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THE HIGH COURT OF SWAZILAND

Civil Case No.463/2000

In the matter between:

MZWANDILE JELE — **Plaintiff**

VS

THE COMMISSIONER OF POLICE — **1st Defendant**
THE ATTORNEY- GENERAL — **2nd Defendant**

CORAM : **MASUKU J.**

For Plaintiff : **Mr Z.W. Magagula**
For Defendant : **Ms S. Maseko (Attorney-General's Chambers)**

JUDGEMENT
15/07/02

The Plaintiff was injured by a member of the Royal Swaziland Police (R.S.P.) at Lundzi on the 13th October 1999. He sustained certain injuries on his right leg. He now claims the following:-

Pain and suffering - E200.000.00

Medical expenses - E300.00

Loss of Amenities of life - E49 900; interest and costs

The main dispute for resolution by this Court revolves around the circumstances in which this shooting incident occurred.

According to the Plaintiff, he was attacked, assaulted and shot by members of the R.S.P. from Bhunya Police Station. Aside from the injuries sustained from the gunshot, the Plaintiff alleges that he was further assaulted by the aforesaid R.S.P. with fists and kicked with heavy boots. The Plaintiff alleges further that these assaults occurred whilst the R.S.P. were acting in the course of duty and within the scope of their employment.

The Defendants on the other hand admit that the Plaintiff was shot on the date in question by the R.S.P. from Bhunya Police Station. They however deny that the Plaintiff was assaulted with fists and further deny that he was kicked. They further contend that the shot fired by the R.S.P. was not wrongful or unlawful nor that it was without probable cause. It is their contention that the Plaintiff was shot by the R.S.P. acting in terms of the provisions of Section 41 of the Criminal Procedure and Evidence Act No.67/1938 (hereinafter referred to as "the Act".), after he attempted to flee notwithstanding an order for him to stop.

By way of curtailing the length and duration of the trial, it was agreed by counsel on both sides that the only question to be determined was whether the R.S.P. had in shooting the Plaintiff acted properly in terms of the aforesaid provisions of the Act. There were however, in the course of evidence being led, other contentious issues which I may not be called upon to decide in view of the narrow parameters of the legal question to be determined but based on the facts proved. The one important issue that did emerge and forms part of the judgement relates to the circumstances in which the Plaintiff was shot as there were conflicting versions.

Before proceeding with this matter any further, I must once again, as I have done on some previous occasions, note with dissatisfaction the scant regard paid by the Plaintiff's attorneys to the mandatory provisions of Rule 18 (10) of the High Court Rules, 1990 (as amended) in the drafting of the Plaintiff's Particulars of Claim. The nomenclature in that Rule, which as I have stated, is couched in peremptory language provides as follows:-

> (10) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof:

Provided that a plaintiff suing for damages for personal injury shall specify the date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give

rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for –

(a) medical costs, and hospital and other similar expenses, and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

© disability in respect of –

(i) the earning of income, stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do;

(ii) the enjoyment of amenities of life, giving particulars and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

It is clear that no attempt to address the requirements of the aforesaid provision has been made by the Plaintiff. The Rules have been designed to smoothen litigation and in cases to also prescribe all necessary allegations to conduce finalisation of litigation and where applicable, to elucidate issues, factors which redound to the benefit of all involved in trial proceedings.

In the case of **JESSIE SHONGWE N.O. VS SAMUEL SHONGWE CIV.APPEAL 76/93**, Melamet J.P. (unreported), made some lapidary remarks about Rules of Court, which remain true as they were then. He stated the following at page 5:-

"On behalf of the Appellant it was contended that there was a general ineptitude amongst practitioners in complying with the rules and that strict compliance with the rules was not regarded as essential. This comes as a surprise to me and if it is in fact so, it is a practice which must cease forth with. The rules of court are intended to introduce certainty and facilitate the speedy administration of justice.

Non compliance, therefore, will introduce uncertainty and frustrate the administration of justice. It encourages negligence amongst practitioners and in the absence of good and sufficient reason, will not be condoned." (my emphasis)

See also the remarks of Tebbutt J.A. in **ANDRIES STEPHANUS VAN WYK & AND V BRL, A DIVISION OF BARLOWS CENTRAL FINANCE CORPORATION CIV. APPEAL** delivered on 30th November 2001 (unreported). I must however apportion some blame to the Defendant's attorneys where non-compliance with this sub-Rule is concerned. In terms of the provisions of Rule 18 (12), if a party fails to comply with any of the provisions of Rule 18, the pleading will be deemed to be an irregular step, thereby entitling the opposite party to proceed in terms of Rule 30. This is what the Defendants must do in the future.

