IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

15/12/16

CASE NO: 22638/2002

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

15/12/2016 .....
DATE SIGNATURE

In the matter between:

T L LOLWANE	First Plaintiff
W M LOLWANE	Second Plaintiff
J RAMOTHIBE	Third Plaintiff
M C SEKWELE	Fourth Plaintiff
A RAMOTHIBE	Fifth Plaintiff
M G LOLWANE	Sixth Plaintiff
M R LOLWANE	Seventh Plaintiff
Z E LOLWANE	Eighth Plaintiff
M G MAHLANOKO	Ninth Plaintiff

and

MINISTER OF SAFETY AND SECURITY	Defendant

JUDGMENT

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1. In this matter, the First to Ninth Plaintiffs instituted action against the Defendant, the Minister of Safety and Security, for damages suffered by them based on delict arising from events that occurred on 26 August 2001 and 7 September 2001 at or near Bapong Village, Mafikeng.

2. The First, Second and Third Plaintiffs allege that they were assaulted by Inspector Montshiwagae when they were shot with live bullets on 21 August 2001.

3. All the Plaintiffs, but for the Third Plaintiff, claim that on 7 September 2001 and at Bapong Village they were unlawfully arrested without a warrant and, according to the evidence, they were detained for a period of more or less four hours. The Third Plaintiff alleges, as an alternative, that he was arrested on 8 September 2001.

4. At the commencement of the matter, the merits and quantum were separated and I'm only to adjudicate on the liability of the defendant arising out of the events of 21 August 2001 and 7 and/or 8 September 2001.

5. The trial before me stretched over a period of 10 days. The Eighth Plaintiff filed a notice of withdrawal and eight witnesses were called by the Plaintiffs, who presented their case at the commencement of the trial. After the Plaintiffs closed their case, the Defendant called six witnesses to testify on its behalf.

6. For purposes of this judgment, I am not going to summarise the evidence of each witness. I do not intend to do so for the reason that the evidence by the various Plaintiffs was repetitive, explaining the same event over and over, although I cannot fault the Plaintiffs for requiring each and every Plaintiff to testify.

7. The factual matrix of the Plaintiffs' evidence was to the effect that on 21 August 2001 two men arrived in the vicinity of the shebeen on the premises of the First Plaintiff (now deceased and substituted by his estate). The two men proceeded to the kraal and removed a cow and chased it to the loading zone. This is one of the issues where the Defendant's witnesses have a different version. According to the Defendant's witnesses, the First Plaintiff identified an incorrect cow which was then chased to the loading zone.

8. The witness Reuben Sekwele testified that he noticed that the wrong cow was selected and the witnesses were all in agreement that the cow was returned to the kraal.

9. According to the Plaintiffs, the First Plaintiff was upset about the fact that the two people, who they later on became aware were policemen, did not discuss the issue beforehand with the First Plaintiff. This led to a standoff between the First Plaintiff and the two policemen.

10. According to the Plaintiffs, one of the policemen stated "*staan ver ek skiet*". This was followed by one of the policemen firing shots at the First Plaintiff (Thando) and thereafter firing shots at the Second Plaintiff (Watchman). The Third Plaintiff gave evidence to the effect that he was also hit by a bullet fired at Watchman. His injury was not of a serious nature.

11. The Defendant's version in relation to the shooting incident is somewhat different as far as the shooting incident is concerned. According to the Defendant's witnesses, the First Plaintiff was confrontational and did not want to allow the policemen to remove the cow that had to be handed back to one Rasemane, who was the owner of the cow.

12. According to the Defendant's version, the First Plaintiff apparently had his one hand in his pocket, at some stage threatened to use his firearm and had a stone in his hand. When the confrontation heated up, he used the words "*come boys*" and people came out of the shebeen armed with pangas and knives. The policeman,

Ramakatsa, was injured probably by a stone that was thrown at him. It is common cause that Ramakatsa sustained an injury and this was not disputed by the Plaintiffs.

13. On 7 September 2001, all the Plaintiffs, with the exception of the Third Plaintiff, were arrested. Ramakatsa, Montshiwagae, Sophie Pele and Reuben Sekwele made statements under oath. It was on the strength of this information that Ramagaga effected the arrests of the Plaintiffs, mainly on the basis of a charge of public violence.

