



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***City of Johannesburg Metropolitan Council v Ngobeni
(314/11) [2012] ZASCA 55 (30 March 2012)***

Media Statement

Today the Supreme Court of Appeal (SCA) upheld an appeal against an order of the South Gauteng High Court, Johannesburg (Spilg J). The judge in the court below found that The City of Johannesburg Metropolitan Council (the appellant) was liable for the damages suffered by Mr Patrick Ngobeni (the respondent) as a consequence of a wrongful shooting, arrest and detention.

The background to the litigation is as follows:

On 15 September 2004, the respondent was shot by a metro police officer during an incident which occurred when he failed to stop at a stop sign. Two metro police officers, Mr Mabaso and Mr Ledwaba, who has since died, had noticed this infraction. They stopped their vehicle behind the respondent's vehicle. During the exchange between the metro police officers and the respondent, one of the officers caused a firearm to discharge, striking the respondent who, as a result, sustained two bullet wounds. As a result of the incident, the respondent was rendered a paraplegic. He instituted action in the South Gauteng High Court against the appellant and the two metro police officers involved and claimed for damages arising from the shooting incident and for his subsequent arrest and detention. He asserted that the officer had discharged the firearm negligently. The appellant and its employees raised a plea of justification for shooting the respondent.

The judge in the court below was faced with two mutually destructive versions. He upheld the respondent's claim and concluded that the officer had not fired the weapon in order to defend the other officer, as claimed, but rather that he had done so unintentionally and negligently. Accordingly, the court found the appellant liable for the damages.

In this court, both parties agreed that the trial judge behaved in an inappropriate manner during the proceedings, in that he, on his own initiative, called certain witnesses, ordered that an inspection in loco be held and in certain instances unduly interfered when some witnesses testified. Counsel agreed that the judge deserved some censure with regard to the manner in which he conducted the trial.

The SCA found upon a perusal of the record that almost a third thereof related to the judge's participation in the trial when he either questioned the witnesses or made comments. This court restated the principle relating to judicial conduct that a trial judge must act as an impartial arbiter; conduct the trial open-mindedly, impartially and fairly and that such conduct must be manifest to all. A judge may ask questions in order to clarify issues but it is important for a judge to guard against conduct which could create the impression that he or she was descending into the arena of conflict or was partisan or had already decided the issue.

After examining various passages from the record, the SCA concluded that the trial judge had improperly interfered and took an active role in the trial. He inter alia, ordered an inspection in loco when neither of the parties had applied for such; *mero motu* called witnesses; refused to excuse a witness; made numerous interferences and interventions throughout the trial in particular when the appellant's witnesses testified; raised concerns about the National Prosecuting Authority's decision; and made various inappropriate remarks during the course of the trial. This court held that the conduct by the judge constituted an irregularity which would have vitiated the proceedings had the parties not requested that the court consider the matter on the merits.

The SCA then turned to the merits and dealt with the applicable principles when a court is faced with two mutually destructive versions. The court reasoned that the *onus* of proof in civil cases can only be discharged by adducing credible evidence to support the contentions by the party who made the allegations. It held that it was imperative for the trial judge to have remained alive to the issue relating to *onus* and make a determination in that regard. Furthermore, that the judge had erred in his approach when he assessed the evidence. The court concluded that it was improbable that a firearm, which was incapable of firing automatically, could have been discharged negligently. It held that the probabilities favoured the appellant's version that the incident occurred after midnight; that the respondent had pointed a firearm at Mr Mabaso and attacked him causing him to sustain an injury and that Ledwaba had shot the respondent whilst defending his colleague. This court accordingly concluded that the trial judge misdirected himself. It held that the respondent had failed to discharge the *onus* of proof and that his claim should have been dismissed.

In the result the SCA issued an order upholding the appeal with costs.

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