REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 303 / 03

In the matter between

NKHUMELENI SARAH MUGWENA — **FIRST APPELLANT**
LEFUNO CHARLOTTE MUGWENA — **SECOND APPELLANT**

and

THE MINISTER OF SAFETY AND SECURITY — **RESPONDENT**

Coram : SCOTT, STREICHER et PONNAN JJA; NKABINDE et MAYA AJJA

Date of hearing : 15 NOVEMBER 2005

Date of delivery : 29 November 2005

SUMMARY

South African Police Service Act 68 of 1995 – whether pursuant to s 57(5) the requirements or prohibitions contained in s 57(1) and (2) should be dispensed with. Whether killing of the deceased by the police justified in private defence.

J U D G M E N T

PONNAN JA

[1] At approximately midnight on 26 August 1997 an off-duty policeman, Charles Makhado Mugwena ('the deceased'), was shot and killed outside his rondavel in the Buwani district of the Northern Province. Earlier that evening Sergeants Botha, Pauer and Chauke, as well as Constable Matumba and police reservist Reyneke had set out from the Makhadu (formerly Louis Trichardt) police station on the instructions of their commanding officer, Captain Van Schie, in search of a certain Thomas Masala, who had reportedly been threatening farm workers with a firearm.

[2] All the members of the SAPS were dressed in either camouflage or standard-issue police attire. They arrived in two police vehicles at a farm on the road between Makhadu and Thohoyandou where they met Boitjie Mudau, an informer. A perfunctory search at the first residence to which they were directed by Mudau failed to yield Masala.

[3] Directed by Mudau, the two vehicles travelled some 50-60 kilometres to the rondavel of the deceased. The area, which was not illuminated by any artificial lighting, was dark. According to both Matumba and Pauer, the latter led the way, followed by the other three members of the SAPS. Reyneke positioned himself behind a mud wall whilst Mudau remained seated in the vehicle. Pauer knocked on the door and, in response to a query as to who it was identified himself as

the police. In response to a further query he informed the occupants that they were looking for a Thomas Masala. Having heard a click that he believed was made by the opening of a briefcase, Botha suggested that the occupant of the hut was arming himself with a firearm. Pauer, in response, retreated into the shadows. The door then opened and the deceased emerged with his firearm drawn. The deceased pointed his firearm in the direction of Matumba. When asked by Botha what he was doing the deceased trained his firearm on Botha. According to Matumba he shouted: 'We are the police' whilst charging at and grabbing the deceased from behind.

[4] Being much larger than Matumba, the deceased broke free and struck at the former with his fist and firearm. Having disengaged himself from Matumba, the deceased overcame the latter’s attack and pinned down Matumba who by that stage had fallen to the ground. The deceased then pointed his firearm at Matumba's head. Matumba discharged his firearm four times in quick succession with fatal results.

[5] The appellants, alleging that the member of the SAPS who had shot and killed the deceased was acting within the course and scope of his employment with the respondent, the Minister of Safety and Security, instituted action against him in the Venda High Court. The first appellant, the surviving spouse of the deceased, did so both in her

personal capacity and in her capacity as mother and natural guardian of the three minor children born of the union between the deceased and herself. Although a minor at the time of the deceased's death, the second appellant, the deceased's daughter, who had since attained majority, instituted action in her personal capacity.

[6] Paragraph 16 of the plaintiff's particulars of claim reads:

'Plaintiffs have not complied with the time periods set out in the provisions of section 57 of Act 68 of 1995. Plaintiffs allege that there exists sufficient reasons requiring the above Honourable Court to dispense with such provisions in the interest of justice, more particularly, and without limiting Plaintiffs in any regard, in that:

16.1 Plaintiffs had difficulty in ascertaining the identity of the assailants whom they had wished to cite as further Defendants, alternatively to assess the extent to which the assailants were acting in the course and scope of their employment.

16.2 Plaintiffs awaited the conduct and outcome of a judicial inquest into the death of the deceased, which inquest was delayed and postponed due to reasons which Plaintiffs had no control over.'

