



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 1858/2009

In the matter between:

Musa H. Vilakati

Plaintiff

And

The Swaziland Government

Defendant

Neutral citation: *Musa H. Vilakati v The Swaziland Government* (1858/2009)
[2018] SZHC 60 (4 April 2018)

Coram : **T. L. Dlamini J**

Date heard : 28 and 29 September 2016, Submissions last
filed 25 November 2016

Date of delivery : 4 April 2018

Summary: *Civil law - Delict – Claim for damages arising from a gunshot injury – Gunshot was fired by a police officer – Negligence alleged – Requirements thereof considered – Self defence pleaded by defendant.*

Held: *That in the circumstances of this case the police officer who fired the gunshot did not act negligently, and that he was acting in self defence – Action dismissed.*

JUDGMENT

- [1] The plaintiff instituted action proceedings for payment of damages arising from a gunshot injury. The gunshot was fired by a member of the Royal Swaziland Police who at the time was acting within the cause and scope of his employment as a police officer.

- [2] The damages sought were for payment of the total sum of **five million six hundred and ten thousand emalangeni (E5 610 000.00)** made up of E 160 000.00 for hospital and medical expenses, E250 000.00 for future medical expenses, E200 000.00 for the loss of income, E3 000 000.00 for estimated future loss of earnings, and E2 000 000.00 for general damages for pain and suffering, loss of amenities of life, disablement and disfigurement.

- [3] From the evidence, it is common cause that the plaintiff was shot by the police at the gate of a homestead where the plaintiff resided. Plaintiff was

shot while the police was attempting to shoot a dog that attacked the police officers and had already bitten the police officer who fired the gunshot. The trouser of his police uniform was torn and remained with a hole.

[4] The plaintiff's evidence is that on the night of 8 November 2008 he was driving back home and was coming from the theatre club where he played pool. On arrival at home he opened the gate using a remote control. He saw his dog coming out of the gate yet ordinarily, it runs around the car. When he looked at the dog he saw two (2) police officers nearby that place and the dog attacked them.

[5] The plaintiff testified that he then stopped his car to assist the police by stopping the dog from attacking them. He moved the dog back into the homestead yard. He also testified that the police wanted to shoot the dog but he pleaded with them not to shoot it. The dog then came back again and while he was still pleading with the police not to shoot it, one officer who he identified as Mbhamali shot at the dog and the plaintiff was shot in the process. He was shot and injured on the left leg according to his evidence, and his leg was broken as a result.

[6] Having been shot, the police offered to take him to hospital. The plaintiff and his family however refused. They called paramedics who took him to hospital. In his evidence, the plaintiff testified that he refused to have the

police take him to hospital because he had a cut leg and the police would not be in a position to carry him in a proper manner.

[7] The plaintiff is the only witness who gave evidence in support of the plaintiff's case.

[8] Officer 3198 Constable Patson Mbhamali gave evidence for the defence. He was the only witness to be called. He testified that on the 8 November 2008 at around 01:30 hours he was patrolling together with Constable Makhanya around St Marks, Golf Course and Eveni. They were driving in a police motor vehicle registered SG 596 PO with police colours and had a police flasher lamp at the top. They were in police uniform and were both armed with R4 rifles.

[9] Constable Mbhamali further testified that whilst patrolling at Eveni they received a report about a robbery that had been committed at Pine Valley. The report was received through the police emergency line 999.

[10] They then proceeded to Pine Valley. Whilst driving and passing near Khula Guest House and turning to the right, with the police vehicle signalling for a right turn towards Pine Valley, they were overtaken by a white motor vehicle that was driving at high speed. Officer Mbhamali testified that the manner in which this motor vehicle turned, made them suspicious and

thought that something was not right. They then followed the motor vehicle with the police flash lamp turned on. This was to show, according to officer Mbhamali, that the motor vehicle they were driving in was a police vehicle.

[11] Officer Mbhamali further testified that they followed the vehicle and were stopping it at the same time. It was his evidence that they stopped the vehicle by using the police flash lamp and also flicking the head lights. They even used the vehicle horn (hoot) because the siren was not functioning but the car did not stop. It proceeded until it turned off the road and stopped at the gate of a particular homestead at Berverly Hills. The driver of the car opened the gate using a remote control. When the gate was half open the driver tried to drive through but knocked it because it had not completely opened. Thereafter he opened the door and alighted from the car and headed straight into the homestead.