In the case of **JULUKA DLAMINI VS THE ATTORNEY GENERAL CASE NO.3073/96** (unreported), I remarked extensively regarding what now appears to be a chronic failure by many practitioners in this Court to pay heed to the provisions of the aforesaid sub-Rule.

Mr Magagula has fairly conceded the above shortcoming in the particulars of claim but has urged this Court to condone the non-compliance without addressing the Court on the main requirement for granting condonation, namely, a full, satisfactory and reasonable explanation for the failure to comply therewith. He cannot plead ignorance of this sub-Rule as the Rules as amended, were promulgated some twelve (12) years ago. There is in my view no cogent explanation for the failure. All that the Court is now urged to do is to, oblivious to legal requirements, exercise mercy and allow this matter to proceed. The failure to comply with the clear and unambiguous and peremptory provisions of the Rules hoping that the Court will have its conscience sufficiently pricked and moved by maudlin sympathy, to jettison the Rules must be the fossil of an old dispensation. It is the last time that I allow such an application.

All practitioners presently in default of compliance with the said sub-Rule, must on reading this judgement invoke the provisions of Rule 28 and ensure compliance forthwith. I am no longer prepared to proceed with any trial in which there is a claim for personal injury but no corresponding compliance with the said sub-Rule in particular. Any vestige of mercy

that I may have had in this regard has, due to previous applications worn so thin that it will no longer be in supply at a subsequent hearing. These remarks are no idle threat and let all practitioners be warned. I will use my discretion *in casu* to allow this action to proceed without creating a precedent however.

Plaintiff's Case

The Plaintiff's evidence was to the following effect: He is 28 years old and presently unemployed. On the date in issue, he was employed at Lundzi Primary School as a temporal teacher. Recounting the events of the date in question, the Plaintiff testified that it was a Wednesday and was in his house which he shared with another teacher. As he was preparing to retire, at about 20h00, he heard some footsteps around the back of his house, which was rather anomalous as there was no footpath there. The Plaintiff, who was in pyjama shorts and a jersey decided to investigate although it was dark outside and there was no electricity in the area.

He opened the door and before he could come out of the house completely, he met a tall man who tried to grab him. It appeared that this man had been there for some time as he was not the one whose footsteps led to the back of the house. This man said nothing but started assaulting the Plaintiff as he tried to break free from the man's grip. This man spoke to the person at the back of the house, saying, "here is the dog". Both men were dressed in plain clothes. Neither of them introduced themselves.

As soon as the second man came, the Plaintiff was overpowered and he fell to the ground. At that point, Plaintiff attempted to run away but he heard the sound of gunfire whilst he was still on the ground. The Plaintiff testified that at this stage, he was lying on his back facing upwards, having pulled his knees and hands towards his chest. It is his testimony that it is at this stage that he was shot, having been unable to see that his assailants were armed. After the shot, the assaults on his body subsided. He thereafter rose to his feet, ran for some sixty metres and then fell to the ground on his stomach. The two men were joined by a third man and they handcuffed his arms to his back. He was caused to walk to his house limping after being shot. He was not assisted in walking. His house was dark, necessitating that they go and look for matches at the house of the headmaster, Mr Mdluli who also joined them.

On arrival at the Plaintiff's house, the men then introduced themselves as R.S.P. members and that they had come to conduct a search of the Plaintiff's house in connection with money that went missing from the school. They proceeded with the search and intermittently assaulted the Plaintiff with open hands. The R.S.P. noticed that Plaintiff had been injured and at that stage were praising the one who discharged the firearm for his good marksmanship. They never bothered to investigate the nature and extent of the injuries sustained by the Plaintiff.

The Plaintiff's roommate then arrived and he investigated what was happening. They proceeded to assault Plaintiff in his roommate's presence. After failing to find the money, they showed the Plaintiff where their vehicle was parked, some five hundred metres away. Plaintiff's roommate assisted him to the motor vehicle and on the way, he returned to the house to fetch a bandage in order to dress the wound. At this stage, the Plaintiff was still handcuffed and was driven to Mhlambanyatsi Clinic where he was not attended but was instead referred to Mbabane Government Hospital.

The Plaintiff told the Court that he sustained an injury below the right knee and on the posterior of the right thigh. According to him, the bullet entered in the foot and went up to the thigh as he was lying down. At Mbabane Government Hospital, the Plaintiff was admitted for three days despite protestations by the RSP who were bent on taking Plaintiff with them. He was handcuffed to a hospital bed with no guard in sight for the entire three days of admission. On the third day, a Friday, he was not discharged but was taken away by the R.S.P. without the Doctor's sanction.

