

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES: **R C HART + 3 v MASAKHANE SECUIRTY (PTY) LTD**
NOT REPORTABLE

Case Number: **317/08 & 318/08**

1. High Court: **PORT ELIZABETH**

[1] DATE HEARD: **3, 4 & 5 AUGUST 2009**

[2] DATE DELIVERED: **20 AUGUST 2009**

JUDGE(S): **EKSTEEN AJ**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Plaintiff(s): **ADV P MOUTON**
2. for the Defendant(s): **ADV BEYLEVELD**
- 3.**

Instructing attorneys:

- Plaintiff(s): **VAN VOLLENHOVEN & ASSOCIATES**
- Defendant(s): **Mc WILLIAMS & ELLIOT**

CASE INFORMATION -

1. *Nature of proceedings:*
2. *Key Words:*
3. *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA

NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No. 317/08
318/08

Date delivered: 20 August 2009

In the matter between:

RONALD CHRISTOPHER HART

First Plaintiff

JAN STALMEESTER

Second Plaintiff

THEMBELANE ASHELY MOSS

Third Plaintiff

PUMPLANI BLOUW

Fourth Plaintiff

and

MASAKHANE SECURITY (PTY) LIMITED

Defendant

JUDGMENT

EKSTEEN AJ:

[1] During May 2006 the defendant, a private company providing security services, was contracted to Transnet Limited to provide security services on the train operating between Uitenhage and Port Elizabeth. Early in the morning on 31 May 2006 violence erupted on the train on route to Port Elizabeth between the Swartkops and New Brighton Stations. In the course of the events which unfolded in the third last carriage from the rear of the train (coach 11850) a security guard in the employ of the defendant was forcibly thrown from the moving train and various shots were fired in coach 11850. One Dietlov (the deceased), a passenger on the carriage was fatally injured in the shooting whilst a number of passenger sustained gunshot wounds.

[2] Two separate summonses were issued flowing from these events under case no. 317/08 and 318/08 respectively. The two cases have been consolidated by order of court.

[3] The plaintiff in case no. 317/08, one Liesl Tarentaal, claims damages from the defendant in her representative capacity as mother and natural guardian of her minor child Shanick Mellissa Tarentaal. She alleges that the deceased died in the said shooting on the train when he was shot between the eyes by one of the security officers in the employ of the defendant. Tarentaal contends that she was engaged to be married to the deceased at the time of his death and that the minor child had been born from their union. As a result of his death the minor child has lost the maintenance and support which the deceased provided and which he was in law obliged to provide.

[4] There are four plaintiffs in case no. 318/08. All these plaintiffs allege that they sustained gunshot wounds at the hands of the security officers and they accordingly claim damages from the defendant arising from the injuries which they sustained in the incident.

[5] In each case the plaintiffs contend that the security officers acted negligently in discharging their firearms in coach 11850 in the presence of other passengers. In response the defendant has admitted in its plea that four security officers were present on the train and that they were

performing security services on behalf of the defendant. Whilst there is some ambiguity in some of the pleadings it was common cause at the trial that the security officers acted within the course and scope of their employment with the defendant at all times material hereto. It is alleged on behalf of the defendant that the four guards were attacked by a group of persons armed with bottles, blunt objects and firearms. It is alleged that a struggled ensued and when one of the assailants pointed a firearm at one of the officers, one Sidlova, he wrestled with the attacker to grab the firearm away from him in order to save his own life. In the course hereof shots went off. The defendant alleges that another security officer, one Swayana, fired shots when the attack occurred, particularly when Sidlova was flung from the train, "after shots were fired" and other employees were physically attacked. It contends that the shots were fired in order to save the lives of the defendant's employees.

[6] In these circumstances the defendant denies that any of its employees acted negligently and contends that they acted in self defence when discharging their firearms. In addition the defendant denies that any of the plaintiffs or the deceased were struck by bullets discharged by any of its employees.

[7] At a pre-trial conference in terms of Rule 37 of the Uniform Rules of Court the parties agreed to a separation of merits and quantum in terms of Rule 33(4). Such a separation was duly ordered. In the circumstances two issues fall to be determined. First, whether the deceased or any one of

the plaintiffs in case no. 318/08 was struck by a bullet discharged by any employee of the defendant. Secondly, in the event of it being established that any of the plaintiffs or the deceased was shot by an employee of the defendant, then whether such employee acted negligently in shooting the plaintiff or deceased.

