

SOUTH AFRICA / JUDGMENT

Mondlane and Others v Minister of Safety and Security (05/27921) [2011] ZAGPPHC 68; 2011 (2) SACR 425 (GNP) (29 April 2011)

[2011] ZAGPPHC 68

COURT

North Gauteng High Court, Pretoria

BEFORE

Zondo

CASE / FILE NUMBER

05/27921

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG DIVISION)

CASE

NO: 05/27921

DATE:29/04/2011

In

the matter between:

JORDAN

A.

MONDLANE.....1st

PLAINTIFF

AUGUSTINO

S.

BANZE.....2nd

PLAINTIFF

JEREMIA

BANNY.....3rd

PLAINTIFF

DANITO

NKUNA.....4th

PLAINTIFF

And

MINISTER

OF SAFETY AND

SECURITY.....

DEFENDANT

JUDGMENT**ZONDO, J****Introduction**

[1] The four plaintiffs instituted action against the defendant for damages for unlawful arrest, detention and malicious prosecution. In addition the first and second plaintiffs also sued the defendant for damages suffered by them as a result injuries they sustained when a certain police officer shot and wounded them. The defendant has been sued on the basis that as the Minister responsible for the police he is vicariously liable for the conduct of the police in arresting the four plaintiffs, detaining them and shooting and wounding the first and second plaintiffs. At the trial that followed, the claim for damages for malicious prosecution was not pursued. It probably had been withdrawn earlier.

The witnesses

[2] At the trial three of the plaintiffs gave evidence. Those were the first, second and fourth plaintiffs. By agreement between the parties the evidence of the fourth plaintiff was confined to the issue of the motor vehicle in which the plaintiffs were travelling on the day when they were arrested. The parties agreed that no adverse inference should be drawn against the fourth plaintiff or against all the plaintiffs because of this. The defendant called two witnesses. They were Sgt Andries Kleynhans who at the time of the incident was a member of the Crime Prevention Unit in Silverton, Gauteng, and Mr Jan Kleynhans, who is Sgt Andries Kleynhans brother, and was employed by ADT Security at the time of the incident.

Evidence about the events giving rise to the Court action

[3] In the early hours of 21 May 2004 Inspector Spies and Sgt Kleynhans of the Crime Prevention Unit of the South African Police Service in Silverton, Gauteng received a report over the radio from a member of the ADT Security that there had been an incident of housebreaking at a music shop called Music Mate in Boardwalk Lakeside in Hans Strydom Drive, Faerie Glen. Sgt Kleynhans' brother, Jan

Kleynhans, was employed by ADT Security and he was the one who conveyed the report to Sgt Kleynhans. ADT Security requested back-up from the Crime Prevention Unit. The information that was relayed to Sgt Kleynhans was that the people responsible for the housebreaking in the music shop were four black men who were travelling in a yellow Toyota Corolla. It would appear that at the time that ADT Security asked the Crime Prevention Unit for a back-up, they i.e ADT Security were chasing the Toyota Corolla in question along Hans Strydom Drive.

- [4] Subsequent to receiving the request from ADT Security, Inspector Spies and Sgt Kleynhans proceeded to Hans Strydom Drive via the N4 Highway. While they were on the N4 Highway, Spies and Kleynhans saw a Toyota Corolla with four occupants which, according to them, matched the description that ADT Security had given them. According to them, the Toyota Corolla was travelling at a high speed on the N4 Highway towards Pretoria. Spies and Kleynhans then chased the Toyota Corolla on the N4 Highway towards Pretoria and into the N1 Highway (South) towards Johannesburg.
- [5] According to the defendant's witnesses the vehicle that Spies and Kleynhans used to chase the Toyota Corolla was fitted with a loud hailer and blue lights. Sgt Kleynhans testified that the blue lights on their car were flashing as they were chasing the Toyota Corolla. He said that the Toyota Corolla was travelling at a very high speed. He said that at times they (i.e he and Spies) were driving at about 160km/h as they were chasing the Toyota Corolla. He testified that they used a loud hailer to ask the driver of the Toyota Corolla to stop but the driver would not stop. The plaintiffs' witnesses, namely the first, second and fourth plaintiffs, all denied that their car was at any stage being chased by the police or by anybody. They also all denied any involvement in housebreaking at the music shop concerned. Their evidence was that the first, third and fourth plaintiffs had gone to Witbank to fetch the second plaintiff who was coming from Mozambique and they were using the fourth plaintiff's car and their destination was Rustenburg but they were to use a route that went via Krugersdorp because they did not know any other route. According to them, coming from Witbank, they joined the N1 (South) towards Johannesburg at some stage. They testified that they never noticed any motor vehicle, let alone a police vehicle, chasing them. They admitted that their vehicle was travelling at a high speed most of the time including when they were on the N1 Highway (South). The second plaintiff testified that he was the only one in the car who was not drunk. He said that all the other plaintiffs were drunk.
- [6] According to the evidence of the first, second and fourth plaintiffs, while on the N1 Highway (South) towards Johannesburg, they passed police vehicles which were parked on the side of the road and, soon after they had passed the police cars on the side of the road, shots were fired at them and two of them, namely, the first and second plaintiffs were shot and wounded. According to the second plaintiff he asked the driver of their vehicle to stop the car after he had been shot and also because he thought that the police, which, on the version of the plaintiffs, were on the side of the road, had signalled that the car should stop. Sgt Kleynhans testified that he must have fired about five to seven shots at the Toyota Corolla that he and Spies were chasing. In the process he also shot at the tyres of the Toyota Corolla and that is how the Toyota Corolla stopped.
- [7] The first plaintiff testified that he was shot in the right hand shoulder blade. He said that the bullet went through his shoulder

