

SOUTH AFRICA / JUDGMENT

Phakula v Minister of Safety and Security [2023] ZAGPPHC 277; 64450/2011 (6 April 2023)

[2023] ZAGPPHC 277

COURT

North Gauteng High Court, Pretoria

BEFORE

WJ du Plessis

CASE / FILE NUMBER

64450/2011

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Policy

FLYNOTES:

CRIMINAL – Arrest – Use of force – Reasonably necessary and proportional to circumstances – Suspected robber fleeing house toward open veld – Police officer firing at his legs – To prevent escape and risk that suspect, regarded as dangerous, would put people in danger – Officer had reasonable grounds, even if no firearm was found on suspect – Criminal Procedure Act 51 of 1977, s 49.

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 64450/2011
(1)
REPORTABLE: NO
(2)

OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: NO

DATE: 6 APRIL 2023
WJ
du Plessis
In

the matter between: THABANG
PHAKULA
PLAINTIFF
and
MINISTER
OF SAFETY AND SECURITY DEFENDANT

JUDGMENT

DU PLESSIS AJ

- [1] This is a retrial of a claim for damages for the unlawful shooting, arrest and detention of the plaintiff. This court only needs to determine the merits.
- [2] The plaintiff, Mr Thabang Phakula, alleges that on 26 October 2010, he was unlawfully shot by Warrant Officer De Klerk ("De Klerk") acting in the scope of his employment (with the defendant). As a result of this shooting, the plaintiff sustained multiple gunshot wounds. The plaintiff also alleges that after the shot, he was assaulted by De Klerk, and that because of this assault, he sustained two broken teeth.[1] After being shot, the plaintiff alleges that he was unlawfully arrested by members of South African Police Service ("SAPS"), and after that he was detained at the instance of members of SAPS until 11 November 2011 as a consequence of bail having been refused.
- [3] The defendant admits that the plaintiff was shot by De Klerk, acting in the course and scope of his employment with the defendant, as a consequence of which he sustained gunshot injuries and that the plaintiff was arrested by members of SAPS and thereafter detained until 30 September 2011 as a consequence of having been refused bail.
- [4] The defendant, however, denies that the plaintiff was unlawfully shot by any member of the SAPS and pleads that the plaintiff was lawfully shot by De Klerk acting in terms of s 49(2) of the Criminal Procedure Act 51 of 1977 ("the CPA"). Alternatively, in the event of the court finding that the plaintiff was shot in the process of other SAPS members having fired shots, that the other members of the SAPS fired shots in self- defence, alternatively in a situation of necessity; or that the firing of the shots by the other members of the SAPS was under the circumstances lawful, reasonable and necessary.

- [5] The defendant further denies that the arrest of the plaintiff was unlawful and pleads that firstly, the SAPS members were peace officers as defined by section 1 of the CPA, and secondly, the SAPS members reasonably suspected the plaintiff of having committed an offence referred to in Schedule 1 of the Criminal Procedure Act, namely housebreaking with the intent to rob and attempted robbery with aggravating circumstances, alternatively housebreaking with aggravating circumstances, alternatively housebreaking with the intent to steal and attempted theft, alternatively attempted murder. This places the arrest within the parameters of s 40(1)(b) of the CPA.
- [6] As for the detention of the plaintiff, the defendant pleads that it was pursuant to the refusal of bail on 9 December 2010, in terms of an order of a court that the plaintiff remained in custody. This is a consequence of a judicial act.
- [7] The defendant denies that De Klerk assaulted the plaintiff.

The evidence

- [8] The defendant called the following witnesses to testify on its behalf:
- i. Then Warrant Officer Gert Pieter de Klerk ("De Klerk");[2]
 - ii. Then Constable Danie de Bruin ("De Bruin");[3]
 - iii. Then Sergeant Paul Hendrik Keyser ("Keyser");[4] and
 - iv. Then Warrant Officer Botes ("Botes");[5]
- [9] They were all members of SAPS at the time of the incident. Only De Klerk is a member at the time of testifying.
- [10] The plaintiff did not call any witnesses but testified on his own behalf.
- (i) De Klerk
- [11] At the time of the incident, De Klerk had 17 years of experience working in the SAPS. He was then, and is still now, a member of the Tactical Operations Management Section of the Directorate for Priority Crimes and Investigation ("the Hawks").
- [12] He testified that they received information that an armed robbery would occur at 9[...] W[...] Street in Witbank on 26 October 2010. This prompted De Klerk and six other Hawks members to be deployed to the evacuated house. They took up their position at around 19:00 in the house in anticipation of the robbery. He testified that Botes and Pretorius were in the Kitchen, Viljoen, the controller, in the dining room, Van der Mescht and de Klerk in the hallway, and De Bruin and Smith in the lounge upstairs. Members of the SAPS Middelburg were outside the premise in the streets to guard escape routes.