[12] Officer Mbhamali also testified that he then noticed that the driver was Mr Vilakati. It was his evidence that he knew him because they played soccer together. He then called him by his surname **Vilakati** whilst his colleague officer Makhanya called him by the name **Castello**. The plaintiff did not stop but ran into the homestead and even left the door of the motor vehicle opened. Soon thereafter he came out with a huge brown dog that he unleashed and set on them. The officers shouted and told the plaintiff to control the dog and stop it from attacking them but he did not. Instead he continued to set it on them. He did so even when the police threatened to shoot it.

- [13] Officer Mbhamali testified that indeed the dog attacked them and was vicious. His colleague officer Makhanya was able to escape and entered the police car on the driver's seat side although he was not the driver. Officer Mbhamali walked backwards as the dog was pouncing on him. He also wanted to hide inside the police vehicle in the passenger's side. The dog however bit him when he reached the vehicle's door. It bit him on the right leg and the trouser of his police uniform was torn and left with a hole.
- [14] Having bitten officer Mbhamali, the dog ran back into the homestead yard but again quickly came back on attack. According to evidence submitted, officer Mbhamali then got an opportunity to shoot the dog as he could not earlier on. It was his evidence that the dog was too close to him earlier on and he feared that the bullet might hit the hard surface and ricochet and hit him as well. He however missed the dog due to the state of shock that he was in and he heard the plaintiff screaming. That is how, according to officer Mbhamali, the plaintiff was accidentally shot.
- [15] According to Mbhamali's evidence an ambulance thereafter arrived after having been called by the plaintiff's family. The officers called the shift officer at the police station inspector Gumedze who also came to the scene. Officer Mbhamali went to hospital afterwards because he was bleeding from the dog's bite. The trouser that he wore on the night was submitted as part of the evidence. It is a blue police trouser that was torn and had a hole on the portion that covers the right leg.

[16] The Plaintiff's contention is that the police had no reason or justification to shoot and injure him. The defendant, on the other hand, contends that the plaintiff was shot while the police were acting in self defence. It was pleaded that the plaintiff was shot while the police were shooting at the vicious dog that had been set on them by the plaintiff.

[17] In the particulars of claim the plaintiff *inter alia* states what is quoted below:

- “4. *On or about the 8th November, 2008 and at Plot No. 1433, Bervely Hills, Lusundvu Road, Mbabane, the Plaintiff was shot at and injured by certain members of the police force who are known to Plaintiff as Mbhamali and Makhanya of Mbabane Police Station, who were at all material times employed by the Defendant and were acting in the cause and within their scope of employment.*
5. *The said members of the Royal Swaziland Police Force had no reason to shoot and injure the Plaintiff.*
6. *As a result of the said shooting the Plaintiff was seriously injured on his lower left leg sustaining a fracture and deep shot gun wound on his lower left leg.”*

[18] The defendant on the other hand pleaded that the shooting was lawful and justified in the circumstances as the police officers were acting in self defence. The plea states as quoted below:

“2.2 Defendant however wish to aver that the shooting was lawful and justified under the circumstances in as much as the police were acting in self defence.

2.3 Defendant aver further that the Plaintiff attacked the police officers using a vicious dog, which bit the hell out of a police officer. Whilst shooting at the dog, the bullet hit a hard surface, ricocheted and hit the Plaintiff.”

[19] It was submitted on the plaintiff’s behalf that the first question for determination is whether or not there was a legal justification for the attempt to pursue and/or arrest the plaintiff on the date in question.

[20] It was submitted by the plaintiff’s attorney that based on the evidence submitted, the motor vehicle of the plaintiff and that of the police were driving towards the same direction as the plaintiff’s vehicle is said to have overtaken that of the police. The attorney argued that the inference to be drawn is that the plaintiff was not coming from Pine Valley where a robbery had been reported as both plaintiff and police were heading towards the Pine Valley direction. It was therefore his submission and argument that any suggestion to the effect that the plaintiff could have been coming from Pine Valley is spurious and improbable.

[21] It was further argued that there was no nexus (connection) on the reported robbery incident at Pine Valley and the plaintiff. This is because the evidence did not even suggests that the motor vehicle driven by the plaintiff

had a similar description to the vehicle that was involved in the robbery. There was further no evidence, it was argued, that the identity of the robber could be that of the plaintiff. For the above reasons, it was argued that there was no legal justification for the pursuit of the plaintiff.

