

Republic of South Africa

REPORTABLE
IN THE HIGH COURT OF

SOUTH AFRICA

(Cape of Good Hope Provincial Division)

Case No: 190/02

In the matter between

THE MINISTER OF SAFETY AND SECURITY

First

IVAN JACOBUS VAN DEN HEEVER

Applicant

Second Applicant

and

SIZWE ALFRED GAQA

Respondent

JUDGMENT DELIVERED ON 26 FEBRUARY 2002

DESAI, J:

A bullet is lodged in the respondent's leg and the applicants seek the sanction of this Court to have the bullet surgically removed for the purpose of ballistic tests. They have reason to believe that the respondent was shot and injured in the course of a botched robbery in which both the victims were killed. The respondent resists the application, and the removal of the bullet, on several grounds.

The circumstances which led to the arrest of the respondent on the charges of murder are set out in the affidavit of the second applicant, Inspector **Ivan Jacobus van den Heever**, who is the investigating officer in the case. It appears that Mr **Mabona**

Boesman (“**Boesman**”) was the owner of the **Helpmekaar Tavern** in **Khayelitsha**, Cape. At about 12:00 on 31 December 2001 he arrived at the First National Bank at Bellville. He was accompanied by a security guard in his employ, one Mr **Boxser Bangani** (“**Bangani**”). They were accosted by two other men and shots were fired, resulting in the death of **Bangani** at the scene and **Boesman** a short while later at the Tygerberg Hospital.

Second applicant found R90 000,00 in cash in the boot of **Boesman’s** car. The money was the apparent motive for the attack. An eyewitness told second applicant that one of the assailants had been shot and injured and second applicant also found at the scene a **Norico** 9mm pistol and an **Astra** .38 “special” revolver which was licensed in **Boesman’s** name. Barely two days later on 2 January 2002, second applicant learnt from an informer that the respondent had been involved in the aforementioned incident and had bullet wounds on his thighs. The name of the informer is not mentioned as second applicant believes that the public exposure of his name could expose him to serious harm.

In any event, respondent was detained the next morning at New Crossroads, with both his thighs bandaged. He indicated to the second applicant that he had been involved in a scuffle at the **Zama Tavern** the previous day when someone interfered with his girlfriend **Nosipho** and that he had been injured with a screwdriver. He also mentioned that he had received medical treatment at the **G F Jooste Hospital**. Second applicant and his colleagues thereafter took the respondent to the **G F**

Jooste Hospital. It appeared that the hospital had no record of the respondent receiving any treatment. The owner of the **Zama Tavern** also denied that the incident described by the respondent had taken place the previous day. Furthermore, **Nosipho**, in the respondent's presence, denied that he was her boyfriend and had no knowledge of any injuries sustained by him with a screwdriver. Second applicant then arrested the respondent on the two murder charges.

On 3 January 2002 the respondent was taken to Dr **K N L Linda**, the district surgeon, at Goodwood. As both Dr **Linda** and the respondent are Xhosa speaking, the consultation took place in Xhosa. The respondent reiterated his earlier explanation for his injuries and also told Dr **Linda** that he had been stabbed with a screwdriver. He described how he was stabbed in his legs while lying on his stomach. The respondent also told Dr **Linda** that he had been treated at the **G F Jooste Hospital** but had not been given either a hospital card or a reference number. Dr **Linda** noted that the respondent's wounds were slightly septic bullet wounds which had not been professionally treated. X-rays were taken and the x-ray of the respondent's left leg showed a clearly visible bullet. Dr **Linda** pointed this out to the respondent. He did not initially respond. At a later stage, however, he told Dr **Linda** that he did not want the bullet removed.

The next day the respondent informed the second applicant that he in fact had been shot by an unknown person at Guguletu. The incident had not been reported to the police as the person who had shot him had apologised. He could not furnish either

the name or address of the person that had allegedly shot him. The second applicant also arranged for the X-ray to be examined by Captain **Frans Maritz** of the police forensic laboratory. Captain **Maritz** is of the opinion that the bullet visible on the X-ray is either a .38 or a .357 calibre bullet. If the bullet is removed from the respondent's leg and made available to him, Captain **Maritz** is of the opinion that he would be able to ascertain if it was fired from the .38 revolver licensed in the name of **Boesman**. According to second applicant, none of the eyewitnesses are in a position to properly identify **Boesman** and **Bangani's** assailant or assailants. The only available evidence is the bullet which may or may not link the respondent to the murders.

An orthopaedic surgeon, **Frans Steyn**, is of the view that the removal of the bullet will be a relatively simple and safe procedure under general anaesthetic. In the circumstances, the second applicant has obtained a search warrant to secure the bullet but is unable to act in terms thereof without employing reasonable force as the respondent refuses to permit the removal of the bullet from his leg.

