

Not reportable
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case no: **2012/08**
Date heard: **1/3/2010**
Date delivered: **25/5/2010**

In the matter between:

ALVIN JORDAAN

Plaintiff

and

THE MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

Pillay J,

This is an action for damages arising out of an incident in which the plaintiff was shot and injured by members of the South African Police Services ('Police').

Prior to the commencement of the hearing, the parties had engaged in a pre-trial conference as envisaged by Rule 37 of the Uniform Rules of Court and clarified certain issues. These were reduced to writing in the form of a minute.

Of note the parties agreed that the two bundles, made available at the hearing as exhibits 'A' and 'B' would be admitted into evidence. Exhibit 'A' consists of a series of photographs and medical records pertaining to the plaintiff. Few of the photographs depict firstly the erf where the incident occurred. The other photographs depict his injuries sustained in the incident. Exhibit 'B' consists of a number of police statements and various reports regarding the shooting in question.

Plaintiff's cause of action is based on an alleged deliberate and intentional assault by shooting, alternatively reckless or negligent shooting by a member of police, acting within the course and scope of his employment of the defendant.

It is common cause that the plaintiff sustained the following injuries arising out of this shooting incident:

- (a) An entrance wound to the left buttock over the greater trochanter (This bullet was reportedly extracted by way of surgery and probably through the area of the scrotum);
- (b) Two entrance and two exit wounds over the distal tibia of the right leg;
and

- (c) An entrance wound on the dorsum of the right foot inline with the second toe. This injury entailed a severed tendon in the right foot .The exit wound was located on the sole of the foot.

I was told that the quantum was agreed upon and only the issue of liability (or otherwise) of the defendant was required to be determined. I was requested that should I find that the defendant is liable, to make such an order and to include the agreed award and together with costs.

The defendant pleaded that the plaintiff was one of two people who was assaulting an officer who was in the process of arresting plaintiff's brother, and shooting the plaintiff constituted lawful action in warding off the dangers which flowed from the assault.

It was also agreed between the parties that the relevant conduct of the police was within the course and scope of employment by the defendant. Furthermore it was also agreed that the onus was on the defendant to justify the said shooting. However, the plaintiff accepted that he would lead evidence first.

It is common cause that on the 22 April 2006 the plaintiff together with three others accompanied his brother Caesar Jordaan ('Caesar'), an informal motor mechanic, to a scrap yard in Despatch, in order to purchase second-hand motor vehicle parts.

Caesar was driving a motor vehicle which belonged to his client. He was not able to find the parts at Despatch scrap yard and then decided to proceed to the nearby one in Uitenhage.

At the turn-off from Despatch to Uitenhage, they were stopped by the police who were travelling in a marked police vehicle.

Caesar was examined for signs of intoxication and all the occupants were bodily searched. The motor vehicle they were travelling in was also searched. Caesar was found to be sober and nothing untoward was found in the motor vehicle or on the others.

The driver of the police motor vehicle was Captain Schnetler and his passenger was Inspector Williams. Caesar drove towards his home using what is referred to as the 'Old Uitenhage Road'.

Caesar testified on behalf of the plaintiff. He said that, at the Uitenhage turn-off, he was asked to attend the Despatch Police Station by Captain Schnetler. He explained to the police that he needed to first drop the motor vehicle at home as it was that of his client. Despite the objection of Inspector Williams, Captain Schnetler agreed to the request on the understanding that he go to the Despatch Police Station thereafter.

He explained that on the way home, he realised that the police were following them. He was driving within the normal speed limits. While driving on the Old

Uitenhage Road, the police vehicle had been driven right up alongside his motor vehicle and Inspector Williams sprayed gas into his face and the motor vehicle. He then rolled up the window to prevent more gas being sprayed into his vehicle.

Soon thereafter he heard two loud bangs and noticed, when he looked back, that Inspector Williams had a firearm in his right hand. He did not know what caused the sounds but in the circumstances, concluded that they were gunshots. He became scared and thought that he and the others were in danger. He drove straight home with the police following.

