



THE REPUBLIC OF SOUTH AFRICA
**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 17042/2009

Before the Hon. Mr Justice Bozalek

Hearing: 7- 10; 21; 22 & 24 August 2017
Judgment Delivered: 19 September 2017

In the matter between:

NTOMBIZAKE MDIKO

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT

BOZALEK J

[1] The plaintiff brought an action for damages against the defendant, the Minister of Police, arising out of the alleged wrongful killing of her late husband, Mr Lunga Mdiko ('the deceased'), by a police officer, (now) Sergeant Vuyolwethu Mantashe ('Mantashe'). The issue before the Court was the determination of the merits of the claim. In short the plaintiff pleaded that on 31 May 2008 her husband was unlawfully and wrongfully shot and killed by Mantashe acting within the course and scope of his employment with the defendant. The defendant admitted that Mantashe shot and killed the deceased and in doing so was acting within the course and scope of his employment. He pleaded however

that Mantashe had acted lawfully and reasonably in that the deceased had unlawfully and without provocation launched an unlawful attack upon Mantashe who had reasonable grounds for believing, and did believe, that he was in grave physical danger; further that Mantashe's use of force was necessary in the circumstances to repel the unlawful attack.

[2] The parties correctly accepted that the onus of proving self-defence lay on the defendant¹ as a result of which the defendant led the evidence of its two witnesses, Mantashe and a police photographer, first. The plaintiff called the evidence of only one witness a Mr Basil Zamuxolo Daba ('Daba') before closing its case.

[3] Although both eyewitnesses purported to be describing the same events and there were many aspects common to their evidence, there were also critical differences. In order to establish the facts it is necessary to set out the evidence of both eyewitnesses in some detail and evaluate same.

THE EVIDENCE

Sergeant V Mantashe

[4] Mantashe testified that on 31 May 2008 he was driving a white Mazda on Mew Way when a white Ford came driving towards him. At that stage he was a detective with four years' experience and was 28 years of age. It is common cause that the Mazda was unmarked and that Mantashe was dressed in civilian clothing. He testified that he had his police firearm, a pistol, in a holster clipped to his belt and tucked into the waist band of his trousers under his leather jacket.

[5] The Ford was being driven recklessly over the barrier line so Mantashe flicked his lights and hooted to warn the driver of the Ford who turned out to be the deceased.

¹ *Mabaso v Felix* 1981 (3) SA 865 (A).

Mantashe was scared that his vehicle and the Ford would collide and in fact he had to slow almost to a halt to avoid a collision. Immediately afterwards the Ford continued without stopping so Mantashe made a U-turn in Mew Way and followed the Ford, again flicking his lights and hooting, trying to get the vehicle to stop. At one stage he was able to drive alongside the Ford and while doing so held up his left hand which contained his police identification and a large police badge (Exhibit G) to show the deceased that he was a policeman.

[6] The two vehicles reached the intersection of Mew Way and Spine Road where the deceased did not stop but continued through the intersection and came to a stop on the other side in the lay by. Mantashe brought his vehicle to a stop a few meters ahead of the Ford, also in the lay by. Before he could step out of his vehicle the deceased and two of the three male passengers were next to the open window on Mantashe's side of the Mazda. One passenger had dreadlocks and was wearing a red T-shirt. A fourth man also got out of the Ford but stood with his arms folded next to it. Mantashe testified that the deceased was aggressive, his eyes were red and his breath smelt heavily of alcohol. It is common cause that a blood sample later taken from the deceased showed that the concentration of the alcohol in the specimen was 0.19grams per millilitre. Speaking in isiXhosa and with an angry tone the deceased asked whether Mantashe was a policeman. Mantashe answered that he was and the deceased then asked for Mantashe's authority. Mantashe referred again to his police identification, saying the deceased had already seen it.

[7] The deceased then asked whether the Mazda was a police car and started arguing even when Mantashe answered that it was. The dreadlocked man advised the deceased to leave Mantashe alone. The deceased maintained however that the Mazda was not a police

car even though Mantashe pulled the mouthpiece of his police radio out to show the deceased. The deceased then reached into the Mazda and grabbed Mantashe by his jacket round the chest area with both hands. The door of the Mazda was then opened and Mantashe was dragged out by one of the men but he was not able to say which one. At this stage the deceased and Mantashe were facing each other with the other two men leaning on Mantashe but doing nothing else. The deceased still had both hands on Mantashe pulling him hard and a wrestling match commenced between the two men.

