IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. CA 72/2017

THANDELAKHE DOBELA **1st Appellant**

ALINDILE GOQOLO **2nd Appellant**

and

THE MINISTER OF POLICE **Respondent**

JUDGMENT

BROOKS J

[1] On 21 February 2017 judgment was delivered on the merits of the appellants' claims for damages which came before the court *a quo* consolidated in a single action. An order was made as follows:

> "1. The plaintiffs' claims are hereby dismissed.
>
> 2. The plaintiffs are hereby ordered to pay the defendant's costs jointly and severally one paying the other to be absolved."

[2] An application for leave to appeal against the whole of the judgment was served and filed on 23 February 2017. On 3 March 2017 the appellants were granted leave to appeal to the full court against the whole of the judgment of the court *a quo.* It was further ordered that the costs of the application for leave to appeal shall be costs in the appeal.

[3] In the particulars of claim it is alleged that a relative of the appellants (the deceased) was shot on 30 July 2014 by a member of the South African Police Service. It was alleged that in shooting the deceased the member concerned assaulted the deceased alternatively acted negligently in one or more of the ways set out in the particulars of claim, causing the death of the deceased and giving rise to the claims for damages.

[4] In an amended plea served and filed on 22 August 2016 the defendant admitted only the names of the appellants. All the remaining elements of the particulars of claim were denied. The only allegation made in amplification of the denial was expressed as follows:

> "In amplification of the denial, the defendant pleads that the shooting of the plaintiff (sic) was neither wrongful nor negligent as it occurred in circumstances where the police officer concerned with the shooting of Bhekisisa Dobela (the "deceased") was defending himself against the deceased who was attacking him with a bush-knifer."

[5] It is apparent from the record that Mr Dukada, who appeared on behalf of the appellants in both the court *a quo* and in this court together with Ms Mncotsho-Boya, had prepared a written opening address. Therein it was

recorded that at trial stage the defendant admitted that the deceased had been shot by a member of the South African Police Service who was acting in the course and the scope of his employment by the defendant. The first issue to be determined was whether or not the deceased had advanced towards a policeman armed with a bush-knife and a shield. The second issue, which would arise for determination only if the court found that the deceased had advanced towards a policeman armed with a bush knife and shield, was whether the shooting of the deceased was justified as self-defence in the circumstances.

[6] The parties' legal representatives were in agreement that the respondent bore the *onus* of proof in respect of the justification for the shooting.

[7] Inevitably, mutually destructive versions of the events of the day in question were given by the appellants and the witnesses for the respondent in their evidence. In considering the mutually destructive versions, the court *a quo* found the appellants' version "not to be supported by the probabilities" and the version of the policeman concerned to be "supported by probabilities." Thereafter, the enquiry as to whether the means of defence selected by the policeman was commensurate with the danger he faced and justifiable, or not, was answered in favour of the respondent.

[8] In the notice of appeal the submission is made that when faced with the mutually destructive versions the court *a quo* did not apply the accepted principles of evidential analysis correctly, resulting in the erroneous outcome and permitting the interference of this court on appeal.

[9] It is apparent from the judgment that the court *a quo* considered the manner in which the appellants gave evidence to be "spontaneous". The observation made was that the appellants "showed no sense of sophistication." These are positive attributes which carry connotations of honesty. The main reasons for rejecting their evidence appear to have been expressed as follows:

> "Having said that I find gaps in their version. If I were to believe that the deceased was not in possession of a bush knife, I need to find that somehow the police planted it on the scene. Then the question would be, how would they have known that under a substantial pile of poles as depicted in Exhibit "A", was a bush knife, retrieve it and plant it next to the deceased. As for not mentioning it in the statements by the police officers at the scene, in my view the weapon was in the photos already. What would have angered the police to the extent of shooting the deceased for merely asking why as legal people wold they kick the door? If the police had firearms, handcuffs and pepper sprays, why would they not over power a barehanded man. What would make sergeant Dlamini who was not even part of the altercation to just get in and shoot. The second plaintiff was at pains in explaining whether the deceased was aware of the whereabouts of the bush knife. She had said he was not but at the same time also said he is the one who packed the poles on top of the bush knife. To this extent I find their version, that the deceased did not have a bush knife, not to be supported by the probabilities. It is very possible that they did not see everything that happened that day due to their emotional state and or the speed at which the events unfolded. Despite the fact that sergeant Dlamini was a single witness as to the shooting, his testimony is supported by probabilities as relating to the rest of the evidence."

