IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 17429/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED
DATE: 24 October 2014
SIGNATURE: Jansen

24/10/2014

In the matter between: —

MOSHIDI LUCKY NHLANHLA Plaintiff

And

THE MINISTER OF POLICE First Defendant

NAWA JAMES MATSOBANE Second Defendant

JUDGMENT

JANSEN J

[1] In this action, it was common cause that the second defendant, a police officer, shot the plaintiff, a police constable who was stationed at the Dennilton Police Station, Limpopo Province. The plaintiff is, as a result, a paraplegic and wheelchair bound.

[2] The first defendant is the Minister of Police, and the second defendant an employee of the first defendant. Relief was sought against both defendants. However, it was not proved by the plaintiff that the second defendant did not act within the cause and scope of his employment with the first defendant or was actuated by malice, as was pleaded by the plaintiff.

[3] It was agreed that the merits of the action would be separated from the quantum, and so ordered.

[4] The second defendant's defence was one of self-defence. In this respect it is trite that the second defendant bears the evidentiary onus to prove, on a preponderance of probabilities, that he acted in self-defence, and the state the onus to prove, also on a preponderance of probabilities, that the second defendant did not exceed the boundaries of self-defence.

[5] As the action progressed, it became clear that a tragic chain of events occurred, which led to the plaintiff being confined to a wheelchair. The

plaintiff has lost all the amenities of life, such as mobility, to take care of himself and will never be able to participate in sport or in any form of physical activity again. Tragically he had participated in sport, in which he had a keen interest, on the day before he was shot. As a result, the plaintiff suffered a loss of self-esteem and a loss of dignity. In particular, his right to be free from all forms of violence from either public or private sources as provided for in section 12(1)(c) of the Constitution was breached. He also suffered an egregious assault on his right to bodily and psychological integrity. This is so, particularly as he was a fit, young police officer who played an important role in upholding the social structure of our society.

[6] The amount of damages claimed by the plaintiff under separate headings of damages total R12 028 500.00.

[7] It was agreed that the first defendant would assume the duty to lead its evidence first, in view of the common cause facts and due to the evidentiary burden which it bears.

[8] The first witness called was the second defendant, Mr Nawa (hereinafter referred to as "**the second defendant**"). The second defendant testified that on 30 April 2009, a suspect who had been involved in an armed robbery at Middelburg, was arrested by the police. The suspect (hereinafter referred to

as "**the first suspect**") indicated that he knew where a second suspect lived, who was in possession of an unlicensed firearm.

[9] The second defendant testified that six police officers in two motor vehicles set out to arrest the second suspect who lived in Siyabuswa. He further testified that it was during the night.

[10] Upon arrival, he, the police officers and the first suspect (who was in his custody and under his direct supervision and control) alighted from the two police motor vehicles and proceeded to the room where the first suspect stated that the second suspect resided.

[11] They knocked on the door but there was no response. They then peeped through the keyhole and saw a key in the keyhole, which, on their interpretation, meant that the door was locked from the inside. They then heard the sound of a window breaking.

[12] Instead of seeking to arrest the suspect, the six police officers fled for cover. The area, although rural, was developed in that there were shacks and buildings erected in the area. The second defendant said that he, whilst holding onto the first suspect, jumped a fence which appeared to be bent and close to the ground and that he and the first suspect took cover behind an

outside toilet on the property next door to the one where the second suspect resided.

[13] The second defendant stated that although he was wearing civilian clothing, he also wore a bulletproof vest which clearly indicated that he was a police officer, in luminescent lettering, imprinted on the front and back thereof. He stated that his firearm was in his hand, cocked and ready to shoot, as testified.

[14] A photograph was produced in evidence showing the outdoor toilet building behind which the second defendant and the first suspect took cover and the narrow passage between it and the neighbour's house. The toilet building was close to the corner of the house.

[15] The second defendant testified that the "dress" of a person he suddenly saw standing in front of him fitted the "dress" of the second suspect. No evidence was led as to what the "dress" of the second suspect was or what the second defendant sought to convey in stating this.

[16] This person was the plaintiff, Mr Lucky Nhlanhla Moshidi (hereinafter referred to as "**the plaintiff**") who resided in the house next door to the second suspect.