[8] Quite early in the struggle on the deceased spun him around and Mantashe ended up facing in the direction the vehicles were facing but being firmly gripped by the deceased from behind. According to Mantashe the deceased, who was taller, larger and more muscular, also began feeling over Mantashe's body as he held him in this grip. Mantashe concluded that the deceased was searching for his firearm and when the deceased found it Mantashe brought his hand down so that both his and the deceased's hands were on the firearm. The deceased and Mantashe then started to struggle over the firearm and Mantashe called on the dreadlocked man to stop the deceased from attacking him but no assistance was forthcoming.

[9] The deceased pulled Mantashe from side to side, all the while gripping him in the manner described. Mantashe continuously tried to reason with the deceased asking him to stop and calling him '*bhuti*'. The deceased did not answer however only breathing heavily. Mantashe kept trying to pull away from the other two men, moving away from the vehicles in the direction in which they were facing. On two occasions during the struggle the dreadlocked man stopped passing taxis and unsuccessfully urged the drivers to shoot Mantashe. At some point a shot went off from Mantashe's firearm and the two passengers hung further back. The deceased and Mantashe continued to struggle, moving

down Mew Way. At different times the firearm was pointing in different directions as the two men struggled over it.

[10] More shots went off. The deceased and Mantashe fell to the ground with the deceased on top of Mantashe. They both stood up again, with the deceased still behind Mantashe reaching around him and gripping him. At one point during the prolonged struggle Mantashe bit the deceased's left hand and the deceased bit Mantashe on his back. The deceased kept trying to point the firearm at Mantashe who at one stage allowed the deceased to bend his wrists and point the gun in his (Mantashe's) direction while both the deceased and Mantashe's hands were on the trigger. Mantashe then allowed the trigger to be pulled as he moved and a shot went off with the bullet going through Mantashe's jacket under his armpit and, he presumed, hitting the deceased because he felt the latter's body jerk behind him.

[11] This, however, only made the deceased '*angrier*'. Once again Mantashe allowed the deceased to point the firearm back at him (Mantashe), but towards his lower face, throat and chest. Mantashe then moved his upper body to the right and pulled the trigger with the result that the shot struck the deceased. Mantashe felt the deceased's body sliding off him to the ground, bringing to an end the struggle which, he estimated, had lasted about three minutes. Mantashe then ran back to his Mazda to call for police reinforcement using his police radio. He testified of his belief that when the deceased realised he was a policeman and knew that he was alone he must have decided to rob him of his firearm and that he, Mantashe, had believed that if the deceased had got hold of his firearm he would have shot him with it.

[12] A prosecution was commenced against Mantashe for murder which carried on for many years until it was struck off the court roll as a result of the unavailability of state witnesses. Mantashe testified that he pleaded not guilty but no evidence was led against him. Internal disciplinary steps were also taken against him and he appeared before a police tribunal facing four charges of breaching the police code of conduct. According to discovered documents in the trial bundle Mantashe was found guilty of two charges but in my view of the lack of any direct evidence on these aspects and the lack of relevance of these '*convictions*' I shall disregard all but the fact of the criminal and disciplinary proceedings.

Mr B Z Daba

[13] At the time of giving evidence Daba was 60 years of age and employed as a machine operator. He testified that on the day in question he was driving down Spine Road and noticed Mantashe's Mazda about 12 meters ahead of him and ahead of that the deceased's Ford. Both vehicles were driving normally but the driver of the Mazda had his right hand out of his window and was making hand gestures to the Ford driver to stop. When the vehicles reached the intersection of Spine Road and Mew Way the Ford turned right and stopped in the nearby layby. The Mazda followed and stopped in front of the Ford. Daba thought the two vehicle owners were friends and that they were driving together and he initially proceeded on his way down Spine Road. He soon made a U-turn however when he realised that he wanted to visit a friend who lived in the opposite direction. As he approached the self-same intersection he became aware of a commotion emanating from the drivers of the Ford and the Mazda. The deceased was standing alongside the Ford and Mantashe was standing between the two vehicles. Their voices

were loud with Mantashe demanding the deceased's driver's licence and the deceased demanding Mantashe's police authority.

