

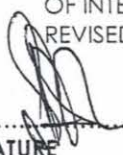
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 72700/2015

26/1/18

|                                                                                   |                                 |
|-----------------------------------------------------------------------------------|---------------------------------|
| (1)                                                                               | REPORTABLE: NO                  |
| (2)                                                                               | OF INTEREST TO OTHER JUDGES: NO |
| (3)                                                                               | REVISED.                        |
|  |                                 |
| SIGNATURE                                                                         | DATE                            |
|                                                                                   | 26/01/2018                      |

In the matter between:

**SIMANGALISO LUCKY THANJEKWAYO**

Plaintiff

**versus**

**MINISTER OF POLICE**

Defendant

---

**JUDGMENT**

---

**MPHAHLELE J**

[1] The plaintiff instituted action against the defendant for damages arising a shooting incident that took place on 06 June 2014.

[2] At the commencement of the trial and by agreement between the parties, the merits for liability and quantum are separated in terms of rule 33(4) of the uniform rules of court and the matter proceeded on the issue of liability, and the issue of quantum to stand over for determination at a later stage.

[3] It is common cause between the parties that on 02 June 2014 at Thembalihle, Vrede, Free State Province, one Constable Mabula shot the plaintiff.

[4] The defendant relied on self defence for the shooting of the plaintiff. The defendant having conceded that in shooting the plaintiff the police officer concerned was acting in the course and scope of his employment, the only question before this court is whether the shooting of the plaintiff was justified. The onus was on the defendant to prove that the shooting of the plaintiff was justified [Mabaso v Felix 1981 (3) SA 865 (A)].

[5] The defendant led the evidence of two witnesses, viz. Constable H K Mabula and Constable R Mokoena. The plaintiff testified in person and also led the evidence of Mr. B P Tshwala.

[6] Constable Hloriso Kgabo Mabula testified that on 02 June 2014 he was duty doing the stop and search with Constable Mokoena in Makopo Street. It was at between 00h00 and 01h00 when he noticed two men walking side by side busy consuming liquor. Mokoena then stopped the vehicle and Mabula approached one of the men and after introducing himself, the man refused Mabula to search him. Mabula then warned the man he was arresting him for drinking in public. The man resisted the arrest and Mabula asked Mokoena to assist him with the arrest. The man then shouted and informed his friend that the officers (referring to them as dogs) wanted to arrest him.

[7] Whilst struggling with arresting the plaintiff, Mabula was struck with a beer bottle at the back. He did not know who struck him with the bottle as there was a crowd of about fifteen people present at the scene of the incident. The crowd threw bricks and beer bottles at the two officers. Despite for calls to stop, the crowd continued attacking the officers and threatening them with more violence. They warned the crowd several times that they were disturbing them in executing their

duties. Mabula then warned the crowd that he will shoot. One of the crowd hit Mabula with a stone on his right ankle which caused him to fall on his back. Under cross-examination he stated that the plaintiff is the one who hit him on the right ankle with a brick which caused him to fall down.

[8] After warning the crowd twice, Mabula discharged two warning shots (on the ground) before falling down. He fired a third shot whilst on the ground lying on his back. The shot was directed the shot at the person leading the crowd approaching him. He later learnt the person shot was the plaintiff in this matter. The plaintiff was about six meters away at the time of the shooting. He feared for his life so he had no other alternative but to fire the shot to defend himself.

[9] He stated that he wrong to mention in his statement to the police that he shot the plaintiff as he was falling down. He admitted that the statement was made whilst the incident was still fresh in his mind but blamed the mistake on the trauma caused by the incident. He fired the shot because was still approaching him whilst he was lying on the ground.

[10] Upon arrival of a back-up, Mokoena took him to hospital for medical attention.

[11] The attempted murder charges against him were later withdrawn as it was found that he acted in self defence.

[12] According to Mabula, the plaintiff was holding a beer bottle in his hand and could not walk properly (was staggering) at the time he was apprehended.

[13] Out of the group of about 15 people, only three were arrested. The three were subsequently acquitted.

[14] They retreated together towards the same direction as the crowd was chasing them with Mokoena on his right hand side. He could not say if Mokoena fired any shot(s) or not but was certain that he was the one shot the plaintiff. He directed the shot at the plaintiff's chest. At



the time the plaintiff was not standing still, he was running. He denied under cross-examination that he shot the plaintiff twice, first on the left arm then on the stomach.

[15] Constable Richard Mokoena testified that on 02 June 2014 he was the driver of a police vehicle on duty with Mabula. On noticing a (man walking) pedestrian busy drinking, Mabula asked him to stop. Mabula approached the man and he noticed Mabula trying to search this man. Then Mabula asked him to assist arrest the man. Mabula informed the man that he intended to issue a fine. The man resisted the arrest and called other people. Then several men appeared and threw beer bottles and stones at them (the two police officers). He heard Mabula (who was three steps behind him) mentioning that he was hit at the back. Mokoena was in the midst of the crowd. He lost control of the plaintiff and then retreated. As he and Mabula were busy retreating he heard Mabula pleading with the crowd to stop the attack. He then heard two gunshots from his left hand side where Mabula was. Then he noticed the crowd running away with Mabula and the plaintiff lying on the ground. Mabula and the plaintiff were about four metres away from each other. Mabula informed him that he was struck with a stone on his right foot and a beer bottle on his right hand. Mabula had his firearm in his left hand. He immediately called for back-up and was advised by warrant officer Malinga to take Mabula to hospital for treatment. He did not sustain any injuries as he was wearing a bullet proof vest and boots.

