

SOUTH AFRICA / JUDGMENT

Ngwazi v Minister of Police (7990/2016) [2022] ZAKZDHC 53 (2 December 2022)

[2022] ZAKZDHC 53**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Marion

CASE / FILE NUMBER

7990/2016

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Source record**FLYNOTES:**

WRONGFULNESS AND POLICE BULLET
PERSONAL
INJURY – Police shooting – Wrongfulness –
Suspects in robbery firing at police – Police firing
on
suspects while they fled in vehicle – Plaintiff struck by
stray bullet – Use of force reasonable to overcome
resistance and attempt to prevent suspects from fleeing – No
wrongful act and actions justified on grounds of self-defence
or
necessity – Plaintiff's claim dismissed –
Criminal Procedure Act 51 of 1977, s 49.
IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
CASE
NO: 7990/2016
In

the matter between:

SENZI
ERIC NGWAZI
PLAINTIFF
and
MINISTER
OF POLICE
DEFENDANT
ORDER
The

following order shall
issue:

The
plaintiff's claim is dismissed with costs.

JUDGMENT

Marion AJ

[1] The plaintiff claims damages from the defendant for the plaintiff's alleged wrongful and unlawful shooting by a member of the South African Police Services (SAPS).

[2] The defendant is sued nominally in his capacity as the head of the SAPS. It is alleged by the plaintiff that the police officers present at the time of the incident were

in the employ of the SAPS and acted within the course and scope of their employment.

[3] As a result of the shooting the plaintiff sustained injuries to his left forearm. The nature and extent of his injuries are not relevant for the present purposes as the issues of liability and quantum have been separated by consent.

[4] The plaintiff avers that the "shooting of the Plaintiff was unlawful in that there were no grounds to warrant such shooting." [1]

[5] The defendant, in his amended plea, pleaded as follows:

'2.12 the use of force by members of the South African Police Services was a result of the threat and danger of physical harm posed by the suspects and/or to overcome resistance by the suspects and to prevent their flight which was reasonably necessary and proportional in the circumstances;

alternatively,

2.13 the aforesaid members of the South African Police Services acted in self-defence.'

[6] The defendant further denied the unlawful shooting of the plaintiff by the police and averred that "the Plaintiff was not shot by one of its members of the South African Police Services." [2]

[7] Pleadings serve a specific purpose; they define the issues to enable the other party to know what case he or she is required to meet. The plaintiff is required to plead his or her case in terms that are lucid, logical and intelligible. [3]

[8] On the pleadings and evidence led at the trial, the following are common cause facts:

(a) on 21 December 2013 and at or near the intersection of Queen and Grey Streets, Durban a robbery took place at a music store;

(b) a shootout ensued between the suspects and the members of SAPS; and

(c) the plaintiff was shot on his left forearm.

[9] The disputed facts as pleaded and advanced at trial may be summarised as follows:

- (a) the defendant disputed the plaintiff's version that he was shot by one of the members of the SAPS;
- (b) the plaintiff disputed that the use of force by SAPS, as a result of the threat and danger posed by the suspects, was reasonably necessary and proportional in the circumstances; and
- (c) the plaintiff disputed that the SAPS members acted in self- defence.

[10] The triable issues are:

- (a) whether the SAPS members wrongfully and unlawfully shot the plaintiff; and
- (b) whether there were grounds for the SAPS members to discharge their firearms when they did.

[11] In *Mabaso v Felix*[4] the Supreme Court of Appeal set out the general principles that apply in matters involving delict that affect the bodily integrity of the plaintiff and in circumstances where the defendant raises a ground of justification such as self-defence. The court held that the defendant bears the overall onus of proving his or her justification for the otherwise unlawful conduct.