[22] It was however submitted on behalf of the defendant that when the police vehicle signalled to make a right turn, the plaintiff's motor vehicle was to wait for the police vehicle to turn. Instead of waiting and allowing the police vehicle to turn, the plaintiff's vehicle overtook that of the police at high speed. This then caused the police to be suspicious about the motor vehicle as there was no reason, in their view, why the plaintiff's vehicle was so much in a hurry at that time of the night. It was around 01:30 hours.

[23] It was also submitted that the suspicion was justified because a robbery had just been reported and all of a sudden the plaintiff's motor vehicle came and drove past that of the police at high speed when the police vehicle was signaling to make a right turn. The police then signaled for the plaintiff's vehicle to stop but it did not, hence the pursuit.

[24] In his evidence, officer Mbhamali testified that whilst near Khula Guest House signalling to make a right turn towards Pine Valley direction, they were overtaken by a white motor vehicle that was being driven at high speed. They became suspicious of the motor vehicle because of the manner it overtook the police vehicle and the speed at which it was driven.

[25] They then followed the motor vehicle. They signalled for it to stop by using the police flash lamp to indicate that they were police officers. They also flicked the head lights of their vehicle and even sounded the vehicle's horn (hooter) because the siren was not functioning but the motor vehicle did not stop. They followed it whilst still signalling for it to stop until the vehicle turned off the main road and stopped at the gate of a homestead at Berverly Hills.

[26] It was put to officer Mbhamali during cross-examination that there was no justification for pursuing the plaintiff. His response was that there was a reason. As police officers they deal with offences on a daily basis and are entitled to stop all motor vehicles on the road including those that were not driven properly. He further testified that it is their duty as police officers to see to it that any suspiciously driven motor vehicle has not been used in the commission of a crime.

[27] It was further put to officer Mbhamali that since the plaintiff's vehicle overtook that of the police, the plaintiff could not therefore have been coming from Pine Valley where the robbery took place as both the police and plaintiff were driving towards the Pine Valley direction. Officer Mbhamali agreed but qualified his response by stating that there are many routes that could be used to run away from Pine Valley and they could not just simply turn a blind eye to the plaintiff's vehicle simple because it was now coming from behind them.

[28] On the basis of the evidence tendered in court, it is my finding that the plaintiff disregarded the police when they stopped him and he refused to stop. I am satisfied on the evidence that the police did all that they could to stop the vehicle that was driven by the plaintiff but plaintiff refused to heed their call to stop.

[29] I find it apposite to mention that by refusing or failing to comply with the directive of the police when he was signalled to stop, the plaintiff contravened section 7(1) (b) read with section 11(a) of the **Road Traffic Act No. 6 of 2007**. Section 7(1) (b) of the Act empowers a police officer when in uniform to require the driver of a motor vehicle to stop such vehicle. Section 11 (1) (a) of the Act compels all persons to comply with any such instruction or direction given to him by a police officer. The mandatory term “shall” is used in section 11. For ease of reference the two sections are reproduced below:

“7.(1) In addition to the functions assigned to a police officer/ traffic officer under this Act and any other law a police officer / traffic officer may –

(a)...

(b) when in uniform, require the driver of a vehicle to stop such vehicle,”

“11. (1) A person shall –

(a) comply with any instruction or direction given to him by an authorized officer or a police officer;”

[30] Section 2 of the Act defines ‘police officer’ to mean “*a member of the Royal Swaziland Police Force*”.

[31] On the night of 8th November 2008 the plaintiff was being stopped by members of the Royal Swaziland Police Force who were in uniform and driving a police motor vehicle that had police colours. He however did not stop. This conduct constitutes an offence in terms of section 122 of the Road Traffic Act of 2007.

[32] The plaintiff testified that he was not aware that he was being followed and stopped by police officers. He only took notice of their presence after he had stopped at the gate of his homestead.

[33] During cross-examination it was put to officer Mbhamali that the arrival at the gate of the plaintiff’s homestead was before 12:00 midnight. Mbhamali denied and maintained that it was around 01:30 hours as he testified in-chief. There is therefore no doubt that from the evidence, the incident giving rise to this action occurred at night at around midnight on average.

[34] The unchallenged evidence before court is that when the plaintiff was stopped, the police officers were driving in a police motor vehicle. The flash lamp of the police vehicle was turned on, the police vehicle’s head lights were flicking, and the police vehicle horn was sounded. The plaintiff’s

evidence is that he never saw the police and was unaware that he was being stopped.

