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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 13384/17

In the matter between:

KAMA

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGEMENT DELIVERED ON THIS 20TH DAY OF JANUARY 2023

FORTUIN, J:

A. INTRODUCTION

[1] The plaintiff, Z[...] Kama, sues the defendant, the Minister of Police, for damages arising from an incident which occurred on 12 July 2016.

[2] These damages arose from an incident on 12 July 2016, when three policemen, Detective Sgt. Tshambo (“Tshambo”), Detective Sgt. Witbooi (“Witbooi”) and Detective Constable Hagile (“Hagile”), whilst in the employ of the defendant and in the execution of their duties, were chasing a suspect in Homtini Street in Delft. In chasing the suspect,

Tshambo collided with the plaintiff, who was a pedestrian in Homtini Street. As a result of this collision, the plaintiff suffered personal injuries and *inter alia* broke her left ankle.

[3] The plaintiff claims the sum of R1 000 000,00 in respect of damages suffered, together with interest on the aforesaid amount at the legal rate, at *tempore morae*. The court ordered that the merits and quantum was separated, and the hearing proceeded on the merits only.

B. ISSUES IN DISPUTE

[4] The main issues in this dispute can be summarized as follows:

- a. how the collision occurred between Tshambo and the plaintiff; and
- b. whether the collision occurred because of the unlawful and intentional or negligent action of Tshambo.

[5] Should the court find that Tshambo was negligent in causing the injuries to the plaintiff, it should be determined whether there was any contributory negligence by the plaintiff.

[6] It is the plaintiff's version that Tshambo unlawfully and wrongfully assaulted her by grabbing her and throwing her to the ground, and thereafter trampling on her. Alternatively, that the incident was caused by the sole negligence of Tshambo.

[7] It is the defendant's version that Tshambo "*in an effort to stop, slid with his feet under plaintiff. Plaintiff fell onto Tshambo*". Moreover, that the police were executing their duties at the time the alleged incident occurred.

C. PLAINTIFF'S CASE

[8] The plaintiff was the only witness and her evidence can be summarized as follows: On 12 July 2016 at around 11h00, she was walking in Leiden Street, on the right side of the road, carrying her five-month old baby on her back. As she was about to cross the road to enter Homtini Street from Leiden Street, she heard gunshots coming from the direction of Homtini Street.

[9] She witnessed a white car in Homtini Street from where the shots came. The street was quiet. There were no other people in Homtini Street. The only people visible in the general vicinity were about four or five people standing at the blue bus stop in Leiden Street.

[10] The two witnesses for the defendant disputed this version.

[11] The applicant noticed a man running towards her with a firearm in his hand from the direction where the car was. It is undisputed that this was Tshambo. Because the area was notorious for gangsterism, she thought Tshambo was a gangster. She was scared and moved to the right onto the pavement in Homtini Street in order for him to pass her.

[12] Tshambo moved to his left out of the road directly towards the plaintiff where she was on the pavement. According to her, he was moving at a high speed. The plaintiff testified that she thought she was going to die.

[13] He then grabbed and pushed her, saying: "*Voetsek you asshole, can't you see that I am busy?*" He then caused her to fall by kicking with his right leg toward her legs and threw her to the ground. He fell on top of her. Her left leg was entangled with his. Tshambo violently attempted to untangle his leg, succeeded and ran off.

[14] In the process of freeing his leg, she heard a snapping sound and her left leg fell to the side. When she fell, her baby fell off her back onto the street and landed as indicated in photo 8. Chucky, a male person, now deceased, took her baby and asked if

she was all right. She felt a warmth in her leg and could not get up. Members of the public assisted her to get up and into an unmarked police vehicle.

[15] She saw Tshambo again when he was in the car with his colleagues. In the car was a suspect and three policemen, including Tshambo. She had a conversation with him wherein he told her that her leg was not broken. They took her to the Delft Clinic, where she was placed in a wheelchair and pushed into the clinic. They left her there.

[16] After being seen to at the clinic, it transpired that her ankle was indeed broken in two places. She was transferred to Tygerberg Hospital later the same day, where she was operated on.

[17] During cross-examination, Tshambo's version was put to the plaintiff as follows:

17.1 Tshambo did not grab her "on her back";

17.2 To avoid any collision and to minimize injuries, he slid his feet on the ground to come to a stop;

17.3 This resulted in him falling underneath the plaintiff and the plaintiff falling on top of him; and

17.4 He had the firearm in his right hand.

[18] Moreover, her baby did not fall to the ground as testified by her. In fact, Tshambo was aware of the baby on the plaintiff's back, and that is why he had his left hand out so that, should the baby fall, he could catch the baby. In fact, he caught the baby in his hand and the baby never fell to the ground.

[19] This was the case for the plaintiff.

