

SOUTH AFRICA / JUDGMENT

Nomnganga v Minister of Police , RSA (2981/2019) [2023] ZAECHMHC 10 (14 March 2023)

[2023] ZAECHMHC 10

COURT

Eastern Cape High Court, Mthatha

BEFORE

Notyesi

CASE / FILE NUMBER

2981/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MTHATHA)

REPORTABLE

Case

No: 2981/2019

Date

Heard: 17/08/2022

18/08/2022

20/01/2023

Date

Delivered: 14/03/2023

In

the matter between:

SIYANDA

NOMNGANGA PLAINTIFF

and

MINISTER

OF POLICE,

RSA DEFENDANT

JUDGMENT

Notyesi AJ

Introduction

- [1] The plaintiff instituted an action for damages against the defendant arising from a shooting incident in which he was injured. In his particulars of claim, the plaintiff alleged that on 2 October 2018, he was walking in the street near the taxi rank at Bizana, when he was wrongfully and intentionally shot by a member of the South African Police Service, whilst acting within the course and scope of his employment with the defendant.
- [2] The defendant admitted the shooting of the plaintiff, however, alleged that the shooting was justified in that the police officer was acting in self-defence. In the plea, the defendant alleged that the plaintiff had pointed a firearm at the police officer and that despite a warning to drop that firearm, he failed to do so. Consequently, the defendant contended that, on account of the plaintiff's failure to drop the firearm, the police official grounded a reasonable belief that he was in physical danger and that he was entitled to shoot the plaintiff to obviate the imminent threat of danger as presented by the plaintiff. The defendant had submitted that the officer shot the plaintiff in his leg to immobilize or disarm him.
- [3] Prior to the commencement of the proceedings, the issues of quantum and liability were separated by agreement between the parties. The matter proceeded before this Court on the issue of liability only.

During the pre-trial procedures, the defendant had accepted that he bore the onus to justify the shooting and that he had the duty to begin.

- [4] Therefore, on the pleadings, the issues for determination on liability are:
- (a) The lawfulness of the shooting of the plaintiff; and
 - (b) The appropriate award of costs.

The evidence

- [5] During trial proceedings, the defendant adduced the evidence of a single witness, Sgt Sikhumbuzo Mantusi. Briefly, Sgt Mantusi testified that he is a member of the South African Police Service stationed at Bizana. He joined the police service on 9 July 2007. He had received training as a police officer at the Bhisho training academy. During the course of his training as a police officer, he was taught and skilled on the use of firearms. His training was for a period of six months and whereafter he was deployed to the Bizana police station.

- [6] According to Sgt Mantusi, on 2 October 2018, he had reported for duty and he was dressed in full police uniform. At approximately 11h00 and 12h00, he joined other members who were doing patrol duties around Bizana. The members he joined were Sgt Ndunge, Sgt Jojo Kwazela and Const Guqaza. They were four police officers in number. In performing their patrol, they were travelling in a double cab Nissan bakkie with police markings. Const Guqaza was the driver.
- [7] In the course of their patrol, Sgt Jojo Kwazela received a phone call from the station. It was reported that there were gun shots heard near the post office. In response, they rushed to the direction of the post office. As they were approaching the post office, they observed movement of persons in the vicinity which was indicative of panic, suggesting that something was amiss around the area.
- [8] Const Guqaza stopped the vehicle. He then approached a man who was selling shoes next to the post office. He made enquiries from this man about the alleged shooting. The man informed Const Guqaza, in their presence, that there was a shooting in the area. That man who had been approached by Const Guqaza informed them that the persons

who were shooting had run to the direction of Rhino stores which was on their left hand side. The man also indicated that two of the men who were shooting, were carrying sport bags. Without further delay, they gave a chase in that direction. On their way, they again met another man. They enquired from this man whether he had seen the persons who were shooting. This man directed them to the taxi rank by way of gestures as he did not speak. They then took the direction of the taxi rank.

- [9] When they were passing the office of Border Taxi Alliance, they noticed boys who were near the taxi rank and they were about to reach the open field where trucks usually park. He noticed that two of the

boys had firearms, which were pistols. Const Guqaza stopped their vehicle and Sgt Mantusi was the first to alight from the vehicle. He was carrying an R5 rifle. They followed the boys in the direction of Browns Cash & Carry and Mafumbatha stadium.