Evidence of the plaintiff

[12] The first witness who testified was an expert, Mr Rick Crouch. A summary of his evidence has been filed in terms of Uniform rule 36(9). He is a private investigator registered with PSIRA. He is an experienced private investigator with a police investigation background. He was instructed to conduct a crime scene investigation in respect of the events that unfolded on 21 December 2013. He attended at the scene on 3 May 2022. He sourced his information from the plaintiff and Mlungisi Hlongwane whom he interviewed at the scene. He arrived at the following conclusions:

- (a) the plaintiff was seated in the front passenger side of a taxi that was parked at a taxi rank on Denis Hurley Street (Queen Street) opposite the Victoria Street 'mall' (market). He was alone in the taxi. The taxi was reversed into the parking;
- (b) there was a shootout after a robbery between suspects and the SAPS;
- (c) the suspects were shooting in an easterly direction away from the direction of the plaintiff;
- (d) the SAPS members were returning fire in a westerly direction which was in the direction of the plaintiff; and
- (e) the stray bullet entered the taxi through the open driver's side window.

[13] Under cross-examination Crouch could not dispute the following:

- (a) that it may have been five policemen pursuing the suspected robbers and not ten as per his report;
 - (b) that the police vehicle was parked at the intersection of Queen and Grey Streets and not where he depicted the vehicle in terms of his sketch; and
 - (c) that the distance between where the shootout had taken place and the taxi rank was approximately 250 meters and not 130.76 meters.
- [14] The next witness was Nonhlanhla Ndlovu who was employed at Independent Police investigative Directorate (“IPID”). She is a senior investigator who investigates cases against police officers. She confirmed the contents of her affidavit which was handed in as exhibit “B”. [5] Her affidavit stated that she investigated an incident where two by-standers were shot by police after chasing a car-jacking vehicle.

Her evidence took the matter no further.

- [15] The plaintiff testified he was 34 years old and employed on a part-time basis as a maintenance worker. On 21 December 2013 he was employed as a taxi conductor. He was seated in a taxi and a bullet struck him through the driver’s window which was left opened. After he was shot he got out of the taxi and ran to the toilet to hide. As he entered the toilet another bullet hit the outside toilet wall. He went to inform the driver of the taxi, Hlongwane, that he was shot and injured. Hlongwane then informed him about the shootout between the police and the suspected robbers. The police called for an ambulance however they took too long to arrive and Hlongwane took him for medical attention.
- [16] Under cross-examination the plaintiff testified that he was injured on his left hand. He failed to have any response regarding why there was no bullet hole on the toilet wall as indicated by Crouch in his report. This was in contradiction to his evidence that a bullet hit the toilet wall as he entered. He thereafter stated that he was inside the toilet when the bullet struck. The plaintiff could not dispute the defendant’s version that suspects were shooting at the police officers and the police returned fire.
- [17] The next witness called to testify was Mlungisi Clifton Hlongwane, a 38-year-old male, taxi driver. On 21 December 2013 he was the designated driver of the taxi in which plaintiff was a conductor. He was standing outside the taxi when the shooting took place and the plaintiff was seated inside the taxi. There was a shootout between the police and suspected criminals. He testified that at some stage he saw one of the suspect’s shooting at the police through the open window of a sedan. The plaintiff subsequently reported to him that he could not feel his hand and that he suspected that he was shot. The police officers called for an ambulance but due to a lengthy wait, the ambulance did not arrive and he took the plaintiff to hospital for medical attention. He confirmed that he was interviewed by Crouch and confirmed the point of positions of the suspected criminals, plaintiff and police vehicle as depicted on exhibit ‘B’. He testified that the police were moving in the direction of the suspects. Everything happened at a fast pace; the suspected criminals were moving towards

the taxi rank and the police were in pursuit of them. There was an exchange of gun fire between the suspects and the police. His evidence was that one of the suspects was facing backwards out of the vehicle and shooting at the police.

- [18] Under cross-examination it was put to him that the vehicle driven by the suspects was a white sedan. His response was that the incident occurred a long time ago. Hlongwane stated that the police vehicle was parked close to the taxi rank. He saw two police on foot but could not be certain about them firing any shots. He did not see who shot the plaintiff. The plaintiff was shot in the left lower forearm.
- [19] The defendant's application for absolution from the instance was dismissed and reasons duly given. The defendant called five police officers to testify. I shall deal with the salient features of their evidence and not repeat their entire evidence which is on record.

