IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

CASE NO. 7369/06

In the matter between:

NELISIWE GOODNESS KHOZA	FIRST PLAINTIFF
NELISIWE GOODNESS KHOZA N.O	SECOND PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY	FIRST DEFENDANT
INSPECTOR MERGAN NAIDOO	SECOND DEFENDANT

JUDGMENT

Delivered on: 22 JUNE 2009

GYANDA J

[1] Initially in this matter the Plaintiff's mother Nelisiwe Goodness Khoza, sued on his behalf in her capacity as his mother and natural guardian, citing the Minister of Safety and Security as the First Defendant in his capacity as the employer of the Second Defendant, Inspector Mergan Naidoo, and certain other policeman whose identities were unknown to the Plaintiff, claiming that as a result of the conduct of the Second Defendant and the other members of the South African Police Services, acting within the course and scope of their employment with the First Defendant, her son, Sandile Khoza, was wrongfully and unlawfully shot and injured on the 6th September 2005 at Kwa Bester township.

[2] At the time of the hearing, Sandile Khoza, had been substituted as Plaintiff in his mother's stead. The Plaintiff alleging that as a result of the unlawful conduct of the Second Defendant and/or other members of the South African Police Services in shooting the Plaintiff as aforesaid, he was severely injured, in consequence of which he was hospitalized and has been permanently disabled and rendered a paraplegic. In addition the Plaintiff contends that he was wrongfully and unlawfully arrested and detained by members of the South African Police Services. In consequence of his injuries and the unlawful arrest and detention, the Plaintiff contends that he has suffered loss and damages in the total sum of nineteen million four hundred and twenty five thousand rand [R19 425 000-00], for which he seeks to hold the Defendants liable, and accordingly seeks a Judgment against them in that amount. The Defendants have denied that the Second Defendant or other police officials acting within the course and scope of their employment with the First Defendant shot the Plaintiff as alleged and put the Plaintiff to the proof thereof.

[3] Furthermore, the Defendants deny that the Plaintiff was arrested as alleged or at all and put the Plaintiff to the proof thereof as well. Praying that the Plaintiff's claim be dismissed with costs. By the time the matter was heard before me, the Parties had agreed in terms of the Provisions of Rule 33(4) to separate the issues of Quantum and Liability electing to proceed at this initial stage on the issue of Liability alone and holding the determination of the issue of Quantum over for a

later stage. At the outset the Defendant's conceded that they bore the onus of proof and the duty to begin and were ready to proceed with the trial.

[4] Having separated the issues in terms of the Provisions of Rule 33(4), the Defendant, having conceded the onus of proof and the onus to begin thereafter called its witnesses in support of their case. Before I embark on an analysis of the evidence, it is perhaps convenient at this stage to deal with the question of the onus of proof. As I understand the situation, the Defendants conceded the onus to prove and to begin with the leading of evidence on the basis that the police had shot the Plaintiff on the occasion of the incident on the 6th September 2005 upon Vezi Road in the Kwa Bester Township in Kwa Mashu, and accordingly, bore the onus of justifying the shooting.

It being common cause that the police had opened fire on two "suspects" whom they allege were brandishing firearms on the occasion in question and firing at them. During the course of the trial and in the light of the evidence of Dr G. Perumal, an expert forensic pathologist called by the Plaintiff, it became common cause that the bullet that caused the injury to the Plaintiff was most probably a ricocheted or glanced off bullet that struck the Plaintiff.

[5] Moreover, Dr Perumal conceded that in the event, the Plaintiff's companion, one Khehla Khoza, was also armed with a firearm and firing in the general direction of the police, and had the Plaintiff been in the vicinity of his line of fire, then, and in

that event and in the event of the Plaintiff and Khehla Khoza being approximately one hundred and fifty metres apart from each other at the stage of the shooting, it is possible that a bullet fired by Khehla Khoza could have ricocheted and struck the Plaintiff causing him the injury in question. In the light of the evidence of the police witness, Sgt Gresham Anthony Nair, of the dog unit who arrested the Plaintiff and Khehla Khoza, it appears that the Plaintiff and Khehla Khoza were in a swamp of dense bushes, mud and water when he arrested them.

