

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, MTHATHA)

CASE NO. 2247/2009

In the matter between

NCEBAKAZI SITINISE AND OTHERS

Plaintiffs

and

MINISTER OF SAFETY AND SECURITY

AND OTHERS

First Defendant

LAWRENCE WINDY TYANI

Second Defendant

JUDGMENT

HARTLE J:

1. The issue in this consolidated dependants' action turns on the question whether the killing of Mr *Mcedisi Sitinise* (the deceased), who was admittedly shot once by a police officer acting during the course and scope of his duties in that capacity, and as a result of which he died, was lawfully justified in the circumstance.
2. The first plaintiff is the brother of the deceased who claims to have been supported by the latter during his lifetime. The second plaintiff is the surviving spouse of the deceased who sues in that capacity and as guardian of her and the deceased's minor children as well on behalf of a minor brother of the deceased.
3. At the outset of the trial I granted an order separating the single issue referred to above from the remaining issues highlighted by the parties at the pre-trial conference, *viz* quantum and the issue of the legal duty on the part of the deceased to support the plaintiffs during his lifetime.
4. The basis upon which the defendants pleaded the shooting was justified was set out in thus in their amended plea:

“4. Sergeants Pongwana, Mthwa and Tyani were peace officers within the meaning of section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977) (the Act)

5. On our about 23rd December 2003 at or near Ntshiqo Administrative Area, Tsolo, members of the South African Police were urgently called at the homestead of one Mcedisi Sinyinise (deceased)
6. It was alleged that the deceased was posing a violent threat to his wife (2nd plaintiff) and or to the public, in that the deceased;
 - 6.1 had forcefully pulled 2nd plaintiff from her maiden home to their matrimonial home at gun point.
 - 6.2 had locked himself and 2nd plaintiff on their two room flat threatening to shoot her and himself to death.
 - 6.3 had fired two shoots randomly.
7. Members of the police including the 2nd plaintiff proceeded to the said homestead in order to discharge their constitutional obligations and police duties as set out in the Act, the Republic of South African Constitution Act, 1996 (Act 106 of 1996) and the South African Police Service Act, 1995 (Act 68 of 1995)
8. The said police found the deceased and 2nd plaintiff still locked in the room.
9. After sergeant Pongwana had announced the presence of the police officials to deceased, he pleaded with him to open the door.
10. The door was eventually opened after sometime and the deceased was seen carrying a firearm.
11. The firearm aforesaid was pointed towards the opened door and the second defendant.
12. Sergeant Pongwana asked the deceased to drop down the firearm and this was ignored by the deceased.
13. The 2nd defendant fired one shot in self defence alternatively in defence of the 2nd plaintiff whose life was in danger.” (Sic)

5. The second defendant who fired the fatal shot, namely Sgt *Tyani*, died on 7 May 2011. An abridged death certificate substantiating this fact was filed of record by consent between the parties.
6. As will appear from a summary of the evidence below, the events pleaded in paragraphs 4 – 8 of the defendants’ plea are largely common cause. What the deceased was doing at the time the fatal shot was fired is, however, in issue between the parties.
7. The defendants correctly having accepted the onus to prove the lawfulness of the shooting commenced leading evidence.¹ *Monwabisi Richard Pongwana*, a warrant officer in the South African Police Service testified that on 23 December 2009 he was doing crime prevention duties in Tsolo with one *Xolani Mtwana* and the late second defendant when around 21h00 they received a call to come to the police station. On their arrival there they learnt from a male complainant that the latter’s sister (who it is common cause is the second plaintiff) had been taken “*by force*” from her birth home to her marital home by her husband under what he noted to be “*unfavourable*” circumstances. These circumstances involved the fact that the deceased was “*by nature not controllable*” and that he had a firearm. The complainant feared that his sister might be injured or killed.

¹ *Mabaso v Felix* 1981 (3) SA 865 (A); *Minister of Law and Order v Monti* 1995 (1) SA 35 (A).

