

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT
Johannesburg Local Division

CASE NO: 18147/10

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

Tshuma, Njabulo

Plaintiff

And

The Minister of Safety and Security

Defendant

JUDGMENT

1. The plaintiff, a Zimbabwean citizen, visited this country for a short while, from 30 May 2009. He stayed at his cousin's residence in the informal settlement of Diepsloot. At that time he was employed as a security guard at the Manor Hotel in Zimbabwe. In the early hours of the morning of 3 June 2009 he was sleeping at his cousin's home (referred to in the pleadings and in the evidence as a "*shack*") when he was rudely disturbed by members of the South African Police Services (SAPS) and eventually

shot, arrested and detained by them. It is his claim that he was unlawfully assaulted (by virtue of having been shot), arrested and detained by these members of the SAPS. It is common cause that the members of the SAPS acted in the course and scope of their employment when assaulting, arresting and detaining the plaintiff. As a result of which the plaintiff seeks to hold the defendant vicariously liable for the harm he suffered at the hands of these members of the SAPS.

2. The facts surrounding the shooting and arrest of the plaintiff are controversial – the parties could agree on very little as to what transpired, and how it transpired on that morning. This necessitated entertaining oral evidence so that determinations could be made on each of the relevant, but controversial, facts. However, before analysing this evidence it would be helpful to list the common cause facts.
3. It is common cause that on the morning of the 3 June 2009 the plaintiff was peacefully sleeping in a dwelling that consisted of a single room and which was built largely with corrugated iron (the door-frame was made of metal though the door was made of wood). It was located on a plot in Diepsloot. There were two dwellings on the plot, a large one in the front and a small one at the back. The small one, as mentioned above, consisted of a single room. It is in this dwelling that the plaintiff and his niece were sleeping. It was not a particularly strong dwelling or one that was reasonably sound-proofed. Sounds pitched at very low decibels could be heard both inside and outside of the dwelling, and so someone

sleeping inside could be easily roused by the slightest noise outside. The electricity supply to the dwelling was very basic. The door to the dwelling was a basic wooden one, but which had a hole drilled into it. A hole was also drilled in the corrugated iron that came into contact with the door when it was closed. The two holes were used to place a chain through them. The chain could then be locked with a padlock to prevent unlawful entry to the dwelling. The dwelling was on a small plot of land with a perimeter fence. The perimeter fence was no deterrent to anyone seeking entry to the plot of land on which the dwelling was erected.

4. On 2 June 2009, the plaintiff and his niece had supper just before it got dark and retired to bed in the dwelling. At about 01h00 on 3 June 2009 a substantial number of SAPS's employees arrived at the plot. They had with them searchlights as well as formidable weapons, including R5 rifles. They surrounded the dwelling, making it impossible for the occupants to escape therefrom. One of them carried a loudhailer, which he used to inform the occupants that they were members of the SAPS who had surrounded the dwelling and who were there on police business. He called out to the occupants to come out of the dwelling with their hands in the air. The plaintiff and his niece were awoken by the commotion. They were frightened by this sudden disturbance of their peaceful sleep. The plaintiff told his niece to hide under the bed she slept on, while he got out of bed, took an axe that was on the floor nearby and knocked it hard against the corrugated iron to indicate to the persons outside that there were occupants inside the dwelling. He unlocked the chain, opened the door (he

says only partially, the SAPS members who testified, say wholly) to see what was happening outside, at which point gunshots were fired at him by members of the SAPS. He immediately retreated inside and shut the door. His niece, who was petrified, noticed that he was bleeding in the leg and informed him that he had been shot. He shouted that he had been shot and that he would be coming out. He also shouted that in order for him to come out those outside should not shoot at him. The members of SAPS obliged. He came out and was immediately placed under arrest. His niece also exited. An ambulance was called for, the dwelling was searched, and he was transported under police guard to the hospital where he was kept under permanent police guard. His one leg was shackled to a metal railing that was part of the bed he was kept on. Each time he needed to use the ablutions, the policeman guarding him removed the shackle. He was never charged for any offence, did not make any appearance in any court and on 22 June 2009, without warning, the shackle was removed by the police guard and he was told that he was free to leave at his convenience.

5. The rest is controversial and can only be determined after having regard to the *viva voce* evidence presented by the parties.

The evidence of the defendant

6. The defendant called six witnesses to wit, Lieutenant Janse van Vuuren (Lt van Vuuren); Captain Sholtz (Capt Sholtz), Captain Sharp (Capt Sharp), Sergeant Suresh Naidoo (Sergeant Naidoo) and Lieutenant Shai Paul Jodola (Lt Jodola).

