



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

Case Number: **17816/2018**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
DATE: 28 September 2023
SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

SIFISO QOLO

Plaintiff

and

FIDELITY ADT (PTY) LTD

First Defendant

MBUYISELI MTIYANE

Second Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The plaintiff's claim is for damages that he suffered as a result of a shooting incident that occurred on 5 June 2016.
- [2] At the commencement of the trial, the parties requested that the merits and quantum of the plaintiff's claim be separated. Such an order was granted, and the trial only proceeded in respect of the merits of the plaintiff's claim.

Pleadings

- [3] The second defendant, is a security officer in the employment of the first defendant. It is common cause between the parties that the second defendant shot the plaintiff on 5 June 2016 and in doing so, acted within the course and scope of his employment with the first defendant.
- [4] The plaintiff avers that the second defendant in discharging his service pistol acted wrongfully and intentionally.
- [5] Although the defendants admit the incident, they deny that the second defendant acted wrongfully and unlawfully. The defendants pleaded that, in shooting the plaintiff, the second defendant did so to protect his life.
- [6] The only issue in dispute is, therefore, whether the second defendant acted in private defence when he shot the plaintiff.

Common cause facts

- [7] The second defendant has been a reaction officer since 1 September 2014 and underwent the appropriate training to fulfil his duties.

- [8] The second defendant was on duty on 5 June 2016 when he received a call at 00:25 from the control room to attend to an alarm that was activated at the premises of a company known as 3Q Concrete Holdings (Pty) Ltd. The premises of the company is situated at 22A Waterfall Avenue, Rustenburg Industrial Area at the corner of Oliver Tambo Road and Waterfall Avenue.
- [9] The second defendant proceeded to the premises and parked his vehicle in Waterfall Avenue in front of a palisade fence. He alighted from his motor vehicle and walked down Waterfall Avenue. He turned right into Oliver Tambo Road and entered the premises at a side gate. Having satisfied himself that everything was in order he left the premises.
- [10] On his way to his vehicle he accosted the plaintiff and the shooting incident occurred. The version of the parties in respect of the events that preceded the shooting incident, however, differs vastly as will more fully *infra*.

EVIDENCE

- [11] In view of the defendants' plea of private defence, the court ruled that the defendants had the duty to begin, and the defendants proceeded to call three witnesses.
- [12] The first witness, Mr Mulder ("Mulder"), is the first defendant's Contact and Monitoring Centre Management Manager. Mulder in essence and with reference to the activation report pertaining to the events in question, confirmed the second defendant's version.

- [13] The second witness, Mr Fowlds ("Fowlds"), is the first defendants' Group Learning and Development Manager. Fowlds confirmed the initial training that the second defendant received and stated that the second defendant also received further training on an annual basis.
- [14] Fowlds dealt with the circumstances under which reaction officers work daily. He testified that since 2010, 15 reaction officers had been shot and killed and 48 wounded. He, furthermore, stated that reaction officers are increasingly attacked in attempts to steal their firearm.
- [15] The second defendant testified next and confirmed the common cause facts set out *supra*. The second defendant explained that when he was on his way to his vehicle and whilst still in Oliver Thabo Roas he heard a noise and looked in the direction from where the noise emanated. He saw three males standing at a container underneath a tree.
- [16] There were no streetlights and visibility was limited. Whilst proceeding down the middle of Oliver Thabo Road, the second defendant realised that one of the three males were following him. Due to the remoteness of the area and the fact that he was followed, the second defendant became wary and moved to the sidewalk. He increased his pace and observed that the person following him had done the same. When the second defendant turned the corner the person was close behind him and the other two males were also gaining ground.
- [17] Naturally, the second defendant became increasingly more concerned and walked with a brisk pace towards his vehicle. Once at his vehicle and whilst endeavouring to unlock the vehicle he had his back to the person that followed

him. The person was a few meters behind him, and he turned around to face the person. As will become apparent, the person turned out to be the plaintiff.

