

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 23114/2010

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	2011-09-30
	DATE
	SIGNATURE

30/9/2011

In the matter between:

SANJAY MOHALNLAL DOOKHI

Plaintiff

and

MORNE TROSKIE

Defendant

J U D G M E N T

MAKGOKA, J:

Introduction

[1] On the evening of 10 November 2007 the plaintiff's family and friends were celebrating Diwali, a Hindu festival to usher in the new season at the end of the monsoon. As part of the celebrations, fire-crackers are lit. An argument ensued between the defendant and the plaintiff about the use of the firecrackers. The end result of the argument was that the defendant shot the plaintiff. The plaintiff claims

delictual damages as a result of that shooting. The defendant's plea is one of self-defence.

The evidence

[2] The plaintiff and the defendant testified in their respective cases. The defendant's former wife also testified on his behalf. The following is a brief exposition of the totality of their evidence. The defendant lives a street across plaintiff's house. The day before the incident, Friday 9 November 2007, there were complainants by some neighbours about the noise caused by fire-crackers discharged at the plaintiff's house. Police intervened. On the evening of the incident, the plaintiff, his family and friends were continuing with the celebration, in the process discharging fire-crackers. The defendant, unhappy with that, went to the plaintiff's property and confronted the plaintiff. There was argument between them, which ended with the defendant hitting the plaintiff with a sjambok on the head. This is the first encounter between the parties.

[3] The plaintiff rushed into his house, while the defendant fled to his house, telling his wife of a possible danger and requested her to call the police and the armed response company. He then took out his own fire-arm and went outside. In the meanwhile the plaintiff had arrived at the defendant's property and standing outside, near or in the vicinity of the defendant's gate. The defendant fired several shots, one which struck the plaintiff on his right thigh. A criminal trial followed, in which the defendant was the accused. It resulted in his acquittal. The transcribed record of those proceedings is part of the papers in this court.

Disputed facts

[4] Although the facts are largely common cause, two issues are in dispute. First, it is disputed by the plaintiff that he aggressively threatened to shoot during the earlier encounter at his property. Second, the parties differ as to the position (outside the defendant's property) where the plaintiff stood when the defendant shot him. According to the plaintiff, he stood on an elevated level behind the concrete wall, whereas according to the defendant, the plaintiff was standing right in front of the gate. I can dispose of these summarily.

[5] With regard to the first aspect, it is clear that the plaintiff was deeply hurt and humiliated by the defendant in hitting him with a sjambok, in front of his family and friends. He is a police officer. He must have felt a deep sense of humiliation. He was very angry-he admitted that much in evidence. The probabilities are therefore that when he turned to rush into his house, he did indicate to the defendant that he was going to shoot him. On the second aspect, the blood trail from the plaintiff's injury suggests that the plaintiff was shot while standing in front of the defendant's gate. There are no blood spots at the area where he testified to have been standing. Furthermore, this was never an issue in the criminal trial, where it was common cause that the plaintiff was standing in front of the defendant's gate when he was shot.

[6] On the probabilities, I accept the defendant's version on both aspects. Having said that, I must hasten to state that this is not a matter which turns so much on the

credibility of the witnesses, but on the objective facts. For what it is worth, the plaintiff was unsatisfactory in some aspects, for example the position he stood when he was shot. Obviously with his version, he sought to portray himself as not having been in a position to shoot the defendant, as he would have been impeded by the concrete wall. There were inconsistencies in his evidence in the criminal trial and in this court. But for all that, his evidence, and in particular his credibility, is largely irrelevant to the determination of the crisp question whether the defendant acted in self-defence under the circumstances. I do not need to accept his evidence to make that determination.

The law

[7] As a general proposition, every infringement of the body *per se* infringes the personality right to *corpus* and therefore, wrongful. In *Stoffberg v Elliot* 1923 CPD 148 it was stated:

“In the eyes of the law, every person has certain absolute rights which the law protects ... and one of those rights is the right of absolute security of the person. Nobody can interfere in any way with the person of another, except in certain circumstances ... Any bodily interference with or restraint of a man's person which is not justified in law, or excused in law, or consented to, is a wrong, and for that wrong the person whose body has been interfered with has a right to claim such damages as he can prove he had suffered owing to the interference.”

[8] To state the obvious, the right to bodily integrity is not absolute, as it is clear from the above passage. One of the grounds of justification is private-defence, as is the plea in the present case. Therefore if the body of another is infringed through an act of private defence such an infringement is lawful if all the requirements are met. The requirements to be satisfied before a plea of self-defence to a delictual claim for

damages will be upheld are the following: (i) there must have been an unlawful attack or threatened attack and the victim must have had reasonable grounds for believing that he was in physical danger; (ii) the means of defence must have been commensurate with the danger and (iii) dangerous means of defence must not have been adopted when the threatened injury could have been avoided in some other reasonable way: See *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 526G-H.

[9] The defendant bears the onus of proving that the infringement was justified. See *Mabaso v Felix* 1981 (3) SA 865 (A) at 871g-874D; *Ferreira v Ntshingila* 1990 (4) SA 271(A) at 273A and *Ntamo & Others v Minister of Safety and Security* 2001 (1) SA 830 (TKHC).