[10] In my view, the portion of the judgment of the court *a quo* quoted in the preceding paragraph demonstrated insufficient evaluation of the following factors in the evidence:

- the position of the bush knife as depicted in Exhibit "A", a set of photographs depicting the scene after the shooting;

- the appearance of the stack of poles in Exhibit "A";

- the position of the shield as depicted in Exhibit "A";

- the position of the entry and exit wounds on the body of the deceased as recorded in the *post mortem* report;

- the evidence of sergeant Dlamini as a single witness in the relation to the shooting and the justification therefor.

In the circumstances, in my view there is merit in the submission made on behalf of the appellants to the effect that the legal principles applicable to the evaluation of the mutually destructive versions emerging from the evidence were applied inadequately by the court *a quo* in determining the issue of the liability of the respondent. Accordingly, it is appropriate that this court revisit the evidence on appeal.

[11] The approach to be adopted when dealing with the question of *onus* and the probabilities was outlined by Eksteen JP (as he then was) in *National Employers' General Insurance Co Ltd v Jagers,*[1] as follows:

> 'It seems to me, with respect, that in any civil case, as in any criminal case, the *onus* can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the *onus* rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version 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

[1]1984 (4) 437 (E) at 440D. See also *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 1 SCA at para 5 and *Dreyer v AXZS Industries* (PTY) Ltd 2006 (5) SA 548 (SCA) at 558-G.

> allegations against the general 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 that the defendant's version is false.'

[12] In *Santam BPK v Biddulph*[2] the correct approach to such disputes was stated to be as follows at 589G:

> "It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration."

[13] In my view, no basis exists for the view that an acceptance of the appellants' version that the deceased was not in possession of a bush knife requires a finding to be made that the police planted it on the scene. It was not disputed that the deceased used a bush knife to prepare poles and that these poles were stacked in the room. They appear in photograph 8 of Exhibit "A". The bush knife appears in photograph 9 of Exhibit "A". Judging by the size of a large plastic bowl also depicted in photograph 8 of Exhibit "A", the bush knife appears to be lying approximately a metre and a half from the pile of poles. They appear in no way to have been disturbed and present in the photograph as a neat stack against the wall. The bush knife, which according to sergeant Dlamini was being wielded by the deceased in his right hand, is depicted in the photograph above the left shoulder of the deceased. Its thicker "business end" is pointing towards the deceased and it is lying parallel to the wall. If the

[2] 2004 (5) SA 586 (SCA).

evidence from the police were correct, one would have expected the pile of poles to have been disturbed by the deceased in a hasty removal of the bush knife from underneath the poles and for it to be lying somewhere on the right hand side of the deceased and in a position which reflects the mobility of the deceased in the instant before his death. In sharp contrast, the bush knife gives every appearance of having been laid neatly next to the wall and in the vicinity of the neat stack of poles at the end of the working day. The position of the bush knife is not explained by the evidence of the appellants. However, equally, it is not explained by the evidence of sergeant Dlamini. It is also significant that notwithstanding the centrality of the bush knife to the version of the police, the bush knife is not the subject of a more specific photograph in Exhibit "A" and is not even identified by a marker in the photograph in which it does appear. If the police version is a fabrication, it may well be that the bush knife was visible and in a different position closer to, or partially under some of the poles in the front of the stack, or indeed in the position in which it appears in the photographs. Therein may be an answer to the theoretical question asked by the court *a quo* about how the police would have known of its whereabouts. The opportunistic decision to claim that it was wielded by the deceased then falls far short of activity which would be required to show that the police "planted it on the scene".

[14] Moreover, in my view the position of the bush knife in the photograph in Exhibit "A" *per se* does not militate against an acceptance of the appellants' version that the deceased was not armed with the bush knife. The only aspect which is irreconcilable with their version is that the evidence of the second appellant creates the expectation that the bush knife should have remained, impractically, where she said the deceased put it, under the pile of poles. Looking at the undisturbed pile of poles depicted in Exhibit "A", on either

version it seems unlikely that the bush knife was removed from under the pile of poles in a frenzy. This means that on either version it is unlikely that the deceased would have placed it under the pile of poles in the first place. In my view, in suggesting that he did so the first appellant may well have been mistaken, possibly because of one of the sociological factors relating to levels of sophistication and opportunities for observation referred to by the court *a quo* in assessing the appellants' evidence. This does not mean that the first appellant was being dishonest on the point and that her evidence is tainted and falls to be rejected. This is particularly so where her evidence is corroborated substantially in other important aspects by the evidence of the second appellant.

[15] According to the evidence of the police, when the deceased armed himself with the bush knife he also armed himself with the shield, holding the shield in his left hand as he wielded the bush knife in his right hand. In the relevant photographs in Exhibit "A", the shield is depicted lying on the right hand side of the deceased and at some distance from him. Two observations arise from this objective evidence. Firstly, if the evidence of the police was to be accepted, one would have expected the shield to have been located somewhere at the left hand side of the body of the deceased after he was shot. Secondly, and importantly, it appears to have been common cause that prior to the shooting the shield was hanging on the wall at a position in the room which was just above, or at least in close proximity to, the place where the shield is shown in the photographs.

[16] It was the evidence of the appellants that the catalyst for the shooting was the activity of the deceased in reaching up to remove the shield from the wall. According to their evidence, immediately upon seeing this, sergeant Dlamini

shot the deceased. The position of the shield on the floor directly below, or at least in the vicinity of, the place where it had been hanging on the wall is consistent with this version.

[17] No challenge was made to the accuracy of the content of the *post mortem* report prepared in respect of the deceased and which formed part of the bundle of documents discovered by the respondent. The content thereof which records the findings of the medical practitioner conducting an external examination of the deceased's body reads as follows:

> "**External examination:**
>
> 1. Perforating gunshot wound to the chest.
>
> (a) **Entry wound**
>
> 15 x 10mm oval gunshot entry wound on the left chest wall in the mid-axillary line, 30mm from the midline and 1310mm above the heel. There is a surrounding ring of abrasion on the inferior aspect of the entry wound. The central defect measures 5 x 5mm. There is no soot blackening or tattooing around the entry defect.
>
> (b) **Exit wound**
>
> 15 x 10mm gunshot exit wound on the right chest wall, 210mm from the midline and 1410mm above the heel. The edges of the exit wound are irregular.
>
> (c) **Wound track**
>
> The wound track enters on the left chest wall through the 7th intercostal space, and perforates the lower lobe of the lung, through the heart sac, perforating the right atrium of the heart, and across the midline perforating the middle lobe of the right lung and out through the 5th intercostal space in the anterior axillary line. The wound track is associated with 1000ml blood in the left chest cavity and 800ml blood in the right chest cavity and 100 ml

> blood in the heart sac. The direction of the wound track is from the left to the right and slightly upwards."

[18] It was the evidence of the appellants that the deceased had been shot whilst he was reaching for the shield which was hanging on the wall. This involved a twisting motion by the deceased towards the right of his body as he reached for the shield. The entry and exit wounds of the gunshot are commensurate with a shot being fired at the deceased from a position somewhat to the left of him as he made a reaching or stretching movement as described by the appellants. So, too, is the slight upward path that the bullet appears to have travelled through the deceased's body.

[19] In contrast, the objective evidence of the entry and exit wounds on the deceased's body and the slight upward path of travel of the bullet as it moved through his body is more difficult to reconcile with the respondent's version of how the shooting took place. According to sergeant Dlamini the deceased was advancing towards him with the bush knife and the shield, demonstrating a clear intention to "chop" the sergeant with the bush knife. In the absence of any direct evidence to indicate the contrary, it is a reasonable inference to draw from this description that the deceased was facing the sergeant "head on" as he advanced. How it came to be that in these circumstances the sergeant shooting at the deceased with a rifle should have caused an entry wound on the left hand side of the deceased's body and an exit wound at a slightly higher point on the right hand side of the deceased's body is difficult to imagine. In my view, this difficulty has an important impact upon an assessment of the probabilities inherent in the version offered by sergeant Dlamini.

[20] Whilst there is no specific "cautionary rule" in respect of the evidence of a single witness in civil proceedings, when a court is faced with the uncorroborated evidence of a witness it must be satisfied that in all material respects that evidence is satisfactory and credible before it can be accepted.[3] This is particularly so when such uncorroborated evidence is sought to be relied upon by a party in the discharge of an *onus* placed upon it.

[3] DANIELS v GENERAL ACCIDENT INSURANCE Co. LTD 1992 (1) SA 757 (C)

[21] It is common cause that before shooting the deceased sergeant Dlamini fired no warning shot. Nor did he take any action aimed at blocking the attack which he claimed was imminent, or to evade it in any way. Under cross examination he gave a number of reasons for not firing a warning shot or for not shooting the deceased in a less vital part of his body. The implausibility of the reasons he offered and the lack of consistency therein demonstrated by his answers have a detrimental effect upon his credibility. This is aggravated when his answers are evaluated against the objective facts which emerged from the evidence and as an integral part of the assessment of the probabilities inherent in the different versions which emerged from the evidence. In my view, sergeant Dlamini could be described best as a defensive witness. The effect of the defensiveness was the production of implausible evidence which, when standing uncorroborated, cannot be relied upon as credible evidence.

[22] In my view, on a conspectus of all the evidence placed before the court *a quo*, the version given by the appellants is supported by the objective factors identified in this judgment. If the remaining obstacle to an acceptance of their version is the argument raised on behalf of the respondent to the effect that it is against the general probabilities that a policeman would shoot an unarmed man, in my view this obstacle is not insurmountable. It is common cause that the deceased was singularly unimpressed by the inconsiderately timed and invasive visit to his home by the police. They were resilient in the face of the deceased's vociferous expression of his outrage. On the appellants' own version the deceased reached up for a shield hanging on the wall in his room. Regrettably, it is not unheard of for a sudden movement made by an angry person to be misinterpreted by a person against whom the anger is directed to be more sinister or threatening than it really is. Where, in such circumstances, the person who feels threatened is armed, regrettably the result is sometimes a shot fired in panic which is later revealed to have been an unnecessary over reaction.

[23] In my view, it is more probable that a tragic over reaction by sergeant Dlamini occurred than that the deceased should have armed himself with a bush knife and a shield, in the presence of two armed policeman, and to have succeeded in confronting these policeman, and evicting them from his home notwithstanding that one of them was pointing a pistol at him, to then turn upon

a third policeman who was armed with a rifle. In other words the probabilities inherent in the appellants' version are more evident and extensive than the probabilities inherent in the respondent's version.

[24] If the conclusion reached in the preceding paragraphs is erroneous, then in my view an evaluation of the probabilities inherent in the mutually destructive versions reveals that at the very least they are equal, in the sense that they do not favour the one version any more than the other.

[25] Where the respondent bears the *onus,* neither the finding that the probabilities inherent in the appellants' version outweigh those inherent in the respondent's version nor a finding that the probabilities inherent in both versions are evenly matched is of assistance to the respondent.[4]

[26] In my view, even if one were to accept for the purposes of the argument that the respondent's version of how the shooting occurred should be accepted, the explanations offered by sergeant Dlamini for his failure to fire a warning shot, or his failure to fire a shot at a less vital part of the deceased's body are not convincing. It is clear from their evidence that the policemen originally inside the room with the deceased saw him pick up both the bush knife and the shield, from different parts of the room. Why was he permitted to do so without intervention of any sort? Why was the deceased successful in evicting the two policemen from his room without being restrained? Why was no warning shot fired? The evidence of sergeant Dlamini claims that, although things moved quickly, he had the opportunity to observe the eviction of his two fellow officers by the deceased. No cogent reason was given by him for his failure to intervene and restrain the deceased. When the deceased turned his attention to sergeant Dlamini, why could the latter not use his unloaded rifle as a weapon to block the deceased or to knock him off balance? Instead he chose to cock the rifle and to fire a shot at the deceased. Even if one accepts all the explanations given by sergeant Dlamini up to that point, in my view an all important question remains unanswered. Why did sergeant Dlamini not ensure that the shot he fired was directed at the legs of the deceased? In all probability this would have

[4] Note 1 *ibid*

prevented the deceased from completing his attack. The suggestion that this would have required him to aim, which he had no opportunity to do, is ridiculous. That suggestion was the core of his explanation for not doing so. In my view, it is not an acceptable explanation when it is offered by a policeman trained in the use firearms whose primary duties include the prevention of crime and the prevention of unnecessary loss of life. It is entirely reasonable to expect such a police officer to be able to use the firearm in his possession in as restrained a manner as possible. The failure on the part of sergeant Dlamini to do so was unacceptable, unjustified and unnecessarily cost the deceased his life.

[27] It follows that in my view the respondent failed to discharge the *onus* of proving on a balance of probabilities that sergeant Dlamini shot the deceased in self-defence and in circumstances where the shooting did not exceed the reasonable bounds of self-defence and was justified accordingly.

[28] The following order will issue:

> "1. The appeal succeeds with costs, such costs to include the costs occasioned by the use of two counsel.
>
> 2. The order of the court *a quo* made on 21 February 2017 is set aside and replaced with the following order:
>
> '1. The defendant shall be liable to the plaintiffs in their personal and representative capacities, where applicable, for the payment of such damages as the plaintiffs may prove, or as the parties may agree, to have arisen from the death of Bhekisisa Dobela on 30 July 2014;
>
> 2. The defendant shall be liable for the payment of the plaintiffs' costs of suit to date, such costs to include the costs occasioned by the use of two counsel and to bear interest at the prescribed rate of interest calculated from a date fourteen days after *allocatur* to date of payment.'"

RWN BROOKS

JUDGE OF THE HIGH COURT

TOKOTA J:

I agree.

BR TOKOTA

JUDGE OF THE HIGH COURT

NOMJANA-NDZONDO AJ

I agree.

B NOMJANA-NDZONDO

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

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Date heard:	10 November 2017
Date delivered:	28 November 2017