

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

CASE NO: 174/17

In the matter between:

NOMAPHELO CYNTHIA DEMESHA

Plaintiff

and

MINISTER OF POLICE

Defendant

JUDGMENT

MBABANE AJ

Introduction

[1] This action was instituted pursuant to the tragic death of Silulami Demesha (the deceased) who was shot and killed near Nobonke Café at Kundlunkulu Locality on 19 October 2016. On that fateful morning, the police officers from Mqanduli Police Station were following a lead on the suspects who were involved in a robbery at or near Qokolweni Locality, Mqanduli and the information they received led them to Kundlunkulu Locality.

[2] The salient facts surrounding the death of the deceased are in dispute as the plaintiff on the one hand alleges that the deceased was shot and killed by the police and the police on the other allege that the deceased could have been killed by an unknown assailant who was running away from them.

[3] The plaintiff (the deceased's widow) instituted these proceedings claiming loss of support against the Minister of Police arising out of the death of the deceased. She sues in her personal and representative capacity as foster parent and legal guardian of the minor children, Yonelani Demesha born in 2001 and Imange Demesha born in 2007.

[4] The pre-trial minute reveal that the following is common cause:

- (a) That the deceased died on 19 October 2016;
- (b) That he died from a gunshot wound at or near Nobonke Café, Kundlunkulu Locality, Mqanduli.
- (c) That the deceased was:
 - (i) the plaintiff's husband, and had a legal duty to support her;
 - (ii) the natural father of and had a legal duty to support both Yonelani and Imange Demesha;
 - (iii) self-employed; and
 - (iv) able to and discharged his legal duty to support the plaintiff, Yonelani, and Imange.

[5] The plaintiff in the particulars of claim alleges that on the 19th October 2016 and at or near Nobonke Café, Kundlunkulu Locality, Mqanduli, members of the SAPS whose full names, further particulars and identities are not known to the plaintiff but who, at all material times were acting within the course and scope of their employment as members of the SAPS shot and murdered the deceased.

[6] The defendant pleaded as follows:

“On 19 October 2016, members of crime prevention unit in the employ of the defendant were doing crime prevention duties at Mqanduli district within their precinct. They were dispatched by the 10111 office an office responsible to dispatch all members in the employ of the defendant in emergency cases, but at the time there was an imminent armed robbery at Mahodini location, Mahodini store within the policing precinct of Ngangelizwe Police Station, Mthatha and the Cas number was opened therein.

On arrival at Mthebe location a locality within Mqanduli they met members of Mthatha Flying Squad whom they describe[d] the culprits according to the information at their disposal and further inform them that such suspects have taken the direction of Ndlunkulu location.

These members proceeded to Ndlunkulu location. Upon reaching Nobonke store, they saw a man leaving the shop with the same description of another suspect wearing [beige] pants and black jacket, such identity was conveyed by flying squad members.

The primary rationale of approaching the shop was just to check, or instincts that there might be a group of people either enjoying themselves by liquor.

The police start[ed] shouting him to stop but resisted such a call by drawing up a firearm and opened fire against members of the South African Police Services. There was a cross fire between this man and the members of the defendant. The man managed to flee and fled to the river valley surrounded by the hills. Upon chasing the suspect, the police found that there is an old man lying on the road.

The members of the South African Police Services start[ed] focusing on the deceased, calling the other police and members of Independent Police Investigative [Directorate] (“IPID”) to execute their duties.

The exact cause of death of the deceased is not known by the defendant, in the event that there was a crossfire the defendant bears no knowledge of the cause of death.”

[7] At the commencement of the trial, the parties made a joint application, which was granted, in terms of rule 33(4) of the Uniform Rules for the separation of the issue of liability and quantum, with liability falling to be dealt with first and the issue of quantum standing over for determination at a later stage.

[8] Seeing that the defendant denies that the deceased was shot and killed by the members of the South African Police Services, it became common case that the onus of proof rests with the plaintiff.

The Plaintiff's case through the evidence

[9] The plaintiff called the evidence of one witness, Wandile Malamba (“Malamba”). Malamba testified that he knows the deceased and they are from the same locality. He further testified that the deceased was shot at the back by a coloured policeman. He described the policeman who shot the deceased as light in complexion. At the time of the incident, he and the deceased were walking in opposite directions. The deceased was about 12 paces from him at the time he was shot and the policeman who shot him was about 7 paces from the deceased. He testified that the weather was sunny, and it was at about 11:30 in the morning when the incident occurred, and as such he could see clearly. He further testified that the policeman who shot the deceased was coming from the shop approaching the deceased slightly on the side from the back. The deceased was carrying a bottle of brandy and medication from the clinic at the time. He was not running but walking towards him. Malamba further testified that after hearing gun shot and seeing the deceased falling, he ran to the shop and he met some of the local men to whom he narrated about the shooting of the deceased. He further testified that the people at the shop thought that it was Schimfithi that was being shot (Schimfithi is apparently known as a ‘rascal’ in that community). He corrected them and advised them that the police did not shoot Schimfithi but the deceased. They then attempted to get closer to the scene where the deceased was, but the police refused them access to the scene. He wanted to show the men from the shop that the person who was shot was the deceased and not Schimfithi. They used another route and subsequently managed to get closer to where the deceased was lying and they all saw that it was the deceased, not Schimfithi, who was shot and killed. He further testified that afterwards, the policeman who shot at the deceased, whilst smoking a cigarette, told the community members that he shot at the wrong person. He further testified that there were three police officers, two of which were male officers and the other one was female. They were all in police uniform.