[8] At the time of the incident a national strike in the security industry was in progress and had persisted for some weeks. In these circumstances security officers who reported for work did so in plain clothes in order to promote their own safety. The four security guards who did duty on the train between Uitenhage and Port Elizabeth on the morning in question were all dressed in plain clothes and had all worked on this train providing security services for a week or two preceding the incident. Part of their function on the train was to inspect the boarding tickets of commuters and for this reason they were known to passengers as security officers prior to the incident.

[9] Coach 11850 was a typical railway carriage and had two entrances on each side of the carriage for passengers boarding or alighting from the train at the station. There is a single door at each end of the coach permitting pedestrian traffic from one carriage to the next while the train is in motion. It has one row of benches down the length of the coach on either side facing each other and there is provision for standing room between these two rows of benches. There are a number of metal poles extending from the floor to the roof of the carriage, presumably to enable

standing passengers to hold on to in order to stabilise themselves whilst the train is in motion.

[10]The first plaintiff in case no. 318/08 (“Hart”) testified that he travels on this particular train each day to and from work. There is usually a group of passengers who sit on the floor of the train opposite the entrance to the coach playing dominos. Sidlova did not approve of this practice and an argument had previously arisen between him and some of the domino players. On the fateful morning the domino players once again took up their position in front of the passenger entrance to the carriage. The carriage was full of passengers with many people standing in the aisle. Hart was not a domino player but was seated at the end of the row of seats next to the passenger’s entrance where the domino players played. At some stage one of the passengers said “hier kom security”. He saw a short stocky security official, who, it transpired, was Sidlova. He was known to Hart as “Sid”. Sidlova approached the domino players and it appeared to Hart that he disapproved of their presence there. An argument arose between Sidlova and one of the players. In the course hereof some of the passengers grabbed Sidlova by the shirt. A struggle ensued. At this stage Hart stood on his seat in order to see what was happening. He noticed that the doors of the train were open even though the train was in motion. He saw Sidlova reach behind his back and noticed that Sidlova was reaching for a firearm which was tucked into his trousers. He shouted to warn the passengers that Sidlova had a gun and

was going to shoot. At this stage the passengers pushed Sidlova out of the moving train without any shots being fired.

[11]When Sidlova was ejected from the train and as he fell next to the railway line shots went off in the carriage without any warning. Hart says that he saw the remaining three security guards that were on the train at that stage standing outside the door at the end of the carriage and on the platform between coach 11850 and the next coach, the fourth coach from the rear of the train. He says that the security officers were shooting. Many shots rang out and passengers were fleeing and seeking cover. During this shooting he says that he was struck in the left side. He also noticed the deceased lying on the ground and saw that he had been shot between the eyes. He was dead.

[12]Hart denies that any shots were fired before Sidlova was ejected from the train. He did not see any passengers armed with firearms and in his view nobody's life was in danger after Sidlova had been ejected from the train.

[13]In cross-examination Hart conceded that he had not seen any of the security guards, apart from Sidlova, in possession of a firearm. He could not see who was shooting, but, he maintains that the shots emanated from the door at the end of the carriage where the security guards stood.

[14]The second plaintiff ("Stalmeester") largely corroborates the version of events to which Hart testified. He states that he was indeed one of the

domino players that morning. He saw the security officers arrive and he confirms that they were dressed in civilian clothes. They were known to him as security officers as they had performed duty on the train prior to this morning. He states that an argument ensued between one of the security officers and some passengers about something which had allegedly occurred the previous day. A second security officer intervened and some passengers then grabbed this second security officer by the shirt. A struggle ensued. At this stage he went to take up his seat on one of the benches between the passenger entrance to the carriage and the door at the end closest to the fourth last carriage. He did not actually see Sidlova being thrown out of the train. He states, however, that when the struggled occurred he saw two of the other security officers, a man and a woman, move on through the door at the end of coach 11850 to the fourth carriage. Shortly thereafter the man returned, opened the door at the end of the carriage and began to shoot randomly into the carriage. Stalmeester states that he could see the man shooting at the end of the carriage although he did not see his face and would therefore be unable to identify the person. He was shot in the abdomen in the course of this shooting.

[15]The third plaintiff ("Moss") then testified. He too relates the story of these events as he observed them. He states that he was seated throughout on the bench between the passenger entrance and the door at the end of the carriage closest to the fourth last carriage. He noted the security officers approaching in the carriage and that an argument then ensued between

one of the security officers and some passengers. He could not hear what was being said from where he was seated but he noted the security officer reaching for a firearm which had been tucked into his belt behind his back. At this stage passengers grabbed the security officer and threw him from the moving train. Moss did not notice any passengers attacking the security officer with bottles or any other weapons. He denies having seen any passenger in possession of a firearm.