Moreover, that they were between one hundred to one hundred and fifty metres apart from each other in the swamp. In the light of this evidence and the evidence of Dr Perumal, I queried counsel as to whether the admission in relation to the question of the onus and the duty to begin was correct. Mr Aboobaker for the Plaintiff argued that the concession by and on behalf of the Defendants was an admission and could not be withdrawn at this late stage and was, moreover, correctly made on the basis that it was indeed the police who were shooting at the Plaintiff rather than Khehla Khoza, and that the "possibility" arising from the evidence of the expert, Dr Perumal, should not change the situation.

Ms Norman, for the Defendants contended that if the Defendant's Plea is examined carefully, nowhere in the Plea has the Defendant conceded that the police had shot the Plaintiff and the assumption of the onus to prove and to begin was clearly made at a time when they believed, wrongly, that the Plaintiff was shot by the police. This was clearly done at a stage when the Defendant had no idea that the

expert, Dr Perumal may make the concession of the possibility that the Plaintiff was shot by Khehla Khoza. That concession was made on the basis:-

(a) THAT the bullet that struck the Plaintiff was a ricocheted or glanced off bullet; and

(b) THAT the distance between the Plaintiff and Khehla Khoza for such an occurrence to occur, had to be in the region of one hundred and fifty metres or so.

This evidence, Ms Norman contends, only arose during the course of the evidence of Sgt Gresham Anthony Nair and Dr Perumal and was not something that the Defendants would have been aware of at the time they conceded the onus was on them.

[6] The admission by Ms Norman, (she argued) of the onus to begin and the onus to prove did in no way amount to an admission by her that the Plaintiff was indeed shot by the Second Defendant and/or other employees of the First Defendant acting within the course and scope of their employment with the First Defendant. If that were the effect of her admission then no purpose would have been served in continuing with the trial. The admission made by Ms Norman was not an admission of a fact which would not have to be proved but rather an admission

relative to the legal consequences flowing from facts proved during the trial. In this regard see:-

Price N. O. V Allied – J B S Building Society [1]. See also:-

R V Papangelis [2].

The question therefore as to who bore the onus of proof in this matter will be revisited when the issue is determined as to whether or not the Plaintiff and his companion Khehla Khoza were armed with firearms on the day in question. If they were not armed with firearms as contended for by the Defendants then, in that case, the acceptance of the onus was correctly made and the Defendants bore the onus of proving that the conduct of the policemen in shooting the Plaintiff was justified in terms of the provision Section 49, of the Criminal Procedure Act, No. 51 of 1977. However, in the event of the Court accepting that Khehla Khoza and the Plaintiff were armed with firearms and shooting, then the onus may very well be on the Plaintiff, regard being had to the evidence that I have already referred to, to prove his claim on the usual basis, *"he who alleges must prove".*

[7] The incidents which gave rise to the Plaintiff's claim against the Defendants occurred on the 6th September 2005 upon Vezi Road, Kwa Bester Township, Kwa Mashu, when the Plaintiff and his companion Khehla Khoza and one other person who has been referred to in the evidence as Mphiwe, (or Simphiwe) were confronted by members of the South African Police Services consisting of,

[1] 1980(3) SA874 at page 882 (D) – (H)
[2] 1960(2) SA 309 (O) at page 310 (H) - 311(A)

Inspector Anesh Singh and Inspector Parshlen Nair, as a result of which a shooting occurred in consequence of which the Plaintiff was injured.

The evidence which is undisputed is that shortly before the shooting occurred on Vezi Road, the two policemen, Anesh Singh and Parshlen Nair, were traveling in their patrol vehicle along the main road referred to as the M25 when they were flagged down by one Siboniselo Shangase who complained to them that he had been a passenger on a motor bus travelling upon the M25 when he and other passengers were accosted and robbed at gunpoint by three boys of various items inter alia three hundred rand [R300-00], that belonged to him. As a result of the complaint made by Siboniselo Shangase to the two policemen, they invited him into their motor vehicle, and he having described his assailants directed the policemen in the approximate direction that his assailants had taken and, whilst they were so engaged they drove upon Vezi Road whereupon they encountered the three people alleged to be the robbers who had robbed the complainant, Siboniselo Shangase. I should, at this stage, add that neither the Plaintiff nor the Defendant called Siboniselo Shangase as a witness.

[8] Ms Norman who appeared for the Defendants contended that she was not going to call Siboniselo Shangase because she had discovered that subsequent to making his statement to the police shortly after the incident in question, the witness Siboniselo Shangase had been interviewed by the Plaintiff's legal representatives and had made a statement to them which she had not seen.

