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IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ZANDISILE NTSOMI APPELLANT

and

THE MINISTER OF LAW AND ORDER .. RESPONDENT

CORAM : JOUBERT, HEFER, NESTADT, KUMLEBEN
JJA et KRIEGLER AJA
HEARD : 7 MAY 1992
DELIVERED : 29 MAY 1992

J U D G M E N T

KUMLEBEN, JA/...

KUMLEBEN, JA:

At about 10pm on the night of 12 October 1985 at the Zwelethemba township, Worcester, Sergeant van der Merwe of the South African Police shot the appellant in the leg resulting in its amputation above the knee. In due course, arising from this injury, the appellant instituted action in the Cape Provincial Division of the Supreme Court against the respondent for damages in the amount of R50 000. The cause of action was based on the allegation that at the time the shot was fired Van der Merwe was acting within the scope of his employment as a policeman and that the shooting was unlawful. The respondent admitted the former averment. He, however, denied that the policeman's action was unjustified. He pleaded that Van der Merwe was attempting to arrest the appellant in the course of his duties as a policeman or, alternatively, that he acted in self-defence.

At the start of the trial the court (Van Deventer AJ) ordered that the question of liability be first decided. The respondent called Van der Merwe and a colleague, Captain van Huyssteen, as witnesses. The appellant was the sole witness to testify on his behalf. The trial court accepted the evidence of the respondent's two witnesses in preference to that of the appellant, held that Van der Merwe had acted lawfully in defence of his person and accordingly dismissed the appellant's claim with costs. It granted him leave to appeal to this court.

The background facts, and the sequence of events that night, are fully set out in the judgment of the court a quo: 1990(1) S.A. 512(C). I need only sketch them.

The appellant, 21 years old at the time, lived at Zwelethemba township. That evening Van Huyssteen, who was stationed at Worcester and in charge

of the special units combating civil unrest, received a report of a disturbance in the township: that a crowd of people were throwing stones in the direction of the communal hall and at a police patrol vehicle. He summoned Van der Merwe from the charge office to accompany him to the scene of commotion in Theoha Avenue in the township. Van der Merwe was not ordinarily involved in riot control duties. On arrival at this street they found that a house, and a Combi next to it, had been set on fire. From inside the yard adjacent to the street stones were thrown at their vehicle by people who were obscured from their view. They saw ahead of them a motor car being pushed into the street by three persons who set about successfully igniting it. Van der Merwe, acting on instructions, fired at them with his pistol. The two policemen realised that they were in a situation of extreme danger and Van der Merwe, again on the instruction of

Van Huyssteen, reversed his vehicle in order to place a safer distance between them and their assailants. Police reinforcements joined them. Van Huyssteen decided to deploy a three-man patrol on foot with a view to their arresting the stone-throwers. Van der Merwe was in charge accompanied by Constable Luff and Sergeant Brink. Each was armed with a pistol and a shotgun. They proceeded under cover between the rows of houses in the block bounded on two sides by Ngetu Avenue and Theoha Avenue. Van der Merwe took up a position at the south-east corner of erf no 382. (The area concerned is depicted on the map, Exhibit RSC2, and in more detail on the diagram, Exhibit RSC3.) He saw police vehicles being stoned by two persons in the vicinity of erf no 396. (There was no moon that night. There were street lights in the vicinity but Van der Merwe could not say how many were on. The light emitted from the burning house and Combi contributed to

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or accounted for such visibility as there was.) The three policemen crossed Theoha Avenue and took up a position on the south-east corner of the house on erf no 397 (marked X4 on Exhibit RSC3). This enabled Van der Merwe to see at a shorter distance the two persons who were still throwing stones at passing vehicles. He heard a stone strike one, which came to an abrupt and noisy standstill. He could clearly see these two persons who were involved but the light was insufficient for him to identify their features.

