

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civ. Case No. 244/07

In the matter between

PRINCE KHUMALO

Plaintiff

vs

TERENCE EVEZARD REILLY N.O

1st Defendant

ELIZABETH REILLY N.O.

2nd Defendant

JAMES WEIGHTON REILLY N.O.

3rd Defendant

PETROS MGCIBELO NGOMANE N.O.

4th Defendant

CORAM

Mamba J

FOR Plaintiff

Mr. S. Dlamini

FOR Defendants

Mr. K. Motsa

JUDGMENT
28th April 2011

[1] The Hlane Game Sanctuary which has been referred to herein as either Hlane Royal National Park or as Hlane Wild Life Nature Reserve is situated in the Lubombo Region, near Simunye. It comprises more than one camp and there is at least one gate leading in or out of each camp. Two of such gates are the Elugodvweni and Emdolofiyeni gates. I shall hereinafter refer to these gates as the first and second gate respectively.

[2] According to the plaintiff, at about 7 pm on 25th June 2006, he together with his friend Stanley Phuzukumila Sifundza, otherwise commonly known as Mafudede, a Siswati corruption or rendition of Mcfadden, left Siteki bound for KaKhuphuka to fetch certain persons who had earlier that day been transported there by Sifundza. They travelled in Sifundza's Kombi bearing registration number SD 633 PN. It was just the two of them in the motor vehicle and Sifundza was driving it. The shortest route to their destination, he said, was the road that passed through the Hlane Game Reserve.

[3] On reaching the game park, they went through the first gate without any incident but when they got to the second gate, the boom gate was closed. Sifundza stopped his motor vehicle, sounded his horn or hooter two times and about fifteen (15) Game Rangers emerged from the dark. They demanded to search the motor vehicle to which permission was granted by Sifundza, who alighted from the motor vehicle and opened the doors thereof to the Game Rangers to conduct the search. After the search, which apparently revealed nothing, Sifundza returned to his place behind the steering wheel in readiness to go through the gate but the Game rangers would not open it. Again he alighted from the motor vehicle to seek an explanation from the game rangers why they would not allow him through. Sifundza then decided to call the police and since he had insufficient money on his mobile telephone to call the police, one of the Game rangers advised him to call them on their 999, which is one of the Police free telephone lines. The game ranger also advised him to go through the gate to

stand on an ant-hill nearby where he would be able to have access to telephone network coverage. Mafudede obliged.

[4] After Mafudede had proceeded to the ant-hill one Game ranger opened the boom gate and advised the plaintiff to drive the Kombi through to the other side to join Sifundza on their journey as the search on the motor vehicle had yielded nothing to warrant their further detention there. The plaintiff says he complied but lo and behold, as he drove past the gate and whilst still on the first gear, he had the sound of rapid gun fire. The shots hit him and his vehicle. In all three shots hit him on the left shoulder-blade. He jumped out of the moving vehicle and fled into the dark forest or thicket. From his hide-out in the bush, he was able to see the game rangers searching the Kombi again with the aid of a torch. They unsuccessfully looked for him in the nearby bush and he was able to overhear one of the game rangers saying that if found he should be killed as a way of destroying any evidence against them.

[5] The Plaintiff says he managed to crawl on his knees in the dark forest until he reached a sugar cane field. In the early morning hours of the next day, a police officer from Simunye called him on his mobile telephone. He told him of his ordeal and location. Later police in the company of Mafudede came and took him to Good Shepherd hospital for medical attention. From there he was transferred to the Mbabane Government hospital and later to Chris Hani Baragwanath hospital in South Africa where he was hospitalized for about six-weeks. The

plaintiff testified further that two bullets are still lodged in his body. He told the court that the doctors advised him against an attempt to remove them as they were lodged or imbedded in a sensitive or precarious part of his body.

[6] The evidence of Mafudede Sifundza, who gave evidence as Pw2, is in all essential respects, similar to that of the plaintiff. Sifundza testified though that he saw and spoke to about 4 game rangers at the second gate. These game rangers were armed with spears, knobsticks and guns. One of them rebuked him for hooting in the park and said this was prohibited. His evidence was that it was the plaintiff who advised him to call the police on their 999 emergency line.