- [13] Around 19:30, they took their positions and dimmed the lights so that people from outside could not see them. Outside the house there were bright lights in the swimming pool area and the garage. The streetlights were also on.
- [14] At around 21:00, five men jumped over the wall into the yard, of which three were armed. They moved to the back door, and he heard tampering with the gate at the kitchen and lounge doors. Botes and Pretorius then moved closer to the lounge, as did he, De Klerk.
- [15] He stationed himself in the hallway, where he could see the dining room and the lounge. He heard people whispering in the dining room, and he heard them moving towards the hallway where he was standing. He saw a pistol coming around the corner, held by a man leopard crawling into the hallway. He then saw a head but did not know whose head it was. Botes, however, crouching on his knees next to the hall, was right next to the person. Botes then fired many shots, killing the person, after which Botes moved into the dining room area where there were other suspects and more shooting. De Klerk could not recall how many shots, but he remembers it was more than one or two.
- [16] At this stage, De Klerk turned around to exit the house to arrest those who attempted to flee the scene. As he came outside, he heard De Bruin from the balcony shouting, "Stop! Stop! Police!". He heard a warning shot being fired. De Bruin used a torch to point out the subject to De Klerk, which he testified wore a white jacket and a black backpack. He saw the suspect running from the swimming pool area to the palisade, which he jumped over, ignoring the warnings of the police. De Klerk then shot a warning shot in the grass, but the person continued to flee. In the process, he dropped his bag inside the premises.
- [17] De Klerk, about 15 meters from the palisade, saw the person running from left to right in his line of sight towards an open veld, presumably to escape. He could not get out of the premise as the gate was locked. The police still shouted, but the person did not heed the warning. He then took his R1 rifle and fired three shots at the suspect's legs to get him arrested. He did this, he testifies, to prevent the person from kidnapping others, taking someone hostage, or doing some future harm as he deemed the person dangerous based on the shootings in the house. He did not know at the time whether the person was armed.
- [18] However, he believed that he had to affect the arrest in the way that he did, as he did not have the person's particulars to affect the arrest in any other way. He decided in the moment, full of adrenalin and the excitement of the shootout inside the house.
- [19] At this stage his colleagues Van Zyl and Keyser arrived. He pointed out the suspect to them, who was lying in the road with jeans and a white jacket. He testified that he did not lose sight of the suspect fleeing. When the gate opened, he walked to the person. Keyser was busy questioning the person. De Klerk explained how he shot the suspect, whom we now know is the plaintiff.

