IN THE COURT OF APPEAL OF SWAZILAND

CIV. APPEAL NO. 2/2006

In the matter between

GUGU PRUDENCE HLATSHWAYO APPELLANT

And

THE ATTORNEY GENERAL RESPONDENT

Held at Mbabane

CORAM: BANDA, JA
RAMODIBEDI, JA
MAGID, AJA

HEARD: 5th May 2006

DELIVERED: 18th May 2006

SUMMARY

[1] Master and servant - Police officers shooting the deceased's husband to death - Claim for damages - Whether the killing justified under Section 41 (1) of the Criminal procedure and Evidence Act 67/1938 as amended - Requirements thereof

JUDGMENT

RAMODIBEDI, JA

[1] On the night of 23 April 2001 and at or near Matsapha, members of the Royal Swaziland Police Force ("the police") acting within the course and scope of their employment with the Government of the Kingdom of Swaziland, shot and killed the Appellant's late husband, Mfanzile Polotwane Hlatshwayo ("the deceased").

[2] The Appellant claimed in the High Court a sum of E850, 000-00 as compensation for the alleged wrongful killing of the deceased. She did so both in her personal capacity and as well as in her capacity as guardian of her child born of her relationship with the deceased.

[3] The High Court (Annandale AC J) dismissed the Appellant's claim with costs on the ground that the killing of the deceased

was justified under Section 41 (1) of the Criminal Procedure and Evidence Act 67/1938 as amended

("the Act"). Hence the present appeal. It follows that the sole question which arises for determination in this appeal is whether the court *a quo* was justified in arriving at the conclusion that it did. In this regard, it will be observed that the Appellant relies on no fewer than sixteen (16) grounds of appeal. What stands out like a sore thumb, however, is that all these grounds except grounds 1 and 16 are wrongly directed specifically against the "findings" of the trial court. An appeal, however, does not lie against the findings or reasons for judgment but only against the substantive order made by a court.

See for example, **Administrator, Cape and Another v Ntshwaqela and others 1990 (1) S.A. 705 (A) at 715 C -D.**

On this principle, therefore, I consider that only grounds 1 and 16 are sufficient to pass muster. Although these grounds clearly repeat one another, they seek to challenge the trial court's order to the effect that the killing of the deceased was justified in terms of Section 41 (1) of the Act.

[4] It proves convenient at this stage to reproduce Section 41 of the Act in order to appreciate the contest. It reads as follows:-

"41 (1) If any peace officer 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. (Amended A. 14/1991)".

[5] The offences mentioned in Part II of the First Schedule in turn include, for the purposes of this appeal, theft, either at common law or as defined by any statute.

[6] Turning to the facts of the case, I observe at the outset that the parties advanced two diametrically opposed versions un tne events leading up to the shooting of die deceased.

While the Respondent's witnesses testified that the deceased was shot while fleeing from a lawful arrest, the Appellant's sole witness, namely, Sicelo Nhlabatsi (PW1) sought to convey the

impression that the police summarily executed the deceased for no justifiable reason.

[7] Another observation requires to be made at this stage. It is this. By consent the parties agreed that since the onus was on the Respondent to show that the police were justified in shooting the deceased, the Respondent should be the first to call evidence. The following police officers then testified on behalf of the Respondent, namely, No. 3450 Constable Dumisani Gama (DW1), No. 4036 Thokozane Ngozo (DW2) and No. 3074 Woman Constable Florence Dlamini (DW3).

[8] In summary, the evidence of Respondent's witnesses show that on the night of 23 January 2001 at about 12.00 midnight they received a message through the police radio from Manzini Police Station informing all the police who were on the road at that particular time of the night that they should be on the lookout for a motor vehicle which had been taken at gunpoint at KaKhoza area. The message described the motor vehicle in question as a yellow Uno ("the Uno"), bearing registration number plate SD 955

BN. It was further stated in the message that the Uno was being towed by a red motor vehicle. Significantly, both DW1 and DW2 were out on patrol on the road when they heard this message.