DEFENDANT'S CASE

[20] The defendant called two witnesses. The first witness was **Witbooi**, who testified that he was with Tshambo, Hagile and a suspect on the day in question, looking for a second suspect. When Hagile spotted the suspect, Tshambo fired one shot in the air and shouted "police".

[21] According to the witness, Homtini Street was full of people at that time. Between 10 and 15 people were walking up and down the street. When the shot was fired, people started moving away. Some were standing against the wall of an adjacent house, some moved to the open field, and some remained in the street.

[22] The plaintiff, however, approached them from the front. Tshambo was trying to avoid the approaching people by moving left and right. The witness saw him slipping and making contact with the plaintiff, who had a baby on her back, and both of them fell.

[23] After apprehending the second suspect, the witness drove past the scene with the two suspects in the car. He saw the lady in the street with her baby on her lap. He did not see the baby fall at any time. According to him, the crowd became aggressive and, because the lady was complaining of pain in her ankle, they decided to take her to the clinic.

[24] Tshambo was seated in the front of the car with the baby on his lap, whilst the two suspects were seated at the back on top of each other in order to make space for Hagile and the plaintiff. According to this witness, no conversation took place in the car on the way to the clinic.

[25] When they arrived at the clinic, one of the security officers brought the plaintiff a wheelchair. Tshambo alighted the car with the baby and spoke to a man who said that he was the father of the baby.

[26] **Tshambo** was the second witness for the defendant. He is employed as a sergeant in the SAPS at the time of the incident for a period of 18 years and stationed at Delft Police Station. Sergeant Witbooi was his partner in 2016. He confirmed that on 12 July 2012, he was wearing civilian clothes and that Witbooi was driving the white Toyota with no police markings. They were in search of two murder suspects. The witness was seated at the left front passenger seat and Hagile was seated at the back.

[27] After apprehending the first suspect, the second suspect ran off in the direction of Leiden Avenue. The witness got out of the car and ran in the direction of Homtini Street. According to the witness there were more than 5 people in the street at the time.

[28] When he got to Homtini Street, he shouted "police" thinking that the suspect might stop. The people in the vicinity all moved out of the way – some to the pavements and others to the nearby yards of the houses on that street. He fired one shot at the suspect and shouted "stop police" in Xhosa. He testified that he did not see the plaintiff at this stage.

[29] He continued running, and noticed further down the street a lady entering the street from the side of Leiden Avenue on the side of the stop sign. According to the witness there is no bus stop in Leiden street, as the plaintiff testified. He shouted in Xhosa that the lady should move to the pavement. She did move to the pavement on the left side.

[30] He wanted to cross the road, but realised that the white car was still behind him, also approaching. When he looked back he realised that the car was too close, so he decided, for his own safety, to allow the car to pass first.

[31] He then saw the lady, who was now back in the road, in front of him with a baby on her back. He decided to go around her onto the pavement which was covered in sand. The lady, in turn, moved back to the sandy pavement. He tried to avoid colliding with her and moved back to the road. She unfortunately did the same. He tried to stop

but his formal shoes could not get any grip on the road, so he slipped. Both his feet went beneath the lady. His feet got entangled with the lady's feet and he fell onto his back.

[32] According to the witness, during this ordeal, he was focussed on the firearm in his hand, the lady in the street and the baby on her back. He denied that his hand ever "went out to try to touch" the lady as, on his version, his firearm was in his right hand.

[33] Tshambo was adamant that he would never grab someone with both his hands while holding a firearm in one of them, and in particular while running at a high speed. According to him, it would place the plaintiff's life in danger to use the same hand in which the firearm was held. He accordingly denied "violently grabbing" the plaintiff.

[34] In trying to avoid the collision, he fell on his back and the lady fell on top of him. The baby ended up in his hand still wrapped in the towels. He was certain that the baby never fell on the ground. The baby never cried. He further testified that the lady was walking at all relevant times, and not running. The witness also testified that he and the other police officers did not talk *en route* to the Day Hospital, as stated by the plaintiff.

[35] It was his testimony that, had the lady stayed on the pavement, the collision could have been avoided.

[36] After they both fell, the plaintiff sat on the pavement and said that her left ankle was broken. He continued following the suspect who was at large. When he saw Hagile apprehending the suspect, he returned to the plaintiff. Witbooi then arrived on the scene with the car. They were concerned about being overpowered by members of the public as this was a gang infested area. They decided to, instead of waiting on an ambulance, rather take the plaintiff to the day hospital to have her ankle seen to. At the clinic, when the plaintiff confirmed that a man who arrived at the same time as them was the baby's father, he handed the baby to its father.

EVALUATION OF EVIDENCE

[37] The plaintiff gave her evidence in an honest manner, and her demeanour was that of a reliable witness. She relayed an incident that was clearly traumatic to her. Her recollection of the incident was detailed considering the time that has lapsed between the incident and her testimony. In order to evaluate the probabilities in her version, it is necessary to consider each of the individual aspects thereof.