[14] Daba was then approached by someone asking what was going on and he answered him. When he turned back to the two men he saw that the deceased was holding Mantashe from behind. The deceased's hands were clasped together over Mantashe's chest pinning Mantashe's right hand which was holding a firearm against the latter's chest with the firearm pointing to his left. Daba could not see where Mantashe's left hand was. Prior to this Daba had not seen any firearm in the possession of either man. The two men remained in this position throughout the struggle that ensued.

[15] Daba remained standing alongside his vehicle which was parked on the opposite side of the road to the Mazda and the Ford, watching the men wrestle along the pavement. They fell down and got up again but held the same position throughout. Mantashe was repeatedly asking the deceased to let go of him whilst the deceased was repeatedly asking Mantashe why he (Mantashe) wanted to shoot him. A shot then went off but Daba was not able to say where it went. It shocked him however and he climbed into his vehicle and reversed back down Mew Way in order to take himself out of danger. After reversing his car down way for some distance Daba again alighted from his vehicle and witnessed the two men slowly making their way down Mew Way towards him, struggling all the while still with the deceased gripping Mantashe from behind thereby pinning Mantashe's arm holding the firearm to his chest.

[16] Daba testified that the deceased appeared to get tired and eventually released Mantashe from his grasp at the same time lifting both his hands into the air in the classic gesture of surrender. As he did so the deceased said in isiXhosa '*uxolo bhuti*' – 'sorry

boetie'. Having been released Mantashe was able to turn around which he did and at a very close distance to the deceased he shot him in the upper part of his body, possibly the head. As he did this Daba called out '*no my brother*' or words to that effect in isiXhosa to restrain Mantashe from shooting the deceased but it was too late. The deceased immediately fell to the ground. Mantashe then went back to his vehicle in Mew Way further up the road and called the police. Within some ten minutes police reinforcements arrived.

[17] Daba testified that he watched the struggle between the two men throughout but he was not able to explain hearing only two shots i.e. the one that caused him to reverse his vehicle taking himself out of harm's way and the second, apparently fatal, shot after the deceased had surrendered.

Other evidence

[18] Further evidence was put before the court by way of formal admissions, a post-mortem report, a ballistics report, photographs taken at the scene, a sketch plan (not to scale) of the scene and photographs of Mantashe taken after the shooting.

[19] As far as admissions are concerned it was admitted on behalf of the defendant that after the shooting a firearm with one magazine and three live 9mm rounds were confiscated from Mantashe, that the police collected five cartridge cases, one cartridge i.e. an unfired round and one bullet (i.e. the bullet tip) from the scene of the shooting. The accuracy of the post mortem report and the blood sample taken from the deceased were similarly admitted.

[20] Photographs of the scene of the shooting were put before court, showing the position of the Ford and the Mazda vehicle in Mew Way with the deceased's body lying

approximately 40 – 60 meters further down the road. On the opposite side of the road to the deceased's body was a vehicle identified by Daba as his. The same scene is depicted in another photograph from the opposite angle but there the vehicle identified by Daba as his appears to be absent. Explaining the absence of his vehicle in the second photograph Daba testified that at a certain point the police had asked him to move his vehicle.

[21] Photographs of Mantashe taken some hours after the scene show at least two bite marks on his left upper back. A photograph of the white leather jacket he was wearing shows blood stains on the left front together with a hole in the left upper front a few inches below the armpit.

The post-mortem report

[22] The post-mortem's chief findings were that the deceased's body had two entry gunshot wounds to the chest as well as one to the abdominal wall and one to the right upper leg i.e. four in all. The track of the gunshot wound to the chest perforated the deceased's aorta, the right main bronchus and the right lung. The cause of death was gunshot wounds to the body. In laymen's terms the deceased was shot in his right upper inner leg, the bullet exiting nearby. He was shot in his left upper waist area, the bullet exiting through his buttock. He was shot in his left upper chest, near the armpit, the bullet exiting nearby. He was then shot through his upper midchest the bullet exiting from his back, lower down. It was this last bullet which perforated the pericardium, the aorta and the bronchus. The bullet wound to the leg and to the left chest area only passed through soft tissue inflicting no serious vascular injuries.

