

**KWAZULU-NATAL HIGH COURT, DURBAN**

**REPUBLIC OF SOUTH AFRICA**

Case no: 14847/2005

**REPORTABLE**

In the matter between:

**MUSAWENKOSI NGUBANE**

**PLAINTIFF**

And

**CHIEF EXECUTIVE DIRECTOR OF  
EMERGENCY SERVICES ETHEKWINI  
METROPOLITAN SERVICE**

**FIRST DEFENDANT**

**MILES DOUGLAS XAVIER MITCHELL**

**SECOND DEFENDANT**

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**JUDGMENT**

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**MADONDO J**

[1] In this action the plaintiff claims damages from the defendants in consequence of bodily injuries suffered by the plaintiff on 21 October 2004 at the corner of Point Road and West Street, Durban, when the second defendant shot and injured him in the chest and both legs.

[2] The plaintiff is Musawenkosi Ngubane, a major male of 1680 Othweba Location, Catoridge.

[3] The first defendant is the Chief Executive Director of Emergency Services of Ethekwini Metropolitan Services, also known as Durban Police Service, of 75 Winder Street, Durban.

[4] The second defendant is Miles Douglas Xavier Mitchell, a major male, Durban

Metropolitan Police Officer, attached to the Dog Unit at 16 Old Fort Place, Durban.

[5] At the time the second defendant shot at the plaintiff he was in the employ of the first defendant. He acted in the course and within the scope of his employment with the first defendant, and as a result the first defendant is vicariously liable for the action of the second defendant.

[6] At the request of the parties in terms of Rule 33(4) the issues of liability and the quantum of damages were separated at the commencement of the trial. This court has been asked to try and determine the issue of the defendant's liability only. The question of the quantum of damages is accordingly held over for later determination, if the need arises.

[7] It is common cause that a shootout between the plaintiff and one, Bheki, occurred on 21 October 2004 at the corner of Point Road and West Street, Durban. The two were fighting over a girlfriend. The second defendant and other members of the Metropolitan Police Service attended the scene of the shooting. On their arrival the member of the Metropolitan Police Service announced their presence on the scene and ordered the plaintiff and the said Bheki to stop shooting at each other.

[8] Bheki dropped down his firearm and raised his hands. However, the plaintiff did not do as Bheki did, instead, he turned around and faced the second defendant and his colleagues with a firearm in his hand, pointed in their direction.

[9] Seeing that the plaintiff was then posing imminent danger to the safety of his security and of the members of the public at large, the second defendant fired three shots at the

plaintiff in quick succession and he, the second defendant, took cover behind a parked vehicle.

[10] Whereupon the plaintiff fell backwards onto the pavement. On approaching the spot the plaintiff had fallen down, the second defendant noticed that the plaintiff still had the firearm in his hand. Realising that he had not hit the target the second defendant shouted at the plaintiff and told him to drop the gun. It was only then the plaintiff dropped the gun.

[11] The plaintiff alleges that the second defendant unlawfully and wrongfully shot and injured him. To the contrary, the defendants aver that at the time the second defendant fired shots at the plaintiff he was acting in self defence and in defence of the members of the public at large. In support of their contention the defendants rely on the provisions of section 49 of the Criminal Procedure Act, 51 of 1977. This section provides:

“Use of force in effecting arrest –

(1) For the purposes of this section –

- a) “Arrestor” means any person authorised under this Act to arrest or to assist in arresting a suspect; and
- b) “Suspect” means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If an arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonable necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-

- (a) That the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

- (b) That there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) That the offence for which the arrest is sought is in progress and is of forcible and serious nature and involves the use of like threatening violence or a strong likelihood that it will cause grievous bodily harm.”

[12] Before a conduct maybe statutorily justified, the accused must prove on the balance of probabilities that he complied with the following requirements (*S v Janse Van Rensburg and another* 2009(2) SACR 216(C) at 224 paragraph 22):

- (a) That he was authorised by the Criminal Procedure act to arrest or assist in the arrest of the person who had been assaulted;
- (b) That he made an attempt to arrest the injured person – he must have actually made an attempt to deprive him of his freedom in order to secure his presence in court not to punish him (*Wierner v Molomo* 1983(3) SA 151(A) at 158E-H).
- (c) That the injured person had resisted arrest and could not be taken into custody without the use of force or that the injured person had fled whilst it was clear to him that an attempt was being made to arrest him and that such flight could not be prevented without the use of force;
- (d) That the force which was used to overcome resistance or to prevent the flight was reasonably necessary and proportional in the circumstances;
- (e) That the suspect has posed a threat or danger of serious physical harm.

[13] In *S v Govender* 2001 (2) SACR 197(SCA) at 204- 205, the Supreme Court of Appeal introduced the threat or danger posed by the fugitive to the arrestor, to others or to society as an important additional factor whereby the proportionality of the force to be permitted in arresting a fugitive, had to be determined. In *Ex parte: Minister of Safety and Security: In re S v Wallis* 2002(2) SACR 105 (CC) 127 – 138, the seriousness of the relevant offence was rejected as the only criterion determining proportionality.