- [20] When Keyser asked the plaintiff his name, he stated that his name is Mpho Kekana. He also acknowledged that the person shot inside was his relative, and he admitted that he knew about a green Audi around the corner.
- [21] The plaintiff then received medical attention, at which stage Keyser arrested him.
- [22] De Klerk then went back and found the bag that had been dropped. They found cable ties (customarily used to tie people's hands and feet) and ammunition in the bag when he opened it. He left the bag for the investigation team.
- [23] De Klerk does not deny shooting the plaintiff but denies the plaintiff's version that he shot him from the balcony or that he shot him while he was walking on the street while phoning his girlfriend. He denies assaulting the plaintiff and states that neighbours came from their homes angry and aggressive, wanting to hurt the plaintiff with stones. He also says that no charges of assault were laid against him, and he was also not charged with the shooting. He denies knowing anything about the plaintiff's confiscated phone or wristwatch.
- [24] De Klerk testified that his R1 rifle is equipped with an aim point system that guarantees accuracy, which means he is unlikely to shoot a bystander once he aims at a subject. It is also possible to shoot through a palisade.
- [25] During cross-examination he was asked whether he knew if the Audi was booked in or not. He said he is not an investigating officer, so he does not know what happened to the Audi afterwards. He did not need to follow up on whether there was a SAP13 form and, if there was, why it was not in the docket. Counsel for the plaintiff stated that he tried to obtain this form through discovery but did not receive a warm reception from the defendant. De Klerk, however, remained adamant that there was an Audi.
- [26] He was also asked how many shots he fired (three) and how many hit the plaintiff (unsure). He did disagreed with the contention that the plaintiff was outnumbered as far as police officers and weapons were concerned, as, at that stage, he did not know whether the plaintiff was armed.
- [27] While he did not see the plaintiff in the dining room, there was an exchange of fire in the dining room, apart from Botes' shot in the hallway. He also answered that he did not know who fired the shots in the dining room or how many shots Botes fired. He was referred to photos showing where the ammunition shells were found, but he said he did not know about that as he did not compile the report and thus could not testify to it. He was also asked whether these bullets came from Botes' firearm and again answered that he could not attest to that as it is not within his knowledge.
- [28] Counsel then put to him that he was on the balcony with De Bruin, which he denied. He stated again that he shot the plaintiff running from the house and across the road and denied the plaintiff's version that he was walking in the street trying to reach his girlfriend. He denies that he fired three shots in the upper left arm from the balcony, two in the legs, and a shot in the hip as the plaintiff was lying on the ground. He does not know where the

plaintiff sustained the injuries on his arms but suspects it was during the crossfire in the dining room.

- [29] The hospital record, not properly introduced as evidence, was shown to him where it indicated six wounds. He did not know where the other wounds came from. He testified that he did not know about the other injuries when he shot the plaintiff.
- [30] He did not know where the R1 cartridges were; it is not unique that they could not be found. He cannot testify as to the incomplete record.
- [31] He did not see the other suspects; he only heard them speaking in the room and was informed by Viljoen that there were five. He does not know why no other arrests were made – possibly because the other three suspects fled in a different direction after the shooting. He was questioned about the other suspects at length, with a statement that he shot the plaintiff mistakenly, thinking he was part of a gang, which he denied. He could also not summons the police in the street to affect the arrest, as people fled in different directions, and the plaintiff was heading for a veld where he could escape easily.
- [32] He did not see the plaintiff in the house – De Bruin and Smith pointed out the suspect with the torch on the gun. They warned the suspect by shouting and firing warning shots. He then decided to shoot three times, as he was unsure if the other shots hit the plaintiff. Since the plaintiff ran from left to right, he shot him in the right hip.
- [33] As to the phone: De Klerk denies that the plaintiff asked him to look through the phone to call his girlfriend.
- [34] There was also a line of questioning as to what was in his statement and why he did not inform the court at the bail hearing that he did not see the plaintiff in the house and that it was not the plaintiff that shot at Botes. He got visibly agitated at this line of questioning, stating that he could not testify on something that he did not know and that a statement contained things that he knew, not that he did not know. He denies that he deliberately withheld information that would enable the plaintiff to get bail.

De Bruin

- [35] De Bruin testified that he was part of the team stationed in the house on the evening. As De Klerk also testified, he was stationed in the lounge exiting onto a balcony. He took the position after dark and had a view of the yard and the palisade. Around 21:00, he saw five figures climbing over the wall from outside, moving towards the house. He also heard the backdoor gate being tampered with and glass breaking. The next moment, he testified, there was chaos. Based on the instructions, this prompted him to go outside on the balcony to secure arrests.

- [36] He saw people running from the door to the wall, upon which he shouted, "Stop! Police!" firing one warning shot. He saw a person in the corner and called to De Klerk "daar is een in die hoek!"[6], pointing at the person with the torch mounted on his R5. Visibility was good, and he saw the person wearing a white jacket.
- [37] He heard De Klerk shout to the person, "Stop! Polisie!". The person did not stop but instead proceeded to climb over the wall. De Klerk then shot in his direction. He was unsure if it was a warning shot; he did not see what happened, and he only heard shots afterwards but did not know from whom they came.
- [38] In cross-examination he confirmed that it was only him and Smith on the balcony. He was asked if the incident happened at 19:00, to which he answered no, at 21:00. He testified that there were six other police officers. He stated that Keyser was in the house (instead of Pretorius), and when asked about it again, he confirmed it was Keyser. He also said that he does not know Keyser well since they are not in the same unit.
- [39] During re-examination, this issue was clarified: he does not know Pretorius well, and he does not know Keyser at all; he conceded the possibility of a mistake.