[7] The claim of the appellants was met, in the first instance, with a special plea that s 57(1) of the South African Police Service Act 68 of 1995 ('the Act') had not been complied with, hence, so it was contended, the appellants were barred from instituting the action. In the main plea it was asserted that the member of the SAPS who shot and killed the deceased did so whilst acting in self defence. The issue of liability

having been separated from that of *quantum*, two issues arose for determination before Hetisani J in the court *a quo*. First, should the court dispense, pursuant to the provisions of s 57(5) of the Act, with the requirements or prohibitions contained in s 57(1) and (2)? If so, secondly, whether the killing of the deceased was justified in self-defence. The learned judge in the court *a quo* concluded:

'The special plea is upheld and the Plaintiffs' claim is dismissed because it has technically not complied with the provision of s 57(1) of the South African Police Service Act, Act No 68 of 1995. Because of the decision above, it is no longer necessary to delve into the merits of this case.'

The present appeal is with leave of this court.

[8] Section 57, to the extent here relevant provides:

'(1) No legal proceedings shall be instituted against the Service or any body or person in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.

(2) No legal proceedings contemplated in subsection (1) shall be instituted before the expiry of at least one calendar month after written notification of the intention to

institute such proceedings, has been served on the defendant, wherein particulars of the alleged act or omission are contained.

(3) ...

(4) ...

(5) Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those subsections where the interests of justice so require.'

[9] The first appellant, a primary school educator by profession, is possessed of a three-year teaching diploma in addition to her matriculation certificate. After the death of her husband she observed a period of mourning of approximately four months during which she was housebound. According to her it was the lack of progress in the criminal investigation as well as the failure to commence the inquest proceedings that prompted her to initially consult with an attorney. Leon Klaff, the attorney in question, recorded that she first visited him on 30 December 1998 some sixteen months after her husband's death. By that stage the 12 calendar months envisaged in s 57(1) had already run its course. Approximately nine months were to pass before a formal s 57 notice came to be despatched on 18 October 1999 and received, it would appear, on the 26th of that month. The summons in the matter ultimately came to be issued on 19 July 2000 and served six days later.

[10] From the time he first received instructions until despatch of the formal notice, attorney Klaff indulged in a desultory exchange of correspondence with various state departments. The correspondence was directed primarily at the employers of both the first appellant and the deceased. The purpose, so it would seem, was to secure sufficient detail to properly quantify the claim of the appellants. The lackadaisical conduct of the attorney makes it plain that he was oblivious to the time limits prescribed by s 57 of the Act. Indeed that was his evidence. He believed, quite erroneously, that 'the limits would only start running after the criminal [trial] or inquest ... had been finalised'.

[11] It is a poor reflection on an attorney of 24 years standing that he should be blissfully ignorant of the relevant statutory requirements. And yet, that it seems, is precisely the case. Alarmingly, his evidence whilst being cross-examined was to the effect that he had only just for the first time then read s 57(5). He was likewise unaware that he could have sought and perhaps obtained an extension of time for the prosecution of the claim. Ultimately his explanation is that as a country practitioner whose practice is limited by the financial constraints of his clients, he could hardly have acquired the specialist knowledge required for the timeous prosecution of the appellants' claim.

[12] The question whether the granting of an application in terms of s 57(5) of the Act would be in the interests of justice in the context in which that expression is used involves in my view essentially a value judgment based on general considerations of equity and fairness to both parties viewed against the factual matrix of each case (*Lek v Estates Agents Board* 1978 (3) SA 160 (C) at 171C).

[13] Section 57 replaced s 32 of the previous Police Act 7 of 1958. The latter could hardly have passed constitutional scrutiny (see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)). Of the predecessor to s 57 (s 17 of the South African Police Service Rationalisation Proclamation R5 of 1995) this court per Corbett CJ in *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A) at 96 D-H stated:

‘Although ... [it] has the same general purpose as s 32 of the Police Act had, there are certain important differences between the two enactments. Firstly, the expiry period has been extended from six months to 12 calendar months. Secondly, whereas under s 32 the expiry period commenced to run as from the date when the cause of action arose, under s 17 this period commences as from the date upon which the claimant became aware of the act or omission constituting his cause of action or as from the date when the claimant might be reasonably expected to have become aware of the act or omission, reasonably expected to have become aware of the act or omission, whichever is the "earliest" (*sic*) date. This change means that s 17 is more or less in line with s 12(3) of the Prescription Act 68 of 1969. And, thirdly, whereas under s 32 the Court had no power to dispense with the

requirements of the section, under s 17(5) there is provision for such a dispensing power, to be exercised where the interests of justices so require. There is no doubt that s 32 was a somewhat Draconian measure in that a claimant who was unaware that he had a cause of action when it arose or who failed for reasons falling short of impossibility to prosecute his claim within the time limits laid down received no special consideration or redress. Section 17 was obviously introduced in order to ameliorate the position (cf *Pizani's* case *supra* at 602D-H).'