blade exited in the right hand side of his chest - just almost below the shoulder. The second plaintiff was hit by two shots. The one bullet hit him on his right upper leg. Another one hit him in the middle of the right side of his back. As a result of the shots or as a result of one of the shots the second plaintiff can no longer walk and uses a wheelchair. Before the incident, he could walk on his own.

[8] After the vehicle in which the plaintiffs were travelling had stopped, Sgt Kleynhans and Spies came to the car. After they realised

that two of the occupants of the vehicle had been injured, they called paramedics. The police found music equipment in the boot of the Toyota Corolla. Although the first and second plaintiffs testified that they had not seen any music equipment in the Toyota

Corolla, the fourth plaintiff admitted that there was music equipment in the vehicle and that the police found it. The first and second plaintiffs were taken to hospital as they were injured. While they were in hospital, they were guarded by the police. In the meantime the third and fourth plaintiffs were kept in police custody and appeared in court. After the first and second plaintiffs had been discharged from hospital, they were also charged and joined the third and fourth plaintiffs in the criminal matter then pending in court. The plaintiffs were not granted bail and remained in custody for about a year. They were charged with housebreaking with the intent to steal and theft but were discharged at the end of the State case in terms of sec 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ("the CPA") on the 5th May 2005. The charge of housebreaking with intent to steal referred to housebreaking at the music shop and the charge of theft referred to theft of music equipment in that shop.

Consideration of the matter

[9] Subsequently the plaintiffs instituted the present action against the defendant. The parties agreed to separate the merits from relief. This judgment relates to the issue of liability only. Although Counsel for the plaintiffs did not expressly abandon the plaintiffs' claim for unlawful arrest and detention he, very wisely, refrained from making any submissions in support of those claims. He only made submissions on the claim for damages arising out of the shooting incident. Only the first and second plaintiffs suffered injuries in that shooting. Accordingly, only the two plaintiffs are affected by the claim in respect of which Counsel for the plaintiffs made

submissions.

[10] The plaintiff's claim for unlawful arrest and detention depended for their success on the police not having had reasonable grounds to believe that the plaintiffs were the four occupants of a Toyota Corolla who had broken into the music shop referred to earlier or that the police did not have reasonable grounds for believing that they had committed a crime. The people who had broken into the music shop were alleged to have stolen some music equipment and had fled in a yellow Toyota Corolla. The evidence of different witnesses with regard to the colour of the motor vehicle in which the plaintiffs travelled differed. Some

testified that the motor vehicle was white whereas others testified that it was yellow. The evidence of those plaintiffs who testified was also not to the same effect in this regard. The second plaintiff testified that it was a yellow Toyota Corolla whereas the fourth plaintiff insisted that it was a white Toyota Corolla. The first plaintiff testified that it was a white Toyota Corolla. Counsel showed the first plaintiff a piece of white paper and the first plaintiff said that the Toyota Corolla in which the plaintiffs travelled was as white as that piece of paper. However, Sgt Kleynhans, testified that the vehicle was yellow in colour. Mr Jan Kleynhans' evidence corroborated that of Sgt Kleynhans in this regard.