He explained that he entered the driveway of his parental home. He stopped in front of the inside gate, got out and when he was opening the gate to park the vehicle, he was grabbed from behind, punched in the face and pulled away from the gate by Inspector Williams. He resisted what he described as an attack on his person by Inspector Williams and denied that he had given anyone reason to do so. He explained that he at first pulled away from Inspector Williams, then pushed him away and when the attack on him continued, he hit back.

He also stated that the plaintiff had come to his assistance and that at some stage, his mother and sister also came out of the house and shouted at the police. He explained that during the assault, he was pinned on the bonnet of the motor vehicle and this developed into wrestling with Inspector Williams.

He testified that the plaintiff's intervention consisted of coming between him and Inspector Williams and trying to pull them apart.

He described that the plaintiff was then shot in the foot. He realised this when, after hearing a shot, the plaintiff shouted out that he had been shot in the foot. He then saw Captain Schnetler shoot at the plaintiff again when the latter was about one or two metres away from his scuffle with Inspector Williams.

Caesar explained further that Inspector Williams then took his own fire-arm from out of his holster and seemed to want to hold it against his head. He told me that he was able to push the Inspector's arm in which the firearm was, away from his head and kept it away until the shooting was finished.

Soon thereafter, he was dragged away and locked up at the back of the police van. He was taken to the Despatch police station where he discovered that he had also been shot. He stated that he was never informed of the reasons for his arrest and he was never charged in respect of any offence flowing from his driving and/or for his conduct on that day.

He denied that he had interfered with the execution of duties of the police on that day especially that of Captain Schnetler and /or Inspector Williams.

He also denied that he sped away from them in Despatch and in particular, that he put the lives of others at risk. He also denied that he had ignored the

red lights of a robots or that he proceeded through intersections at which he should first have stopped in compliance with traffic signs.

He denied that he tried to jump over the gate in an attempt to escape from Inspector Williams. He also denied that during a tussle between Inspector Williams and himself, he wanted to get hold of the Inspector's firearm either on his own or together with the plaintiff.

He further denied that Captain Schnetler had tried to pull him away or hit him or had sprayed him with gas.

He specifically denied that Captain Schnetler had discharged two warning shots in order to warn them that he would or intended to use the firearm. He explained that the first shot injured the plaintiff in the foot. He was unable to say how many shots were fired during the incident because he was rendered temporarily deaf with the first shot being discharged so near him.

The plaintiff's sister Jolaan Jordaan was also called to testify. She said that at the time she was still living at her mother's house where the incident occurred. In the afternoon of 22 April 2006 the dog started barking. She then went outside and saw that Caesar and a policeman were fighting. Caesar was lying on the bonnet of a motor car parked in front of the gate next to the house. This gate was where a built garage now stands.

Her mother, who had gone out with her said that they should stop the policeman from assaulting Caesar. Their attempt to do so failed because they were pushed away by the policeman. (Inspector Williams).

She said that she and her mother had been sprayed with gas by the same policeman. This forced them to run away from the immediate scene to a position from which they could still observe what was happening. It is common cause that Captain Schnetler sprayed the gas at them.

She described that soon thereafter a shot was fired and the plaintiff exclaimed to his mother that he had been shot in the foot. While bending and holding his foot, she saw the policeman shoot him again in the region of the buttock. The plaintiff then fell.

She saw Captain Schnetler then shoot at the felled plaintiff twice more in the region of his legs, when he was lying on his side. Shortly thereafter, Caesar was put into the police van.

She said that before he was shot, the plaintiff was trying to separate Caesar and the policeman who were fighting. She also noticed that after the plaintiff was shot, the other policeman (Williams) had his firearm in his hand.

She described that when the plaintiff was shot the second time, he was approximately two metres away from Caesar and the other policeman. She

denied that the plaintiff had continued fighting with either of the policemen after he was shot in the foot.

The plaintiff then testified. He confirmed in so far as it affected him, what Caesar testified had occurred with the police in Despatch and on the way to their house.

He described how when Caesar was busy opening the gate, Inspector Williams pulled him away and pinned him on the bonnet of the motor vehicle. He explained that when he saw Inspector Williams assaulting Caesar for no apparent reason, he tried to intervene in defence of his brother by trying to keep them apart.

