

SOUTH AFRICA / JUDGMENT

Resinga v Minister of Police (6878/2017) [2024] ZALMPPHC 131 (23 August 2024)

[2024] ZALMPPHC 131**COURT**

Limpopo High Court, Polokwane

BEFORE

Naude-Odendaal

CASE / FILE NUMBER

6878/2017

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****DIVISION, POLOKWANE)****CASE****NO: 6878/2017****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO THE JUDGES: YES/NO****(3)****REVISED: YES/NO****SIGNATURE:**

Naude-Odendaal J

DATE: 23/08/2024

In

the matter between:

MADYISA

CONFERENCE RESINGA

PLAINTIFF

And

MINISTER

OF

POLICE

DEFENDANT

JUDGMENT

NAUDE-ODENDAAL J:

- [1] Trigger Happy! The Plaintiff instituted an action for delictual damages against the Defendant arising from an unlawful and wrongful assault and shooting by a member of the South African Police Service (SAPS).
- [2] On 22 July 2017 at around 20h00pm at Nghomoghomo Village, near a certain Van Roy Tavern, the Plaintiff, an off-duty police officer was shot and injured by a member of the Saselemani SAPS. The police officer from Saselemani SAPS was acting in the course and scope of his employment and therefore the Defendant is vicariously liable for the actions of the police officer.
- [3] The Defendant admitted the shooting of the Plaintiff on 22 July 2017 by a member of the Saselemani SAPS, but however pleaded that the shooting of the Plaintiff was justified in that Warrant Officer M.A. Chauke, in private defence, shot the Plaintiff.
- [4] The Defendant further pleaded that the life of Warrant Officer M.A. Chauke and other members of SAPS and community were in danger posed by the Plaintiff. It was further pleaded that the danger posed by the Plaintiff was imminent and that the force applied by the members of the Defendant, was reasonable and necessary under the circumstances to avoid a further threatened attack by the Plaintiff.
- [5] The Defendant further denied that the Plaintiff was assaulted by a member(s) of SAPS.

PLAINTIFF'S CASE:

- [6] The Plaintiff and Mr. Hobyane Nephtaly Hlengani testified in support of the Plaintiff's case. The Plaintiff's evidence, in summary, was that on the evening of 22 July 2017, he, and his friend, Mr. Hobyane, were coming from a funeral at Kabelo Village. On their way back home to Xigalo Village, they ended up at Nghomoghomo Village, near a certain Van Roy Tavern.
- [7] The Plaintiff and Mr. Hobyane were near the tavern area around 20h00pm to take advantage of the lighting in the area, as they were trying to hitch hike to Xigalo. It was late at night, however the area around the tavern was well-lit and visibility was clear.
- [8] According to the Plaintiff, as they were walking, he was suddenly shot on his leg without any warning by the police officer. He fell to the ground and started crawling towards safety at an RDP House to take cover. As he was crawling, the police members continued shooting. Another police officer suddenly climbed on top of the Plaintiff and started assaulting him with fists. The community members who gathered at the scene there at the RDP House then informed the police officer on top of the Plaintiff, that the Plaintiff was also a police officer.

- [9] According to the Plaintiff, the police officer on top of him introduced himself then as Chauke and said that he is also a police officer at Saseleman Police Station. According to the Plaintiff, Mr. Chauke then asked him for his work card, he informed Mr. Chauke that it was in his wallet in his back pocket. Mr. Chauke took out the Plaintiff's wallet and found his work card, confirming that indeed the Plaintiff was also a police officer.
- [10] Neither the Plaintiff, nor the police officers from Saseleman Police Station were wearing uniforms. The Plaintiff did have his service pistol with him on the day of the incident, but his firearm was not visible as he was wearing a long jacket. He further stated that he did not discharge his firearm on the date of the incident and therefore the members of SAPS did not have a reason to shoot him.
- [11] As a result of the shooting, the Plaintiff sustained an open gunshot wound to his left thigh and left knee, a fracture to his left leg femur and multiple assault wounds to his head and face.
- [12] The Plaintiff further testified that his service pistol was confiscated on the day of the incident and returned to him by SAPS, after some investigations. He was however never charged, disciplined, or punished by his employer, SAPS, for unlawful discharge of a firearm relating to the present incident.
- [13] The Plaintiff testified further, that Mr. Hobyane did not have a firearm in his possession on the day of the incident.
- [14] The Plaintiff's second witness was Mr. Hobyane. Mr. Hobyane testified that on the evening of the 22nd of July 2017, he and the Plaintiff were coming from a funeral at Kabelo Village. On their way back home to Xigalo Village, they ended up at Nghomoghomo Village, near a certain Van Roy Tavern. He and the Plaintiff were near the tavern area around 20h00pm to take advantage of the lighting in the area, as they were trying to hitch hike to Xigalo.
- [15] According to Mr. Hobyane, immediately upon arrival at the area, a double cab bakkie, an unmarked Amarok, arrived. Two male persons alighted from the vehicle. They were armed and holding their firearms. Upon seeing the male persons with the firearms, Mr. Hobyane ran away into Van Roy Tavern. As he entered Van Roy Tavern, he suddenly heard gunshots being fired.
- [16] According to Mr. Hobyane, the male persons did not give any indication that they were police officers, they did not at any stage tell them to lift their hands in the air and neither he, nor the Plaintiff provoked them in any manner whatsoever.
- [17] Mr. Hobyane also testified that he does not have a firearm, does not have a firearm license and did not have any firearm on him on that evening.