- [10] When the boys noticed that they were being followed by the police, they started shooting at the police. Sgt Mantusi and Const Guqaza returned fire. The boys jumped over the fence and entered into the Mafumbatha stadium. Const Guqaza followed them and entered the stadium. The boys were firing shots and Const Guqaza was returning fire. Sgt Mantusi did not enter into the stadium. Some of the boys came out of the stadium, although some remained inside the stadium. The firing of shots was ongoing inside the stadium. One of the boys jumped out of the stadium on the side of Sgt Mantusi. He was shot by another person who had appeared within that vicinity. Sgt Mantusi witnessed that incident of shooting. The person who shot the boy who had just jumped out of the stadium ran away and proceeded to the taxi rank. He coalesced with the crowd that had been curiously observing the episode of gun shots.

- [11] Sgt Mantusi decided to follow this person as he had disappeared into the crowd. He had no details about the person, although he was hoping to find him. There were many vehicles which were parked at or near the taxi rank. As Sgt Mantusi was tracking down the person who had joined the crowd, he noticed a person, although he could not confirm whether it was the same person whom he was tracking down. The person he noticed at this stage, was carrying two firearms. He held one firearm with his left hand and the other with his right hand. The firearm in his right hand was pointed at the direction of Sgt Mantusi. The firearm in his left hand, was pointed down.
- [12] Sgt Mantusi ordered this person to put the firearms down. He shouted twice to the person, ordering him to put the firearms down. The person ignored Sgt Mantusi and did not heed the order. Sgt Mantusi then shot him in his right leg with the R5 rifle. As a result of that shooting, the person fell down. According to Sgt Mantusi, he had shot this person in his leg in order to disarm him. Sgt Mantusi stated that he had felt that his life was at risk.
- [13] After the person was shot, Sgt Kwazela Jojo appeared on the scene. She took possession of the two firearms. Sgt Mantusi asked the shot person about his personal details. In response, the person gave his details as Siyanda Nomnganga (the plaintiff herein) and that he was from Nomlacu village, Bizana. When this person was asked about the reason why he failed to put the firearms down on instructions of Sgt Mantusi, he offered no response. Sgt Mantusi asked the plaintiff about possession of the firearms and he failed to offer any response. He then warned him that he was under arrest for possession of firearms without a licence. He advised the plaintiff about his Constitutional rights as an accused person. Sgt Mantusi did not take the plaintiff into custody, because he was injured and needed medical attention.
- [14] Sgt Mantusi warned the plaintiff and allowed him to be taken to the hospital for treatment. He was taken by ambulance to St Patrick's Hospital in Bizana. Sgt Mantusi made a statement in connection with the incident. According to Sgt Mantusi, the station commander, Lieutenant Colonel Fremantle, was also at the scene and there were members of the Local Criminal Record Centre.
- [15] Sgt Mantusi left the scene and returned to the police station, where he continued with the arresting procedures. He entered the name of the plaintiff to the SAP 14 register. He recorded the particulars of the plaintiff, although the plaintiff was not physically at the police station. Sgt Mantusi also recorded the particulars of the charge and the docket was transferred to the Crime Investigation Detective section.
- [16] Sgt Mantusi was cross-examined and he contradicted himself during cross examination. Although in his evidence in chief, he had suggested that he shot the plaintiff when they were facing each other, during cross-examination, he suggested that the plaintiff was moving and that he might have changed his stance. He suggested that he too was moving towards his right. The positioning of the plaintiff and Sgt Mantusi was not apparent as Sgt Mantusi gave conflicting versions. On the reasons why Sgt Mantusi shot the plaintiff, he gave three versions; first he suggested that he wanted to disarm the plaintiff; secondly, he suggested

that he wanted the plaintiff to lose concentration; and thirdly, he suggested that he wanted to take him off balance.

[17] Sgt Mantusi testified about his life being at risk pursuant to a leading question by his counsel. In this regard, I quote from the record:

‘Mr Ngadlela: Just before you proceed, why did you shoot him in his right leg?

Mr Mantusi: The reason I shot him, M’Lord, on his leg is that I wanted to disarm him.

Mr Ngadlela: Yes, proceed.

Mr Mantusi: Now as he had fallen down along with the firearms, M’Lord, then Jojo Kwazela appeared on the scene.

Mr Ngadlela: At that time was your life in danger?

Mr Mantusi: That is correct, M’Lord, my life was at risk, because the person had pointed a firearm at me.’