[7] The plaintiff has stated in his particulars of claim that the rangers acted intentionally and unlawfully in shooting and wounding him as aforesaid and they were acting during the course of their employment as servants of Big Game Park Trust, and within the scope of such employment. Consequent upon such shooting, the plaintiff says he suffered damages in the sum of E930,000-00 which he now claims from the Defendants, in their capacities as Trustees of the said Trust.

[8] The defendants admit that on the relevant date, an employee of the Trust, one Simon Hlandze who was at all material times acting as a Game ranger or a person acting on the instructions and or directions of a Game ranger, fired about six shots with a firearm at a Kombi motor

vehicle that was occupied by the plaintiff and another person, unknown to them. The defendants have stated that the motor vehicle was fired at whilst it was in the process of being driven away at high speed from a check point in an endeavour to resist or avoid an arrest by the game rangers. The rangers wanted to arrest the occupants of the motor vehicle because they had evidence or at least reason to suspect that the occupants of the motor vehicle had contravened the provisions of the Game Act Number 51 of 1953 (as amended) (hereinafter referred to as the Act) in that they had hunted and or killed two Timpala. In the circumstances, the defendants plead that their action in shooting and wounding the plaintiff was lawful and justified as per the provisions of s 23(2)(d) of the Act.

[9] Before I revert to the evidence led by the defendants in support of their case, I note that the defendants have not pleaded that they were acting in private (self) defence in shooting the plaintiff. Whilst they aver that the rangers had evidence that the plaintiff and his confederates had hunted game in the nature of two timpala, they have not alleged that they were themselves under attack or that they had reason to believe that such attack was imminent; or that their property (game) was under attack and protection or defence thereof necessary. The plea or defence is squarely based on the right to effect an arrest; grounded on a reasonable belief that the person targeted to be arrested has contravened one or more of the provisions of the Act. That being the case, I shall not burden this judgment with an examination or discussion on whether or not the defendants have satisfied the requirements of private or self-defence. I say so

notwithstanding that both Counsel made submissions before me on this point. That is not the defendants' case though.

[10] The evidence by the four (4) defence witnesses may be summarized as follows:

[10.1] On the day in question, at about 2.00 pm, a white BMW (motor vehicle) owned and driven by Mafudede entered the Game park through the first gate and drove towards the second gate. Through their communications radio (walkie Talkie), the rangers at the first gate alerted those at the second gate about the presence and movement of the motor vehicle aforesaid. However, after sometime, the motor vehicle drove towards the first gate and exited the park before it reached the second. Before it left the Park, the rangers (at the first gate) demanded to search it. This demand was strenuously resisted by Mafudede who stated that his motor vehicle could only be searched by the police. He, however, later relented. The search yielded nothing and before driving away from that check point, Mafudede held Vusi Mahlalela, a game ranger, by the scruff of his neck - literally - and informed him that he would shoot him dead the next time he came across him. There were three occupants in the motor vehicle. These were the plaintiff, Mafudede and an unidentified person.

10.2. Being suspicious of the unexplained sudden change of direction of the BMW motor vehicle, another game ranger Simon

Hlandze and two of his co workers went to investigate. They were able to find the spot where the motor vehicle had stopped and later returned to the first gate. Next to the road on that spot, footprints or tracks and blood stains on the ground lead them to two dead male timpala. They had been shot and their throats slit open. They left them there and returned to the second gate. (I shall assume that the intention was to scout or survey the Park from a vantage point in an endeavor to discover who would return to collect the dead animals).