Moreover, she advised the Court that in consultation with Siboniselo Shangase, it appeared that he had made a complete about turn on the statement that he had given to the police shortly after the incident and, moreover, he was totally unco-operative in her endeavors to ascertain what brought about the change. Mr Aboobaker who appeared for the Plaintiff also declined the opportunity of calling Siboniselo Shangase as a witness although conceding that he had consulted with the witness in question and that the Plaintiffs held a statement by him. It is common cause that such a statement was not provided to the Defendant's representatives prior to the trial commencing, or at any time thereafter. I advised both counsel that in the event of them not calling the witness, Siboniselo Shangase, and in the interest of Justice I wished to call the witness as on the version of the Defendants, he was present at the scene of the shooting and, this may very well have been the case of the Plaintiff. In which event he would have been a crucial witness to the incident. I advised both counsel as I understood the situation, this being a civil case the Court had no inherent authority to call witnesses save with the consent of both the parties. See:-

Rowe v The Assistant Magistrate, Pretoria [3]. See also:-

Buys v Nansfield Trading Stores [4].

[9] In spite of the invitation to both parties to consent to the Court calling the witness in question in the interest of Justice, Ms Norman consented to the Court so calling

[3] 1925 TPD 361
[4] 1926 TPD 513

the witness, but Mr Aboobaker for the Plaintiff refused such consent on the basis that:-

(a) There is no acceptable or proper explanation by the Defendant why the defense did not call the witness in question;

(b) The calling of the complainant is unlikely to remedy a hopelessly deficient case;

(c) The Plaintiff seeks finality in this case which has become to long and drawn out;

(d) No attempts have been made in any event to bring the complainant to Court – this case will have to be adjourned;

(e) There is no reason why the Plaintiff should assist the Defendant in endeavoring to remedy major deficiency in the Defendant's case; and

(f) There are no compelling reasons why the Plaintiff should accede to a request by the Court to call a witness – this is not a criminal case and the issue of interest of Justice, simply do not rise.

As I understood Mr Aboobaker's submission on the last point, he contended that this is not a public interest matter and therefore it being a civil case, the interest of Justice does not arise. I do not agree. In the first place what is sought is a payment by the Plaintiff from public funds, and in my view it is important that in such a case the public sees that the interests of Justice are met. In any event in the light of the attitude taken by Mr Aboobaker and in the light of the lack of consent on the part of the Plaintiff to call the witness, the Court did not call him.

On the 8th June 2008 at a resumed hearing at the instance of the Court to recall Dr G. Perumal, Mr Aboobaker indicated that the Plaintiff, in the interests of Justice, changed his stance and was now consenting to the Court calling Sibonelo Shangase as a witness. Miss Norman for the Defendant argued that in as much as the Plaintiff was now making an application to the Court for it to call Sibonelo Shangase, the proper course of conduct for the Plaintiff was to make a formal application on notice of motion so that the Defendant could properly respond to the application after having taken full instructions. I do not intend dealing with this aspect any further as a Judgment in this regard is on record. The witness was not called by the Court to testify.

[10] Mr Aboobaker had argued that in as much as the Defendant did not call a witness that was primarily a defense witness, the Court should draw an adverse inference against the Defendant for their failure to call the witness in question. As I have already said Ms Norman had laid the basis as to why the Defendant was not going

to call the witness. In spite of this, Mr Aboobaker argued that the Defendant could have called the complainant, Siboniselo Shangase, and thereafter declared him to be a hostile witness, but her failure to do so must obviously attract an adverse inference by the Court. I do not agree. Ms Norman, because of the attitude of the witness subsequent to his making a statement as the Defendant's witness and a complainant in a criminal case, in thereafter consulting with the Plaintiff's representatives and making another statement, which she did not see. Moreover, he was unwilling to consult with Ms Norman in any co-operative manner so that she could not call him as a witness. In any event she was quite willing for the Court to call Siboniselo Shangase as a witness and consented thereto. The same could not be said for the Plaintiff's representative, who, at a very late stage, attempted to change their stance. In these circumstances, it would be extremely unfair to draw any adverse inferences against the Defendant for the failure to call Siboniselo Shangase.