14. Taking all the evidence that was led at the trial into account, I have to adjudicate upon the following two issues.

15. Firstly, whether the Defendant is liable in delict to the First, Second and Third Plaintiffs in respect of an assault or unlawful conduct perpetrated against the First, Second and Third Plaintiffs. As far as this issue is concerned, this court will have to decide as to whether the conduct of Montshiwagae was commensurate with the threat posed by the group action. As far as this issue is concerned, the onus rested on the Defendant to prove that it was justified in shooting at the First, Second and Third Plaintiffs.[1]

16. The second issue to be determined is whether the arrest of the respective Plaintiffs was lawful and justified without a warrant of

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1 *Mabaso v Felix* 1981 (3) SA 855 (A)

arrest on the basis that the policeman, Ramagaga, had a reasonable suspicion that justified the arrests. The question on this point will not be what eye witnesses stated during the course of the trial before me, but what information was before Ramagaga at the time he effected the arrests and whether that information was sufficient in the sense that he had a reasonable suspicion objectively tested to effect the arrests. This decision of Ramagaga was based on the statements taken at the time from Ramakatsa, Montshiwagae, Sophie Pele and Reuben Sekwele.

17. I will now deal with the first issue, and that is whether there was an attack of such proportions that it justified the shooting by Montshiwagae. As I stated earlier, the onus clearly rested on the Defendant to prove justification for shooting the First, Second and Third Plaintiffs. The Defendant relied on an attack by a group of people of approximately 25 people as well as others from a different direction. The witnesses that the Defendant relied upon for purposes of this justification are the witnesses Montshiwagae, Ramakatsa, Pele and Reuben Sekwele.

18. The evidence of Montshiwagae and Ramakatsa was fairly consistent. The evidence of Pele was not consistent with the evidence of the other witnesses called on behalf of the Defendant.

19. The witness Pele did not impress me at all. I had the opportunity of observing her as a witness and she was not an impressive witness. She took a long time to answer very basic questions that were put to her and her description of the events is inherently improbable. The witness described an event in terms of which Thando Lolwane, the First Plaintiff, broke a beer bottle when he jumped over the gate. No one else in the trial has witnessed such an event.

20. It also seems from the evidence in totality that the truck in which she claimed she viewed the incident from, was probably not in front of the First Plaintiff's gate, but rather in the vicinity of the loading zone. I am of the view that the evidence of Pele in respect of the actual shooting incident may well be rejected.

21. What remains is the evidence of the two policemen and Reuben Sekwele. It is rather strange, once again, that Reuben Sekwele did not see any attack. One would have expected that he would have noticed at least some form of attack on the policemen whom he was assisting. It is also necessary to note that Ramakatsa and Montshiwagae testified about a second group of people attacking them from both sides of the fence, whilst their statements that were made a few days after the shooting incident make no mention of this.

22. As far as the shooting of the Second Plaintiff (Watchman) is concerned, the evidence at the trial was that Montshiwagae saw him

attacking him having a panga in his hand. In bundle B appear the statements of the two police witnesses as well as the statement of Reuben Sekwele, which was taken from them at a time when the events were certainly still fresh in their memories. It is clear from these statements that neither Ramakatsa nor Montshiwagae made any mention of any panga that was in the possession of the Second Plaintiff. It is unthinkable that they forgot to mention a panga in the possession of the Second Plaintiff if such was the case, shortly after the incident.

23. A question was also directed at Montshiwagae as to whether the panga was collected from the scene after the shooting incident. He stated it was not. In my view, it would have been an important consideration for the policemen on the scene, as members of the public were shot by members of the police with live ammunition. When the question was posed to Montshiwagae as to why no effort was made to retrieve at least the panga of the Second Plaintiff, Montshiwagae answered that because of the mood and the apparent animosity and hostility of the people present no effort was made to retrieve the panga. I find this explanation nonsensical as the policemen still took possession of the cow, which was the basis for the tension and the hostility. If the hostility was so overbearing one would have expected them to leave the cow behind and come back on another day to pick up the cow. In the circumstances, the Second Plaintiff was in all probability not in possession of a panga.

24. It further appears that although it was put on behalf of the policemen that Watchman attacked them, no mention was made in cross-examination that Watchman was indeed in possession of a panga. Even if I'm wrong and even if this fact was in fact put to Watchman, I would still, on the totality of the evidence, come to the same conclusion that the Second Plaintiff was probably not armed.

25. In my view, and more specifically on the probabilities, I come to the conclusion that the evidence by the policemen about the attack on them was exaggerated in the circumstances, especially their reliance on people armed with pangas, knives and stones. I accept that Ramakatsa was at least hit by a stone and I also accept that the First Plaintiff was not prepared to hand over the correct cow and that there was some provocation by the First Plaintiff and other people present. However, I do not accept that the attack on the policemen was of such a nature that they were entitled and justified in the circumstances to fire live ammunition directly towards the First and the Second Plaintiffs, in which process the Third Plaintiff was also injured. Montshiwagae had the necessary intent (*dolus*) to injure the First and Second Plaintiffs and had at least the intention in the form of *dolus eventualis* to injure the Third Plaintiff.