[18] Sgt Mantusi was also cross examined about his statement made subsequent to the incident. Mr Mgidlana, counsel for the plaintiff, pointed out some inconsistencies between the written statement and the evidence in chief. It was further put to Sgt Mantusi that there was a witness, Mr Mzomba, who had witnessed the incident of shooting, and according to that witness, the plaintiff never pointed a firearm at the police officer. It was put to Sgt Mantusi that he shot the plaintiff by mistake and that he had confirmed to the station commander, Mr Fremantle (Freeze), that he shot the plaintiff by mistake. It was further put to Sgt Mantusi that the plaintiff was taken to the hospital by a private vehicle and that he was never arrested.

[19] The defendant’s case was concluded subsequent to the cross-examination of Sgt Mantusi and the defendant tendered no further evidence.

[20] Two witnesses testified in support of the plaintiff’s case. The first witness was the plaintiff, Mr Siyanda Nomnganga and the second witness was Maxwell Mzomba. In brief, the plaintiff’s testimony was that he was 35 years of age and a resident of Nomlacu Administrative Area, Bizana. He was also a taxi conductor at the time of the incident. He further testified that on 2 October 2018, he was shot by Sgt Mantusi of Bizana Police Station.

[21] On this day, the plaintiff was in the taxi rank of Bizana when he heard gun shots at the playing ground, which is near the taxi rank. According to the plaintiff, there were thugs who were shooting at each other at the playing ground. One of the thugs came out of the playing ground and he was shot by another member of the thugs and he fell in front of a truck. The plaintiff, at that stage, also noticed that members of the police forum were also within the vicinity. The thug that had been shot, had firearms which had fallen down with him in front of the truck. The firearms which were in possession of the thug that had been shot were two.

- [22] When the plaintiff saw the two firearms and the fallen person, he called a member of the police forum, Mr Maxwell Mzomba. He drew his attention to the fallen person and the two firearms which were left lying on the ground. He requested that they should take the two firearms to the police, because they were exposed. Maxwell Mzomba, a member of the police forum, instructed the plaintiff to take possession of the firearms so that they could be sent to the police. The police were not too far from them at the time. He took the firearms and held both firearms with his left hand by hooking his fingers through the trigger guard of each firearm. They then moved in the direction of where the police were standing. As the plaintiff was moving in the direction of the police, he heard noise behind him and when he turned his back, he felt a bullet enter his right leg.
- [23] After he was shot, he then saw a person standing on his right hand side. Maxwell Mzomba, who was in the company of the plaintiff, confronted the person that shot the plaintiff. He asked why he shot the plaintiff. Maxwell Mzomba knew the names of the person as Sikhumbuzo Mantusi. According to the plaintiff, there was no reply from Sikhumbuzo, save that he was under the impression that this was one of the thugs that were shooting on that day.
- [24] The station commander, Mr Fremantle (Freeze), arrived at the scene of the plaintiff's shooting. Upon his arrival, he asked if the plaintiff was one of the thugs. Sgt Mantusi replied that he had shot the wrong person. Freeze (the station commander) was not pleased with the action of Sgt Mantusi and he threw out his hands and left. The plaintiff was taken to hospital by Mr Shona, who was working at the hospital. He was taken to hospital in a private motor vehicle.

According to the plaintiff, he was never arrested by the police. He was taken to St Patrick's Hospital and later transferred to Mthatha Hospital. He remained in hospital from 2 October 2018 until 7 December 2018, when he was discharged. He was admitted to St Patricks Hospital and Mthatha.

- [25] The plaintiff was cross-examined. During cross-examination, the plaintiff was squeezed by Mr Ngadlela, counsel for the defendant, on his decision to become involved in a risky situation where there was shooting. The response of the plaintiff on this criticism, was that there were many other persons who had gone to observe the shooting. According to the plaintiff, even the members of the police forum had gone to the area of the shooting. One of the police forum members was Maxwell Mzomba. According to the plaintiff, there was a crowd within the vicinity of the shooting. The plaintiff disputed that Sgt Mantusi had given him a warning and an order to drop the firearms and also denied that he refused to drop the firearms. The plaintiff denied that he pointed a firearm to Sgt Mantusi.