7. Lt van Vuuren was the commanding officer of the Crime Intelligence Services based in Pretoria dealing with tracing of alleged criminals who were sought by the SAPS. On 2 June 2009 at about 22h00 he was told, per telephone call, that an informer was able to supply information about the whereabouts of an alleged criminal who was sought by them with regard to a number of household and business robberies in the Diepsloot area. He rounded up his team, consisting of Capt Scholtz, Capt Sharp, a Warrant Officer Pearce (W O Pearce) and a Sergeant Louw (Sgt Louw). Together they went to a petrol station where they were met and briefed by the informer and his handler. The informer told them that the alleged criminal was residing in a dwelling in the informal settlement of Diepsloot. The full address supplied was No 4753 Babiri Street, Extension 5, Diepsloot (Babiri Street). They were told in no uncertain terms that he was presently there. There were a number of other members of SAPS belonging to "*the flying squad*" present at the briefing. Once told that the alleged criminal was at the dwelling in Babiri Street, Lt van Vuuran decided that it was necessary to proceed there. They prepared themselves for a visit to Babiri Street in order to accost the alleged criminal. Each of them was clad in a bullet-proof vest. Each one of them was carrying a firearm. Some of the firearms in their possession were semi-automatic R5 rifles. They took bright torchlights, a loudhailer and a hammer (which is a heavy piece of metal). The hammer was to be used to break down the door. All this equipment was necessary if they were to be prepared for any and every contemplated contingency. They had with

them a photograph of the wanted alleged criminal. They did not secure a warrant for the arrest of the alleged criminal since it would not be obtained in time for them to secure his arrest. After midnight they proceeded to the address supplied to them by the informer. Lt van Vuuren's entire team was with him. Before reaching the address, they chose to detour to the Erasmia police station, which was the police station nearest to the address they were heading to, where they requested the station commander to instruct policemen to accompany them as back-up. Their request was acceded to, though he cannot recall how many they were. All he could say is that they were many. Upon their arrival at the dwelling in Babiri Street, he ordered all the police officers to spread out and surround the entire dwelling so that the occupants would not be able to leave it undetected. The dwelling consisted of a single room that was in the backyard of another dwelling. Both dwellings were made of corrugated iron. He instructed Capt Sholtz, Capt Sharp, Sgt Louw and W O Pearse to proceed ahead of him. As they reached the front door of the dwelling they shone the torchlight directly on it. The officer who had the loudhailer called out to the occupants informing them that they were police and instructing them to come out with their hands held upwards where they would be visible. They heard a loud bang coming from inside the dwelling. He then heard gunshots and very soon thereafter saw a man come out of the dwelling. The man was bleeding. He instructed his officers to summon an ambulance to the premises. Together with his men he entered the dwelling and searched it for automatic weapons. Apart from an axe lying on the floor they found nothing of significance. The occupant who was shot is the

plaintiff. He thought that the plaintiff was the person that was sought by the police and so the plaintiff was immediately arrested, even though there was no warrant for his arrest. As soon as the ambulance arrived the plaintiff was taken to hospital under police guard as he was now under arrest. Later he learnt that the plaintiff was not the alleged criminal that was being sought by the police.

8. Capt Sholtz testified along the same lines as Lt van Vuuren as to the events leading up to their arrival at the dwelling. Taking the baton from there he said that they were accompanied "*by not more than twenty (20) policeman*", and that they parked a bit away from the dwelling. They had to pass through a narrow passage way to get to the dwelling. They got there on foot. Himself and Sgt Louw went ahead with Capt Sharp providing back-up for him, and W O Pearse providing back-up for Sgt Louw. As they reached the plot they switched on their torches. They got to the dwelling in the backyard. He saw that there was an iron-gate protecting the door but this gate was unlocked. He stood right in front of it and opened it. He had his firearm in his hand. Sgt Louw, who was next to him, knocked on the door frame and announced that they were police and that the occupants should come out with their hands up. In fact, both Sgt Louw and W O Pearse shouted "*It is the police, come out.*" They did this for about 20 minutes and got no response. Instead, he heard the sound of four bangs against the corrugated iron. The sound came from inside the dwelling. Soon thereafter, the door of the dwelling opened inwards and he saw a human figure emerge. He did not see the human figure clearly. At that