Analysis of the evidence and an evaluation of the witnesses

[23] In a comprehensive and well prepared argument the defendant's counsel, Ms Erasmus, urged the court to accept the evidence of Mantashe and reject that of Daba. Her main criticism of the latter's evidence was that despite having claimed to have viewed the entire incident Daba could give no explanation for hearing any more than two shots when at least three more must have been fired during the struggle. Counsel also sought to cast doubt on Daba's evidence by reason of the absence of his vehicle in one of the photographs taken at the scene of the shooting. She submitted further that Daba may only have had a passing, partial view of the incident inasmuch as Mantashe testified that during the struggle a sedan vehicle had driven passed slowly at some point. This, it was suggested, must have been Daba's vehicle.

[24] When regard is had to the evidence of Mantashe and Daba there are many similarities but also striking divergent aspects.

[25] Firstly, the differences. Mantashe testified that the vehicles were in Mew Way from the beginning of the incident i.e. from when the Mazda was allegedly recklessly driven right to the end of the incident. Daba, on the other hand, testified that the vehicles had initially been proceeding down Spine Road and turned right into Mew Way before stopping in the lay by. Secondly, Mantashe testified that before he could alight from his vehicle he had been cornered and confronted so to speak whilst still in his vehicle. He testified that two of the deceased's passengers had played a threatening role in the early part of the confrontation. According to Daba when he first saw the deceased and Mantashe at the layby both were out of their vehicles and not struggling; furthermore, the three passengers in the Mazda had remained in the vehicle throughout, only emerging after the deceased was fatally shot.

[26] Thirdly, Mantashe testified that he never drew his firearm and that it was pulled from his holster during the struggle by the deceased. Daba did not testify precisely how the firearm was first produced but the most likely inference to be drawn from his evidence is that Mantashe must have drawn his firearm early on before the struggle between the two men commenced. Fourthly, Mantashe testified that during the struggle the dreadlocked man twice dropped stopped passing taxis and unsuccessfully urged the drivers to kill Mantashe. Finally, and most importantly, Daba testified that Mantashe shot the deceased when the latter had his arms in the air in a gesture of surrender and was apologizing to Mantashe. On the other hand, Mantashe testified that the last and presumably fatal shot had been fired by him when the firearm was pointing back at him but that he had moved to the side at the last second, this being the only way that he could shoot the deceased and ward off his unlawful attack.

[27] It was common cause in the evidence of the two witnesses was that there was an initial argument between the two men with the deceased demanding proof of Mantashe's authority as a police officer; further that there had been a prolonged struggle during which the deceased had gripped Mantashe from behind, clasping his arms – in effect a struggle for control of Mantashe's firearm.

[28] Mantashe gave his evidence with considerable confidence and articulacy. He is clearly an intelligent person but this manifested often in argumentative and, at times, arrogant replies to questions put to him in cross examination. He also impressed as an emotional witness who, at times during his evidence, gave highly animated descriptions and explanations of events of the fateful day. Although he fared quite well under cross-examination there were, however, several important aspects of his evidence which appeared to be improbable.

[29] The first is the unlikelihood of Mantashe, as a trained police officer, being unable to alight from his vehicle after pulling up a few meters in front of the Mazda with the result that in effect it was the deceased and his passengers who were confronting him. His evidence in this regard was at odds with that of Daba. The impression left by Mantashe's evidence in this regard is that he was pulled over by the deceased rather than vice versa.

[30] A second aspect is the contrast between Mantashe's evidence that he identified himself as a policeman early on even before the vehicles stopped by showing his police identification and his further evidence that the dispute which marked the early part of the confrontation was characterised by the deceased trying to establish whether Mantashe was a policeman or not. If, as Mantashe testified, he successfully showed his police identification to the deceased while both were still driving – incidentally something not mentioned in Mantashe's statement – why would the deceased persist in demanding such identification after the vehicles had stopped?

[31] A further improbable aspect was Mantashe's evidence that during the struggle the dreadlocked man several times called upon passing taxi drivers to shoot Mantashe. This evidence, which also was flatly contradicted by that of Daba's, is simply improbable on its own terms. Further, there is the remarkable, and critical, improbability of Mantashe being able to fire the last and fatal shot into the deceased's chest, backwards to so speak i.e. while still being gripped by the deceased from behind, an issue to which I shall return.

[32] A further troubling aspect of Mantashe's evidence, although it is unrelated to the probabilities, was the fact that notwithstanding that he was criminally charged with murder arising out of the incident and faced internal police disciplinary action, Mantashe

only made a statement regarding the circumstances of the shooting some two years after the incident and very shortly before the disciplinary proceedings commenced. In this regard he sought to explain that he viewed the investigating officer as biased but as a detective himself he must have realised that the sooner he gave his exculpatory version the less likely he was to face criminal prosecution and/or internal disciplinary proceedings.