26. In these circumstances, I am of the view that the assaults on the First, Second and Third Plaintiffs were unlawful and intentional and

that the Defendant is accordingly liable in delict towards the First, Second and Third Plaintiffs.

27. Before I deal with the second issue that I have to determine, counsel for the Defendant, under the heading "facts not in dispute" in his heads of argument, dealt with two authorities, to wit, *Small v Smith*[2] and *President of the RSA v South African Rugby Football Union.*[3] The submission made by counsel on behalf of the Defendant is that counsel for the Plaintiffs did not put enough of his case concerning every witness of the Defendant so as to give them a fair warning and an opportunity of explaining the contradictions and the differences between the evidence of the Plaintiffs' witnesses and that of the Defendant's witnesses. He further makes the point that if the evidence goes unchallenged in cross-examination a party is at liberty afterwards to argue that the witness on behalf of whom the cross-examination was conducted should be disbelieved.

28. I do not put in question the principles enunciated upon by the different courts, more so what was said by the Constitutional Court in the *South African Football Union* matter. I am, however, of the view that, although these principles are surely applicable to every trial matter, it will depend on the manner in which the proceedings were conducted. In this matter, for instance, the Plaintiffs could easily have argued before the matter went to trial that the Defendant

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2 1954 (3) SA 434 (SWA)
3 2000 (1) SA 1 (CC)

had the duty to begin. If that was the case, it would have been expected from counsel for the Plaintiffs to have put meticulously the versions on behalf of at least the seven Plaintiffs who would have given evidence only after the witnesses for the Defendant have testified.

29. In this particular matter, however, the parties came to an agreement that the Plaintiffs would proceed tendering their evidence first at the trial. As it happened, eight of the Plaintiffs gave evidence as to how they experienced the events of 21 August 2001. The Defendant's counsel had the opportunity of cross-examining these witnesses and of consulting with their own witnesses about the veracity and the truth of the evidence of the witnesses called on behalf of the Plaintiffs. Moreover, the Defendant's witnesses had the opportunity of sitting in court listening to the evidence tendered on behalf of the Plaintiffs. I am of the view that in such circumstances it was not necessary for Plaintiffs' counsel to repeat the evidence in cross-examination to the Defendant's witnesses who testified after the evidence was led on behalf of the Plaintiffs, as the witnesses of the Defendant should have been fully aware of what evidence was tendered as part of Plaintiffs' case.

30. In this matter, it was important for the Defendant's counsel to put its version properly and according to the principles as enunciated in *Small v Smith* and *President of the RSA v South African Rugby*

Football Union supra. I am not suggesting at all that counsel for the Defendant did not put the version of their witnesses properly to the Plaintiffs' witnesses.

31. In the circumstances, I am not prepared to make a finding that the evidence of Ramakatsa and Montshiwagae should be accepted merely on the basis that the versions of the Plaintiffs were not put in the fullest detail to them whilst the policemen gave their evidence at the trial.

32. I will now deal with the second issue to be determined. What is important as far as the determination of the second issue is concerned is not what was testified as to what happened on 21 August 2001 but rather what information was available to Ramagaga when he decided to arrest the Plaintiffs without a warrant. In this regard, the contents of the statements of Ramakatsa, Montshiwagae, Sophie Pele and Reuben Sekwele are of the utmost importance.

33. Before I deal with the content of the statements that were available to Ramagaga when he made the decision to arrest the Plaintiffs without a warrant of arrest, it is important to consider the relevant legal principles in regard to an arrest without a warrant in terms of section 40(1)(b) of the Criminal Procedure Act, Act No 51 of 1977.

34. In *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA), the Supreme Court of Appeal referred to *Shidiack v Union Government* 1912 AD 642 at 651 – 652 where Innes ACJ stated as follows:

> *"Now it is settled law that where a matter is left to the discretion of the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result. Not being a juridical functionary no appeal or review in the ordinary sense would lie and if he has duly and honestly applied himself to the question which has been left to his discretion it is impossible for a court of law either to make him change his mind or to substitute its conclusion for its own... There are circumstances in which interference would be possible and right if for instance such an officer acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the court may grant relief but it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."*

35. In the above judgment (*Sekhoto*), it was further pointed out that a further requirement introduced by the Bill of Rights would be that the exercise of discretion must also be objectively rational.[4]

36. In *Nkhambule v Minister of Law and Order*,[5] Myburgh J referred with approval to the remarks by Jones J in *Mabona and Another v Minister of Law and Order*,[6] where it was stated:

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4 *Minister of Safety and Security v Sekhoto and Another supra* at para [39]
5 1993 (1) SACR 434 (T)
6 1988 (2) SA 654 (SE) at 658 F – H

"It seems to me that in evaluating his information the reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and will not accept it lightly without checking it when it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality or cogency to engender him a conviction that a suspect is in fact guilty. This section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty and arbitrary, and not a reasonable suspicion."