10.3. Mphikwa Gamedze, a Game ranger stationed at the second gate testified that at about 8 pm they received a message from their colleagues at the first gate that a Kombi had entered the park and was driving towards the second gate. Indeed the Kombi approached the second gate. It had its bright lights on. Before getting closer to the gate, it stopped and switched on its dim lights. The driver got out of the motor vehicle and moved through its front towards the other side of the motor vehicle. He and his colleagues noticed that something was being pulled and dragged out of the motor vehicle. After the passenger door was closed, the driver returned to his side and again drove the motor vehicle towards the gate. It stopped just before the closed gate and the driver hooted twice before the Game rangers approached it. The driver was Mafudede who told the Game rangers to open the gate for him as he was rushing a sick person to hospital.

10.4. After introducing themselves as Game rangers, the rangers-sought permission from Mafudede to search the motor vehicle, which permission was granted. Mr Sifundza opened, the passenger door to the rangers. On the floor of the motor vehicle the rangers found animal fur, blood and dung (animal droppings) which they determined belonged to an impala. On being asked about these, Mafudede denied its origin and suggested that these were probably the remains of a goat that had been carried by a traditional wedding party that had used his motor vehicle earlier that day.

10.5. Upon inspection at the spot where the Kombi had stopped just before reaching the gate, two rangers, Majahonke Manana and Dumsani Dlamini found two dead timpala. When the rangers would not open the gate to allow the Kombi through, Mafudede indicated that he wanted to telephone his attorney on his mobile telephone, claiming that the rangers were abusing him. He told the rangers that he could not have access to the telephone network from the spot near his motor vehicle and he then moved through the boom gate apparently in an attempt to locate a spot from which he could use his cellular telephone. He, however, ran away and disappeared into the dark, leaving his Kombi and two occupants behind.

10.6. On being asked to alight from the Kombi, the two occupants refused to do so and locked themselves in the motor

vehicle, and one of them took the drivers seat. This person, it is common cause, was the plaintiff. In an attempt to resolve the stand off, the rangers resolved to drive in their motor vehicle to the nearest police station. When the boom gate opened to let their motor vehicle through, the plaintiff drove the Kombi through the gate at high speed and drove away. It was at this stage that Simon Hlandze, fired about seven shots with an R5 rifle at it in an effort to stop the motor vehicle, so that its occupants could arrested. He aimed at its wheels. He believed, reasonably, he said, that the occupants of the Kombi had violated the Act by hunting game in the Park. The two dead timpala that had been off-loaded from the motor vehicle, the dung, blood and animal fur found in the motor vehicle were evidence of this contravention of the Act, he said.

10.7. The Kombi was found about 700 metres away from the gate by the rangers. Its lights were on. The front doors were opened and, its occupants had vanished. A search in the nearby surroundings revealed nothing. There was blood on the driver's seat and the right front wheel had been shot and punctured. The Police were alerted and they arrived at the scene at about 11 pm in the company of Mafudede. They were shown the animal fur, dung and blood in the Kombi and the two dead timpala. The rangers and Mafudede immediately recorded their respective statements to the police on the incident. These statements were handed in court by consent and were individually marked exhibits A to G. That concluded the case for the defendants.

[11] From the above evidence, one notes that:

(a) The plaintiff and Mafudede deny having driven in the white BMW in the game park in the afternoon on the day in question. Mafudede says he was watching a soccer match at Mpolonjeni at that time and could not have been at the Game Park. He also testified that he never ever owned such a car;

(b) The plaintiff and Mafudede aver that they were the only two occupants of the Kombi in the game park that evening.

(c) Both Mafudede and the plaintiff testified that they were allowed by the game rangers to go through the second gate. They did not run away from the check-point and were surprised when the Kombi was fired on and it was only then that they ran away into the dark forest.

(d) The plaintiff's case is that there was no blood, dung or animal fur found in the Kombi.

[12] For purposes of this judgment, it is not necessary for me to make a finding on whether or not the plaintiff and Mafudede were in the game park at around 2 pm on the relevant day. A determination of this point would only be necessary and or desirable where the credibility of the witnesses and the probabilities in the case are on the spot-light. I suspect that the only reason the defendants led this evidence was to suggest that these two persons, plus the unknown or unidentified third person, had entered the game park in the afternoon, killed the two timpala and left them in the park with the intention of collecting them

at night under cover of darkness. They then returned at night on this mission and were caught by the rangers at the second gate. As to when the animals had been hunted and killed, is in my judgment, a secondary and peripheral issue to the incident of the actual shooting in question.