[9] In due course the witnesses came across two motor vehicles matching the description given in the police message. It was a red Nissan Bakkie ("the bakkie") which was towing the Uno. This naturally aroused the suspicion of the witnesses. Hence they stopped to check but the driver of the bakkie who had been outside seemingly attending to "something" immediately ran back into the bakkie. He started the ignition of the bakkie and then drove off towards the direction of the University with the Uno still on tow.

[10] At this stage the witnesses made a U turn and followed the two motor vehicles in question. They again confirmed the descriptions from the Manzini Police. They could now clearly see the registration number plate SD 955 BN. Reassured that these were the vehicles they were looking for, they say that they tried to stop them with the intention of arresting the occupants thereof. The first attempt was to switch on the blue police flashing light. They also kept flicking their headlights at the same time. These signals to stop were however ignored, and so the chase continued with the flicking lights all the way until they were about to reach the University entrance or gate.

[11] It is the evidence of these witnesses that at some stage they drove parallel with the driver of the bakkie. DW1 then opened

his window on the passenger side and actually talked to the driver of the bakkie ordering him to stop on the side of the road. This instruction was once again ignored. There were three occupants in the bakkie. DW1 called for reinforcement from Matsapha Police Station and Malkerns Police Station respectively. They continued to give chase behind the Uno. Meanwhile the response from Matsapha Traffic Patrol was that they were busy. No response came from Malkerns Police Station.

[12] In yet another attempt to stop the two motor vehicles in question, Respondent's witnesses say that they overtook them and tried to block the road at the junction towards Matsapha circle. Still the bakkie drove off. The witnesses continued the chase until the rope that was used to tow the Uno broke. At this stage the Uno gained speed apparently due to the downward slope at the area.

[13] When it reached the traffic circle, the bakkie drove in the direction of Manzini and thus escaped. The Uno drove around the circle and then took the old road from Matsapha to Mbabane, towards Mahlanya. It kept making turns on the dirt road until it suddenly stopped and the doors were opened. Two occupants alighted from the Uno. The witnesses stopped at a puddle or dam of water on the road. DW1 started running after the suspects on foot. Significantly, he testifies that he shouted

at these people to stop because he and DW2 wanted to arrest them. He also shouted that they were police officers. These suspects however kept running towards the main road.

[14] Realising that the suspects from the Uno were not prepared to stop, both witnesses say that they then fired warning shots but to no avail. The suspects increased speed. At this stage both witnesses fired a shot each aiming in the general direction of the suspects in order to incapacitate them so that they could effect an arrest. Significantly, DW1 testifies that it was difficult to take a proper aim as the suspects were running and the witnesses were also running. Moreover, it is not disputed that the suspects were running along a footpath which went through the bushes but leading to the main road. I have no hesitation in accepting in the circumstances that taking a proper aim would have been very difficult indeed.

[15] It is the witnesses' evidence that after shooting in the general direction of the suspects they then saw the driver of the Uno fall down. It turned out that this was the deceased. Regrettably he was certified dead upon arrival at the hospital.

[16] Back at the Uno, DW1 found PW1 hiding inside the motor vehicle. He arrested him "for theft of the motor vehicle at KaKhoza area".

[17] As alluded to in paragraph [6] above, PWl's version was diametrically opposed to that of the Respondent's witnesses. He testified in chief that he knew the deceased as a colleague. In cross-examination however, he said that he was employed by the deceased or that the latter had helped him find a job. On the night in question he left with the deceased at about 12.00 midnight to go and collect the deceased's motor vehicle, namely the Uno, from one Skorokoro at KaKhoza area. It turned out in cross-examination that there was "some dispute over the payment" for the Uno. The deceased then decided to go and tow away the motor vehicle in the middle of the night.