[17] The second defendant further testified that he kept the first suspect tightly gripped to the left of his body and held his firearm in his right hand. He allegedly shouted "*police*" only to be met with a response that "*there are no*

police here". He testified that the plaintiff pointed his firearm at him, that he panicked and reacted by shooting the plaintiff.

[18] The second defendant testified that after shooting the plaintiff, the plaintiff collapsed on the ground.

[19] As the plaintiff fell to the ground his firearm also fell to the ground. The plaintiff's distraught wife appeared and said that the plaintiff was her husband. It then transpired that he was a police officer. The second defendant's firearm as well as the plaintiff's firearm were taken for ballistic tests. However, the results of these tests were not produced in evidence at the trial. The second defendant returned to the room of the second suspect and told the other police officers, who seemed to have returned, that he had shot the second suspect. He was then told that the second suspect had already been apprehended at his room and had been taken into custody by the other police officers whilst the confrontation and shooting between him and the plaintiff were taking place.

[20] Why so many police officers would run for cover merely because of the sound of a window breaking is incomprehensible. The police officers by far outnumbered the one suspect, even though he was probably armed. It is difficult to fathom why they sought to flee, save to conclude that bravery did not form part of their repertoire. Be that as it may they scattered into neighbouring properties. (Their precise whereabouts were unknown to the second defendant.)

[21] The second defendant testified that some other members of the community were in the street but that the nearest town was some distance away.

[22] The second defendant further testified that everything happened very quickly. He said it never occurred to him that the person he shot was not the second suspect but an off-duty police officer. The second defendant further testified that the plaintiff was unknown to him. He also testified that the writing on his, the second defendant's bulletproof vest, was visible.

[23] As stated, the second defendant admitted that he panicked. The question arises as to why he did not rely on his bulletproof vest, the fact that he allegedly identified himself as a police officer and that he had a firearm. Was shooting the plaintiff his only option?

[24] Under cross-examination the second defendant conceded that they had enough back-up. Although he admitted that it was not the first time that he was in the Siyabuswa area, he stated that he did not know the particular address pointed out to him by the first suspect. He also stated that he wrote down the address only when he made a statement after the incident.

[25] Upon questioning he stated that there were lights but that they were not bright. From this one can assume that there was some form of visibility but not clear visibility.

[26] It was put to him that it was the plaintiff who saw the second defendant first and who spoke first by asking the second defendant and first suspect: "*Hey who are you, what are you doing at my house? I am a police officer*". It was also put to him that the plaintiff would testify that the next thing he heard instead of an answer to his question was the sound of a gunshot and that he was hit in the chest, on the left-hand side.

[27] The second defendant stated that as the police were always under threat they could not afford to wait for somebody to harm them first. They had to take action. Whether the second defendant wished to convey that he had a right to kill is unclear. What was clear to the court, however, was that the second defendant's mentality was one of "shoot, and only then ask questions". Under cross-examination he was also questioned whether the plaintiff could have seen him even before he took cover behind the toilet. He answered in the positive and stated that he saw the plaintiff in the house in his underwear. He denied that he could see the plaintiff clearly because he alleged that the light was not clear or vivid. The second defendant testified that when he fired the shot he was five metres away from the plaintiff. This does not tally with his evidence in chief that the plaintiff suddenly appeared right in front of him. He stated that his firearm was breeched and that there was a bullet in the chamber. He referred to it as a "one up". The second defendant said he was not pointing his firearm. He stated that he held it next to his leg at all relevant times and

that the plaintiff was the aggressor and would have shot him had he not shot first. This, of course, is pure speculation on the part of the second defendant.

[28] In further cross-examination when questioned whether, had he been in the plaintiff's position, he would not also have wished to protect his family, his response was the following: "*I would not have come out, but I would have waited for the intruder to attack first and only act after the intruder had attacked.*" This statement of course runs counter to his evidence that there was no duty on him to wait until attacked before taking action.

[29] The second defendant then contradicted himself and testified that he could see the plaintiff clearly and that he said the word "*police*" to the plaintiff but that the plaintiff answered that "*there are no police here*".