[16]When Sidlova was thrown from the train Moss saw another security officer at the door at the end of the carriage standing just outside the door. At this stage, after Sidlova had been thrown from the train, this security officer opened fire. He shot indiscriminately until the weapon was empty. A second security officer, who was standing immediately behind this security officer, then provided him with a second weapon and he again commenced shooting.

[17]Moss is unable to state how many shots were discharged but testified that when the shooting started, the deceased, who was standing immediately in front of him, was hit, first in the buttock and thereafter in the head. He says that passengers fled and sought cover and he turned his back on the shooting looking back from time to time at the security officer shooting. After the shooting he realised that he had been struck in the shoulder and at the back of his head causing superficial abrasions to his skull.

[18]The fourth plaintiff ("Blouw") also corroborates the version of the other plaintiffs in general terms. He was seated next to Moss. He states that he did not see Sidlova being thrown from the train because standing passengers obscured his view, although he learnt subsequently of the event. He states that coach 11850 was full of passengers and that it was difficult to see what was happening at the pedestrian entrances to the carriage.

[19]He noticed the four security guards enter the carriage checking on boarding tickets. They proceeded past him to approximately opposite the pedestrian entrance to the carriage. At that stage he noticed security guards retreat through the door at the end of the carriage. Having passed through the door they then returned, opened the door and from a position outside the door started shooting randomly into the carriage. From where he and Moss were seated they could see their assailant and recognised him. He was one of the security officials who had been doing duty on the train ever since the strike began.

[20]Blouw did not notice any violence prior to the commencement of this shooting and, although he was aware of a noise in the vicinity of where the domino players were seated he did not witness any fighting.

[21]Blouw states that during the shooting he saw his assailant lower his firearm and shoot Blouw in the foot.

[22]In addition to the plaintiffs a witness Savahl was called on their behalf.

Savahl was a passenger on the train this morning. He too was acquainted with the appearance of the plain clothed security officers and had seen them on the train before the incident. Savahl did not witness the struggle with Sidlova. He saw Sidlova depart through the open door of the moving train but is not aware of what gave rise to this. Seconds later he saw the door at the end of the coach open and one of the security officers standing outside the door. At that moment shots began to ring out.

[23]Savahl was looking in the direction of the open door at the end of the carriage and could see the assailant with the weapon pointed in his direction. He states that when the shooting started persons ran and dived for cover. He believed it was unnecessary and that the security officers were firing "blanks". He realised his mistake when the deceased, who was standing right next to him, was shot in the head and fell to the ground. The deceased was dead.

[24]Savahl saw the security officer continually shooting until his weapon was empty and then he drew a second weapon from the side of his body and again started shooting until this weapon too was empty. At this stage he sought cover.

[25]At New Brighton Station the police were present on the station and disarmed the security guards confiscating their weapons.

[26]Under cross-examination Savahl conceded that he only saw two security officials on the train. One was thrown from the train and the other was the person who fired the shots. He did not see any attack on Sidlova prior to him being thrown from the train.

[27]During cross-examination Savahl was confronted with a document which purports to be a police statement minuted from him. In particular it was suggested to Savahl that on a proper construction of the statement he had informed the police that he had heard five to six shots being fired prior to Sidlova being thrown off the train. Savahl, for his part, admits his signature on the statement and admits that he made a statement to the police. He states, however, that the statement was not read back to him prior to the signature neither was he given a opportunity to read through the statement before signature. He denies that he informed the police of shots fired prior to Sidlova being pushed out of the train.

[28]The approach which is to be adopted where there are contradictions between the police statement and the *viva voce* evidence of a witness was considered in ***S v Mafaladiso en andere*** 2003 (1) SACR 583 (SCA) 593e-594h. A summary thereof is contained in the head note which reads as follows:

“The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in

neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witness actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural difference between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence (must), amongst other factors, be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge,

namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.”

[29]A further fact that is associated with the quality of the witness’s explanation regarding contradictions/omissions is the reaction of the witness when confronted with such contradictions or omissions. Different witnesses will react in different ways. Regard must always be had to the type of person the witness is. (See ***S v Govender and Others*** 2006 (1) SACR 322.)

[30]In the present instance, I have already stated that the witness Savahl denies that he ever conveyed the disputed information to the police official who took down his statement. He says that he was not afforded the opportunity to read the statement or to have it read to him prior to signature and he accordingly denied that the police officer recorded what the witness told him. In the face hereof the police official who minuted the statement from him was not called to prove the statement and the evidence of Savahl in this regard stands uncontradicted. On weighing up all the evidence and considering the guidelines set out above I am by no means satisfied that a self-contradiction has been established.

