IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

29/4/16

CASE NUMBER: A93/ 2014

NGHC CASE NO: 15033/11

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

APRIL 2016
DATE

SIGNATURE

In the matter between:

MINISTER OF POLICE — APPELLANT

(Defendant a quo)

And

MALEFO RAKE MOTLAPELO — RESPONDENT

(Plaintiff a quo)

MAVUNDLA J.

[1] This is an appeal against the whole judgment and order of Thobane AJ delivered on 5 November 2013, with the leave of the Court *a quo* having been granted on 5 February 2014.

[2] At the commencement of the trial the Court *a quo* ordered in terms of Rule 33(4), by agreement between the parties, that the matter proceed only on the merits, the issue of quantum standing over for later determination.

[3] It is common cause that the respondent was shot with a rubber bullet on the leg by one Captain W. A. Smidt who was at the relevant time acting in the course and scope of his employment with appellant on the 13 May 2009 at Rosslyn.

[4] The appellant pleaded self-defence and in the alternative necessity. To buttress its defence the defendant called two witnesses, namely Captain W. A. Smit, Warrant Officer M. L. Leboho.

[5] At the closure of the appellant's case, the respondent closed his case without testifying. The trial Court found in favour of the respondent and ordered the appellant to pay the respondent's full proven or agreed damages suffered as a result of the shooting of the 13th May 2009 with costs relating to the liability. It is against this judgment and order that is appealed against.

[6] The only issue to be determined was whether the shooting was wrongful, unlawful and or negligent, as pleaded by the appellant. It is trite that the *onus* rested on the

appellant, to demonstrate that the shooting was justified, if it was done in self defence or out of necessity. In this regard in *Mabaso v Felix* 1981 (3) 865 (AD) at 876F the Appellate Court held that "Turning now to the pleadings in the present case we think that their essence and effect are as set out above. Consequently, according to substantive and adjective law, the *onus* was on the defendant to prove that in shooting and injuring the plaintiff he acted in self-defence and that such shooting was reasonably and legitimately required for defending himself. The Court *a quo* therefore erred in imposing that *onus* on the plaintiff."

[7] In Kgaleng v Minister of Safety and Security and Another 2001 (4) SA 854 (WLD) at 865 the Court held that: A plea of defence is aimed at showing that the attack by the defendant was not wrongful. For that very reason, the test is objective. The legal position is thus summarised by Boberg The Law of Delict vol 1 (1984) at 788:

'The enquiry is factual, and - since the issue is wrongfulness, not fault - the test is objective. Thus the question is not whether the defendant believed his conduct to be justified, but whether the law considers it so. This, in turn, depends on whether it was a reasonable response for the defendant to make to the situation, judged objectively and even with hindsight - though not without regard to the individual defendant's resources, motives and circumstances, for no test can be applied in a vacuum. If the test is satisfied the defendant escapes liability because he acted lawfully in a situation of necessity or defence. If the test is not satisfied the defendant cannot invoke necessity or defence to justify his conduct, which therefore remains wrongful.'

[8] It is common *casu* that Captain W. A. Smit, Warrant Officer M. L. Leboho on the 13 May 2009 the day of the incident complained of, as employees and in the course of their employment with the of the defendant respondent, to a complaint of intimidation at 98 Sloan Street that a white Nissan Truck was in the middle of the road and under attack.

[9] On their arrival at the scene, they observed a group of about 80 people surrounding the truck. Others were on top of the truck and they were assaulting the occupants of the truck. Smit testified that: At the truck there were about 80 black males that were standing in the middle of the road. Some of them were in front of the truck, some of them were in between the trailer and the horse and some of them were at the back, on top of the truck, busy assaulting the workers that were inside the truck through the windows.[1] Others were on top of the truck and others on the side. They tried to negotiate with this group of people and tried to remove them away from the truck. They were then surrounded by this group and he was pushed by a male with both his hands on his chest. This man was wearing a green shirt and dark blue trousers. Smit fell against the truck and at this stage feared for himself, as well as his colleague and the safety of the people that were inside the back of the truck as well as the driver and also the property of the company, the truck itself. At that stage he took his shotgun and shot one rubber 12 gage round into the ground. The group started to move away from the truck.[2]