[30] The second defendant further testified that the plaintiff should have realised that he was a police officer because he was wearing his bulletproof vest. When asked why the place where the plaintiff fell was at the corner of the house the second defendant stated that the plaintiff stood right in front of him and, after being shot, staggered to the corner where he fell. This is not what the second defendant testified in his evidence-in-chief.

[31] The second defendant reiterated under cross-examination that he thought that he would be shot if he did not shoot first and that everything happened very quickly. He further reiterated that he did not know the plaintiff at all.

[32] The second defendant further testified under cross-examination that the plaintiff should not have exited and should have stayed in the house. He also posed the hypothetical question: "*Why wait for somebody to hurt you first?*" The second defendant then reiterated the rather damning confession that he saw the plaintiff for the first time in his house – "*moving in his underwear*". The second defendant said the plaintiff could have peeped through the window or fired a warning shot and should not have exited his home. When it was put to him that if he had been wearing a bulletproof vest then in the available light it would have been visible to the plaintiff, he rather quickly responded that the light was not that vivid.

[33] In cross-examination the second defendant was asked whether the plaintiff could not have shot him from the window had he wished to do so, because he had a clear view from there. The second defendant's response was that "*he was not aware, but maybe the plaintiff thought if he opened the window he (the second defendant) would hear him*".

[34] Furthermore, the room of the second suspect was behind the second defendant and not located in the direction from which the plaintiff was coming. To this the second defendant answered that danger could come from any angle.

[35] The second defendant further admitted that when he saw the plaintiff he panicked, because he did not see clearly. He then contradicted himself again by stating that he could see clearly as he could see the firearm in the plaintiff's hand as he stood there in his underpants. It was further put to him in cross-examination that he never identified himself as a police officer to which he responded that he did, and reiterated that the plaintiff stated that there were no police officers present.

[36] Furthermore, the plaintiff in the criminal trial (wherein the second defendant was the accused) and also in this trial testified that he was carrying a torch – rendering the second defendant's version that the plaintiff, due to poor lighting, would not have seen the lettering on his bulletproof vest, highly improbable.

[37] As stated, the second defendant also gave the unlikely version that the plaintiff was standing right in front of him when he shot him, whereafter he staggered to the corner of the house where he fell.

[38] It was further put to the second defendant that the plaintiff had the right to protect his property. The second defendant stated that after he had identified himself as a police officer and had received the answer that there were no police present and then hearing the plaintiff cock his firearm, he proceeded to shoot him.

[39] When it was put to the second defendant that it was irresponsible to enter a neighbour's premises, he answered in the affirmative, but tempered his answer by stating that it was the plaintiff who had acted irresponsibly by exiting his house. It was also put to him in cross-examination that it was irresponsible for a police officer not to announce his presence when entering a property, whereupon the second defendant stated that had he done so, it would have caused the second suspect to flee. This does not make sense within the context of the second defendant not chasing after the second suspect, but rather fleeing to take cover.

[40] When asked why he and his fellow police officers had not done a proper investigation, he stated that it would have been too dangerous to approach the second suspect. He further stated that he had no time to fire a warning shot as the plaintiff would have killed him. It was wholly unclear to the court as to why he presumed, as a given, that he would be shot. It rather appeared to the court that the second defendant felt entitled to shoot the plaintiff.

[41] It was also put to the second defendant that the second suspect was arrested on his (the second suspect's) own property whilst he, the second defendant, was on the neighbouring property. He replied that he had left to go into the yard to look for someone with a firearm, as he thought that the second suspect had fled. On his evidence in chief, he fled in order to take cover.

[42] The next witness called on behalf of the defendants was a certain Mr Bafana Masilela, a police officer who had accompanied the second defendant that fateful night.

[43] Mr Masilela testified that during April 2009 there was an armed robbery in Middelburg and that a suspect was caught, who undertook to take the police to the residence of a second suspect in Siyabuswa.

[44] Mr Masilela testified in chief that the police, accompanied by the first suspect, went to the second suspect's room, which was pointed out to them by the first suspect. He testified that they knocked but that there was no response.