[31]I pause to mention that a similar approach was followed in respect of statements allegedly made by the plaintiffs in case no. 318/08. I do not

intend herein to analyse questions put to each of them in this regard. Suffice it to say that when dealing with the various witnesses I have had regard to the evidence given by them in connection with all the aspects dealt with by counsel when questioning them in connection with their police statements. In evaluating the credibility and reliability of each of these witnesses I have taken all this into account, adopting the guidelines which I have set out above.

[32]For the defendant the witness Sidlova testified. Sidlova testified that he and his colleagues had completed their duties between Uitenhage and Swartkops Station. They were not required to perform any duties between Swartkops Station and New Brighton Station and accordingly preceded down the length of the train towards the rear carriage. Two of his colleagues proceeded ahead of him into coach 11850. He is unable to recall how far ahead they were and did not see them as he entered coach 11850. As he entered the door at the end of the carriage he was isolated and he noticed that the carriage was unusually full of people. Nobody was seated on the benches but persons stood on top of the benches and on the floor. As he entered the coach a man with a black leather jacket approached him from the front and struck him on the head with a full 750ml bottle of Black Label beer. Simultaneously he was stabbed with a sharp object from behind. He noticed that one of his assailants raised a firearm and pointed it at him. At this stage a struggle ensued as he pushed the firearm down to the ground in order to protect himself. In this process the firearm was discharged into the ground beneath him. He

believes that it was discharged at least on two occasions but cannot say how many rounds were fired. Thereafter he was thrown from the train and does not know what ensued thereafter.

[33]After the completion of the evidence of Sidlova a further Rule 37 Minute was prepared and handed in. This Minute records a number of agreements relating to firearms found in the possession of security officers employed by the defendant.

[34]It was common cause at the hearing that the four security officers in the employ of the defendant who served on the train that morning were one Tsotsa, a woman and Swayana, Madevula and Sidlova. The admissions recorded in the Rule 37 Minute reveal that a 9mm Norico firearm with one magazine containing eight unfired rounds was found in possession of Tsotsa. A .38 special revolver (Taurus) was found in possession of Swayana on the New Brighton Station immediately after the event. The firearm had four live rounds in and one empty cartridge. In addition five empty cartridges were found in the left jacket pocket of the said Swayana. At the same time a .38 special revolver (Taurus) was found in possession of Madevula together with five used cartridges. There is no evidence of any other empty cartridges found on the train or in possession of anyone who was on the train.

[35]Each of the first to the fourth plaintiffs in case no. 318/08 bear the onus to establish on a balance of probability that he was injured by a bullet

discharged from a firearm operated by one of the defendant's employees. Tarentaal, similarly, bears the onus to establish that the deceased was shot by a bullet discharged by an employee of the defendant. In the event of this being established the defendant would bear the onus to prove that the shooting was justified on the grounds pleaded. Compare ***Mabaso v Felix*** 1981 (3) SA 865 (A) at 173B-F and 174B-E; and ***Minister of Law and Order v Monty*** 1995 (1) SA 35 (A) at 39D-F and 40A-C.

[36]The first to fourth plaintiffs made a favourable impression upon me in the witness box. I did not gain the impression of any endeavour to embellish or to mislead. They had all been subjected to an unexpected traumatic experience and I gained the impression that they related, as best they could, their recall of the events. The witness Savahl too, gave his evidence in a simple straightforward manner as he related events which transpired directly before him. Sidlova, on the other hand, did not make a favourable impression upon me in the witness box. On numerous occasions lengthy silences followed when simple questions were put to him. Some questions simply remained unanswered.

[37]In considering the evidence of the plaintiffs I am alive to the discrepancies which exist between the various versions. Discrepancies of this nature are not surprising in the circumstances to which the evidence relates and in view of the lapse of time from the incident to trial. I do not consider these discrepancies to be material to the issues in dispute. The witness Savahl was standing five metres away from the assailant and could see the

weapon aimed at him. He presented a vivid account of his observations. I was favourably impressed with the candour and demeanour of this witness in the witness box. He has no relationship with any of the plaintiffs and I detected no apparent bias in his evidence. The deceased was standing directly alongside Savahl and Savahl testified that the deceased was shot by the security officer from the door at the end of the carriage. In view of his position in the carriage and his proximity to the assailant and the deceased I am satisfied that he had sufficient opportunity to experience and observe the events which occurred to give a reliable account thereof. Moss similarly testified that the deceased was standing in front of him when he was shot. It occurred after Sidlova was ejected from the train and nobody other than the security officer at the end of the carriage was shooting at the time.