While he was trying to stop Inspector Williams from further assaulting his brother, Captain Schnetler shot him in the right foot. He then stopped intervening in that scuffle in order to hold or attend to his injured foot. While he was doing so, he was shot in the upper buttock. This caused him to fall down. Immediately thereafter while lying on his side, he noticed that Captain Schnetler had come right up to him. He testified that Captain Schnetler said that he was going to kill someone that day whereupon he shot him twice in the right leg. The plaintiff insisted that he tried to help his brother who was being assaulted by Inspector Williams.

He again insisted that they were on their way home in terms of an agreement with Captain Schnetler when they left Despatch and were not trying to get away from the police.

The plaintiff also denied that Caesar had tried to escape over a gate or that he and Caesar had tried to obtain possession of Inspector Williams' firearm.

He further denied that Schnetler had tried to pull him away and that he had sprayed both him and Caesar with pepper spray. He further denied that at some time during the scuffle, Williams did not have full control over his firearm. He also said that he did not know if a shot from Williams' firearm was somehow discharged during the incident.

The plaintiff denied that Williams was bleeding and that Schnetler had discharged two warning shots or that he gave verbal warning.

He stated that after he was shot in the foot he was forced to step aside and hold his foot. He emphasized that Schnetler shot him in the upper buttock when he was holding his foot and that felled him. He sternly disputed the proposition that Schnetler did not shoot at him at all when he was lying on the ground. He explained that after he was shot in the foot, he could hardly stand on it.

The plaintiff then closed his case.

Captain Hendrick Jacobus Schnetler testified on behalf of the defendant. He has twenty-four years service. He is stationed at the Despatch Police Station as he was, at the time of the incident.

He stated that on the afternoon of 22 April 2006, he was with Inspector Williams on patrol in the Despatch area.

They received a report from other people that a motor vehicle fitting the description of the vehicle driven at the time by Caesar, was being driven by a person who appeared to be intoxicated. They were also given information about the general direction in which such motor vehicle was being driven.

Proceeding in that direction, they saw the motor vehicle so described and indicated to the driver that he should stop. The motor vehicle was stopped at the mouth of the turn off to Uitenhage. The people who complained to them earlier also stopped there a short while later.

The driver, (Caesar), was examined and searched with the four other persons in that motor vehicle. The motor vehicle was also searched. He explained that the searches were for drugs and/or firearms.

Captain Schnetler testified that Caesar was sober and no drugs or firearms were found on anyone or in the motor vehicle. He explained that because the people who initially complained to them seemed dissatisfied, he asked Caesar to accompany them to the Despatch Police Station, merely to settle the matter

especially seeing that they were all parked in the vicinity of the mouth of the off-ramp and causing a potential blockage of the road. It seems there was no intention to charge or arrest anyone.

He said that they would drive behind them. He described that Caesar executed a U-turn and started to speed away driving through stop-streets, against the traffic lights and thereby causing danger to other people. They then gave chase because of Caesar's 'reckless and negligent driving'.

He described how they tried to stop the motor vehicle being driven away on the Old Uitenhage Road to Booysen Park. Firstly, he drove up right next to Caesar's vehicle so as to facilitate the spraying of gas into it through its open window. Shortly thereafter when the gas did not work, Inspector Williams discharged two stun-grenades near Caesar's motor vehicle. Neither of these attempts succeeded and Caesar proceeded to Booysen Park. The police followed them right to plaintiff's home.

He testified that he noticed Caesar trying to escape over a gate and Inspector Williams went to stop him. He noticed that a scuffle between the two then took place. He also saw the plaintiff join an assault on Inspector Williams. When he noticed the plaintiff and Caesar trying to gain possession of Inspector Williams' firearm as they assaulted him with clenched fists, he went to the assistance of his colleague. He stated that he saw each of Caesar and plaintiff with a hand on Inspector Williams' firearm. At this stage Inspector Williams had his firearm held in his hand and in the air.