point he felt a jerk against his bullet-proofed vest and fell backwards against a wall that was approximately one metre away from the door. He saw the door closing with the human figure disappearing inside. He then heard gunshots being fired at the door and on the corrugated iron surrounding the door. He cannot recall how many gunshots were fired. As he had fallen against the wall he was only able to regain his balance with the assistance of Lt van Vuuren who asked if he was injured to which he replied: "*No, I'm fine*". He learnt later that Sgt Louw and W O Pearse were the ones that discharged their firearms. A man came crawling out of the dwelling shouting I have been shot. They moved him aside, entered the dwelling where they found his niece as well as an axe lying on the floor. They searched it further and found nothing of note. After seeing the axe, he realised that he had been hit with it before the shooting commenced. He decided to remove the axe from the dwelling and take it with him to the Erasmia police station where he booked it in as an exhibit. He left before the police photographer had arrived on the scene to take photographs of it. The axe was never sent to the forensic department for further analysis. He agreed that he should not have done so as it was part of the crime scene. Nevertheless, one of the photographs taken after he had left shows the axe on the floor inside the dwelling. Later that morning, before 09h00 to be exact, he typed up a statement recording what, according to him, had occurred early that morning. The relevant portions of the statement reads:

"I went to the door with Sergeant Louw and my back up was Captain Sharp and Sergeant Louw's back up was Inspector Pearse. The door had a safety gate and it was not locked and I opened it to the right slowly in order not to make known our presence until we were ready to operate.

Then Sergeant Louw knocked on the iron door and announced that we are from the police and that the person inside must open the door and then to come out of the house with their hands raised above their heads. I then heard four (4) loud bangs that sounded like gunfire from inside the house and then the door opened from the inside and there was man in the doorway with an axe in his right hand raised above his head ready to strike and I saw that he was striking at me and I fell back against the wall of the house which was behind me and withdrew to my left and rolled my shoulders to my left and just felt the blow going over me and felt something jerk at my jacket on the right hand side.

I heard gunfire from my left where Captain Sharp was standing with Inspector Pearse and they were in direct support of me and Sergeant Louw. I moved away from the door and took cover.

Sergeant Louw thereafter instructed the man to come out of the house but there was no reply from the house. Sergeant Louw persisted for approximately 25 min to shout at the people inside the house that we are from the Police and that the house is surrounded and that they must come out with their hands raised and that there is no where to go.

After the person came out of the house I arrested the suspect known as Njabulo Tshuma with date of birth 1979-05-02 and detained him at Erasmia SAPS: Erasmia CAS 34/06/2009 refers Attempted Murder. An axe, found inside the doorway, which I booked in as an exhibit Erasmia SAP 13/331/2009 refers, and SAP 14/15/06/2009 and OB entry 169/06/2009. The suspect had injuries on his leg and was transported to Kalafong hospital.”¹

9. During cross-examination he was unable to explain why, if he had taken the axe with him before the photographer had arrived on the scene, was it still in the dwelling after he left. He also could not explain why, if he was so close to the door with a torch-light focussed on the door, was he not able to see it opening and clearly see a man emerging with an axe in his hand.

10. Capt Sharp’s testimony was presented to shed greater light on the actual shooting of the plaintiff. He stated that he saw the door of the dwelling opening and someone emerging therefrom and attacking Capt Sholtz. This happened very quickly. Instantaneously, he discharged his firearm, which

¹ Bundle, pp 72-73. The statement is quoted verbatim. It was deposed to before a commissioner of oaths.

was an R5 Rifle, and which was pointed at the person who came out of the dwelling. He cannot recall how many shots he fired. Captain Pearce also discharged his firearm and did so at exactly the same time as himself. Once the shooting commenced, the person retreated into the dwelling. They searched the dwelling, found a young lady inside and the axe lying on the floor. Capt Sholtz took the axe and booked it in at Erasmia police station. Later that morning he typed up a statement of his account of the incident and deposed to it at 09h00. The font used by him is exactly the same as that used by Capt Sholtz. The statement of Capt Sholtz and his statement contain numerous sentences that are identical in terms.

