

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)**



APPEAL CASE NO: A5037/2012

SOUTH GAUTENG HIGH COURT CASE NO: 20606/2010

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

DATE

SIGNATURE

In the matter between:-

THE MINISTER OF POLICE

Appellant

(Defendant in the Court below)

and

TSHWANYANE, PETER KABELO

Respondent

(Plaintiff in the Court below)

JUDGMENT

WILLIS J:

[1] The appellant, the Minister of Police, has appealed to the Full Court against the judgment of Rossouw AJ delivered on 11 January 2012. The appellant appeals with the leave of the learned judge in the court below.

[2] The plaintiff claims damages arising from a bullet wound to his foot that was inflicted upon him by Detective Constable Nki Stephen Selomo during the course of an arrest in the Protea Gardens Mall, Soweto on 7 September 2009. The remnant of a bullet was located in the soft tissues lateral to the *os calcis* on the right of the plaintiff's right heel. The issue of the plaintiff's liability was separated from that of *quantum*. The court below adjudicated the question of the defendant's liability. The learned judge found in favour of the plaintiff.

[3] Detective Constable Selomo gave impressive evidence. He described how he had been investigating two charges of assault with intent to

commit grievous bodily harm. Dangerous wounds, of a serious nature, had been inflicted upon the complainants. Acting on information given to him by a reliable, unpaid informer, Selomo went in search of the suspect. Having unsuccessfully attempted to find the suspect at a shack in Protea south on a few occasions, he and the informer drove about in the area, known as Midway, looking for the culprit. The informer pointed out the plaintiff. Selomo went over to the plaintiff on foot. When Selomo began to introduce himself to the plaintiff, the plaintiff started to run away. When Selomo realised that he would not catch the plaintiff on foot, he climbed back into his vehicle. The plaintiff did not heed calls by Selomo to him that he should stop. Selomo fired a single warning shot, towards the ground, which ricocheted and hit the plaintiff in the foot. The ricochet is corroborated by the fact that there was merely a remnant of a bullet that was removed from the plaintiff's foot.

[4] Having been hit in the foot, the plaintiff stopped. Selomo then arrested him. Later, Selomo noticed blood oozing out of the shoe of the plaintiff. When he realised that he had injured the plaintiff, Selomo took him to the Lerato Hospital for treatment.

[5] The plaintiff admitted that he had run away 'because that man (i.e. Selomo) was going to arrest me if I stayed there'. The plaintiff said he was about to smoke a 'zol' of dagga which was still in his hand at the time when he first saw Selomo. According to the plaintiff he was dispossessed of this zol by Selomo. The plaintiff said that he was afraid he would be charged with possession of dagga. The plaintiff has not been charged with either of the assaults which were under investigation.

[7] The plaintiff said that, after he had been apprehended by Selomo, Selomo had slapped him in the face with an open hand. Selomo denies this. Selomo was incontestably the better witness. For example, the plaintiff initially said he was shot in the back, then his thigh and, only after some prompting, the foot. That the plaintiff was shot in the foot is supported by the report of the doctor who examined him. Where there is an irreconcilable difference between the evidence of the plaintiff and Selomo, Selomo's evidence is to be preferred.

[6] In his amended particulars of claim the plaintiff alleges that he was 'wrongfully shot in the foot and then assaulted by a police officer by the name of Selomo'. No allegation is made of Selomo's negligence, never mind the manner in respect of which he might have been negligent.

[7] Selomo was cross-examined as to why he had shot in the direction of the ground rather than in the air. Selomo gave credible evidence that he believed that in the context of the situation it was safer to shoot towards the ground than in the air. During the course of argument counsel for the plaintiff submitted that the arrest of the plaintiff in the manner which it did, in fact, take place could have been avoided by a raid on the plaintiff's shack at night. As to whether or not this might be a reasonable proposition, this was never put to Selomo when he was cross-examined.

[8] Section 40 (1) (b) of the Criminal Procedure Act, No. 51 of 1977 as amended, ('the Act') provides that a peace officer (as was Selomo) may,

without out a warrant, arrest any person 'whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody'. The offences in question were 'Schedule 1' offences.

[9] Section 49 (1) (b) of the Act provides that if a person whom it is sought lawfully to arrest:

flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the arrest or to prevent the person concerned from fleeing.

[10] The learned trial judge found that:

...it has not been established that Mr Selomo intentionally injured the Plaintiff. Mr Selomo, however, acted negligently in the circumstances by firing the shot In the result I find that the defendant is liable to pay the plaintiff's damages as a result of the defendant's servant acting in the course and scope of his employment.

and

the Defendant's problem in this case is that Mr Selomo did not at the relevant time have the intention to arrest the Plaintiff. He was merely investigating the matter. Such force as was used was therefore not used in order to effect an arrest. Section 49 does therefore not apply and the defence is misconceived.

[11] The court below erred in finding that Selomo did not have the intention to arrest the plaintiff. Selomo clearly did. The court below also erred in finding that Selomo acted negligently. If one applies the classic test in the well known case of *Kruger v Coetzee*:¹

For the purposes of liability *culpa* arises if-

(a) a *diligens paterfamilias* in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and cause him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.²

the ricochet was not a reasonably foreseeable possibility.

[12] Having made a lawful decision to arrest the plaintiff, using such force as was reasonably necessary and proportional in the circumstances to prevent him from fleeing as a suspect, Selomo could not, in the circumstances, have taken any other reasonable steps to prevent the accident from occurring.

[13] In any event, even if I am wrong in my conclusion as to the absence of negligence on the part of Selomo, it was wrong to determine that

¹ 1966 (2) SA 428 (A)

² At 430E:

Selomo's negligence was the basis upon which the defendant was liable. Negligence was not, however, alleged in the particulars of claim.

[14] The court is keenly aware that we must not condone 'trigger-happiness' on the part of the police. On the other hand, we cannot set so high and unrealistic a standard that they cannot properly attend to their most important function of bringing criminal offenders to book. Counsel for both sides relied on the Constitutional Court's decision in *Ex Parte Minister of Safety and Security: In re S v Walters*.³ In that case, the court summarised the position as follows:

- (a) The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- (b) Arrest is not the only means of achieving this purpose, nor always the best.
- (c) Arrest may never be used to punish a suspect.
- (d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
- (e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.
- (f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.

³ 2002 (4) SA 613

- (g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
- (h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
- (i) These limitations in no way detract from the rights of an arrester attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person.⁴

Selomo's conduct was not in conflict with these requirements.

[15] The appellant succeeds. The following is the order of the court:

- (i) The appeal is upheld;
- (ii) The order of the trial court is set aside and the following substituted therefor:

'The plaintiff's claim is dismissed with costs'.

**DATED AT JOHANNESBURG THIS 7th DAY OF FEBRUARY,
2013**

⁴ At paragraph [54]

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

J.P. HORN

JUDGE OF THE HIGH COURT

I agree.

B. MASHILE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv. *A. M. Pheto*

Counsel for the Respondent: Adv. *D. Bisshoff*

Attorney for the Appellant: The State Attorney

Attorney for the Respondent: Raphael & David Smith Inc.

Dates of hearing: 30th January, 2013

Date of judgment: 7th February, 2013