[10] Under cross examination, it was put to Malamba that it will be disputed that the person he described as a coloured policeman shot at the deceased. Malamba stood firm on his version that it was the coloured policeman that shot and killed the deceased.

It was further put to Malamba that the police were chasing after a suspect and that the suspect opened fire towards them. Malamba disputed that and testified that the suspect they were looking for was not the deceased. He added that the police were not telling the truth because the deceased did not shoot at anyone but instead, it is the police that shot at him. He disputed the proposition that was put to him that there was a shooting between the suspect who was running away and the police. He confirmed that he did not see Schimfithi on that day, but he was certain that there was no shooting between the police and an unknown assailant.

The Defendant's case through the evidence

[11] The defence called three witnesses. The first witness called was Sgt. Hazron Warren Livers ("Livers"). He testified that he is a sergeant employed in the South African Police Services. He started working at Mqanduli Police station from 2006 and was transferred to Mthatha Flying Squad unit from 01 April 2018.

[12] Livers testified that on 19 October 2016, he was patrolling with constable Mbana and constable Tofu. Whilst they were patrolling, they received a report that a robbery was in progress at Mahodini bottle store and that the suspects were armed. On the way to Qokolweni, they met their colleagues from the flying squad unit stationed at Mthatha who gave them full description of the four suspects. They (Livers and two other officers) then proceeded down the valley to check around the vicinity where the robbery took place, and they met two gentlemen who informed them that they saw four suspects running towards the direction of Ndlunkulu locality. They then drove towards the shop in Ndlunkulu and patrolled that area. They entered into the yard of Nobonke store and it was at that time that they saw a male who was wearing clothes that fitted the description that was given to them. Livers decided to alight from the vehicle and to follow that suspect on foot. The suspect went around the store and whilst Livers was approaching the corner, the suspect started shooting at him. He lied down and rolled on the grass and fired back at the suspect. The suspect went through the hole on the fence of the shop and ran across the road. He was running and firing shots at all

directions. After the suspect disappeared, Constable Tofu came to him and told him that someone was shot up the road and they all went to him trying to assist. They called an ambulance and also informed the Commander who arrived shortly followed by the ambulance. IPID was also informed about the incident. Their firearms were booked in and taken for ballistic tests. Livers disputed the evidence of Malamba and testified that he was inside the yard and he did not shoot the deceased. He further labelled Malamba a drug addict whom he saw smoking dagga when the IPID was taking statements. Livers confirmed that he was the only coloured police officer that was there. He further denied that he told the community members that he shot at the wrong person. He stated that he cannot remember whether he was informed about the mischievous Schimfithi, but the person who ran away fitted the description that was given for the shop robbers. He concluded by stating that he does not know who shot the deceased, but he is certain that he is not the one who shot him.

[13] During cross examination, he stated that he does not know that the mandate of IPID is to investigate wrongful and criminal conduct reported about the police. It was also put to him that the reasons for the confiscation of their firearms is that they were investigated for shooting and killing the deceased. He stated that it is a standard procedure that if a person is shot the IPID gets involved. He further advised that his firearm is not linked to the death of the deceased as per the ballistic report. It was however put to him that there is nothing in the ballistic report that says specifically that one of the bullets that were tested was found from the deceased body. Livers replied by stating that he cannot comment to that because he is not a ballistic expert.

[14] Livers was also probed about the description of the suspect that was given by the members of the flying squad. He stated that he cannot remember what he wrote in his statement, but he cannot dispute that the description that was given to him is that one of the suspects was wearing black jacket and beige trousers.

[15] The photo album was also shown to Livers and specific reference was made to photos 5,6,7, and 8 which depicted photos of the lifeless body of the deceased wearing

black jacket and beige pants. He stated that the deceased was far away from the shop, and he denied that he shot the deceased and that he was responsible for his death. Livers was also asked about the alleged suspect whom he was chasing as to what happened to him. He stated that they decided not to pursue the suspect anymore but to assist the deceased by calling for help. It was put to Livers that the only reason he did not chase this alleged suspect is that there was no other suspect. He disagreed.