- [11] When the fourth plaintiff testified that the Toyota Corolla was white and that he knew it well because it was his car, it was put to him that the second plaintiff had testified that it was yellow. His answer to this was that the second plaintiff did not know his car well. On the probabilities, the Toyota Corolla was yellow. I cannot rely on the evidence of the fourth plaintiff because in his evidence relating to an issue that I will deal with shortly he clearly lied to this court. I find that the evidence given by the defendant's witnesses was reliable, logical and sound. Accordingly, the case must be decided on the basis that the Toyota Corolla in which the four plaintiffs were travelling was yellow. However, even if it was not yellow, this would not change anything material. I say this because what Mr Jan Kleynhans from ADT Security informed Sgt Kleynhans that the car in which the people who had broken into the music shop were travelling was a Toyota Corolla which had four black males in it and, indeed, the car in which the four plaintiffs were travelling was a Toyota Corolla, and it had four occupants who were male and black.
- [12] The police had been informed that some music equipment had been stolen from the music shop by four people travelling in a yellow

Toyota Corolla. Sgt Kleynhans testified that during their chasing of the plaintiffs' car, they switched on their sirens, used a loud hailer that was fitted into their car to ask the plaintiffs to stop but the plaintiffs did not stop. In this regard Sgt Kleynhans said that in chasing the plaintiffs' car, their car i.e. the police car was sometimes as close as five and even three meters behind the plaintiffs' car. The plaintiffs who testified all said that they did not see any car that was chasing their car nor did they hear any siren or loud hailer. I accept the version of the defendant's witnesses that the police chased the plaintiffs' car and that, in chasing it, their car was sometimes as close as five and even three meters behind the plaintiffs' car. I reject as highly improbable the plaintiffs' evidence that they did not hear the loud hailer and the police siren when these were used by the police to try and stop them. The probabilities are that the plaintiffs heard the loud hailer and the siren and were aware that they were being followed by the police but they continued to flee. In this regard I must also point out that the evidence of the police about them chasing the plaintiffs' car and using the siren is corroborated by Mr Jan Kleynhans who confirmed having initially chased the plaintiffs' car alone but to also having done so with the police once the police had also seen the plaintiffs'

car. Mr Jan Kleynhans testified that he heard the loud hailer and the siren being used by the police to try and stop the Toyota Corolla. Mr Jan Kleynhans testified that the plaintiffs' car never went out of his sight throughout the chasing.

[13] Sgt Kleynhans said in his evidence that he must have fired between five and seven shots at the plaintiffs' car. He said that he aimed at the tyres of the car. When one has regard to the fact that one bullet hit one of the plaintiffs in his shoulder blade it is difficult to accept that, in firing all the shots that he fired, Sgt Kleynhans' target was the tyres of the plaintiffs' car. It cannot be. To that extent that part of his evidence must be rejected.

[14] It is common cause between the fourth plaintiff and the defendant that there were items of music equipment that were found in the boot of the plaintiffs' car. In his evidence the fourth plaintiff testified that the music equipment belonged to a man called Bob. He did not provide Bob's surname. He testified that Bob hired music equipment out to people who had functions. He said that Bob had called him during the evening of 20 May 2004 and asked him to collect his music equipment from someone and he had done that during the evening of the 20th May before he had gone to Witbank after 21h00 where, he said, he went to fetch the second plaintiff. The first and second plaintiff testified that they did not see any music equipment in the car that night / morning. This is strange because the fourth plaintiff testified that he collected the music equipment on their way from Tembisa Township to Witbank. One would have thought that at least one of the other plaintiffs would have witnessed the loading of the music equipment into the boot of the car.

[15] When the fourth plaintiff gave his evidence, he confirmed that there was a criminal case that he and the other plaintiffs faced in the Regional Court in Pretoria where they were charged with housebreaking with the intent to steal and theft. The housebreaking related to the music shop referred to earlier and the charge of theft related to the music equipment. In the criminal case the plaintiffs were represented by an attorney. As already indicated, they were discharged at the end of the State case in terms of section 174 of the CPA. That means that they were discharged without having taken the witness stand or called any witness to refute the allegations against them.

[16] The basis upon which the Regional Court discharged the plaintiffs was this: There had been a number of break-ins in the music shop concerned. The owner of the shop who gave evidence to identify the music equipment as belonging to the music shop had not done a proper inventory of items stolen during the various break-ins. There was too much confusion about which items were taken during which break-in and the identification was based simply on a general appearance of the items and not, for example, on serial numbers. This did not make it possible for the Regional Court to conclude that the music equipment had been stolen from the music shop concerned.