- [18] According to the second defendant the plaintiff was wearing a hoody, which covered his head, and his hands were in the pockets of the hoody. He asked the plaintiff in English "*what do you want?*", whereupon the plaintiff mumbled something that he could not clearly hear. At this stage the second defendant noticed that the other two persons were also close to him and were standing at the palisade fencing.
- [19] The plaintiff kept advancing towards the second defendant and when he was approximately 1 meter away, the second defendant, being on full alert, placed his hand on his firearm and said to the plaintiff in English "*stop or I will shoot*". The plaintiff did not heed the warning and proceeded towards the second defendant. The second defendant testified that he was concerned that the plaintiff was concealing some kind of weapon as he still had his hands in the pockets of the hoody.
- [20] The plaintiff was close to the second defendant and the second defendant took his firearm, cocked and discharged it. The plaintiff spun and fell to the ground.
- [21] Upon the discharge of the firearm, the other two persons, who were approximately 4-6 metres away from him, fled the scene. The second defendant called for back-up and an ambulance arrived that took the plaintiff to hospital.
- [22] During cross-examination, it was *inter alia* put to the second defendant that the plaintiff denies wearing a hoody on the night in question. The second defendant

did not agree. In support of the plaintiff's version, the second defendant was referred to a photo taken of the plaintiff at the scene of the incident, and it was put to him that the photograph confirms that the plaintiff was not wearing a hoody.

[23] The second defendant denied that the photograph supports the plaintiff's version and upon a careful examination of the photograph, I am of the view that the photograph is inconclusive. The second defendant was, furthermore, referred to a statement that appears in the investigation report compiled by the first defendant after the incident.

[24] In the statement, the second defendant stated that the plaintiff was carrying something in his right hand and that he fired a shot at the plaintiff's right hand "*because he was attacking*". The second defendant could not explain the discrepancy.

[25] The defendants closed their case, and the plaintiff was called to testify.

[26] The plaintiff testified that he was 17 years old and in grade 12 on the date of the incident. After attending a gathering on the evening in question, the plaintiff and his friend, Xola, proceeded to the showgrounds where an event was taking place. Xola did not have enough money for the entrance fee and the plaintiff gave him the money he had in his possession because: "*Xola was not familiar with the place and I wanted him to be safe.*" The agreement was that Xola will purchase a cheaper ticket inside the event, which he will bring to the plaintiff to allow the plaintiff to enter the event.

- [27] Xola, however, did not return and at approximately 24:00, the plaintiff decided to walk to town to get a taxi. The plaintiff testified that he proceeded down the main road. In Waterfall Avenue and after he had walked past the corner of Waterfall Avenue and Oliver Tambo Road, he heard a gun "*breach*" and someone saying "*stop!*". He stopped and the person who called out to him approached him from behind. This person proved to be the second defendant.
- [28] The plaintiff testified that the second defendant was hiding in or under a tree prior to their interaction. The second defendant pointed a firearm at him and asked him "*Where are your friends?*" to which he replied, *Which friends?*". The plaintiff corrected himself and testified that the second defendant ordered him to lift his hands whilst he was approaching him. The second defendant then asked in Xhosa "*Where are your friends?*" to which he replied, "*What friends, my only friend is Xola who went inside to buy a ticket and didn't return.*".
- [29] The second defendant said in Xhosa that he was lying, there were three of you guys. The second defendant then told him to put his hands behind his back and whilst he was complying with the instruction, the second defendant shot him.
- [30] During cross-examination, the plaintiff's statement he gave to police officer Khumalo after the incident was shown to him. The plaintiff confirmed the contents of the statement. The statement contains several discrepancies between his evidence in chief and his version in the statement.
- [31] When confronted with these discrepancies, the plaintiff on various occasions gave different reasons for the discrepancies. The various reasons may be summarised as follows:

31.1 Khumalo was biased/vindictive in that before he made the statement, he called the plaintiff names and asked *“why do I come from the Eastern Cape to Rustenburg?”*;

31.2 he was in pain / felt sick / unwell;

31.3 there was a language / interpretation problem;

31.4 he was not given an opportunity to read the statement and signed it without reading it. The plaintiff, however, confirmed that Khumalo did read the statement to him before he signed;

31.5 he was 17 years old and still a minor. I pause to mention, that the statement was taken in the presence of the plaintiff's mother.