[38] She testified in chief that Tshambo grabbed her violently, using both hands. Her version changed slightly during cross-examination when it was put to her that Tshambo had a firearm in one of his hands, and could accordingly not have grabbed her as she initially testified. What was undisputed from her version was that the two of them collided and ended up on the ground. The way in which the collision occurred is, however, in dispute.

[39] A second aspect of her testimony was that a certain person, who she knew as Chucky, took her baby from her at the scene of the incident. This version was not supported by any of the other witnesses. She is, accordingly, a single witness as to this aspect.

[40] The defendant's witnesses were clear and unambiguous in respect of the baby. Their version as to how they travelled together to the clinic is probable. It would have been extremely irresponsible to allow a baby to be left in the care of a person on the scene. It seems that the most probable version is that they took the baby with its mother when they transported her to the clinic.

[41] There was no real dispute on the side of the plaintiff about the baby's father collecting the baby outside the clinic on their arrival there. These officers were on duty, in the process of effecting an arrest. It is very probable that they would remember what they did with a baby during that arrest.

[42] The plaintiff was a single witness in respect of her version. Tshambo and Witbooi corroborated each other in all material respects. As stated earlier, their versions are, on its own, more probable than that of the plaintiff's. In any event, Chucky was not called to testify, nor any of the other members of the public, who on her version, were present on the scene.

[43] It is obvious that the plaintiff gave her own recollection of the events, and this court accordingly does not find that she is deliberately trying to mislead the court. It should, however, be borne in mind that this was an extremely fast moving scene. Moreover, the plaintiff must have been severely traumatised being caught in the middle of a scene with gunfire going off. She was trying to protect her baby and would for obvious reasons move from one side to the other, i.e. from the pavement to the road in order to secure their safety.

RELEVANT LEGAL PRINCIPLES

[44] The law in respect of a claim for damages is trite. The plaintiff bears the onus to prove, on a balance of probabilities that the defendant acted wrongfully. In *casu* we are faced with two irreconcilable versions on most of the issues. In **Stellenbosch Farmers Winery Group Ltd & Another v Martell ET CIE & Others**¹

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (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)

¹ 2003(1) SA 11 (SCA) para [5].

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 extracurial 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 event. 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 to experience or observe the event in question and (ii) 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 a 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."

[45] Subsequently, in **Santam Bpk v Biddulph**², the following was said in clarifying the test for truthfulness:

"However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true ..."

CONCLUSION

[46] It is common cause that there was a collision between Thsambo and the plaintiff. Moreover, that it was a fast moving scene and that the plaintiff was attempting to get out

² 2004 (5) SA 586 (SCA).

of Tshambo's way to protect herself and her baby. I therefore find her explanation of how she moved between the pavement and the road probable. In assessing the evidence, the evidence by Tshambo, supported by Witbooi in all material respects cannot be ignored. I therefore find the defendant's version equally probable.

[47] As laid down in **SFW**³, when the court struggles with credibility findings in one direction and the evaluation of the general in another direction and all the factors are equal, then the probabilities will prevail. An assessment of the probability or improbability of each of the two versions revealed the following.

[48] The defendant's version is probable because there could be no reason for Tshambo to violently throw the plaintiff to the ground. Colliding with her and attempting to avoid the collision, in my view, is the more probable version.

[49] Likewise, does all the other portions of his version, which were corroborated by Witbooi, also pass the probability test. Both the plaintiff and the two witnesses for the defendant testified that the area was gang infested. Leaving the scene as soon as possible before an ambulance could arrive is therefore the more probable version compared to that of the plaintiff that she handed her baby to a man in the crowd and left with the police without her baby.

[50] The fact that the baby was later handed to the father at the hospital was never seriously disputed by the plaintiff. Chucky who, on her version, took the baby at the scene, nor any other member of the public who were on the scene was never called. In any event, the probabilities favour the defendant's version.

[51] The fact that the plaintiff was taken to the clinic by the police officers also points to an accidental collision and not of a violent attack. Surely, if the plaintiff's version of a deliberate attack was true, then the behaviour of the police officers after the event seems extremely improbable.

³ *Supra*.

[52] I am satisfied that the plaintiff did not prove any assault by the defendant. Undisputed evidence was led of police officers who, in pursuit of a suspect did everything in their power to affect an arrest. The evidence on both sides show a clear attempt to avoid the collision. In the circumstances, I am satisfied that this was merely an unfortunate accident.

[53] Accordingly, I do not find any wrongfulness or negligence.

ORDER

[54] In the circumstances I make the following order.

The plaintiff's claim is dismissed with costs.

FORTUIN, J

Dates of hearing: 26-27 January 2022; 1 & 22 March 2022

Date of judgment: 20 January 2023

Counsel for applicant: Adv M Botha

Instructed by: Kruger & Co

Counsel for respondent: Adv C Brown

Instructed by: NPP