



IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 1992/2011P

In the matter between:

JABULANI DAVID MLABE

PLAINTIFF

And

THE MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Plaintiff instituted an action against Defendant claiming damages in the amount R650 000.00 due to a gunshot wound he alleges he sustained which originated from a member of the South African Police Services who fired shots in the vicinity where he was. Defendant defends the action. Defendant in their plea pleads that the police officers were placed in a dangerous situation and acted out of necessity and that there were reasonable grounds of imminent danger resulting. This was as a result of them pursuing a certain vehicle.

[2] At the beginning of the trial the parties however agreed that the matter will only proceed on the issue of liability.

[3] Jabulani David Mlabe testified that he resided at Blaawubosch and was 74 years of age. After the incident which happened on 12 March 2008 he could no longer be employed. He was 58 years of age at the time and was employed at Iscor in Newcastle and had been so employed for about 8 years earning R7 000.00 per month. On the day in question at about 10:45 he was riding his bicycle and was on his way home from work. He was riding on the left side of the road going up the road and the police vehicle was coming from the opposite direction towards him. While he was still cycling he was shot in his right leg. He fell from the bicycle, picked up the bicycle and people came to assist him. He tore a plastic bag and placed it around the wound. He was then taken to hospital. They stopped a private motor vehicle but a police vehicle took him to hospital.

[4] The police vehicle was travelling in the opposite direction coming from the same direction as the gang which they were chasing. There were 3 police vehicles. He was struck by a bullet fired by a policeman at the back of a police van pointing in his direction. At that stage the motor vehicle which they had pursued was already about 20 metres past him. The bullet struck him on the inside of his right thigh grazing his bone. The suspects in the motor vehicle were also firing shots at the police. Only one of the persons in the suspects vehicle fired.

[5] After he had been shot one Xaba informed the police who spoke on the radio to other police. He stayed in hospital for a period of 3 days. The bullet could not be found. The bullet entered the inside of his right thigh and came out at the back and hit a helmet which was tied at the back of the bicycle. The road was not very busy at the time. He stated that he was confused because he does not understand what the problem with the police is as a mistake happened. He was plus minus 40 metres from the police when the shot was fired. He denied that he was injured by a suspect and

again confirmed that he saw the gun with the police officer at the back of the motor vehicle.

[6] There were certain photographs which were used during evidence and during cross examination he stated that they were only taken this year. It was put to him that the incident happened approximately 16 years ago and that the area had changed in the interim. He stated that there are some new houses but most of the houses were there before. He cycled on the road at the time. He agreed that during 2008 there were no pavements in that area. The houses there were not too far from each other. He accepted that the police officers were pursuing suspects in a motor vehicle on the said day. He made a statement to the police while he was in hospital. He only saw one suspect that was armed.

[7] It was put to him that a report was received of a high jacking and that these people were armed and dangerous and were going to rob persons. He replied that this could be. He agreed that the suspects vehicle was driving at high speed and that the police vehicles were pursuing it. It was put to him that it was disputed that anyone was at the back of the bakkie and that there were 3 people seated in front of the bakkie. He disagreed. He stated that he could see clearly what was happening. He testified that he was near the mall at the time on the left side of the road. It was put to him that the vehicles had come down on the right side but made a U-turn and then went north in pursuit of the suspects.

[8] When he was shown photograph B41 he testified that he was travelling from the bottom of the photograph on the left up towards the top. The vehicle was heading down towards section 7 and the motor vehicle was on the right side of the photograph. He testified that there were small speed humps in the road. The vehicle of the suspects came past him and he did not see them shoot him. It was put to him that the police had to take cover, open the door of their vehicle to avoid being shot and returned fire. He responded that means that they were shooting in his direction as he was going in the opposite direction on the left side of the road. It was put to him that the police

would say they went in the same direction as he did and he responded that they then would have shot him at the back. He disputed that and stated that they came towards him and shot him in the thigh. It was put to him that the passenger in the back of the suspects vehicle fired after the vehicle was turned around and shot in his direction. He responded that it was improbable as they had passed him coming from the front. He denied that he was shot by the suspects shooting at the police.

[9] He was adamant that he was shot by a bullet fired by a police officer. It was put to him that the police acted in self-defence when firing the shots. It was put to him that the suspects vehicle collided with a cell phone tower, that one was found in a toilet and also shot at the police when fleeing. He testified that he had no knowledge thereof. It was put to him that one Nkabinde did find him on the roadside and received information via the radio that an innocent person was shot. He replied that unfortunately Mr. Xaba, who witnessed the incident, has since died.