Keyser

- [40] Keyser testified via Teams. He stated that he was in the house on the day, acting on the tipoff received. He was with Van Zyl outside the premises on the other side of the veld, about a 300 – 500m drive from the house. They waited in the car and, around 21:00, heard gunshots from the house. They then drove there for backup.
- [41] De Klerk informed them of the suspect on the other side of the road on the pavement when they arrived at the house. De Klerk was inside the premise as the gate was locked. The suspect was injured on his leg and arm, and he wore jeans and a white jacket.
- [42] Once the gate was opened, De Klerk told him what had happened inside the house and that he had shot the plaintiff. He was also informed of the bag with the cable ties and ammunition found next to the palisade.
- [43] Keyser then spoke to the plaintiff while De Klerk was with him. He read him his s 35 rights and asked him for his identity and why he was there. The plaintiff told him that he was there with his cousin and six other suspects to rob the owner of Pick n Pay. The plaintiff told him about the Audi around the corner and gave his name as Mpho Kekana. Keyser then arrested the plaintiff for armed robbery and attempted murder based on the information obtained from De Klerk and the suspect himself.
- [44] Keyser also testified that since De Klerk left the premise, he was never alone. De Klerk did not assault the plaintiff; he would have reported it if that was the case. No cell phone was on the scene, nor was anyone asked to phone his girlfriend.

- [45] A few days later, upon following up at the hospital, the hospital informed him there was no one by that name. When he explained that he was looking for the suspect that was shot, he was told the person had changed his name on their records and moved to another ward. His name is Thabang Phakula.
- [46] He testified that the accused applied for bail on 23 November 2010, which they opposed. Bail was refused on 9 December 2010, and the plaintiff remained in custody until he was discharged.
- [47] During cross-examination he was asked about De Bruin's testimony that he was inside the house, and he stated that he was never stationed inside the house. He was also questioned about the Audi – which he said was booked in. He testified that he was the person who compiled the docket, but he is not sure where the SAP13 form for the Audi was. It was put to him that there was no Audi, which he denied. He was questioned about this again later and gave the same answers.
- [48] He was also cross-examined about the fact that he had interrogated a wounded person. He answered that the plaintiff was still conscious and answered the questions clearly. It was put to him that the plaintiff will deny being interrogated about the Audi and the bag, to which he responded that that would be a lie. Keyser stated that he also did not find a cell phone on the scene.
- [49] He admitted to opposing bail and that the count of attempted murder was justified as there had been a shooting in the house, and he, at that stage, did not know who did the shooting. This was despite not finding a firearm on the plaintiff. He stated that on the strength of information received from De Klerk and the answers the plaintiff gave, he decided to arrest the plaintiff.
- [50] As to the bag: he testified that the bag was taken by forensics. He does not know if it was presented at the court – his responsibility is to collect evidence and take it to court at the prosecutor's request. He also did not testify at the criminal trial, as the prosecutor did not call him to do so.
- [51] It was put to Keyser that nobody placed the plaintiff inside the house, to which Keyser replied that De Klerk told him he saw him in the yard and that, based on that, they regarded him as one of the suspects.

Botes

- [52] Botes has been part of the police service for 30 years by the time of the incident. He, too, testified about the tipoff and added that the tipoff included that anyone who will be found in the house will be held hostage.
- [53] He confirmed that De Bruin and Smith were part of the team inside and were stationed in the lounge where the balcony overlooks the street. They were in the house around 19:00. Around 20:45, De Bruin and Smith saw five suspect persons climbing over the wall. From

where he stood in the bedroom, he could see five people moving past, some with backpacks. He then lost sight of them and heard a rattling at the kitchen gate. He looked through the curtain where he could see that the person closest to him wore denim jeans and a white jacket, with a backpack and a weapon in his hand.