[17] The basis of the plaintiffs' defence against the charge of the alleged theft of the music equipment found in the car in which they were travelling was not that the music equipment was Bob's property and the fourth plaintiff had been requested by Bob to collect it from

somebody on the evening of the 20th May 2004 and he was to take it to Bob in due course. Obviously if, as far as the fourth plaintiff was concerned, the music equipment belonged to Bob who had asked him to collect it from someone and bring it to him, that is the first thing one would have expected the fourth plaintiff to say to the police when they accused him and the other plaintiffs of having stolen the music equipment from the music shop in question. One would have expected the fourth plaintiff to have said to the police: "I have not stolen this property. It belongs to Bob, my friend. He asked me to collect it from someone who had hired it and I was going to take it to Bob in due course. I can take you to Bob's residence!" The fourth plaintiff did not say this to the Police. In case the fourth plaintiff had some or other understandable reason for not saying this to the police, for example, if he chose to exercise his right to remain silent, surely he should have told his attorney this version when he instructed him to defend him or the plaintiffs against the charge. He did not.

- [18] Under cross examination the fourth plaintiff was asked why he had not told his attorney in the criminal trial that the music equipment for which he was charged with theft belonged to his friend, Bob. His answer was that his attorney told him to accept that the music equipment was stolen property. He could not explain how and why his attorney would have said that he must accept that the music equipment was stolen property without first giving him an opportunity of giving him his version. At this stage Counsel for the defendant put it to the fourth plaintiff that the true reason why he, the fourth plaintiff, had not told his attorney in the criminal trial that the music equipment belonged to Bob was not that the attorney had told him to accept that the music equipment was stolen property but that this story was a recent fabrication. The fourth plaintiff denied this.
- [19] The fourth plaintiff admitted that, after he had been acquitted and released from police custody, he did not go to the police to ask for the return to him of the music equipment. This was despite the fact that he had been acquitted in the criminal court where one of the charges he had faced was that of theft of the music equipment. He and the other plaintiffs had stayed in Police custody for close to a year. He could not explain why, if the music equipment belonged to Bob, he did not, after his acquittal, approach the police to recover the music equipment. In fact, if, indeed, the music equipment belonged to Bob, one would have expected that, as soon as possible after his arrest, the fourth plaintiff would have sent a message to Bob that his music equipment had been taken by the police when he, i.e. the fourth plaintiff was arrested and he should visit him in Police custody to discuss the matter. The fourth plaintiff did not do this. Even if the fourth plaintiff had not sent a message to Bob, Bob would have either telephoned the fourth plaintiff or gone to the latter's residence to find out where his equipment was and he would then have been told that the fourth plaintiff was in police custody and he would have visited the fourth plaintiff in police custody to get an explanation of what had happened. Thereafter Bob would have approached the police to demand the return of his equipment. This also did not happen. It is undisputed that the music equipment in question was very expensive. Lastly, when the fourth plaintiff was

asked whether, after his release from police custody, he went to see Bob. He said that he did after two or three weeks or so. He certainly did not go there immediately after his release. He said that, when he came to Bob's residence, Bob was not there and he was told that Bob no longer lived there. He said that the person or people he found in the residence did not know where Bob lived then.

[20] The first and second plaintiffs testified that they did not see any music equipment in the car. If the plaintiffs are the people who broke into the music shop called Music Mate and fled in a Toyota Corolla that was described as a yellow Toyota Corolla, then the first and second plaintiffs gave untruthful evidence when they testified that they did not see any music equipment in the car because, in that event, they were all party to stealing that music equipment from the music shop. Their evidence that they came from Witbank where they had fetched the second plaintiff who was coming from Mozambique was unsatisfactory in a number of respects. One such respect was that, although according to the second plaintiff, he had left South Africa for Mozambique in December 2003 and was, therefore, returning to South Africa after about five months, he was not carrying any suitcase or bag containing some of his clothing. His explanation that the reason for this was that he had another set of clothes in South Africa was not satisfactory because he was carrying absolutely nothing.

[21] The evidence of the defendant's witnesses that the report was that the people who had broken into the music shop were four black men in a yellow Toyota Corolla was unchallenged. Mr Jan Kleynhans' evidence that he spotted a Toyota Corolla which matched the description given to him as the Toyota Corolla in which the four suspects were travelling and that he chased that Toyota Corolla until he came to where the plaintiffs' Toyota Corolla had stopped and that it had never gone out of his sight as he chased it must be accepted. The evidence of Sgt Andries Kleynhans that he and W/O Spies spotted the Toyota Corolla in Hans Strydom Drive and it went to N4 and later N1 south in the direction of Johannesburg must also be accepted. After the police had chased the Toyota Corolla for some distance without the occupants of the Toyota Corolla stopping even though the police used a loud hailer and a siren to try and stop them, the police fired shots at the Toyota Corolla and it stopped. Music equipment was found in the boot of the Toyota Corolla. The Toyota Corolla fitted the description of the Toyota Corolla that had been used by people who had broken into the music shop and the occupants of the Toyota Corolla were not able to satisfactorily account for the music equipment found in the car in which they were travelling. They were arrested, detained and charged with house breaking with the intention to steal into the music shop in question with the intent to steal music equipment. Although they were acquitted, they did not go to the police after their acquittal to ask for the return of the music equipment.