[16] The second witness called was Constable Bongeka Astra Mbana. She testified that she is employed as a police officer at Mqanduli police station. She stated that on 19 October 2016 she was on duty with Livers and constable Tofu. Her testimony is the same as the one of Livers relating to what happened before they went to Ndlunkulu locality. She confirmed that they were given the full details of the robbery and description of the suspects by the members of the flying squad. They proceeded towards Ndlunkulu, and when they were about to reach the shop, they saw someone coming out of the shop who fitted the description that was given to them by the members of the flying squad. Livers alighted from the police vehicle and approached the suspect and he started running. When Mbana was also alighting from the police vehicle the suspect was already running towards the back of the shop. She heard gunshots and as she was joining the road, she saw the suspect and pulled out her firearm and also fired shots. Tofu then told them that there was a man that was lying on the road. She established that the man had been hit during the shooting. They called their supervisors from the police station and upon their arrival they explained to them what happened. She stated that she does not know who shot the deceased, but she disputed the evidence of Malamba that the deceased was shot by Livers. She confirmed that there were similarities between the clothing of the deceased and the suspect they were chasing.

[17] During cross examination, Mbana stated that she does not know who shot the deceased and therefore she cannot confirm nor deny whether it was Livers or not. She confirmed that IPID gets involved when there is suspected wrongdoing by the police, and they were called because they were suspected to have killed the deceased.

[18] The third witness called was Constable Nyameko Tofu (Tofu). He is employed as a police officer by the SAPS stationed at Mqanduli police station. On 19 October 2016, he was with Livers and Mbana. They were looking for three suspects who committed a robbery at Mahodini. On their way to Qokolweni they met members of the flying squad who gave them description of the suspects. They continued searching until they reached Nobonke store. When they were about to stop the car, they saw a person who matched the description of one of the suspects they were looking for in front of the shop and he went around the corner of the building. Livers jumped off the vehicle and started chasing at the suspect. Mbana followed as well. He then saw the suspect going towards the direction of the gate and he stopped next to the gate. He heard gunshots and saw the suspect outside the yard firing shots. Tofu drew out his firearm, but he did not fire any shots. After the gunshots stopped, he started chasing the suspect but whilst chasing he saw a person who was on the road falling. He called Mbana and Livers informing them that someone was injured. The suspect ran away. They immediately called an ambulance and other stakeholders from their workplace. These includes detectives, fingerprint officers, and their commanders. The IPID was called by their commanders. He disputed that the deceased was shot by Livers.

[19] During cross examination, Tofu confirmed that (i) he did not see who shot the deceased; (ii) he does not know who shot the deceased; (iii) he does not know whether Mbana or Livers shot at the deceased or not because he did not see it happening, (iv) the deceased was wearing black jacket and beige pants and that those were the same clothes that were described by members of the flying squad.

Issue(s) for determination

[20] The issue is whether the deceased was shot and killed by members of the South African Police Services.

Analysis of the evidence

[21] It is trite that in civil proceedings the party that bears the onus must, in order to succeed, prove its case on a balance of probabilities. I am also mindful of the fact that the proper way to decide between the two opposing versions should be by reference to reliability, credibility, and probabilities. This principle was stipulated in the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et CIE and Others*¹, where the Supreme Court of Appeal set out guidelines for resolving factual disputes and held that the court, in order to come to a conclusion on disputed issues, must make findings on:

- (a) the credibility of the various factual witnesses;
- (b) their reliability; and
- (c) the probabilities.

[22] In *National Employers General Insurance Limited v Jagers*², the court set out the approach to be adopted when dealing with the question of onus and the probabilities. He held as follows:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he 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. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."³

¹ 2003 (1) SA 11 (SCA).

² 1984 (4) SA 437(E).

³ Page 440 D-G.

[23] The plaintiff relied on the evidence of a single witness. In terms of section 16 of the *Civil Proceedings Evidence Act*⁴ judgement may be given in any civil proceedings on the evidence of a single competent witness. In *Daniels v General Accident Insurance Co Ltd*⁵ the court held as follows:

“Although there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the Court that on a balance of probabilities it is the truth.”

[24] In my view, Malamba although a single witness, was credible and reliable. I am however mindful of the fact that the findings of credibility cannot be judged in isolation but are to be considered in the light of the proven fact and the probabilities of the matter.⁶ Malamba gave a clear description of what he saw in relation to the shooting of the deceased. He created a very good impression in court both about his demeanor and his actual testimony. His narration about what he saw on that day cannot be faulted and even during cross examination he was unshaken. The criticism against his evidence relates to matters that are not related to the issue. For example, the unfounded accusations that were levelled by Livers about him being a drug addict have nothing to do with what he saw on that day. Importantly, it was not disputed that the witness was present when the incident happened and that he was on the road travelling in opposite direction with the deceased.

