



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2022-12-12

DATE

SIGNATURE

Case Number: 75039/2019

In the matter between:

FATUWANI RODNEY RAMAHALA

Plaintiff

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

POTTERILL J

- [1] On 26 August 2017 the plaintiff while asleep with a girlfriend, Kgomotso, in a flat in Sunnyside received a call from another girlfriend [Amanda] to pick her up at Menlyn shopping centre. He tried to get out of this task as to not raise suspicion with Kgomotso, informing Amanda that he had taken medicine for ill-health. Dr Ndhlovu testified that the plaintiff had told him that he could not pick up this girlfriend because he had epileptic fits the previous day and was feeling weak. But, she persisted and at around 24:00 he arrived at the Menlyn shopping centre. The plaintiff could perhaps foresee the complication in his love life, but little did he know how explosive that evening, early morning would turn out. It ended up with him chasing away from officers of the defendant [the Metro Police] with his vehicle being shot at 15 times in the process. He was arrested and taken to the Brooklyn Police station. He was detained for drunken and reckless driving.
- [2] This incident caused the plaintiff to issue a summons seeking in total R2 million from the Metro Police as compensation for emotional shock, pain and suffering and *contumelia*. Quantum and merits were separated. I only need to deal with the merits.
- [3] The cause of action pleaded in the summons is assault and/or harassment. For both the plaintiff and the Metro Police the argument was in fact whether the officers of the Metro Police were justified in the actions that they took.

- [4] Constable De Jager [De Jager] and Constable Shaku [Shaku] were on duty and were performing their duties as traffic officers as defined in Section 1 of the National Road Traffic Act 93 of 1996 [NRT Act]. Both testified that they were on patrol in Pretoria Central, Hatfield, Menlyn and surrounds to combat offences for example drunken driving and did so as part of visible policing. They were in uniform and drove a marked Ford Focus with blue lights. There was no radio to call for assistance in the vehicle. Constable De Jager and Shaku were issued with fire-arms with 15 rounds of ammunition each. When the two firearms were confiscated Shaku still had all 15 rounds in the magazine but, De Jager had no rounds in his magazine.
- [5] They came from Hatfield and at the robot controlled intersection of Atterbury and Lois streets Menlyn, while having right of way, a BMW made a U-turn in their path of travel. Their vehicle nearly collided with the BMW. The BMW had crossed a red robot, because they turned right due to a flickering green light for them. The three-way controlled traffic light, while flickering green for them, is red for the path of travel for the BMW. - This working of the robot was not placed in dispute. The plaintiff admitted that he had made a U-turn in his evidence-in-chief. He said he did not understand the English term of a U-turn, but agreed he did manoeuvre as described by a U-turn. He did so because he had passed Amanda and she had called him on his cell phone to tell him that he had passed her. He denied that he made a U-turn against a red light.

- [6] Due to this incident De Jager switched on the blue lights and gave one short burst signal and went on the right hand side of the BMW. The BMW stopped in a bus lane and the Ford Focus, the vehicle of the Metro Police stopped behind it. His intention was to ask the driver of the BMW why he skipped a red robot. The plaintiff averred he was not stopped; he had stopped for Amanda. Yet, in his statement he recorded “... *Tshwane metro police vehicle ordered me to stop.*”
- [7] De Jager put his hand on the fire-arm as he approached the vehicle. Shaku also got out of their vehicle. The plaintiff said he did not know if De Jager’s partner was a black male, but both were in uniform. He asked the male driver of the BMW for his licence. He did not provide him with it. The plaintiff was looking for the licence because he knew that De Jager was a Metro Police officer and intended to hand over the licence to De Jager. He did not hear De Jager asking for the ID, because he was busy talking to Amanda. De Jager testified that in fact he was ignored by the plaintiff. It is common cause that the driver’s window was open. Shaku testified that the plaintiff did look for the licence. The plaintiff testified he opened the window after De Jager banged on the window with a fist and also the fire-arm. De Jager denied that he banged on the window. De Jager noticed that the driver’s eyes were bloodshot and he smelled liquor. He ascertained this because he dipped his head in through the open window. Shaku testified he did not see De Jager put his head in through the window. The plaintiff admittedly had taken alcohol but

said it was before 17:00 that day and his eyes were red from sleeping.