[54] As he could not talk to the others in the house, he moved to the dining room area to provide backup to Viljoen. He squatted against the wall to avoid being seen and heard whispering and movement in the dining room. Next, he saw a pistol in the hands of a person leopard crawling next to him. He had to decide whether to grab the gun (too dangerous) or wait and shoot. When the person's head came around the corner, he saw Botes and fired a shot at him but missed. This prompted Botes to fire four shots back at the suspect. He knows that three of them hit the person. He moved into the door and saw people

fleeing. He shot two more shots in the dining room at the fleeing suspects. He fired six shots in total and heard more shots which

possibly came from Viljoen, he is not sure.

[55] Botes then shouted to the other police officers in the front that the suspects were trying to flee, although he could not see where they were running to. He heard gunshots in the front of the house but did not know where they came from. He later went outside and saw De Klerk and Keyser speaking to a person on the ground wearing jeans and a white jacket. He told De Klerk that it was the person he saw at the window and told them he had a bag and a firearm.

[56] He testified that De Klerk asked the suspect what he was doing there, and he said he came with his uncle to rob the house. They came with a green Audi.

[57] Botes appeared nervous under cross-examination. He was questioned about the absence of mentioning the green Audi in his statement, to which he answered that he did not write about what happened outside in his statement.

[58] Botes was further questioned about De Bruin's testimony that Keyser was inside the house, to which Botes answered that De Bruin must be mistaken. He was repeatedly asked about this and stated that Keyser was not inside the house. He was also questioned about who opened the gate and what happened in front of the house, to which he replied numerous times that he could not testify on it as he was not there and did not see what happened at the front during the shootings.

[59] It was put to him that the plaintiff will deny that it was him that he saw through the window and that the police interrogated him. He replied that that would be a lie.

[60] He further stated that it is possible that the plaintiff was shot in the arms during the crossfire. He does not know if the plaintiff was shot before climbing over the wall, but he thinks it is possible to climb over a wall with a wounded arm because of adrenalin.

Plaintiff

- [61] The plaintiff's testimony in essence, was the following. On the day, he got a lift (hiking) from Mamelodi to Witbank, where he was dropped off at around 19:00. He was alone, on his way to visit his girlfriend. While he was walking down the road, there was a house on the right-hand side. It was the first time he was in this area.
- [62] As he passed the house, people shouted over a loudhailer in Afrikaans, things he did not understand. Then there were tiny red lights facing him, about 9 meters away, that concerned him. He was trying to call from his cell phone and heard a shot. He was shot three times in the arm from the balcony. This was followed by many other shots, hitting him in the middle of the right leg and two bullets in the hip. There were a total of seven wounds.
- [63] The plaintiff was adamant that he did not try and jump over the wall and that he did not know the deceased. He does not know about the Audi – he testified that he got a lift to Witbank. He further denied introducing himself as Mpho Kekana and insists he introduced himself as Thabang Phakula. As to a bag, he admits that he had a bag but that it had toiletries and a clean shirt in it. The police took his cell phone and wallet as evidence, he said.
- [64] Under cross-examination, he confirmed that he was shot at 19:00. He was reminded that four witnesses testified that it was 21:00 and that it was never put to the other witnesses that the plaintiff's version is that it happened at 19:00. He remained adamant that the incident occurred at 19:00.
- [65] As to the injuries, he stated that three shots came from the balcony. He does not know where the other shots came from – but they were two. He also stated that the big wound in the hip came from De Klerk, who shot him while lying in the road. When asked how many times he was shot, he stated six times: three from the balcony and three from De Klerk. Counsel for the defendant pointed out that during his criminal trial, he did not indicate that he was fleeing, and in his initial pleadings, there was no mention of being shot from the balcony. Counsel also referred him to various expert reports submitted to quantify the claim. He did not mention being shot from the balcony to any of the experts – but rather that he was shot from the street. He further gave two different versions to the psychiatrist and the clinical psychologist. To the psychiatrists, he stated that the police officers approached him, questioned him, and then started shooting 8 or 9 shots at him. To the clinical psychologist he said that he answered a call from his girlfriend when the police approached him and confused him with a robber and shot him, while more police officers came running towards him, shooting him. As to De Klerk and Keyser's versions of what happened in the street, he stated that they were lying.
- [66] For clarity it was asked if his version is that he was an innocent bystander that was shot at or if his version was that he was lined up and shot at from the balcony after lights were shone on him. He confirmed the latter – he was innocently shot. It is not that he was mistaken for