The respondent denies that he was involved in the attack upon **Boesman** and **Bangani** and alleges that the wounds sustained by him are not connected to that incident. He denies that he told second applicant that he sustained the injury at the **Zama Tavern**. He says that he was involved in a shooting incident at the **Strandfontein** beach on 1 January 2002. He was treated at the **G F Jooste Hospital** but does not know whether his friends gave the hospital his correct name.

He was drunk and cannot remember much. He admits that **Nosipho** is in fact not his girlfriend. He denies telling Dr **Linda** that he had been injured with a screwdriver. He alleges that the second applicant told Dr **Linda** that he claimed that he had been injured with a screwdriver. The respondent admits telling Dr **Linda** that he did not want the bullet in his leg to be removed. He maintains that this is not a strange request. He was told that the bullet is lodged in his flesh and is not endangering any blood vessel or bone structure. It was, he believes, therefore unnecessary for the bullet to be removed. He is of the view that the medical procedure could endanger his life and result in pain, suffering and inconvenience. Furthermore, in his community, it is not strange for people who had been shot to walk around with the bullet in their bodies, especially if it was not life-threatening. He contends that if the relief sought by the applicants is granted, his rights in terms of the Constitution would be violated. The specific rights which would be violated are not mentioned by him.

Mr **J C Marais**, who appeared on behalf of the respondent, vigorously contended that the application should fail. Before dealing with the various arguments raised by him, I note that, simultaneously with the filing of his heads of argument, an application was made for the striking out of certain paragraphs of the affidavits filed by second applicant. These are the paragraphs which relate to the information obtained by the second applicant from the informer. Mr **Marais**, perhaps inadvertently, did not pursue this application in oral argument but in his heads of argument it is simply contended that the paragraphs should be struck out as they are either hearsay or irrelevant. The information obtained from the informer may be hearsay, but it is neither inadmissible nor irrelevant. Police often obtain this sort of information which is then followed up. In this instance the information led to the respondent and it is his condition and conduct which give rise to the reasonable suspicion that he may be involved in the commission of the murders being investigated by the second applicant.

Mr **Marais** argued that the applicants herein seek final relief and such relief should only be granted if the facts as stated by the respondent, together with the admitted

facts in the applicant's affidavit, justify such an order (see **Stellenbosch Farmers' Winery Limited v Stellenvale Winery (Pty) Ltd 1957(4) SA 234 (C) at 235**). This general rule is qualified by **Corbett, J** (as he then was) in **Plascon Evans Paints v Van Riebeeck Paints 1984(3) SA 634 (A) at 634H** as follows:

“In certain circumstances the denial by a respondent of facts alleged by the applicant may not be such as to raise a real genuine or ***bone fide** dispute of fact.*”

Despite respondent's denial, there is in fact no real dispute with regard to the key aspects of this matter. At about the same time as the attacks upon the deceased, the respondent sustained a bullet injury. He does not readily admit that he had sustained such an injury. The bullet lodged in his leg is possibly from a .38 revolver. One of the deceased had a similar firearm and apparently shot his assailant. The respondent is linked to the attack by an informer and he has the bullet in his leg. The respondent's denials of what transpired at Dr **Linda's** surgery are both far-fetched and untenable. The circumstances in which he alleges he was shot are equally far-fetched. There is also the undisputed evidence of his unprofessionally treated wounds and the unconvincing and unverified evidence of treatment at the **G F Jooste Hospital**. Assuming Mr **Marais** is correct and that the so-called **Plascon-Evans** rule is applicable for the purposes of the relief sought herein, the applicants have quite clearly made out a case – and a convincing one – for final relief.

The next issue raised by Mr **Marais**, if I understand him correctly, is the following. He contends that there is no statutory or common law authorisation for the relief sought.

Section 27 of the Criminal Procedure Act 51 of 1977 (“the Act”) provides as follows:

“The police official who may lawfully search any person may use such force as may be reasonable and necessary to overcome any resistance against such force.”

It is apparent from this section that the legislation afforded police officers authority to use any reasonable violence to effect the search. The violence itself is not defined. The facts of each case determine the nature of the force required for the search. The purposive approach in interpreting section 27 is probably most appropriate (see in this regard **Levack & Others v The Regional Magistrate, Wynberg & Another 1999(4) SA (A) 747 at 751**).

Similarly, section 37(1)(c) of the Act permits an official to take such steps as he may deem necessary in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance. While a bullet is clearly not a mark, characteristic or distinguishing feature of the respondent’s body, a police officer may nevertheless take the necessary steps to determine whether his body shows the bullet – a condition or appearance - which may be linked to **Boesman’s** revolver. I am of the view that both the aforementioned sections permit the violence necessary to remove the bullet.