8. The three policemen dispatched to the deceased's home together with the complainant. When they arrived there an elderly relative of the deceased urged them to leave since there was no longer a problem there, but both the complainant's abiding concerns - he thought that his sister would be prejudiced if the police presence was removed, and their own doubts that the situation was under control caused them to remain, at least in order to establish whether the presence of a specialized unit was not required. The complainant had emphasized that the deceased had been shooting randomly (a fact later confirmed by the second plaintiff when she testified) and that even the elderly relative who was discouraging them from entering his homestead was unable to control him.
9. A discussion with the older relative resulted in a brother of the deceased, one *Luyolo*, offering his services to "*penetrate*" the homestead so that they could get closer to the second plaintiff in order to determine her position. *Luyolo* tried by calling out to the deceased but the latter urged him to return the next day as he was about to sleep. The witness - who had moved up closer with *Luyolo* - listened at the window of the homestead and got "*a sense*" that there was an argument going on between the deceased and the second plaintiff, making him even more uncomfortable about retreating. He returned to report his concerns to his colleagues. He also called radio control to report the situation but was unable to give them any helpful information right then.
10. At this point a woman claiming to be a relative (*Thandile Sitinise*)

volunteered her services to knock at the door of the homestead and speak to the deceased. She explained when she testified later that the purpose of approaching her brother on this basis was to negotiate with him so that he would not carry out this threat of shooting the second plaintiff. They followed her into the two roomed homestead where she knocked at the door of the bedroom, which was the inner room. The witness himself took cover against the wall in line with the door to the bedroom. It was a small room of approximately 3 – 4 square metres. *Mtwa* was behind him, followed by the second defendant, who was positioned at an angle of approximately 45° in relation to the bedroom door, but near the doorway where they had entered.

11. *Thandile* called out the deceased's name and informed him that she was looking for her "*sister*". He told her to return in the morning, but she persisted in speaking with the second plaintiff who at least intimated to her that she was scared. At this point the witness sensed that someone was touching or fiddling at the bedroom door from the inside. In the meantime *Thandile* began to retreat from the room with the candle she had come in with. She left it in the doorway on the floor and went out of the room completely.

12. The top of the stable door to the bedroom opened, giving the witness an opportunity to better assuage the situation. As he was attempting to look into the bedroom to check on the movements of the deceased he saw the barrel of a firearm (which he later clarified was a pistol). He shouted to the deceased that they were with the police and that he should drop the firearm.

This elicited no response, only a pause. As the witness made a move once again to check what the deceased was doing inside the room, he heard a shot being fired which, it later transpired, had been discharged from the second defendant's firearm.

13. The second plaintiff came running out of the door screaming that her husband had shot himself. He took the candle from where it had been left and approached the bedroom where he found the deceased lying on his face to the edge of the bed. The latter's firearm was on the bed above his outstretched arms. A spent rifle cartridge was later recovered in the room on the ground.

14. When he later interrogated the situation with the second defendant, the latter informed him that he was obliged to shoot as the deceased's firearm was pointed directly at him. Further, and as far as he was concerned, he believed that when he and his colleagues had approached the deceased's homestead, the second plaintiff's life was in danger, both because she had told her sister that she was fearful to remain with her husband, and because the complainant had reported to them that a firearm was involved. He also clarified, under re-examination, that the members had established that the deceased had earlier on made threats to kill both the second plaintiff and himself on that day, a fact not denied by the second plaintiff when she later testified. This he said they had heard from the complainant, which was the reason the latter had gone to the police station in the first place to seek their assistance.

15. He explained under cross examination that the second defendant had conveyed to him after the shot was fired that whereas he and *Mtwa* were able to take cover where they did, he himself was precluded from doing so by a table in the room, resulting in him being in “*clear view*” of the door opened by the deceased at the time the latter pointed the firearm at him.