The scene of shooting

[10] Before I deal with the specific facts, a brief description of the scene is helpful to understand the context of the shooting. The plaintiff's property is surrounded by a concrete wall all round. A wide concrete driveway leads to an entrance gate, which itself leads to a garage, which is separate from the main house. The entrance door to the kitchen is to the right of the garage. It is secured by a security burglar and a wooden door. Next to the kitchen door is a normal-size kitchen window, through which one is able to have a clear view of the area in front of the garage and the gate.

The defendant's version

[11] Back to the facts. The defendant's version is that during the first encounter at the plaintiff's property, the plaintiff had verbally threatened to shoot him. According

to him when he saw the plaintiff standing outside his property with a gun, he formed a view that the plaintiff was going to make good his threat, hence he shot the plaintiff. He avers that the plaintiff, while standing outside his gate, had raised the hand holding the firearm in his direction. He immediately thought that that the plaintiff was about to shoot him.

Issue for determination

[12] On the authorities, it seems to me that the proper formulation of the question should be properly formulated as follows: did the plaintiff pose any danger to the defendant while standing outside his property? If the answer is in the affirmative, was the danger posed by the plaintiff imminent? If so, was the shooting of the plaintiff the only reasonable alternative for the defendant? Put differently, could the threatened danger have been avoided?

[13] To consider the above, one has to have regard to the totality of factors. As a starting point, I am prepared to accept that when he left the plaintiff's property after the first encounter, the defendant had a genuinely-held belief that the plaintiff intended to shoot him – either from the surrounding circumstances or the plaintiff's actual verbal threat (which is the more plausible). But once inside the sanctuary of his house, the danger posed by the plaintiff subsided somehow. The situation afforded him less drastic measures to avoid the potential danger posed by the plaintiff. In *Ntamo v Minister of Safety and Security* (supra) it was held that if the threatened harm can be avoided without the use of force, for example if one could flee without the danger to oneself, one is not entitled to act in self-defence.

In *Bhakaria v Mia* 1918 TPD 56 at 58 it was held that a person may use force only "after he has exhausted every other remedy". Consequently the infringement of the body is permissible if it is the only reasonable alternative.

[14] I mention two such reasonable alternatives at the disposal of the defendant. First, he could have remained in the house, observed the plaintiff's movements from the kitchen window, while waiting for the police and armed response to arrive, who had already been summoned. According to the defendant's wife, the latter normally took seconds to arrive. The plaintiff was standing at the gate. For him to have caused imminent danger to the defendant, the plaintiff would have had to scale over the gate or concrete wall, break open both the burglar gate to the kitchen door and the door itself. That would have taken time and effort, long enough for either the police or armed response to arrive. There was therefore simply no need for the defendant to venture outside. Second, he could have fired a warning shot. From the photos of the scene, it appears that the defendant fired randomly in the direction of the plaintiff. Some of the bullets struck the concrete wall from inside, and others struck the palisade gate. This is consistent with a person who had the intent to injure the plaintiff, more than avoid a danger to himself.

[15] I therefore take a view that although the plaintiff's presence outside the defendant's property posed some danger, it was certainly not "imminent". It would have been imminent had the plaintiff scaled over the wall, broken down the security gate and door. Whilst remaining outside at the gate, the plaintiff, in my view, posed no more than a potential harm. Where the threatened harm could be avoided without

the use of force self-defence cannot succeed. See *R v Molife* 1940 AD 202 at 204 and *R v Attwood* 1946 AD 331 at 340.

[16] I am satisfied that the plaintiff did not create imminent danger to the defendant, and the defendant could not, objectively, have considered himself to be in such danger. Much was made of the defendant's evidence that while outside his house, the plaintiff lifted his hand (holding the firearm) in his direction, thus creating a reasonable impression he was about to shoot him. This is irrelevant as he should not have ventured outside in the first place. The defendant's wife testified that the plaintiff was shouting for the defendant to come out as he wanted to shoot him. Under those circumstances, why venture into harm's way? At the risk of repeating myself, the threatened danger could have been avoided in some other reasonable way, as pointed out above. Therefore the defendant has failed to discharge the onus to establish the lawfulness of shooting the plaintiff. He could not have acted in self-defence.

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

1. The defendant is ordered to pay:
 - 1.1 100% of the plaintiff's proved or agreed damages resulting from the injuries sustained during the shooting incident on 10 November 2010;
 - 1.2 The plaintiff's costs.
2. The determination of *quantum* is postponed *sine die*.



T M MAKGOKA
JUDGE OF THE HIGH COURT

DATES OF HEARING : 1, 2 & 5 SEPTEMBER 2011

JUDGMENT DELIVERED : 30 SEPTEMBER 2011

FOR THE PLAINTIFF : MR Z OMAR (ATTORNEY)

INSTRUCTED BY : ZEHIR OMAR ATTORNEYS, SPRINGS, AND
FRIEDLAND HART SOLOMON NICHOLSON,
PRETORIA

FOR THE DEFENDANT : ADV C ACKER

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