CIV/T/415/84

IN THE HIGH COURT OF LESOTHO

In the Matter of :

P.A. 'NOTO Plaintiff

and

THABISO SEKELEOANE ..... Defendant

JUDGEMENT

Delivered by the Hon. Mr. Justice B.K. Molai on the 7th day of April, 1989.

Plaintiff herein sued defendant for payment of M5,016 as damages or compensation, interest at the rate of 12% p.a. and costs of suit. Defendant intimated intention to defend the action and duly filed his plea. A pre-trial conference was held after which plaintiff set down the matter for hearing. On the date of hearing defendant failed to show up and judgment by default was entered against him in the amount of M1,518 comprising M1,500 damages and M18 medical expenses, costs of suit and interest at the rate of 12% per annum a tempore morae.

By agreement of the parties the default judgment was subsequently rescinded and defendant allowed to proceed with his defence of the action.

In her declaration to the summons Plaintiff stated that on 12th February, 1983 she was struck and injured by a bullet negligently fired by defendant. As a result plaintiff suffered

2/ damages .....

damages (for which defendant was liable) in the amount of M5,016-00 made up as follows:

(a) M5,000-00 for pain and suffering,

(b) M16-00 for medical expenses.

Wherefor, Plaintiff claimed against defendant as aforesaid.

In his plea defendant denied that Plaintiff was, on 12th February, 1983 struck and injured by a bullet negligently fired by him. He denied therefore, that he was liable in damages to Plaintiff in the amount claimed or at all. Wherefor, defendant prayed that plaintiff's claim be dismissed with costs.

In an attempt to curtail the duration of this trial the parties held a pre-trial conference in which it was agreed that at the material time defendant did fire three (3) shots from his pistol in self-defence against three (3) attackers. One of the bullets strayed and hit the plaintiff who was admittedly not one of the attackers. However, defendant denied negligence and, therefore, liability to plaintiff.

In as far as it is relevant, the evidence heard by the court was that adduced by the defendant himself who told the court that on the evening of 12th February, 1983 he left his restaurant at Waggon Wheel in the Industrial area of Maseru on his way home at Ha Thamae. He was travelling in his combi and went via Maseru Location.

When he approached Jabavu's shop in the location, defendant noticed three (3) boys standing in the road. Thinking that the boys were under the influence of intoxication he stopped the combi. One of the boys walked past but the other two opened the door

of the combi and started hitting him with fists. He fell out of the combi.

When he got up defendant took out his pistol and chased the three (3) boys. As he passed next to Jabavu's shop he fired two shots at the boys but missed. He fired a third shot which hit one of them. Defendant then went and reported to the police.

At about 8.15p.m. he was informed by the police that there had been shooting at the home of the Plaintiff. He denied knowledge of it and told the police that at the time he fired shots with his pistol he was in front of Jababu's shop. Defendant and the police went to examine the place where he had been firing shots. They then went to Plaintiff's house in the vicinity. The police entered into the house whilst he remained outside. He did not, therefore, know what transpired inside the house. He, however,denied that Plaintiff was struck and injured by any of the shots fired by him on the evening in question.

Defendant's testimony that when he was next to Jabavu's shop he was attacked by three boys was corroborated by P.W.3, David Jabavu, the owner of the shop. According to him P.W.3 was, at the material time, standing outside his shop when he noticed three (3) "Tsotsies", one of whom was Zakaria, fighting the defendant in the street. He went to intervene by telling the "Tsotsies" to stop it but all in vain. He confirmed that eventually Plaintiff took out a firearm and chased the "TSotsies" who were then running away. As he chased them in the street defendant fired shots at the "Tsotsies" one of whom was struck and injured by a bullet fired by him (defendant).

4/ In her .....

In her testimony plaintiff told the court that she was a nurse by profession. On the evening in question, 12th February, 1983, she and her husband were preparing to attend a dinner party at Lesotho Sun Hotel. Between 6.30 p.m. and 7.00 p.m. she was standing at the entrance of her kitchen giving instructions to her gardner when she heard gun reports in the street. She then noticed that she had been injured and blood was running down her leg. She did not feel pain at the time but on examining her leg plaintiff found that there was a wound which penetrated through the flesh of her thigh just above the knee. She looked around and noticed a bullet on the floor next to the zink in the kitchen. It appeared the bullet had hit her on the thigh, penetrated through the flesh and hit the zinc before dropping down on the floor.

Plaintiff's evidence was in all material respects corroborated by her husband David 'Noto who testified as P.W.2 in this trial. According to him P.W.2 was collecting the ignition keys of his car from the bedroom when he heard gun reports and the noise of something hitting the zinc in the kitchen. He proceeded to the kitchen to find out what was happening. He found Plaintiff standing at the entrace of the kitchen. She was clearly injured and bleeding from the thigh. He rushed her to Queen Elizabeth II hospital where she was medically treated as an out-patient by a certain DR. Masemene who, however, did not testify in this trial.