someone else (like a fleeing suspect); it was a cold-blooded deliberate shooting. It was put to him that his version was inherently absurd and improbable. The police officers all testified that they followed a suspect fleeing. On his version, it would mean that all of a sudden, the suspect disappeared, with the plaintiff then walking down the street and being gunned down by the police. He answered he did not hear the warning shots, and the shouting "stop stop polisie" was in Afrikaans, which he did not understand. He also did not hear the shots in the house, even though Keisier, 300m from the house, heard it. It was put to him that he was not truthful.

- [67] The plaintiff admitted that he did not lay a charge against the police, stating he employed an advocate to help him. He did not follow up on it in 13 years and only instituted a claim for damages. He did not report the theft of his cell phone or wallet. Since he lost his phone, he could not call his girlfriend to testify. He did not think of contacting the service provider to get the number from his records.

Evaluation of evidence

- [68] It is now for this court to evaluate the evidence the witnesses gave. Overall, the witnesses for the defendant did not contradict one another, and also not under cross-examination. There was one contradiction: De Bruin testifying that Keyser was inside the house. He explained that the police officers do not know each other very well. I accept this explanation and do not find the contradiction so material as to make an adverse finding regarding De Bruin's credibility or to reject his testimony.
- [69] De Bruin's version was not challenged in cross-examination that he and Smith took up positions in the lounge and went to the balcony when shots were fired. De Klerk and Botes confirmed De Bruin's evidence. The only shots fired from the balcony were warning shots. I accordingly find that the plaintiff was not shot from the balcony.
- [70] The evidence of De Bruin that he was standing on the balcony, saw the suspect running from the pool to the palisade, that De Klerk saw the suspect climb over the palisade, and then fired shots at his leg, stands as uncontested. In *S v Fortuin*[7] it was held that
- "If a party wishes to lead evidence to contradict an opposing witness, he or she should first cross-examine the witness upon the fact he or she intend to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he or she should be cross-examined upon the matters which it will be alleged make his or her evidence unworthy of credit. [...] Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness' evidence".
- [71] The plaintiff was a poor witness and contradicted himself during his testimony. He insisted that the incident occurred at 19:00. The evidence given by the police officers that the shooting took place around 21:00 was largely left unchallenged in cross-examination.

- [72] It is improbable that the police would make up the name Mpho Kekana, or the existence of the Audi. No reasons were proffered as to why the police would fabricate the name or the presence of the Audi. The missing dockets and perhaps incomplete investigation do not adversely affect this case, as the burden of proof is one of a balance of probabilities.
- [73] The plaintiff's version that he was deliberately shot while innocently walking down the street is rejected as improbable. Various inconsistent statements were made on different occasions, as alluded to above. This has an adverse effect on the credibility of the witness, specifically as to where shots were fired from.
- [74] It is also unclear why the plaintiff did not call his girlfriend to testify, as she could corroborate his version. It is improbable that a person would continue to leisurely walk down the street on the phone with his girlfriend while there is a shootout in the house right next to him. At least two warning shots were fired, and people shouted, "stop, polisie!". Even if in a different language, the commotion of the shootout and the presence of police officers in uniforms shouting makes it improbable that a person would leisurely continue walking down the street.
- [75] Having dealt with the evidence, my findings are the following : the plaintiff was part of a group of robbers that broke into the house in the evening, around 21:00. Once Botes shot and killed the one suspect, a shootout ensued in the dining room. It is probable that the plaintiff got shot in the crossfire. The suspects then fled in various directions, with the plaintiff jumping over the palisade to escape through the open veld across the street. As he fled, De Bruin and Smithh pointed him out with a torch mounted on their riffles, shooting a warning shot and shouting that he must stop. De Klerk, who was outside by this time, also shot a warning shot. Then, De Klerk, suspecting that the plaintiff committed an offence in terms of Schedule 1 of the CPA, shot the plaintiff in the right leg and hip to arrest the plaintiff. Some time after, Keyser

arrived at the scene, and on the strength of what De Klerk told him and what the suspect told him, he arrested the plaintiff.