11. Sgt Naidoo, who is, amongst others, a photographer with the SAPS, testified that he was summoned to the scene of the shooting at about 01h15 on the morning of 3 June 2009. He arrived there at 02h20. Another policeman there told him that a suspect, who had a firearm in his possession, was shot by the police. He was instructed to take photographs of the scene. He did not take detailed photographs of the door to the dwelling as his attention was not directed to it. He found the axe lying on the floor and was told to photograph it. He took photographs of a number of R5 cartridges lying on the floor. After taking photographs of the scene he left.
12. Lt Jodola was tasked to investigate the charge laid against the plaintiff by Capt Sharp. He was only allocated this task on 9 June 2009. On 4 June 2009, i.e. one day after the incident and the arrest, another officer had

been given this task. That officer collected statements from witnesses to the incident, including the plaintiff and his niece. On 9 June 2009, upon receiving the docket containing these statements, he immediately proceeded to the magistrates court to have the matter placed on the court roll. He was unsuccessful as the prosecutor controlling the roll refused to accede to his request because the arrest of the plaintiff had taken place more than forty-eight (48) hours before the 9th June 2009. He immediately proceeded to the charge office at Erasmia police station and informed the policemen there (he cannot recall their names or ranks) that he was tasked to investigate the charge against the plaintiff, but that since the prosecutor at the magistrates court refused to place the matter on the court roll, they should ensure that the plaintiff was no longer detained. He was under the impression that they would immediately release the plaintiff as they were the ones that had detained him at the Kalafong Hospital. He was surprised to learn that the plaintiff was only released on 22 June 2009. As far as he was concerned there was no case for the plaintiff to answer. However, he could not enlighten the court as to whether it was necessary to arrest the plaintiff or not.

The plaintiff's evidence

13. The plaintiff, a Zimbabwean citizen, testified that he travelled to and arrived in Johannesburg on 30 May 2009 in order to attend a job interview. He spent the night at his cousin's dwelling, which consists of a single room (a "shack" in his words) in Diepsloot. He lived there from 30 May to 3 June 2009 when he was shot by the police and hospitalised. On the evening of

2 June 2009 he was with his niece, a Ms Olitha Ncube (Ms Ncube), at the dwelling. He chopped wood for a fire which he prepared in order to keep them warm, had a meal with his niece, and after a while they both retired to bed. At approximately 01h00 on 3 June 2009 he and his niece were awakened by the sound of loud noises coming from outside the dwelling. He heard voices of men. The voices came from right outside the door of the dwelling they were sleeping in. His niece was very frightened as was he, but he tried to keep calm and told her to get under the bed in order to protect herself. They both thought that the persons whose voices they heard were robbers. He took hold of an axe that was lying on the floor and knocked it several times against the corrugated iron in order to arouse the persons sleeping in the main dwelling. He was standing near the door. Immediately thereafter he heard the sound of gunshots and before he could react he was shot in the leg. He heard the people outside shout: *"Police. Jackie come out, the place is surrounded."* He replied that he was not Jackie, that he was shot and that he intended to come out. His niece opened the door and ran back to hide under the bed, while he slowly crawled out of the dwelling. Thereafter he was arrested and taken to hospital. The rest of his evidence is captured in the common cause facts identified above.²

14. The plaintiff's niece, Ms Ncube, testified under strain of great emotion. From the commencement of her testimony she indicated that the incident was extremely traumatising for her and that she still had great difficulty

² See paras 3 and 4

coming to terms with it. Despite this she gave a clear account of what occurred. She corroborated the plaintiff's evidence that they were awakened by loud noises coming from outside the dwelling; that she was absolutely petrified; that she thought that they were on the verge of being accosted by robbers; that the plaintiff told her to take cover by hiding under the bed that she was sleeping on; that the plaintiff knocked against the side of the dwelling with the axe in the hope of arousing the occupants of the main dwelling and that the plaintiff was shot in the leg while still inside the dwelling.

The probabilities of the two versions

15. The two versions are diametrically opposed to each other. There is no way that they can be reconciled: only one of the two versions can be a correct and a true reflection of the facts. In a matter such as this it is necessary to have regard to the credibility of each of the witnesses, their reliability and the probabilities of each of the versions being true, taking into account all the facts. This principle, trite as it may be, has been elaborated upon in the following terms:

“On the central issue, as to what 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 of 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 will prevail.³

16. There are a number of problems with Capt Sholtz's testimony. Firstly, his account that whilst he was right in front of the door with a torchlight focussed on it, he could not see a human being, but only see what appeared to be a human figure, coming out of the door which opened slowly towards the inside. The human being was no more than an arm's-length away from him. He, on the other hand, just stood there with his firearm pointing at the door doing nothing and saying nothing while this human being swung an axe at him. This version does not fit easily with a basic common sense understanding of human interaction. No person caught in the same circumstances as he was on that morning could have avoided seeing a human being emerging from a door that was opening inwards, and no reasonable person would have failed to react instantaneously, especially since he would have been, as Capt Sholtz was, fully prepared for a confrontation. The next problem is that according to him he took the axe with him before the photographer came, yet the axe

³ *Stellenbodsch Farmers Winery Group Limited & Another v Martell et CIE & Others* 2003 (1) SA (SCA) 11 at paragraph 5.

is seen in a photograph taken after he supposedly left. The third problem is that according to his statement written a few hours after the incident he “*detained him at Erasmia SAPS*”. Yet is it common cause that the plaintiff was never taken to the Erasmia police station. He was taken directly to the Kalafong Hospital where he was detained while receiving treatment for the gunshot wound.