This, without informing the people in the premises where the vehicle was parked. This, as it seems to me, would justify the reason why there was a message run over the police radio informing the police to be on the lookout for a motor vehicle which had been taken at gunpoint at KaKhoza area. It follows in my judgment that Respondent's witnesses had reasonable cause to believe that the deceased and his companion had committed an offence, namely, theft within the Meaning of Section 41 (1) of the Act. I should add at the outset that I did not understand the Appellant's counsel to contest the soundness of this proposition.

[18] In brief, PW1 confirms that a police motor vehicle driven by DW2 did follow them and that it was indeed flashing a blue light at all times. He confirms that they failed to stop. Incredibly, he says that the police flashing light was the only source of light they had at the time because their car had no lights. The police gratuitously provided the light for them.

[19] Yet at some point, PW1 confirms that the police drove very close to the Uno. So close that when the Uno came to a halt the police bumped it from behind. He says that it was at this stage that the deceased alighted from the Uno.

As he was just closing the door of the Uno, the deceased was shot by the police officer who was seated as a passenger in the police vehicle. I should observe at this stage that if this version is believed it would mean that the deceased was shot in cold blood and for no apparent justification.

It is however important to note that after seeing and hearing PW1 give evidence, the trial court made very strong credibility findings against him. He described him as "a totally unreliable witness who fabricated evidence in a wholly unsatisfactory manner". With justification, as it seems to me, he refers *inter alia* to the glaring improbability inherent in PWl's version to the effect that he thought the police flashing blue light was an attempt by the police to render assistance to them as their car had no lights. As a parting shot, the

learned trial Judge sums up the question of PW1 's credibility in these terms :-

"It is not frequently that this court hears a witness with such scant modicum of veneer to be economical with the truth "

These are very strong credibility findings indeed. In this regard it is well established that an appellate court will generally not interfere with findings of a trial court in the absence of a material misdirection. This is so because a trial court enjoys advantages which an appellate court does not have. It is steeped in the atmosphere of the trial and as such it is in a position to see and hear witnesses as well as to observe their demeanour and thus draw its own impression of them.

See **Rex v Dhlumayo and Another 1948 (2)** S**.A. 677 (A).**

[21] On the other hand, it is pertinent to note that after duly subjecting the evidence of Respondent's witnesses to a thorough critical analysis, the trial court came to the conclusion that although such evidence had its own rough edges, it was nevertheless in accordance with probabilities. The court thus accepted their version. In my view this conclusion is fully justified both on the facts and in law as set out in the preceding paragraph.

[22] Now reverting to Section 41 (1) of the Act as fully reproduced in paragraph [4] above, it is right to say that there are four essential requirements which a person relying on this section must satisfy before a defence of justifiable killing may succeed, namely:-

(1) that he/she had reasonable cause to believe that the deceased had committed an offence mentioned in the First Schedule;

(2) that he/she had attempted to arrest the deceased;

(3) that despite such attempted arrest the deceased had fled or offered resistance; and

(4) that there was no other way of arresting the deceased but to kill him.

See for example **R v Britz 1949 (3)** S.A. **293** (A).

[23] Regarding the first requirement, and as pointed out in paragraph [17] above, uncontested evidence shows that the Respondent's witnesses had reasonable cause to believe that the deceased had committed theft which is an offence mentioned in the First Schedule to the Act.

[24] In so far as the second and third requirements are concerned, it is not seriously contested that the police (DW1 and DW2)

attempted to arrest the deceased and his companions and that despite such attempted arrest they had fled. The trial court's findings in this regard were fully justified on the facts.

[25] In this Court, Mr. Ntiwane for the Appellant concentrated heavily on the fourth requirement. He sought to convey the impression that the police were negligent in failing to resort to alternative methods of arresting the deceased rather than shoot him. He submitted, for example, that:-

(1) Since the police "knew and saw that the deceased and the other suspects were running towards the main road, they could have driven up the road and could have overtaken the deceased and his colleague".

(2) In any event, so the argument continues, the police should have shot the deceased in the legs.