Captain Schnetler testified that when approaching them, he had his firearm in his left hand and a pepper spray in the other. He tried to pull them away from Inspector Williams but this did not help. At that stage Inspector Williams was not in control of the firearm anymore and his attackers' fingers were on the trigger of the firearm, though he could not say whose fingers (of the two) it actually was.

He explained that two females then came to the assistance of Caesar and plaintiff and also tried to gain possession of Inspector William's firearm. As a result he sprayed pepper spray at the two females till they moved away and ran to the back section of the front of the property. The plaintiff was still assaulting Inspector Williams. Captain Schnetler stated that he then hit both plaintiff and Caesar with his firearm a number of times. He testified that Inspector Williams' firearm was by then pointing towards himself.

In the circumstances he discharged two warning shots at an angle of about forty-five degrees away from the plaintiff in order to persuade them to stop assaulting Inspector Williams. He was about one metre from him when he discharged the warning shots. This did not have any effect and circumstances then forced him to shoot the plaintiff in the foot. This according to Captain Schnetler did not deter plaintiff who continued with the assault on Inspector Williams. He was therefore again forced to shoot at the plaintiff. He shot at the region of plaintiff's hip. As soon as he did so, the plaintiff fell to the ground. This seemed to have stopped the scuffle and Caesar was then taken

to the police vehicle into which he was locked and an ambulance was called for plaintiff.

Captain Schnetler conceded that he was the only person that was shooting in the immediate vicinity at that time and that in the circumstances, it could only have been the shots he discharged which caused the injuries to the plaintiff.

He explained that Caesar's reckless driving formed the basis for wanting to arrest him as this was committed in front of the police.

He could not explain how the plaintiff sustained four gunshot wounds when two of the four shots he discharged were directed away from the plaintiff. He conceded that at that angle, these two shots could not have injured the plaintiff.

Inspector Dewald Williams also testified on behalf of the defendant. He has seventeen years service and is also stationed at Despatch Police Station as he was at the material time.

He testified that during the afternoon of Saturday, 22 April 2006, while on patrol with Captain Schnetler, they received a report from some members of the public that a particular motor vehicle was being driven by an intoxicated driver. They had received a description of the motor vehicle and followed the general direction described to them in search of this motor vehicle. Shortly thereafter, they saw this vehicle and stopped it in the area of Despatch.

The driver was examined and found to be sober. He and the others as well as the vehicle were then searched for drugs and firearms although this reason was never disclosed to any of those who were searched. Nothing untoward was however found.

He described that while still at that scene, two other vehicles stopped. One of these carried those who had initially complained to the police about the drunken driving. He stated that an argument then ensued between them and plaintiff's group.

He further testified that because the scene had the potential to block the road, they decided that both groups should go straight to the Despatch Police Station in order to straighten out matters. The police station was two kilometres away from where they were. They had put one of Caesar's young friends into their vehicle.

Inspector Williams stated that all parties were willing to do so and specifically denied that there was any request, let alone agreement, that Caesar could first take the vehicle back to Booyens Park.

He told me that, as they started to leave, Caesar began to pull off in an extremely fast manner, ignoring the red traffic lights and stop signs and driving in a dangerous manner in the direction of Booyens Park to the Old Uitenhage Road.

The police decided to follow them and tried to stop them. Inspector Williams testified to discharging two stun-grenades behind their vehicle in an attempt to get them to stop. He stated that he resorted to stun-grenades after his attempt to stop them by spraying pepper spray into their vehicle had failed. Upon being confronted by the prospect of causing an accident by discharging stun-grenades near Caesar's vehicle, he explained that he did not throw it on the road but into the bushy area alongside the road. He also added that the road was too busy to overtake Caesar's vehicle and therefore could not drive to the front of it in order to stop it.

He described that they followed Caesar right up to his home. When Caesar tried to escape, Inspector Williams pulled him off the gate over which he was trying to jump and pinned him down in trying to effect his arrest. However Caesar then resisted and tried to grab his firearm during the ensuing struggle in which the plaintiff was also involved when trying to assist Caesar. At some stage during the struggle, Caesar had his finger on the trigger.