[11] Inspectors Anesh Singh and Parshlen Nair testified that on encountering the three Suspects, as pointed out to them by the complainant, they stopped the marked police motor vehicle in which they were travelling and demanded of the suspects to stop. Whereupon two of the suspects immediately turned around, drew firearms and began firing at them. They in return drew their firearms and returned fire. The two armed suspects, according to them, ran down an embankment in Vezi Road, stopping occasionally to fire back at the two policemen who were firing at them until such time as these armed assailants entered into the

tall reeds visible at the bottom of the embankment which has been described by Sgt Gresham Anthony Nair of the dog unit, as a swamp. The third of the suspects, who appeared to be unarmed, ran in the opposite direction up the embankment towards the M25 roadway and no shots were fired at him, nor was he pursued. Immediately thereafter, Singh and Parshlen Nair contacted radio control and the dog unit for assistance in apprehending the two armed suspects that had entered into the swamp. Sgt Gresham Anthony Nair of the dog unit was accompanied by Sgt Vincent Naidoo who responded to the call for back up and assistance in as much as policemen had been shot at. They testified as to how they arrived at the scene and went to the vicinity of the swamp where the suspects had disappeared. They called out to the suspects about their intention to release their dog, but received no response whereupon they released the dog and followed the dog into the swamp.

Approximately one hundred metres into the swamp they came across a suspect who was unable to move, (clearly the Plaintiff *in casu*), whom they apprehended. Moving a further one hundred to one hundred and fifty metres into the swamp, the dog apprehended the second of these two suspects who was clearly Khehla Khoza. The suspects were removed from the swamp after they were searched and arrested. No weapons of any sort were found on the suspects. Shortly thereafter, the suspects were removed to hospital. Members of the Local Criminal Record Centre and the duty officer on call were called to the scene and investigations were conducted by them.

[12] The version of the Plaintiff is that on the day in question, Khehla Khoza, in the company of one Mphiwe had gone to a butcher shop in Besters known as Splits Meat where they purchased some forty rand (R40-00) worth of polony, for and on behalf of a tuck shop operator, one Khamwela. Having purchased the polony, they were on their way back home when they encountered the Plaintiff who was the cousin of Khehla Khoza. Coincidently they both, (i.e the Plaintiff and Khehla Khoza), lived in the same premises. They continued walking in the company of each other when they heard the sounds of a vehicle travelling at high speed come to a stop immediately behind them. They turned around, (either having heard the motor vehicle or having heard the sound of a gunshot being fired), when they noticed the policeman having his head and shoulders outside the window of the police motor vehicle on the left hand side, pointing a firearm at them and firing at them, they immediately fled the scene. They denied having being in possession of any firearms and claimed that the police were shooting at them for no reason at all.

[13] It is common cause that the Plaintiff and Khehla Khoza were charged for robbery with aggravating circumstances and that these charges were subsequently withdrawn as, on the version of the Plaintiff and the witness, Khehla Khoza, the docket had been lost, and they were allowed to go. In addition to the various witnesses called by the Plaintiff and the Defendant, and I do not intend to repeat the evidence of the various witnesses or to summarize them for the purposes of

this Judgment, as such evidence is on record, the Plaintiff called as an expert witness, Dr G. Perumal, whose evidence was called essentially to confirm that the Plaintiff and Khehla Khoza were struck by bullets that hit them in their backs. This was in addition to the concession that I have already referred to, namely, that the Plaintiff was struck by a ricocheted or glanced off bullet which caused him the injury in question. Dr Perumal was recalled by the Court specifically to confirm that the Plaintiff, having been shot, would no longer be able to walk or run. That is, immediately upon being injured, he would be rendered immobile unless he crawled with the aid of his arms and elbows, which Dr Perumal confirmed.

[14] The contention of the Defendant is that had the Plaintiff not been shot and taken to hospital, he would have been arrested in terms of the provisions of Section 40(1)(b) of the Criminal Procedure Act No. 51 of 1977, which authorizes a peace officer to arrest, without a warrant, any person whom he reasonably suspects of having committed a Schedule 1 offence, which would include robbery. This however, did not necessarily justify the use of deadly force in the event of resistance or flight by the suspects. The use of force in such a situation is governed by the provisions of Section 49 of the Criminal Procedure Act No. 51 of 1977, which provides:-

"49 USE OF FORCE IN EFFECTING AN ARREST

(1) *For the purposes of this Section:-*

(a) 'arrestor' means any person authorized under this Act to arrest or to assist in arresting a suspect; and

(b) 'suspect' means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) *If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds:-*

(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm."