[35] A further unchallenged evidence is that the plaintiff's motor vehicle overtook that of the police. In my view, it is highly unlikely that a driver of a motor vehicle can overtake a police vehicle that has police colours without noticing that he has overtaken a police vehicle.

[36] I take judicial notice of the fact that the police flasher lamp is quickly and easily visible at night. That is also true with flicking head lights of a vehicle. It is my finding on the evidence that the plaintiff's version is on a balance of probabilities untruthful and I accordingly reject it.

[37] Police have the right to stop speeding vehicles on the road, including vehicles that are driven in a manner that brings about suspicion. In the present case the evidence is that the police vehicle was signalling to make a right turn. Notwithstanding the signal for a right turn, the plaintiff's vehicle proceeded to overtake it.

[38] In my opinion and finding the police acted within their right and duty to stop the plaintiff's vehicle. The plaintiff was in turn duty bound to comply and stop the vehicle. He however did not do so. The police were acting within their right and duty to pursue the vehicle following its failure to stop.

[39] It was submitted on behalf of the plaintiff that there were no reasonable grounds to suspect that the plaintiff committed the robbery that was reported. Therefore it was argued that the intended arrest or the pursuit was unlawful.

[40] I have already made my determination and finding on the issue of the pursuit of the plaintiff by the police. I now must deal with the submission and argument that the police intended to arrest the plaintiff. It was argued on the plaintiff's behalf that the intended arrest was unlawful because the plaintiff was not reasonably suspected to have committed a crime at the time. It was also submitted that no warrant for his arrest had been issued and any intended arrest was therefore unlawful.

[41] The defendant's attorney correctly submitted in my view, that the issue of arrest was neither here nor there. The witness for the defence never testified that they intended to arrest the plaintiff. He also never testified that they had a warrant for the arrest of the plaintiff. That allegation is not made even in the defendant's plea. It simply has never been part of the evidence of the defendant. The allegation or argument that the police intended to arrest the plaintiff is unfounded and misplaced. It does not arise at all.

[42] I now proceed to determine the question of how the plaintiff was shot. In his evidence in-chief the plaintiff testified that on the 8 November 2008 he was

driving back home. He opened the gate of the homestead using a remote control. On this day he saw his dog going out of the gate yet ordinarily it runs around the car. When he looked at the direction of the dog he saw police officers parked nearby. The dog attacked the police officers, hence he stopped his car to assist the police from the dog attack.

[43] The plaintiff was asked by his attorney if he took notice that he was being followed by the police before he reached the gate of the homestead. His answer was that he did not. The plaintiff testified that he stopped the dog from attacking the police and moved it back into the yard of the homestead. The police wanted to shoot it but he pleaded with them not to shoot it. The dog then came back and attacked the police again. He continued to plead with the police not to shoot it but officer Mbhamali came back with the gun and tried to shoot it but the plaintiff was shot in the process.

[44] In paragraph 2.3 of the plea the defendant states that the police were attacked by the plaintiff using a vicious dog that bit the hell out of a police officer. Whilst shooting at the dog, the bullet hit a hard surface, ricocheted and hit the plaintiff.

[45] In his evidence officer Mbhamali testified that when the plaintiff opened the gate using a remote control, the gate opened half-way. Plaintiff then tried to drive through but knocked the gate since it was half open. Thereafter he opened the vehicle door and alighted and ran into the homestead. He even

left the vehicle door opened. According to the evidence, that is when officer Mbhamali realized that it was Mr Vilakati. He knew him because they played soccer together and had known him for a long time.

[46] Officer Mbhamali then called him by his surname **Vilakati** whilst his colleague officer Makhanya called him by the name **Castello**. The plaintiff did not listen to them but continued to rush into the homestead and came back with a brown huge dog that he set on them. He continued to set the dog on them despite that they told him to stop the dog from attacking them and that they will shoot it.

[47] In their attempt to avoid the attack by the dog, the officers sought refuge in the car, according to officer Mbhamali's evidence. Officer Makhanya entered the police car through the door of the driver's seat whilst officer Mbhamali was walking backwards as the dog was pouncing on him. Whilst opening the passenger's door, officer Mbhamali was bitten by the dog and left with a torn trouser. This evidence was not challenged by the plaintiff and was not denied either. The trouser was presented in court as evidence.

[48] Having bitten officer Mbhamali, the dog then ran back into the homestead's yard but made a quick turn again to attack the officer. It was at this point that officer Mbhamali shot the dog but the bullet missed it and hit the plaintiff.