[16] Under cross-examination he testified that he grabbed his firearm before the shots were fired. Only to change later and mention that he grabbed his firearm before the two shots were fired because he heard someone in the crowd saying 'let us take their firearms'. He never fired any shot(s) despite their lives being in danger.

[17] The plaintiff testified that on 02 June 2014 at approximately 00h00 he was walking home from a tavern with his friend, Bafana. And Vuzi was walking about 15 metres behind them. Looking back he noticed Vuzi being stopped by a police officer. He then turned back to find out what was happening with Vuzi. He left Bafana behind as he went towards Vuzi's direction. As he was about to reach Vuzi, a police officer one Mabule alighted from the police van and produced a firearm. Mabule remarked that he has been looking for them and then started shooting. Mabule only shot the plaintiff. He shot the plaintiff twice, first on the left wrist then the tummy. He then fled towards his home direction. He fell down and called on Bafana to inform his mother that he has been shot. His mother and Vuzi attended at the scene of the

incident and then Vuzi took him to hospital for medical attention. The plaintiff, Vuzi and Bafana were arrested but eventually not found guilty of any charge. Vuzi has since passed on.

[18] He knew Mabula before the shooting incident. They stay in the same street but are not on speaking terms. Under cross-examination he mentioned that Mabula once attended at his home looking for his brother and his brother's friend. He ordered them to leave as the people they were looking for were not there. As they were leaving his home Mabula and the police officers remarked that they will get him. There were six police officers, only knew Mabula's name. He suspected this incident to be the reason for the shooting.

[19] He denied that shots were fired in order to protect police officers who were under attack. He maintained that no warning shots were fired. He agreed that in his statement to the police he stated that the police officers were checking the beers, whether they were opened or not. As he was approaching Vuzi he noticed that the police were checking the beers. Under cross-examination he testified that it was a lie that Mabula asked to search Vuzi. Only to change later and mention that he would not know if Mabula asked to search Vuzi as he was not near Vuzi.

[20] Bafana Patrick Tshwala testified that on 02 June 2014 he was walking with the plaintiff and Vuzi towards the plaintiff's home. He and the plaintiff were walking together and Vuzi following from behind. On looking back, he noticed Vuzi standing next to a police van. Then plaintiff turned back towards the police to check what was happening. The police van was about 35 metres away. Before the plaintiff could reach the police van he heard a gunshot. Under cross-examination he was confronted with his statement to the police wherein he mentioned that 'after a while he was there I heard a sound of a gunshot'. In response he stated that he was not the one who wrote down the statement. Plaintiff then approached his direction running, fell down and before reaching him and pleaded with him to inform his mother that he he has been shot. He summoned plaintiff's mother who asked the police to take his son (the plaintiff) to hospital. The police refused stating that they do not transport injured people. Vuzi eventually took him to hospital.

[21] He denied that the police officers were ever attacked and maintained that there was no commotion during the shooting. He



further denied that Mabula was lying on the ground when shooting the plaintiff. He however did not know who fired the shots and what triggered the shooting.

[22] He disputed under cross-examination that the police first asked to search Vuzi. Only to change later and mention that he could not hear the conversation between the police and Vuzi. He further could not see what was happening between the police and Vuzi.

[23] The court is faced with two mutually destructive / conflicting versions. The court must under the circumstances make findings on the credibility of the factual witnesses; their reliability and the probabilities.

[24] The evidence of the defence witnesses is confusing and riddled with contradictions.

[25] The two police officers maintained that they were attacked by a crowd of about 15 people and during the attack they called for back-up. This crowd was apparently still present at the scene when the other officers (the back-up) arrived but both officers failed to give a reasonable explanation why no arrests were made at the scene. Further they failed to explain why only the 3 (the plaintiff, the late Vuzi and Tshwala) were arrested. These three were only arrested days after the date of the shooting incident.

[26] According to Mokoena, he was about 4 or 5 metres away from Mabula during the attack by the crowd. This crowd was apparently throwing beer bottles and bricks at both himself and Magbula but what is Mokoena never fired a shot, not even a warning shot.

[27] On the evidence of the two police officers (Mabula and Mokoena) there is uncertainty as to whether Mabula fired 2 or 3 shots and at whom such shots were supposedly fired. Mokoena who was not far from Mabula stated that he heard only two shots and Mabula on the other hand stated that he fired three shots (two warning shots and the third shot was directed at the plaintiff). Mabula further contradicted himself as to what stage was the third shot fired. He testified that he was already lying on the ground when he fired the third shot contrary to what is stated in his statement contained in the police docket. In that statement he stated that he fired the third shot at the plaintiff whilst in

the process of falling. This plaintiff that was shot, according to Mabula, was drunk and staggering when Mabula first noticed him. There is no suggestion that the plaintiff regained his composure and was eventually able to run and be in a position to wage a fight against the two police officers, let alone Mabula.

[28] It follows that the defendant failed to discharge the onus resting on it to prove that the shooting of the plaintiff was justified.

[29] in the circumstances, the following order is hereby made:

1. The defendant is liable to pay 100% of the plaintiff's proven or agreed damages caused by the shooting incident that took place on 06 June 2014.
2. The defendant to pay the costs.



---

S S MPHAHLELE  
JUDGE OF THE HIGH COURT,  
PRETORIA

For the plaintiff: Advocate L Mgwetyana  
Instructed by: Mjali & Zimema Attorneys  
For the defendant: Advocate U B Makuya  
Instructed by: The State Attorney