16. He conceded that the deceased had been shot in the chest, but did not agree that he had been shot from behind.² As an aside I mention that apart from it being common cause that the deceased was fatally struck in the chest, no evidence was in fact led as to the nature of the wound or the trajectory of the fired cartridge so as to provide any assistance to the court in this regard.³

17. The first defendant also adduced the evidence of Sergeant *Xolani Mtwa* who confirmed his involvement at the scene on the night in question whilst on duty with *Pongwana* and the second defendant. After receiving a call from the police station concerning an allegation that there was someone who wanted to shoot his wife at *Ntshiqo*, the three of them dispatched together to the deceased’s homestead. There they encountered the elderly relative of the deceased who discouraged them from entering, but they decided nonetheless to proceed and investigate the matter for themselves since they had been informed that the deceased was inside together with the second plaintiff and

² During cross examination counsel for the plaintiffs flirted with the suggestion that the entrance wound was on the deceased’s back, but this was not taken any further.

³ Evidence as to what was found on the scene after the shooting would have been helpful and perhaps conclusive of some of the issues between the parties which were in dispute.

that he wanted to kill her. People inside the yard had also said of the deceased that he was violent and that they could not trust themselves to sleep whilst he was around.

18.They were led inside by *Thandile* who knocked at the inner door with a candle in hand, *Pongwana* announcing at the time of the knocking that they were police officers. *Pongwana* was positioned next to the door in front of the witness with the second defendant behind him. Since there was no response to her knocking she left, putting the candle down. The door ultimately opened whereupon he heard *Pongwana* say that they were with the police and instructing the deceased to put down his firearm. He personally did not see a firearm, since he was behind *Pongwana* at the time.

19.Afterwards he heard a shot being fired. The second plaintiff left the room screaming that the deceased had shot himself. When *Pongwana* asked who among them had discharged a shot, the second defendant claimed it was him. The latter explained at the time that the deceased had appeared with a firearm pointed at him. In response to a leading question put to him whether the second defendant had told him why he didn't "*duck*", the witness added that he had had no chance to do so because there was a table obstructing him and the room was "*not big enough*".

20.In rebuttal of the defendants' evidence, the second plaintiff, who was married to the deceased, testified that on the fateful night she was at her birth home when he arrived there drunk and accosted her with a firearm. He

grabbed her and pulled her along with him – at gunpoint - to their marital home which is approximately 15 minutes away. He threatened along the way that both of them would die that day.

21. When they arrived at their homestead he took her into the bedroom and secured the door, again repeating the death threats. She was not certain if anyone had observed her being taken away from her birth home, but assumed that her sister followed because she was on the scene soon after their arrival at the homestead and was screaming outside.

22. The deceased's uncle knocked at the door and called out to the deceased asking him what was happening and requesting him to open the door. The deceased responded by telling the latter that he should take care of their (the second plaintiff and the deceased's) children. Whilst all this activity was going on from the outside, the deceased fired shots with the firearm, but since it was dark inside, she could not tell where he aimed. She was pleading with him to stop. He repeated from time to time that they would die together but in the end he calmed down, undressed and said they should get into bed. At this point he took the firearm, stripped its magazine from it and put it next to the pillow. By now some two hours had lapsed.

23. The deceased fell asleep ultimately but was not in a deep sleep. She did not undress herself as she was not yet ready to sleep. She took the magazine and put it in the pocket of a jacket she was wearing. She heard both *Luyolo* (a young relative from her marital home) and *Thandile* appealing to the

deceased from outside the bedroom to open and then saying they were leaving. The deceased ultimately proceeded toward the door to open it.

24. On his reaching the door, she immediately heard a shot ring out. Her husband fell down. She got up from the bed and ran out of the door. There was candle light in the adjoining room. She noticed two police officers upon exiting (whose presence she had hitherto been unaware of), but ignored them since she was in a state of shock.

25. Under cross examination she conceded without hesitation that her life had been in danger earlier on in the evening on account of the peculiar circumstances. She denied however that she had any reason to leave the bedroom or fear anything at the time the shot was fired because – so she explained – she and the deceased were at that time “*talking sense*” and understanding one another.

26. She was adamant that, at the time the deceased approached the door, he was unarmed. She denied that the police had announced their presence on the scene. Similarly she denied that *Pongwana* had ordered the deceased to drop the firearm. As far as she was concerned her husband never communicated with anyone from leaving the bed to approach the bedroom door until he fell down.