- [26] The plaintiff confirmed, during cross-examination, that he knew Sgt Mantusi because they had worked together at the Bizana taxi rank prior to him becoming a police officer. The plaintiff further explained that when he was shot, he did not see Sgt Mantusi for the reason that he was behind him at the time of shooting, though, he later identified him as the person who had shot him. The plaintiff maintained his version during cross examination.
- [27] The next witness for the plaintiff was Maxwell Mzomba. He testified that he was 45 years old. During the time of the incident, he was working as a rank manager and appointed as a member of the police forum. He confirmed that he knew the plaintiff and that he was also working at the taxi rank as a conductor. According to Mr Mzomba, on 2 October 2018, he was walking along with the plaintiff. The plaintiff saw two firearms that were laying on the ground. The plaintiff was concerned that the firearms could be picked up by wrong persons and used for the commission of crimes. The plaintiff suggested that the firearms should be taken to the police that were within the vicinity as there was a shooting that had taken place earlier near the taxi rank.
- [28] He then asked the plaintiff to pick up the firearms so that they could take them and hand over to the police. There were police within the area, not far from them. The plaintiff picked up the two firearms and held them with his left index finger. The plaintiff held the firearms by the trigger guards with his index left finger. As they were moving in the direction of the police, the plaintiff was shot by Sgt Sikhumbuzo Mantusi. He confronted Sgt Mantusi about the shooting and also attended to the plaintiff. The station commander also arrived at the scene. On his arrival, the station commander made

enquiries from Sgt Mantusi about whether the plaintiff was one of the persons who were shooting in the area. In his response, Sgt Mantusi,

confessed to have shot a wrong person. Sgt Mantusi confirmed that the plaintiff was not one of the persons who were firing shots in the area. Subsequent thereto, the plaintiff was taken to the hospital by a private vehicle.

- [29] During cross-examination, Mr Mzomba denied that the plaintiff had pointed a firearm at Sgt Mantusi. He further denied that Sgt Mantusi had twice warned the plaintiff to drop the firearms down. He further confirmed that he knew Sgt Mantusi for the reasons that they had worked together at the taxi rank and that they would attend police forum meetings together.
- [30] That concluded the evidence tendered on behalf of the plaintiff.

Common cause facts

[31] On the total conspectus of evidence, these facts are common cause:

- (a) On 2 October 2018, the plaintiff was shot by Sgt Mantusi;
- (b) Earlier on that day, there was a shooting at the Mafumbatha stadium and near the taxi rank;
- (c) The shooting was between two groups of boys (thugs) who were fighting each other;

- (d) The police had intervened in that shooting to restore law and order;
- (e) During the incident, shots were also fired at the police;
- (f) There was a member of the boys (thug) that was shot as he jumped out of the stadium and he was shot by an unknown person, presumably a member of the other gang;
- (g) When this man was shot, two firearms fell on the ground with him; and
- (h) The plaintiff picked up the firearm upon the directions of Mr Mzomba, a member of the police forum.

[32] The facts summarised below are in dispute:

- (i) That the plaintiff had pointed a firearm to Sgt Mantusi;
- (ii) That the plaintiff was holding the firearms with his left index finger through the trigger guard;
- (iii) That Sgt Mantusi admitted to have shot the plaintiff by mistake;
- (iv) That the plaintiff was arrested by Sgt Mantusi and warned;
- (v) The positioning of Sgt Mantusi when he shot the plaintiff, it is not clear whether they were facing each other or Sgt Mantusi was moving on the side of the plaintiff;
- (vi) Whether the plaintiff was arrested by Sgt Mantusi after being shot and charged for possession of firearms; and
- (vii) Whether the plaintiff was taken to hospital by a private vehicle or an ambulance.

The issue

[33] In order to resolve the main issue before Court regarding lawfulness of the shooting of the plaintiff, the Court must consider the disputed question on whether Sgt Mantusi was pointed with a firearm by the plaintiff and whether Sgt Mantusi's life was in danger. For reasons that shall become apparent later, before grappling with the resolution of the disputed issues, it is appropriate to first set out the applicable legal principles.

The legal principles

[34] Where the defendant, in an action against him, as is the case here, has pleaded self-defence, the onus is generally upon him to plead and prove that the force used in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression.[1] Mr Ngadlela, counsel for the defendant, correctly conceded this trite legal position. The test for determining self defence is objective,

that is, whether a reasonable person in the position of the defendant would have considered that there was a real risk that death or serious injury was imminent.[2]

[35] In *Zandisile Ntsomi v The Minister of Law & Order*,^[3] Kumbleben JA quoted from the case of *Ntanjana v Vorster and Minister of Justice*^[4] 1950 (4) SA 398 (C) 406 A-D and outlined the principles as follows:

‘The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors

operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic wise after the event,

weighing the matter in the secluded security of the courtroom. . . . Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation of imminent peril. ‘Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons’ per Innes, JA in *Union Government v Buur* (1914, AD 273 at p 286).’