[22] What is strange is that the first plaintiff's evidence about the music equipment differed from that of the fourth plaintiff. One would have expected that the first plaintiff would have given evidence that would have given some credence to the fourth plaintiff's evidence that the music equipment was collected from someone at Bob's request on the 20th May 2004 before the first, third and fourth plaintiffs went, on their version, to Witbank to fetch the second

plaintiff. The first plaintiff gave no such evidence. He gave his evidence as if he did not even know that the police had found music equipment in the boot of the Toyota Corolla. The second plaintiff also gave evidence as if he too did not know this. Assuming that, as the two of them were already seriously injured when the police came to the car after it had stopped and they were taken to hospital, they did not see the music equipment being taken out of the boot, the position cannot be that, even after their acquittal, the fourth plaintiff would not have told them that the police had found music equipment in the boot of his car. That is if their evidence that they did not see any music equipment in the car was true. It cannot be that, if they really had not seen the music equipment in the car, the fourth plaintiff would not since May 2004 to the date of the trial, have told them that music equipment had been found in the boot of the car by the police

and told them how such equipment had come to be in the car. At least once the plaintiffs were charged with the theft of that music

equipment they would have asked the fourth plaintiff about it and he would have told them his version concerning it. That is, indeed, if they had known nothing about it prior to their arrest. Why then did they testify as if they were never aware that music equipment was found in the car? They must have decided that their story was simply going to be that they never saw any music equipment in the car no matter what the consequences of that version were.

[23] When all of the above is taken into account, I do not have the slightest hesitation in concluding that the fourth plaintiff was a dishonest and unreliable witness and that his story that the music equipment belonged to Bob and he had collected it from someone on Bob's request on the night of the 20th May 2004 was a fabrication. If, indeed, the fourth plaintiff's story was true, he would have told the other plaintiffs that the music equipment in respect of which they were charged with theft was Bob's property and it had been in the car at the time of their arrest in May 2004. The fourth plaintiff has had many years to tell the other plaintiffs this if, indeed, there was any truth in the story. If the fourth plaintiff had told them this version, they probably would have testified that that is what the fourth plaintiff told them about the music equipment. They did not say this.

[24] When all of these factors are taken into account, the probabilities are overwhelming that the plaintiffs were the four black men who broke into the music shop and fled in a yellow Toyota Corolla. This, therefore means that all four the plaintiffs knew of the presence of the music equipment in the car, because all of them had been party to breaking into the music shop from which they had stolen the music equipment. Therefore, the evidence of the first and second plaintiffs that they did not see any music equipment in the car was given dishonestly and was untrue. In the light of all the above I find that the music equipment that was found in the Toyota Corolla was stolen property and, on a balance of probabilities, was stolen from the music shop in question. This finding is at variance with the finding of the Regional Court in the criminal trial. This can be explained on the basis that the Regional Court made its decision without the benefit of the fourth plaintiffs' evidence about the equipment belonging to Bob. In the light of this, this matter must then be decided on the basis that the plaintiffs'

broke into the music shop referred to earlier, stole the music equipment and fled in a yellow Toyota Corolla, were chased by the police and ADT Security, refused to stop when the police tried to stop them by using a loud hailer and a siren and their car ultimately stopped after Sgt Andries Kleynhans

had fired shots at the car some of which hit the tyres of the car.

[25] In my view, the police had reasonable grounds to believe that the plaintiffs had committed an offence or two and were entitled to arrest them. Their arrest was, therefore, lawful and valid. The police were entitled to keep them in custody for 48 hours. Beyond

that their continued detention was dependent upon them being granted bail by the court. They were not granted bail by the court and that decision was never set aside on appeal or review. Their detention was therefore also lawful.

Accordingly, the plaintiffs' claims of damages arising out of their arrest and detention fall to be dismissed.

The claim relating to the shooting [26] I now turn to consider the first and second plaintiffs' claim that the police acted unlawfully in firing shots and wounding them as they did. The defendant accepts that the police acted within the course and scope of their employment when they fired the shots which wounded the first and second plaintiffs. Accordingly, he will accept liability for their actions if it is established that they acted unlawfully in firing the shots which injured the first and second plaintiffs. The only question that I must decide is whether or not Sgt Andries Kleynhans was entitled to shoot and wound the first and second plaintiffs in the circumstances which prevailed. That is the question to which I turn.