[15] Mr Aboobaker argued that two issues had to be determined in order to decide whether the shooting of the Plaintiff was lawful in the circumstances:-

(a) Whether the policemen reasonably suspected the Plaintiff to having committed the offence of robbery; and

(b) Whether the Plaintiff was armed as contended for by the police, (which would cover the situation arising in terms of the provisions of Section 49(2)(a) and/ or (b) of the Criminal Procedure Act, No. 51 of 1977).

I agree with that submission and Ms Norman did not argue otherwise.

[16] However, Mr Aboobaker contended that in the absence of the evidence from the complainant, Siboniselo Shangase, the Court cannot find that the policemen had a reasonable suspicion that the Plaintiff had committed the offence of robbery, complained of. In as much as Siboniselo Shangase had not testified and all that the Court had was the police version of what he had conveyed to them. He argued that the Court was unaware of precisely what Siboniselo Shangase had told the policemen at the time the police encountered the three "suspects" on Vezi

Road. However, whatever he told them, must be examined accumulatively in the light of the circumstances in which the police found themselves, namely:-

(a) The police were stopped by the complainant Siboniselo Shangase who complained of having been robbed of three hundred rand [R300-00] by three males who he described as having worn school uniforms. In this regard Mr Aboobaker argued that the evidence in relation to the three persons having worn school uniforms must be rejected out of hand as it is totally unsatisfactory on the basis that Khehla Khoza clearly was not wearing any school uniform. I do not agree for the following reasons:-

(i) The allegation is made by the defense witnesses that the third person, Mphiwe, was in fact wearing a school uniform, which was not disputed, and it is common cause that the Plaintiff wore a school uniform;

(ii) I pertinently brought to the attention of both Counsel in Court that Khehla Khoza, from his build and appearance clearly appeared to be the approximate build of a high school going student. Both Counsel agreed with this description.

(b) The witness, Siboniselo Shangase, had directed the two policemen in the approximate direction taken by his three assailants in consequence of which the police drove in that direction finding themselves upon Vezi Road;

(c) Upon Vezi Road the complainant pointed out the three suspects to the policemen, and in spite of not knowing what the exact words were that were used by Siboniselo Shangase, one can accept that he pointed out the three suspects and conveyed to the police, words to the effect that these three persons ought to be apprehended by the police. It is inconceivable in these circumstances on the evidence tendered by the police, and if that were accepted to be true, that the police would in those circumstances have any opportunity to first question the suspects and the complainant, Siboniselo Shangase, to satisfy themselves that the correct persons were being pointed out. On the version of the police these three "suspects" immediately turned around, and two of the "suspects" produced firearms and opened fire on the police. This aspect of whether the suspects were armed with firearms will obviously be taken into further consideration when dealing with the aspect of whether or not they were armed, entitling the police to open fire in the circumstances that they did.

[17] As I have said earlier, that in determining whether the conduct of the police in firing upon the Plaintiff was reasonable in the circumstances, must depend upon, *inter alia*, whether the Plaintiff and his companion, Khehla Khoza, were in fact

armed with firearms with which they fired upon the police. The totality of the evidence in this regard must be viewed in the light of the principles set out in the decision of the Supreme Court of Appeal in the matter of:-

Govender v Minister of Safety and Security[5]

In the Judgment of Olivier, JA. At page 205, the learned Judge of Appeal said:-

"*[21] I am of the view that in giving effect to Section 49(1) of the Act, and in applying the Constitutional standard of reasonableness, the existing (and narrow) test of proportionality between the seriousness of the relevant offence and the force used should be expanded to include a consideration of proportionality between the nature and degree of the force used and the threat posed by the fugitive to the safety and security of the police officers, other individuals and society as a whole. In so doing, full weight should be given to the fact that the fugitive is obviously young, or unarmed, or of slight build, etc. and where applicable he should have been brought to Justice in some other way. In licensing only such force necessary to overcome resistance or prevent flight, as is "reasonable", Section 49(1) implies that in certain circumstances the use of force necessary for the objects stated will nevertheless be unreasonable. It is the requirement of reasonableness that now requires interpretation in the light of the Constitutional values. Conduct unreasonable in the light of the Constitution can never be, "reasonably necessary", to achieve a statutory purpose."*

[5] 2001(2) SACR page 197 at page 2005

[18] Kriegler, J delivering the unanimous Judgment of the Constitutional Court in the matter of:

Ex parte Minister of Safety and Security and Others; in re: *S v Walters*[6],

tabulated the main points in determining whether the use of force was reasonable in any given circumstances as follows:-

[54] In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

(a) The purpose of arrest is to bring before Court for trial, persons suspected of having committed offences;

(b) Arrest is not the only means of achieving this purpose, nor always the best;

(c) Arrest may never be used to punish a suspect;

(d) Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest;

[6] 2002(2) SACR 105 at page 134

(e) Where force is necessary only the least degree of force reasonably necessary to carry out the arrest may be used;

(f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence, the suspect is suspected of having committed; the force being proportional in all these circumstances;

(g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only;

(h) Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others, or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later;

(i) *These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self defense or in defense of any other person."*

The principles enunciated by the Supreme Court of Appeal and the Constitutional Court in the Judgments referred to above where applied in the recent Judgment of Jones, J in the South Eastern Cape Local Division, decision of:

April v Minister of Safety and Security[7]

where the learned Judge said:

> *"[8] I have not lost sight in the warnings in the authorities against an armchair Judgment of police action which must often be taken quickly in dangerous circumstances for the effective prevention of crime or the protection of the public. I must also not lose sight of the importance of a balanced evaluation. It is necessary to balance the responsibility of the police to carry out their difficult duties effectively, on the one hand, against the Constitutional right to life and bodily integrity which lies at the root of the proper understanding and application of Section 49, on the other. The Constitutional Court in* Ex parte Minister of Safety and Security: *in re* S v Walters *2002(2) SACR 105 (CC) has laid down specific guidelines in paragraph [54] of how the Courts should apply the tests of reasonable necessity and proportionality to the use of potentially deadly force to prevent a suspect from fleeing from arrest. The Section provides justification only for the least degree of force reasonably necessary to make an arrest in prevailing circumstances, the force to be proportional to the threat of violence posed by the suspect. Shooting a suspect solely to prevent his escape is permissible only in very limited circumstances, and is not justified unless the suspect poses an immediate threat of violence or where he is suspected of a crime involving an infliction*

[7] 2008(3) All SA 270 at paragraph 8

or threatened infliction of serious bodily harm and his arrest cannot be affected by any other means. These criteria are not present in this case. See also the approach of the Supreme Court of Appeal in: Govender v Minister of Safety and Security *(Supra)."*

Mr Aboobaker, in supplementary heads of argument filed, with the leave of the Court, argued that the first issue that should be determined is whether or not Khehla Khoza and the Plaintiff were armed and, in as much as the probabilities overwhelmingly favour the inference that they were not armed, the identification of the Plaintiff and Khehla Khoza as the suspects by Sibonelo Shangase was therefore incorrect and the Plaintiff must succeed. There is no reason for this approach to be followed as, on the evidence of the State, Sibonelo Shangase must have pointed them out or else there would have been no need for the police to engage them as they did. From what appears hereinafter, even following the approach contended for by Mr Aboobaker, the conclusions I reach are the same.

[19] Criticisms have been leveled back and forth by both Counsel relating to the quality of the witnesses called by both sides. I will not go into that aspect in any detail as it is not of any great significance in reaching the decision that I do. Save to state that Khela Khoza was an absolutely poor witness and a reading of the record will show that he did not answer the question, was evasive, did not remember things and was essentially a totally unreliable witness. The witness, Kamwela, who appeared to have given his evidence in a forthright manner is another whose evidence cannot be relied upon because he did not even know the date on which

the incident occurred and the only basis upon which he was able to say what Khehla Khoza had been wearing on that date was, according to him, the fact that Khehla Khoza only had one t-shirt, a red one in colour.

[20] Mrs Khoza, the mother of the Plaintiff, was clearly blindly protective of her child. She was adamant that the Plaintiff was not carrying a firearm, when in truth she had no basis of being able to know whether he was carrying one or not. Her being reduced to tears at the moment that I asked her a totally innocuous and unemotional question, namely, what she thought the Plaintiff wanted to achieve by instituting the current action, in my view, was clearly staged and intended to induce and evoke a feeling of sympathy towards her and her son. She, like the Plaintiff and Khehla Khoza clearly insisted that there was no firearm because the police did not find one. This does not necessarily follow as a matter of course.