- [76] On a conspectus of the evidence, the question is first whether the arrest was lawful, and secondly whether the use of force in this instance was within the bounds of s 49 of the CPA. Once these questions are answered, the question of whether the defendant can be held liable for the plaintiff's detention after bail was refused will be dealt with.

The law

- (i) The arrest: section 40(1)(b)

- [77] Section 40(1)(b) of the CPA provides that a peace officer may arrest a person without a warrant if he reasonably suspects the suspect of committing an offence referred to in Schedule 1, other than escaping from custody.

- i. The arrestor must be a peace officer;

- ii. The arrestor must entertain a suspicion;
- iii. The suspicion must be that the suspect committed an offence referred to in Schedule 1; and
- iv. The suspicion must rest on reasonable ground.

[78] The defendant that wishes to provide a justification for conduct that might otherwise be unlawful bears the onus to prove such a ground of justification.[8] This is an objective test. [9] Suspicion does not require absolute certainty or the requirement that there be sufficient evidence at that point for a prima facie case against the arrestee.[10] Based on the accepted version of the events as set out above and viewed objectively, I am satisfied that at the time of the arrest, all the requirements were present that justified an arrest without a warrant.

(ii) Section 49(2)

[79] Section 49 of the CPA[11] has been amended twice, firstly, in 1998 by s 7 of the Judicial Matters Second Amendment Act[12] that came into operation on 18 July 2003, and secondly, in 2012 by s 1 of the Criminal Procedure Amendment Act.[13] The cause of action in this matter arose in 2010, which means that s 49(2), as amended in 2003, was the applicable law at the time.

[80] At that time, s 49 read 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."

[81] The use of deadly force to affect an arrest comes at the cost of various constitutional rights, namely (possibly) the right to life,[14] freedom and security of the person,[15] and the right to dignity.[16] This was all considered by the Constitutional Court in *Ex Parte Minister of Safety and Security: In re S v Walters*,[17] dealing with the original version of s 49. The principles laid out in the case remain helpful in understanding how this section should be understood in line with the Constitution. The court made it clear that[18]

"If the fugitive is not suspected of having committed a crime involving the infliction or threatened infliction of serious bodily harm or if the fugitive constitutes no threat to the arrester or to someone else or to the public at large and can be picked up later, there is no justification for the use of any significant force, let alone deadly force."

[82] The court then laid down some principles regarding arrest and the use of force. These are:

"[54] In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

- (a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- (b) Arrest is not the only means of achieving this purpose, nor always the best.
- (c) Arrest may never be used to punish a suspect.
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.
- (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
- (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or 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 carrying out the arrest, whether at that time or later.

- (i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.”

[83] In *April v Minister of Safety and Security*[19] the court had to apply this version of the CPA since the cause of action arose in 2006. The court stated:[20]

“In order to discharge the onus resting upon him, the defendant must not only prove that the police suspected on reasonable grounds that the plaintiff was part of a conspiracy to rob the cash-in-transit vehicle. This would justify the arrest. He must also satisfy the requirements laid down in section 49(2). In terms of that section the use of deadly force likely to cause either the suspect's death or grievous bodily harm to him is justified only in limited circumstances. There must be acceptable evidence that the police

believed on reasonable grounds that the use of the R5 rifle and the 9mm pistol to prevent the plaintiff from fleeing and resisting ... was immediately necessary for their protection or to the protection of any other persons; that there was a substantial risk that the plaintiff would cause imminent or future death or grievous bodily harm if the arrest was delayed; or that the offence in question was in progress and was of a forcible nature involving the use of life-threatening violence or a strong likelihood that it would cause grievous bodily harm”

[84] Likewise, *Mondlane v Minister of Safety and Security*[21] dealt with the second version of the section. The court stated that the

"belief that the arrestor must hold or must have held is the belief that force is immediately necessary for the purposes of protecting [themselves], and person lawfully assisting the arrestor and any other person from imminent or future death or grievous harm”.