[10] According to Leboho the crowd surrounded them and their lives were in danger. They tried to negotiate with them but they were not talking, page 128 lines 9-12.They went inside the crowd and then the crowd started surrounding them and pushed them against the truck; page 129 lines 13-14. The people inside the truck could not jump out. Smit fired a shot into the ground as the crowd pushed them against the truck and the crowd dispersed. Page131 lines 16-21 and page 132 lines 1-17.

[11] It is now trite that a court of appeal is reluctant to upset the findings of the trial court, which is in a better position to estimate what is probable or improbable, *inter alia*. The court of appeal will only reverse the trial court's findings where the reasons

[1] Page 79 line 3-11 of volume 2 of 2 pages of the record.;
[2] Page 79 lines 12-lines 1-5 page 80 of volume 2 of the record.

for its findings are unsatisfactory; *vide Rex v Dhlumayo and Another* 1948 (2) SA 677 (A)

[12] In my view, the evidence referred to herein above demonstrates, on objective evaluation, that the situation was volatile and that it warranted the protection of both the people in the truck as well as Smit and Leboho.[3] This much was accepted by the trial Court. In a volatile situation, as *in casu*, it is neither here nor there that the witnesses contradict each other on whether the shot was directed to the right or to the left. *In casu*, both witnesses are *ad idem* that the shot was fired into the ground. This much is corroborated by the very fact that the plaintiff was shot on the foot. The evidence from the record places the plaintiff, as the person in green, in close proximity to Smit. In my view, the trial court misdirected itself in finding that it was improbable that Smit fired a shot into the ground.

[13] In my view, objectively speaking, the firing of the shot into the ground was reasonable. Of particular importance, is the very fact that no one is alleged to have been shot on the upper body. Had this been the position, that fact would have controverted the version of the two police officers that the shot was directed to the ground.

[14] In the circumstances of the situation *in casu*, as explained by the two police officers, in my view, the conduct of Smit was reasonable. This finding is inescapable particularly because the plaintiff did not adduce any evidence to controvert that of the defendant. A plaintiff, who closes his case where there is damning evidence, does so at his own peril.

[15] In the circumstances, I am of the view, that the trial court misdirected itself in rejecting the evidence of the defendant and finding that the defendant failed to

[3] Page 173 lines 1-3.

discharge the *onus* resting on it that there was threat against the life of the people in the truck, Smit and his colleague and the property, in particular the truck, warranting the firing of the shot which caused the injury to the plaintiff. The appeal stands to be upheld.

[16] The appellant engaged the services of senior counsel. In my view, this is a matter which did not warrant the services of senior counsel. The issues were not complicated and a seasoned junior counsel could have adequately handled this matter. Therefore the appellant is not entitled to the costs attended to the employment of senior counsel.

[17] In the premises, I would make the following order:

1. That the appeal is upheld with costs such costs to exclude the costs of senior counsel, save costs of counsel calculated on the scale of a senior junior counsel;

2. That the order of Court *a quo* of 5 November 2013 is set aside and substituted with the following order:

   "That plaintiff's action is dismissed with costs."

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

W.R.C PRINSLOO
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

K.E. MATOJANE

JUDGE OF THE HIGH COURT

DATE OF HEARING	: 28 / 01/ 2015
DATE OF JUDGMENT	: / 04/ 2016
APPELLANT'S ADV	: ADV A.C. FERREIRA SC with ADV L. A. PRETORIUS
INSTRUCTED BY	: STATE ATTORNEY PRETORIA
RESPONDENT'S ' ADV	: ADV K.K. KEKANA
INSTRUCTED BY	: MPHELA AND ASSOCIATES