[36] In *Ntamo & Others v Minister of Safety & Security*^[5] it was stated that where the threatened harm can be avoided without the use of force, self-defence cannot succeed. When force is necessary to neutralise the threat of harm, the force must not be more than is reasonable to achieve that purpose.

[37] The courts have repeatedly emphasized that where there are safe methods to thwart the aggression, the police should offer such methods and avoid hurting the aggressor.^[6] The police should approach a suspect with professionalism, proper planning and without bungling. The community expects police to

exercise professionalism as to guarantee the safety of the members of the public whilst at the same time taking care not unnecessarily to take the life of the aggressor. The boni mores of society or the legal convictions of the community dictate that this should be the position. Conduct found wanting is wrongful.^[7] Many factors need to be considered by the court to determine whether the force used by a police officer was proportionate to the aggression confronting the officer.

[38] Reverting to the present case, should the Court accept the defendant’s version that Sgt Mantusi was pointed with a firearm in circumstances where there was a shooting incident and that a person had just been killed in front of him, then it is evident that the conduct of the police would have satisfied each of these requirements set out above to justify his action. However, the problems in accepting the version of Sgt Mantusi are inter alia the following, aside from the issues of credibility:

- (a) The fact that the plaintiff was not arrested for possession of firearms;
- (b) The fact that the station commander, Mr Fremantle, was not called to refute the allegation that Sgt Mantusi had confessed that he wrongly shot the plaintiff;
- (c) The failure to call Sgt Jojo, who had picked up the firearms after the plaintiff was shot to corroborate Sgt Mantusi's version that he was pointed at with a firearm when he decided to shoot the plaintiff; and
- (d) In my view, the evidence of Sgt Jojo and Commander Fremantle, was crucial to the defendant's case, particularly, that the plaintiff had called a witness, Mr Mzomba, to corroborate his evidence.

Adverse inferences

[39] Whether or not a party should call a witness is inherently problematic as the Court is not in a position to know all the reasons why a witness is not called as the Court is not privy to the relationship between the party and the witness.

[40] The full bench of the Eastern Cape division in the case of Minister of Safety & Security v Zoyisile Stanley Ntopane NO[8] Greenland AJ held:

'[i] . . . so each case must be judged on its own merits and the Court should only drawn an adverse inference if it is safe to do so. See *Webronchek v LK Jacobs 1 co Ltd* 1948 (4) SA 671 (A). In that case, Van der Heever JA set out that:

"moreover a litigant who calls witness vouches, as it were, on pain of being discredited himself, for his probity and truthfulness. The potential witness may be untruthfully, hostile, he may have a bad memory of an unfortunate presence. After all the Plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the onus which lay upon him."

[ii] See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A), the principle was laid down as follows:

"where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts unfavourable to him should be drawn would depend on the facts peculiar to the case where the question arises."

[iii] In the case of *Just Names Properties II CC & Another v Fourie & Others* 2007 (3) SA 1 (W) Jajbhay J, mindful of *Webranchek v LK Jacobs supra*, however concluded –

"In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her non-appearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision . . ."

- [41] Sgt Mantusi had testified that they were four police officials who attended to the shooting. He further testified that when the plaintiff was shot, the two firearms were picked up by Const Jojo. I have no doubt in my mind that Const Jojo was within the vicinity when the plaintiff was shot by Sgt Mantusi. Also, it was repeatedly put to Sgt Mantusi that when he was confronted by the station commander on the shooting of the plaintiff, the response of Sgt Mantusi was that he shot the plaintiff by mistake or that he shot the wrong person.
- [42] In these circumstances, there can be no acceptable reason as to why the station commander and Const Jojo or other police officials who had knowledge of the case, could not have been called. The inference to be drawn is that none could support the claim of a warning to the plaintiff and an order for the plaintiff to drop the firearms. The other inference is that Lt Col Fremantle, the station commander, would support the plaintiff's version that Sgt Mantusi confirmed that he wrongly or mistakenly shot the plaintiff.
- [43] The next question for determination is the two mutual conflicting versions regarding the shooting of the plaintiff by Sgt Mantusi. Sgt Mantusi had alleged that at the time he shot and injured the plaintiff, he was pointed at with a gun by the plaintiff. On the one hand, the plaintiff avers that he was just walking towards the direction of the police carrying the firearms with his left index finger. He disputed that he pointed the firearm at Sgt Mantusi. In order to resolve the disputed facts, this Court is required to do an analysis of the evidence.