[45] Mr Masilela testified that upon hearing a window breaking the police officers ran away and took cover in the yards of the second suspect's neighbours. He testified that he heard a commotion, the words "*police*" and the answer that "*there are no police here*" spoken and then a gunshot. He also testified that he heard a gun being cocked. The sequence of these events was not furnished

by Mr Masilela. He testified that he knew that the one voice was that of his colleague but did not recognise the other voice. He testified that he was shocked and horrified.

[46] Mr Masilela further testified that he went to the scene and found the plaintiff lying on the ground. He testified that he was very surprised to ascertain that the plaintiff was a police colleague. He testified that he found a firearm on the ground with its hammer back and the firearm "on fire". He testified that he had never seen the plaintiff before.

[47] Mr Masilela testified that the second suspect was arrested on his own property and that his firearm was found. Which of the police officers returned to the second suspect's property, and when they did so, was never clarified in evidence.

[48] When asked whether there were any civilians in the vicinity Mr Masilela answered in the negative, stating that it was already past midnight.

[49] Under cross-examination Mr Masilela testified that there were six police officers plus the first suspect, who travelled from Middelburg to the second suspect's residence. He testified that when they were sent to a certain district their commanders would inform the relevant authorities in that area of this

fact. He did not know whether this had been done in the instant case. This is an aspect which was also never clarified by the first defendant's witnesses.

[50] Mr Masilela stated that they entered the second suspect's property through a gate and were directed to a room at the back of the property by the first suspect.

[51] Mr Masilela further testified that because the second suspect was armed, they had to take their own safety into consideration as well. Mr Masilela reiterated in cross-examination that because they heard the sound of a window breaking they ran away and that he went to the neighbour's house and jumped over something in the process. He stated that the property to which he fled was to the left of the second suspect's room when facing the room (this was corroborated on an exhibit marked "**Nhlanhla 1**" drawn by the plaintiff when he testified).

[52] Mr Masilela further testified that he was at the back of the plaintiff's house with two other police officers.

[53] Mr Masilela testified that he recalled making a police statement about the incident on 11 February 2010. It was pointed out that he had never mentioned the fact that he heard the plaintiff's firearm being cocked, nor hearing the words "*police*", nor an answer that "*there is no police here*" in his statement.

Mr Masilela's answer was that one tends to forget detail and that "*a human brain functions differently*".

[54] Mr Masilela was then taken to his evidence given in the criminal trial against the second defendant on 20 March 2012 (nearly two years later after the shooting) wherein he had stated that he heard the sound of a firearm being cocked and the second defendant saying "*police*" and the answer "*there are no police here*". It was put to him that he seemed to forget facts to which Mr Masilela responded: "*I agree*".

[55] It was also put to Mr Masilela that he also made no mention of hearing voices stating anything in his police statement of 11 February 2010. Mr Masilela admitted as much.

[56] Mr Masilela was asked whether he had made the police statement and given evidence in the criminal proceedings voluntarily. He answered in the affirmative.

[57] A very strange aspect of his evidence in the criminal proceedings was that he claimed to have taken cover behind the toilet whilst the second defendant seems to have been somewhere else. This bizarre aspect of his evidence in the criminal trial was not traversed with him in this trial.

[58] Mr Moshidi, the plaintiff, was the next witness to testify.

[59] The plaintiff testified that he had been a constable for ten years, and that on the day that he was shot he was asleep in his house at Siyabuswa, with his wife and child. He heard a noise outside but did not know what caused the noise. He said he peeped through his sitting room's window and saw people running around in his yard. He said that he then went to the kitchen and when he looked out he could see two persons in his yard. He stated that he returned to his bedroom to fetch his torch and firearm. He then stated that he exited from the front door of his house, locked the front door and proceeded down his stoep and peered around the corner and saw two people standing behind the toilet. The plaintiff then stated that he asked them who they were, as this was his house, and what they wanted. The plaintiff stated that these two people were dressed in civilian clothing. The plaintiff pertinently testified that the safety pin of his firearm was on. He further testified that even though the safety mechanism of his firearm was on he would still be able to fire it but would require more force. He also testified that the second defendant never identified himself as a police officer. The plaintiff testified that a person in the second defendant's position should have identified himself as a police officer. He also testified that the second defendant was not wearing a police bulletproof vest. He further stated that had he wished to shoot the two people he had "*quite an opportunity*" to shoot but did not do so. He further testified that one of the two people was on the point of surrendering when he (the

plaintiff) was shot. He stated that the two people were standing parallel to each other (it was understood by the court that he meant the one in front of the other) and then the shot went off. He stated that when he was shot he was standing on the "stoep" at the corner of the house and then lost consciousness. He testified that he was unsure when his wife came out of the house.

