

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA

^A
CASE NO: 2012/3942

9/10/2014

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED. <input checked="" type="checkbox"/>
<p>.....8.15.14 DATE</p> <p>..... SIGNATURE</p>	

In the matter between:

SHITUMBELELA THOMPSON MHLONGO

PLAINTIFF

and

**MINISTER OF POLICE
PHAHLELA ELLIAS NKUNA**

1ST DEFENDANT

2ND DEFENDANT

J U D G M E N T

WRIGHT J

1. The plaintiff, Mr Mhlongo claims damages from the defendants arising out of a shooting incident on 11 March 2012. It is common cause that the second defendant, acting in the course and scope of his employment with the first defendant, shot Mr Mhlongo in the stomach. By agreement, the only issues for decision are the merits of the claim and the question of damages. At the request of the parties I separated these issues and postponed the question of

damages. Mr Kekana appeared for Mr Mhlongo and Mr Nonyane, with Ms KD Magano, for the defendants. Mr Nonyane accepted the onus to justify the shooting and he accepted the duty to begin.

2. Captain Nkuna, the second defendant testified. At 7pm on the evening in question he arrived at the house of Ms Tebogo Nobela. He and Ms Nobela were alone at the house. The house consists of a single room made of brick. It has one door made of "wood sawdust ". There are two small windows, one each on each side of the house. Each window is in a wall which is at ninety degrees to the wall in which the single door is fitted. Accordingly, any person knocking on the door from the outside is not visible to anyone inside the house if the door is closed.
3. At 8pm Captain Nkuna heard a car arriving at high speed. Ms Nobela went outside and then locked Captain Nkuna inside. He heard two male voices. They were shouting that the door should be opened as they wanted to kill the policeman inside. Captain Nkuna had no place to go. He shouted twice that the men outside, who were trying to break down the door, should move away or he would shoot. Captain Nkuna was armed only with his 9mm semi-automatic Z88 pistol. It was loaded with one clip of 15 rounds of live ammunition. He cocked his pistol loudly so that the attackers could hear that he was cocking his pistol.
4. The attack on the door continued. When Captain Nkuna realised that the door was in the process of being opened he fired what he described as a warning shot through the door at the two men standing on the other side of the door. The attack continued for 30 seconds and then he fired the second shot. The attack then stopped.
5. During cross examination of Captain Nkuna I admitted in evidence as exhibits A and B written statements made by Captain Nkuna prior to his evidence in court and inconsistent with it. Exhibit A is inconsistent with Captain Nkuna's testimony in that:
 - 5.1 exhibit A contains no reference to a loud cocking of the weapon
 - 5.2 exhibit A contains no reference to having warned the attackers twice to stop or be shot .

6. Exhibit B is inconsistent with Captain Nkuna's testimony as exhibit B contains no reference to a loud cocking and it contains a reference to Captain Nkuna not having seen damage to the door. In testimony Captain Nkuna had stated that after the shooting he had seen damage to the door.
7. I attach little weight to any of the inconsistencies save for the lack of reference to a warning in exhibit A. In my view a warning or lack of it prior to the shooting is relevant to a determination of the merits in this case and Captain Nkuna, as an experienced police officer would at all times have been aware of this consideration.
8. Ms Nobela testified. She was at home with Captain Nkuna. He was inside. She was outside. The house has only one window. A person standing outside the door is not visible to someone inside the house if the door is closed. The plaintiff and his cousin Patrick (whose surname also happens to be Nkuna) arrived by taxi. They got out of the taxi armed with wheel spanners. They saw Ms Nobela lock the door with a key from the outside. They pushed her out of the way and started breaking down the door. They kept shouting that they wanted to kill the policeman.
9. Captain Nkuna fired a shot through the closed door which hit the plaintiff who then ran away with Patrick. Before Captain Nkuna fired the shot he warned the attackers to move away otherwise he would shoot. Ms Nobela moved away from the door. Ms Nobela kept quiet. Two shots were fired, the second immediately after the first. The first shot hit the plaintiff.
10. I admitted as exhibit C a statement made by Ms Nobela to the police after the incident. It contained at least the following material contradictions with her evidence in court:
 - 10.1 According to the statement Ms Nobela was assaulted by the attacking pair carrying wheel spanners. Her evidence in court omitted this allegation. When the contradiction was put to her she said that she had in fact been hit on the forehead by the plaintiff with a wheel spanner when he had arrived.
 - 10.2 Exhibit C makes mention of the plaintiff and Patrick threatening to kill both Captain Nkuna and Ms Nobela. Ms Nobela's testimony in court,

prior to the contradiction being put to her, was that the plaintiff and Patrick had threatened the life of Captain Nkuna.