Although Plaintiff believed that P.W.2 had paid M2-00 for the medical treatment at Queen Elizabeth II hospital the latter was not certain that the M2 was in fact paid. In any event neither

5/ plaintiff ....

plaintiff nor P.W.2 could produce any receipt as proof of payment of the M2.00.

On the following day Plaintiff's wound was still bleeding and she had to go to Dr. Patel who on two occasions gave her medical treatment for which she paid a total of M16-00. As proof thereof plaintiff handed in Exh "A" - a receipt issued on 22nd March, 1983 by Dr. Patel who in turn referred her to Dr. Siddique of Queen Elizabeth II hospital. To the best recollection of both Plaintiff and P.W.2 no fees were charged for the examination carried out by Dr. Siddique who was not even called as a witness in this trial.

According to her, plaintiff suffered continuous pains for about 3 weeks as a result of the injury she had sustained on 12th February, 1983. Thereafter she had only periodical pains.

It is significant that in his evidence defendant denied that Plaintiff was shot and injured by a bullet negligently fired by him. There is, however, no evidence that on the evening in question any other person besides the defendant fired shots in the vicinity of plaintiff's house. That being so, it seems to me the only logical inference to be drawn is that plaintiff was struck and injured by one of the bullets admittedly fired by the defendant in the vicinity of her house. Indeed, this was conceded by the parties in the minutes of pre-trial conference in which defendant was legally represented by Mr. Mphalane then of the firm of Attorneys styled Cooper and Sons, Co.

It is perhaps convenient to mention at this juncture that it was contended in argument that in his power of Attorney

defendant had authorised Stefan Carl Buys and/or Louis Johannes Pienaar to represent him in this case. He had authorised neither Mphalane nor the firm of Attorneys styled Cooper and Sons, Co. to do so. Defendant could not, therefore, be bound by the admissions made in the minutes of pre-trial conference by either Mphalane or the firm styled Cooper and Sons, Co.

It is not really disputed, however, that Messrs Buys, Pienaar and Mphalane were all member of the firm styled Cooper and Sons, Co. which in his application for the rescision of judgment defendant/applicant clearly referred to as his attorneys - vide para. 3, 4 and 7 of the founding affidavit. Indeed ad para 5 of his Replying Affidavit defendant/applicant specifically referred to Mr. Mphalane of Cooper and Sons, Co. as his attorney.

The contention which defendant now raises in argument viz. that he had authorised neither Mphalane nor the firm of Cooper and Sons, Co. to represent him in the main action was not pleaded. It is, therefore, an attempt to extend the plea he had filed with the Registrar of this court. This, in my view the defendant/applicant cannot be permitted to do. The principle is that he must stand or fall by his pleadings.

The important question for the decision in this matter is whether or not in firing shots, one of which struck and injured the Plaintiff, the defendant acted negligently. On one hand plaintiff says he was. On the other hand defendant says he fired the shots in self-defence against his attackers of whom Plaintiff was admittedly not one. He contends, therefore, that he was not negligent.

7/ In his work .....

In his work Principles of South African Law (1956 Ed.) at p.519 by Wille, the learned author states that in the absence of evidence that it was due to inevitable accident (i.e. vis divina "Act of God" or wild animal) the injury must have been due to the act or omission of some human being, in other words, some person must have been negligent.

In the instant case it cannot, even by any stretch of imagination, be held that plaintiff's injury was the result of vis divina or wild animal. I have found on evidence that Plaintiff sustained injury as a result of the act of defendant who (on the authority of what Wille said op.cit.) must be held negligent. It follows, therefore, that the question I have earlier posted viz. whether or not in firing shots, one of which struck and injured the plaintiff defendant acted negligently must be answered in the affirmative. That being so, it must be accepted that defendant is liable in damages to plaintiff.

As it has been pointed out earlier in this judgment, the quantum was assessed in the amount of M1,500 under the heading of general damages. Regard being had to the fact that the bullet fired by defendant only penetrated plaintiff's flesh causing an injury for which she was not even hospitalised, I am of the opinion that the claim of M5,000 for pain and suffering was grossly inflated. Consequently I have no quarrel with the assessment of M1,500 made by my brother Levy, A.J., as he then was.

As regards the award of M18 made by the learned Judge for medical expenses it is worth noting that plaintiff had claimed only M16 which she was able to support by the receipt issued on 22nd March, 1983 by Dr. Patel. The M2 allegedly paid for

plaintiff's treatment by Dr. Masemene at Queen Elizabeth II hospital could not be supported by any receipt. That being so, I find no justification for awarding Plaintiff the M2-00 as damages for medical expenses. I shall accordingly allow damages for medical expenses in the amount of only M16-00 which plaintiff had in fact claimed and was able to substantiate with the receipt issued by Dr. Patel.

In the result, judgment is entered against the defendant in the amount of M1,516 as damages, interest at the rate of 12% a tempore morae and costs of suit.

B.K. MOLAI.

JUDGE.

7th April, 1989.

For Plaintiff : Mr. Moiloa
For Defendant : Mr. Nthethe.