[60] The plaintiff testified that he had never experienced such activities before and that there had been no previous burglaries at his home. He testified that he always protected his wife and child by accompanying them to the toilet at night when they required to go to the toilet. He further testified that it was customary for the nearest police station in an area to which police officers were sent to be informed of their arrival. The plaintiff further testified that he did not pick up a signal from the police station.

[61] Under cross-examination, it was put to the plaintiff that the police are constantly under threat and was asked whether he saw the people in his backyard as a threat. The plaintiff stated that he did not know what they were doing there and was not even aware of the fact that the second defendant had a firearm. He testified that they ran quickly to conceal themselves and that he went outside to ascertain what was happening. He testified that there are two gates and that relatives would traverse his property using the two gates to enter and exit from his property as a short-cut. The plaintiff stated that he went outside to investigate and did not cock his firearm. He reiterated that he

peeped around the corner with his firearm pointing in the direction of the two people whom he saw at his toilet. He stated that he had asked them who they were and why they were at his house and on his premises, and that they should raise their arms. He said that although he pointed his firearm at them he had no intention of shooting them.

[62] The plaintiff was asked how he could have been shot in his left ribcage if he was merely peeping around the corner and he explained by stating that because he was using his torch he had to twist his body in such a manner that his left side was exposed. He denied that he exposed his full body and stated that had his full body been exposed he would have been shot in the abdomen.

[63] When asked whether he was also issued with a bulletproof vest he answered in the affirmative and stated that most of them were made of reflective material. He testified that during the night, in an unsecured exterior, one would wear a bulletproof vest made of reflective material, but added that on that night he was not wearing his bulletproof vest as he was not on duty.

[64] Upon questioning, the plaintiff stated that the two persons were not holding onto each other and that he did not see whether they were armed and that he initially asked: "*Who are you? This is my house. What do you want*" and then identified himself as a police officer.

[65] The plaintiff further testified that the one person stood behind the other in the passage between the house and toilet and that the one who was in front raised his arms when he, the plaintiff, was shot. The plaintiff testified that his left rib cage was exposed and that that is where he was shot. He added that no reasonable person would have thought that he would fire as he identified himself as the owner of the house and a police officer.

[66] The plaintiff said that he was in his underpants only. He stated that the distance from the corner of the house to the toilet was about a metre and a half. He stated that after being shot he fell at the corner.

[67] In re-examination, he confirmed that nobody was wearing a police bulletproof vest and that the two persons whom he saw were in civilian clothes. He reiterated that the safety pin of his firearm was on. He also stated that he could have shot them had he wanted to, and that nobody was holding the other's hand/arm.

Analysis of the evidence:

[68] The plaintiff was a single witness and the state called two witnesses.

[69] In ***Stellenbosch Farmers' Winery Group Limited and Another v Martell & Cie SA & Others*** **(427/01) [2002] ZASCA 98 (6 September 2002)** at

paragraph [5] (pages 4–5) it was held that when the court is faced with two conflicting versions the court must make findings on the following: —

" ***(a) the credibility of the various factual witnesses;***

(b) their reliability; and

(c) the probabilities.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as

(i) the witness's candour and demeanour in the witness-box,

(ii) his bias, latent and blatant,

(iii) internal contradictions in his evidence,

(iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions,

(iv) the probability or improbability of particular aspects of his version,

(v) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[70] In ***Baring Eiendomme Bpk v Roux*** **2001 [1] All SA 399 (SCA)** at paragraph **[6]** the Supreme Court of Appeal adopted the following passage in ***National Employers' General Insurance Co Ltd v Jagers*** **1984 (4) SA 437 (A)** at 440E–441A: —