[26] In my view, this submission amounts to armchair criticism, being wise after the event. It ignores the objective factors, namely, that the police were confronted with a fast moving scene which happened at night and in circumstances where the deceased and his companion ignored police warning shots. The evidence as correctly found by the trial court shows that the deceased and his companion ran away on foot following a footpath that went through the bushes. It follows that the police could not chase them in their police car which in any event is said to have been blocked by the Uno at that stage. Nor can

one ignore the uncontested police evidence that the deceased and his companion outpaced them apparently running into the darkness and to safety.

[27] The fact that the deceased's companion did succeed in running to safety supports the police version. How, in these circumstances, it could reasonably be expected that the police who were running would take careful aim at running targets and more particularly at the deceased's legs, in the dark and also bearing in mind the bushes thereat, is not apparent to me. This submission is in my view unrealistic and was correctly rejected by the court *a quo.* I conclude therefore that the court was justified in finding that there was no other way of arresting the deceased but to kill him. Hence the fourth requirement to Section 41 (1) of the Act has been satisfied.

[28] In the light of the foregoing considerations, if follows that the trial court's conclusion that the killing of the deceased was justified under Section 41(1) of the Act was correct in the peculiar circumstances of the case.

[29] It remains for me to say one last word of caution as courts have often held. Bearing in mind the sanctity of human life, the Legislature obviously intended Section 41(1) of the Act to be strictly interpreted so as to preserve life where this can

reasonably be done. It behoves courts therefore to closely scrutinize the circumstances surrounding the killing of a person fleeing from or resisting arrest in order to determine whether the four requirements set out in paragraph [22] above have been satisfied. Each case will obviously depend on its own peculiar circumstances.

See **Mazeka v Minister of Justice 1956 (1) S.A. 312 (A) at 316: Labuschagne v R 1960 (1) S.A. 632 (A) at 640.**

[30] Before closing this judgment, it is a matter of regret that I have to comment on the remarks made by Mr. Ntiwane for the Appellant in his Heads of Argument as these have caused this Court a lot of distress. On page 22, subparagraph 11.9 of his Heads of Argument, Mr. Ntiwane quotes the following remarks of the court *a quo* concerning PW1:-

"11.9 To accept his evidence as even possibly true would be to commit a serious error of judgment. His evidence of the events during the police chase, the collection of the Uno and inherent improbabilities thereof are so wholly unsatisfactory and untrue that it deprives his further evidence relating to the shooting of the possibility of being acceptable as possibly true".

On page 23 sub-paragraph 11.10, Mr. Ntiwane then attacks the learned Judge *a quo* in the following terms:-

> *11.10 It is submitted that such criticism of the witness PW1 was unwarranted and was done mala fide as clearly the witness was not shaken or discredited under cross-examination ".* (My own underlining.)

[31] Now, to say that a judicial officer, let alone the Chief Justice, acted *mala fide* is undoubtedly an insult of the first order. It cannot be deprecated strongly enough especially coming as it does from counsel of Mr. Ntiwane's experience. It is deplorable and irresponsible language that can only bring the justice system as well as the legal profession in this country into disrepute. It cannot be stressed strongly enough that it is the hallmark of our judicial system that it is indeed the duty of every legal practitioner to treat the courts with courtesy, decency and respect. It is for this reason that this Court immediately pulled up Mr. Ntiwane on the issue. In fairness to him, he promptly and unreservedly apologised for his unfortunate remarks. One hopes that it will never again be necessary for this Court to have to deal with a similar issue in future.

[32] Reverting to the merits of the appeal, it follows from the foregoing considerations that the appeal must be dismissed with costs. It is so ordered.

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

R.A. BANDA JUSTICE OF APPEAL

I agree

P.A.M. MAGID, ACTING JUSTICE OF APPEAL

For Appellant: MR. C. NTIWANE

For Respondent: ADVOCATE J.M. VAN DER WALT