Inspector Williams also testified that he was aware of two females who had tried to assist his two attackers at some stage but they were prevented from further interfering by Captain Schnetler. A shot was then discharged when Caesar pulled the trigger during the scuffle. He then heard at least two shots being fired. He could not give details thereof.

He explained that he tried to put handcuffs onto Caesar who was much smaller than himself.

While he was struggling with Caesar, he could not see what Schnetler was doing and in that respect he could not throw any light on Schnetler's action in discharging his firearm.

Mr Swanepoel who appeared for the plaintiff, and despite the agreement between the parties, argued that the onus of proving that shooting at the plaintiff was justified lies with the defendant. The argument is based on an assertion that the shooting occurred during an attempt to arrest. In the light of it being raised, I will deal with this issue briefly.

The defendant pleaded that when the plaintiff, with Caesar on the one hand, and Inspector Williams on the other, were struggling for possession of the latter's firearm, he shot the plaintiff once.

However contextually, it is clear from the pleadings that Captain Schnetler's conduct occurred within the broad spectrum of effecting an arrest.

The importance of this aspect is the prospects of dealing with this case outside of Section 49 of the Criminal Procedure Act 51 of 1977 in which case, the onus would conceivably be on the plaintiff to prove the defendant's liability.

In my view, the use of the firearm occurred as part and parcel of the broad operation of effecting an arrest. Judging from the pleadings and indeed the evidence and the conduct of the case, it is clear that this was always the parties' approach to the dispute. Consequently, the onus would still be on the defendant to justify shooting the plaintiff.

The issue is rather academic since the parties had in any event agreed at a rule 37 conference (and recorded it as such), that the defendant carried the onus of justifying the shooting on the basis of necessity and/or third party defence.

Consequently it is not necessary to determine whether the onus shifted on the basis that the activity changed from effecting an arrest to one of necessity or private defence.

Mr Swanepoel raised a number of legal arguments ranging from constitutional imperatives to freedom of individuals, proportionality, legality of the arrest and the entitlement to take drastic steps in circumstances brought about by the person(s) contemplating such steps themselves.

In the light of the conclusions I have arrived at, it is not necessary to deal with any of these legal aspects.

The version of the plaintiff differs vastly from that of the defendant's witnesses especially on the crucial aspects.

The plaintiff and Caesar deny having caused any situation which justified the action of the police.

While there were differences within the versions of the plaintiff's witnesses, these did not touch the material aspects and on which the plaintiff's witnesses were consistent.

Whereas on the other hand, the version of the defendant's witnesses while generally consistent, raises certain questions which go to the root of the case.

Where the plaintiff's version and that of the defendant are mutually destructive, the parties carrying the onus of proving his or her case can only succeed if:

"he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true", (per Eksteen JA in *National Employer's General Insurance Co Ltd v Jaggars* 1984 (4) SA 437 (A) at 440 E-G in which the plaintiff [Respondent] had the onus of proving liability of the defendant

[Appellant]. See also: *Plaatjies and Another v Road Accident Fund* [1999] 1 All SA 162 (SE).

While it is common cause that all concerned would have met up at the Despatch Police Station, it is improbable that Caesar would have raced away in a reckless manner in full view of the police. Furthermore, it is improbable that, having been examined and searched and nothing untoward being found by the police, Caesar would have committed such traffic offences, least of all in the presence of the police. It does not seem that he had reason to race away or escape from the police.

Furthermore, in an attempt to stop Caesar from proceeding further, the police were able to drive right up alongside their motor vehicle and spray him with gas. Yet the defendant's version in this regard is not that Caesar was travelling too fast but that they did not find an opportunity to overtake and force him to stop. It is improbable that over a distance in excess of twenty kilometres, no such opportunity presented itself. This aspect is further complicated by the use of stun-grenades in circumstances which rendered the road too busy to overtake. It is improbable that any policeman would or could put innocent road users at risk with the effects of a stun-grenade in such circumstances.

What is more, even if the use of stun-grenades was justified at the time, it could hardly cause Caesar to stop his motor vehicle because, as Inspector Williams said, he threw them in the bush alongside the road. Inspector

Williams changed his evidence on that aspect in testifying that he threw them in the bush when it was pointed out to him that discharging the stun-grenades on the road, which impression he initially gave, could cause a danger not only to Caesar but other road users. The initial impression of his evidence was that he threw them immediately behind Caesar's vehicle.