Was Sgt Andries Kleynhans entitled to shoot and injure the first and second plaintiffs?

[27] The first and the second plaintiffs testified that, just before shots were fired at them, they saw certain police vehicles which were parked on the side of the road. They said that they believed that the shots came from the police officers who were either in those police cars or who were standing outside those police vehicles. Both Sgt Andries Kleynhans and Jan Kleynhans testified said that there were no police vehicles on the side of the road. Sgt Andries Kleynhans' evidence that he was the one who fired shots at the Toyota Corolla is probably the correct version. He would have no reason to say he fired shots at the Toyota Corolla and seriously wounded two of the occupants if in fact he was not the one who had fired shots at the Toyota Corolla. Furthermore, since the Toyota Corolla stopped not far from where, according to the two plaintiffs, the police cars were parked on the side of the road, it is highly unlikely that such police Officers would not have come to where the Toyota Corolla stopped to see whether they could not be of assistance to their colleagues who had been chasing that car.

[28] During his evidence Sgt Andries Kleynhans either did not testify as to what the purpose was of his firing the shots that he fired including the ones which injured the two plaintiffs or, if he did testify as to such purpose, he must have said that the purpose thereof was to stop the

Toyota Corolla so that he and W/O Spies could apprehend the plaintiffs whom they were suspecting of having committed the offences of housebreaking and theft. In the defendant's plea the defendant alleged that the police officers who fired the shots were peace officers as defined in section 1 of the CPA who reasonably suspected the plaintiffs of having committed an offence referred to in Schedule 1 of the aforesaid Act, namely, robbery, alternatively housebreaking with intent to steal and theft. The defendant alleged that the plaintiffs had fled when it was clear that an attempt was being made to arrest them and in order to effect an arrest and / or to prevent the plaintiffs from fleeing, the police had fired shots at the vehicle. The defendant also averred that the force that was used was reasonable and necessary in order to effect the arrest of the plaintiffs / or to prevent them from fleeing. It was also alleged that the relevant members of the South African police Service had acted in the bona fide belief that they were justified in firing the shots at the vehicle to effect the arrest of the plaintiffs and / or to prevent the plaintiffs from fleeing. Counsel for the defendant relied upon the provisions of sec 49(1) and (2)(b) of the CPA to justify the conduct of the police in this regard.

[29] Section 49 (1) and (2) of the CPA reads as follows: "(49) Use of force in affecting arrest. -

(1) For the purposes of this section-

(a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect, and

(b) 'suspect' means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspects 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 is 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 purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(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;

(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."

This is the provision of section 49 of the CPA as substituted by section 7 of the Judicial Matters Amendment Act, 1998 (Act 122 of 1998). The parties were agreed that this provision came into operation on the 18th July 2003 and that, therefore, it is the provision which governed the right of the police to use force to effect an arrest as at the 21st May 2004 which was the day when the police shot and wounded the first and second plaintiffs.

[30] A careful reading of sec 49 reveals that it deals with two situations where the use of force to effect an arrest is permitted and, therefore, justified and lawful. The first situation is where non-deadly force may be used. The second situation is where deadly force may be used. The reference to "deadly force" is a reference to force that is intended to, or, is likely to, cause death or grievous bodily harm to a suspect. Non-deadly force is force which is not intended to cause or is not likely to cause death or grievous bodily harm to a suspect. The term "deadly force" appears in the proviso in sec 49. Sec 49 allows the use of non-deadly force only if the following requirements are met:

- (a) there must be an arrestor as defined in sec 49(1); that is a person who is authorised under the CPA to arrest or assist in the arresting of a suspect;
- (b) there must be a suspect as defined in sec 49(1) of the CPA; that is a person in respect of whom an arrestor has or had a reasonable

suspicion that such person is committing or has committed an offence.

- (c) the force must be used or must have been used by the arrestor and not someone else;
- (d) the force must have been used on a suspect as defined in sec 49(1) of the CPA;
- (e) the arrestor must have or must have had a suspicion that the suspect is committing or has committed an offence;

(f) the suspicion held by the arrestor that the suspect is committing or has committed an offence must be or must have been reasonable;

- (g) the arrestor must be attempting to or must have been attempting to arrest the suspect and the suspect must be resisting the attempt or must have been fleeing or must have been resisting the attempt and fleeing;
- (h) it must have been clear that an attempt to arrest the suspect was being made;
- (i) the position must be or must have been that the suspect could not be arrested without the use of force;
- (j) the purpose of the use of force must be or must have been to effect the arrest.
- (k) the force used must be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing.