- [18] Mr. Hobyane testified that after he heard the gunshots being fired, he saw people running towards the direction where the Plaintiff went to take cover. When he arrived there, he saw a person stepping on the Plaintiff's chest. He was assaulting the Plaintiff. The person was not wearing any uniform. Mr. Hobyane testified that some of the community members there then said to this person that the Plaintiff is also a police officer. The person stopped assaulting the Plaintiff.
- [19] The Plaintiff was injured. He was taken to hospital by ambulance. Mr. Hobyane accompanied the Plaintiff in the ambulance to hospital together with a police officer. The police officer later took Mr. Hobyane home. Mr. Hobyane was never charged or arrested for any offence relating to the incident.

DEFENDANT'S CASE:

- [20] Mr. Tsenane, Warrant Officer M.A. Chauke and Constable R.R. Chauke testified on behalf of the Defendant.
- [21] Mr. Tsenane testified that he is employed at Saseleman Police Station as a gardener. He testified that, on the day in question when he was entering Eden Valley Tavern, two ladies approached him and informed him that there are two men that are in possession of a firearm, he then called Saseleman Police Station to report the incident.
- [22] Mr. Tsenane testified that he identified the two male persons and saw that one of them was carrying a firearm on his left side. He only saw one person in possession of a firearm. He did not approach the two gentlemen and did not say anything to them. He immediately went to call the Saseleman Police Station. He was informed that a Police Vehicle is on its way.
- [23] Mr. Tsenane testified that when the police vehicle arrived, he got into the vehicle and they went after the taxi in which the two gentlemen boarded. They couldn't find the taxi, but as they turned left at some stage at a T-junction, they saw the two gentlemen. They travelled to the left direction and passed the two gentlemen. They went to stop at the tavern where there was better light and waited for the gentlemen to enter their, because they anticipated that they would enter the tavern after coming from another tavern.
- [24] Mr. Tsenane testified further that the driver of the police vehicle parked the vehicle to face in the direction of where the two gentlemen were. He pointed the two gentlemen out to the police officers in the vehicle, then alighted the vehicle and left. As he alighted from the vehicle, the police officers also alighted from the vehicle. As he was leaving, he suddenly heard a gunshot being fired. He got scared and ran away. He stopped after a short distance and went back to go and look what was happening after he heard the community gathering there near an RDP House.
- [25] Mr. Tsenane confirmed that both the Plaintiff and Warrant Officer Chauke were shot. Mr. Tsenane further confirmed that the police officer who accompanied Warrant Officer Chauke also ran away, he was however in possession of a R5-Rifle.