"***...Where there are two mutually destructive stories,*** [the Plaintiff] ***can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is***

therefore false and mistaken and falls to be rejected. In deciding whether that evidence is true or not, the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in Koster Ko-Operatiewe Landbou Maatskappy Bpk v Suid-Afrikaanse Spoorweë & Hawens 1974 (4) SA 420 (W) and African Eagle Assurance Co Ltd v Cainer 1980 (2) SA 324. I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case,

as though the two aspects constitute separate fields of the enquiry. In fact as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[71] The plaintiff made a good impression on the court. The plaintiff's evidence was consistent, and he came across as a credible witness. His version of the facts was also inherently probable. His version that he peeped around the corner also accords with his evidence that he went out to investigate what was happening. That would be the cautionary and natural thing to do. It is also common cause that he went out in his underpants only. In fact, the second defendant admitted that he saw that the plaintiff was only wearing underpants when he saw the plaintiff peeping through the curtains of his house.

[72] If the plaintiff really intended shooting anybody, one would assume that he would have donned clothes and put on his bulletproof vest. He did nothing of the sort. He took a torch and his firearm which he claims had the safety pin on. He did not know what to expect and why people were in his yard. He also testified that he never cocked his weapon.

[73] The plaintiff was consistent in his version that he first requested the two persons whom he saw on his property to identify themselves by asking them

who they were and why they were on his property and then asking them what they wanted. He also told them that he was a police officer. Given the fact that he had been a police officer for ten years he testified that he would have reacted differently had the second defendant identified himself as a police officer or worn a bulletproof vest as the second defendant claims to have done.

[74] Nothing indicates that the plaintiff went outside with a view to shooting anybody. He never shied away from the fact that he pointed a firearm at the second defendant and the person who accompanied him. There are no inherent improbabilities in his version.

[75] Conduct is wrongful if public policy considerations demand that in the circumstances that a plaintiff has to be compensated for the loss caused by the negligent act of a defendant. It is then that it can be said that the legal convictions of the society regard the conduct as wrongful. The Supreme Court of Appeal has cautioned not to formulate the issue of unlawfulness in terms of "*a duty of care*" but rather to establish whether there was a legal duty on a person or entity *vis-à-vis* a defendant.[1]

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1 ***Telematrix (Pty) Ltd v Advertising Standards Authority*** **2006 (1) SA 461** at paragraph **[14]**; ***Local Transitional Council of Delmas v Boshoff*** **2005 (5) SA 514 SCA** at **522D–E**.

[76] The second defendant's version leaves much to be desired. Many of the contradictions in his evidence have been set out above. The most telling is that the plaintiff allegedly appeared out of the blue and stood right before him. If this were the case, the plaintiff would have seen the second defendant's bulletproof vest and would not have posed the question asking him to identify himself. In fact, in the criminal trial, Mr Masilela did not mention the bulletproof vest at all, nor in his police statement.

[77] The plaintiff would also have seen the bulletproof vest when peeping from the window and rather have asked "*What are police officers doing in my yard?*". It is also highly unlikely that Mr Masilela and the second defendant would have heard the plaintiff cocking his firearm. This evidence is also not to be found in Mr Masilela's police statement.

[78] It also defies logic why the plaintiff would have stated, in response to the second defendant identifying himself as the police that "*There are no police here*", save if this response was prompted by the fact that the second defendant and second suspect were not wearing bulletproof vests.

[79] The second defendant knew he was on somebody else's property. In fact, he was trespassing and should have taken into account, as a police officer, that one cannot simply enter another person's property with impunity in the middle of the night and that he should have made it very clear that he was a

police officer. He had already seen the occupant of the house who was only wearing his underclothes before he exited and peered around the corner of his house. A suspect would also not ask perceived trespassers what they were doing on his property. These factors should have alerted the second defendant to the fact that the plaintiff was clearly not the second suspect. The second defendant conceded during cross-examination that it was irresponsible to enter other people's property without announcing that one was the police, but stated that he could not do so because that would have alerted the second suspect as to his whereabouts. The second defendant stated that it was rather the plaintiff who was irresponsible in venturing outside his house. This statement clearly cannot be accepted. Home owners are entitled to investigate what trespassers are doing on their property in the middle of the night.