He further testified that he experienced a lot of pain from the shooting even after leaving hospital, as he was still limping. From Mbabane, he was taken to Mhlambanyatsi *en route* to Bhunya where he was detained. According to him, he had no tablets or any medication prescribed and only managed to secure some after his relatives visited him. He visited Dr J.J. Vilakazi and a Mr Smith who prescribed some medication for him. The Plaintiff also informed the Court that he was subsequently acquitted of the theft charges.

It was his further evidence that he spent around E300.00 for hospital expenses and proceeded to confirm the claims reflected in his particulars of claim. He further testified that he was able to walk normally after three months from the occurrence of the incident.

In cross-examination, the Plaintiff told the Court that he went to investigate who the person outside was as he thought it was his roommate. It was suggested to him that the RSP had come to arrest him prior to 13th October 1999, but Plaintiff said he did not recall this. He told the Court that the was unaware that he had fled when RSP came to arrest him earlier and that this was in front of the school children.

It was put to him that on the day in question, the RSP knocked on his door and he opened the door. This was denied. It was put to him that there was there were two RSP at the door, not one but Plaintiff insisted there was one officer. It was further put to him that Mthethwa (DW 3) introduced himself and the other officers and exhibited their identify cards but this Plaintiff denied. It was put to him that as they explained their mission, the Plaintiff pushed one officer and ran away. He was ordered to stop but to no avail and others heard the order for Plaintiff to stop. As a result, RSP fired two warning shots but still, the Plaintiff did not stop. Since there was no way to stop him, a third shot was fired and which hit the Plaintiff. All these issues were denied by Plaintiff and he insisted that he only heard one shot being fired.

It was put to him that he was never assaulted with fists and was never kicked. This was denied. He told the Court that other than the gunshot injuries, he did not sustain any other and that he was treated for the gunshot injuries only. Plaintiff denied that the RSP were carrying a torch.

In re-examination, the Plaintiff denied that RSP had ever come looking for him at Lundzi prior to 13th October 1999. The Plaintiff, in response to questions by the Court testified that he was manacled to a bed at the hospital with no officer to attend to him. As a result, he could not answer the call of nature for the three days he was there although he was drinking water. He could not take food.

DW 2 was Dr Kingsley Dundun, an Orthopaedic surgeon who testified that he attended the Plaintiff at the Government Hospital on the night of the 13th October 1999 and prepared a

report of his findings. It was his evidence that he noted three injuries on Plaintiff, all consistent with gun wounds as evidenced by burn marks and metal bullet fragments inside. He opined that one of the wounds suggested that the Plaintiff may have been shot at short distance. He could not recall if the Plaintiff was admitted on the night in question but suspected that he could have been, owing to the serious injuries he had sustained.

In cross-examination, PW 2 testified that he did not remove any bullet from the Plaintiff. He also testified that it appeared that Plaintiff may have been shot at least two times. It was put to him that the wound on the posterior of the thigh was not a gunshot wound. His response was that it had burn marks and metal fragments from x-ray pictures, indicating a great likelihood that they were gunshot wounds. The Plaintiff was not treated for other injuries he knew of. He also testified that there were no disabilities from his assessment then as the movement of toes was normal and there were no signs of neurological defects then. He handed in his report which was marked Exhibit "A".

In re-examination, PW 2 agreed that all three wounds could have resulted from the shot, depending on the victim's posture at the time of shooting. According to him, the Plaintiff could not have healed completely in three days. At this juncture, the Plaintiff closed his case.

Analysis of the Plaintiff's evidence

The Applicant was in my view not entirely truthful and honest. I formed a distinct impression in respect of certain matters that he was making facile attempts to mislead the Court. He was also, in my view, guilty of exaggerating the occurrence of certain events. Incidents which protruded as a sore thumb in regard to the above matters include the following:-

Firstly, the Plaintiff exhibited signs of uncomfortableness and this was only when he was subjected to cross-examination by the defence. The first incident was when it was put to him that the RSP had come to arrest the Plaintiff at his school and that he fled in front of the school children and skipped over the fence. Although he denied this, he was very hesitant. This was also repeated when put to him that he started fleeing on the night in question after the RSP ordered him to stop. Again he was very hesitant and exhibited signs

of overheating, redolent of the timeless remarks by Osborne in his work entitled, "The Mind of the Juror 1937", at page 86, where the following appears;

> *"The witnesses speak...not by words alone...Their faces and their changing expressions maybe pictures that prove the truth of ancient Chinese saying that a picture is equal to thousand words..."*

Secondly, there are improbable aspects surrounding the Plaintiff's story. It is inconceivable that a person shot, at such close range by a powerful firearm as an R4 rifle and sustain the injuries described in the report, particularly the one on the posterior of the thigh would be able to run for a distance of about 60 metres before falling down. Furthermore, with such serious injuries, it would be unlikely that the Plaintiff, as he alleges, walked unassisted from the point where he was allegedly shot to his house, to the Headmasters house and back and later to the motor vehicle. The injuries sustained by the Plaintiff are admittedly serious and this was testified by PW 2.