- [26] Under cross-examination, Mr. Tsenane said that these two women who complained to him, was not known to him. He did not even know their names. He further stated under cross-examination that they only said to him that "they have seen somebody who is in possession of a gun", nothing more. There was no pointing of a firearm. The person was carrying the firearm at his groin area.
- [27] Mr. Tsenane further under cross-examination testified that there was no altercation between the police officers he was with and the two gentlemen he identified. He didn't hear anything except for the sudden gunshot as he left. He did not hear any instructions by the police officers either, only a sudden gunshot.
- [28] The Defendant called Warrant Officer M.A. Chauke (W/O Chauke) as its second witness. W/O Chauke testified that he was on duty on the day in question when he was requested to attend to an incident at a tavern where two men were in possession of a firearm and threatening women. W/O Chauke was in possession of his service pistol. He attended to the complaint together with Constable R.R. Chauke who was in possession of a R5 Rifle. When they arrived at the tavern, Mr. Tsenane, who called the station about the complaint, informed them that the two male persons (the Plaintiff and Mr. Hobyane), just left by a taxi. They assumed that since the two male persons were at a tavern drinking, they might be going to the next nearby tavern. They requested Mr. Tsenane to accompany them to identify the two suspects.
- [29] W/O Chauke testified that they first met the Plaintiff and Mr. Hobyane on the road and Mr. Tsenane identified them. As Mr. Tsenane identified them, they could see the firearm on Mr. Hobyane's groin. They then decided to stop at Van Roy Tavern's gate as there was better visibility with the lighting there coming from the tavern.
- [30] When the Plaintiff and Mr. Hobyane approached Van Roy Tavern's Gate, they got out of the vehicle and informed them loudly that they are the police and they wanted to conduct a search. According to W/O Chauke, Mr. Hobyane complied by raising his hands and laid on the ground, however, as Chauke R.R. was about to search Mr. Hobyane, the Plaintiff quickly took out his firearm and started shooting towards them and shot him on his right femur and he fell to the ground. As he was on the ground, he then retaliated by shooting the Plaintiff on his left femur. After the Plaintiff got shot, he crawled on the ground towards the nearby shack.
- [31] W/O Chauke testified that Constable R.R. Chauke ran from the scene and dropped his rifle on the ground. Constable R.R. Chauke never fired any shot.
- [32] The third and last witness for the Defendant was Constable R.R. Chauke. Constable Chauke testified that he was on duty on the day in question. They received a call from Mr. Tsenane, informing them that two women had complained to him about two men, one of whom was carrying a gun and threatening them.

- [33] Constable Chauke then booked out a R5 rifle with 10 live ammunition rounds, which was recorded in the firearm register and on the occurrence book. The occurrence book and the register recorded that he booked out the rifle and 10 live rounds, as well as that the 10 live rounds of ammunition and R5 rifle was returned.
- [34] Constable Chauke further testified that Mr. Hobyane complied with his request to search him. He raised his hands and when he was requested to lie on the ground, he did so.
- [35] Constable Chauke testified that the Plaintiff fired a shot towards them as he was about to search Mr. Hobyane, he then dropped his rifle and fled the scene. Constable Chauke confirmed that they were not threatened by the gentlemen (the Plaintiff and Mr. Hobyane) in any way whatsoever, he also stated that they (he and W/O Chauke) did not threaten the Plaintiff and Mr. Hobyane.

THE LAW AND APPLICATION OF THE LAW:

- [36] In the present matter, the shooting of the Plaintiff was not denied, although the subsequent assault was denied by the Defendant. The Defendant raised self-defence as an excuse or justification for the shooting of the Plaintiff. The Defendant bore the onus in respect of the defence or justification raised. In order for the Defendant to succeed with the defence raised, the Defendant had to plead and prove:-
- (a) a real or threatened attack by the Plaintiff.
 - (b) reasonable grounds for believing that the defendant was in physical danger;
 - (c) that the force used was necessary in the circumstances to repel the attack and commensurate with the Plaintiff's aggression. (See *Mabaso v Felix* [1981] 2 All SA 306 (A), 1981 (3) SA 865 (A) p 874 and *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC) para. 138.)
- [37] A person, acting out of necessity may lawfully inflict harm on another. The danger must exist or be imminent, and there must be no reasonable means of averting the danger except by inflicting harm. The means and measures must not be excessive, having regard to all circumstances of the case. Whether a situation of necessity existed is a factual question which must be determined objectively. (See *Petersen v Minister of Safety and Security* [2010] 1 All SA 19 (SA).)
- [38] In the present matter, there are two mutually destructive versions of the incident, and more specifically, who shot, and who shot first. The Defendant did not dispute or challenge the evidence of the Plaintiff or Mr. Hobyane that the Plaintiff was further assaulted by fists after the shooting, whilst lying on the ground. This was only denied in the Defendant's plea.
- [39] The question is which one of the two versions in respect of the shooting should be accepted. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others* 2003 (1) SA (SCA) 1 at [5] Supreme Court of Appeal held as follows:-

"[5] 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's 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 of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's 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."