[25] It was also argued by counsel for the defendant that the evidence of Malamba contradicts the case pleaded by the plaintiff in the particulars of claim. The basis for this argument is that the plaintiff did not mention in the particulars of claim that the deceased was shot by a coloured police officer. I disagree with this argument. Firstly, Malamba is not the plaintiff but an independent witness who witnessed what happened on that day relating to the death of the deceased. Secondly, the evidence presented by Malamba is consistent with what is alleged in the particulars of claim in that he testified that the

⁴ Civil Proceedings Evidence Act, 1965 (Act 25 of 1965).

⁵ 1992 (1) SA 757 (CPO) at 760 A-B.

⁶ *Santam v Biddulph* 2004 (5) 586 (SCA) at 589G.

deceased was killed by a member of the South African Police Services, and I do not see how the omission of race of a police officer who shot the deceased in the particulars of claim can be construed as a contradiction, let alone a material one.

[26] Although the defendant called the evidence of three witnesses with the aim of having corroborating testimonies, they are not independent witnesses. They are colleagues who happened to be implicated in the death of the deceased hence they were investigated by the IPID. Malamba on the other hand is an independent witness, unaffected and unrelated to any of the parties. Also, the version of the Livers, Mbana, and Tofu is improbable when having regard to the totality of the evidence in this case especially in view of the following:

- (a) They were looking for suspects, one of whom was wearing black jacket and beige trousers. The deceased was wearing black jacket and beige trousers. In my view, the mysterious death of the deceased who happened to fit the description of the suspects that the police were looking for was not just a coincidence, but it had to do with what he was wearing on that fateful morning.
- (b) The fact that Livers, Mbana, and Tofu did not pursue the alleged suspect after realising that the deceased has been shot cannot be ignored. This is because a suspect was being pursued for having committed serious crimes and on their own version he was armed and dangerous. In my view, one of them could have been able to call for help or an ambulance whilst others continue with the chase. What is more peculiar is the fact that there were no cartridges recovered at the scene except the ones from the police officers notwithstanding their testimony that the 'fleeing' suspect fired shots. The ballistic report reveals that the bullets and cartridges only belong to the police.
- (c) The commanders and IPID were called on the scene. It is common cause that the IPID is only called upon when there is suspicion of a misconduct by

police officers. It is also common cause that the incident attracted the interest of the IPID because the conduct of the police officers on that fateful day had to be investigated. What makes matters worse is Livers's evasiveness regarding his knowledge about the functions of the IPID. It is inconceivable that a police officer with more than 14 years in the police services cannot know that the functions of IPID are to investigate unlawful conduct by police.

[27] Therefore, the proven facts in this action are that the deceased was shot and killed at about 11h30 on 19 October 2016. Livers, Mbana, and Tofu were looking for a suspect that was wearing black jacket and beige trousers. The deceased was wearing black jacket and beige trousers. The probabilities are that, given the similarities between the deceased's clothing and that of the suspect, Livers thought that the deceased was the suspect and shot and killed him in circumstances where the deceased was not posing any danger to him which is why the IPID got involved. I am therefore satisfied that, on a balance of probabilities, the plaintiff has succeeded in discharging the onus of proving that the deceased was shot and killed by the members of the South African Police Services.

Costs

[28] The general rule is that the costs usually follow the result and I cannot see any circumstances which would justify any departure from the general rule. Mr Bodlani requested the court to allow the plaintiff the costs of two counsel on the basis that the matter is one of importance to the deceased's family who lost a breadwinner. The enquiry that was adopted in *Koekemor v Parity Insurance Company Ltd. and Another*⁷ is whether, in all the circumstances, the expenses incurred in the employment of more than one counsel were necessary or proper for the attainment of justice or for enforcing the rights of the plaintiff, and were not incurred through over-caution, negligence or mistake. The court in the *Koekemoer* case held that among relevant considerations are the following:

⁷ 1964 (4) SA 138 (T) at 144 F.

- (a) the volume of evidence (oral or written) dealt with by counsel or which he or they could reasonably have expected to be called upon to deal with;
- (b) the complexity of the facts or the law relevant to the case;
- (c) the presence or absence of scientific or technical problems, and their difficulty if they were present;
- (d) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case;
- (e) the importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by counsel.

[29] In this case, I am not convinced that the complexity of the issues involved required the engagement of two counsel. Therefore, the costs of the second counsel are not allowed.

[30] In the result I make the following order.

- (a) The defendant is held liable for the damages that the plaintiff shall prove consequent upon the death of Silulami Demesha on 19 October 2016.
- (b) The quantum of damages to which the plaintiff is entitled shall be determined on a date to be arranged with the Registrar of this Court.
- (c) The defendant shall pay the costs of the action incurred thus far.

S M MBABANE

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

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Date heard: 20 February 2019

Date of Judgment: 30 April 2019