- [8] While asking for the ID Amanda got into the vehicle. It is common cause that the plaintiff expressed his frustration with Amanda. He testified she had got him into trouble to take this trip because he was going to get hi-jacked. Shaku testified that the plaintiff in Venda said, because; “*eish*” he had consumed alcohol. Shaku would not have prior knowledge that the plaintiff was Venda if he had not heard this statement. Amanda in her statement said that the plaintiff refused to come and pick her up because he was drunk.
- [9] The plaintiff testified that because De Jager had his hand on the firearm next to his body this body posture scared him. De Jager testified that he would always approach a vehicle with his hand on the fire-arm; one would not know what to expect when pulling over a vehicle. The plaintiff testified when he did not produce documentation De Jager wanted to open the door, but it was locked. De Jager denied he tried to open the door, but had asked the plaintiff to get out of the vehicle. The plaintiff agreed that De Jager had asked him to alight. The plaintiff took off because of the banging against the window with the firearm. The banging was not recorded in his statement. He testified the statement was summarised by the attorney and therefore excluded the banging. He did tell the attorney about the banging. De Jager denied that he was banging on the window. He also saw De Jager drawing his firearm and this scared him. De Jager denied that he drew his firearm. The voice of De

Jager was bully like. He thought he was being hi-jacked and he knew that coloured people (De Jager) are dangerous. He denied that he told the doctor that De Jager had said "*that he was a man of the law could not follow him*". He knew of the metro blockade not 220 metres from where he was, but he thought they were also criminals because they used cones to narrow the lanes and criminals use cones. In his evidence in chief he did not mention the road block and he denied that when fleeing De Jager he went right through the road block, not heeding the officer with a flashlight request to stop and in fact almost colliding with one of the officers. He did not hear De Jager shouting to those officers to stop the BMW.

[10] He decided to go to the nearest police station. He signalled to the officers that they must follow him. He pulled off slowly and the BMW's hazards were on. He denied that he sped off, but volunteered that his BMW could easily outrun the Ford Focus, stunningly so in sport mode. He had hardly driven 5 metres and one shot was fired with the driver's side being struck. Amanda said they were going to be killed and she wanted to get out. He stopped and she alighted from the vehicle. A second shot was fired.

[11] There were then 2 vehicles, one next to him and one behind him. The one vehicle would try to block him but he would change lanes. There were again shots fired at his vehicle. He testified that one shot penetrated the rear door towards him. He maintained the same speed and at Magnolia Dell there was again shooting at his vehicle.

- [12] He did not in evidence in chief testify that from the road block to where Amanda alighted he had to pass through three robot controlled intersections in Atterbury. These robots control off- and onramps onto Atterbury from the highway. He denied that he went through those intersections against red robots and that at the second robot from the road block he nearly hit a vehicle that had right of way. De Jager testified he had to slow down at these intersections and caught up with the plaintiff where vehicles blocked the plaintiff's vehicle at an intersection.
- [13] At the intersection between Justice Mahomed and Atterbury the plaintiff was blocked by vehicles in front of him at the intersection. De Jager and Shaku exited their vehicle and De Jager requested the plaintiff to get out of his vehicle. The plaintiff instead pulled off travelling down the lane for oncoming traffic in Justice Mahomed.
- [14] It was common cause that Amanda left the vehicle in the vicinity of a BP garage where Atterbury continues, but also splits into Justice Mahomed road. He denied that after the spilt he was in the lane for oncoming traffic. It was common cause that De Jager there alighted from his vehicle and approached him. The plaintiff denied that De Jager asked him to switch off his vehicle. He then sped off again. He denied that it was fast. In cross-examination for the first time he told the court that while Amanda was alighting there was a shot fired because she had to duck. He persisted that the shot was fired while he was stationary and De Jager was next to him on his right. The shot was fired from inside De Jager's vehicle. He persisted that De

Jager was firing while driving, but he conceded that De Jager would have to shoot past his partner in the vehicle and through their vehicle to achieve this feat. De Jager denied that he took a shot past his partner. He was outside the vehicle when he aimed and shot at the right front wheel of the BMW to prevent the BMW from driving off. The vehicles in front of the BMW moved off and the BMW moved off. The evidence of the plaintiff was that at that stage there were three vehicles blocking and chasing him. De Jager denied that there were three vehicles, at that stage it was only his vehicle. De Jager denied that the plaintiff ever informed him that he was driving to a police station.