[40] I deal with an evaluation of the evidence and witnesses, as follows:-

40.1 The Plaintiff:

- (a) The Plaintiff and Mr. Hobyane, corroborated each other in respect of their movements of the evening of the incident. The Plaintiff confirmed that he had his service pistol on him at his waist and that Mr. Hobyane did not have any firearm on him.
- (b) The Plaintiff did not contradict himself in examination in chief, or under cross-examination.
- (c) The Plaintiff maintained throughout the trial that he never threatened any person with his firearm, not the two women at the tavern, nor at the scene of the incident. This, however only during cross-examination, was confirmed by Mr. Tsenane. Mr. Tsenane testified that the women, (who are unknown to him) informed him that there was a male in possession of a firearm. Mr. Tsenane further testified that he only saw the firearm on the person of the Plaintiff where the Plaintiff had it towards his groin area.

- (d) In respect of the scene of the incident, the Plaintiff, Mr. Hobyane and Mr. Tsenane corroborated each other in that the Plaintiff and Mr. Hobyane testified that W/O Chauke and Constable Chauke did not arrive in a marked police vehicle, they did not wear uniform and at no stage did they inform the Plaintiff or Mr. Hobyane that they were police officers. Mr. Tsenane in corroboration also confirmed that when W/O Chauke and Constable Chauke alighted from the vehicle, they were in possession of firearms, and in respect of Constable Chauke a R5 rifle. Mr. Tsenane immediately left the scene and moved away for about 10 to 12m. He suddenly heard gunshots being fired. He didn't hear anything else except for the sudden gunshots. Mr. Tsenane's version confirms the Plaintiff and Mr. Hobyane's version that W/O Chauke and Constable Chauke never introduced themselves as police officers and never shouted that the Plaintiff and Mr. Hobyane must raise their hands or asked for permission to search them, as per the versions of W/O Chauke and Constable Chauke.
- (e) What remains a mystery is however the fact that the Plaintiff testified that he never fired any shot from his firearm and Mr. Hobyane did not have a firearm in his possession. Furthermore, it is common cause that Constable Chauke never fired a shot from the R5 rifle. Who then shot W/O Chauke?
- (f) If I take into regard the Plaintiff's candour and demeanour in the witness-box, the Plaintiff was a very consistent, calm and collected witness. There were no bias, latent and blatant, internal contradictions in his evidence. The only external contradiction with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, was that in his statement he stated that he was assaulted by bricks, whilst in court he only testified to an assault by fists. His injuries however, remained consistent.
- (g) I find the Plaintiff's version and/or recollection of the events that gave rise to the shooting incident probable in that it was already established that the Defendant's members arrived in an unmarked vehicle, they were not wearing uniform, they alighted heavily armed and suddenly a shooting started without any forewarning heard or identification by them, as also confirmed by Mr. Tsenane. It was also not disputed that the Plaintiff crawled away to an RDP house to seek cover and that he was then assaulted there by another member of the Defendant until the community intervened and said that he was also a police officer. His injuries sustained, is also consistent with the description of the assault and the fact that he was shot.

40.2 Mr. Hobyane:

- (a) Without repeating what was already stated here above, it needs to be said that Mr. Hobyane, although he did not appear as confident in the witness box as the Plaintiff, gave a clear recollection of the events of the evening. He did not contradict himself in any material aspect. His version that he ran away and later returned was also confirmed by the Plaintiff, W/O Chauke and Constable Chauke. It was also confirmed by the Plaintiff that Mr. Hobyane did not have a firearm in his possession. In this regard, a firearm was never recovered from Mr. Hobyane or in the area and Mr. Hobyane was never charged after the shooting incident

with any offence. He was only taken home.

- (b) Mr. Hobyane did not exaggerate in his recollection of the events, nor in respect of the assault meted out against the Plaintiff. Although Mr. Hobyane was not too good with estimation of distances, his miscalculation or uncertainty cannot in any way be ascribed to dishonesty or evasiveness. Mr. Hobyane was a very reliable and consistent witness and did not change his version under cross-examination. He remained firm in his answers and recollection of the unfolding of events of the night of the incident.