[14] In *Govender* case, *supra*, at p205 d-e, in applying the Constitutional standard of

reasonableness, the court expanded the test of proportionality between the seriousness of the offence and the force used to include a consideration of proportionality between the nature and degree of force used and the threat posed by the fugitive to the safety of security of police officers, other individuals and society.

[15] It has been contended that the conduct of the second defendant fell within the ambit of the provisions of section 49 of the Act; alternatively, the second defendant was in danger and defended himself in a situation of necessity. The second defendant is a police officer and therefore he was authorised to effect an arrest. In the premises, the second defendant satisfied the first requirement. With regard to the second requirement it is difficult if not impossible to say that the second defendant made an attempt to effect an arrest on the plaintiff. However, it has been argued that the shouting by the second defendant “stop this is the police” was sufficient to communicate to the plaintiff who was armed with a firearm which he had discharged that he was about to be arrested. In my view, this statement could not be conclusive in this regard on the grounds that the plaintiff was in lawful possession of a firearm and in his mind he was acting in self defence.

[16] The evidence does not show that the plaintiff had at any stage resisted an arrest. The second defendant cannot, accordingly, be heard to say that the force he used was necessary to overcome or to prevent the flight. No evidence has been led to the effect that the plaintiff made any attempt to flee. The second defendant has once again failed to satisfy this requirement.

[17] However, the evidence adduced points to that the plaintiff posed a threat or danger of serious physical harm which compelled the second defendant to defend himself against it. It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against unlawful use of force. See Mckerron Law of Delict 7<sup>th</sup> ed at 74. Force is not reasonable if it is either unnecessary, i.e. greater than is requisite for the purpose or disproportionate to the evil to be prevented.

[18] It is unnecessary to decide whether the plaintiff's conduct ought to be regarded as resistance to arrest as the alternative plea of self defence is relevant to the facts of this case. I shall now proceed to consider the matter on the facts I have found proven whether the shooting was justified, more particularly whether the defendants have discharged the onus of proving justification. See *Mabaso v Felix* 1981(1) SA 864(A).

[19] In *Ntsomi v Minister of Law and Order* 1990(1) SA612 (CPD) at 526G-H, the requirements to be satisfied before a plea of self defence is upheld were summarised as follows:

- (a) There must have been an unlawful attack or threatened attack and the victim must have reasonable grounds for believing that he was in physical danger;
- (b) The means of defence must have been commensurate with the danger and dangerous means of defence must not have been adopted in some other reasonable way.

[20] The same test is applied in cases of self-defence as in cases of attempted arrest. See *R v Koning* 1953 (3) SA 220(T). There must have been actual presence of imminent danger, a reasonably apparent of necessity of taking the action taken. It is common cause that the plaintiff was involved in a shootout between him and one Bheki Nyoka at the corner of Brackhill

and Point Road when the second defendant and Maggos arrived on the scene. The second defendant and Maggos were on duty, clad in a police uniform and travelling in a police van. They announced their presence on the scene by saying, “stop this is the police” and ordered to the two who were engaged in a shootout to cease fire. Bheki stopped immediately and dropped his gun down. However, the plaintiff turned around and faced the direction of the second defendant and Maggos with a firearm in his hand, pointed in the same direction.

[21] Both the second defendant and Maggos testified that the plaintiff pointed a firearm in their direction and that such a conduct by the plaintiff constituted imminent danger to the life of the second defendant, for instance. However, there has been a discrepancy in the evidence of the two as to how plaintiff went about in pointing a firearm in their direction. The second defendant said that the plaintiff pointed a firearm at him moving the hand that carried a firearm across his chest whereas Maggos said that the plaintiff pointed the firearm at the second defendant with a hand stretched out. He went on to demonstrate the manner the plaintiff pointed a firearm by making a gesture with his right hand sticking out in front of his chest, simulating a firearm. The discrepancy as to how the plaintiff went about in pointing a firearm in the direction of the second defendant is in, my view, not material and decisive of the matter. The crux of the matter is whether or not the plaintiff pointed the firearm in the direction of the members of the police. Both witnesses testified that the plaintiff did point a firearm in the direction of the second defendant. The plaintiff said that at the time he was shot at, he had a firearm in his hands facing upwards. Raising hands with a firearm in them was in itself quite unusual and constituting imminent danger to the members of the police. It has also been common cause that after the second defendant had fired shots at the plaintiff, the

plaintiff still had firearm in his hand.

[22] In his evidence-in-chief the plaintiff testified that the police shot him whilst he was raising his hands, with a firearm pointing upwards. However, he later changed to say that he was shot three times at different stages: At the first stage, he was shot and injured whilst he was crouching behind the concrete bin, the second occasion, when he raised his hand, and lastly, after he had dropped the firearm down. During such episodes the plaintiff was shot twice on the legs, abdomen and the chest.

[23] However, it is not in dispute that when the second defendant fired three shots at the plaintiff, the plaintiff had a firearm in his hand. He fell backwards onto the pavement still holding a firearm until the second defendant told him to drop it down.