Thirdly, the Plaintiff alleges that he was admitted for three (3) days at the Mbabane Government Hospital but was manacled to a bed for the entire duration of his admission. This is inconceivable. He told the Court that he was not allowed to go to the toilet during this time. This becomes inexorably unbelievable when regard is had to the fact that the Plaintiff was during the three days of anguish imbibing liquids. It is common cause that there are hospital wards reserved for suspects who are to be under security. No hospital can allow a patient to be manacled to a bed without movement for three days. I reject the Plaintiff's story in this regard as improbable and untrue.

Fourthly, his explanation of how he came out to investigate the cause of the noise at his house is also unsatisfactory. In chief, he stated that he heard the footsteps behind the house and then chose to open the door to see who was there. When put to him as to how he could go out at night not knowing who was outside, he responded by saying that he thought it was his roommate, although earlier, and in chief, he discounted the possibility of that being his roommate as the latter knew the way to the entrance and was in any event a teetotaller according to him.

Fifthly, his assertion of the position from which he was shot defies logic. It is not clear which the entry and exit wounds are on the lower knee from Exhibit "A". As it is accepted by all parties that one bullet struck the Plaintiff, it is inexplicable how the bullet would enter and exit at the points shown and also injure the Plaintiff in the area below his right thigh. The posture he alleges he had maintained when he was shot is inconsistent with the position of the injuries sustained in my view. From exhibit "A" Form A, it would appear that the entry wound was the one on the back of the right leg, which is consistent with the defence story and which will unfold shortly.

As testified by S/I Nxumalo, the R4 Rifle has an effective shooting range of 600 metres. If it is true that the Plaintiff was shot in the position which he alleges i.e. less than one (1) metre away, he could have sustained more severe injuries or could have even died as DW 3 testified. In this regard, the Plaintiff's story is improbable. The burn marks noted by the Doctor as being indicative of the shooting as having been from close range would be consistent with the use of the R4 Rifle with such long range being used to shoot at a target some 30 to 40 metres away.

Defence Case

The defence paraded four (4) witnesses. DW 1 was Nelson Vusumuzi Masuku, Plaintiff's roommate. He informed the Court that he returned to the house at around 20h00 and the headmaster called him as he entered the house. He testified that after DW 2 refused to talk privately to Plaintiff, the latter admitted having taken the money and offered to repay it. It was his evidence that he was in good terms with the Plaintiff and he dressed the Plaintiff's wounds. He further testified that it was dark but Nhlabatsi the Police officer was carrying a torch. He denied that the Plaintiff was ever assaulted by the RSP in his presence. He denied hearing any gun shot.

DW 2 was Albert Mandla Mdluli, the Plaintiff's head teacher at the time. He testified that he reported the loss of the money to the RSP. Regarding the events of the day in question, he testified that around noon, he went to look for Plaintiff at his house and at his classroom at the RSP's behest but Plaintiff was not in. The RSP were also present.

That same evening, around 20h00, whilst listening to the radio, he heard a voice saying loudly, "Mzwandile, we are members of the R.S.P., do not run away". He heard footsteps after that and later, two gunshots next to his house. The third, he heard next to the school toilet. A few minutes later, a person came to his door, announcing himself as an R.S.P. member. He was told to open the door. He obliged. He found Nhlabatsi carrying a torch and Plaintiff was crying. DW 2 noted that Plaintiff had sustained injuries and they proceeded to the Plaintiff's house.

He confirmed that Plaintiff tried to speak to him privately, but he declined. Plaintiff eventually confessed to having taken the money and offered to repay it. DW 2 declined the offer. Plaintiff was bandaged and later assisted to the R.S.P. vehicle outside the gate. The following day, DW2 went to report to Plaintiff's parents what had befallen him, regarding the shooting and his arrest. DW 2 also confirmed that Nhlabatsi was carrying a torch, which provided a light to all of them. It was his further evidence that the R.S.P. shouted to Plaintiff to stop on three (3) occasions before he heard the gunshots. He was cross-examined at length.