[32] The plaintiff was also referred to a report from a clinical psychologist, Dr M Katjene, whom the plaintiff consulted after the incident. The plaintiff was invited to read the paragraph detailing the incident and confirmed that the information in the paragraph was correctly recorded. The relevant portion of the paragraph reads as follows:

“In not providing answers that the Security Officer was looking for, an altercation ensued resulting in the Security Officer shooting him in the chest and right arm.”

[33] Confronted with the aforesaid, the plaintiff could not explain what *“altercation”* ensued between him and the second defendant. Upon some prompting, the plaintiff testified that whilst he did not argue with the second defendant, the second defendant started raising his voice when he asked him *“Where are your*

friends?". Upon further questioning the plaintiff stated that the second defendant became aggressive and asked him three times *"Where are your friends?"*

- [34] Confronted with a different version given to Dr Rajulli, an educational psychologist, to wit: *"(He) stopped him and asked where his friends were, when he responded with "I don't know" (he) started to insult him and called him names such as criminal."*, the plaintiff replied that Dr Rajulli's recordal of what he told him was incorrect. He could not explain why Dr Rajulli would incorrectly record his version.

- [35] The plaintiff testified that, although there was sufficient light in Waterfall Avenue, he did not see the second defendant's vehicle or the second defendant under the tree when he walked past the tree. This concluded the evidence on behalf of the plaintiff.

Evaluation of evidence

- [36] The versions of respectively the plaintiff and the second defendant are mutually destructive. In *Stellenbosch Framers' Winery Group Ltd and Another v Martel et Cie and Others* 2003 (1) SA 11 (SCA), the Supreme Court of Appeal summarised the technique to be employed when approaching mutually destructive versions as follows at para [5]:

"...To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability; and (c) the probabilities."

- [37] The second defendant made a good impression in the witness stand. He gave his evidence in a clear and concise manner and fared well under cross-examination. Save for the one minor discrepancy, he did not contradict himself during cross-examination.
- [38] The plaintiff on the other hand, did not fare well as a witness. He was evasive during cross-examination and clearly uncomfortable when faced with difficult questions. Although the inconsistencies between the various versions are not of such a nature, that his evidence can be rejected out of hand, his various explanations for the inconsistencies have a negative impact on his credibility. It is, furthermore, unclear on what basis the plaintiff could assert that the second defendant was hiding in or under a tree, whereas he testified that he did not observe the second defendant prior to their interaction.
- [39] In weighing up the probabilities of the divergent versions, I consider the second defendant's version to be more probable for the reasons that follow. The second defendant's duties as a security officer on the evening in question entailed that he had to react to an alarm that was activated at a client's premises. The second defendant, who on all accounts are well trained, was merely performing his duties.
- [40] It is difficult to understand why the second defendant will abandon his official duties to ambush the plaintiff. On the plaintiff's version the second defendant was hiding in/behind a tree, waiting for the plaintiff to pass. How the second defendant would have known that the plaintiff would pass the premises and at what time he would do so, remains a mystery.

- [41] Furthermore, the second defendant, for reasons unknown and without rhyme or reason decided to shoot the plaintiff in circumstance where the plaintiff complied with all the instructions issued by the second defendant. One should bear in mind that the second defendant was not called to the premises to look for possible suspects, but to inspect the premises where the alarm sounded.
- [42] In contrast, the second defendant's version that he was followed by the plaintiff and his companions when he left the premises is probable. The fact that he felt threatened in the prevailing circumstances is understandable and makes sense. The statistics provided by Fowlds explains the first defendant's apprehension that he might be ambushed and assaulted.
- [43] It is more probable that the second defendant would have discharged his firearm only as a last resort and only after the plaintiff had advanced towards him, notwithstanding his reasonable request to stop doing so. The fact that the plaintiff did not clearly answer the second defendant's questions, no doubt contributed to the already loaded atmosphere.
- [44] In the result, I find that the second defendant's version is, on a balance of probabilities, more probable than that of the plaintiff.