[15] De Jager on his cell phone then called a colleague to come and assist. He did so because the plaintiff was an ongoing threat to other road users. In Justice Mahomed there was no traffic and he would pass the BMW that was now travelling slower. It is common cause that the reason for this was that De Jager had struck the tyre but the BMW was equipped with run-flat tyres so it could travel, but slower. He would stop in front of the BMW and get out of the vehicle, but the BMW would reverse and pass him on his right. De Jager then fired shots at the left tyres as he was passing him.

[16] Another vehicle then joined him. They tried to box the plaintiff in, but he just kept on going through Sunnyside ignoring the commands of the traffic lights. De Jager would proceed into the intersections before the plaintiff to serve as a warning for motorists, if any. The plaintiff accepted this was the correct position but persisted there

was a third vehicle. He agreed that he had a heavy and powerful vehicle and that the Metro vehicles could not ram it to force it to come to a standstill.

[17] At the intersection of Vos and Spuy streets the plaintiff came to a standstill. He testified that he did so because he realised he left Amanda stranded and decided to call Lumka, her sister, and told her that he was shot at and on his way to a police station. She said he could meet her and he decided to meet her where she stayed. That is the reason he stopped there. He would not get out of the vehicle because he was scared. A crowd had gathered and there were more Metro and SAPS vehicles on the scene. But when Lumka and Alfred appeared he got out of the vehicle. Initially he said that he was grabbed and forcefully removed, picked up from his vehicle, but later said that because Lumka was there he was prepared to exit his vehicle. He never succeeded in his purpose to get to a police station because his conscience told him to call Amanda's sister. De Jager arrested him on the scene.

[18] De Jager testified that there is no standing order not to fire at a tyre and it was the only reasonable thing to do because the plaintiff persisted in ignoring their requests to get out of the vehicle. The plaintiff was driving recklessly and could cause harm to other road users. He did have to attend a disciplinary hearing for this incident but he was sent for personal emotional counselling at a wellness programme. He had been promoted in the meantime.

[19] Shaku in all material aspects corroborated the version of De Jager. The non-material contradictions were whether De Jager put his head through the open window or not, Shaku testified that he did not see that and whether the plaintiff initially cooperated. It was however common cause that the plaintiff never provided his licence to De Jager. Although he did not speak Venda, he understood what the plaintiff had said to Amanda and was prepared to be tested on his understanding of Venda pertaining to liquor in court. This challenge was not taken up.

[20] In his evidence in chief the plaintiff testified that he was never tested for alcohol; at the station they only took a breathalyser. In cross-examination he recalled that in fact his blood was taken by Dr. Seller, a medical officer, but it was for health reasons. He gave Dr Seller an incorrect name reflected as *“Madomba Tshilidzi”* and later gave his correct name because *“his mind was coming back”*. It was never denied in cross-examination, but was in any event admitted in terms of s220 of the Law of Evidence Amendment Act 45 of 1988 that the chain of evidence of the blood monster was correct and that the blood alcohol level of the plaintiff was 0,11 grams per 100 millilitres, more than twice over the legal permitted limit.

[21] He testified he was never charged with any offence and he was released the next morning. He denied that he received a summons. He denied that he paid bail to be released. Without fear for contradiction I can find that the plaintiff was arrested and held in the cells and was only released after bail was paid for his release. The

subpoenaed witness, Sergeant Sepato, brought to court the original docket and the J398 reflecting that bail was paid at the police station in the amount of R1000 on 27 August 2017 with receipt number B39115. The docket also reflected that the plaintiff was charged with reckless and drunken driving and that the summons was personally served on the plaintiff. The docket also reflected that “*diversion was successfully completed*” which could not have been done if the charges were withdrawn. The plaintiff testified knew there was a diversion offered, but he thought it was because of threats.

[22] The plaintiff called an investigator from the Independent Police Investigative Directorate [IPID], MS Moholola. She had interviewed the plaintiff and De Jager and they had the firearms of De Jager and Shaku ballistically tested. IPID does not prescribe to the National Prosecuting Authority to prosecute, they just make a recommendation. They did recommend prosecution. The plaintiff never told this witness that De Jager drew his firearm at Menlyn or that he banged with the firearm on the window.