[14] Against that backdrop I return to the facts. Although an educated woman, it is plain, on a reading of her evidence that the first appellant is unsophisticated in the ways of the law. Perturbed at the lack of progress in the criminal investigation, she approached an attorney. Her purpose in doing so was to ensure that her interests and those of her children would be adequately protected during the formal inquest into her husband's death and any subsequent criminal trial that may ensue. According to the first appellant, she knew immediately after the incident that her husband had been shot and killed by the police. In her view his killing was unlawful. She, thus, in her words wanted 'compensation for what had [been] done'. That, however, by no stretch of the imagination, can lead one to the conclusion that she knew that a civil suit had to be instituted against the respondent and more importantly that she had twelve calendar months within which to do it. To borrow from Didcott J, her lack of knowledge

'... must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.'

(*Moholomi v Minister of Defence* 1997 (1) SA 124 (CC) para 14.)

[15] Properly construed her evidence is to the effect that until her first consultation with attorney Klaff, she did not believe that more was expected of her than merely co-operating with the police investigation. From that point onwards the matter was entrusted to him. The inexperience of her attorney in prosecuting claims of the kind encountered here is patent. It can hardly be suggested that the first appellant should have been alive to the relevant time-bar provisions when her attorney himself had no inkling of their existence. No wilful dilatoriness can be attributed to the first appellant. After all, given her 'isolation from the mainstream of the law', her belief that the matter was receiving appropriate attention and the solace she drew from the knowledge that the matter was in the capable hands of a skilled

professional, can hardly be faulted. It hardly seems fair on the facts here present to attribute her attorney's alarming ineptitude to her.

[16] The delay has not been an unconscionable one. To all of that must be added an important factor, namely, that the first appellant was also claiming on behalf of minor children, who would be left remediless, were the relief sought not be granted. Whether the interests of justice would best be served in holding that the claim on behalf of the minor children had also expired and how that squared with the constitutional principle of the best interests of the child received no consideration whatsoever by the trial court. On the view that I take of the matter it is not necessary to dwell any further on that aspect or to distinguish between the claims of the first appellant in her personal capacity and those on behalf of the minor children. The appellants and the minor children have suffered both financially and emotionally. The loss of financial security that the deceased's death causes is likely to be substantial. The present action seeks to ameliorate in part the loss visited on them by his death.

[17] There has not been any suggestion of prejudice to the respondent. In my view there was none. An off-duty policeman was killed. An investigation was conducted by senior members of the SAPS into his death. A full inquest into his death followed and a finding was returned by the inquest magistrate. Shortly after the shooting each of the

members who was present at the scene of the shooting deposed to a statement. No disadvantage was claimed by virtue of the effluxion of time. Notwithstanding the lapse of time from the death of the deceased until the institution of the action it was not necessary for the respondent to cause any new enquiries to be made. All the information reasonably required to decide what defence, if any, should be mounted was readily available to the respondent.

[18] Section 57 permits account to be taken of the claimant's fault or the lack thereof and the prejudice suffered by the state or its absence (*Moholomi* para 19). It seeks, on the one hand to protect innocent claimants who may be time-barred in consequence of not having complied with the prescribed time limits and, on the other, to protect the police, a large bureaucracy, against the prejudice it may suffer in consequence of inordinate delays in instituting actions against it. Striking a balance between these competing considerations is thus central to the enquiry envisaged by ss 5. That subsection is cast in wide terms. It empowers a court to engage in a weighing-up exercise. That ought to have characterised the approach of the trial court. It did not. That prejudice to the respondent had not been asserted and, in fact, was manifestly absent, did not merit a mention in the trial court's judgment. In its approach to the duty cast upon it by the legislation it misdirected

itself. Absent prejudice there was little if anything to tip the scales in favour of the respondent or against the grant of the relief sought.

[19] As the failure to comply with the provisions of ss 57(1) and (2) has been neither blameworthy, given the heavy handicaps that burden the appellants, nor prejudicial to the respondent, the trial court ought to have dispensed with the requirements or prohibitions contained in those subsections. It must follow that on this aspect of the case the conclusion of the trial court cannot be sustained. In the result the special plea ought to have been dismissed with costs.