Legal principles

- [45] Private defence is defined in *Criminal Law*, C R Snyman, 4th ed at 102 as follows:

"A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently

threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack."

- [46] In *casu* the second defendant shot the plaintiff to repel an imminently threatening attack on his bodily integrity. Bearing the definition in mind, two questions then arise, to wit (a) was the shooting of the plaintiff necessary to protect the second defendant's bodily integrity? and (b) was the shooting more harmful than necessary to ward off the imminently threatening attack?
- [47] In answering the questions posed *supra*, it is intrusive to have regard to the following extract from *Ntanjana v Vorster & Minister of Justice* 1950 (4) SA 398 (C) at 406 A - .:

"The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the rôle of the armchair critic wise after the event, weighing the matter in the secluded security of the Courtroom. (Cf. Rex v Jack Bob (supra); Rex v Hele (1947 (1), S.A.L.R. 272 at p. 276 (E.D.L.)); Rex v Gege (supra); Gardiner & Lansdown S.A. Criminal Law & Procedure (5th Ed., Vol. II, p. 1413).) Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation

of imminent peril. 'Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons' per INNES, J.A., in Union Government v Buur (1914 AD 273 at p. 286)."

- [48] The second defendant was confronted with a person ("the plaintiff") who purposefully pursued him on his way to his vehicle. The plaintiff was clothed in a hoody and his hands were in the pockets of the hoody. The plaintiff gained ground and was close to the second defendant when he was on the verge of opening the door of his vehicle.

- [49] One should, furthermore, bear in mind that the two males that were in the company of the plaintiff were also moving closer to the second defendant.

- [50] The plaintiff did not respond to the second defendant's questions or his instruction to stop. The final warning uttered by the second defendant, to wit: "*Stop or I will shoot you*" did not deter the plaintiff at all. Having regard to the dangerous circumstances in which securities officers work and the fact that security officers had been assault and killed in the past, the perceived danger experienced by the second defendant is reasonable.

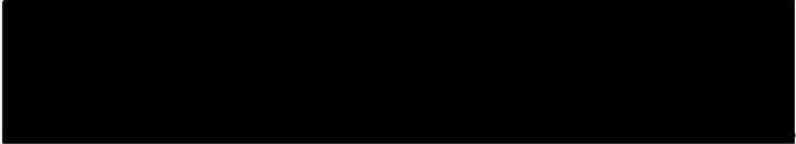
- [51] Although the plaintiff did not yield any visible weapon, the belief that the plaintiff might carry a weapon is strengthened by the fact that no normal person would approach an armed person empty handed. The fact that the plaintiff kept on coming closer even after the warning sounded by the second defendant, justifies the second defendant's belief that an attack was imminent.

- [52] Taking all the aforesaid circumstances into account, I am satisfied that it was necessary for the second defendant to shoot the plaintiff in order to protect his bodily integrity.
- [53] Was the shooting, however, more harmful than necessary to ward off the imminently threatening attack?
- [54] The only weapon the second defendant had to his disposal to repel the imminent threat to his bodily integrity was his firearm. During cross-examination it was not put to the second defendant that he used excessive force or that he could have repelled the imminent threat in any other manner.
- [55] In the result, I am satisfied that the defendants have established on a balance of probabilities that the second defendant acted in private defence when he shot the plaintiff.
- [56] Consequently, the plaintiff failed to prove that the second defendant acted intentionally and unlawfully and the plaintiff's claim stands to be dismissed.

ORDER

The following order is made:

1. The plaintiff's claim is dismissed with costs.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATES HEARD:

17, 18, 19 July & 01 September 2023

DATE DELIVERED:

28 September 2023

APPEARANCES

For the Plaintiff: Advocate MV Botomane

Instructed by: Mphela Attorneys

For the Defendants: Advocate P van Niekerk

Instructed by: Eversheds Sutherland