27. She acknowledged that she had said in an earlier statement made to the

police that when the deceased had stood up she heard something fall to the ground, but she added that she had clarified to them that she was not sure whether it was a firearm or not. She could not remember saying in the police statement that a shot was fired before the door opened.

28. The plaintiffs further adduced the testimony of *Thandile Sitinise*, a half sibling of the deceased. On the night in question she had accompanied her brother - who she also confirmed to be under the influence of alcohol - to the second plaintiff's birth home. There the deceased had pointed a firearm at the second plaintiff, grabbed her by the collar, and pulled her along to their matrimonial home at gunpoint. She and the second plaintiff's sister followed the couple to their homestead. When she arrived there the deceased and the second plaintiff had gone into their bedroom. She heard him say that he was going to kill her. Other people arrived to intervene including her uncle and *Luyolo*. Whilst she was inside the first room of the homestead *Luyolo* and *Phumelele* entered. They appealed to the deceased to open but he would not.

29. The second plaintiff's brother had in the meantime summonsed the police, phoning from the yard of the homestead. This was around 7 or 8 pm. They arrived later asking where the deceased was and she led them to the bedroom. Four members entered whilst others remained outside. She was flanked by members attending the scene, two on each side. She and *Luyolo* called on her brother to open but she could not recall whether he responded or not. He opened the door just slightly, however, when a shot rang out. She could not say who fired at him, neither did she see the deceased or observe

that he was carrying a firearm. She could not recall the police pleading with him to put down a firearm. She too denied that the police announced their presence there. She left the room after the shot was fired.

30. She disavowed telling the police in a statement that the deceased opened the door carrying a firearm which he pointed to himself and that it was at this point that he was shot.

31. None of the earlier statements deposed to by the plaintiffs' witnesses were proved in evidence.

32. The question which arises for decision in this matter is whether the defendants have proved on a balance of probabilities that when the second defendant fired the shot which killed the deceased, he acted in self defence, or rather "*private defence*", which term generally finds favour with modern authors since the ground of justification avails not only persons who defend themselves, but also those who defend others.⁴ The crux of their case in this regard is that the second defendant fired the shot in defence of himself, alternatively in defence of the second plaintiff whose life was in danger.

33. A person acts in private defence and his act is therefore lawful, if he uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon his or somebody's else's life, bodily integrity or other

⁴ CR Snyman, *Criminal Law*, 5th ed at p103

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.⁵

34. In *S v Makwanyane & Another*⁶ the constitutional basis for this ground of justification was articulated as follows by *Chaskalson P*:

“Self-defence is recognized by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33 (1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger”.⁷

35. A number of conditions need to be satisfied for a successful reliance on the defence,⁸ evident from the following requirements which must exist:

35.1 in respect of the attack:

⁵ *Criminal Law, Supra*, p 103. See also LAWSA, Vol 6, at par 38 – 48.

⁶ 1995 (3) SA 391 (CC).

⁷ At par [138]

⁸ See *Makanyane, Supra*, in which the court noted that there are “strict limits to the taking of life” even in the hostage situation illustrated in the judgment, and that “the law insists upon these limits being adhered to.”

- a) it must be unlawful;
- b) it must be directed at an interest which legally deserves to be protected; and
- c) it must be imminent but not yet completed.

35.2 in respect of the defence:

- a) the defensive act must be directed against the attacker;
- b) the defensive act must be necessary;
- c) there must be a reasonable relationship between the attack and the defensive act; and
- d) the attacked person must be aware of the fact that he is acting in private defence.⁹

36.I find that this matter can be determined on the basis of only a single contention, *viz* whether the fatal shot was fired by the second defendant against an unlawful act.

37. Although the defendants' justification was pre-dominantly underpinned by the traumatic events which had preceded the shooting and the violent threat which the deceased allegedly posed to the second plaintiff, the attack which

⁹ Snyman *supra*, at pgs 107 – 113.

ultimately warranted the discharge of the second defendant's firearm (on the defendants' version) was the alleged unexpected (and supervening) attack of the deceased on the second defendant by pointing a pistol at him. This was the primary basis for the ground of justification; the risk to the second plaintiff's life being relied upon only in the alternative. Whilst being mindful in assessing the second defendants' conduct that a court must take into account all the surrounding circumstances and not split the event up into fractions of a second¹⁰ it is, however, *this threat vis-à-vis* the second defendant and the critical moment in time which I need focus my attention on. When the shot was fired, the second defendant was not shooting to protect the second plaintiff, albeit it may have had this effect co-incidentally in their view.