The case law relating to self-defence:

[80] As stated, the defendants bore the full onus to prove self-defence.

[81] It is trite that self-defence (or termed private defence) is a ground of justification in which conduct which appears to be wrongful is rendered lawful. The questions to be posed are:[2] —

[82] Was there an attack? Clearly the plaintiff was not attacking anybody.

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2 Neethling, Potgieter and Visser **The Law of Delict** 6th edition LexisNexis at page 82 *et seq.*

[83] If there was an attack, was it unlawful? The plaintiff merely went outside to investigate who the persons were who were running around in his yard and hiding in his yard at 12h00 at night.

[84] Did the second defendant have reasonable grounds to believe that he was in physical danger?

[85] What is clear is that the second defendant was quick to flee. The sound of breaking glass caused all six police officers to run away to take cover. The second defendant admitted that he panicked but sought to create the impression that the "danger" was more imminent than it was by placing the plaintiff right in front of him and not at the corner of the house. There was also the addition of the version that the plaintiff cocked his firearm, which noise he allegedly heard. The second defendant knew that the occupant of the house had seen him and was in his underpants. He was clearly not thinking or reasoning rationally and allowed fear to cloud his judgment. Police officers are trained to act reasonably and as calmly as possible in dangerous situations. The second defendant was wearing a police bulletproof vest on his version and the plaintiff was bare-chested. On the evidence, it appears as though the second defendant simply went into a blind panic and fired. The questions which the plaintiff posed make absolute sense on the plaintiff's version of the events and the plaintiff's alleged response that "*There are no police here*" only makes sense had the second defendant not worn his bulletproof vest. It is

wholly improbable that the plaintiff would not have asked a police colleague what the problem was and would have sought to assist him.

[86] Was the force necessary in the circumstances to repel the attack? Any "attack" was an unreasonable perceived attack. Upon the analysis of the evidence there was no real attack

[87] The court pauses to point out that without the courts ever having stated this in such terms, what they are actually investigating when establishing whether a person acted in self-defence is which *commissio(nes)* AND *omissio(nes)* occurred. No doubt the Supreme Court of Appeal or the Constitutional Court will refine the test in the future and perhaps draw such distinctions. Why it is important to do so is that acts which cause harm are *per se* unlawful but before an *omissio* will be termed unlawful it has to be established whether a legal duty rested on the person/entity which caused the harm. It is clear that to date a globular approach has been adopted in self-defence cases and acts and omission are dealt with simultaneously. In the process the distinction between wrongfulness and negligence becomes blurred.

[88] General liability in delict based on negligence is proved when: —

"(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 causing him patrimonial loss; and

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

(b) ... Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.[3] "

***Swinburne v Newbee Investments* 2010 (5) SA 296 KZD** at paragraphs **[11]** and **[13]**

[89] It is expected in general of the *diligens paterfamilias* to take reasonable care that persons should not be injured. A *diligens paterfamilias* is required to take reasonable steps to guard against foreseeable injury. Whether reasonable

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3 ***Kruger v Coetzee* 1966 (2) SA 428 (A)** at **4320E–G**;

***Sea Harvest Corporation v Duncan Dock Cold Storage* 2000 (1) SA 827 SCA** at paragraphs **[21]–[22]**.

steps were taken depends upon the circumstances of each case.[4] The law does not require perfection. It only requires reasonable conduct.

[90] Four basic considerations in each case which influence the reaction of a reasonable man in a situation posing a foreseeable risk of harm to others are: —

[88.1] the degree or extent of the risk created by the actor's conduct;

[88.2] the gravity of the possible consequences if the risk of harm materialises;

[88.3] the utility of the actor's conduct; and

[88.4] the burden of eliminating the risk of harm.[5]

[91] The facts of the case ***Mugwena and Another v Minister of Safety and Security*** **(303/2003) [2005] ZASCA 117; [2006] 2 All SA 126 (SCA) (29 November 2005)** are very similar to the facts of this case.[6]

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4 ***Kriel v Premier, Vrystaat*** **2003 (5) SA 66 OPA** at 71E–F;

Spencer v Barclays Bank **1947 (3) SA 230 T**;

Smit v Suid-Afrikaanse Vervoerdienste **1984 (1) 246 KPA** at **250B–G**.