11. The following material contradictions appear between the evidence of Captain Nkuna and Ms Nobela:
 - 11.1 According to Captain Nkuna the house had two windows. Ms Nobela said her house has one window.
 - 11.2 Captain Nkuna said he fired two shots. Ms Nobela said one shot was fired. She then altered the number of shots to two.
 - 11.3 According to Captain Nkuna 30 seconds elapsed between the firing of the shots. Ms Nobela said the second shot was immediately after the first.
 - 11.4 Captain Nkuna said that the second shot hit the plaintiff. According to Ms Nobela it was the first.
12. If the defendants' evidence is all true it means that Captain Nkuna fired through the door at a time when he had every reason to think that Ms Nobela could well be in the firing line.
13. Ms Nobela's evidence that the two attackers saw her lock the door from the outside raises the question why the key was not simply taken from her. It would have been easy for two men, armed with wheel spanners to relieve her of the key. An attack on the door would therefore seem to be unnecessary. Ms Nobela could provide no explanation for this anomaly.
14. The facts considered in the previous two paragraphs incline me to the view that Ms Nobela was inside the house at the time of the attack.
15. After the testimony of Ms Nobela, Mr Nonyane closed the defendants' case.
16. Against this weak evidence the plaintiff testified. He was with his cousin Patrick Nkuna. Patrick received a call on his cellphone. Patrick told the plaintiff that it was Patrick's son complaining that he had been locked out of the house and that a man was at the house. Patrick is the father of Ms Nobela's children. The house is that in which Ms Nobela lives with the children.

17. Patrick drove the plaintiff to the house with the sole purpose of collecting the children. At all times the plaintiff was not armed. On arrival Patrick took a wheel spanner and the two men approached the house. Ms Nobela, looking through the slightly opened door from inside the house, saw that it was Patrick and the plaintiff who were approaching and that Patrick had a wheel spanner. She locked the door from the inside. Patrick knocked on the door. Immediately, a shot was fired from inside the house, through the door which struck the plaintiff on the side of his stomach. At that time the plaintiff and Patrick were standing in front of the door. Patrick then broke the door with a wheel spanner. The second shot was fired about 30 seconds after the first shot. During this period the plaintiff and Patrick remained in front of the door. Only after the second shot was fired did the plaintiff and Patrick split up and move away from the door.
18. The plaintiff was an evasive witness. He struggled to a great extent to answer the simplest of questions. His version, in its entirety, is most unlikely to be true. Patrick, despite his presence at court was not called to testify for the plaintiff.
19. In my view the following picture is probably what happened. Patrick, concerned about his children and angry or jealous at the report that another man was with Ms Nobela decided to confront the man. On arrival he took a wheel spanner and approached the house with the plaintiff. Neither Patrick nor the plaintiff was in any mood for discussion. At about the time that Ms Nobela locked the door from the inside Captain Nkuna became aware of the impending attack. Either he saw Patrick and the plaintiff approaching or Ms Nobela told him. He had nowhere to go.
20. The fact that the plaintiff and Patrick remained in front of the door for about 30 seconds after the first shot, during which time Patrick broke the door with a wheel spanner, is strong evidence that Captain Nkuna was the target of a sustained and ferocious attack. A grown man in a bad mood can easily kill another man with one blow of a wheel spanner.

21. Professor Burchell, in his Principles of Criminal law, 4th edition, chapter 8 discusses private defence. The learned author lists the elements of this defence as:
 - 21.1 an attack
 - 21.2 upon a legally protected interest
 - 21.3 where the defence is directed against the attacker.
22. The learned author writes that the defence is to be tested objectively and that there must be evidence that the defence was:
 - 22.1 necessary to avert the attack
 - 22.2 a reasonable response to the attack
 - 22.3 directed against the attacker.
23. In my view the defendants, mainly through the evidence of the plaintiff have established their pleaded defence. Captain Nkuna's life was in danger and he knew, reasonably so, that it was. He was trapped and his only means of defence was his pistol. In the circumstances he acted reasonably.
24. Perhaps Captain Nkuna could have fired a warning shot through the roof or floor. However, the first shot, despite hitting the plaintiff on his version, only increased the ferocity of the attack. In these circumstances it is most likely that a warning shot would have had no effect whatsoever. Captain Nkuna of course was not to know that a first shot, of any kind would have no deterrent effect until after he had fired it. The point is never the less that in his urgent circumstances he was justified in giving no warning of any kind if in fact he did not. Compare Burchell at page 124 – 125.

Order:

1. Judgment is entered for the defendants with costs.



GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

On behalf of the Applicant:	Adv KK Kekana
Instructed by:	Rammutla-At-Law Inc
On behalf of the Respondent:	Adv P Nonyane and Adv KD Mogano
Instructed by:	State Attorney
Dates of Hearing:	7, 8 October 2014
Date of Judgment:	9 October 2014