[10] After Plaintiff was cross examined it was placed on record by the defence that the police were going towards Newcastle and the police towards section 7 Madadeni. The directions as he testified he was going and the police was thus confirmed by the defence.

[11] One Mr. Neluheni employed by the attorneys Matodzi Neluheni as a photographer stated that he took various photographs and gave various distances that he had noted. He stated that the mall was on the left side of road on photographs 13 and 14 and in photographs 14 to 26 the mall would be on the right side. In photograph 1 section 7 would be behind him and the mall at the top of the photograph. That was the case for Plaintiff.

[12] The first witness for the defence was Dumisani Joseph Nkabinde who had been employed by the South African Police Services for 34 years and retired on 31 October 2009. He was a Lieutenant Colonel in charge of the community centre at Osizweni.

He was on his way from Madadeni Court when he received a report over the radio control that there was a person who was injured by police and suspects. He went to the scene, was stopped by a male, one Mlaba, who was alone and reported that during this chase he was injured. He told him that he was injured by the police. He was surprised how he knew this as both were shooting. He saw his injury above the right knee and that it was bleeding and the bullet entered from the front to the back of the thigh. He was waiting for the ambulance to arrive. Mr. Xaba, riding a tractor, stopped.

[13] He then took Plaintiff to hospital for treatment. He was shown photograph 17 and indicated that if one goes up in the photograph it is towards Madadeni section 7 and if one goes down to Newcastle Utrecht. He mentioned that the area in photograph 17 looked similar to where he found Mr. Mlaba but the paving was not there at the time. It was not his duty to look for cartridges but he did so but failed to find any. He reported it to the Madadeni police station and made a statement. During cross examination he stated that he found Mr. Mlaba on the same side of the road as the mall. He could not recall who stopped him. From the time that he received the report to arriving at the victim was about 3 to 5 minutes. He stated again that Plaintiff informed him that he was shot by the police. He stated that the bullet entered from the front. It was put to him that there were always houses in the area which was more or less the same as it was on the photograph.

[14] The next witness was Captain Elvis Buthelezi also currently retired who had the rank of Warrant Officer at the time and the rank of Captain when he retired. He testified virtually as he was receiving dialysis. At the time he was stationed at Osizweni to investigate crime. On the day in question he was seated inside a pickup and the driver was Warrant Officer Mazibuko. He was seated on the left side and it was a single cab pickup. An informer was seated between them. There was no canopy on the vehicle. There were two police vehicles involved. The other was also a marked police vehicle, a kombi. Theirs was not a marked police vehicle. They were armed with 9mm Z88 pistols.

[15] The suspects came from the direction of section 7. They were going towards the south direction which is Osizweni and they were in a white Toyota vehicle. They turned around and went in a direction that they came from back to section 7. They then chased them. It was in the Blaawubosch area. In 2008 there were no pavements in the area as on the photograph. On the left side the houses were closer to the road than on the right side. They were travelling fast and there were two suspects in the vehicle. The driver and the other one at the left back of the vehicle. While pursuing the suspects they struck a big tree. There were many speed bumps and they must have lost control of their vehicle. They then opened fire again. They first opened fire at the first speed bump and they did not return fire. At the second speed bump they lost control and fired. He opened the left front door taking cover and returned fire.

[16] The one at the back of the Toyota Corola was armed and fired. The suspect fired 2 shots and he fired 3 shots. A kombi came to assist as back up and the suspects drove into section 7. There was no other option but to shoot at each other. He did not see anybody on a bicycle or on the side of the road. He denied that there were any policemen standing at the back of the bakkie. The suspect fled into section 7, later they caught up with them at a container where they left the motor vehicle and fled. They arrested one of the suspects in a toilet and recovered a firearm and ammunition. He made a statement to the police on the same day and stated that he had to return fire.

[17] During cross examination he confirmed that the informer was found in Blaawubosch and sat in the middle of them in the pickup. The informer identified the vehicle as that of the suspects. In the second police motor vehicle there were a number of police officers. They were working for crime prevention. He did not speak to them but Mazibuko did. He was in the motor vehicle with the informer when Mazibuko went to speak to them. They were heading towards section 7. He did not know in what direction the cyclist was going. When the suspects saw the marked police vehicle they made a U-turn going back to section 7 and then they went after them. When he saw that the suspects made a U-turn the pickup also made a U-turn and chased after them. No suspect was arrested in the area.

