



REPUBLIC OF SOUTH AFRICA

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

REPORTABLE

Case number: 389/2001

In the matter between:

MINISTER OF SAFETY AND SECURITY

Appellant

and

**NOSISEKO JOYCE NTAMO
AND HER MINOR CHILDREN**

Respondents

CORAM: HEFER AP, FARLAM, NAVSA, MPATI JJA and JONES AJA

HEARD: 29 AUGUST 2002

DELIVERED: 26 SEPTEMBER 2002

Summary: Delict – action for damages – fatal shooting by police – defence of justification not established on facts.

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JUDGMENT

MPATI JA:

[1] On 21 September 1994 Lungile Lennox Ntamo (the deceased) was shot and killed by members of the South African Police Service (SAPS), at Tsomo in the Transkei. His surviving spouse and her six minor children (the respondents) subsequently instituted action in the Transkei High Court against the appellant in his capacity as the employer of the members concerned for damages for loss of support.

[2] At the commencement of the trial Madlanga AJP ordered, by agreement between the parties, that the merits and *quantum* be separated in terms of Rule 33(4) of the Uniform Rules of Court and that the matter proceed on the issue of liability only, the question of *quantum* to stand over for determination at a later date. After hearing evidence he found in favour of the respondents on the merits. His judgment is reported as *Ntamo and Others v Minister of Safety and Security* 2001 (1) SA 830 (Tk). The learned judge subsequently refused the appellant leave to appeal. This appeal is before us with leave of this Court.

[3] The appellant admitted in his plea that his employees shot and killed the deceased, but pleaded that their “actions were necessary for their protection as well as that of the members of the public”. The only question before the Court *a quo*, therefore, was whether the killing of the deceased was justified, the appellant

having conceded that in shooting the deceased the members of the SAPS concerned were acting in the course and scope of their employment as his servants. It was common cause at the trial, and rightly so, that the *onus* was on the appellant to prove that the fatal shooting of the deceased was justified (*Mabaso v Felix* 1981 (3) SA 865 (A); *Ferreira v Ntshingila* 1990 (4) SA 271 (A)).

[4] The facts are comprehensively set out in the judgment of the court *a quo* and will not be repeated here, save those necessary for the determination of this appeal. The deceased was a passenger on a bus travelling from Cape Town to Umtata. His destination was the small town of Engcobo. When the bus was about to reach Tsomo, which is off the route to Engcobo, and for reasons that do not require recording, the deceased became embroiled in an argument with other passengers. As the bus reached the bus rank at Tsomo, the deceased grabbed one of the passengers and slapped him while pointing a cocked firearm at him. Having stopped the bus at the bus rank the driver alighted and rushed to the police station where he reported the incident. Before he reached the police station he heard a shot.

[5] It is not in dispute that four policemen were assigned to investigate the matter, under the leadership of Sergeant Manana – I propose to refer to the policemen by their last names – who was not in uniform. The others were Sergeants Baninzi and Mapongwana and Constable Msebi. They were in uniform and each was armed with a R5 automatic rifle while Sergeant Manana (Manana) was armed with a 9mm pistol. On approaching the bus the three uniformed men took up positions in a semi-circle in relation to the bus, while Manana approached the deceased, who, according to the police witnesses, was standing on the ground near the entrance to the bus wielding a handgun. They had heard the earlier shot which was fired while the bus driver was on his way to the police station. The plan was that because Manana was in civilian clothes he would approach the deceased who would hopefully mistake him for a member of the public, introduce

himself to the deceased as a policeman and dispossess him of his firearm.

[6] As was observed by the court *a quo* the evidence of the police witnesses as to what happened after Manana approached the deceased “is confusing and riddled with contradictions”. I shall accept, however, that Manana introduced himself to the deceased, attempted to dispossess him of his firearm by taking the deceased’s arm that had the firearm and placing it over his (Manana’s) shoulder and ordering the deceased to drop the firearm behind him, that the deceased did not heed such order, but simply pushed Manana, who was much smaller than he was, aside, and that Manana ran for cover, fearing that the deceased would shoot at him.

[7] What happened thereafter is unclear, except that at least three policemen fired repeatedly at the deceased until he fell down. According to Dr Christopher Silvercity Yawiya, who conducted the post mortem examination on the body of the deceased, the deceased sustained two fatal wounds to the right chest and various other entry and exit wounds. The probable cause of death was bleeding in the chest.

[8] Mapongwana and Baninzi testified that they fired at the deceased because he had discharged his firearm first and in the direction of Baninzi. Mapongwana testified that after the deceased had fired the first shot in the direction of Baninzi, he (the deceased) fired a second shot in his (Mapongwana’s) direction. In his police statement, however, Mapongwana said that the deceased fired two shots at Baninzi. He attempted to explain this contradiction by saying that at the time he made his statement, which was on the day of the shooting, he was still in a state of shock. He also testified that he fired at the deceased after the deceased’s first shot and that he was unable to say whether the deceased discharged any further shots

thereafter because of the noise from their firearms. At one stage he said that the deceased continued to shoot after the first shot “until the time when I decided to retaliate”. He himself fired only two shots, so he testified.

[9] Baninzi’s version is that after pushing Manana the deceased fired two shots in his direction. He (Baninzi) retreated and lay down on the ground and fired twice in the deceased’s direction. At that stage the deceased was “swinging”, i.e. turning from side to side, but he was not sure that any further shots were fired by the deceased. This is so because he was quick to shoot back. He fired four shots at the deceased because he was protecting his own life as well as the public. According to the evidence of Mapongwana there were a few members of the public, presumably looking on, who were at a distance from the bus. There is no evidence to suggest that members of the public were in danger of being shot by the deceased at the relevant time.

[10] In his evidence Manana said that while he was running away from the deceased he heard two shots being fired. He did not know who was being shot. He took out his own firearm and fired twice at the deceased, who was standing and facing his (Manana’s) three colleagues who were lying down. He said that in shooting at the deceased he was saving his own life and those of others.

[11] On the evidence of these three policemen there is uncertainty as to whether the deceased fired one or two shots, if he fired at all, and at whom such shot or shots were supposedly fired. It will be remembered that the sound of one shot was heard by the bus driver and the policemen themselves – while the bus driver was on his way to make a report to the police. There is no suggestion that anyone other than the deceased fired that shot. Mapongwana testified that only one cartridge from the deceased’s firearm was found on the scene while the station commander, Lieutenant Swanqu, who arrived on the scene within five minutes of the shooting, testified that he found two cartridges near the bus, two-and-a-half paces apart.

[12] In my view, no finding can be made, on the evidence of the three policemen – constable Msebi did not testify and the bus driver said he could not see anything as he was behind the policemen – even in the absence of any evidence on behalf of the respondents, that their lives or the public were in danger at the time that they shot and killed the deceased. It follows that the appellant failed to discharge the *onus* resting on him to prove that the fatal shooting of the deceased was justified.

[13] The appeal is dismissed with costs.

CONCUR:

L MPATI JA

HEFER AP

FARLAM JA

NAVSA JA

JONES AJA