According to Van der Merwe, when he again saw the two men from the second observation station he moved towards them, keeping them continuously in sight. As he approached them, they turned round as a result of the police vehicle suddenly stopping and ran towards him. This was at a time when he was climbing over a low fence between erf no 396 and no 397. He was

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dressed in the conventional blue-grey uniform of the S A Police: long trousers, safari jacket with shiny buttons and flat-topped peak cap. On seeing him the two stone-throwers took evasive action. They were virtually face to face. One turned about and ran whence he had come. The other checked momentarily, turned to his right, ran towards a building within the yard of erf no 396 and disappeared round the south-eastern corner of that dwelling. Van der Merwe ran after him. As Van der Merwe rounded that corner, he found himself in a narrow alley between the building, as it existed at the time, and the northern boundary fence of the adjoining property. The appellant had stopped and turned around. Thus they came face to face. He was alone and did not know where his two colleagues were. He struck at Van der Merwe with an object held in his hand. Van der Merwe warded off the

blow by raising the shotgun with both hands to a horizontal position. The object struck the magazine of the shotgun and the left index finger of his one hand. His assailant appeared to be momentarily off-balance and for an instant moved back slightly. He immediately raised his right hand to strike again. Van der Merwe reacted by firing a shot, as he put it, in the direction of the appellant's legs and the ground. He and Sergeant Brink, who soon afterwards appeared on the scene, carried the injured appellant to the street and from there he was conveyed in a police vehicle to hospital.

The appellant told a different story. That night he and a friend came to the house at erf no 396 to see his friend, Zimpewe, who lived there. He sent Kenneth to convey a message to Zimpewe. Kenneth left on this errand and the appellant went to the lavatory.

Afterwards he went to wash his hands at a tap. Whilst doing so, shots were fired at him. He fell and people started hitting and kicking him where he lay. As a result of this assault his face was swollen and the right side of his body lacerated. He denied that he ever threw stones or indeed that any stone-throwing took place that evening; that he was shot at the place described by Van der Merwe; that the house and Combi were burning at the time; or that there were any police vehicles in the vicinity. It was, he said, a peaceful night in the township without any abnormal activity.

There were ample grounds for the rejection of the appellant's evidence. This Mr van der Berg, who appeared on his behalf, readily conceded. His story was patently a fabrication from first to last. In accepting the evidence of Van der Merwe, the court commented:

"His answers were at times somewhat evasive and quite often exculpatory, but my impression of him was that he was serious and quite concerned about the incident. There was no sign of insensitivity. He appeared to be a rather sensitive and intense personality. I am not inclined to draw an unfavourable inference from his inclination to be exculpatory. He gave the impression of a policeman who takes his work very seriously and there was nothing unsympathetic in his testimony or response. I found nothing in the witness' demeanour or attitude that indicated or possibly suggested untruthfulness or dishonesty and I do not agree with counsel for the plaintiff that Sergeant Van der Merwe must be held to have been untruthful." (523G - I) ,

On my reading of the record I found nothing to support the qualified censure that Van der Merwe was "somewhat evasive" and Mr van der Berg was unable to refer to any evidence to substantiate this. I merely mention this in passing since the court was unquestionably correct in finding that Van der Merwe was in all material respects a truthful witness and implicitly a reliable one. This Mr van der Berg initially conceded in argument. Nevertheless for a spell - a rather

protracted one - he sought to qualify this concession by submitting that portions of Van der Merwe's uncontradicted evidence, despite the finding of the court a quo, ought not to be taken into account. No sound reasons for this approach were furnished nor was there any clear indication of what portions of his evidence were to be disregarded. Plainly the question of liability is to be decided - as it was in the court below - on the acceptance of Van der Merwe's evidence as a whole. (The evidence of Van Huyssteen was likewise accepted, its most significant detail being his confirmation that the shotgun was damaged and the finger injured as described by Van der Merwe.)

The judgment of the court a quo sets out comprehensively - and instructively - the principles to be applied when considering a plea of self-defence. (526D - 527B and 528B - 529B). For present purposes I need only quote, for emphasis, what was said by Van

Winsen AJ in Ntanjana v Vorster and Minister of Justice

1950(4) SA 398(C) 406 A - D:

"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 Court-room. (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, A.D. 273 at p. 286)."

