

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

CASE NUMBER: 33855/2012

In the matter between:

16/3/2016

MOLEKANA, T

PLAINTIFF

and

(1) Reportable: No

(2) Of interest to other Judges: No

EKHURULENI METROPOLITAN MUNICIPALITY

FIRST DEFENDANT

NKUNA, T

SECOND DEFENDANT

JUDGMENT:

STRIJDOM AJ:

INTRODUCTION

1. The Plaintiff in this matter is an adult male residing at Tembisa in Gauteng who sues in his personal capacity.
2. The Plaintiff instituted action against the Ekurhuleni Metropolitan Municipality (First Respondent) and Thomas Nkuna (Second Respondent) claiming damages in the sum of R5,760,000.00 as a result of an assault on him by the Second Defendant.

3. The parties agreed that the issues of liability will be separated from the quantum.
4. It was agreed between the parties that the Defendants carry the burden of proof that the conduct of Thomas Nkuna was lawful.

ISSUES IN DISPUTE:

5. What is in dispute is whether the assault and shooting was lawful. The Second Defendant alleged that he acted in self-defense when he was unlawfully assaulted by the Plaintiff.

FACTS – COMMON CAUSE:

6. The Defendants admitted that the Second Defendant shot the Plaintiff at close range with a firearm.

SUMMARY OF FACTS:

7. The evidence tendered by the Defendants can be succinctly summarized as follows:

- 7.1. Tony Thomas Nkuna testified that he was a constable in the Ekurhuleni Metro Police and on 25 January 2011 he was on duty with Superintendent Lebepe, when they approached the Plaintiff, who was conducting an informal business from a structure on the sidewalk of RTJ Namane Drive, Hospital View, Tembisa, in contravention of the municipal by-laws.
- 7.2. When Superintendent Lebepe explained to the Plaintiff that he was contravening the by-laws, the Plaintiff moved to the structure from which he was selling and pulled out a steel pipe from the structure and waived it in front of him.
- 7.3. The Plaintiff was instructed by Lebepe to remove the structure or they would remove it for him. The Plaintiff refused to move the structure after which Nkuna and Lebepe started to remove the structure.
- 7.4. The Plaintiff then threw away the steel pipe and picked up two stones and throw stones in their direction. He was warned by Lebepe that he will be arrested. The Plaintiff fled but returned with two stones in his hands and made actions demonstrating that he was going to throw the stones at them
- 7.5. The Plaintiff ran through an opening into the premises adjacent to RTJ Namane Drive and was followed by Nkuna. The Plaintiff ran through different premises and back to the place where his

structure was. He picked up a crate and ran across RTJ Namane Street.

- 7.6. Nkuna followed the Plaintiff into a premises where the Plaintiff was staying. He saw the Plaintiff with a spade in this hands. When the Plaintiff was close to the kitchen door he made an attempt with his left hand to grab the Plaintiff's right hand, causing the spade to fall our of the Plaintiff's hand. The Plaintiff broke loose from him and grabbed Nkuna's wrist with both his hands and bit Nkuna on his thumb.
- 7.7. Nkuna tried to pull his hand from the mouth of the Plaintiff and used his left hand against the Plaintiff's forehead to forcefully pull his thumb from the Plaintiff's mouth.
- 7.8. Nkuna grabbed the Plaintiff around his neck and the Plaintiff used a padlock to hit the witness over his head, causing injuries on Nkuna's head. The Plaintiff also bit him on his left arm. Nkuna used his left hand to wipe the blood from his eyes and saw the Plaintiff holding a spade in both hands above his head approaching Nkuna.
- 7.9. Nkuna, realising that his life was in danger, pulled his firearm and shot the Plaintiff in his thigh after which the Plaintiff fell down.
- 7.10. The doctor's report, J88, depicting the witnesses injuries sustained on the day in question was handed in as *Exhibit "A"*.