DW 3 was 3473 Constable Mxolisi Mtsetfwa, who testified that on the date in question, he, in the company of 2912 Constable Malinga (DW 4) and 2566 Constable Bongani Nhlabatsi (now deceased) went to Lundzi Primary School in a Police van. They went to investigate the case reported by DW 2. DW 3 was carrying an R4 Rifle with 15 live rounds of ammunition. Nhlabatsi was carrying a torch, while DW 4 was carrying a magnum revolver with six live rounds of ammunition. They arrived at around 19h30 and parked the vehicle outside the school gate as the main gate was locked.

They walked to PW 1's house and on arrival, DW 4 went towards a small window of the house, whilst DW 3 and Nhlabatsi went to the front door. The latter knocked on the door whilst DW 3 stood on the side. A person emerged from the house wearing pyjama shorts. Nhlabatsi shone the torch to the person, PW 1 and greeted him. DW 3 then introduced themselves and Nhlabatsi knew him. As DW 3 was taking out the identity card, PW 1 jumped out of the house at great speed knocking down Nhlabatsi.

He ran away. Nhlabatsi shone the torch at him as DW 3 told him to stop but to no avail. They gave chase at the same time yelling at him to stop but PW 1 would not stop. DW 3

then fired two (2) warning shots in the air but PW 1 was still undeterred in his resolve to disappear from the scene. He ran in the direction of some thick forests behind the school fence. Nhlabatsi was shining the torch at him and DW 3 shot PW 1 on his leg.

He fell down on some wattle tree stumps which had been left protruding from the ground. They ran to him with DW 4 who had joined them by now. PW 1 was lying facing upwards. DW 3 asked why he was running away and PW 1 apologised. DW 3 produced an identity document. He cautioned him in terms of the Judges' Rules and PW 1 told them that the money was in the house. They realised that PW 1 had sustained injuries and Nhlabatsi supported him. They proceeded to DW 2's house and identified themselves. PW 1 asked to speak privately to DW 2 who declined. They proceeded to DW 1's house where he told them there was no money. He offered to repay it though.

DW 1 then arrived and he was later asked to dress PW 1's wounds. DW 3 also asked DW 1 to give some clothes to PW 1 so that he could be transported to hospital. Nhlabatsi supported him to the gate. He was taken to Mhlambanyatsi Clinic, where first aid was administered to him and was later taken to Mbabane Government Hospital where he was treated.

The Doctor, after seeing him asked if DW 3 wanted to take PW 1 with him or not. DW 3 opted to take him as there was no security in the wards. He was however ordered to being PW 1 back the following day for x-rays, which he did. PW 1 was taken to Bhunya Police Station, where he was detained. The Doctor told DW 1 there was no fracture and that DW 1 would heal quickly but had to be brought now and again for treatment. DW 3 denied that PW 1 was admitted in hospital. It was his evidence that PW 1 was shot some 30 – 45 metres away from his house. DW 3 denied that the wound on the posterior of the thigh was a gunshot, alleging that the Plaintiff fell onto a sharp wattle stump when he was shot. He denied that PW 1 was ever handcuffed to a bed. He was also cross examined at length.

DW 4 was 2912 Constable Kenneth Nhlabatsi, who was with DW 3. He in large measure confirmed the evidence of DW 3 in material respects. He however did not see what occurred at the door of PW 1's house. His last involvement with PW 1 was when they returned from Mbabane Government Hospital on the 13th.

Analysis of Defence Case

The defence witnesses were largely truthful and consistent in the crucial aspects of their evidence. In particular, I was impressed by DW 1 and DW 2. There are certain matters in which there were some contradictions e.g. whether or not the R.S.P. were in uniform, on the night in question; who assisted PW 1 after he was shot; whether the R.S.P. had come to investigate the issue or to effect an arrest. These are however issues which are in my view not crucial and do not detract materially from the general impression I formed on the truthfulness of their account. It is trite that the Court is at large, whilst accepting a portion of a witness' evidence, to reject another.

There are now before Court two conflicting versions regarding how the Plaintiff was shot and these versions are mutually destructive. There is the Plaintiff's version on the one hand and that of the Defence on the other. The proper approach to be adopted in such cases was stated with absolute clarity by Eksteen J. in **NATIONAL EMPLOYER'S GENERAL INSURANCE CO. LTD VS JAGERS 1984 (4) SA 437 (A) at 440 E – G,** where it was held that in such cases, the Plaintiff will have made out a case if:-

> *"He satisfies the Court on a preponderance of probabilities that his versions is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and the Defendant's version is false."*

For the reasons set out previously, it is my finding that the Plaintiff's story is not probable. The defence story is in my view more probable because other than the Police Officers, DW 3 and DW 4, the shouts for the Plaintiff to stop were heard by DW 2, who although Mr

Magagula criticised was unmoved on this point. Although he was the complainant, it was not put to him that he was concocting evidence for any ulterior motive. In any event his whole conduct towards the Plaintiff after the shooting was not one of an interested complainant, suggesting that in respect of the theft case PW 1 had gotten his just desert. He assisted the Plaintiff and even went to report to Plaintiff's parents what had occurred. He struck me as an impressive witness even under cross-examination not withstanding that he may have been the complainant.