40.3 Mr. Tsenane:

- (a) Mr. Tsenane contradicted himself in various material aspects during his evidence in chief and cross-examination. At first, he testified that two women approached him and complained that they were being threatened by two males with firearms, later, under cross-examination, he stated that two women approached him and said they saw a male person in possession of a firearm - nothing about both males being in possession of firearms and nothing about the males threatening the women with the firearms. The male person was simply in possession of a firearm, that's it.
- (b) Mr. Tsenane further contradicted himself in that under cross-examination, the two women were not known to him. He assumed they knew him, but he did not know them or could remember them.
- (c) In examination in chief, Mr. Tsenane testified that both males (the Plaintiff and Mr. Hobyane) were in possession of firearms, however under cross-examination, he testified that only the Plaintiff was in possession of a firearm.
- (d) What I find strange from the evidence of Mr. Tsenane was the fact that he accompanied the members of the Defendant all the way in order to assist them to find two male persons, of whom one was simply in possession of a firearm, but the moment they arrived at the scene, he alighted the vehicle and summarily left. It is strange that he did not remain in the vehicle, or remain at the scene, but without anything being said and happening, he out of his own accord simply left.
- (e) I find it further strange that Mr. Tsenane, prior to anything happening or any imposing danger, decided to flee to safety. Mr. Tsenane himself testified that he did not hear anything before the gunshots, there was only gunshots after he left. There was not altercation the police or anybody and he did not hear any instructions by the Defendant's members either, he was however only 10 meters away from the incident.
- (f) Mr. Tsenane's evidence appeared to be bias in favour of the Defendant's members. It appeared from his evidence that he knew who shot the first shot, but did not want to testify to that effect in court. Mr. Tsenane had numerous internal contradictions in his evidence, as well as external contradictions.

- (g) I find it highly improbable that a person would form the onset, without any altercation or threat alight from a vehicle and start fleeing. I find it further highly improbable that a person who were about 10m away from the scene, did not hear from which direction the first shot was fired and did not hear whether there was any instructions shouted by the members of the Defendant. Mr. Tsenane's evidence leaves much to be desired and in my view should be approached with caution.

40.4 W/O Chauke:

- (a) W/O Chauke testified that Mr. Tsenane pointed out that the one in possession of a firearm, was the one dressed in a black T- Shirt and Black Trouser. It was clear from the initial evidence of W/O Chauke and Mr. Tsenane that only one of the males were in possession of a firearm. W/O Chauke testified that he saw the firearm as it was in the person's trouser at his groin. It was only later, that the Defendant's version changed to now suddenly both males being in possession of a firearm.
- (b) W/O Chauke testified that he alighted from the vehicle and shouted very loudly to the two male persons that they are the police and they were requesting permission to search them. This is in contradiction to the version of the Plaintiff, Mr. Hobyane and Mr. Tsenane. Even Mr. Tsenane for the Defendant said he did not hear anything.
- (c) According to W/O Chauke, these two male persons were only 5 to 6 meters from them. He testified under cross-examination that he might have discharged his firearm three times.
- (d) Although I can't find that W/O Chauke materially contradicted himself, it is clear that there is a contradiction between his version and even the version of Mr. Tsenane, who testified for the Defendant.
- (e) I find W/O Chauke's version improbable that he alighted from the vehicle and immediately shouted to the Plaintiff and Mr. Hobyane that they are police and wanted permission to search them. It is clear from the testimony of the Plaintiff, Mr. Hobyane and Mr. Tsenane, that a shooting immediately ensued.
- (f) I find it improbable that the Plaintiff, had he known W/O Chauke and Constable Chauke were police officers, would have immediately open fire without any forewarning, especially being a police officer himself. It is clear from the evidence that the Plaintiff and Mr. Hobyane were minding their own business and peacefully unaware of the Defendant's members, until they alighted heavily armed. The Plaintiff was not even aware that the Defendant's members were police officers until after the shooting when the community came to his rescue and informed the member who assaulted the Plaintiff that the Plaintiff was also a police officer.
- (g) I find it further very improbable that had the Plaintiff opened fire as per the evidence of W/O Chauke, he was not charged or any disciplinary steps were taken against the Plaintiff.

- (h) I find it further very unlikely that Mr. Tsenane, without any word being uttered or any confrontation, summarily moved away to safety immediately before the shooting started. In all probability, Mr. Tsenane knew that something is about to happen.