- 7.11. The Plaintiff's version was put to the witness in cross-examination and he disagreed with the Plaintiff's version.
- 7.12. The witness was confronted with the fact that he should have fired a warning shot. He testified that there was no time to fire a warning shot, since the Plaintiff would have hit him before he could fire a warning shot.
- 7.13. He was confronted with the fact that *Exhibit "C"* does not make any mention of stitches on his head. He explained that he does not remember if it was the same person who treated him who compiled the J88 form. He also explained that the photographs handed in as *Exhibit "I"* was taken before he was stitched.
- 7.14. He denies that he strangled or hit the Plaintiff with a spade.
- 7.15. He further testified that it was possible that the Plaintiff could have lost his left front tooth when he forcefully removed his thumb from the Plaintiff's mouth.
- 7.16. During cross-examination he explained that it was not possible for him to run away from the Plaintiff when the Plaintiff attacked him with a spade because they were in a small passage.
- 7.17. Superintendent Lebepe testified that he was in the company of Nkuna when they confronted the street hawkers and the Plaintiff. He explained to the Plaintiff that he must remove his structure because he cannot trade without a trading license.

- 7.18. He testified that the Plaintiff took a pole from the structure and said he was not moving there and no one is going to move him. Lebepe start to demolish the structure whilst the Plaintiff picked up stones. The Plaintiff then pretended to throw the bricks to which he took cover behind a car.
- 7.19. The Plaintiff was swearing at them and was swinging a pipe in front of them.
- 7.20. He further testified that the Plaintiff ran away and Nkuna gave chase behind the Plaintiff. While he was looking for Nkuna and the Plaintiff, he heard the sound of a gunshot and went to where he heard the shot.
- 7.21. The witness arrived at the scene where Nkuna was and noticed that Nkuna was bleeding from the head and had blood on his face.
- 7.22. Lebepe testified that they had informed the Plaintiff that they are going to arrest him if he interferes and that is the reason why they had to pursue him. The Plaintiff ran away when they wanted to arrest him for failing to comply with their instructions.
- 7.23. Lebepe was confronted in cross-examination with the Plaintiff's version but denied the Plaintiff's version.

PLAINTIFF'S VERSION:

8. Plaintiff testified that on the day in question he was selling cigarettes, biscuits and sweets behind his house on the sidewalk. The police arrived and informed him to remove his structure from the sidewalk because he was disturbing the motorists. He told the police that he will remove the structure.
9. While he was busy to demolish the structure he was holding an iron rod that he removed from the structure and Thomas Nkuna pulled it out of his hands. He then ran towards the back gate of his premises. Nkuna approached him and attempt to stab him with the iron rod. He held the gate with both hands to prevent Nkuna from stabbing him.
10. He testified that he ran through premises and both of the Metro policemen were running after him.
11. At one stage he went back to the structure, pick up a crate with stock and went to his house where he put the crate behind the door. He closed the door and went towards the small gate.
12. He saw Nkuna picked up a spade and approached him. Nkuna then hit him with the spade. The Plaintiff then closed his face with both hands and when he stood up again, Nkuna started strangling him with the spade.
13. He testified that he then bite Nkuna and hit him on the head with a padlock. Nkuna then released his chokehold with the spade and he ran a distance

from Nkuna. He then stood and looked at Nkuna who took a firearm and shot him in the leg.

14. The Plaintiff showed a place on his upper eyelid where he was hit with the spade by Nkuna, also pointed out a wound below the lower lip where the spade hit him. His left front tooth was also lost.
15. He testified that he did not see Nkuna bleeding and denied that he ever attacked or provoked Nkuna.
16. In cross-examination by counsel for the Defendants he testified that he gave his full co-operation with the police officers but cannot explain why Nkuna would grab an iron and wanted to stab him. He knew when he ran away the police are going to arrest him.
17. He explained in cross-examination that he ran away because the police accused him of smoking dagga and not for interfering with the execution of their duties.
18. The Plaintiff cannot explain why if he was hit with a spade on the left side of his face his front teeth were damaged. His version in this regard is highly improbable.
19. He testified that he stood one meter from Nkuna, when Nkuna fired a shot at him. In court he indicated a distance of seven metre. In the particulars of claim, par. 5, on page 4, it was alleged that the Plaintiff was shot at close range while he was attempting to run away.

20. The Plaintiff also contradicted his written statement that was handed in as *Exhibit "F"*, on material aspects.
21. In par. 4 of *Exhibit "F"*, his version was that one of the policemen started to strangle him around his neck while one of the members attempted to stab him with a steel pipe and then alleged that he tried to stab the member with the steel pipe. This is in contradiction with the evidence during the trial.
22. He contradicted the evidence of his sister Tato Hosina Molekana that Nkuna did not assault the Plaintiff after he was lying down. She testified that other police officers, men and woman, kicked the Plaintiff.