[13] On the presence or otherwise of blood, animal fur and game droppings in the Combi, the rangers were all in unison that such substances were present in the Combi at the relevant time. Police officers Pollen Motsa, Alhabert Mkhabela and Simon Lukhele all confirm the existence of blood stains in the motor vehicle. This is separate from the blood stains that were on the driver's seat. Motsa also witnessed the presence of "some fur which I'm not familiar with". Mr Mkhabela also refers to the presence of "fur and dung (umsimbane)" in the Combi. It is common ground that "umsimbane" refers to animal droppings such as that excreted by goats, sheep and game of the same class. The Game rangers who testified in court were adamant that the animal dung and fur found in the Combi belonged to an impala and they were very familiar with these in their daily operations as Game rangers. Mafudede acknowledged the presence of the dung to the police and suggested that this was from a goat which had been transported by someone else in his motor vehicle earlier that day. He was, however, unable to point out to the police the person who had transported this goat or where such goat had been taken to.

[14] Whilst the scenes of crime police officers were called to the scene and the Combi was photographed in situ, no such photographs were

exhibited in court. Had such photographs been taken and exhibited in court, they may have illuminated this issue. Notwithstanding this deficiency or loop-hole, the evidence before me satisfies me on a preponderance of probabilities that there was fur, blood and dung found in the Combi when it was searched at the second gate. I am further satisfied that the rangers reasonably believed then that the fur and dung in particular, belonged to an impala.

[15] The statement made by Mafudede to the police on 26 June 2006, after the shooting, was handed in by consent as exhibit D. In that statement he stated inter alia that:

"I do recall very well on 25th June 2006 at about 0700 hours, I left Siteki to Hlane with Prince Khumalo and a person who had asked for a lift to Ngomane. ...[After the shooting incident] - we went to where the Combi was and we found that it had been shot at and the people I was with were nowhere to be found and there was a pool of blood inside the Kombi." (I have added the emphasis) This statement is a clear acknowledgment by Mr Sifundza that there were three persons in his Kombi when it got to the second gate and that when he left it there, two persons remained in it. His and plaintiffs denial in court of the presence of a third person in the Kombi at the relevant time is mischievous. It is a lie. The mischief lies in their unwillingness to reveal or identify the third person.

[16] The plaintiff and Mafudede denied that they had the impala in the motor vehicle they travelled in. They also denied having made a stop

just before reaching the second gate. They did not however deny the discovery of the two dead timpala by the rangers. They maintained however, that they had nothing to do with these. Again, the evidence of the rangers is very clear on this point. The motor vehicle approached with its bright lights. It switched on its dim lights and stopped. The rangers could clearly see the driver move in front of the stationary motor vehicle and going to open the passenger's door. The rangers were able to hear or notice the door being opened and something being pulled or dragged out of the motor vehicle. It was at this very spot that the two rangers, Manana and Dumisani Dlamini found the two dead timpala. This search, one should remember, was carried out after Mafudede had bolted and the plaintiff and his other companion locked themselves inside the Kombi. I have no hesitation whatsoever in accepting the defence evidence that the two dead timpala were found at the alleged spot and under those circumstances described by the defence witnesses. The conclusion is, in my judgment, inescapable that these timpala were deposited there by the occupants of the Kombi after realizing that the second gate was closed and they would be searched on reaching it.

[17] The version of the plaintiff on how he was shot at is rather bizarre in the circumstances of this case. I have found it as a fact that he and the third person in the Kombi locked themselves in the motor vehicle after Mafudede ran away and escaped into the night. Mafudede's escape and the discovery of the two timpala no doubt reinforced the suspicion by the rangers that the plaintiff and his confederates were

guilty of hunting game in the park. The game rangers were determined to at least question the remaining occupants of the motor vehicle. It is highly improbable that the rangers or just one of them could have opened the boom gate and told the plaintiff to drive through and to rejoin Mafudede on the other side.