He also testified that he heard three shots after the shouts for PW 1 to stop. Two were next to his house and the last one next to the toilet some 30 to 35 metres away from his house. This is also consistent with DW 3's evidence. I therefor reject the Plaintiff's story that only one shot was fired and proceed to reject his story that no source of light was provided. DW 1 to DW 4 are in unison that Nhlabatsi was carrying a torch on the night in question. Even DW 1, who was a disinterested and dispassionate witness confirmed this.

For the foregoing reasons it is my view that the Plaintiff's version of the shooting be rejected. The case must therefor be decided on the Defendant's version. In view of PW 2's evidence that there were metal fragments found also in the wound on the posterior of the thigh, I am prepared to accept that that wound was also caused by the same bullet. In any event, there is no medical or other evidence to support the Defendants claim that the Plaintiff was injured by a tree stump. I hasten to add that it does not necessarily follow that because I have rejected the Plaintiff's version as improbable that his claim must as of necessity be dismissed. The question to be determined at this stage, it being common cause that the Plaintiff was shot by DW 3 is whether on the defence version, the Defendants have shown on a balance of probabilities that there was full compliance by them with the provisions of Section 41 of the Act, thereby justifying the shooting.

Having said this, there is in my view no evidence whatsoever that the Plaintiff was assaulted by the RSP as testified by him. According to his version, PW 2 must at least have observed some bruises on the Plaintiff's body. PW 2's report indicates that there were none. Even DW 1, the Plaintiff's roommate did not confirm such assaults. The Plaintiff has in my view failed on a balance of probabilities to show that he was assaulted with fists and kicked with heavy boots by the RSP.

The law applicable to Section 41 of the Act.

Section 41 of the C.P. & E reads as follows:-

(1) If any peace office or private person authorised or required under this Act to arrest or assist in arresting any person who has committed or is on reasonable grounds suspected of having committed any of the offences mentioned in Part II of the First Schedule, attempts to make such arrest, and the person whose arrest is so attempted flees or resists and cannot be apprehended and prevented from escaping, by other means than by such officer or private person killing the person so fleeing or resisting, such killing shall be deemed in law to be justifiable homicide.

(2) This section shall not give a right to cause the death of a person who is not accused or suspected of having committed one of the offences mentioned in Part II of the First Schedule and, the offence of theft is limited for the purposes of this section to theft in a dwelling at night time, and theft of stock or produce, as defined in any law for the preventing the theft of stock or produce.

This Section entitles any peace office or private person to shoot and kill a person who has or is suspected on reasonable grounds to have committed an offence listed in Part II of the First Schedule. There must however have been an attempt to arrest that person by the peace officer or private person but such attempt having been foiled by the arrestee fleeing or resisting arrest and there being no other means at the arresting person's disposal to apprehend and prevent the arrestee from escaping than by shooting him. In terms of this sub-section, if the arrestee is killed, this becomes justifiable homicide.

The next question for determination is whether an arresting officer can find refuge under this Section if he, in an attempt to arrest a person who is fleeing or resisting arrest shoots at the arrestee in an attempt to apprehend him but the arrestee is wounded but not killed by a firearm. In my view, the answer must be in the affirmative for Parliament can never be said to have intended the protection to avail an arresting officer who inflicts a fatal wound but deny such protection to one who inflicts less serious injury. Such conclusion would border on the absurd because it would be anomalous for an arresting officer or private person, ostensibly acting in terms of this Section, to shoot with an intention to kill the arrestee, to be protected by this Section, where as if he only manages to wound the arrestee

though intending to kill him, will not be protected. Such a situation would be untenable. In my view, the more serious must include the less serious and for that reason, the word killing in this case occurring in Section 41 (1) must be taken to also include wounding.

Support for the view I have taken can be found in various cases in the Republic of South Africa before this Section was amended to distinguish between wounding and killing. In **REX VS BRITZ 1949 AD 293** at **299**, Shreiner **J.A.**, who dealt with a similarly worded statute stated the following at page 299.