TATO HOSINA MOLEKANA:

23. The witness testified that she stays with her brother in the same house and on 25 January 2011 she heard a noise and went outside. She saw her brother and police officers arguing. She went back into the house. At a later stage she went outside and saw a traffic officer hitting her brother with a spade and throttling him with the spade.
24. She saw her brother hitting the officer with a padlock on the head. She heard her child screaming and went to the child but before she got to the child she heard the sound of a shot. She saw traffic officers kicking her brother on the leg where he was shot. They also kicked him on the head and body.

25. During cross-examination she testified that at no stage before the shooting did she see any struggle outside the yard or any traffic officer threatening her brother with physical violence. They were about 3 meters away from the structure of the Plaintiff.
26. Her brother was already shot when she went outside the house.
27. She testified that Nkuna did not assault her brother while he was lying on the ground. The Plaintiff testified that after Nkuna shot him he fell on the ground and Nkuna tramped on his head.

EVALUATION OF THE EVIDENCE:

28. It is submitted by counsel for the Plaintiff that his version is more probable and that it was corroborated by Tato Hosina Molekana.
29. Counsel for the Defendants admitted that the court should find on a balance of probabilities that the Defendants succeeded in proving that Constable Nkuna acted in self-defense when he shot the Plaintiff.
30. In my view the Plaintiff was a poor witness whose evidence falls to be rejected. His evidence was riddled with untruths and improbabilities. When confronted with material discrepancies in his evidence he habitually resorted to feeble excuses. He contradicted himself on material aspects and also contradicted the evidence of his sister Tato Molekana. She was not present when the shot was fired and cannot corroborate the Plaintiff on the issue whether Nkuna acted lawfully or not.

31. Thomas Nkuna in my view was a reliable witness who did not contradict himself on material aspects and there are not inherent improbabilities in his evidence. He was a single witness as far as the shooting is concerned. His evidence was satisfactory on all material aspects. He was also corroborated by Superintendent Lebepe.
32. There were contradictions between the evidence of Lebepe and Nkuna but those contradictions were not of a material nature. Despite the immaterial discrepancies between Lebepe and Nkuna I am of the view that Lebepe was a truthful witness and his evidence corroborated the evidence of Nkuna to a great extent.

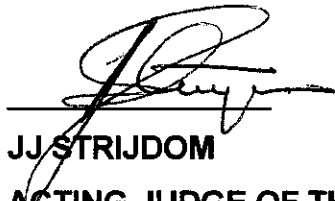
THE LAW:

33. In terms of Section 40(1)(a) and (j) of Act 51 of 1977 a peace officer may without a warrant arrest any person who commits or attempts to commit any offence in his presence or who willfully obstructs him in the execution of his duty.
34. Upon evaluation of all the evidence I am of the view that the Plaintiff interfered with the duties of Nkuna in the following ways:
- 34.1. By refusing to remove a structure and goods that were being sold in contravention of the by-laws of the Ekurhuleni Metropolitan Municipality.

- 34.2. By assaulting them and/or threatening to assault them.
- 34.3. By resisting an arrest.
35. I am of the view that the evidence revealed that the police officers were entitled to arrest the Plaintiff without a warrant of arrest.
36. It is the Defendants' case that Nkuna acted in self-defense when he fired a shot at the Plaintiff.
37. The requirements to be satisfied before a plea of self-defense will be upheld may be summarised as follows:
- 37.1. There must have been an unlawful attack or threatened attack and the victim must have had reasonable grounds for believing that he was in physical danger.
- 37.2. The reason of defense must have been commensurate with the danger and dangerous means of defense must not have been adopted when the threatened injury could have been avoided, in some other reasonable way.
38. In applying the principles in the Ntsomi case¹, I am of the view that the Defendants discharged the onus to prove on a balance of probabilities that the Second Defendant acted in self-defense when he shot the Plaintiff and that he did not acted unlawfully.

¹ Ntsomi v Minister of Law and Order 1990 (1) SA 512 (C) on 526

39. In the premises the Plaintiff's claim is dismissed with costs.



JJ STRIJDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

DELIVERED ON:

APPEARANCES:

Counsel for Plaintiff:

Adv. A. Granova

Attorneys for Plaintiff:

Qhibie Attorneys

Counsel for Defendants:

Adv. JW Kok

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