In any event, police are obliged to investigate crimes – in this instance a double murder – in terms of section 205(3) of the Constitution of the Republic of South Africa 1996 (“the Constitution”) and, without the bullet, they may be hamstrung in fulfilling this constitutional duty.

Finally, Mr **Marais** argued that the violence envisaged by the applicants would result in several constitutionally guaranteed rights being infringed. He contended that every

accused has a right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings. It also includes the right not to be compelled to give self-incriminating evidence (sections 35(3)(h) and (j) of the Constitution). No further reference was made to the presumption of innocence during the course of oral argument and it is unclear as to how applicant's proposed conduct would impact upon this right. Mr **Marais** referred on a number of occasions to the removal of the bullet resulting in the respondent giving self-incriminating evidence. Somewhat surprisingly, Mr **Marais** did not refer to any authorities in this regard and did not advance any arguments why I should not regard the bullet as real evidence as opposed to the furnishing of oral and testimonial evidence by the accused. In other words, why I should differ from **Claasen, J** in **S v Huma & Another 1996(1) SA 232 (WLD) at 238A**. I elect not to do so for the reasons set out in that judgment.

Mr **Marais** also referred to the other rights which are potentially infringed by the relief sought by the applicants. In particular, the right to have one's dignity respected and protected (section 10 of the Constitution); the right to freedom and security of the person and to be free from all forms of violence (sections 12(1)(c) of the Constitution); the right to bodily and psychological integrity (section 12(2) of the Constitution).

The proposed surgical intervention to remove the bullet would undoubtedly be a serious affront to the respondent's human dignity and an act of state-sanctioned violence against his bodily – and perhaps also psychological – integrity. The application is unusual, but not without precedent. In **Winston v Lee 470 US 753**

1985 the United States Supreme Court was confronted with a similar problem. An order was sought for the removal of a bullet which could provide evidence of the suspect's guilt or innocence in an armed robbery. The bullet in that case was lodged in the suspect's chest and there was some dispute with regard to the medical risks involved. There was also, it ultimately appeared, no compelling need for the bullet as there was other evidence against the suspect. Concluding that the search was unreasonable in the circumstances, **Brennan, J** commented:

"The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweighs the substantial privacy interests at stake is a delicate one, admitting of few categorical answers."

The facts of this case are, of course, very different. There is little danger of any harm to the respondent when the bullet is removed. He contends that the operation could endanger his life but there is no medical evidence furnished to support this belief. The orthopaedic surgeon states categorically that it would be an uncomplicated procedure. Furthermore, other than the bullet there is no other evidence against the respondent. This case also relates to more serious crime – namely, a double murder.

The order sought, as I have already indicated, involves the limitation of rights. Rights are not absolute and in terms of the Constitution, more especially section 36(1) thereof, they may be limited if the limitation is reasonable and justifiable in an open and democratic society. As stated by **Brand, J** (as he then was) in **Dotcom Trading**

121 (Pty) Ltd t/a Live Africa Network News v The Honourable Mr Justice King**N.O. & Others 2000(4) All SA 128 (C):**

“The application of section 36 involves a process of the weighing up of competing values and ultimately an assessment based on proportionality which calls for the balancing of different interests. Inherent in this process of weighing up is that it can only be done on a case-by-case basis with reference to the facts and circumstances of the particular case.”

Adopting the aforementioned approach, it is apparent that a refusal to assist the applicant in this case will result in serious crimes remaining unsolved, law enforcement stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the resolution of such crime. Respondent's interests in all the circumstances, are of lesser significance. Though the intrusion is substantial, community interests must prevail in this instance.

In the result I make the following order:

1. Second applicant, in his capacity as a police official, is entitled to use reasonable force, including any necessary surgical procedure performed by duly qualified medical doctors and paramedical personnel in consultation with the superintendent of the Tygerberg Hospital, to remove the object referred to in the search warrant issued on 14 January 2002, a copy whereof is attached to second applicant's supporting affidavit marked “7” (“the object”) and to seize same in terms of the provisions of section 20 of the Criminal Procedure Act.
2. The respondent is directed and ordered, within 24-hours of the granting of this order, to subject himself to the necessary surgical procedure for the

removal of the object, including the furnishing by him of the necessary consent which by law or otherwise may be required therefore.

3. The Sheriff of the above Honourable Court is hereby directed and ordered to furnish the necessary consent on behalf of the respondent should the respondent fail to comply with the provisions of paragraph 2 above.
4. Leave is granted to the applicants to apply to this Court on the same papers, supplemented where necessary, for an order in terms whereof respondent be committed to prison for such period as this Court may deem fit should he fail or refuse to comply with this order set out in paragraph 2 above.
5. Respondent is ordered to pay the costs of this application.

DESAI J