Evidence of the defendant

- [20] Sergeant Peter Mduduzi Bonnet is employed by the SAPS stationed at the Operation Response Services (O.R.S), Durban Harbour since 2006. On 21 December 2013 he was in a marked police vehicle with four other colleagues. They went to drop off a colleague at Grey Street and then drove down Queen Street. A member of the public alerted them to a robbery that was taking place at the music store at the intersection of Grey and Queen Streets. The driver made a few turns to get to the music store and parked outside facing Queen Street. Three suspects were proceeding out the shop armed with firearms. They began firing towards the police. Bonnet took cover behind a pillar and noticed that the suspects were proceeding towards a BMW parked on Grey Street. He fired three shots towards the BMW. Two of the suspects got into the vehicle and the other was ten meters away attempting to get into the vehicle. Bonnet chased the suspect and vehicle on foot and the suspect threw the money on the road and opened fire on him. He fired two more shots in the direction of the suspects' getaway vehicle. According to his evidence he was 250 meters away from the taxi rank at the time he fired the last two shots. The place where he fired the shots from was not busy, there were only people walking on the pavement. He was unaware that any members of the public were shot on that day.

- [21] Under cross-examination it was put to him that in his statement he stated that he was aware that someone was injured at the scene. He responded that he could not dispute that but that the incident happened a long time ago and he did not remember.
- [22] Constable Abednigo Ngcebo Luthuli was employed by the SAPS stationed at O.R.S. for 17 years. He corroborated Bonnet's evidence in material respects. He did not fire any shots at the suspects. He was unable to obtain the registration number of the suspects' vehicle. The area was busy as it was 17h00 and there were people walking on the side of the road. He was unaware of any members of the public being shot.

- [23] Constable Siyabonga Errol Lusiki testified that he was employed by the SAPS stationed at O.R.S for 16 years. He also corroborated Bonnet's evidence in material respects. The suspects began shooting at the police as he jumped out the vehicle and he fired two shots at them in the direction of the suspects' vehicle. He was in front of the police vehicle at the time he opened fire. There were pedestrians on the side of the road.
- [24] Under cross-examination he confirmed that two members of the public were shot. One was shot on his left arm and the other on the upper side of his body.
- [25] Constable Siyanda Victor Mkhize was employed by the SAPS stationed at O.R.S for 17 years. He was the driver of the police vehicle a Nissan Interstar on the day of the incident. He corroborated the evidence of the defendants' witnesses in material respects. He testified that the suspects opened fire first and the police then returned fire towards the suspects and the getaway vehicle. He did not fire any shots.
- [26] Constable Trevor Ntshingila was a member of the SAPS stationed at O.R.S for 17 years. He also corroborated the previous witnesses that testified on behalf of the defendant. He did not open fire. The suspects shot at the police first. He took cover and then jumped back into the vehicle being driven by Constable Mkhize. He testified that the shooting took place in a public area and people were in the corridors. He did not witness any of his colleagues shooting as he hid behind a block.

The law

- [27] The issue is whether the defendant is delictually liable for the conduct of the police officers as alleged by the plaintiff. The plaintiff claims that the defendant is vicariously liable for the wrongful and unlawful shooting of the plaintiff resulting in an injury to his left arm. An act that causes injury to another, or death, is *prima facie* wrongful.[6]
- [28] The onus rests with the plaintiff to prove his case. The evidence as it stands shows that on 21 December 2013, a robbery was in progress and that there was a shootout between the alleged suspects and the police. There is no direct evidence that the bullet that was fired from the firearms of the police caused the plaintiff's injury. The evidence before this court is that the police were shooting in the general direction of the taxi rank which is where the plaintiff was seated in a taxi. The probability exists that a stray bullet fired by the police may have caused the plaintiff's injury.

- [29] In *Kruger v Coetzee*[7] Holmes JA held:

'Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.'