[23] On a preponderance of probabilities the version of the Metro Police must be accepted.¹ The plaintiff was intoxicated, despite his denials; the admitted blood test results prove this. He did not make a good impression on the court due to the contradictions in his evidence. He drove over a red light while executing an admitted U-turn. The working of the robot was not attacked and he could only

¹ *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440E-G

have executed it against a red robot if De Jager, as confirmed by Shaku had right of way. He did not even recall the near collision with the marked metro vehicle. It was common cause that he was agitated with Amanda because he was now stopped by the Metro Police while he knew he was intoxicated and he said so. He never mentioned the road block that he passed through twice. This would have been important and would spontaneously be recalled if his thought was, as he testified, that it was a big criminal orchestrated road block. In any event, De Jager and Shaku were not cross-examined at all pertaining to the actions of the plaintiff at the road block or about the road block. He denied that he was stopped by the Metro Police after the U-turn, yet in his statement he said the Metro Police stopped him. The fear that he was being hi-jacked was pronounced because De Jager banged against the window with firearm. Yet this was not recorded in his statement or told to the IPID officer; a fact that would spontaneously be repeated simply because it was traumatic and it would have exasperated the fear and the reason to pull off.

- [24] His version that De Jager shot at him while De Jager was driving from inside the vehicle; past Shaku and through his own vehicle is so improbable and untenable that it can only be rejected. He contradicted himself with whether he was forcefully removed from his vehicle or voluntarily left because of the presence of Lumka. His denial that blood was taken from him is simply untrue. When confronted with the evidence of the Dr Seller, he then admitted that blood was taken, but for health reasons, is so unreliable and untenable that it must be rejected.

[25] The court has real evidence of bail being paid. Before me was the bail receipt book, an official book. It was never questioned that this official book or the receipt itself was not what it professed to be and was contrived. It was just denied that the plaintiff himself paid the bail. The bail receipt is before court and the investigating officer testified that the bail receipt was placed in the docket. I can find that bail of a R1 000 was paid for the release of the plaintiff. The denial of the diversion was contradicted by the plaintiff himself who in fact testified that it was offered to him. On this common cause fact, the reasonable inference is that the outcome of the charge was diversion as testified to by the investigating officer and the docket that was handed as up evidence reflecting same. The investigating officer has no interest in the outcome of this matter and no such suggestions were put to the witness. There is no probability that the diversion or the payment of bail was fabricated. The plaintiff is untruthful when testifying that no bail was paid and that diversion was not completed.

[26] The plaintiff did not volunteer why Amanda was not called as a witness. When cross-examined as to why she was not being called the plaintiff answered that he had lost contact. Even if he had lost contact he knew the number of her sister and where she and her husband stayed. No explanation was proffered as to what investigation was done to find this crucial witness. The court must make a negative inference as to why Amanda was not called.

- [27] This rejection of the plaintiff's version thus leaves no inference that the plaintiff was scared because he thought he was being hi-jacked. He did not want to stop because he was intoxicated. He did not drive to the nearest police station, but bypassed it because he was not on his way to the nearest police station.
- [28] Both the witnesses for the Metro Police made a good impression on the court. De Jager testified logically and coherently and did not deviate from his version. There is nothing improbable in his version. He was corroborated by Shaku and there were no material contradictions.
- [29] Having rejected the version of the appellant as unreliable, the question remains as to whether the conduct of the Metro officers, in accepting their version, was justified in the circumstances. The court must thus find whether their actions were lawful.
- [30] In terms of s3(1)(b) of the NRT Act any traffic officer may require the driver of a vehicle to stop his vehicle. The fact that the plaintiff crossed a red light and as result nearly collided with their vehicle would entitle them stopping the plaintiff.²
- [31] The next question is whether in attempting to stop the plaintiff De Jager was justified in taking the actions he did. On behalf of the plaintiff it was argued that firing 15 shots at the vehicle of the plaintiff

² ss 58, 63 and 65 of the NRT Act

was unreasonable and they could have taken other reasonable steps to stop the plaintiff; De Jager's actions were not justified.

[32] The plaintiff never handed over his licence as requested.³ By then De Jager had in addition to the previous offence smelt alcohol on the plaintiff and noticed that his eyes were bloodshot. He ignored the instruction of the Metro officer to step out of the vehicle so that De Jager could investigate if he was intoxicated. He pulled off and then went through a roadblock ignoring an officer's request to stop. They followed him. He then went through 3 red robots again endangering other motorists. He drove in the lane of oncoming traffic. At the intersection of Justice Mahomed and Atterbury he again ignored an instruction to stop and alight from the vehicle. These escalated actions rendered the suspicion of intoxication of the plaintiff reasonable. Firing the first shot at the tyre to prevent the plaintiff from pulling off was justified under those circumstances.