[33] Yet another puzzling factor was the contrast between Mantashe's portrayal of the deceased's two passengers as forming part of the initial attack upon him only for them to stand passively by during the prolonged struggle between himself and the deceased thereby leaving the latter to his fate. As plaintiff's counsel submitted, if two of the deceased's passengers were initially so threatening to Mantashe, it is difficult to understand why they stood passively by while the deceased fought a prolonged and losing battle for possession of the firearm. I do not find convincing Mantashe's explanation that he was pulling the deceased away from the deceased's passengers and that the shots which were fired may have deterred them. Unhindered, the two men could have reached the struggling men in seconds, and, as I understand the evidence, the shots were only fired some time into the struggle.

[34] Daba made a favourable impression as a witness, and his version of events contained no conspicuous improbabilities save for how the struggle ended, a further critical issue to which I shall return. He testified in Xhosa and it was clear from his answers that he was not a sophisticated person. He was not argumentative, answering all questions forthrightly. He did not embroider his evidence, was not shaken in cross examination and stuck to his version of events. On the day of the incident Daba gave a statement to the police which in all material respects reflected the version to which he

testified in the witness box. Certain discrepancies were identified but the witness testified, without being contradicted, that he gave his statement through a Xhosa interpreter and that his statement was not read back to him before he was required to sign it. In the circumstances I do not consider that these discrepancies materially affect the quality of Daba's evidence.

[35] Although Ms Erasmus submitted that Daba's evidence that he was present throughout the incident should be rejected, I do not consider that there can be any doubt that he witnessed the incident in the manner that he testified. This is borne out by his detailed account of events, much of which tallies with Mantashe's evidence, and by his unchallenged identification of his vehicle in one of the photographs in the position to which he said he had reversed it.

[36] The major criticism levelled against Daba's evidence was that he did not hear three of the five shots fired. In my view, however, this is quite explicable by reason of the fact that he temporarily removed himself from the immediate scene of the two struggling men early on in the confrontation, namely after he heard the first shot. At that point he turned his back on the two men, climbed into his vehicle and reversed some 40 – 50 meters down what appears to be a busy road. He testified that he used his right rear mirror to do so but that at the same time kept an eye on the two struggling men. Having regard to the scene and to the photos it seems quite possible, if not likely, that it was during this period that further shots were fired. These could have been muffled by Mantashe's or the deceased's bodies or clothing or by the engine noise of Daba's reversing vehicle and thus not heard by him. Furthermore, as was pointed out by the plaintiff's counsel, if anything the fact that Daba had no ready explanation for not hearing

the three shots points to his credibility as a witness. In other words Daba did not contrive an explanation or falsely claim to have heard the other shots which must have been fired.

[37] Considering the evidence as a whole it is clear that there must have been an incident, probably the one described by Mantashe, which caused him to pull the Mazda vehicle over. Thereafter a confrontation developed between him and the deceased. This is not surprising since the deceased must have been strongly under the influence of alcohol. What also seems clear is that what initially troubled the deceased was whether Mantashe was a policeman and whether he had the authority to stop the deceased. This is evidenced by the account of both witnesses that the deceased demanded to know whether Mantashe was a policeman and to see proof of his authority. The Mazda vehicle showed no police markings and Mantashe was dressed in civilian clothes. It was his evidence that he showed his police identification to the deceased but initially this was only fleeting i.e. by holding up his card as he drove alongside the deceased. There is no corroboration for Mantashe's evidence that he did in this manner effectively identify himself as a policeman or that the deceased had properly observed this. As mentioned earlier if Mantashe had properly identified himself earlier in the manner he described it is strange that the deceased would have kept demanding to see his authority as a policeman.