40.5 Constable Chauke:

- (a) Constable Chauke's version to a great extent was the same as W/O Chauke's version. However, his version as to how they shouted that they were the police and how Mr. Hobyane complied and lay on the ground under Constable Chauke's control does not correspond with the timespan in which the shooting started. Mr. Tsenane testified that he immediately alighted from the vehicle when the Defendant's member's alighted and moved away, he did not hear anything. When he was about 5 to 6m away, the shooting summarily started. Five to Six meters is not far from the vehicle and a short distance which can be crossed in mere seconds.
- (b) If the events unfolded as per Constable Chauke's version, the shooting could not have started almost immediately. Mr. Tsenane would have been further away by the time the shooting started.
- (c) In my view, Constable Chauke and W/O Chauke adapted their versions of what really transpired at the scene and the only reason a person would do that is because the truth might not be favourable to their defense.

[41] As a final step, the court has to determine whether the Defendant burdened with the onus of proof has succeeded in discharging it. In *Ndlovu v Minister of Police* and a related matter

[2022] JOL 53977 (MM), the court held that the defendant bore the onus of proof in respect of the claim of the first plaintiff. On the facts before the court, without making a finding as to credibility of any of the witnesses, the court found that the version of the first plaintiff was more probable than that of the defendant. The defendant, therefore, failed in discharging the onus resting on the police to prove on a preponderance of probabilities that the shooting of the first plaintiff was justifiable.

[42] In *Koster Kooperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* 1974 (4) SA 420 (W) it was stated by Coetzee J:-

"...Where there are no probabilities - where, for instance, the *factum probandum* was whether a particular thing was white or black, with not the slightest evidence as to the preponderance of white or black things in that particular community, there are clearly no probabilities of any sort. And when the testimony of witnesses in conflict, the one merely saying the thing was white and the other black, it does not matter logically what the measure of proof is, whether it is on a balance of probabilities or beyond reasonable doubt. The position is simply that there is no proof, by any criterium, unless one is satisfied that one witness' evidence is true and that of the other is false."

- [43] On the facts before me, I am able to find that the version of the Plaintiff is more probable than that of the Defendant, wherefore I find that the Defendant did not succeed in discharging the onus resting on it to prove on a preponderance of probabilities that the shooting of the Plaintiff was justifiable.
- [44] In my view, the evidence did not establish that the Plaintiff was indeed attacking W/O Chauke and Constable Chauke, and a reasonable person would not have believed that the members of the Defendant's lives or bodily integrity was in imminent danger. The evidence by Constable Chauke was that the Plaintiff's firearm was in his pants at his groin. He did not threaten them, neither did Mr. Hobyane. Mr. Tsenane testified that he heard nothing before the gunshots, completely nothing, there were only the gunshots. He confirmed that there was no altercation between the Plaintiff and Mr. Hobyane and the members of the Defendant. He also did not hear any instructions whatsoever shouted to the Plaintiff and Mr. Hobyane by the members of the Defendant.
- [45] The overwhelming probability is that W/O Chauke, whilst being predisposed as to the situation that they could be facing, overreacted when shooting the Plaintiff and therefore, having been in the vehicle with the members of the Defendant, Mr. Tsenane, immediately alighted and moved away to safety.
- [46] In my view, the Plaintiff managed to prove the requisite elements to sustain a claim of delictual liability against the Defendant, i.e. a negligent act by the Defendant and that such negligent act caused the Plaintiff an injury. The Plaintiff's claim must therefore succeed.
- [47] As a general rule, costs follow the result. There is no reason to deviate in the present matter from the general rule.

ORDER:

[48] In the result, I therefore make the following order:-

1. The Defendant is held 100% liable for the damages that the Plaintiff might be able to prove, suffered in consequence of him being shot and assaulted by members of the Defendant.
2. The Defendant is ordered to pay the Plaintiff's costs.

M. NAUDÈ-ODENDAAL

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

APPEARANCES: HEARD ON : 16 - 17 APRIL 2024 HEADS OF ARGUMENT FILED : 30 APRIL 2024

JUDGMENT

DELIVERED ON : 23 AUGUST 2024. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 23 AUGUST 2024 at 10H00 FOR THE PLAINTIFF : Adv. R.T. Ramashia INSTRUCTED BY : Ntiyiso Mathebula Attorneys C/O MQ Ramaila Attorneys Polokwane ntiyisomathebula1@gmail.com advocate@ramashia.co.za tlouramashia@gmail.com FOR THE DEFENDANT : Adv. N.R. Choeu INSTRUCTED BY : The State Attorney: Polokwane

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