

IN THE HIGH COURT OF SOUTH AFRICA  
(TRANSVAAL PROVINCIAL DIVISION)

Case No. 40431/2005

11 November 2008

IN THE MATTER BETWEEN:

L.S Nkomo

Plaintiff

And

Minister of safety &

security + 3 others

Defendants

---

## Judgment

---

RAULINGA J

This matter relates to an alleged assault in that an official of the defendant fired a rubber bullet which injured the plaintiff. The defendants contend that the shot was fired lawfully out of necessity.

The plaintiff claims damages to the tune of R124 000 for hospital expenses, loss of income and general pain and suffering.

The plaintiff is Lesley Stanley Nkomo an adult male employed as a taxi driver and residing at 25430 Phase 4, Mandela Village, Mamelodi East, Pretoria.

The First Defendant is the Minister of Safety and Security with offices situated at 225 Thibault Arcade, Pretorius Street Pretoria.

The Second Defendant is the National Commissioner of SAPS 7<sup>th</sup> floor, Wachthuis, Thibault Arcade, Pretorius Street, Pretoria.

The Third Defendant is the Station Commissioner of Mamelodi Police Station.

The Fourth Defendant is Constable F Smith an adult male with force no 0544144-7 who is under the supervision of the Third Defendant.

Only the merits will be dealt with, and the quantum is postponed *sine die*.

The defendant bears the duty to begin.

The defendant called the following witnesses:

Koos Thobane:

He is a superintendent in the SAPS – with more than 19 years service as a police officer. On the 3<sup>rd</sup> May 2003 he was a Captain in the SAPS stationed at Mamelodi Police Station. He was on duty in the company of Inspector Mokonyane when the complainant Glory Chabalala reported to them that she was assaulted by a certain Robert. As a result of the report they accompanied the complainant to the scene of the incident at Mamelodi East

where the complainant pointed out Robert. There were a number of people, apparently, attending a party at the said house. When they arrived they announced their presence as police officers. When they attempted to arrest Robert, he became violent and the crowd started to swear at them. The suspect, i.e. Robert then bolted through the gate and inspector Mokonyane followed him. He tried to calm the crowd but in vain. Since their lives were in danger (the police officers) he summonsed a back-up and in response Constable Smith arrived with other colleagues. He was still busy in the premises trying to calm the crowd when he heard the sound of gunfire. The plaintiff was shot and injured and as a result he was conveyed to hospital by ambulance.

They took the complainant to the police van because the crowd was threatening to assault her. They couldn't let her go alone because her life was in danger.

The defence then handed in a bundle as exhibit "A".

Cross-examination by Mr Kok

The witness was in control of the incident because he was the most senior police official. He didn't notice the other police vehicles, because he was concentrating on calming down the members of the public, who were harassing the police and threatening to assault the complainant. The crowd was preventing the police from arresting the suspect. The complainant didn't sustain visible injuries as a result of the assault on her by the suspect. It is the duty of police officers to arrest a suspect once a complaint is laid. They didn't ask the complainant if she knew the suspect's residential address or not, but she pointed out the place to them. Although the case opened was for a common assault, he had the duty to protect the complainant. He knows that he does not have to arrest everybody, but in this case, the complainant was frightened and fearful of the crowd. He didn't act outside the police standing orders. He had investigated the matter before proceeding to the scene. There are other alternatives instead of arrest, but in this instance, he had no alternative because the complainant was threatened. Robert was not arrested on that day because he ran away.

(At this stage Mr. Kok produces a bundle as exhibit "B". He reads paragraphs 2 + 6 of Circular 26/5/1 issued by the National Commissioner on the 9<sup>th</sup> May 2005)

Referring to the circular, the witness answered as follows: “It was one of those instances in which we had to arrest”. At that stage the complainant was not in danger because she was in the company of police officers.

He didn’t see Constable Smith arrive, but he heard his voice. Smith submitted a statement, but he does not know the contents of the statement. Smith told him that he shot the plaintiff and nothing further. Inspector Mokonyane never told him what happened. Inspector Mokonyane followed the suspect as he was running away. No police officer was injured in the incident only that Inspector Mokonyane’s hat-dress fell. He didn’t see Smith follow anybody, but he heard the gunshot from the direction where the suspect was. The Plaintiff assaulted Inspector Mokonyane. Inspector Mokonyane explained to him what had happened – he told him that his hat-dress fell. Inspector Mokonyane didn’t tell him who assaulted him (It can be mentioned that at that stage the witness was referred to the statement in which he had said that Inspector Mokonyane told him that he was assaulted by the Plaintiff. The witness then changed his statement and said that he saw the Plaintiff assault Inspector Mokonyane.) There were a number of exhibits picked from the scene, e.g. rubber bullets

Glory Chabalala

On the 3<sup>rd</sup> May 2003 she laid a complaint of assault at Mamelodi Police Station. On that day at about 17H30 she was on her way to the shop when she was assaulted by one Robert with an open hand. There were many people in the house of the suspect. Robert insulted her after the assault and his sister fought with her. They threw stones at her and she ran away and went home. She thereafter went to the Police Station to report the matter and the police accompanied her to the said house. The police took her to the scene at about 22H00. She pointed Robert to the police. She remained in the police van because the crowd was swearing at her. She saw the police take Robert away. She then heard gunfire. Thereafter the police took her home. She does not know who was shot.

Cross Examination by Mr. Kok

She knows Robert. She knew where he lived. She showed the police his home. There was a party at Robert's house. She was not injured because he only hit her with an open hand. She didn't receive any medical treatment. It

was a serious assault because she was threatened by Robert and the members of his family. Robert's sister fought with her. Robert's brother threw stones at her. She only laid a charge against Robert because she was still confused. She told the police about the stones but she does not know why they didn't write it down in the statement. The statement was read back to her.

(The statement is shown to the witness-page 46). The statement was given to her to read and she signed it because she knew it was correct.

She didn't get out of the police van because the crowd was threatening to assault her. She was in the police van where she pointed Robert to the police. She was in the company of a female police officer. She however cannot remember whether there was a female police officer or not. She cannot remember whether she was alone in the police van or not. She might have forgotten some of the events.

She saw the two police officers who approached Robert but she is not certain. Robert was about 6 meters from the police van. They arrested him and they were taking him to the police van where the crowd prevented his arrest. She couldn't see the police officers at that stage. She however could



see them while they were trying to force him into the vehicle. Only one police-officer arrested Robert. She does not know what happened to the other police-officer. She heard the gunfire while she was in the police van-it was outside the premises of the house. She does not know why Superintendent Thobane said he went out of the vehicle with her. She never went out of the police-van. (When shown the statement the witness then said she saw Robert run away, contrary to what she had said before.) She got out of the vehicle and the police took her back, but she never entered the premises. She might have forgotten some of the events. She is not trying to assist the police in their case.

Francois Smith

He is a constable in the SAPS.

On the 3<sup>rd</sup> May 2003 he was on duty when he received a complaint that his colleagues were in danger at Mamelodi. He and his other colleague proceeded to the scene at about 23H00. When they arrived there was a crowd of people on the premises and he then called for additional backup. He saw Inspector Mokonyane being chased by five people who eventually

caught up with him and pushed him against the fence. One of the said people was aiming a beer bottle at Inspector Mokonyane trying to stab him. Inspector Mokonyane was screaming. He warned the person who was aiming the bottle at Inspector Mokonyane to stop his threat but in vain. Since the said person wouldn't heed his warning he then fired one shot at him. The said person is Lesley the plaintiff. He was injured in the stomach and was conveyed to the hospital by an ambulance. When he fired the shot he was 20 meters away running towards Inspector Mokonyane and the culprit. The attack on Inspector Mokonyane was eminent and his life was in danger. The witness's life was also in danger, because he was in possession of a shotgun and a pistol. He used rubber bullets which are non-lethal. The bullets may penetrate one's body but are non-lethal. Before he joined the SAPS, he was a member of the SANDF where he received training on firearms. If he had aimed at the plaintiff's head, he would have received more serious injuries. Inspector Mokonyane was not injured. He was armed with a pistol. He was not aware what the scuffle was all about. The flying squad was to assist them. There were only two vehicles from Mamelodi. After he shot the plaintiff, the latter fell to the ground.

Cross-examination by Mr. Kok

He was at the same Police Station as Inspector Mokonyane and Superintendent Thobane but doing different shifts. Superintendent Thobane was the most senior amongst them at the scene. Supt Thobane took control of the scene by trying to calm the crowd and making contact for back-up by radio. The crowd was throwing stones at the police even the control-officer had to withdraw because of the stones which were being thrown at the police. He does not have any experience with a rubber-bullet that has ever killed anybody if fired from a shotgun. However, a rubber bullet may penetrate clothes, skin and flesh depending on its velocity. According to the medical report, a rubber bullet had lodged into the plaintiff's body. He does not know what became of the broken bottle. The plaintiff was lying about 30 meters from the bottle. He fell to the ground as he was running away. He went to check the plaintiff and called for an ambulance. After he shot at the plaintiff, the plaintiff dropped the bottle and run away – (this is contrary to what the witness said earlier.)

Inspector Mokonyane remained where he was. He checked him and found nothing wrong with him. He was not injured but he was in shock because of the attack on him. He did not make a statement to the police because he is a

suspect. Supt Thobane did not come to him. He saw Supt Thobane but he is not certain if he saw him. His main mission was to assist Inspector Mokoyane who was in danger. The bottle was broken into small pieces and it could not have been used as an exhibit. He did not discuss the matter with both Supt Thobane and Inspector Mokoyane. All the five people who attacked Inspector Mokoyane were males. When he shot at the plaintiff there was no female person in the vicinity. The plaintiff ran past him, with a beer bottle in his hand. Robert was one of the five people attacking Inspector Mokonyane. He did not know Robert before. The plaintiff was in the proximity of a meter from Inspector Mokonyane holding the Inspector with his left hand. He made a summary of the facts to the duty-officer. He cannot remember everything because it happened five years ago. The duty officer and other officers came from different stations. He knows how to compile a docket because he has been a police officer since 2002. The crowd was screaming, shouting and swearing. He did not see anybody in Inspector Mokonyane's vehicle. The vehicle was parked 200 meters from where the incident took place. He did not see Inspector Mokonyane trying to force the suspect into his vehicle. The closest spaza shop was about 300 meters from his vehicle. He was about 20 meters from the plaintiff when he fired the shot. It was dark with a little bit of light. Nothing obscured him

from seeing the plaintiff. He saw the plaintiff breaking the bottle. The plaintiff made two attempts to stab Inspector Mokonyane. It was a 750 ml bottle. (The witness demonstrates how the stabbing attempts were made. It can be mentioned that the said demonstration did not assist the court much in making any valuable conclusions.) A shotgun is very accurate. One can shoot with a shotgun running. He has done target shooting at provincial level. He can shoot with any firearm. One ball hit the plaintiff. The second ball would have hit the ground. He could not have missed the plaintiff at a distance of 20 meters even if he was running. He was not aiming at Robert, but the plaintiff.

Re-examination by Mr Mphaga

The Director of Public Prosecutions Office declined to prosecute him.

(Mr. Kok informed the court that even the case against Robert was withdrawn.)

Alfred Lesibane Mokonyane

He is an Inspector in the SAPS. On 3 May 2003 he received a complaint from Glory Chabalala. He proceeded to the scene in the company of Superintendent Thobane and the complainant who pointed one Robert as the suspect. He approached the suspect with the aim of arresting him. The suspect's sister interfered with the suspect's arrest. He however managed to arrest the suspect. A crowd of people who were attending a party at the suspect's house grabbed the suspect and prevented him from apprehending him. One of them had a bottle in his hand. He followed the suspect, when three people came and prevented the arrest again. One of them had a bottle in his possession. He broke the said bottle and attempted to stab him. As the said person aimed the bottle at him, he then heard gunfire. He then saw the person who was aiming to stab him with the bottle, fall down. An ambulance was summoned and the victim was conveyed to the hospital. A docket was opened against the suspect. He submitted a statement to the police. (The witness is referred to exhibit A – his statement in particular.) He made the statement on 5 May 2003. There were about 30 people at the scene. He went out to his vehicle to call for back-up because he and Supt Thobane were overpowered. When he heard gunfire, he saw Constable Smith and realized that he was there to protect him. He was in possession of a firearm but he could not use it because people were pushing him. He

thinks Constable Smith must have fired a shot at a distance of 20 meters from the victim. After the plaintiff was shot he retreated and fell. Constable Smith called for an ambulance.

Cross-examination by Mr. Kok

He went to the scene to arrest the suspect, but he was also protecting the complainant.

He does not know how the matter was reported because he did not obtain a statement from the complainant. She did not tell him how she was assaulted. She only pointed out the suspect to him. When he approached the suspect he had left the complainant in the company of Supt Thobane. The complainant had no visible injuries. She was afraid to go home because she was under threat and she might have been killed. Even if there was no threat against her, he would have arrested the suspect. (The witness is shown exhibit “B” – Instructions to arrest and detain.) He disagrees that arrest is the last resort. He cannot remember seeing exhibit “B” but he was trained on how to arrest. He can arrest anybody who commits an offence. He knows that police officers are not supposed to arrest suspects on common assaults. (The

witness was then referred to Standing Order G34. He confirms that he was trained on the said standing order.) However if the complainant is not safe he can arrest. He does not know about Standing Order 3(3). It is the police's duty to arrest whether the offence is serious or not. (The witness is again referred to his statement in exhibit "A".)

Although the threat is not mentioned in the statement, the complainant told him about it. There was no female police officer who accompanied them to the scene. When they arrived at the scene they all got out of the vehicle including the complainant. They all entered the premises. When the crowd started to attack the complainant, they then moved her back to the vehicle. He did not witness the fight between Makgabo (Robert's sister) and Glory (the complainant). However, Makgabo prevented him from arresting Robert. He does not know why the complainant said she remained in the vehicle because she accompanied them into the premises. Robert was running towards the Spaza shop when the gunfire went off. The crowd pushed him and his headdress fell off. The plaintiff was attempting to stab him. When he broke the bottle, he was about two meters away from him. He made two attempts to stab him, but was distracted by the gunfire. After the gunfire, the plaintiff walked about 4 meters away and fell. He did not



see Robert when he was pushed against the fence. If Constable Smith said he saw him that would be his own version. The plaintiff did not hold him by one hand while he was attempting to stab him. He did not discuss the incident with Supt Thobane. The bottle was broken into small pieces. He made a mistake in the statement when he said the plaintiff was behind Constable Smith. The plaintiff was actually in front. He cannot explain why he said the plaintiff started to stab him, instead of “he wanted to stab him.” He was speaking in Afrikaans while his colleague Matroos was writing the statement in English. He cannot write Afrikaans. He, the witness, wrote down the statement and explained to Matroos.

Re-examination by Mr. Mphaga

Matroos was a detective inspector who has since died.

Defendants closed their case

The plaintiff calls:

Lesley Stanley Nkomo

He is the plaintiff in the case. On 3 May 2003 he was at home when he was shot in the stomach by a police officer. He was in the company of Thabiso walking from the direction of the Spaza shop going home to a party. He saw Robert running past the two of them. He saw police chasing Robert and he immediately realized that he was bleeding from his stomach. He was conveyed to the hospital where a bullet was removed from his body. After he was shot, he ran for almost two paces and fell. He was not in possession of a beer bottle when he was shot. He was not fighting with anybody.

Cross-examination by Mr. Mphaga.

He saw Robert running towards them and run past between the two of them.

They had gone to buy some simba chips at the Spaza shop. He heard gunfire and then felt that he was bleeding from his stomach. He saw a white person holding a big firearm. The said white person shot towards them. He fired immediately after Robert had run past them. The said white person did not talk to them before shooting. (The witness was referred to his statement on page 48.) He submitted the statement to Detective Inspector Matroos on 8

May 2003. He cannot remember if he was relating the events of 3 May 2003. On 3 May 2003 there were problems at his home. His sister Makgabo was fighting with one Gloria and as a result the police came to his home. When he left for the Spaza shop there were two police officers at his home. He was part of the problem which occurred at his home. He never said that he saw Robert with a number of police officers following him as it is reflected in the statement. The statement was not read back to him. The person who obtained the statement was speaking in Afrikaans. He is not conversant in Afrikaans. He thought the police-officer would write what he said. He never said that the police officers caught Robert in his presence, as it is reflected in the statement. The firearm was not pointed at Robert but at him. When he submitted the statement he was not ready, due to the injuries he had sustained, it is as a result that he made mistakes in the statement. The police officer never gave warning by saying "I shoot" as it is reflected in his statement. He did not hear anything. However his version in his statement that he was shot is correct. He did not mention Thabiso in the statement, because at that time he was alone. He said in the statement "I saw Robert my brother" in singular because he was speaking for himself. He never had a broken bottle in his possession. It is not true that he attempted to stab Inspector Mokonyane with a bottle. There was a fight at his home.

People were drinking beer. He was also drinking beer but he was not intoxicated. (At this stage, the application by the defense to cross-examine the witness, in terms of section 3 of Act 45 of 1988, dismissed.) However the defense was granted an application to cross-examine in terms of section 34 of Act 45 of 1988). Exhibit “C” is produced.

He does not know if Robert had an argument with Gloria. He does not know if the police tried to arrest Robert in his presence. Robert was not arrested in his presence. He did not prevent the police from arresting Robert. Thabiso is Robert’s girlfriend. It is not true that he was shot because the police wanted to save Inspector Mokonyane’s life.

Re-examination by Mr. Kok

He has never handled a firearm. When he said he was not ready to make a statement he meant that he was still feeling pain.

Thabiso Mathane

On the 3<sup>rd</sup> May 2003 she was at a party when the plaintiff was shot. She was from the spaza-shop in the company of the plaintiff when she saw Robert running past the two of them. A police officer fired a shot and the plaintiff fell. He shot only once. When the shot was fired Robert had already ran past the two of them. She did not see the plaintiff holding a bottle nor did she see the plaintiff fight anybody.

#### Cross-examination by Mr Mphaga

She knows Gloria Chabalala because she came to Robert's place. She was not present when the police arrived because she and the plaintiff had already left. She saw police officers at the gate. She saw a white man fire a shot at the plaintiff. She was later told that the police wanted to arrest Robert. (The witness is referred to her statement which is part of exhibit "A".) She cannot remember as to when she made a statement. She saw the police arrive with Gloria looking for Robert. She didn't see the police officers making an attempt to arrest Robert. She never said that Makgabo interfered with the police when they wanted to arrest Robert nor did she say that she followed Robert until he was arrested as it is reflected in her statement. The statement was not read back to her but she signed it. She doesn't know why it is not

reflected in her statement that she and Robert went to the spaza-shop. She does not know if the plaintiff tried to prevent the police from arresting Robert. She cannot remember as to when she made a statement. She saw the police arrive with Gloria looking for Robert. She did not see the police-officers making an attempt to arrest Robert. She never said that Makgoho prevented the police when they wanted to arrest Robert nor did she say that she followed Robert until he was arrested as it is reflected in her statement. The statement was not read back to her but she signed it. She does not know why it is not reflected in her statement that she and Robert went to the Spaza shop. She does not know if the plaintiff tried to prevent the police from arresting Robert. The plaintiff then closed his case.

The least one can say is that the evidence of the Defendants is infested with a number of contradictions. To mention but a few:

According to Superintendent Thobane the complainant accompanied them into the premises, whereas she (the complainant) testified that she remained in the police van all the time. At one stage he accompanied the complainant to the police van, which is a fact she denies. Thobane aid that Smith told him that he shot the plaintiff. Constable Smith denies ever talking to him.

Superintendent Thobane first denied that Inspector Mokonyane told him that he was assaulted by the plaintiff. However in his statement it appears that he said so. The complainant, Glory Chabalala contradicts the evidence of Superintendent Thobane as already mentioned above. She testified that she stayed in the police van because the crowd was threatening to assault her. She first said that she was in the company of a female officer, and then changed and said that she cannot remember if there was a female officer in the police van. She saw the police take Robert to the van, but later she said she does not know what happened – Robert ran away. She then said that she got out of the police van and the police took her back. This is contrary to what she had said earlier.

Constable Francois Smith: He had first said that he does not know what happened to the broken bottle, but later he said the plaintiff dropped the bottle and ran away and further that the bottle was broken into small pieces. He saw the plaintiff break the bottle.

Inspector Mokonyane contradicted the complainant in that he said there was no female police officer present at the scene. He further contradicts her in that he said she never remained in the police van, she entered the premises

with them. He never saw Robert when he was pushed against the fence which contradicts what Constable Smith said.

The plaintiff's testimony is in a staccato. He denies anything that does not suit his case and only accepts what is favourable to him. He contradicted his statement and later conceded that he made mistakes in the statement because he was still feeling pains. He denies that the police gave him a warning, but confirms that his version in the statement is correct. He denies ever mentioning the name of Thabiso in the statement. It is surprising how this could have been reflected in the statement if he didn't mention it himself.

The defendant was allowed to cross-examine on the statement produced in terms of section 34 of Act 45 of 1988. It transpired that the plaintiff used the (I) instead of (we) as he claimed that he was in the company of Thabiso. That story does not take one anywhere.

The inconsistencies in the defendants' evidence don't advance their case because the discrepancies impact on the credibility of their witnesses. The inconsistencies in the defendants' evidence are material and strengthen the issue of dispute raised by the plaintiff.



Although the lawfulness or unlawfulness raised by the plaintiff may not impact on the issue in dispute because the plaintiff's pleadings are based on a delictual claim, the inconsistencies in the defendants' case can be counted in the plaintiff's favour.

Both the plaintiff and his witness Thabiso deny that the police read the statements back to them. They also deny a number of allegations raised in the said statements. It is common cause that police officers omit to read the statements back to the deponents in a number of instances. The plaintiff and his witness can be given a benefit of doubt in this regard.

The plaintiff's claim is not based on an unlawful arrest, but on an unlawful shooting – the question is whether the conduct of the person on whom the lawful or unlawful arrest was to be effected justified the fourth defendant to act in self defense or not. This can be deduced from looking into the probabilities and circumstances of this case.

The inferences which the court may draw may be influenced by the inconsistencies weighed against the evidence in its totality.

Although the evidence of the fourth Defendant is not as contradictory as that of Thobane, Mokonyane and Chabalala, all for the defendants, the reasonableness of his belief that Inspector Mokonyane was in danger is reduced by the inconsistencies in their evidence – Compare *Ntanjana v Foster and Minister of Justice* 1950 (4) SA 398 (C). See also *R v Hele* 1947 (1) SA 272 (EDL).

It is as a result difficult to conclude that the fourth defendant's actions were justified in the circumstances. While I agree with the dictum of the court in *Ntanjana* at 406 (A-D) *supra*, I must state that the set of facts are different in this matter.

The statement of Robert, who is now deceased, was allowed in terms of section 34 of Act 25 of 1965 for cross-examination purposes only, no less no more. The assessment of the statement's evidential value is left in the discretion of the court. My opinion is that it didn't assist the cause of the defendants.

The decision of *Malahe and Others v Minister of Safety and Security and Others* 1999 (1) SA 528 (SCA) is approved in favour of the plaintiff.

Considering that the Defendant were burdened with the onus of proof, I find that the defendants failed to discharge their onus. The plaintiff succeeded, on a balance of probabilities, in proving his claim for damages.

The following order is therefore made: The plaintiff's claim succeeds with costs.

---

JUDGE OF THE HIGH COURT