[49] It was submitted and argued on behalf of the plaintiff that officer Mbhamali was negligent in shooting the plaintiff. The plaintiff's argument is that Mbhamali went to the police vehicle to retrieve the gun. It was further argued that the gun accidentally went off and the conclusion to be made is that it was not in the safe mode. It was further argued that the plaintiff was in close proximity to the dog and that Mbhamali, as a trained police officer with at least 25 years' experience and possessing knowledge in the use of guns, ought to have foreseen that carrying the gun whilst not in the safe mode carried the possibility of injuring the plaintiff.

[50] Reference was made to the case of **Kruger vs Coetzee 1966 (2) SA 428** where **Holmes JA**, at page 430, states the requirements of the negligence as follows:

“For the purpose of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) Would take reasonable steps to guard against such occurrence, and

(b) the defendant failed to take such steps.”

[51] **Holmes JA** went on to state that the question of whether a *diligens paterfamilias* in the position of the defendant would take any guarding steps, and if so, what steps would be reasonable, always depend upon the particular

circumstances of each case. The onus to prove what steps could and should reasonably have been taken rest on the plaintiff. **Kruger vs Coetzee (supra)** at p. 431.

[52] A submission was made on behalf of the plaintiff that officer Mbhamali went to the police vehicle to retrieve the gun. This is incorrect because in evidence Mbhamali denied whilst being cross-examined that he went back to the car to retrieve the firearm. His evidence was that service firearms are not left alone and they (police officers) always carry them when getting out of the police vehicles.

[53] It was also submitted that the plaintiff's evidence is that the firearm accidentally went off and it was argued that the evidence therefore leads to the conclusion that the firearm was not in the safe mode. By failing to keep the firearm in the safe mode, officer Mbhamali was said to have acted negligently. That submission is also incorrect. The plaintiff's evidence is that after he stopped the dog from attacking the police officers, the dog came back again and whilst the plaintiff pleaded with the police not to shoot it, officer Mbhamali came back with the firearm and tried to shoot the dog and the plaintiff was shot in the process.

[54] **Nathan CJ**, as then he was, citing with approval **S v Motleleni 1976 (1) SA 403** in **R v Sifundza 1970 – 1976 SLR 394 at 395**, states that “ *a person is entitled to apply such force as is reasonably necessary in the circumstances*

to protect himself against unlawful threatened or actual attack. The test whether he has acted reasonably is objective. But the court does not measure this with precision; it looks at the circumstances as a whole.” (own emphasis) see also: **R v John Ndlovu 1970 – 1976 SLR 389.**

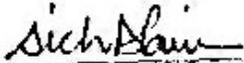
[55] In *casu*, officer Mbhamali was armed with the service firearm when being attacked by the dog. He was actually bitten by the dog and the trouser of his police uniform was torn and left with a hole from the dog’s bite. The dog then ran back into the yard of the homestead but again came back on attack. Officer Mbhamali then shot at the dog but the bullet hit a hard surface and ricocheted and hit the plaintiff. In my view and finding, officer Mbhamali acted in self defence. The plaintiff has failed to prove that he acted negligently. For this reason the action fails and is liable to be dismissed.

[56] I find it necessary to point out, for the purpose of guiding the plaintiff for a future litigation of a similar claim, that supporting medical documents and evidence of qualified medical practitioners are necessary. In *casu*, no medical document was furnished as proof that the applicant was injured and admitted in the hospitals as alleged. According to his evidence, plaintiff was admitted at the Mbabane Clinic, was also referred to Manzini Clinic, and was then admitted at the Nelspruit Medi-Clinic. No document was furnished to show the period for which he was admitted. No evidence was furnished as proof of the salary that he was earning and upon which the claim for the loss of salary is based. No medical evidence was furnished as proof of the

injury he sustained, and whether or not the injury is permanent. In my opinion the claims by the plaintiff are not supported by any clear evidence.

[57] It was submitted by the plaintiff's attorney that due to financial constraints, the plaintiff could not file a medical report detailing the nature, extent and costs of the injury suffered. This was, with due respect to Mr Shongwe for the plaintiff, never submitted in evidence by the plaintiff. It was not mentioned in the pleadings either.

[58] For the foregoing, the action fails and is dismissed with cost.



T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Plaintiff : Mr M. Shongwe

For Defendant : Mr V. Kunene