(Mafudede had of course escaped into the dark). It is again unlikely in the extreme that having allowed the plaintiff to drive through the gate, the rangers would then open fire on the motor vehicle. I accept the evidence of the defendants that the plaintiff, without any prompting from the rangers, drove the Kombi away from the check point in the manner and under the circumstances described by the rangers, in particular Simon Hlandze who then fired at it with his R5 rifle. I now examine the lawfulness or otherwise of that shooting.

[18] I should point out from the outset that where the act complained of (*injuria*) involves an interference, very often physical interference with the plaintiffs property or bodily integrity, such as an assault, arrest and false attachment of property, once the plaintiff establishes such interference, the defendant bears the onus or burden of proving that the interference, in this case the assault, was lawful or excusable. See *MAKHOSAZANA DLAMINI v RADIO SHOP* Civ Case 3118/05, judgment of this court delivered on 28 April 2011, *MINISTER OF LAW AND ORDER v HURLEY*, 1986(3) SA 568 (A) *MABASO v FELIX*, 1981 (3) SA 865(A). The plaintiff need not of course prove that the defendant knew that his actions are unlawful. Vide *MINISTER OF FINANCE v EBN TRADING (PTY) LTD* 1998(2) SA

319(N) at 329 and MINISTER OF JUSTICE v HOFMEYER 1993(3) SA 131(A) at 157. In the present case, the plaintiff has clearly proven that he was on the day in question shot and wounded by servants of the defendants. The defendants admit this fact and have pleaded that it was lawful or justified in the circumstances. The origin of this defence is s23(2) and (3) of the Act which provides that:

"23 (2) Any game ranger or person acting on the instructions of a game ranger shall have the powers and the right:

- (a) to carry and use firearms in the execution of his official duty provided such firearms are properly licensed;
 - (b) to use firearms in self-defence or if he has reason to believe that his life, or the life of any of his colleagues, is threatened or is in danger;
 - (c) to arrest without a warrant any person suspected upon reasonable grounds of having contravened any of the provisions of this Act or regulations made thereunder;
 - (d) to use reasonable force necessary to effect the arrest of or to overpower any person who resists arrest and who is suspected on reasonable grounds of having contravened any of the provisions of this Act;
 - (e) to carry out searches without a warrant under section 22 of this Act;
- (3) A game ranger or person acting on the instructions of a game ranger shall not be liable to prosecution in respect of

any act or omission done in the exercise of his powers or rights under subsection (2) of this section."

[19] It is common ground that Simon Hlandze, the person who actually shot the plaintiff was not a game ranger but a person acting on the instructions of a game ranger. This is contained in his testimony in court and in the statement which was handed in by consent as exhibit B. Again, it is common ground as per exhibit G, that the firearm he used in the shooting was "properly licensed". (I do not know what is meant by being "properly licensed" in this section. I would have thought that a firearm is either licensed or not licensed at all; any qualification of the act of licensing clouds the issue). The reference to prosecution in subsection 3 above refers to criminal prosecution and is not, in my judgment a blanket or an all embracing immunity from such criminal prosecution or civil liability. The immunity obtains only in those cases that fall with the acts sanctioned by subsection 2. For instance, the use of an unlicensed firearm, an arrest without reasonable belief that there has been a contravention of the Act or the use of unreasonable force to effect an arrest, may not attract the protection in question.

[20] In narrating and analyzing the evidence above, I have referred to the events and discoveries that were made by the game rangers and also the reactions of the plaintiff and his companions or fellow travellers. The question whether or not the rangers reasonably suspected that these persons had committed a contravention of the

Act ie hunting game, is objective. See DUNCAN v MINISTER OF LAW AND ORDER, 1986(2) SA 805 (A) at 814 where the court said:

"It was common cause that Bronkhorst was a peace officer and that the assault on Ruhsmann constituted an offence referred to in Schedule 1. It was also common cause that the question whether a peace officer "reasonably suspects" a person of having committed an offence within the ambit of s40 (1) (b) of the Act is objectively justiciable. And it seems clear that the test is not whether a policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion (cf Watson v Commissioner of Customs and Excise 1960 (3) SA 212 (N) at 216; R v Van Heerden 1958 (3) SA 150 (T) at 152; Wiesner v Molomo 1983 (3) SA 151 (A) at 159)." I have no doubt whatsoever that any reasonable person, having witnessed the plaintiff and his companions stop their motor vehicle before reaching the gate and off-loading something which later turned out to be two dead timpala, the discovery of blood, fur and dung in the Combi and the abandonment of the Combi by Mafudede and his running away and disappearance, plus the act of locking themselves in the Combi by the plaintiff and the unidentified third person, would have suspected that the plaintiff and his companions had contravened the provisions of the Act. This suspicion was therefore reasonable in the circumstances. See also BCC PHARMACEUTICALS (PTY) LTD v MINISTER OF HEALTH AND OTHERS, 2007 (3) SA 72(C).

[21] After the discovery of the two dead timpala the rangers demanded that the occupants of the Combi should get off the motor vehicle and they refused to do so. The rangers restricted their movement by inter alia not allowing them through the gate. But even before this incident, their movement had been curtailed and it was this curtailment or restriction that prompted Mafudede to escape on the pretext of trying to telephone his attorney. Simon Hlandze clearly stated that when the rangers opened the gate to allow their own motor vehicle through, the aim was to call the police to the site where the plaintiff was held. When the gate opened and the plaintiff sped away in the Combi, Simon Hlandze shot, first, at the Combi's right front wheel, in an attempt to arrest and detain the plaintiff and his companion. When the plaintiff drove through the gate and sped away in the Combi, it was clear to him that he was about to be arrested and detained. He was running away from this. (Mfanimpela Motsa v Mduduzi Ndlangamandla and Another, Civil Case Number 2788/2006 a judgment by Agyemang J, delivered on 28/10/2010) and the cases therein cited and Prince and Another v Minister of Law and Order and others, 1987 (4) SA231 (E).

[22] The next question is whether the force used by the rangers was reasonably necessary to effect the intended arrest of the plaintiff. Whilst it is important to note that a firearm was used in wounding the plaintiff, it has to be remembered that the game ranger who actually shot the plaintiff did not go out of his way to arm himself with the gun in order to deal with the situation at hand. The situation found him

armed with that R5, so to say. He was in a game park and looking after game. It is a matter of common notoriety for which this court may legitimately take judicial notice of, that armed poaching is rife in our game parks. Consequently rangers have to be armed with appropriate weaponry to protect themselves and the game under their guard. Again, it should be noted that Simon Hlandze deliberately aimed at the right front wheel in trying to prevent the Combi from driving away. This evidence has not been challenged and is supported by the evidence of Alphabert Mkhabela, the Police officer who examined the Combi and found a bullet hole in the rim in question. The shooting occurred at night and in the dark. Visibility was also compromised by the dust caused by the speeding Combi. So, the situation was sudden, unexpected, fast and fleeting. This situation was solely created by the plaintiff. I do not think that under those conditions it would have been realistic for Hlandze to resort to some other means of trying to prevent the plaintiff from fleeing the scene and evading arrest. He used that which was readily available to him for him to respond appropriately to the situation. The fact that not all the gunshots hit at their intended target i.e. the wheels, does not detract from the central fact that there was no deliberate intention to shoot at the plaintiff. I am not unmindful of the fact that no less than six shots were fired at the fleeing Combi and some of these hit and shattered the rear windscreen of the motor vehicle and 3 hit the plaintiff. A lot of factors could account for this and this should not lead to the conclusion that there was a deliberate and conscious attempt to kill the plaintiff rather than arrest him. Such a conclusion is certainly not supported by the probabilities or

circumstances of this case. In the result I hold that the force used herein was reasonable to effect an arrest of the plaintiff and his companion.

[23] For the foregoing reasons, the action is dismissed with costs.

MAMBA J