[20] The conclusion which Hetisani J reached on the special plea rendered it unnecessary for him in his words to: ' ... delve into the merits of this case'. The contrary conclusion reached by me would ordinarily warrant a referral of the matter to the trial court for a consideration of the merits. But on the facts of this case, there would be little if any benefit in remitting the matter. As I have already stated the sole remaining issue for determination on the merits is whether the member of the SAPS who shot and killed the deceased did so whilst acting in self-defence. All the evidence on this aspect of the case has already been tendered before the trial court and forms part of the record on appeal. From the perspective of the appellants it has been eight long years since the death of the deceased. They would obviously prefer that the matter be

finalised. So too I would think the respondent. As the evidence in the matter was concluded on 20 June 2002, and judgment delivered on 29 August 2002, it is unlikely that the trial court would be in a manifestly better position to make that determination. I accordingly pass to consider whether the killing of the deceased was justified.

[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’.

(per Chaskalson P in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 138).

[22] 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.'

(*R v Attwood* 1946 AD 331 at 340).

The test is an objective one. The question to be answered is whether a reasonable person in the position of Constable Matumba would have considered that there was a real risk that death or serious injury was imminent.

[23] The version of the police is that they announced their presence and identified themselves as the police after having knocked on the door of the deceased's rondavel. The first appellant denied that. On that central issue there are two irreconcilable versions. Whether it can be accepted that they did in fact identify themselves as the police is an aspect to which I now turn. The resolution of that dispute must depend largely upon inferences from other facts and upon the probabilities (*Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA) at para 24). The deceased himself a policeman was stationed at the local police station. All the members of the SAPS stationed at that police station would have been known to him. Had a caller, in the middle of the night, claimed to be a policeman, the deceased, would naturally have assumed that it was a colleague from the local police station where he was employed. It is overwhelmingly probable that he would have sought further clarity as to the identity of the visitor and purpose of the visit. However, according to the police nothing like this occurred. What is plain is that it is highly improbable

that he would have emerged in those circumstances with his firearm at the ready to confront persons who had identified themselves to him as policemen. On this disputed issue the probabilities certainly do not favour the police. It must follow that the claim by the police that they had identified themselves immediately after having knocked on the deceased's door accordingly falls to be rejected.

[24] It is common cause that the deceased had no link whatsoever to the matter being investigated. When the police heard what sounded like a briefcase being opened they retreated into the shadows for their own safety. Significantly the deceased's rondavel had no windows. When the deceased emerged in the middle of the night with his firearm drawn a potentially dangerous situation had already been created. From the doorway of his hut the deceased would have peered into the darkness. Indistinct silhouettes would have confronted him. He had to cognitively assess what he must have perceived were the dangers that lurked in the darkness. Little wonder then that he trained his firearm on Botha when the latter spoke. There is nothing in the evidence to suggest that he posed a danger to the police. Why in those circumstances Matumba felt obliged to attack the deceased from behind is unclear and has not been satisfactorily explained. Even then the deceased showed commendable restraint by not discharging his firearm in the face of that unlawful attack.

Instead he sought to ward off Matumba's attack by striking at him with his fists and employing his firearm defensively. Outnumbered four to one it has not been explained why if it was at all necessary to physically restrain the deceased it could not have been done without resort by Matumba to his firearm. Pauer testified that he did not employ his firearm because he did not believe that the deceased would in fact shoot. Before any of the others could enter the fray Matumba had discharged his firearm four times with fatal consequences.

[25] It bears noting that the onus rests on the police to prove on a preponderance of probabilities that the shooting of the deceased was justifiable (*Mabaso v Felix* 1981 (3) SA 865 (A)). In the ultimate analysis the police who were burdened with the onus of proof have not succeeded in discharging it. 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. 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. 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.

[26] In the result the appeal is accordingly upheld with costs and the order of the court *a quo* is set aside to be replaced with the following:

‘(a) The defendant’s special plea is dismissed.

(b) The defendant is held liable for the damages, if any, that the plaintiffs have suffered in consequence of the death of Charles Makhado Mugwena.

(c) The defendant is ordered to pay the plaintiffs’ costs occasioned by this hearing.

(d) The matter is postponed *sine die*.’

V M PONNAN

JUDGE OF APPEAL

CONCUR:

SCOTT JA
STREICHER JA
NKABINDE AJA
MAYA AJA