5 ***Ngudane v South African Transport Services*** **1991 (1) SA 756 AD** at **776H–I**;

Pretoria City Council v De Jager **1997 (2) SA 46 AD** at **56 A–C**.

6 The court agrees with the criticism expressed by Neethling, Potgieter and Visser *supra* at page 84 to the effect that an *ex ante* determination of necessity as was done in ***Mugwena*** *supra* blurs the distinction between wrongfulness and negligence.

[92] In the matter of ***Mugwena and Another v Minister of Safety and Security*** **(303/2003) [2005] ZASCA 117; [2006] 2 All SA 126 (SCA) (29 November 2005)** at paragraph [21] the following dictum appears: —

> "*[21] Self-defence, which is treated in our law as a species of private defence, is recognised by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life and the law insists upon these limits being adhered to.*
>
> *'Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim'.* [emphasis added]
>
> *(per Chaskalson P in S v Makwanyane and Another [1995] ZACC 3; 1995 (3) SA 391 (CC) para 138).*"

[93] In ***R v Attwood*** **1946 AD 331** at 340 the following is stated: —

> "*Homicide in self-defence is justified if the person concerned*
>
> *' ... had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that*

the means he used were the only or least dangerous whereby he could have avoided the danger."

[94] This test is objective.

[95] In the premises, it is held that the second defendant did not prove, on a balance of probabilities, that he acted in self-defence. In the ***Mugwena*** *supra* case upon analysis of the evidence, the following was held at paragraph [25]: —

"[25] ***... The evidence in my view falls far short of establishing that the deceased was indeed intent on discharging his firearm. It must be remembered that the true inquiry is how the risk would have been assessed by a reasonable person in the position of Constable Matumba. The truth is that Matumba's life was not in danger and any belief he held to the contrary was not reasonably held. All of the factors upon which reliance has been placed, whether taken individually or cumulatively, are not supportive of the fact that Matumba was in danger of imminent attack. The decision by Matumba to tackle the deceased from behind was not only ill-advised and dangerous but also precipitous and clearly unlawful. In my view, a reasonable person in the position of Matumba would have taken steps to properly satisfy the deceased that they were the***

> ***police before attacking him. <u>It is difficult to avoid the conclusion that Matumba acted in panic both in tackling and thereafter shooting and killing the deceased. Whilst that may be understandable it cannot justify him shooting the deceased.</u> In my view a reasonable person in the same circumstances as Matumba would not have shot the deceased. It follows that the respondent has failed to discharge the onus resting on him and that on this leg as well the appellants must succeed.***" [emphasis added]

[96] It is difficult to avoid the conclusion that the second defendant acted in panic in shooting and paralysing the plaintiff. Whilst that might perhaps be understandable (adopting the wording used in the ***Mugwena*** case *supra*), it cannot justify the second defendant shooting the plaintiff.

[97] In the result, the first defendant is liable to pay the plaintiff all the damages which he can prove he suffered as a result of the unlawful shooting.

<u>Costs</u>:

[98] In the plaintiff's heads of argument costs were sought for days when the matter apparently stood down. No argument was addressed to the court

regarding these days. Hence, this is an aspect which should be taken up with the taxing master.

Order

In the result, the court orders: —

1. The second defendant, acting in the course and scope of his employment by the first defendant, did not act in self-defence.
2. The plaintiff is entitled to payment by the first defendant of all damages that the plaintiff may prove that the first defendant caused him to suffer.
3. The first defendant is ordered to pay the plaintiff's costs of the action.
4. The issue of quantum is postponed *sine die*.

MM JANSEN J

JUDGE OF THE HIGH COURT

For the Plaintiff **Advocate LT Leballo**
Instructed by Mphela and Associates (012-346 7573/012-4529260)

For the Defendants **Advocate SJ Coetzee**
Instructed by The State Attorney Pretoria (012-309 1563)