[38] Both Savahl and Moss saw the man at the door at the end of the carriage shooting until his first firearm was empty. He thereafter obtained a second firearm. Savahl is of the opinion that the second firearm was drawn from his side whilst Moss's observation was that the second firearm was handed to him by his colleague who stood behind him. Both testified that he continued shooting with the second firearm as well. This evidence accords with the admitted facts relating to the empty cartridges found in possession of Madevula and of Swayana and in the two firearms immediately after the incident.

[39]On a consideration of the totality of the evidence I do not consider that the discrepancy between the witness Savahl and Moss in respect of the manner in which the assailant came to be in possession of the second firearm detracts materially from the reliability of their observations. Furthermore the events to which Sidlova testified do not accord with the pleaded case that the four security guards were attacked by a group of persons. His evidence does not support the further contention pleaded that shots were fired by his colleagues when the attack occurred.

[40]The first, second, third and fourth plaintiffs in case no. 318/08 all testified that after the shooting commenced from the end of the carriage no other shooting occurred. They were all injured in the course of this event. It is apparent from the evidence of Moss and Hart that this assault only commenced after Sidlova had been ejected from the train. No evidence was tendered to contradict this account. In particular no evidence was tendered in respect of any shooting by security officers at the time of the alleged attack on Sidlova as is pleaded.

[41]In these circumstances the evidence of Sidlova becomes largely immaterial. The high water mark of the evidence tendered by Sidlova is that two rounds were discharged from a firearm held by a third party during the course of a struggle when the firearm was pushed down so as to point at the ground. Whilst it was put to Moss during evidence that empty cartridges which do not belong to any of the employees of the defendant were found on the train, no such evidence was forthcoming. Whatever

may have occurred before Sidlova was ejected from the train does not appear to me to displace the uncontradicted evidence discussed above. On a consideration of the evidence of Savahl and of the first to fourth plaintiffs in case no. 318/08 I am satisfied that a reliable account of the shooting which occurred in coach 11850 after Sidlova was thrown off the train has been established. Similarly I am satisfied that the first to fourth plaintiffs in case no. 318/08 have established that each of them was shot in the shooting which occurred after Sidlova had been ejected.

[42]In the circumstances I am satisfied on a balance of probabilities that the first to fourth plaintiffs in case no. 318/08 have established in each case that they were struck by a bullet discharged by a firearm held by an employee of the defendant. I am similarly satisfied that the evidence has established that the deceased was shot by an employee of the defendant and that he died as a result thereof.

[43]It is accordingly incumbent on the defendant to prove the justification for the shooting. The difficulty which the defendant experienced is that neither Madevula nor Swayana were available to testify. In this regard Sidlova testified that Madevula has since passed away and the whereabouts of Swayana are not known. Tsotsa did not testify either. No reason was advanced why Tsotsa did not testify.

[44]In the circumstances it was fairly conceded by counsel acting for the defendant that if I find that the plaintiffs have established that they were

struck by bullets discharged by an employee of the defendant, then the defendant has not established any justification for the shooting. In these circumstances the first to fourth plaintiffs in case no. 318/08 are entitled to payment of such damages as they are able to establish that they have suffered in consequence of the shooting and the injuries which they have sustained in consequence thereof on 31 May 2006. The plaintiff in case no. 317/08 is entitled to payment of such damages as she may establish that she has suffered, in her representative capacity, as a result of the shooting of the deceased on 31 May 2006.

[45]In respect of costs, there is no reason to depart from the ordinary rule that costs should follow the result.

In the result I make the following order:

In case no. 317/08

1. The defendant is liable to pay to the plaintiff such damages as she may prove that she has suffered in her representative capacity as mother and natural guardian of Shanick Mellissa Tarentaal in consequence of the wrongful and unlawful shooting of Cornelius Selwyn Dietlov on 31 May 2006.
2. The defendant is ordered to pay the plaintiffs costs of these proceedings together with interest on the plaintiffs' taxed costs calculated at the legal rate from a date fourteen (14) days after taxation to the date of payment.

In case no. 318/08

1. The defendant is liable to pay to the first, second, third and fourth plaintiffs such damages as each of them is able to prove that he has suffered as a result of his shooting and the injuries sustained therein on 31 May 2006.
2. Defendant is ordered to pay the plaintiffs' costs of these proceedings together with interest thereon calculated at the legal rate from a date fourteen (14) days after taxation to the date of judgment.

J W EKSTEEN

ACTING JUDGE OF THE HIGH COURT