Mr Aboobaker has correctly, and in my view, properly leveled criticisms against the police witnesses, especially in relation to their evidence that all three of the suspects were dressed in school uniform and as to how Khehla Khoza came to be wearing a three quarter black pants and a red t-shirt when, according to the police, he was also wearing a school uniform at the time he entered the swamp. However, I am not persuaded in holding that because of these imperfections in the evidence of the police witnesses, and the other aspects referred to by Mr Aboobaker in Argument, that they are deliverately lying or that this was a police cover up as contended for by Mr Aboobaker.

[21] Mr Aboobaker argued that the following factors in the evidence militate against any finding that the Plaintiff and Khehla Khoza were armed with firearms and shooting as contended for by the police witnesses:-

(a) That in the first place no firearms were found.

(b) Moreover, no primer residue (gunpowder) testing was done to the hands of Khehla Khoza and the Plaintiff. The police witnesses adequately explained that the two suspects were wet from the swamp and their hands were handled by the police in treating them and assisting them out of the swamp and, accordingly, no gunpowder residue would have been found so that testing for it was useless. Alternatively, it could be argued that gunpowder residue found its way onto their hands from the policemen who handled them.

(c) That although some cartridge cases were recovered at the scene of the incident, Superintendant Xaba, who it is common cause had died by the time that the Defendant could have called him as a witness, recorded as having recovered only three spent cartridge cases at the scene of the incident which were never sent for any ballistics analysis to determine as to which firearm they came from. It is common cause that even if the only shots were fired by the police, many more than three shots were fired and, in fact at least thirteen shots were fired by

the police according to the shooting report, in the circumstances, the inference to be drawn is that the other spent cartridges ejected at the scene could not be recovered because of the nature of the terrain, or some other reason about which one can only speculate. Moreover, in the event of there having been a proper ballistics analysis done on the cartridge cases in conjunction with the firearms of the two policemen present on the scene, all these could have done was to confirm whether these shots were fired by the police at the scene or not. It may have, thereby indicated that a firearm or firearms other than those of the police was fired at the scene. To submit that the failure to have these spent cartridges sent for analysis was, "a cover-up by the police", is preposterous especially in the light of the further findings I make in this regard hereunder. On the version of the police witnesses, one of the "suspects" had a revolver, which, as I pointed out to Mr Aboobaker, would not automatically eject spent cartridges at the scene if it were fired.

(d) Mr Aboobaker also submitted that the fact that none of the policemen were injured in any way and that the motor vehicle driven by the policemen was not damaged in any way, likewise excludes the possibility that the Plaintiff and Khehla Khoza were armed with firearms or that they fired shots at the police. The failure for there to have been any injury to the two policemen and/or damage to the motor vehicle

does not automatically mean that the Plaintiff and Khehla Khoza were not armed or that they did not fire any shots.

What is equally acceptable in these circumstances is that they missed their target when they fired because they were not trained like the policemen were, and shots were exchanged in a hurry with both sides being startled by the occurrence. This latter aspect would explain why the police, who were trained in the use of firearms, at virtually point blank distance, on the version of the Plaintiff and his witness were only able to shoot Khehla Khoza once in his thigh and not strike the Plaintiff at all during the incident on Vezi Road itself.

(e) The failure of the police to find any firearms is explained by the fact that both the Plaintiff and Khehla Khoza were in what has been described as a swamp by Nair of the dog unit, who testified that in some places he was chest deep in water and mud, and in others he was knee deep. If items like a firearm had to be disposed in such a place it would be extremely difficult or well near impossible to recover. In this regard what should also be borne in mind is that on the common cause evidence, there was a long lapse of time between the Plaintiff and Khehla Khoza entering into the reeds, (or swamp), until such time as the members of the dog unit arrived and arrested them,

giving them sufficient opportunity to dispose of the firearms if they were possessed of them.

(f) This was an extremely serious offence and the failure of the police and the State to prosecute the suspects adds weight to the submission that there was a cover-up by the police. In this regard the counter balancing factor must obviously be the failure of the Plaintiff and Khehla Khoza to charge the offending policemen for attempted murder. Which they did not do.