> *"The argument for the applicant was based on section 44 and although it deals only with the justification of homicide it seems to have been assumed, in his favour, that by implication, based presumably on the notion that the greater includes the less, the section could, if its conditions were satisfied, provide him with protection."*

The learned Judge of Appeal did not criticise the Judge *a quo* for his approach but decided the issue on the basis and assumptions made by the Judge *a quo*.

See also **S VS MNANZANA 1966 (3) SA 39 and MATLOU VS MAKHUBEDU 1978 (1) SA 946 (AA)** the headnote of which reads as follows regarding the provisions of Section 37 (1) of the Criminal Procedure Act, 56/1955:-

> *"The section contemplates intentional killing and to avoid unacceptable anomalies the word "killing", in the section must be construed as including intentional "wounding".*

I find therefor that the Defendants can seek cover under the provisions of this section, not withstanding that the victim was not killed but injured. This will be so however, if they can show on a balance of probabilities that they have met all the necessary requirements, entitling them to benefit thereunder, the onus to prove that lying on the Defendants. See **MSOMI VS MINISTER OF LAW AND ORDER AND OTHERS 1993 (1) SA 168 (WLD)** at **176 G**, where Levy A.J. stated the following:-

> *"The onus of proof that the shooting of plaintiff was justifiable in terms of the Act rests upon the defendants."*

Before proceeding to consider the requirements for protection under the above provisions, I find it apposite to state the underlying principles governing the proper interpretation and application of this Section, which though being drawn from South Africa, are highly relevant and persuasive in our jurisdiction. This is to be found in the lapidary remarks of van den Heever J.A. in **MAZEKA VS MINISTER OF JUSTICE 1956 (1) SA 312 (AD) at 316; (A)**, where the learned Judge of Appeal stated the following:-

> *'In empowering private persons as well as peace officers to kill a person suspected on reasonable grounds of having committed an offence, who flees in order to escape arrest, the Legislature could not possibly have intended that recourse to shooting should be had light heartedly. The sub-section gives protection only if the guilty or suspected person cannot be apprehended, and prevented from escaping by other means:.....There can be no doubt that the Legislature intended sec.44 (1) to be strictly interpreted."* (my emphasis).

See also **WIESNER VS MOLOMO 1983 (3) SA 151.**

Requirements for application of Section 41.

The following are the requirements to be met by the arresting person or officer. He must show on a balance of probabilities that:-

(a) he was authorised by the Act to arrest the person who was assaulted or to assist in his arrest;
(b) he made an attempt to arrest the injured person
(c) the injured person must have been aware of the attempt to arrest him;
(d) the injured person resisted arrest and could not be taken into custody without the application of force
(e) the force employed to overcome the resistance or to prevent the flight was reasonably necessary in the circumstances

– See also **R VS CONSTABLE JOHN DLAMINI and du Toit *et al*, "Commentary on the Criminal Procedure Act, Juta 1995 at pages 5 – 29 – 30.**

Applying the above requirements to the facts.

(a) It is beyond dispute that DW 3 was a peace officer, regard had to the provisions of Section 2 of the C.P. & E, which describes a peace officer in the following terms: -

> *"include any magistrate or justice; a sheriff or a deputy sheriff; and police officer or person carrying out under any law the powers, duties and functions of a police officer in Swaziland; a gaoler or a warder of any prison or goal, and any chief."*

It is clear *in casu,* that PW 3 and his companions, who are police officers were carrying out functions, powers and duties of police officers. They were therefore in my finding entitled and authorised to arrest the Plaintiff. It is also clear from the evidence, although the Plaintiff was later acquitted, that he was suspected on reasonable grounds to have committed the crime of theft, which falls under those offences listed in Part II of the First Schedule. In my view, the first requirement is satisfied.

(b) and (c) From the Defendant's evidence, which I accepted, I am satisfied that the Police Officers did make an attempt to arrest the Plaintiff. According to DW 3, he and Nhlabatsi, after the Plaintiff had opened the door introduced themselves and as they took out their identify cards, the Plaintiff ran Nhlabatsi down and fled. At this stage he knew that they were Police Officers. There is evidence by DW 2 that the Police had come on some previous occasion looking for the Plaintiff. Plaintiff's denial of this was totally unconvincing. The Plaintiff was therefor aware of the intention to arrest him.

(d) and (e) It is again clear from the Defendants' witnesses that the Plaintiff resisted arrest. In fact he fled. DW 3 testified and this was confirmed by DW 2 and DW 4 that he shouted to the Plaintiff to stop, but to no avail. They chased him but he outran them. Two warning shots were fired but they did not have the desired effect, hence he was eventually shot. According to DW 3 and DW 4, the Plaintiff was about to jump over the fence and disappear into the dark, thereby causing all prospects of apprehending him to evaporate.