As regards this plea of self-defence, Mr van der Berg in the first place argued along the following lines. He submitted that the respondent had failed to prove that the appellant realised he was being confronted and then chased by a policeman; that the appellant was therefore entitled to deduce that his pursuer was acting unlawfully; and that the manner in which the appellant reacted was therefore lawful. In short he submitted that it was the appellant who acted in lawful self-defence, and it followed that Van der Merwe could not have been resisting an unlawful attack. The factual premise for this argument is unsound. There is no suggestion that the combatants were, or might have been, persons other than, on the one hand, the stone-throwers and, on the other, the police. The reaction of the appellant and his associate at the time they first saw Van der Merwe, apparently as he was climbing through the fence,

strongly indicates that his uniform, and possibly the fire-arm he held, identified him as a policeman. In any event there can be little doubt that at the time when the two of them were face to face in the alley and before the appellant delivered the first blow, the official identity of his pursuer must have been known to him. Particularly in the absence of any assertion on the part of the appellant that he did not realise, in the circumstances described by Van der Merwe, that the latter was a policeman, one can accept at least as a probability that this fact was known to him.

Counsel next turned to what is in fact the vital - and really the only - issue in this case viz; whether the means of defence adopted by Van der Merwe were commensurate with the danger confronting him. In this enquiry it is useful, with reference to the particular circumstances of each case, to consider the other options open to Van der Merwe, assuming that he

had time for reflection.

Before undertaking this enquiry - and at the risk of some repetition - certain facts ought to be emphasized. The situation that night was tense and the patrol had embarked upon an exercise fraught with danger. Van der Merwe found himself in the yard of premises totally unfamiliar to him. As he chased the appellant into the alley there was a sudden and unexpected reversal of roles: in the case of the appellant, from fugitive to armed aggressor. The entire episode from this stage until the shot was fired was a continuous one and must have taken place within a very short period of time. (Van der Merwe said that it was a matter of seconds or a fraction of a second.) At no stage was there an interval when Van der Merwe could have reflected on the different courses of defensive action open to him. At no stage did the appellant give any indication that he was about to, or likely to,

disengage: on the contrary the first blow was immediately followed by a second attempted one. According to Van der Merwe, had he failed to ward off the first blow, he would have been struck in the region of his left eye. The encounter, as has been pointed out, took place in a dimly lit alley no more than 60 centimetres in width. Neither of them had room to manoeuvre or take any lateral evasive action. There was no opportunity for Van der Merwe to identify the object held by the appellant. All that he could discern at a critical time was that it was being used as a weapon and had forcefully made contact with his shotgun. Van der Merwe's objective was to do no more than he considered necessary to immobilise the appellant and for that reason aimed at his legs and the ground. The tragic result was not one he intended or had time to contemplate. Van der Merwe's decision and reaction must be seen and adjudged within the context of these

considerations.

Alternative measures Van der Merwe might have adopted were canvassed in argument. Most can be easily disposed of. It was conceded that in the alley there was no opportunity for him to have fired a warning shot. For him to have turned round in order to run away was obviously not a proposition. Nor could he have been expected to ward off the second attempted blow by again blocking it with the shotgun. As he explained "ek was gelukkig om die eerste hou af te weer, ek kon nie 'n kans vat om 'n tweede hou weer te probeer afweer nie." Had he repeated this defensive measure, the second blow may well have struck one of his hands - as indeed the first did - and caused him to release that hand's hold on the shotgun, probably rendering it useless as a means of protection.

A suggested option calling for closer examination is whether Van der Merwe ought to have retreated. In

discussing this, I shall assume that he was in a position no different from an ordinary citizen: in other words, that he was not by virtue of his office entitled or obliged to stand his ground if the danger could reasonably have been averted by his drawing back. When Van der Merwe was asked why he did not do so by retreating a pace or so, he replied: "Soos ek sê, dit kon klipperig - enigiets kon gebeur het en as ek in daardie stadium miskien my voet of iets gehaak het en ek het geval, was ek geheel en al h oop teiken." This is clearly no more than an ex post facto explanation for his not having taken this course and takes the matter no further. In the absence of reliable evidence on the condition underfoot at the relevant time, any actual danger of stumbling ought be discounted. Whether, objectively speaking, an apprehension of such an eventuality would have been unrealistic is another matter. He could hardly be expected to take note of