The requirements prescribed by sec 49 for the lawful use of deadly force on a suspect are the following:

- a) the arrestor must hold a belief or must have held one or more of the beliefs referred to in par (a) or (b) or (c) of sec 49(2), and,
- b) the belief referred to in (a) or (b) or (c) of sec 49(2) held by the arrestor must have been held on reasonable grounds.

[31] Under par (a) of sec 49(2) the belief that the arrestor must hold or must have held is the belief that force is immediately necessary for the purposes of protecting himself or herself, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm. Under par (b) the belief that the arrestor must hold or must have held at the time of the use of force is the belief that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed. Under par (c) the belief that the arrestor must hold or must have held at the time is the belief that the offence for which the arrest is sought is or was in progress and is or was of a forcible and serious nature and involves or involved the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm. The belief held by the arrestor has to relate to par (a) or (b) or (c). Furthermore, such belief must be held on reasonable grounds. The reasonableness or otherwise of the grounds has to be in relation to par(a) or (b) or (c) of sec 49(2) of the CPA.

[32] It is clear from what I have set out above that in order to use even non-deadly force on a suspect lawfully, there are many requirements that must be met. Understandably, there are also stringent requirements that must be met in order to use deadly force on a suspect lawfully. With regard to the use of deadly force on a suspect, it is clear from the proviso in sec 49(2) and from paras (a), (b) and (c) therein that the use of deadly force is only lawful or justified or permitted in cases where the arrestor (i.e. who must be the person who uses or used the force) believes on reasonable grounds:

- (a) that either he (i.e. the arrestor) or anybody lawfully assisting him with the arrest or any other person need protection from imminent or future death or grievous bodily harm and the use of force is immediately necessary for that purpose;
- (c) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed;
- (d) 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.

I was referred to the decision of the Constitutional Court in *The Minister of Safety and Security and Others in Re S v Waiters and*

Another [2002] ZACC 6; 2002 (4) SA 613 (CC) and to the decision of the Supreme Court of Appeal in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) but, on the facts of the present case, I see no warrant for discussing any of them in this judgment.

[33] I have said above that during argument Counsel for the defendant submitted that Sgt Kleynhans believed on reasonable grounds that the plaintiffs had committed a schedule 1 offence and the plaintiffs must have realised that an attempt was being made to arrest them but continued to flee and the force that was used by Kleynhans was reasonably necessary to effect the arrest and was proportional in the circumstances to prevent the plaintiffs from fleeing. He further submitted that Sgt Kleynhans was justified in using the force that he used because he believed on reasonable grounds that there was a substantial risk that the plaintiffs would cause imminent or future death or grievous bodily harm if the arrest was delayed. This last part of the submission was used to try and bring the police's purported justification of the use of force in this case within the ambit of par (b) of sec 49 (2) of the CPA.

[34] The difficulty with that part of Counsel for the defendant's submission that purports to bring the defendant's case within the ambit of par (b) of Sec 49 (2) is that, when Sgt Kleynhans gave his evidence, he never testified that at the time that he fired the shots, he believed that there was a substantial risk that the plaintiffs would cause imminent or future death or grievous bodily

harm if the arrest was delayed. The relevant part of the provision sec 49 (2) (b) reads:

"Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds.

(a).....

(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".

To successfully rely on sec 49 (2) (b) to defend a claim that the arrestor acted unlawfully or was unjustified in using force to effect an arrest on a suspect, it must be established as a fact that the arrestor held the belief contemplated in the proviso in sec 49 (2) (b). In other words it is a jurisdictional requirement that must be proved. If it is not proved, the use of force will fall outside the ambit of the proviso in sec 49(2) and the use of force will then have been unlawful.

[35] The establishment of the fact that the arrestor held the belief referred to in the proviso in sec 49 (2) is separate from another

requirement stipulated by the provision, namely, that the arrestor's belief must be on reasonable grounds. This means that, if it is shown that the arrestor held the belief contemplated in the proviso in sec 49 (2), but it is not shown that there were reasonable grounds for that belief, the use of force will also have been outside the ambit of sec 49 and, therefore, unlawful. However, if

there is no evidence that the arrestor subjectively held the belief contemplated in the proviso, then you do not even proceed to enquire whether there were reasonable grounds. That falls away. Only the arrestor can testify whether or not he held the belief required by the proviso in sec 49 (2). However, when it comes to the requirement whether or not there were reasonable grounds for the belief, that can be tested objectively having regard to the evidence in its entirety. Obviously, the arrestor will testify and give reasons why he held the belief required in sec 49 (2). Those will be his grounds for his belief. Whether or not those grounds were reasonable will then be for the the court to determine. The court will make a value judgment in the light of all the relevant circumstances. In this case the defendant has failed to lead evidence that Sgt Andries Kleynhans held the belief which the proviso in sec 49 (2) requires the arrestor to have held before deadly force could be used on a suspect. Accordingly, Sgt Kleynhans' conduct in firing shots at the car in which the plaintiffs were travelling and in wounding the first and second plaintiffs fell outside the ambit of sec 49(2) and was unjustified and unlawful.

