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Case No 595/92
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IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between

THE MINISTER OF LAW AND ORDER

Appellant

and

JACK NONTINGANA MONTI

Respondent

CORAM: JOUBERT, VAN HEERDEN, E M GROSSKOPF,
VIVIER et VAN DEN HEEVER JJA.

HEARD: 25 AUGUST 1994

DELIVERED: 29 SEPTEMBER 1994

J U D G M E N T

VIVIER JA/

VIVIER JA:

The respondent ("the plaintiff") instituted a delictual action for damages against the appellant ("the defendant") in the Eastern Cape Division for alleged wrongful assault, arrest and detention by a member or members of the South African Police, acting within the course and scope of his or their employment with the defendant. The claim in respect of the wrongful arrest and detention was withdrawn before the close of pleadings and nothing further need be said about it. In support of the claim for wrongful assault the plaintiff alleged in the pleadings that at approximately 10 o'clock on the morning of 10 November 1984, and "in and in the vicinity" of a beer hall in Wood Street, Grahamstown, one or more policeman had taken hold of his clothing and forced him into the partially burnt down beer hall after which he was shot in the back by a policeman firing a shotgun. He

was thereafter slapped in the face by another policeman who also poured the contents of a wine bottle over his face.

In his plea the defendant admitted that the plaintiff was shot by a policeman acting within the course or scope of his employment as such. It was further stated that the shooting took place at approximately 11 o'clock on the morning in question "in the vicinity" of the said beer hall. The defendant went on to plead that the shooting was justified in the particular circumstances of the case viz, that the plaintiff was among a group of approximately 20 persons who broke into and stole goods from the beer hall and threw stones at policemen guarding the hall who feared for their lives. The policeman shooting the plaintiff did so in order to maintain law and order, protect life and property and to identify and arrest the culprits who had committed the said offences. The other allegations of

assault were denied.

Before the trial commenced before **Van Rensburg J** it was ordered in terms of Rule 33(4) that the merits be decided separately from the quantum of damages, and the trial thereafter proceeded on the merits of the plaintiff's claim. In his judgment on this issue **Van Rensburg J**, relying on the decision of this Court in **Mabaso v Felix** 1981 (3) SA 865 (A) at 874A-B, held that on the form of the pleadings the onus rested on the defendant to prove that the shooting was justified. The learned Judge further held that no reliance could be placed on either party's version of the events in question. He accordingly granted an order declaring that the plaintiff had been unlawfully assaulted on 10 November 1984 by being shot in the back and that he was entitled to recover from the defendant such damages as he was able to prove. The learned Judge also held that the

plaintiff had failed to prove the further allegations of assault and that his claim in respect thereof should be dismissed. Costs were reserved for decision at the conclusion of the trial. **Van Rensburg J** subsequently granted leave to the defendant to appeal to this Court solely on the question of whether he was correct in holding that on the form of the pleadings the onus rested on the defendant to justify the shooting.

Mr Eksteen, who appeared for the defendant at the hearing of the appeal, did not challenge the correctness of the decision in **Mabaso v Felix**. It was there held that in an action for damages in respect of a delict affecting a plaintiff's personality and bodily integrity, such as assault, the defendant ordinarily bears the onus of proving the excuse or justification which he raises, such as self-defence. (See also **Ramsay v Minister van Polisie en Andere**

1981 (4) SA 802 (A) at 807E-F and **Ferreira v Ntshingila** 1990

(4) SA 271 (A) at 273A-B.) The form of the pleadings, however, may sometimes be such that the onus is placed on the plaintiff to negative the excuse or justification.

Mr Eksteen submitted that in the present case the defendant in his plea not only denied the unlawfulness of the shooting but also the factual allegations on which the plaintiff relied for his cause of action. He submitted that the present was therefore not a true case of confession and avoidance so that the overall onus remained on the plaintiff to prove the facts upon which he relied. (Cf **Mabaso's** case at 875F-H). I do not agree with counsel's submission. The allegation that the shooting took place at 11 instead of 10 o'clock on the morning in question and that it happened in the vicinity of the beer hall as opposed to inside the beer hall, does not traverse the plaintiff's

cause of action. This was that on the morning in question the defendant's servant had shot him in the back and had done so intentionally. That was not denied in the plea. There is no basis for the contention that the plea related to a shooting incident completely different from that pleaded by the plaintiff. Had that been the case, both the admission of the shooting and the justification pleaded would have been irrelevant. In my view the defendant clearly admitted this assault and pleaded the special defence of justification, namely that the policeman's fear and the necessity to maintain law and order and arrest the wrongdoers caused him to shoot. This is a true case of confession and avoidance, in which the onus of proving the avoidance ordinarily rests on the defendant. The Court *a quo* therefore correctly held that the onus of proving that the shooting was justified rested on the defendant.

The appeal is dismissed with costs.

W. VIVIER JA.

JOUBERT JA)
VAN HEERDEN JA)
E M GROSSKOPF JA)
VAN DEN HEEVER JA) Concur.