[38] On Mantashe's account the deceased was hell-bent on seizing his firearm with a view to using it against him. This strikes me as inherently unlikely. Mantashe had not been singled out as a policeman or a target by the deceased – quite the opposite, since it was Mantashe who decided to stop and confront the deceased. In these circumstances, even accepting that it eventually became clear to the deceased that Mantashe was a policeman, it seems unlikely that he would conceive of the idea of robbing Mantashe of his firearm in broad daylight let alone shooting him. In my view it is far more likely that

soon after alighting from his vehicle Mantashe drew his previously concealed firearm whereupon the deceased, whether he knew that Mantashe was a policeman or not and very possibly because he was under the influence of alcohol, began to fear for his life. In these circumstances his response was to grab Mantashe so as to prevent him from using his firearm. This scenario is borne out by Daba's evidence that throughout the struggle Mantashe was shouting out '*ndiyeke*', '*let me go*' while the deceased was repeatedly and pleadingly asking Mantashe why he wanted to shoot him – '*uxolo bhuti, ufuna ukundidubela ntoni*' meaning '*sorry brother, why do you want to shoot me?*'.

[39] Another factor suggesting that it was Mantashe who drew his weapon early on is the apparent ease with which the deceased was able to find and lay his hands on the firearm. On Mantashe's version it was in a holster clipped to his belt and tucked inside his waistband and covered by his leather jacket. In these circumstances one would not expect the deceased to have spotted the weapon or to have laid his hands on it so easily.

[40] Having regard to the evidence as a whole what appears to have played out in all likelihood was a series of tragic misunderstandings. The deceased was sceptical that Mr Mantashe was a police officer and acting in the course and scope of his employment. When Mantashe drew his firearm the deceased probably feared that Mantashe intended to shoot him and grabbed him from behind to prevent him from doing so. For his part, when the deceased grabbed him, Mantashe probably believed that the deceased was intent upon disarming him and then turning his own weapon upon him.

[41] The ultimate question of whether the defendant's plea of self-defence/justification can succeed turns around what happened in the last few seconds of the struggle. The fundamental difference between the evidence of the two witnesses concerned the

circumstances in which the final and fatal shot was fired. On Mantashe's version he allowed the deceased to point the firearm back at him (Mantashe) but then at the last moment he moved his head or upper body and pulled the trigger, thereby deliberately firing the fatal shot into the deceased's upper chest. On Daba's version when the deceased finally released him from his grip Mantashe turned and shot the deceased at close range notwithstanding that the his hands were in the air in a gesture of surrender.

[42] Although Daba's version of these final seconds appears unlikely, and indeed shocking, on closer examination of the objective facts and the probabilities this impression fades. Mantashe had finally got free of the deceased in what he appears to have believed was a life and death struggle for his firearm. The struggle itself was prolonged and exhausting. Mantashe had already fired four or five shots to no apparent avail. In my view it is not far-fetched that in these circumstances his immediate, and perhaps instinctive, reaction was to fire a further shot to immobilise the deceased. As previously alluded to, even years later Mantashe came across as having an emotional if not a volatile personality. At the time of the shooting he was relatively young, 28 years, comparatively inexperienced as a policeman and probably lacking in the judgment necessary to deal with the crisis situation in which he found himself. In this regard even the act of initially producing his weapon to deal with a road traffic violation when he was alone and not in uniform was ill-considered. It was quite significant that in seeking to justify his decision to pursue and stop the vehicle being recklessly driven by the deceased and not call for back-up, Mantashe testified, several times, that, as a policeman, he did not have to '*yield*' in the face of crime.

[43] As previously indicated, Daba undoubtedly created a more favourable impression as a witness. His evidence included aspects, such as the route taken by the Mazda and

Ford vehicles, which if he was fabricating or embroidering his evidence, would have served no useful purpose in discrediting Mantashe's evidence. As it happens Daba's description of the route accords with the location of Mantashe's proposed destination which is not the case with the route that Mantashe claimed to have used. Daba impressed as a measured and objective witness and his testimony was both probable and in accordance with the established facts. His account of how the final shot was fired squares with the forensic evidence relating to the injuries inflicted by that shot.

[44] By contrast Mantashe's explanation of the circumstances in which the final shot was fired is somewhat difficult to comprehend and unlikely, involving as it does him firing a shot back at himself whilst being gripped from behind by the deceased and, in effect, dodging the bullet at the last moment. Daba's account of the struggle between the two men is wholly credible and does not portray either of them as the aggressor. According to him both men spoke or called out during the struggle. Mantashe's version, on the other hand, was a highly coloured one of him fighting for his life and pleading with the deceased, a silent aggressor intent only on seizing his weapon and who, when an earlier shot struck him, was only made '*angrier*'.