The defendant's witnesses both testified that they searched the occupants of Caesar's motor vehicle as well as the motor vehicle itself routinely for drugs and firearms without divulging such reasons for the searches. Neither of them was able to explain how the plaintiff and Caesar knew that this was the reason for the search.

Most important is the evidence of Captain Schnetler in regard to discharging his firearm at the material time.

It is common cause that the plaintiff was shot and injured four times. Captain Schnetler accepted that in the circumstances all those shots could only have been discharged from his firearm and by him. However he could not explain why the defendant pleaded that he had only shot the plaintiff once.

He explained that he fired two warning shots in a different direction from where the plaintiff was. He testified to directing only two shots at the plaintiff injuring him in the foot and the region of his hip. He was however unable to explain how the plaintiff was shot twice in his leg.

Even on Captain Schnetler's own version, he first injured the plaintiff in the foot and when this did not deter the plaintiff he was forced to shoot at him again and aimed at his hip.

The nature of the injury to the plaintiff's foot involved a severed tendon of that foot with an exit wound located on the sole. Human experience with such an injury dictates that it would be highly improbable that the plaintiff would have been able to stand on that foot let alone use it to balance himself in grappling with Inspector Williams. It is highly improbable that the plaintiff would not have been rendered incapacitated upon being so injured. Consequently it would have been unnecessary to shoot him further.

This and the inability to explain the two injuries to the leg cast extreme doubt on the version of the defendant.

On the other hand the explanation by the plaintiff and his witnesses as to how those injuries were sustained is generally logical and supported by objected and undisputed evidence which has been admitted by defendant. eg: that he was shot four times and the location thereof on the plaintiff's body.

The plaintiff's version is fortified by the absence of an explanation in regard to some of the injuries sustained by the plaintiff. It is probable therefore, that these injuries were inflicted in the manner described by the plaintiff and his witnesses.

In the foregoing, it is extremely difficult to rely on the defendant's version.

Consequently I find that the overall probabilities favour the version of the plaintiff. It follows then that his version must be accepted as being probably true and that of the defendant rejected as improbable.

In the circumstances, the defendant has not discharged the onus of proving that the conduct of Captain Schnetler was justified in the circumstances. The defendant is therefore found to be liable for plaintiff's damages arising out of the incident.

The parties have agreed that in the event of it being found that the defendant is liable for the plaintiff's damages, such an order should be made and that an award in an amount of R 220 000,00 should also be made in favour of the plaintiff. I would also make provision for interest thereon.

They also agreed that in that event, costs of the suit should be granted in favour of the plaintiff and that such costs should include the costs of an inspection in loco, the costs of the relevant photographs and plan as well as the costs attendant on the reports of Mr Meyer and Dr Mackenzie.

In the result, I make the following order:

1. The defendant is held liable for damages sustained by the plaintiff and ordered to pay plaintiff an amount of R 220 000, 00 as and for such damages.
2. The defendant is ordered to pay interest thereon calculated at 15, 5% per annum from a date two weeks after *allocatur* to date of payment.
3. Costs of suit, such costs to include the costs of an inspection in loco, the photographs and plan as well as the costs attendant on the provision of the reports of Mr Meyer and Dr Mackenzie.

R. PILLAY

JUDGE OF THE HIGH COURT

Appearances:

- for the Plaintiff(s)/ Applicant(s)/Appellant(s): ADV. SWANEPOEL
- for the Defendant(s) /Respondent(s): ADV. WOLMARANS

Instructing attorneys:

- Plaintiff(s)/Applicant(s)Appellant(s): SWARTS ATTORNEYS
80 STANFORD RD, KORSTEN,
PORT ELIZABETH, 60001
- Defendant(s) / Respondent(s): STATE ATTORNEY
29 WESTERN RD, CENTRAL
PORT ELIZABETH,6001

CASE INFORMATION -

- *Nature of proceedings* : CIVIL