the ground he was covering as he chased after the appellant - his mind and eyes were on other things. But even if one accepts that any such apprehension would have been misplaced, I do not consider that he could reasonably have been expected to withdraw in the circumstances. The appellant was poised to strike him and for each step backwards he might have taken, his assailant - if anything with more alacrity - could have stepped forward. I stress again that there was no indication that retreat on his part would have caused the appellant to desist from his attack. In conjunction with this submission that Van der Merwe should have retreated, Mr van der Berg argued that Van der Merwe, on his reconstruction of where he was probably standing in the alley, had only just entered it and that a pace or two could have placed him round the corner of the building and out of harm's way. This contention is, however, based on two unrealistic

suppositions; first, that Van der Merwe would have had time to note the extent to which he had entered the passage way at the time he was forced to an abrupt halt, and, second, that he would have had time to take this into account before deciding how to react.

In the result I am of the view that the finding of the court a quo as regards this defence was correct. It is therefore unnecessary to consider the merits of the contention that he had acted lawfully in the course of attempting to effect an arrest.

The appeal is dismissed with costs.

M E KUMLEBEN

JUDGE OF APPEAL

JOUBERT JA)
HEFER JA) - Concur
KRIEGLER AJA)

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et KRIEGLER AJA

DATE HEARD: 7 MAY 1992

DATE DELIVERED: 29 MAY 1992

J U D G M E N T

NESTADT, JA:

It is true that sergeant van der Merwe was in
a situation of imminent and unexpected danger.

Appellant had already attacked van der Merwe once. He was in the throes of doing so again. So appellant was a determined aggressor. They were in close proximity to each other. The type of object that appellant was holding in his hand was unknown to van der Merwe. The lighting was not good. Van der Merwe was alone. He did not know where his colleagues were. There was little room for manoeuvre. Nor was there much time for reflection as to what to do. Moreover in shooting van der Merwe aimed at and struck the appellant in the lower part of his body, namely his one leg. Yet, making full allowance for these factors, I think that in doing so he acted unreasonably. Perhaps the standard of reasonableness against which I measure what van der Merwe did is a more exacting one than that of my Brethren. In any event I am more critical of the manner in which he acted. I leave aside whether an

oral warning or a warning shot were feasible alternative courses of action in the circumstances. I also assume that it was not to be expected of van der Merwe that he should rather have grappled with the appellant or that he should have attempted to ward off the attack as he did the first one or that he should have pushed the appellant away. And I acknowledge that van der Merwe cannot be criticised for not fleeing. In my opinion however instead of shooting at the appellant as he did he ought (whilst still facing the appellant) to have stepped or jumped back a pace or two. This was a simple alternative which even in the agony of the moment should have occurred to and have been undertaken by him. It was one which the trial judge would not appear to have considered. Van der Merwe who was an experienced policeman could quite easily have acted in this way. As

I read his evidence he does not say there was insufficient opportunity to do so. Indeed to my mind he never satisfactorily explained why he could not avoid shooting the appellant. At the critical time the appellant was not advancing towards van der Merwe. There was space to step back. Van der Merwe's fear that he might have stumbled or fallen was not a realistic one. There was no reason for thinking that the surface of the ground in the alley was uneven to any significant extent. The adoption of the suggested course would not have enabled the appellant to escape. Van der Merwe would still have been able to effect an arrest but he would have (temporarily) put himself out of harm's way. The appellant was not attempting to throw whatever object he had in his hand at van der Merwe. He was attempting to actually strike van der

Merwe with the object. By retreating the intended blow would have been evaded. And the appellant would then have become or would have been made aware of the fact that van der Merwe had a firearm. In the unlikely event of the appellant thereafter continuing his attack on van der Merwe, that would have been the time to shoot as he did. Van der Merwe must have been aware of the grave consequences to the appellant of shooting at him. I do not mean to adopt an arm-chair critic approach. But I have come to the conclusion that van der Merwe's response was in all the circumstances too hasty and insufficiently skilful. I think there was an element of panic in what he did. He therefore did not establish the requirements of either self-defence or a defence founded on sec 49(1) of Act 51 of 1977 (see at 506B of the reported judgment). I would allow the appeal.

NESTADT, JA