

SOUTH AFRICA / JUDGMENT

Ngwenya v Minister of Safety and Security (2006/22220) [2012] ZAGPJHC 212 (24 October 2012) [2012] ZAGPJHC 212

COURT

South Gauteng High Court, Johannesburg

BEFORE

Whitcutt

CASE / FILE NUMBER

2006/22220

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SOUTH GAUTENG HIGH COURT, (JOHANNESBURG)

CASE NO: 2006/22220

DATE:24/10/2012

In the

matter between:

NGWENYA

MAPHUNGANE RICHARD.....Plaintiff

And

THE

MINISTER OF SAFETY AND SECURITY.....Defendant

JUDGMENT

Coram: WHITCUTT AJ

Heard: 23rd October 2012

Delivered: 24th October 2012

The plaintiff instituted action against the Minister of Safety and Security, the defendant, on 6 October 2006, claiming damages. He alleges that on 26 October 2003, he was shot by a member of the South African Police Services.

The parties agreed to separate the merits from quantum. Consequently, the trial before me proceeded only on the issues in

paragraphs 1 to 7.1 of the particulars of claim.

At the second pre-trial conference held on 11 July 2008, the following requests for admissions and the responses were minuted -

“2 Admissions

The defendant has pleaded a bare denial and based on the items discovered by the defendant the plaintiff sought the following admissions from the defendant:

2.1 Does the defendant admit that on 26 October 2003 at or near the vicinity of Ngema Street, Meadowlands, there was a shooting incident?

Yes, the defendant admits this.

2.2 Does the defendant admit that police were party to this shooting incident?

Yes. The defendant admits this.

2.3 Does the defendant admit that during this shooting incident a member of the community was injured?

Yes. The defendant admits this.

2.4 Does the defendant admit that the member of the community that was injured was Richard Ngwenya?

2.5 Does the defendant admit that Mr Ngwenya was wounded on the left side of his body/abdomen?

The defendant states that this is a matter for evidence and does not admit to this”

At the trial only one witness, the plaintiff testified. I will deal with the circumstances giving rise to this below.

Mr Ngwenya testified that on 26 October 2003 -

he woke up in the morning and was on his way to work. He was already late. He came out of his yard running. He was rushing to the taxi rank. He was on his own.

As he was busy running he noticed a car coming in his direction. He stopped. He didn't know why it was heading toward him. Behind this motor vehicle emerged a police motor vehicle. The defendant was standing still at the time, on the pavement.

As he was standing on the pavement, he saw a police car emerging from behind the small one and two people from the vehicle in front got out of the car and began to flee.

The fugitives were unarmed.

The two fugitives ran past the plaintiff, on his left hand side.

The police got out of the car, they chased the fugitives.

As the police were chasing them, one took out a firearm.

He held it in his right hand and aimed.

The policeman fired only two shots.

The policeman fired after the fugitives had passed the plaintiff but before the police had reached him. In other words, the

plaintiff was between the fugitives and the pursuing policeman when the two shots were fired.

The first shot struck the plaintiff on the left hand side of his abdomen, just above the hip.

The plaintiff collapsed.

Some of the people queuing for a taxi across the street who knew the plaintiff ran for his son and his brother, who took him to hospital.

According to the plaintiff, the police did not check on him at all after he had been shot

None of these facts was disturbed in cross-examination. The plaintiff's evidence on all material issues (that the fugitives were unarmed, that they were fleeing, that the policeman fired two shots whilst the plaintiff was between him and the fugitives and that the first shot struck him) was given unhesitatingly and definitely.

On its own merits, and in the absence of any countervailing version, or any evidence at all relating to grounds of justification, the plaintiff's evidence is unchallenged and stands to be accepted.

Section 49 of the criminal procedure act no 51 of 1977 reads as follows -

"49 Use of force in effecting 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 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 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 purposes 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; 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.”

I was informed by Mr Sekwati, who appeared for the defendant, that he was not in a position to lead any evidence due to non-availability of witnesses. In consequence, there is no evidence at all before the Court as to the circumstances giving rise to the pursuit which resulted in the shooting of the plaintiff by the police. What was known or suspected by the police about the suspects was not explained. Whether they were suspected of a serious offence, or of being a threat to the public, is not known.

All that is known is that the suspects were unarmed and fleeing at the time of the incident. Moreover, Mr Sekwati quite properly

conceded that the person against whom deadly force was in fact employed, namely the plaintiff, was neither a suspect nor the object of an arrest.

I am mindful, too, of the limits that are in any event placed upon the police in using force when effecting an arrest in terms of section 49, as fully set out, inter alia, in *Ex Parte Minister of Safety and Security and Others: in re S v Walters and another*

[2002] ZACC 6; 2002 (4) SA 613 (CC).

On the basis of the plaintiff's evidence, I find that the plaintiff was shot by a policeman on 26 October 2003, that the

policeman was acting in the course and scope of his employment at the time of the shooting and that his conduct in all the

circumstances was unlawful and amounts to an assault. The defendant is in consequence liable for such damages as the plaintiff may prove he has suffered as a result of the shooting.

In consequence of the separation of issues, the determination of quantum of the damages would have stood over for determination at the resumed hearing. However, before giving judgment in the matter on the merits, I was informed by the parties that they would attempt to reach agreement on the quantum should my finding be in favour of the plaintiff. With my having confirmed that the plaintiff would indeed succeed on the merits, the parties reached agreement as to the quantum, which I incorporate in the order.

Given the long delays in bringing this matter to trial, which has resulted in the fact that the defence were unable to present any witnesses and the plaintiff's one expert had emigrated, the attitude of the parties in working together to reach finality is to be commended.

In the circumstances, I make the following order -

The defendant is liable to compensate the plaintiff for all agreed damages caused by the plaintiff having been shot on 26 October 2003;

by agreement between the parties, the defendant will pay to the plaintiff the amount of R150 000,00 as damages, together with interest thereon at the rate of 15.5% per annum from 6 October 2006, being the date of summons, until date of final payment, and

the defendant is directed to pay the plaintiff's costs relating to proof of liability, such costs to include -

the qualifying costs and the travelling and taxable expenses of the experts Mr Lubbe and Dr Vermaak;

the costs of counsel;

the costs of the interpreter;

the costs of the previous postponed hearings on the party and party scale.

C WHITCUTT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Ms CARSTENS COUNSEL FOR PLAINTIFF

WITS LAW CLINIC PLAINTIFF'S ATTORNEYS

Mr SEKGWATI STATE ATTORNEYS FOR DEFENDANT

DATE OF TRIAL 23rd OCTOBER 2012

DATE OF JUDGMENT 24th OCTOBER 2012

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Prepared on 11 October 2026 · Esheria