[18] He noticed two persons in the Corolla, one was seated at the back on the left. He started shooting while going in the direction of section 7. The suspects were shooting at the police and the suspect was shooting with his arm out of the motor vehicle on the left side. The motor vehicle of the suspects lost control at the second hump. It went off the road and they were then shooting at each other. The police shot at the suspects when they lost control of the vehicle. The Corolla was always ahead of the police vehicle. He used the back tyre of the pickup as a shield. He did not know if Nkabinde received the report that Plaintiff was shot by members of the South African Police Services. He fired at the back tire of the suspects vehicle.

[19] They went to the scene the following day to establish if someone had been shot. He was shown a statement and stated that that was his statement. He was unaware against who in the attempted murder charge was that the warning statement was made by him in 2008. He did not see any cyclist when he fired at the suspects. That was the case for Defendant.

[20] The parties then wished to submit written argument which was then done.

[21] It was submitted on behalf of Plaintiff that Plaintiff was an honest and reliable witness who answered questions put to him without delay and without bias. When he had no knowledge thereof he indicated that he had no such knowledge. He stuck to his version throughout and discharged the onus on him on a balance of probabilities. It was submitted that the witness Mr. Elvis Buthelezi could not clarify various issues as he responded that such was dealt with by Mazibuko. He confirmed that they came driving down on the righthand side of the road which corroborates the evidence of Plaintiff. When certain portions of the evidence of Nkabinde was put to him he elected not to comment. It was submitted that he was not a reliable witness and that there was a case of attempted murder under Madadeni CAS103/02/2008 which was opened against him. He failed to answer simple questions and failed to give straight forward answers.

[22] It was submitted that the members of Defendant fired shots when it was not safe to do so. They were negligent and if they acted reasonably in the circumstances Plaintiff would not have been shot. They had a legal duty of care to take reasonable steps to avoid causing harm to the public. Considering the surroundings they ought to have acted with extreme caution. There were also members of the crime prevention unit present, a specialised unit and there is no indication whether they had fired shots or not.

[23] It was submitted that the costs of 6 October 2025 were wasted due to the fact that the witness of Defendant, Mr. Buthelezi could not attend court after it had been arranged for him to testify virtually on the Monday and that accordingly those costs should be borne by Defendant.

[24] It was submitted on behalf of Defendant that the police officers were pursuing suspects. They were placed in a dangerous situation by a threat which had commenced and that they acted out of necessity under circumstances where action was required. They acted reasonably and lawfully and there were reasonable grounds to believe that there was actual alternatively imminent danger. It was submitted that the issue was whether the members wrongfully and unlawfully shot Plaintiff and whether there were grounds for them to fire. It was submitted that no ballistic evidence was submitted by Plaintiff. The police acted in self-defence and that Plaintiff may have inadvertently been shot by the police. Plaintiff had not presented irrefutable evidence that he was injured by a bullet fired from a firearm belonging to the police.

[25] It was submitted that in the case of *Kruger v Coetzee* 1966 (2) SA 428A at 430 E – F the requirements for negligence are set out. It was further submitted that in terms of section 49 of the Criminal Procedure Act the use of force to affect an arrest can be justified in certain circumstances, that it authorises police to use force when necessary. It was further submitted that the defence of necessity was fulfilled as the

requirements therefore have been satisfied. It was also submitted that the test of self-defence was satisfied. I was then referred to various cases in which an innocent bystander was shot which it was submitted are persuasive. I was referred to the Minister of Safety and Security v Mohofe 2007 (4) SA 125 (SCA) where an innocent bystander was shot and it was held on appeal that the plaintiff's claim was dismissed. I was also referred to the decision of Pietersen v Minister of Safety and Security 2007 (2) ALL SA 177 (CC) where it was held that members of a crowd fired shots at the police, the police returned fire to protect their lives and that such actions were reasonable and justifiable.

[26] It was further argued that the costs of 6 October 2025 should not be paid by Defendant as the dialysis of the witness Buthelezi had changed to Monday from the Tuesday and that the parties were informed that this was the position.

[27] On the evidence which is admitted by both parties it is clear that Plaintiff was on his bicycle and the police approached him coming from the other direction. Accordingly the shots which were fired by the members of Defendant must have been fired in the direction of Plaintiff which was cycling towards them. If it was a shot fired by the suspects then it would have come from behind Plaintiff and would have struck him in the back. His evidence was however clear that the vehicle of the suspects had already passed him when he was shot. Considering the positions of the respective parties at the time the only inference that can be drawn is that the police were advancing towards the direction of Plaintiff when the shots were fired.