The test for negligence is objective. In casu the police opened fire after the suspects began shooting at them. This evidence is clear from both Hlongwane's testimony as well as the defendants' witnesses. The area did have people passing by from work and walking on the

pavements. The police would have objectively foreseen that the possibility existed that a stray bullet may injure a passer-by. The other reasonable possibility that the police would have foreseen was that the armed suspects may escape and whilst fleeing and opening fire they posed a danger to the police and the public. The police in that moment would have taken steps to make the best choice to fulfill their duty to protect the public and to apprehend the suspects. If they just stood by and did nothing that would have been a dereliction of their duties. The choice they ultimately made would have been based on their training and experience.

[30] Section 49 of the Criminal Procedure Act 51 of 1977 reads as follows:

‘49 Use of force in effecting arrest

- (1) ...
- (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, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—
- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.’

[31] In *Govender v Minister of Safety and Security*[8] Booysen J held:

‘It seems to me that at common law and in terms of s 49(1) the Courts approach each case on its own facts and circumstances in the general context of our society and, of course, also the Constitution in deciding in each particular case whether the degree and type of force applied was the minimum force possible, reasonable, necessary and proportionate, such as to justify a reliance upon s 49(1).’

[32] On appeal[9] the Supreme Court of Appeal set out the approach to be adopted in interpreting statutory provisions under the Constitution:

‘This requires magistrates and Judges

- (a) to examine the objects and purport of the Act or section under consideration;
- (b) to examine the ambit and meaning of rights protected by the Constitution;
- (c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, ie by protecting the rights therein protected;

- (d) if such interpretation is possible, to give effect to it, and
- (e) if it is not possible, to initiate steps leading to declaration of constitutional invalidity.'

The court held further:[10]

'...in giving effect to s 49(1) of the Act, and in applying the constitutional standard of reasonableness, the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole.'

[33] The courts have noted that members of the SAPS are burdened with a constitutional duty[11] to prevent, investigate and combat crime, to maintain law and public order, and to ensure the protection and security of all South

Africans.[12]

[34] The force used by SAPS in this case was reasonable to overcome the resistance and to prevent the suspects from fleeing. It was also necessary as the SAPS members were being shot at and they retaliated in self-defence and to protect the public. The evidence before the court confirms that there was no wrongful act and that the actions of the police were justified. The defendant discharged its onus to prove self-defence, alternatively necessity, in justifying the shooting of the suspects by the police.

[35] A probable explanation for the plaintiff's injury on the evidence is that a stray bullet hit him and caused his injury. In considering the evidence relating to the direction that the police were shooting; the bullet may have been one discharged from their firearms. In assessing the evidence in totality, I am satisfied that the police officers' conduct was justified and hence not wrongful and unlawful.

[36] I therefore find that the plaintiff has failed to discharge his onus and establish that he was injured as a result of an unlawful and wrongful shooting by the police.

Order

[37] I make the following order:

Appearances

For the plaintiff : Mr ZSM Khumalo

Pietermaritzburg

For the defendant : Mr R Athmaram

Instructed by : State Attorney

: Durban

Date of hearing : 9 November 2022

Date of judgment : 2 December 2022

- [1] Paragraph 7 of the particulars of claim.
- [2] Paragraph 4 of the amended plea.
- [3] Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 902H-I.
- [4] Mabaso v Felix 1981
- (3) SA 865 (A) at 873E-874E.
- [5] Page 79 of index to discovered bundle.
- [6] Minister van Veiligheid en Sekuriteit v Geldenhuys 2004
- (1) SA 515 (SCA) para 24.
- [7] Kruger v Coetzee 1966
- (2) SA 428 (A) at 430F-G.
- [8] Govender v Minister of Safety and Security 2000
- (1) SA 959 (D) at 967H-I.
- [9] Govender v Minister of Safety and Security 2001
- (4) SA 273 (SCA) para 11.
- [10] Ibid para 21.
- [11] Section 205(3) of the Constitution.
- [12] Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another
- [2002] ZACC 6; 2002 (4) SA 613 (CC) para 48.

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