38. In this regard the evidence suggests that, but for the unexpected attack, the tactical response unit might still have been called upon to intervene if the situation warranted it because, as *Pongwana* put it, it was "*beyond our training*". According to him they needed to at first assess whether "*the complaint is really existing*" before they could summons the specialized unit. On their evidence, therefore, their entry into the inner room of the deceased's homestead was an exercise of early reconnaissance only, to establish the risk to the second plaintiff. There was, for example, no discussion which had taken place before the shooting concerning how the matter was to be dealt with, neither was there any suggestion whatsoever that they entertained any notion of arresting the deceased at all. There was therefore on their evidence no attack on the second plaintiff at this point which warranted any response

¹⁰ *R v Jack Bob* 1929 SWA 32 at 34; *Cele v R* 1945 NPD 173 at 176.

other than simply investigating what the situation was. Neither did *Pongwana* or *Mtwa* testify that their aim was to themselves negotiate with the deceased. It was, however, certainly the desire of *Thandile* to do so when she asked them to accompany her inside. *Pongwana* confirmed that this was their express objective in entering the deceased's homestead at this point.

39. Concerning the perceived danger to the second plaintiff, it is common cause that her life *was* initially threatened, necessitating the presence of the police at the deceased's homestead to intervene. But by the time the fatal shot was fired, however, her evidence was that any danger or risk – certainly concerning herself - had abated. This was the view too of the elderly relative present on the scene. Although the members of police on the other side of the door might reluctant to believe as much when they took cover in the ante-room to the deceased's homestead, the defendants' defence was, however, not one of mistaken self defence *vis-à-vis* the second plaintiff. Rather their case rested fairly and squarely on the alleged fact that the deceased drew a firearm and pointed it directly at the second defendant when he opened the door; thus satisfying the requirement of an unlawful and imminent attack upon him justifying the lethal shot. The crisp question therefore is whether the evidence establishes this alleged fact.

40. In this regard there are mutually opposing versions between the plaintiffs and the defendants concerning the events immediately preceding the shooting. Therefore, before determining whether the defendants have discharged the onus which they bear to negative the *prima facie* unlawfulness of the

shooting, I must first consider whether or not their version can be said to be more probable than that of the plaintiffs who disavowed any unlawful attack by the deceased upon the second defendant prior to the shooting.¹¹

41. The matrix of an unlawful attack on the second defendant under the circumstances contended for by the defendants was bound to be difficult for them to establish in the absence of Sgt *Tyani's* testimony. Whilst no objection was made when *Pongwana* and *Mtwa* testified as to what the second defendant had conveyed to them after the shot was fired, there was certainly no agreement that this hearsay evidence could be admitted by consent. Further no attempt was made to introduce the transcript of the inquest into evidence, or a police statement contemporaneously made by the second defendant.

42. The account of the second defendant's conduct in the circumstances therefore rested exclusively on the evidence of *Pongwana* and *Mtwa*, neither of whom testified directly that the latter's life was placed at risk of harm or death by the deceased pointing a firearm at him. Indeed each of them confirmed the necessity to have questioned the second defendant after the event (both of them being surprised by the turn of events) as to the circumstances under which he had fired the shot, thus confirming that they could not give account for his conduct independently of what he had conveyed to them at the time. *Mtwa* himself did not even observe a firearm and whilst *Pongwana* said he saw the barrel of the deceased's pistol, he

¹¹ See *National Employment General Insurance association v Gany* 1931 AD 187 at 199 as to the test to be applied when there are versions upon trial which are mutually destructive of each other.

could offer nothing significant in unraveling the mystery as to why the shot was discharged by the second defendant when it was. He ought in my view to have been in the best possible position to offer a helpful account of the relevant events which had apparently posed the threat to the second defendant and given content to his concerns at the critical moment. On his version he leaned in again after instructing the deceased to drop the firearm to check on the latter's movements. If anyone saw what the second defendant might have perceived as an imminent threat of attack coming his way, it should have been him. This notwithstanding he saw nothing to personally cause him any ongoing concern or to suggest that his instruction to the deceased to put down the firearm at the time had not been followed. In fact, no action of any significance ensued on the part of the deceased – on *Pongwana's* account – during this interlude and before the shot was fired.