[85] In the end, there is a combination of factors to consider: whether the degree of the force used is proportional to the seriousness of the crime which the victim is suspected of fleeing from, coupled with the possibility of the suspect posing a threat of serious physical harm if they should escape arrest. It should be kept in mind that the arrestor at the time often does not have the luxury of time to make a decision, and unlike a court considering the matter, does not have

the benefit of hindsight. Still, the use of force is invasive and drastic, requiring the court to remain sensitive to the issues raised by s 49 and to decide the case based on the delicate balancing of the rights and duties involved in a particular factual circumstance.

[86] Was the use of force to prevent the plaintiff from escaping, in this case, reasonably necessary and proportional to the circumstances, as the 2003 amendment requires? In my opinion, yes. The police were stationed in the house based on a tip-off that there would be a serious house robbery, which then happened. The suspects were armed, there was a shootout in the house that resulted in the death of a suspect, warning shots were fired and ignored, and De Klerk, acting on information from his colleagues and the knowledge that some suspects were armed, regarded the plaintiff as dangerous. Seeing the plaintiff flee towards an open veld in a build-up area, De Klerk did not aim to kill him but to prevent him

from escaping and putting the

lives of others in danger. These would be reasonable grounds, even if no firearm was found on the plaintiff.

[87] The arrest was, therefore, lawful, and the use of force was reasonable.

(iii) Detention

[88] I have found that the plaintiff was lawfully arrested, with the result that subsequent detention was lawful. The plaintiff then applied for bail, which the magistrate refused on 9 December 2010. For the detention between 9 December 2010, when bail was denied, until 30 September 2011, when the plaintiff was found not guilty and discharged, the defendant cannot be held liable.[22]

[89] The underlying rights applicable in such a case is s 12(1)(a) of the Constitution (not to be deprived of freedom or liberty without just cause), which is likewise protected by s 35(1)(d)-(f) of the Constitution. Thus, even if the arrest was unlawful, the question is whether the defendant can be held liable for the detention between 9 December 2010 and 20 September 2011. I think not. The duty of the police is restricted to ensuring that the plaintiff is brought before a court as soon as possible. The decision to charge the suspect falls under the authority of the National Prosecuting Authority, and the

decision to detain the plaintiff falls within the judicial authority.

[90] During the cross-examination of Keyser, counsel for the plaintiff did ask him about the evidence that was led at the bail application. Keyser indicated that he brings the evidence to the court that the prosecutor requires and that he is not the person that presents the case in court. This is correct. Unless the plaintiff can show that false evidence[23] or unlawfully obtained evidence[24] was given by Keyser during the bail application, leading to the refusal of bail, Keyser cannot be held liable for the detention if the arrest was lawful.

Order:

[91] In the result, the following order is made:

i. The plaintiff's action is dismissed, with costs.

WJ du Plessis AJ

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the plaintiff: Adv MJ Letsoalo

Instructed by: AJ

Masingi attorneys

Counsel for the defendant: Adv TWG Bester SC

Instructed by: State

Attorney

Date of the hearing: 23

– 26 & 30 January 2023.

Date of judgment: 6

April 2023

[1] Paragraph 4 of the Particulars of Claim dated 9 November 2011.

[2] He now holds the rank of captain.

[3] He resigned from the SAPS.

[4] He resigned from the SAPS.

[5] He retired from the SAPS with the rank of Captain.

[6] There is one in the corner.

[7] 2008 (1) SACR 511 (C).

[8] Mabaso v Felix 1981 (3) SA 865 (A).

[9] Ntsomi v Minister of Law and Order 1990 (1) SA 512 (C) at 528F.

[10] Liebenberg v minister of Safety and Security [2009] ZAGPPHC 88 para 19.22.

[11] 51 of 1977.

[12] 122 of 1998.

[13] 9 of 2012.

[14] S 11 of the Constitution.

[15] S 12 of the Constitution.

[16] S 10 of the Constitution.

[17] 2002 (2) SACR 105 (CC).

[18] Para 46.

[19] [2008] 3 All SA 270 (SE).

[20] Par 5.

[21] 2011

(2) SACR 425 (GNP).

[22] Minister of Police and Another v Muller 2020

(1) SACR 432 (SCA).

[23] Woji v Minister of Police [2014] ZASCA 108.

[24] Minister of Safety and security v Tyokwana [2014] ZASCA 130.

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