryn Associated Collieries Ltd* (1939) 3 All ER 722 at 733 appear to me to be apposite:
>
> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But, if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

[35] In order to find for the Plaintiff, I have to come to a finding that, on a balance of probability, the security officers on the scene were in the employ of the Defendant and a shot fired by one of them injured the Plaintiff.

[36] I have difficulty to come to such a finding.

[37] There is no evidence to infer that the security officers on the scene were in the employ of the Defendant. The fact that they wore camouflage uniform without any identification marks to identify the Defendant does not tilt the probabilities in the Plaintiff’s favour.

[38] But even if I accept that the security officers were in the Defendant’s employ it still does not tilt the probabilities in the Plaintiff’s favour because there is no evidence that the security officers were armed with firearms in order to draw the inference that one of them fired the bullet that injured the Plaintiff.

[39] And just like there is no evidence that any of the security officers were armed there is likewise no evidence that any of the protesting students were armed.

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[2] 1978 (3) SA 495 (C) at 500 F.

The confers is also true. There is no evidence that the security officers and/or any of the protesting students were not armed.

[40] Mr Cassim who appeared for the Plaintiff tried to persuade me, in his heads of argument, to have regard to the firearms register, the warning statements and the ballistic report included in the documents discovered by the Plaintiff. He contended that the documents show that fire arm with serial number T 63[…] was issued to Mr MM Nhlapo who was in the employ of the Defendant and who admitted in his warning statement that he had discharged the firearm. The documents further shows, so it was contended, that the said firearm was ballistically matched to the bullet removed from the Plaintiff's arm.

[41] The Plaintiff discovered the aforementioned documents in terms of Uniform Rule 35(9) but did not tender any evidence as to the truthfulness of the contents thereof.

[42] Willis JA writing for the Supreme Court of Appeal in *Visser v 1 Life Direct Insurance Ltd*[3] held at par [39] that:

> "It is trite that the production in evidence of documents in terms of rule 35(10) of the Uniform Rules of Court, after these have been admitted in terms of rule 35(9), as happened in this case, does not extend to the truthfulness of the contents thereof. The documents are not evidence that the content thereof is true. The contents, unless admitted as being true, remain hearsay evidence and therefore inadmissible unless they qualify for admission under one of the recognised exceptions to the hearsay rule." (footnotes omitted)

[43] The contents of the said documents has not been admitted and are thus inadmissible on the basis of hearsay[4]. Nor did the Plaintiff apply to have it admitted in terms of section 3 of the Law of Evidence Amendment Act 45 of 1998.

[44] I therefore cannot take any cognisance of the contents of the said documents.

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[3] 2015 (3) SA 69 (SCA).
[4] See also *Selero (Pty) Ltd and Another v Chauvier and Another* 1982 (2) SA 208 (T) at 215 F - 216 H.

[45] I also considered the Defendant's plea.

[46] As a starting point it must be emphasised that the Defendant denied the incident, and in particular that one of its employees shot the Plaintiff. Thus, to my mind, the plea does not take the matter any further.

[47] However, the Defendant also pleaded over that the protestors has caused severe damage to the campus in the proceeding days, hence the campus was locked down, the uprising escalated and the protesters wanted to forcefully enter the campus and unrestrainedly attacked the security and policing authorities to gain access. A number of security and police were present at the venue, amongst others the SA Police Service, SA Defence Force and other security companies, a number of shots were fired out of self-defence by the said security and policing authorities.

[48] The Defendant's plea over does not tilt the probabilities in favour of the Plaintiff because it clearly refers to shots that were fired by the SAPS and "other security companies" at a time when the protesters wanted to forcefully enter the campus and unrestrainedly attacked the security and policing authorities.

[49] The aforementioned plea clearly does not refer to the incident as testified by the Plaintiff and Radebe.

Order

[50] I therefore find that the Plaintiff has not proved its case on a balance of probabilities and the order I make is one of absolution from the instance.

PJJ ZIETSMAN AJ

Counsel for the Plaintiff: Adv A Cassiem
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