The question is whether in view of the entire circumstances of the case, it was reasonably necessary to essay the assistance of the firearm to apprehend the Plaintiff. Crucial issues to consider in this regard are the nature of the offence, the amount involved and whether there were sufficient details available to the Police which would have enabled them to effect arrest at a later date, regard had to the fact that it was at night. These must be viewed against the harm or potential harm that the person to be arrested stands to suffer.

In coming to a conclusion on these issues, I will try to avoid the posture of an armchair critic, wise only after the event. It is my view that the offence of which the Plaintiff was reasonably suspected of having committed was not very serious and the amount involved, i.e. E900.00 was not a very large sum of money to justify the resort to the firearm. According to the provisions of Section 41 (2), which I consider to apply to cases of wounding, this Section applies in cases of theft only when the theft is perpetrated at night and in a dwelling house and involves theft of stock or produce.

My conclusions in regard to the effects of the provisions of Section 41(2) find support in the judgement of Rooney J. in **THE KING V THORNTON HENWOOD Crim. Trial 148/80** (unreported) at page 9, where the learned Judge stated the following:

> *"It is unnecessary for me to discuss whether or not the action of the accused in shooting the complainants falls under section 41(1) of the Act, cited above. This is because, subsection (2) excludes whatever protection sub-section (1) might afford, from the offence of theft, excepting only theft in a dwelling house at night time and the theft of stock or produce. It follows that even if a thief, attempts to flee or resist arrest and cannot be apprehended or prevented from escaping by other means, he cannot be lawfully killed unless the circumstances set out in 41(1) are present and he is a burglar or a stock thief. It should be underlined that this rule applies not only to private persons making an arrest, but also to peace officers and policemen as well. There is no law which permits use of firearms with impunity to arrest car or other thieves."*

I wish to take the matter further and state that in my view, this Section further suggests that the action must be taken at the time the theft is being committed and may not be resorted to at some date or occasion well after the theft occurred. It is my view that the Defendants

have failed to discharge the **onus** on this score as no compliance with the provisions of sub-section (2) has been shown, this being a case of theft.

I wish to observe further that it would appear that the force the applied was disproportionate regard had to the seriousness of the offence. From the evidence, the Police had previously been to look for the Plaintiff unsuccessfully. They knew his identity, knew where he stayed and could have obtained further information from DW 2 who even knew the Plaintiff's home which could have enabled them to arrest the Plaintiff on some later and less dangerous occasion. The testimony by DW 3 that they wanted to arrest him before he used up the money does not justify them having to invoke that kind of force, considering the amount involved. It is clear in any event that they did not find the money in the Plaintiff's house after conducting a thorough search. They could, after Plaintiff's escape have searched for the money in his house and stood guard as the Plaintiff was bound to return to his house sooner than later as he was only wearing pyjama shots and a jersey whereas it was a cold night according to the evidence.

In **GOVENDER VS MINISTER OF SAFETY AND SECURITY 2000 (1) SA 959 (D & CLD)** at 965, Booysen J. was of the view, which I share, that gross disproportion between the force applied and the seriousness of the offence can and does render the shooting unreasonable. In that case, the Police had shot the Plaintiff on suspicion that he had committed car theft, which he considered a serious and prevalent offence in his jurisdiction. Booysen J. found for that reason that the shooting was in those circumstances justified. At 969 C – D, the learned Judge stated the following:-

> *"The amount and method of force used must therefore be in proportional balance to the aim that is to be achieved and must be the minimum force that would be reasonably effective and feasible in the circumstances. It furthermore includes the weighing up of the nature and seriousness of the specific crime in question as committed against the amount and the method of force used"*

See also **S VS MARTINUS 1990 (2) SACR 568 and S V VAN WYK 1992 (2) SA CR 204.**

Conclusion

As indicated earlier, recourse to the use of a firearm must be anxiously and soberly considered. Resort thereto must be had only in deserving cases where the seriousness of the offence and the attendant circumstances outweigh the discomfort injury or even the death of the arrestee. A conspectus of the facts of this case leads me to the conclusion that resort to the use of a firearm was not justified *in casu*. The Defendants have in my view failed to discharge the onus and I find them liable for shooting the Plaintiff. The provisions of Section 41 cannot in the circumstances avail them.

The costs will follow the event. As agreed, the question of quantum will for now be left for negotiation by the parties.

T.S. MASUKU
JUDGE