

FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN JUDGMENT

ECJ:

PARTIES: **FREDDIE PETLA**
AND
MINISTER OF SAFETY AND SECURITY

- Registrar: **2001/2007**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **04/06/10**

DATE DELIVERED: **17/06/10**

JUDGE(S): **GROGAN AJ**

LEGAL REPRESENTATIVES –

Appearances:

for the Plaintiff(s): **ADV: SH Cole**
for the Defendant(s): **ADV: Rugananan**

Instructing attorneys:

- for the Plaintiff(s): **WHEELDON RUSHMERE & COLE ATTORNEYS**
for the Defendant(s): **NN DULLABH & CO.**

CASE INFORMATION -

- *Nature of proceedings* : **DAMAGES**

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

CASE NO.: 2001/2007

In the matter between:

FREDDIE PETLA

Plaintiff

and

MINISTER OF SAFETY & SECURITY

Defendant

JUDGMENT

GROGAN A J:

[1] In circumstances that will be set out later in this judgment, the plaintiff sustained a gunshot wound as a result of the actions of a police officer on the evening of 18 October 2004. He has instituted action against the defendant, stating in the particulars of claim that the shot was fired intentionally and/or recklessly or negligently by the police officer in the course and scope of his employment, and that in either event the defendant is liable for damages for the injuries he sustained and their *sequalia*.

- [2] At the commencement of the proceedings, the parties sought the Court's leave to separate the issue of liability from that of damages. Leave was granted. This judgment is therefore concerned only with whether the defendant is liable for the injuries suffered by the plaintiff. If such liability is established, the quantum will be decided after evidence is heard concerning the damages, if any, to which the plaintiff is entitled.
- [3] I also record a decision on another preliminary issue. Mr *Cole*, who appeared for the plaintiff, contended that, in view of the nature of the plea, the burden rested on the defendant to prove the facts on which he relied and that the defendant should commence leading evidence. Mr *Rugananan*, for the defendant, contended that the onus of proof and duty to commence rested, as in the normal course, on the defendant. In view of the ambivalence of the plea, the Court ruled, without prejudging the onus, that the plaintiff should commence.
- [4] The evidence revealed the following facts to be common cause. On the evening in question, Inspector (in the current terminology, Warrant Officer) M Sabani was on duty at the Bedford police station with his colleague, Sgt P Kahla. Each officer drew the routine issue of firearms, a 9mm Beretta pistol with 15 live rounds of ammunition in its magazine, and a spare magazine containing 15 more rounds. After nightfall, the duty police officers received a tipoff from an informer advising them that four men, unknown to the community, were in the vicinity driving a white Nissan bakkie, and that the

men appeared to have been involved in criminal activity. Inspector Sabani and Sgt Kahla responded by driving about 10 kilometres along the road leading to Grahamstown, but saw nothing suspicious. They returned to Bedford, and decided to keep the main road through that small town under surveillance from a filling station.

[5] As it happened, the police officers' actions were warranted. After a short wait, they observed the lights of a vehicle approaching from the direction of Grahamstown. It turned out to be a white Nissan bakkie, with two men in the cab and two men seated on the load area. The vehicle was being driven by the plaintiff. The bakkie was loaded with about 800 kg of stolen copper wire. Although the precise route then taken by the bakkie is in dispute, it is common cause that the police officers followed it for some distance before the vehicle came to a halt outside Bedford along the road to Cookhouse, the R63. Gunshots were fired, and all the occupants were apprehended within minutes. It was during this time that a single bullet fired by Inspector Sabani passed laterally through the plaintiff's abdomen. Beyond these facts, the parties take issue on almost every detail.

[6] The plaintiff avers that he chanced upon the three men with whom he was arrested in Cookhouse, from where he took them to Bedford because they had offered him R200.00 to transport furniture. He discovered that the cargo he had agreed to carry consisted of bales of wire only when the men took him to a farm outside Bedford. The plaintiff claimed that the men told him that the

wire had been given to them by the farmer by whom they were employed. According to the plaintiff, the first he realised something might be amiss was after he had turned onto the R63 on his way back to Cookhouse. The moment he saw blue lights flashing behind him, he pulled off onto the gravel beside the tarmac and stopped. The plaintiff claimed that the two policemen then fired off a hail of bullets, and that one fired the round which struck him as he (the plaintiff) was raising himself from the driver's seat to a standing position on the ground preparatory to inquiring why the police had stopped his vehicle.

[7] Inspector Sabani and Sgt Kahla on the other hand, claimed that before the plaintiff's bakkie reached the turnoff onto the R63, it took a detour in the opposite direction through Bedford and that they followed it through the town before it started off on the national road. Inspector Sabani and Sgt Kahla claim that the plaintiff brought his vehicle to a halt in the middle of the left hand lane of the road. This was confirmed by Capt M Britz, who visited the scene after the shooting. The police witnesses claim that five shots were fired, four into the air and one in the plaintiff's direction. When he testified, Inspector Sabani was unable to explain precisely how the bullet had struck the plaintiff, but was adamant that he had fired from some distance in circumstances where it was necessary to resort to firearms to prevent the occupants of the bakkie from escaping or possibly attacking him and his colleague.

[8] It is unnecessary to resolve each of these factual disputes for purposes of determining the defendant's liability. I accept that the police officers had good

reason to suspect that the bakkie's occupants were involved in criminal activity, and that they were doing what would have been expected of any police officer when they stopped the bakkie and apprehended the men. I also accept that when the bakkie came to a halt Inspector Sabani and Sgt Kahla also had good reason to suppose that its occupants might attempt to flee or resist arrest. The only issue in this case is whether the circumstances warranted firing the shot which struck and injured the plaintiff.

[9] Mr *Cole* correctly contended that the issue must be determined on the pleadings and the evidence, having regard to the probabilities and to the credibility of the respective witnesses. I turn first to the pleadings. In the particulars of claim, the plaintiff avers that Inspector Sabani or Sgt Kahla assaulted him by deliberately shooting him with a firearm or, in the alternative, that these police officers acted with reckless disregard of the plaintiff's safety or negligently discharged a firearm in a manner that caused him injury in circumstances where, with the exercise of reasonable care, they could have avoided injuring the plaintiff. The defendant pleads that the shot which injured the plaintiff was fired by Inspector Sabani, who "on reasonable grounds believed that the plaintiff was attempting to get hold of a fire-arm" and to "protect himself from imminent or future death or grievous bodily harm fired a warning shot". According to the plea, that shot "ricocheted (*sic*) off the road surface and struck the plaintiff".

[10] This much is accordingly clear: the defendant's pleaded case was that Inspector Sabani was attempting to defend himself and his colleague against

an anticipated attack, that he had not intended to injure the plaintiff, and that the fact that the plaintiff was struck by a bullet he fired and injured was an unfortunate result of the circumstances in which the shot was fired. On the face of it, this is a plausible defence. It combines elements of self-defence and a denial of negligence and even, possibly, a claim of contributory negligence (not pursued in these proceedings).¹ Since the defendant has set this defence up in his plea, he was bound to prove its elements. I accordingly turn to consider in more detail the oral evidence adduced during the trial, focusing, in the light of the observations I have already made, on what I conceive to be the material facts.

[11] I have set out the essence of the plaintiff's description of the events that unfolded before his vehicle and the police van simultaneously drew to a halt on the R63. In regard to what followed, the plaintiff said two officers alighted from the police van and moved towards his vehicle, firing shots. One of the officers instructed them in English to get out of the vehicle and to lie down on the road, then the other (apparently Sgt Kahla) returned to the police van to arm himself with a "big gun". The plaintiff said that while these developments unfolded he remained seated behind the wheel of the bakkie in a state of shock. He said that Inspector Sabani (whose identity he subsequently learned) instructed the men on the back of the bakkie to get off and lie down on the road. While they did so, Sgt Kahla continued firing shots. The plaintiff said that he then began climbing out of the cab with his left palm upward in a

¹ The merging of these defences is the primary reason I rejected Mr *Cole's* argument that the plaintiff should commence leading evidence.

gesture of surrender and that, when he was out, he raised his right hand as well. At that moment he felt a bullet strike him on the right side of his abdomen. At that moment, Sgt Kahla was positioned close to the open door of the bakkie, and Inspector Sabani was standing next to its right tail light when he fired the shot that struck him. The plaintiff said he did not fall down, but simply exclaimed: "You've shot me!" He was then instructed to go to the spot the other men were lying, where he knelt down. Not long after that, another police officer arrived and the plaintiff was taken to hospital.

- [12] Sgt Kahla, who had at the time been a police officer for 15 years, said that he drove the police van on the night in question. While following the plaintiff's vehicle he deduced that it was carrying a heavy load because it was slewing from side to side. After following the bakkie through the town, it had crossed the main road through Bedford without stopping at the stop sign and proceeded up the road to Cookhouse. Sgt Kahla said he then turned on the blue flashing lights of the police vehicle and hooted. The bakkie proceeded on its way at between 80 and 100 km before it ultimately stopped. Sgt Kahla said he drew to a halt about eight metres behind the bakkie, with the headlights on. The men on the back jumped off and it was evident that they intended to flee into the darkness. Kahla immediately opened the driver's door of the police van and when he was standing on the road he fired two warning shots into the air. The two men stopped in their tracks, and he instructed them to lie down. During this period, Sgt Kahla's attention was focused on these two men. But after they lay down he noticed a third man kneeling on the ground next to them. This man, who turned out to be the plaintiff, said he had

been shot. At first, Kahla thought he was lying, but then he saw blood on the front of his shirt. In the meantime, Sabani had subdued the fourth man and brought him round the bakkie to the others, where he too was instructed to lie down. The police officers then radioed for assistance, and the then commanding officer of the Bedford police station, Captain Britz arrived soon afterwards.

- [13] Inspector Sabani confirmed that he was on duty with Sgt Kahla and that they received information about a suspected crime from an informer. Sabani said he first observed the Nissan bakkie from the garage in Donkin Street. They saw it turn into Hutton Street, and they followed it along Plasket Street, at the end of which the bakkie crossed Donkin Street without heeding the stop sign and set off along the R63. Inspector Sabani estimated that the bakkie travelled between one and four kilometres towards Cookhouse before it stopped in the middle of the left hand lane. Sabani said that he also immediately alighted from the vehicle and fired two shots into the air. He, too, had shouted “Stand still!” in isiXhosa. Having done this, Sabani went round the back of the police van to keep watch on the driver, who was still sitting behind the steering wheel. Since Sabani’s evidence relating to what followed is critical, I quote my notes on this part of his evidence verbatim:

“The driver alighted from the vehicle and tried to run away. As he attempted to run he turned and attempted to run back to the car. I thought he was going to get a weapon or flee in the car. I then tried to shoot him in his legs.

“Why? – To prevent him from doing either of these things.

“Did you hit him? – Yes.

“How many shots did you fire? – Only one.

“Were any other shots discharged? – No.

“So you fired three shots in all? – Yes.

“What else did you see? – After the shooting he was instructed to come to the back of the vehicle.”

[14] It is apparent from the evidence that there is agreement on at least the following facts: the bakkie was carrying stolen goods; it was pitch dark where the vehicles stopped; shots were fired in order to warn the occupants of the bakkie. Apart from this, the plaintiff’s version conflicts in every material respect with that of both police officers. The main conflicts relate to: (i) the route taken by the bakkie before it turned onto the Cookhouse road; (ii) the position of the two vehicles when they halted; (iii) the language used by the police officers when they told the men not to run; (iv) the number of shots fired; (v), and critically, the plaintiff’s movements before he was struck by the bullet.

[15] In my view, little turns apart from credibility on the route followed by the bakkie before it left Bedford and on its speed. Both police officers conceded that their pursuit of the vehicle did not constitute a “chase” in the dramatic sense of that word. I accept, in the defendant’s favour, that on the probabilities the bakkie took a short detour before leaving Bedford, that the vehicle halted on the left lane of the tarmac road, off the gravel, that the men sitting on the load area

immediately jumped off and began running to towards the bush to the right of the vehicles, and that these two men immediately halted when the first shots were fired and lay down in the light of the police van's headlamps. The number of shots fired and the plaintiff's movements before he was struck requires closer scrutiny.

[16] According to the plaintiff, he heard a veritable fusillade of shots immediately after he brought his vehicle to a halt. According to him, one of the policemen even returned to the police van to fetch a rifle when the ammunition in his sidearm ran out. It seems safe to say that this evidence is exaggerated. On cross-examination, the plaintiff reduced the number of shots to between eight and ten. Captain Britz confirmed in evidence that he had checked the ammunition register at the Bedford police station the day before he testified, and that this indicated that Sgt Kahla's issue was returned with 28 live rounds and Inspector Sabani's with 27, indicating that they had fired two and three shots, respectively. Capt Britz conceded that he had no independent recollection of the number of shots fired, and that he was relying only on the records. It is noteworthy that these records were not handed up as evidence, in spite of Mr Cole's invitation to Sgt Kahla to locate the relevant records the day before.

[17] However, in the light of Inspector Sabani's evidence that he had intentionally shot at and hit the plaintiff, little turns on the number of shots fired. That fact eliminates the possibility that the plaintiff may have been struck by one of a

hail of bullets fired indiscriminately at the scene. The issue to be determined is whether, when Sabani fired what he claimed was his third shot at the plaintiff's legs the plaintiff was bent on returning to the bakkie and whether, in these circumstances, it was reasonable to use a firearm to immobilise the plaintiff. On the plaintiff's version, the answer to both questions is in the negative: he was shot before he had left the bakkie and while he was in the process of surrendering to the police. On Sabani's version, a shot at the plaintiff's person would have been reasonably necessary because he would have ignored several clear warnings, including shots, and could reasonably have been suspected to have intended some desperate act by attempting to dash back to his vehicle in the clear view of two armed police officers who had already immobilised two of his companions. The question is whether Inspector Sabani's evidence is true.

- [18] To begin with, I am constrained to record that neither Capt Sabani nor Sgt Kahla was an impressive witness. Each gave the impression that he was trying his best to ensure that his version would be consistent with that of the other. For example, Sgt Kahla, who testified first, was at pains to deny that he had observed the plaintiff before Capt Sabani shot him. On Kahla's version, this seems impossible. He was about eight metres from the bakkie, which was in the glare of the police van's headlights. Once the two men who had been on the back of the bakkie had lain down in the road, Kahla would have had a clear field of vision up the road to the bakkie's right. He said he merely saw the driver's door open and the driver alight and begin to move across the road. It hardly bears mention that it is highly improbable that one of two police

officers faced with a gang of potentially dangerous criminals would have focussed his attention on two of the four without observing so obvious a development as the driver (a portly man) dashing across the road behind them, then immediately returning to his vehicle. It is significant that in an affidavit deposed to on the night of the incident Sgt Kahla stated that the driver “het toe terruggekom en ek het hom ook bevel om op die grond to lê”. Sgt Kahla was also deliberately evasive about his colleague’s position during the shooting, and was reticent about expressing a view on whether it was necessary in the circumstances to shoot the plaintiff. On his statement, it was clearly unnecessary to do so.

- [19] Under cross-examination, the concise version of the shooting given by Inspector Sabani in chief became confused. He was unable to satisfactorily explain the contradiction between his testimony that he had deliberately aimed at the plaintiff’s legs and the statement in an affidavit, also deposed to the same night, that “I fired two warning shots and the driver of the vehicle wanted to run away and another warning shot was fired and the bullet hit the tarmac road recrochet (*sic*) and hit the driver at the stomach”. That contradiction cannot be attributed to the swiftness with which the scene unfolded and the passage of time after the incident, upon which Inspector Sabani relied to account for his fuzzy recall. But more serious is the contradiction between Sabani’s account and the fact, established by unchallenged expert medical evidence, that the bullet struck the plaintiff on

the right side of the abdomen and passed out on the left side.² This would have been impossible had the plaintiff returned to the vehicle, as his left side would then have been exposed to Inspector Sabani. The claim by both police officers that the plaintiff was attempting to dash back to his vehicle can accordingly be ruled out.

[20] Mr *Cole* submitted that in the light of these improbabilities, the evidence of both Inspector Sibani and Sgt Kahla should be rejected *in toto*, and the evidence of the plaintiff accepted. In the circumstances, I am not prepared to determine the matter in that manner. I accordingly do so on the probabilities.

[21] Once it is accepted, as I find, that the plaintiff was not attempting to run back to his vehicle when he was struck by Sabani's bullet, the only remaining possibilities are that when Sabani fired the shot the plaintiff was moving away from his vehicle, as Kahla's evidence seems to confirm, or that he was in the act of getting out of the cab, as the plaintiff claims. Inspector Sabani was unable to state with certainty how far the plaintiff had moved away from his vehicle when he fired the shot. Had the bullet ricocheted, as originally claimed, it would have followed an upward trajectory. According to the

² This testimony was given by Dr C Jameson, who examined the plaintiff some time after the incident. Although Mr *Rugananan* declined to cross examine her, he made the startling submission in closing argument that the Court should reject Dr Jameson's evidence. While I accept that the Court is not bound to slavishly accept expert evidence, I note that Dr Jameson testified that she has examined untold numbers of gunshot wounds and that she had absolutely no doubt about the correctness of her identification of the entry and exit wounds. To reject that evidence on the basis of the belated suggestion that it might be questionable because of the passage of time between the shooting and the examination would be a bold step indeed. I decline to take that step.

medical evidence, the bullet passed through the plaintiff's abdomen from the right to the left side at a downward angle of about 35 degrees. This is consistent with the plaintiff's evidence that he was in the act of raising himself from a sitting position when Sabani, who according to the plaintiff was standing close by, fired the shot. The plaintiff's evidence relating to the immediate sequel is also consistent with that version and with the evidence of Sgt Kahla. According to the plaintiff, he exclaimed that he had been shot and then wandered away from his vehicle until told by Sgt Kahla to join the men lying on the road. He did so. Kahla confirmed this. Had Sabani's version been true, Kahla would not only have certainly seen the plaintiff dashing towards the bakkie. He would not have suddenly realised that the plaintiff was standing on the edge of the road, as he claimed.

[22] Insofar as it is possible to reconstruct the scene that unfolded from the evidence, therefore, I find that the probable sequence of events was as follows. The plaintiff must have been aware for some time that he was being followed by a police vehicle. When ultimately he stopped, he did so in the middle of the left hand lane of the Cookhouse road. The two men sitting on the load of wire jumped from the vehicle and sought to make their escape into the darkness, but were brought to heel by the warning shots of the policemen. Soon after that, Sabani approached the bakkie to apprehend the driver and the passenger in the cab, while Kahla kept the men lying on the road covered. When the plaintiff opened the door of the cab, he was confronted by Sabani, who by this time had moved to the right of the police van and approached the bakkie. By this time, the plaintiff would have heard the earlier warning shots

and shouting, and would probably have been aware that two of his passengers had been instructed to lie down on the road. It would have taken an exceedingly courageous or foolhardy person to attempt a getaway dash in these circumstances. It may well be that the plaintiff moved some distance from the bakkie, perhaps in a crouched position. But the probabilities favour the plaintiff's claim that he intended surrendering and joining those who had already been apprehended before he was struck by Sibani's bullet.

[23] The question therefore arises whether in these circumstances it was necessary or reasonable for Sabani to shoot the plaintiff. As indicated, the defence raised on the pleadings is unclear. The claim that Sabani fired the shot "to protect himself from imminent death" suggests self-defence. Coupled with the averments that the shot was intended as a warning and that the bullet ricocheted off the road surface, the plea could also encompass a denial of negligence. Both defences can be ruled out in the light of the evidence. At the end of the day, it seems that the defendant's defence can be described as a form of necessity: Sabani was doing his duty as a police officer and it was necessary to shoot the plaintiff in the course of apprehending persons suspected of a criminal offence. Many of the judgments (including *Mabaso v Felix* 1981 (3) SA 865 (A) and *Minister of Law & Order v Milne* 1998 (1) SA 271 (W)) to which Mr Cole referred the Court concerned cases in which the plaintiff's were killed by defendants who sought to defend either their own lives or the lives of others. Had the plaintiff in this case been killed, the defendant's defence would not in the circumstances have withstood the principles laid down in those cases. However, I accept that Sabani did not

intend to kill the plaintiff. In view of Sabani's concession that he aimed to injure the plaintiff, the question is whether the use of non-lethal force in the circumstances that prevailed at the time in question was reasonable and justified.

[24] Although the defendant did not rely in terms on section 49 of the Criminal Procedure Act 51 of 1997, which governs the use of force to effect arrests, the provisions of that section equate broadly to the requirements of the common law. Section 49 provides that where a person suspected of having committed an offence attempts to resist arrest or flee, "an arrestor may, in order to effect an arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing". Once it is found, as I have found, that on the probabilities the plaintiff intended surrendering, the protection afforded the defendant by section 49 falls away. Even if Sabani genuinely believed that the plaintiff intended fleeing or attacking him, the defence would not hold because the test in cases of justification is, at least in civil matters, objective (*Van der Walt Delict* 43). No circumstances can justify the shooting of a person who is in the act of surrendering, even if the person who fires the shot is genuinely unaware of that person's intention.

[25] In the final analysis, Mr *Rugananan* was constrained to argue that Inspector Sabani and Sgt Kahla deserve praise for apprehending copper wire thieves and recovering the stolen property. That may be so. But the issue in this case

was whether excessive force was used in carrying out the task. It goes without saying that, in a state governed by the rule of law, the police must balance crime prevention with appropriate restraint and respect for the lives and physical well-being of even the most hardened criminal. I merely note that it is common cause that charges of theft against the plaintiff have been withdrawn.

[26] I accordingly find, and hold, that the defendant, upon whom the onus rested in this regard (see *Felix supra*), has failed to prove on a preponderance of probabilities that, in shooting the plaintiff, his servant acted reasonably, justifiably or on any other lawful ground.

[27] It follows that the defendant is liable for such damages as the plaintiff is able in due course to prove.

[28] The plaintiff is entitled to his costs in the proceedings to date, including the qualifying fees, if any, of Dr Jameson.

[29] The plaintiff is declared a necessary witness.

J G GROGAN

ACTING JUDGE OF THE HIGH COURT