- [36] Although the issue of whether or not there were reasonable grounds for the belief contemplated in the proviso in sec 49(2)(b) falls away in this case, in the light of the conclusion that there is no evidence that the arrestor held the belief that is required by the proviso in sec 49(2), in this case there could have been no such reasonable grounds. This has to be so because there was no evidence that the plaintiffs were armed. No arms or weapons were found in their possession or in the car. There was also no evidence that they posed any imminent threat to anybody including the Police who were chasing them. Accordingly, on this ground, too, the use of force on the two plaintiffs by Sgt Kleynhans fell outside the ambit of sec 49(2) and was unjustified and unlawful.
- [37] With regard to costs, the third and fourth plaintiffs' claims against the defendant have failed. Accordingly, as against those two plaintiffs, the defendant has been wholly successful. Accordingly, they must pay the defendants' costs with regard to their claims. With regard to the first and second plaintiffs, the position is not so simple. The first and second plaintiffs' claims relating to arrest and detention have also failed. Accordingly, the defendant has successfully defended those claims. The first and second plaintiffs have been successful against the defendant in one claim only, namely, the one relating to the shooting. Ordinarily one would say that the first and second plaintiffs should be entitled to the costs of that action but that action was tried in the same proceedings in which the actions for unlawful arrest and unlawful detention failed. The trial took three days. It was never in dispute that the Police had fired shots which wounded the first and second plaintiffs. So the only issue was whether or not the Police were entitled to fire the shots that wounded the first and second plaintiffs. If the only claim that the first and second plaintiffs had brought was the one relating to the shooting, their claim would have succeeded without any of the evidence that was led during the trial if there was no evidence that Sgt Kleynhans had held the belief required by the proviso in sec 49

- (2) (b). Accordingly, it seems to me that more than 80% of the evidence that was led related to the plaintiffs trying to prove those of their claims (including the first and second plaintiffs') in respect of which the defendant has been successful. If the first and second plaintiffs had only sued the defendant for damages arising out of the shooting, the evidence that would have been necessary for that claim at the trial would not have lasted for longer than the morning of the first day of the trial. Even then if the position was that there was no evidence that Sgt Kleynhans had held the belief required by the proviso in sec 49(2), no evidence would have been necessary for that claim to succeed. However, to be on the safe side one can say that whatever evidence may have been required for the two plaintiffs to succeed would not have gone beyond the morning of the first day of the trial. In these circumstances it seems to me that as between the first and second plaintiffs, on the one hand, and the defendant, on the other, each party should pay its own costs.

In the premises I make the following order:

1. The plaintiffs' action relating to their arrest and detention is dismissed.

The first and second plaintiffs' action relating to the shooting succeeds and it is hereby declared that the use of force by Sgt

Kleynhans on the first and second plaintiffs on the morning of the 21st May 2004 was unjustified and unlawful.

3. It is hereby declared that the defendant is liable for the conduct of Sgt Kleynhans in shooting and injuring the first and second

plaintiffs on 21 May 2004.

4. The third and fourth plaintiffs' are to pay the defendant's costs relating to the defendant's defence of the plaintiffs' claims for unlawful arrest and detention.
5. With regard to the costs relating to the first and second plaintiff's claim arising out of the shooting incident, the first and second plaintiffs are to pay their own costs and the defendant is also to pay its own costs.
6. To assist the Taxing Master / Mistress, it is pointed out that 80% of the evidence led at the trial would not have been necessary for the success of the first and second plaintiffs' action referred to in (2) above.

ZONDO,J

Appearances:

1. For the First, Second, Third and Fourth Plaintiffs: Mr A J Swanepoel Instructed by:
Makhubele Attorneys,

C/O Mkhavelle Incorporated, Pretoria

2. For the Defendant: Mr T W G Bester Instructed by: The State Attorney, Pretoria
 3. Date of hearing: 4th November 2009
 4. Date of order: 29 April 2011
 5. Date when full judgment provided: 5 May 2011
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Prepared on 10 October 2026 · Esheria