17. The testimony of Capt Sharp, too, raises an important issue that was not satisfactorily dealt with by the defendant: Capt Sharp was not able to explain how it was that he was only able to note the emergence of the person from the dwelling after the person had already attacked Capt Scholtz. He was, after all, specifically tasked with providing back-up for Capt Scholtz, and as such was on full alert when Capt Sholtz proceeded no more than a pace or two ahead of him.
18. Further, it bears mentioning that the statements made by Capt Sholtz and Capt Sharp at exactly the same time (09h00 on 3 June 2009) were so similar that the inference that there was collusion on their part in documenting their experiences is too strong to be ignored. The ineluctable conclusion to be drawn from this is that when drafting the respective statements they co-operated with each other to such an extent that neither of their accounts can be accepted as being a self-standing and independent record of the incident.

19. On the whole, the version of the defendant as to what happened in the early hours of the morning of 3 June 2009 is tainted by internal contradictions (such as the axe being removed from the scene before the photographer arrived on the scene when, in fact, it was photographed at the scene), and is not credible (such as none of the policeman who were facing the door of the dwelling saw the plaintiff emerge from the dwelling until he had struck Capt Sholtz, and that even though they discharged their firearms as soon as they saw him strike Capt Sholtz, he was able to disappear into the dwelling without being fatally shot. In this regard it has to be borne in mind that they discharged the R5 rifle which is a deadly weapon). The police, it must be remembered, were large in number, were well armed and had surrounded the dwelling before actually announcing their presence. In fact, the success of their mission depended on them maintaining the element of surprise and, for this reason, they were extra careful in moving swiftly and silently before they pounced at the door of the dwelling. In these circumstances, for the defendant's witnesses to claim that they were taken by surprise when the plaintiff, who was allegedly armed with nothing more than an axe, came out of the dwelling and attacked one of them before they discharged their lethal weapons does not make sense. The defendant's witnesses, Lt van Vuuren, Capt Sholtz and Capt Sharp believed that the occupant(s) of the dwelling was armed with lethal firearms and were expecting him/them to use these when they confronted the occupant(s). They were, therefore, not only aware of, but prepared for, a possible violent confrontation, so much so that, they came very well prepared for such a confrontation. On these

facts, it has to be concluded that the defendant's version is simply not probable.

20. The plaintiff's version, on the other hand, makes a great deal more sense. The plaintiff and his niece were asleep when the police struck. They were rudely awakened by the police loudly announcing their presence. They were, naturally, shaken by this and frightened out of their wits. Hence, the plaintiff using the axe to knock on the iron sheeting that walls the dwelling in order to call for help is a perfectly reasonable response.

Costs

21. The plaintiff has succeeded in proving that he was unlawfully arrested, assaulted and detained by members of the SAPS. However, the damages he has suffered as a result thereof have yet to be determined. This, by agreement between the parties and by subsequent order of this court has been reserved for another day. As a result it is not clear what damages the plaintiff will ultimately prove. It may well be that the damages he proves constitutes an amount that falls within the jurisdiction of the magistrates court, in which case he would only be entitled to recover his costs on a magistrates court scale. As this is a matter that can only be determined after the completion of the second stage of this case, I am of the view that the costs of the hearing thus far also be held over and be determined as part of the hearing on the second stage.

The order

- 1 The assault (by way of shooting) of the plaintiff on 3 June 2009, the arrest of the plaintiff on 3 June 2009 and the detention of the plaintiff from 3 June 2009 to 22 June 2009 by members of the South African Police Services is declared to be unlawful.
- 2 The matter is postponed *sine die* for determination of the plaintiff's damages arising from his unlawful assault, arrest and detention.
- 3 The costs of the application are held over to be determined at the hearing concerning the quantum of the damages suffered by the plaintiff as a result of the unlawful conduct referred to in paragraph 1 of this order.

Vally J

Gauteng High Court, Johannesburg Local Division

Appearances:

For the plaintiff	:	Attorney B L Mzamo
For the respondents:		Adv N Sikhakhane
Instructed by	:	State Attorney
Dates of hearing	:	04 th – 13 th February 2015
Date of judgment	:	29 th July 2015