[24] It has never been disputed that the second defendant fired three shots in the direction of the plaintiff in quick succession. Nor has it been put to the second defendant that he first shot the plaintiff whilst he, the plaintiff, was crouching behind the concrete bin and that he also shot him after dropping the gun. The version of the plaintiff has been that the police shot him whilst he was raising hands. That the plaintiff was shot at on three different occasions has, in my view, been a recent fabrication. The plaintiff has manufactured his evidence as he moved along. Nor did the plaintiff mention the three episodes at the disciplinary inquiry. The probabilities, as established by evidence, are that the plaintiff was shot at once by the second defendant when he fired three shots in quick succession.

[25] Some of the injuries the plaintiff had sustained could have been caused at the time the



second defendant fired three shots at the plaintiff. On the plaintiff's version, Bheki shot him in the ankle. The second defendant could not tell whether or not any of the shots he fired struck the plaintiff. However, in the circumstance of this case such a possibility could not be excluded. At this juncture the injuries the plaintiff suffered are of no significance since this court is presently only determining whether or not the defendants are liable to compensate the plaintiff for damages he suffered as a result of the injuries sustained during the shooting incident. The nature and extent of the injuries sustained will only become relevant if the court finds that the defendants are liable to compensate the plaintiff.

[26] Now, I turn to decide whether at the time the second defendant fired shots at the plaintiff he was justified to do so or whether he fired those shots in the circumstances which rendered his conduct unlawful and wrongful. The conspectus of evidence shows beyond any reasonable doubt that at the time the second defendant fired three shots in the direction of the plaintiff, plaintiff had a firearm in his hand pointed in the direction of the second defendant. According to both the second defendant and Maggos the conduct of the plaintiff posed a threat to the life of the second defendant and necessitated him to take a quick action. This finds corroboration in the evidence of Sukdeo that such circumstances constituted imminent danger to the safety of the security of the second defendant though Sukdeo was of the view that the second defendant was supposed to have fired only one shot. However, this goes to the question whether or not the second defendant exceeded the bounds of self defence.

[27] The second defendant had ordered both the plaintiff and Bheki to stop shooting at each other. Bheki immediately stopped shooting, dropped his gun down and threw his hands in the

air. However, the plaintiff did not do the same but he turned around with the firearm in his hand and faced the direction of the members of the police. Notwithstanding, the fact that the plaintiff saw that the police were clad in police uniform and travelling in the police vehicle, he did not let go of his firearm. A reasonable policeman in the position of the second defendant would have reason to consider him to be in danger or serious injury, even death, regard being had to the fact that the plaintiff had already been injured in the shootout between him and Bheki. The second defendant had therefore reasonable grounds for believing that the plaintiff might shoot him. These circumstances demanded that the second defendant should take a quick action in defence of his life and of the lives of the members of the public at large, regard being had to the fact that the shooting incident occurred in a crowded area in the city. Turning around in the circumstances and flee would present an opportunity to the plaintiff to shoot him in the back. The second defendant had therefore to defend himself with whatever he had in his hands. At the time the second defendant had a firearm in his hands which he could reasonably use to defend himself.

[28] I am satisfied that when the second defendant fired three shots he was acting in self defence. He had no deliberate intent to injure the plaintiff. This is quite evident from the fact that after the plaintiff had fallen down the second defendant advanced towards the plaintiff and when he discovered that he still had a firearm in his hand, he did not shoot him but he told him to drop his gun down, instead. The fact that the plaintiff still had a firearm in his hand in law entitled the second defendant to fire more shots at the plaintiff.

[29] Had the second defendant shot and rendered the plaintiff incapacitated and the firearm came out of his hand, firing at the plaintiff in the circumstances would deprive the second

defendant the protection of acting in self defence. The plaintiff had a firearm in his possession and, in the premises; the force used by the second defendant was commensurate with the threat which was being averted. The second defendant need not wait until the plaintiff fired a shot before he could defend himself.

[30] It has been argued that by firing three shots the second defendant exceeded the bounds of self defence. This also finds support in the evidence of Sukdeo. In my view, this is an arm chair criticism. If the first shot hit the plaintiff and rendered him incapacitated, continued shooting at the plaintiff in the circumstances, would constitute exceeding the bounds of self defence.

[31] In the light of the evidence adduced before this Court the second defendant's conduct was not unlawful and wrongful. In fact, he was justified to shoot the plaintiff since he was posing a threat or danger to his life (the second defendant's) and to the members of the public at large in such a crowded area. Nor does the evidence show that in so doing he exceeded the bounds of self defence. In consequence thereof the defendants cannot be held liable to compensate the plaintiff for the damages he suffered as a result of the bodily injuries he sustained during the shooting incident.

[32] In the result, the plaintiffs claim for damages is dismissed with costs.

Date judgment reserved: 30 September 2011

Date judgment delivered: 1 December 2011

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Instructed by: PONOANE ATTORNEYS

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