



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: YES / <u>NO</u>
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3) REVISED
DATE <u>18/09/2019</u>
SIGNATURE <u>[Signature]</u>

CASE NUMBER: 20309/2017

In the matter of

BAFANA MAHLANGU

PLAINTIFF

and

THE MINISTER OF POLICE

DEFENDANT

JUDGMENT

DLAMINI AJ:

INTRODUCTION

- [1] The plaintiff has instituted a delictual claim against the Defendant arising out of an incident that occurred on the 28th February 2017 in Vosloorus Hostel, Block I.
- [2] The plaintiff testified and called his friend Sifiso Mashiloane to testify on his behalf. After the plaintiff had closed its case, the defendant launched this application, requesting this court to grant absolution from the instance.

Test for Absolution

- [3] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel (1) 1976 (4) (SA) 403 AT 409 G-H**, in the following terms:-

"When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court applying its mind reasonable to such evidence would or might (not should not ought to) find for the plaintiff".

- [4] In deciding whether absolution should be granted at the close of the plaintiff's case it must be assumed that, in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The test at this state of the trial is as follows: the court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends (See Van Loggerenberg at D1.531) and the case law cited thereat).

- [5] The main issue for determination by this court is whether:-

(1) The evidence on record and adduced by the plaintiff and the plaintiff's witness is sufficient enough for a reasonable court to give judgment in favour of the plaintiff.

SUMMARY OF EVIDENCE

PLAINTIFF's CASE

- [6] The plaintiff testified that on the day of the incident, he was sited next to his friend Sifiso Mashiloane (Mashiloane) at the Vosloorus Hostel. Two unknown men approached them. These men fired a gun shot in the air. He and Mashiloane ran away. Whilst running, he felt a sharp pain in his back and he fell down.
- [7] He later realised that he had sustain a gunshot wound in his back. He insisted that he does not know who shot him. At first he avers that he was told for the first time by one Judy Thuda (Judy) whilst he was in hospital, that he was shot by the police. He later

changed his version and said he was told for the first time by one of his friends Reggie that he was shot by the police.

[8] **SIFISO MASHILOANE**

The witness confirms that he was sited next to the plaintiff at the hostel. He noted a group of about eight (8) men in groups of two each entered the hostel. He says the third group stood not far from them. One of these men fired a shot in the air. He and the plaintiff ran away. Whilst running away he noticed that these men were actually shooting at them. Plaintiff fell down. He avers that at the scene he told the plaintiff that he was shot by the police.

[9] Counsel for the plaintiff argued that defendant's application for absolution be dismissed. He conceded that the plaintiff's main evidence is that he did not see who shot him. However; he submits that the witness for the plaintiff Mashiloane personally witnessed and confirmed that the plaintiff was shot by the police. He insists that the plaintiff and plaintiff's witness were credible and there is no reason to question the truthfulness of their evidence.

[10] He further argued that in applying the above legal principles to the facts of the instant matter as well as the evidence of the plaintiff and plaintiff's witness; it is more plain that the plaintiff has made out a prima facie case for the relief claimed. That the plaintiff's case would be strengthened by the defendant's witnesses.

[11] The defence counsel argued that absolution should be granted in that:-

The plaintiff does not know who shot him. That the plaintiff's witness Mashiolane is not a credible witness. That Mashiloane's testimony that he saw the police shooting the plaintiff is a fabrication and should be dismissed. That the plaintiff failed to discharge his evidentiary burden and absolution should be granted.

[12] It is common cause that the plaintiff does not know or saw who shot him. In the light of this plaintiff evidence I have difficulty in understanding why the plaintiff did not call either Judy or Reggie or both to testify and corroborate his testimony. There are no facts placed before this court as to why either Judy or Reggie is alleging that it is the

police who shot the plaintiff. Plaintiff's failure to call these two witnesses renders their allegations to be hearsay evidence which is inadmissible and is thus dismissed.

- [13] The only witness who perhaps could have corroborated the plaintiff evidence is Mashiloane. However; I have several difficulties with regard to his testimony. He insist that he told plaintiff at the scene that plaintiff was shot by the police. The plaintiff in his testimony and written statement denies this assertion. Plaintiff insists that he was only told by either Judy or Reggie that he was shot by the police. Plaintiff further testified that he first heard that he was shot by the police whilst he was in hospital and not at the scene, as alleged by Mashiloane.
- [14] He does not give any supporting evidence as to why he says the people who shot at the plaintiff were police officers. In his own version, the two people who fired shots at them were wearing civilian clothing.
- [15] He conceded that he did not see anyone on the scene wearing police uniform, name tags or police badges. He never saw any marked police car on the scene. The only conclusion he drew that these people were police officers, was when he saw them picking up empty bullet cartridges on the scene.
- [16] His testimony is sharply and materially contradicted by the plaintiff. I am thus unable to accept Mashiloane's evidence. It is farfetched, false and not a true reflection of what happened on that day and is accordingly dismissed. Absent the evidence of Judy and Reggie, including Mashiloane (as I have dealt with his evidence above) there is no evidence led by the plaintiff on the delictual element of the plaintiff's claim.
- [17] In my view, there is no sufficient evidence led that compels the Defendant to lead evidence. The plaintiff's case will not be strengthened by the defence witness. There is no prima facie evidence of alleged unlawful conduct by members of the defendant in this case. The plaintiff has failed to discharge his evidentiary burden.

ORDER

In the result, I make the following order:

- (1) Absolution from the instance is granted
- (2) Costs of suit



J DLAMINI
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff
Instructed Jean Keyser Attorneys
C/o Hannelie Swart Attorneys

Adv F F MÜLLER

On behalf of the Defendant
Instructed by the State Attorney

Adv A MOFOKENG

Heard on the 05th September 2019
Judgment handed down on the 19th September 2019