[45] No reason was suggested why Daba would fabricate evidence portraying Mantashe as lying in material aspects of his evidence and as having shot someone who seemingly no longer posed any threat to him. Prior to the incident he knew neither of the men. Finally, Daba's version of the critical events, in contrast to that of Mantashe's, was recorded almost immediately. His virtually contemporaneous statement contains the key elements of his viva voce evidence, most notably that Mantashe fired the final shot just after the deceased lifted his arms in surrender and was apologising.

[46] For all these reasons I prefer and accept the evidence of the witness Daba where there are material conflicts between his version and that of Mantashe's. In particular I accept Daba's account of how the final shot was fired.

Self-defence

[47] It remains to consider, based on the established facts, the plea of self-defence raised by the defendant. The requirements to be established for the attack and for the defence when seeking to prove self-defence are listed separately.² One element of the attack is that it must already have commenced or be imminently threatening but must not yet have ceased. The act/s committed in self-defence must be directed against the aggressor, must be to protect the threatened right and, crucially, the act of defence must not be more harmful than is necessary to ward off the attack.

[48] I am mindful that in determining the reasonableness of Mantashe's actions the court must, in the words of Van Winsen J in *Ntanjana's* case³, avoid the role of an '*armchair critic wise after the event*'. In doing so I am prepared to assume that, at the least, during the prolonged struggle between Mantashe and the deceased and during which he was held from behind, Mantashe believed that he was being subjected to a wrongful attack which threatened his life. I am further prepared to assume that all of the shots fired, save for the final shot, were justified and met the requirements for self-defence.

[49] However, accepting as I have Daba's evidence relating to the final seconds of the struggle, the entire scenario changed shortly prior to the final shot when the deceased released Mantashe from his grip and raised his arms in surrender whilst simultaneously

² See Neethling, Potgieter v Visser, Law of Delict (7 ed) pages 88 – 97.

³ *Ntanjana v Vorster and Minister of Justice* 1950 (4) SA 398 (C).

apologising to him. By this point the deceased had already suffered three gunshot wounds and, having surrendered, no longer posed a threat, let alone an imminent threat, to Mantashe. The final shot subsequently fired by Mantashe, aimed as it must have been at the deceased's chest, was not necessary to protect Mantashe's physical integrity since there was no longer any attack which Mantashe needed to ward off. His act of firing the final shot was grossly disproportionate in the circumstances in which he found himself. The factors which I have listed as explaining why I consider that Daba's account of the final seconds of the struggle are not improbable, viz the previous life and death struggle, Mantashe's exhaustion and his inexperience and personality, in no way serve, either singly or cumulatively, as lawful justification for his conduct in shooting at point blank range a defenceless man who was no longer a threat to him.

[50] In the result I find that the defendant has failed to discharge the onus he bore to prove that his employee killed the deceased in self-defence.

Costs

[51] This matter was set down for hearing on 19 April 2016 but did not proceed on that day inter alia because the defendant's counsel was not available. The parties agreed beforehand that the matter would be postponed with the defendant to pay the plaintiff's wasted costs occasioned by the postponement. An order to this effect was made on 20 April 2016. It later transpired, however, that the matter was not allocated to a judge and could, in any event, not have proceeded on the trial day. Principally on this latter basis the defendant later applied to rescind that part of the order saddling him with the plaintiff's wasted costs. I regard the rescission as ill-founded and opportunistic. Since the defendant's counsel was not available it had no choice but to seek a postponement and tender wasted costs. Having reached an agreement along these lines it does not behove

the defendant to seek to resile therefrom because it later appeared that for another reason, not relating to plaintiff, the trial could not proceed on the day. In the result the application for rescission of the order is dismissed with costs.

Order

[52] For these reasons it is declared that the defendant is liable to the plaintiff for such damages as she is able to prove arising out of the unlawful killing of her husband, the late Mr Lunga Mdiko, on 31 May 2008. In addition the defendant is ordered to pay the plaintiff's costs in the trial action to date on the party and party scale.

BOZALEK J

<i>For the Plaintiff</i>	:	<i>Mr L Godla</i>
<i>As Instructed by</i>	:	<i>Godla & Partners</i>
		<i>Ref: GW Mbiza</i>

<i>For the Defendant</i>	:	<i>Adv E Erasmus</i>
<i>As Instructed by</i>	:	<i>State Attorneys</i>
		<i>Ref: Mr Ngwenya</i>