Analysis

of evidence

- [44] The parties, on the central issue regarding the circumstances of shooting, have adduced conflicting versions. The defendant maintains that Sgt Mantusi had acted in self-defence in circumstances where he found his life in danger on the account of him being pointed with a firearm. Both the plaintiff and his witness have denied that Sgt Mantusi was pointed at with a firearm by the plaintiff.
- [45] In these given circumstances, the Court must evaluate and decide on the credibility of witnesses. It must determine whether the probabilities favour one or the other version, and must decide what evidence is acceptable and why.
- [46] In *National Employers' Mutual General Insurance Association v Gany*,^[9] it was stated:
- 'Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false'.
- [47] In *Stellenbosch Farmers' Winery Group Limited and Another v Martell CIE and Others*^[10] it was held:

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this

nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness; candour and demeanour in the witness box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf; or with established fact or with his own extracurial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency or his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former,

the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[48] Sgt Mantusi gave contradictory versions regarding his position when he shot the plaintiff. He initially suggested that they were facing each other with the plaintiff pointing the firearm at him. He later changed his version and stated that he shot the plaintiff when he was moving towards his right and away from the vehicle that he had appeared from its rear. The evidence of Sgt Mantusi was more confusing in relation to the circumstances when he shot the plaintiff.

[49] Another unsatisfactory feature in Sgt Mantusi's evidence was that after shooting the plaintiff, he informed him that he was under arrest. However, the subsequent conduct of Sgt Mantusi did not suggest that the plaintiff was arrested. The plaintiff was taken by a private vehicle to the hospital. There were no arrangements with the police when the plaintiff was taken to the hospital. I find that the evidence that the plaintiff was arrested after the shooting, was a

fabrication. In this regard, I am fortified by the actions of Sgt Mantusi, when he decided to sign an SAP 14 in terms of detaining the plaintiff in circumstances where he was not in the police station nor had been arrested. This was an afterthought to justify the actions of Sgt Mantusi.

- [50] Sgt Mantusi only answered to a leading question from his counsel about the threat to his life, otherwise, Sgt Mantusi had given conflicting reasons for shooting the plaintiff. Initially, Sgt Mantusi had suggested that he shot the plaintiff to disarm him. He later testified that he shot the plaintiff because he failed to drop the firearm upon his instructions and thirdly, based on a leading question, Sgt Mantusi suggested that he feared for his life. In this regard, I quote from the record verbatim:
- [51] In relation to the question whether Sgt Mantusi was pointed at with a firearm by the plaintiff, I was not satisfied with the evidence of Sgt Mantusi. He contradicted himself in many respects regarding his position in relation to the plaintiff. I therefore reject the evidence of Sgt Mantusi insofar as he suggests that the plaintiff pointed at him with a firearm.
- [52] The evidence of the plaintiff was more convincing. He was corroborated by the evidence of Mr Maxwell Mzomba. Whilst I agree with the submission by Mr Ngadlela that it was risky for the plaintiff to pick up a firearm after a person has recently been shot at and that the scene was not safe, it does not follow that such conduct was unlawful or justify the shooting of the plaintiff. The plaintiff was clear in his evidence and he did not contradict himself. He appeared to be an honest witness. The plaintiff's evidence was corroborated in every material aspect. Mr Mzomba too was a credible witness.
- [53] On the application of the technique set out above, this Court was impressed with the testimony of the plaintiff and his witness. The plaintiff did not exaggerate his case and the further reason that the Court accepts the plaintiff's case is that it is largely corroborated by his witness. The version of the plaintiff is also consistent with the behaviour of the defendants in that whilst a version was put to Sgt Mantusi that he confessed to the station commander that he wrongly or mistakenly shot the plaintiff, the station commander was not called to deal with such material allegation. I do accept that Sgt Mantusi did inform the station commander in the presence of the plaintiff and his witness that he shot the plaintiff by mistake or wrongly.
- [54] This Court also does take into account the fact that Sgt Mantusi was working at the taxi rank prior to his employment as a police officer. He knew both the plaintiff and his witness before the date of the incident. It is improbable that when he saw the plaintiff holding the firearms, his conclusion would be that he was to be shot by the plaintiff. I find no basis to conclude that the plaintiff pointed a firearm to Sgt Mantusi.
- [55] The rejection of the defendant's version in relation to the pointing of the firearm by the plaintiff does not end the matter. The Court must still consider whether the onus has been discharged and that the defence of self-defence is established by the defendant.
- [56] In *National Employers' General Insurance Company Ltd v Jayers*[11] Eksteen AJP held:

‘ . . . the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests where the onus rest on the Plaintiff . . . and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the Plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be extricably bound up with consideration of the probabilities favours the Plaintiff then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff’s case any more than they do the Defendant, the Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the Defendants version is false.’

[57] In a trial, the legal position is that where the probabilities are evenly balanced, in that the evidence of the main witnesses on either side is found to be equally credible or equally incredible, the party that bears the onus loses and the determination of the contested issues is ruled in favour of the party who does not bear the onus.

[58] I am still in the dark as to what actually caused the shooting of the plaintiff on the day in question. It is improbable that the plaintiff, in the presence of the member of the police forum, would have pointed a firearm at a police officer in full uniform, in circumstances where no motive has been shown. It is equally improbable that a policeman would simply commence shooting at the plaintiff for no apparent reasons. In this regard, both versions accordingly, seem equally improbable.

[59] However, having regard to the findings of the Court regarding the failure to call Const Jojo and Lt Col Fremantle, the probabilities tilt in favour of the plaintiff, more especially, when regard is had to the evidence of Mr Mzomba. I have already accepted the plaintiff’s evidence together with his witness. On the other hand, I was unimpressed with Sgt Mantusi.

[60] Applying the principles of trial, the defendant failed to discharge the onus resting upon him on this basis as well since it is the party bearing the onus.

Costs

[61] I have not been persuaded differently, the costs relevant to this stage of proceedings, should follow the results. The defendant shall bear costs.

Conclusion

[62] I am satisfied that the plaintiff has made out a case and I come to the conclusion that the defendant has failed to discharge the onus resting upon him to establish that the shooting of the plaintiff was justified or in self-defence.

Order

[63] In the result the following order is made:

1. By agreement of the parties, the issues of quantum and liability are hereby separated;
2. The conduct of a member of the defendant to shoot and injure the plaintiff is hereby found to be wrongful and unlawful;
3. The defendant is held liable for any proven damages which had been suffered and incurred by the plaintiff consequent to the shooting of the plaintiff on 2 October 2018;
4. The defendant is directed to pay the plaintiff's costs insofar as they relate to the issue of liability and such costs shall include reserved costs to the determination of the defendant's liability.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff :T W Mgidlana Attorneys for the Plaintiff :Majali Gwabeni Incorporated
Mthatha Counsel for the Defendant :N D Ngadlela Attorneys for the Defendant :The State
Attorney Mthatha

- [1] Mabaso v Felix 1981 (3) SA 865 (A) at 874.
- [2] Mngwena & Another v Minister of Safety & Security 2006
- (4) SA 150 SCA at 158C-D, see also Lufuzo Mbangi v Minister of Safety & Security, unreported judgment of the Eastern Cape Division, Case No 891/2006 at 30 ('Lufuzo Mbangi').
- [3] Ntsomi v Minister of Law & Order 1990 (1) SA 512 (C) at 528F-G.
- [4] Ntanjana v Vorster and Minister of Justice 1950
- (4) SA 398 (C) 406A-D.
- [5] Ntamo & Others v Minister of Safety & Security 2001 (1) SA 830 (TKHC) at 836H-J ('Ntamo').
- [6] Ibid at 837D.
- [7] Above Lufuzo Mbangi fn 2 at 32 and also Ntamo at 837I-J and 838 G-H.
- [8] Minister of Safety & Security v Zoyisile Stanley Ntopane NO case no: A85/07.
- [9] National Employers' Mutual General Insurance Association v Gany 1931 AD 187 at 199.
- [10] Stellenbosch Farmers' Winery Group Limited and Another v Martell CIE and Others 2003

(1) SA 11 (SCA) para 5. See also SPW Group Ltd and Another v Martell ETCIE and Others 2002

(1) SA 11 at 14I 15E.

[11] National Employers' General Insurance Co Ltd v Jayers 1984 (4) SA 437 E at 440D-E.

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