[28] Plaintiff's injury is confirmed by the medical evidence and by the witness Nkabinde that Plaintiff was shot on the inside of his right thigh and the bullet exited at the back of his thigh. This supports his version that it was one of the police officers whose shots struck him. If it was a shot of one of the suspects as I have already mentioned then they would have fired the opposite direction to that which the police were approaching and such shot would have struck Plaintiff in the back and could not have struck him in the front of his thigh. It is therefore in my view been proved on a

balance of probabilities that the shot which was fired was indeed fired by a member of the South African Police Services who was acting within the cause and scope of their employment at the time.

[29] Once it has been established that the shot that struck Plaintiff was fired by a member of the South African Police Services it has to be established whether such shot was justified in the circumstances and further whether there was any reason for them to fire at the time and whether there was any negligence on their part. It is clear from the evidence of the members of the South African Police Services who testified, namely Mr. Buthelezi, the only witness by the defence that he did not see Plaintiff on his bicycle at the time when the shots were fired. It is indeed so that Defendants were pursuing a white Corolla in which there were certain suspects. However Nkabinda confirmed that Plaintiff was found on the left side of the road where he was waiting for an ambulance. It was not disputed that Plaintiff was on the left side of the road when he was struck by the bullet.

[30] It is also as I have set out above clear that Defendants were travelling towards Plaintiff when the shots were fired as is confirmed by the injuries sustained. Nkabinde could not take the matter any further as he only arrived at the scene later but from his evidence and the evidence of Buthelezi it is apparent that a report was received that a person was shot by the police.

[31] As already mentioned I have been referred to various cases where innocent bystanders have been shot by a bullet fired by the police when they were in pursuit of a suspect. However each case, in my view, must be dealt with on its own facts. It is indeed so that the police are entitled to use the necessary force in certain circumstances to make an arrest and that they are entitled to defend themselves in situations where their lives are in danger. In the present case, on the evidence, which was presented, it appears that two shots were fired from the suspects vehicle but there is no evidence that any of those shots struck the police vehicle or any of the police officers. It would accordingly on the evidence not appear to me that there was

any threat or imminent danger to their lives at that stage except that certain shots were fired in their direction.

[32] The fact that Buthelezi testified that he did not see Plaintiff on his bicycle when the shots were fired clearly indicates that he did not keep a proper lookout at the time. It was a built-up area where people were walking and they should have ensured that it was safe to fire the shots before they did so. If they had kept a proper lookout they would have seen Plaintiff on his bicycle.

[33] Plaintiff was indeed a good witness. He was an honest witness who kept to his version throughout cross examination. He did not deviate from his evidence at any time and gave a detailed account of the events on the day in question. The injury confirms his evidence. The evidence of Buthelezi was contradictory and at times he did not answer and stated that he had no comment. He also contradicted himself as to where he went to hide when he fired shots. At first he said behind the front wheel then later behind the right back wheel. He stated that they had stopped the vehicle and had opened the door. If that was so it was even more reason for him to have been able to see if there was anyone in the vicinity.

[34] The suspects vehicle was in front of Defendant's vehicle on the same side of the road, namely the righthand side. Therefore shots by the police would have been fired in the direction of Plaintiff and by firing such shots it struck Plaintiff on the other side of the road. This in my view indicates negligence on the part of the police officers.

[35] In my view it has been proved on a balance of probabilities that the shot which struck Plaintiff was fired by a member of the South African Police Services and further that it was due to the negligence of the police. If they kept a proper lookout they would have seen Plaintiff on the other side of the road. There was no threat to their lives at that stage and that the firing by them was not necessary at that stage. Plaintiff has accordingly, on a balance of probabilities, proved his claim.

Accordingly I find the following:

1. Defendant is ordered to compensate Plaintiff for any proven or agreed damages that he may have suffered as result of the gunshot wound.
2. Defendant is to pay Plaintiff's costs including the reserved costs of 6 October 2025.



P C BEZUIDENHOUT J.

JUDGMENT RESEVED ON:

11 NOVEMBER 2025

JUDGMENT HANDED DOWN ON:

17 DECEMBER 2025

COUNSEL FOR PLAINTIFF:

T P NGCOBO

Instructed by:

Matodzi Neluheni Attorneys

c/o: Angus Findlay & Associates

Pietermaritzburg

Cell: 083 205 0630

Tel: 082 891 5702

Ref: Mr. Findlay

COUNSEL FOR DEFENDANT:

T MANICUM

Instructed by:

State Attorney (KZN)

Durban

Tel: 031 365 2542

Email: KBhagwan@justice.gov.za

Ref: 505/0139/11/M/P23/K.BHAWAN/cet

c/o: Cajee Sestubi Chetty Inc

Pietermaritzburg