[33] The argument that when Amanda alighted De Jager should have stopped and questioned her as to who the plaintiff was is under the circumstances untenable. The plaintiff was endangering the lives of road users and he had to be stopped. There would be no preventing of substantial risk that the plaintiff could cause imminent or future grievous bodily harm if the arrest was delayed. If he was to be arrested for driving under the influence of liquor, doing so the next day, or when they had traced the plaintiff, would serve no purpose.

³ s 3 of NRC Act

[34] De Jager followed the plaintiff down Justice Mahomed. They would catch up with the BMW, overtake it and then come to a standstill in front of the BMW. The BMW stopped behind De Jager's vehicle. De Jager would get out of his vehicle and instruct the plaintiff to get out of the BMW. The BMW then would reverse and pass De Jager on his left. De Jager then fired another shot at the BMW. De Jager then called for assistance. It was argued on behalf of the plaintiff that if De Jager had called for assistance earlier this whole situation could have been diffused and that Shaku agreed with this submission. The facts however do not bear out this argument. When the other vehicle arrived the plaintiff still ignored their instructions and did not come to a standstill. The two metro vehicles would attempt to box in the plaintiff but he would use evasive action to pass De Jager. Even with a second vehicle the situation was not diffused. The explanation that De Jager gave that everything happened very fast, but after two shots fired he realised he needed help, is plausible and probable.

[35] The plaintiff thus committed continuous offences in the presence of the Metro officers and they were entitled to attempt to arrest him [s49(2) of the Criminal Procedure Act 51 of 1977 [the CPA]].⁴

⁴ s 49(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds –

(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

In order to affect the arrest they may use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance and prevent the suspect from fleeing.

[36] Did De Jager act reasonably and proportional to prevent injury or death to members of the public as required by s49 of the CPA? De Jager only fired shots after three instructions to stop and alight were ignored. While ignoring these instructions the plaintiff had nearly run over an officer and had recklessly crossed red robots endangering a vehicle that had right of way at a robot controlled intersection. He had made an illegal U-turn nearly causing a collision. He was driving in a lane for oncoming traffic possibly endangering lives. The first shot had hit the tyre, but the run-flat tyres had prevented the stopping of the vehicle.

[37] Another 12 shots were fired while aiming for the tyres. The admitted photographs of the BMW reflect the bullet holes on the left and right side hand fenders, three bullet holes on the tyre, one on the rim, three bullets on the passenger door towards the back wheel and one on the passenger door in line with the side mirror of the vehicle low on the door.

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- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
 - (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

[38] At first blush this may seem not to be proportional, but there was no other way to prevent the plaintiff from fleeing. The BMW was much faster than the Ford Focus and could outrun it. The Ford Focus could not ram the BMW as it was far lighter. The plaintiff simply did not heed the instructions of the Metro officers. He knew he was in trouble and could not flee much further because it was common cause that the vehicle had slowed down because of the hit to the tyre. He knew his actions would cause reactions and he hoped for some security from Amanda's sister. Counsel for the plaintiff could not provide any other lesser degree of force that could be used to stop the fleeing of the suspect and prevention of harm to road users.⁵

[39] Traffic offences can perhaps not be equated to a suspect fleeing after committing a murder, but drunken driving takes innocent people's lives. A suspect cannot be rewarded for breaking the law. The actions of the Metro Police were lawful.

[40] I accordingly make the following order:

[40.1] The defendant proved justification for the force used and the plaintiff's claim is dismissed with costs. Costs to include the costs in respect of the previous hearings of 25, 26, 27, 28 and 29 July 2022 together with costs incumbent upon the employment of senior counsel.

⁵ *Ex parte Minister of Safety and Security: In re S v Walters and Another* 2002 (4) SA 613 (CC)

A handwritten signature in dark ink, consisting of a large, stylized 'S' followed by a horizontal stroke and a small flourish.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NUMBER: 75039/2019

HEARD ON: 25-27 July 2022, 29 July 2022, 17 and 19 October 2022

FOR THE PLAINTIFF: ADV. M.S. SIKHWARI

ADV. H. SINGO

INSTRUCTED BY: Nemukongwe Attorneys Inc

FOR THE DEFENDANT: ADV. B. BOOT SC

INSTRUCTED BY: Prinsloo Whitehead Madalane Inc

DATE OF JUDGMENT: 12 December 2022