43. The evidence of *Pongwana* and *Mtwa* was further not consistent in several respects. Most notably they were not *ad idem* as to when *Pongwana* announced their presence on the scene. *Mtwa* said it was at the time of the knocking, whereas *Pongwana* said he warned the deceased of his presence only when he saw the latter's firearm. Indeed *Pongwana's* evidence in this regard was not even consistent with what was pleaded in par 9 of the defendants' plea, viz that *Pongwana* first announced their presence and then himself pleaded with the deceased himself to open the door. They also differed significantly on the length of time which lapsed between the opening of the door and the firing of the shot. *Pongwana* said it took a while - giving him a second opportunity to look into the bedroom to check on the movements of the deceased, whereas on *Mtwa's* account there was an

instantaneity in the unfolding of the events after the bedroom door was opened culminating in the fired shot.

44. The second plaintiff on the other hand was adamant that the deceased was unarmed and taken unawares even as to a police presence immediately after the latter opened the door to respond to *Thandile's* calling after him. Further, both of them were insistent that a shot was fired almost immediately the deceased opened the door, this negating the possibility of the second defendant being under any kind of threat.

45. The plaintiffs' witnesses gave evidence in a clear and straight forward manner and made a favourable impression on the court. They did not hesitate to make concessions even when such were against their, or the deceased's, interests. The testimony of each was further corroborated by the other and to some extent coincided with aspects of the defendants' evidence, such as for example the rapidity with which *Mtwa* said the shot was discharged after the deceased opened the bedroom door.

46. Although at first blush it appeared inconsistent with the second plaintiff's case that she could for a moment even have entertained the thought when she heard the shot ring out that the deceased had shot himself – since according to her evidence she had removed the magazine from the firearm and put it in a safe place – it is not improbable that she panicked at this point. It appeared to be common cause that she was in a state of severe shock after the incident and could momentarily have forgotten that she had put the magazine in her

pocket.

47. In the result, the balance of probabilities are in my view tilted against the defendants' construction of the decisive events leading up to the shooting, leading me to prefer the plaintiffs' version that at the time the second defendant fired the lethal shot the deceased was not pointing a firearm at him. On the contrary it is difficult to avoid the conclusion that the second defendant's weapon was hastily discharged without any threat being posed to his life whatsoever.

48. On the objective evidence no danger was posed to the second plaintiff's life either, hence the defendants have failed to discharge the onus resting on them to justify the shooting.

49. In the absence of any legal justification the *prima facie* unlawfulness of the second defendant's conduct is conclusive. Therefore I find that the shooting constituted an unlawful assault upon the deceased.

50. Although I was not called upon to decide the issue of culpability, it strikes me as abundantly plain from the evidence that a reasonable police officer in the position of the second defendant would under the circumstances not have discharged his firearm as he did and that his conduct, for which the first defendant is vicariously liable, was therefore negligent as well.

51. In the result I make the following order:

- 1) subject to proof of any obligation on the part of the deceased, *Mncedisi Sinitise*, to have supported the plaintiffs (and those represented by the second plaintiff in the action), the first defendant is liable for all such damages as the plaintiffs made prove or which may be agreed between the parties arising from the shooting of the deceased at Tsolo on 23 December 2003; and
- 2) the costs consequent upon the trial will be costs in the cause.

BC HARTLE

JUDGE OF THE HIGH COURT

Date of hearing: 16 May, 6 June 2012

Date of judgment: 22 June 2012

Appearance for the Plaintiffs:

Mr W T Mqandi

WT Mqandi & Associates

Mthatha

Appearance for the Defendants:

Mr F S Gagela

Instructed by:

State Attorney

Mthatha