37. Against the backdrop of these legal principles set out in the above authorities, it is now necessary to evaluate the critical question in this case and that is to determine what evidential material was available to the investigating officer at the time to establish whether he could have formed a reasonable suspicion in the circumstances.

38. The statements that were available to Ramagaga are, firstly, the statements of the two policemen who attended at the scene on

21 August 2001. These statements were to the effect that the First Plaintiff refused to hand over the cow and, at some stage, screamed "come boys" and that a group of boys, between the number of 20 and 25, came out of the garage armed with knives, pangas and stones. They were surrounded and, according to Montshiwagae, an attempt was made to grab his service pistol and that he fired a warning shot but that the group ignored the warning shot. It was then that more shots were fired.

39. The statement by Ramakatsa also made mention of the First Plaintiff having a stone in his hand and his hands in his pocket. In this statement, it is also repeated that the First Plaintiff screamed "come boys". A group of between 20 to 25 people came out of the garage armed with knives and pangas and started to throw stones at the policemen.

40. Both these statements make out at least a *prima facie* case of public violence. It is true that the statement of Reuben Sekwele does not make mention of an attack by people armed with stones, pangas and knives. According to his statement, he was told to move away and he then heard the shots. Pele also stated that the people who she identified had dangerous weapons like knives and pangas and that she saw them throwing stones at the two policemen. It is also true that she makes mention of a broken beer bottle which was not mentioned by the other two witnesses. In my view, the

statements under oath clearly show that a concerted attack by a group of people took place which was directed at the policemen. During this attack, Ramakatsa sustained an injury to his head. Pele's statement under oath provided the names of the people who were part of the group.

41. The various witnesses, and more particularly Ramagaga on behalf of the Defendant, were thoroughly cross-examined about the contradictions in their evidence and in their statements. Ramagaga was particularly confronted with whether he paid enough attention to the contradictions contained in the statements. I am of the view that in the circumstances of this matter Ramagaga was placed in possession of quite comprehensive statements which described an attack by a group of people in concert. As I have pointed out, there was at least a *prima facie* case made out on these statements and I am of the opinion that there was no duty on Ramagaga to do much more than to consider the statements holistically and then make a decision as to whether the Plaintiffs should be arrested. In my view, Ramagaga formed a reasonable suspicion as required in terms of section 41(1)(b) of the Criminal Procedure Act, Act 51 of 1977. In these circumstances, all the claims by the Plaintiffs in respect of an unlawful arrest must fail.

42. The First, Second and Third Plaintiffs have succeeded in their claims in respect of the assault perpetrated upon them. These plaintiffs,

however, have not succeeded as far as their action for unlawful arrest is concerned. Approximately 75% of the actual time spent in the trial was spent on the issue in relation to the assault perpetrated on the First, Second and Third Plaintiffs. Approximately 25% of the time during the hearing of the action was spent on the question as to whether the arrest of all the plaintiffs was unlawful. I consider it appropriate to make an order that the Defendant pays 50% of the costs of the First, Second and Third Plaintiffs. As far as the Fourth, Fifth, Seventh and Ninth Applicants are concerned, they have not been successful. I take it into account that approximately 25% of the time spent was on the actions based on unlawful arrests. The Fourth, Fifth, Seventh and Ninth Applicants should, in my view, pay 30% towards the costs of the Defendant.

43. In the circumstances, I make the following orders:

1. The Defendant is liable towards the First, Second and Third Plaintiffs in respect of an assault perpetrated by Montshiwagae;

2. The Defendant is ordered to pay 60% of the costs of the First, Second and Third Plaintiffs;

3. The action based on an unlawful arrest of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth Plaintiffs is dismissed;

4. The Fourth, Fifth, Sixth, Seventh and Ninth Plaintiffs are ordered to pay 30% of the costs of the Defendant, including the costs of two counsel, jointly and severally, the one to pay the other to be absolved.

RAUTENBACH AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA