



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 45121/2015

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: NO

DATE: 19 January 2024

In the matter between:

MMATSATSI MARIA MASEMOLA

Plaintiff

And

THE MINISTER OF POLICE

1st Defendant

CST MARUMA

2nd Defendant

JUDGMENT

Botha AJ

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Introduction

- 1.1 This is an action for damages that arose from an alleged unlawful assault by the 2nd Defendant on a certain Mr Thabiso Joseph Masemola.
- 1.2 The assault took the form of a shooting with a firearm to wit the service pistol of the 2nd Defendant, and Mr TJ Masemola was hit on his upper thigh-groin area.
- 1.3 Mr TJ Masemola passed away on 15 November 2014 for reasons totally unrelated to the shooting incident. He was subsequently substituted in this proceedings by his mother, Me Mmatsatsi Maria Masemola as the plaintiff. Mr TJ Masemola will be referred to herein after as “the deceased”
- 1.4 The Particulars of Claim reads as follows:” On or about the 3rd March 2014 at approximately 15h00 and at or near Vezinyayo section, Magakadimeng, Dennilton, Moutse district, Limpopo Province, second Defendant wrongfully, unlawfully and negligently shot Plaintiff using a firearm.”¹
- 1.5 The Defendants pleaded self defence in terms of the common law, pleading that 2nd Defendant defended himself against an unlawful and unwarranted attack by

¹ CL 001-6

the deceased.

- 1.6 At the onset of the trial the issues of merits and the quantum of damages were separated and the trial proceeded on the determination of liability only.
- 1.7 In keeping with the principle in *Mabaso v Felix*² that a defendant claiming self defence normally bears the onus in proving self defence, the parties agreed that the Defendant would begin.

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The evidence for Defendant

2.1 Sergeant Maruma

- 2.1.1 He testified that on the day of the incident he went to Vezinyayo to serve a subpoena on a certain Bongani Ngwenya. He could not find him and en route to the police station he saw Ngwenya along the side of the road. He stopped and saw that Ngwenya's clothes were torn and there was abrasions on his face. Ngwenya informed him that the deceased had beaten him up.
- 2.1.2 He suggested that they go look for the deceased to clear the issue up. They found the deceased close by in the company of a young man busy hitching donkeys to a cart.
- 2.1.3 The witness alighted from the police van and enquired from the deceased why he beat and tore the clothes of Ngwenya. The deceased slapped him on his face and said that Ngwenya is a criminal because Ngwenya killed his friend by the name of "Sinki" and threw the body in the river. According to the witness the deceased was loud and unruly and used abusive language.
- 2.1.4 Ngwenya denied this allegation and said that the young man in the deceased's company is in fact a murderer in that he killed a man by the name of

² 1981 (3) SA 865(A)

"Schoeman"

- 2.1.5 Being a police officer, the witness knew that such a murder was reported that same morning and after he made a phone call to his superior, Captain Mukwevhu(as he then was), he requested the young man to accompany him to the police station. The young man was cooperative and climbed in the back of the police van.
- 2.1.6 The deceased approached the witness and again slapped him saying that he also (the witness), is a criminal and that he will take his firearm and shoot him.
- 2.1.7 On both occasions of being smacked in the face the witness had forcefully pushed the deceased away from him. Thereafter the witness, together with Ngwenya and the young man in the back, drove away.
- 2.1.8 After about 70 meter the witness had to make a detour to get to another road because that day it had rained and there were big water puddles in the road.
- 2.1.9 This detour caused him to drive past the deceased's mother's house. Outside the house he saw the deceased, his mother, his grandmother and his uncle. The mother (Plaintiff) flagged him down and he stopped in front of the house.
- 2.1.10 The Plaintiff started accusing him of assaulting her boy(deceased) and the deceased forcefully pulled open the door on his side (driver side)
- 2.1.11 The witness switched off the vehicle and disembarked. The deceased immediately charged him again and a scuffle ensued but he was pushed away by the witness with the help of the Plaintiff. During the struggle the keys of the vehicle was dropped and it fell under the vehicle by the right front wheel.
- 2.1.12 The deceased stormed again but this time he tried to grab the firearm of the witness which he carried in a holster on his right hip. Another struggle ensued and the deceased slapped the witness again on his face.

- 2.1.13 The family of the deceased tried to calm the deceased down but to no avail. He became more and more unruly and abusive.
- 2.1.14 The witness managed to call his superior (Colonel Mukwevhu) at the station and requested back up be sent to the scene. He reported that he had an uncontrollable situation on his hands.
- 2.1.15 Meanwhile the deceased attacked the witness again and had taken off his t-shirt. Marumo saw that there were ropes tied on the upper arms-the biceps, of the deceased. Apparently , according to tradition, this practise gives a person more strength and the witness testified that it felt as if the deceased was unnaturally strong.
- 2.1.16 At some stage the phone of the witness rang. He saw it was his colleague, Sers Mahlala that probably was the back up. He managed to shove the deceased away and gave the address to the Sergeant.
- 2.1.17 The deceased charged him again trying to dispossess him of the firearm while saying he is going to shoot him before backup arrives . At that stage the witness realised that he will have to use his firearm to ward off the attack and to defend and protect himself.
- 2.1.18 He drew the weapon and fired a warning shot into the ground but it did not deter the deceased. He kept coming towards him and seconds later the witness had to fire a second shot which hit the deceased on his upper thigh and the deceased fell to the ground.
- 2.1.19 The witness testified that the mother initially assisted him in keeping the deceased at bay but grew tired and retreated. The uncle also did not help and so did the onlookers that gathered.
- 2.1.20 He also testified that at some stage the deceased attempted to release the young man from the back of the van and said that he wants to shoot Ngwenya also.

2.1.21 He testified that he was scared and afraid that the deceased might succeed in getting hold of the firearm and then he will be killed by the deceased.

2.1.22 In answer to a question posed by the court he said that the second shot was meant to hit the deceased in order to stop him attacking and because the deceased paid no heed to his warning shot but kept coming towards him. He shot the deceased in order to protect himself.

2.1.23 The witness was cross examined thoroughly. It was put to him that when he shot the deceased there was no imminent danger. It is noticeable that it was never put to the witness that the deceased never assaulted him or tried to dispossess him of his firearm.

2.2 Colonel Mukwevhu

2.2.1 At the time of the incident he was a captain in the SAPS stationed at Dennilton police station. He corroborated Sergeant Maruma with regard to the calls and the request for back up.

2.2.2 After the shooting he attended the scene and observed that the deceased had one bullet wound on his right thigh.

2.2.3 Thereafter he opened a docket for Attempted Murder and he reported the matter to IPID

2.3 Bongani Ngwenya

2.3.1 On 3 March 2014 he was at Vezinyayo walking along a road with his girlfriend and was approached by a group of men armed with pangas.

2.3.2 The deceased was amongst them and accused him of killing his friend "Sinki". The deceased slapped him and tore his clothes. He managed to free himself from the deceased's grip and ran away. Along the road Sers Maruma

stopped next to him and questioned him about the state he is in and why was his clothes torn. He told Maruma and was advised to get in the vehicle to go and look for the deceased. They found the deceased together with a young man hitching donkeys.

- 2.3.3 The deceased again accused him of killing Sinki and was stormed by the deceased. Maruma stopped him and was slapped by the deceased .
- 2.3.4 The witness corroborate the evidence of Maruma with regard what happened at the donkey cart.
- 3.3.5 They drove off and encountered the deceased again who was in the company of his mother, grandmother and his uncle. The mother signalled them to stop which they did.
- 3.3.6 The deceased forcefully pulled the door open and the keys fell out of Maruma's hand. The deceased started causing a scene and attacked Maruma. He wanted Maruma to release his friend from the back of the van. He testified that the deceased stormed and slapped Maruma many times. Some of the blows were warded off by Maruma.
- 2.3.7 The mother and uncle assisted initially to try and restrain the deceased without success. The deceased tried to get hold of the firearm of Maruma.
- 2.3.8 The witness stepped out of the van with the intention to run away from the scene because he was fearful that the deceased might succeed and then he will be shot.
- 2.3.9 After a while of this fracas going on, Maruma fired a shot into the ground and thereafter a second shot which hit the deceased who fell down.
- 2.3.10 After the deceased was shot he was not assaulted by anyone. He testified that the deceased made several attempts to get hold of the firearm and he also heard the deceased threaten to shoot him (the witness)

- 2.3.11 The witness was cross examined but nothing contentious arose. Overall the witness corroborated the evidence of Maruma. That was the case for the Defendants.

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The Evidence for the Plaintiff

3.1 Kennith Ratshitali

- 3.1.1 On 3 March 2014 he was a senior investigator at IPID. He was appointed as the investigator of the docket for Attempted Murder.
- 3.1.2 On 13 March 2014 he travelled to Dennilton and collected the docket.
- 3.1.3 He wanted to interview Maruma but Maruma was out of town that day and thus not available. He then got the impression that Maruma was uncooperative with the investigation. That was an unjustified impression because he came to ,Dennilton unannounced and without prior arrangement.
- 3.1.4 His evidence took the Plaintiff's case no further.

3.2 Maria Masemola

- 3.2.1 She is the mother of the deceased. On 3 March 2014 she was at her mother's house. The deceased gave her the house key and as they walked out, Maruma was outside the gate in the street.
- 3.2.2 She asked him what the deceased had done and Maruma answered that he had done nothing but that he (Maruma) wanted to teach him a lesson because of his cheeky stubbornness.
- 3.2.3 Maruma then took out his firearm and fired two shots. The deceased fell and

Maruma went up to him and kicked him while lying on the ground.

3.2.4 She grabbed Maruma and pulled him away. Maruma then said to her that he will shoot her also.

3.2.5 She did not see the deceased assault the policeman or trying to take his firearm.

3.2.6 She was cross examined and it needs mention at this stage already that her evidence was shockingly bad in quality. She was argumentative, evasive, threw tantrums and gave sarcastic answers like for instance when it was put to her that the deceased attempted to take the firearm from Maruma, she answered that the snake was biting his own intestines.

3.2.6 At some stage she refused to answer questions. It is not necessary to further elaborate, the record speaks for itself. Suffice to find that she was not a credible and honest witness.

That was the case for the Plaintiff.

4

Legal principles

4.1 It is trite that the use of force against another person is under normal circumstances unlawful but is justified in defence of person, property or another legal interest to protect against an unlawful attack subject to certain conditions.

4.2 The Attack

- (i) The attack must be unlawful;³
- (ii) The attack must be directed against a legal interest for instance against life and limb, property and or other interests not now relevant;⁴
- (iii) Attack must be imminent or already commenced.⁵

4.3 The defence must be directed against the unlawful attack

- (i) The defence must be directed against the attacker. When the defender injures a third person in the course of repelling an unlawful attack, reliance cannot be placed on self defence to justify the act, although he might rely on necessity.
- (ii) The defence is only justified where it is necessary to protect a legal interest which cannot effectively , at that moment, be protected in another way.⁶
- (iii) The measure of force used must be reasonable in the circumstances. The defence must merely be a deterrent and not retribution.⁷

5

Evaluation of the witnesses

5.1 Some reference is already made in regard to the evidence of the Plaintiff Me Masemola. Suffice to state that even though she was not a reliable and credible witness, it goes further than that. Her evidence is totally uncorroborated and I am of the view that her evidence even surprised her

³ Ndara 1955(4)SA182 (A);Goliath 1972(3) SA 1 (A)

⁴ Ex Parte Min of Justice:in re S v Van Wyk 1967(1) SA 488 (A)

⁵ S v Van Wyk supra

⁶ S v Van Wyk supra

⁷ S v Van Wyk supra; S v Ntali 1975 (1) SA 429 (A) par 436

counsel also. Adv Netshiozwi appeared to be a good , competent and able counsel. She will not neglect to make essential averments and statements with regard to the Plaintiff's case to the defence witnesses. The only deduction to be made is that she fabricated the evidence whilst in the witness box.

5.2 On the other hand, Sers Maruma and Mr B Ngwenya testified rationally and honestly. On all the relevant issues they corroborated each other. Col Mukwevhu also corroborated the evidence of Maruma.

5.3 I thus find that the version of the Defendant is credible and have the appearance of truth and believability to it- therefor plausible.

5.4 I find on a preponderance of probabilities that the events of day in question occurred as per the witnesses of the Defendants.

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Facts applied to the Legal Principles

6.1 The Defendant in its Heads of Argument argues that there are two mutually destructive versions before court. I do not agree. As found above- the version of the Plaintiff is rejected as untruthful, uncorroborated and improbable. Therefor , the only version before court is that of the Defendant.

6.2 The test for self defence is objective. The court must place itself in the shoes of the person claiming self defence. The court must avoid being an armchair critic relying on hindsight.

6.3 The questions to be answered are:-

The Attack

(i) Was the attack by the deceased on Maruma unlawful?
A) Yes

(ii) Was the attack directed against a protectable legal interest ?

A) Yes, the life of Maruma and Ngwenya.

(iii) Was the attack imminent or already commenced?

A) Yes

The Defence

- (i) I find that the defence was directed against the attacker (deceased) only;
- (ii) The defence was justified to protect a legal interest which, at that moment, could not been protected in any other way;
- (iii) The measure of force was reasonable- the deceased was not fatally wounded. He completely recovered from the bullet wound. I find that the defence was a justified deterrent.

I therefor make the following order:

1. The action is dismissed
2. The Plaintiff to pay the costs on a normal party - party scale.



GB Botha AJ

Date of hearing: 2 November 2023 and 3 November 2023

Judgment delivered: 19 January 2024

Attorneys for Plaintiff : Mphela & Associates

Groblersdal

Counsel for Plaintiff :Adv Netshiozwi

Attorneys for Defendants: State Attorney

Counsel for Defendants: Adv BT Moeletsi