[22] I am in agreement with the submissions by Ms Norman that there are certainly numerous factors that militate against the version of the Plaintiff and Khehla Khoza, and supports that of the police witnesses in relation to the Plaintiff and Khehla Khoza being armed, and firing shots at them, they are:-

(a) In the first place both policemen testified that shots were fired at them by Khehla Khoza and the Plaintiff;

(b) The version of the Plaintiff and Khehla Khoza of the policeman protruding his upper torso through the window of the travelling police motor vehicle, at the same time pointing and firing at them, before the vehicle came to a stop is totally improbable in the circumstances. It is extremely unlikely and totally improbable that a policeman would behave in this fashion and shoot at

people alleged to be suspects whilst their backs were towards the policemen. As, that is in effect the version of Khehla Khoza;

(c) Khehla Khoza and the Plaintiff were unable to explain why the police would shoot at Khehla Khoza and the Plaintiff and not at their companion, Mphiwe. Whereas, the policemen provide a perfectly logical explanation for their conduct in this regard, namely, that Mphiwe posed no threat to them, was unarmed and ran away from the scene by fleeing up the bank to the vicinity of the M25 highway and in the opposite direction of that taken by the Plaintiff and Khehla Khoza. Whereas Khehla Khoza and the Plaintiff were armed with firearms and firing at them.

(d) Mr Aboobaker laid great emphasis on the failure to find any firearm or any cartridge cases linked to that of firearms other than the police firearms. In this regard, he was clearly unaware of the fact that it was alleged that one of the assailants who fired at the police was armed with a revolver, hence a firearm that did not automatically eject any spent cartridges at the scene. Moreover, the failure to find any firearm or spent cartridges linked to firearms other that of the police, whilst in themselves a matter for concern, is equally surprising as the failure of any witness to see any polony at the scene. One would have expected at least one witness to have come to Court and testified that a large amount of polony was found lying at the scene in Vezi Road or anywhere in the vicinity of the route taken by the Plaintiff and Khehla Khoza.

No one testified to the finding of large amounts of polony which were indicated by Kamwela to be approximately one foot high each, cut in individual slices as polony is normally cut for sale.

(e) Mr Aboobaker leveled great criticisms against the police based on what is contained in Annexure "L" which was the transcript of the report made by the police witnesses to radio control on the day of the incident. He submitted that the police did not, of their own accord, make any reference to the fact that the suspects were armed and/or fired upon the police until such stage as they were asked a leading question in that regard. While this may be so, the evidence of Nair from the dog unit, and Singh, was quite clear that Singh had made a report to the dog unit calling for backup because the police had come under fire, and Nair had testified that he had proceeded to the scene with the dog and his companion because the police had come under fire.

These statements were made at a time before the conversation contained in the transcript and Annexure "L" had taken place. As a scrutiny of the transcript indicates that it, (the discussion transcribed), was taking place at a time when the members of the dog unit were already in the swamp or reeds, attending to the arrest of the suspects. In these circumstances, contrary to the submission made by Mr Aboobaker, it appears that immediately following the incident and at the very first opportunity to report, the police had

complained of the fact that the assailants were armed with firearms and had fired upon them.

(f) A further factor confirming the version of the defense that the suspects, (the Plaintiff and Khehla Khoza), were armed is evident in the evidence of Mrs Khoza who testified that immediately upon her arrival at the scene, she spoke to some policeman about the incident, who had commented to her that those two boys were armed to the teeth.

(g) It is inconceivable that the two policemen would have waited and called for backup, allowing the suspects an opportunity to get away, if the suspects were unarmed and had not fired upon them. Mr Aboobaker argued that in this regard, as well as in shooting at the suspects, that the police had, in the first place acted precipitously in shooting without first ascertaining whether or not the suspects were in fact armed and, further, that their failure to pursue the suspects into the swamp, arose from their belief that the suspects were armed, rather than what they had testified to seeing. I do not agree.

These are two trained policemen with a considerable amount of experience, and if they acted with undue haste in the first instance, in firing upon the suspects, I seriously doubt that they would have been as careful as they were in the circumstances, in calling for backup and the dog unit to assist them in apprehending the suspects. Quite clearly, in my view, they believed and they

were aware of the fact that the suspects were armed and dangerous, having been fired upon already and were unwilling to take unnecessary risks of being shot by pursuing them into the bushes or swamp. If the Plaintiff's version were true then the police would have known that the suspects were in fact unarmed and nothing would have prevented them in pursuing the suspects into the swamp.

(h) In the event of the Plaintiff and Khehla Khoza not being armed and not having fired upon the police, it is extremely strange that when they were called upon by the police to surrender before the dog was set upon them, they remained totally quiet. One would have expected them to have explained that they were unarmed and that they had been injured but they chose to remain silent, in my view, in an attempt to get away, or evading detection, perhaps believing that the police would not enter the swamp.

(i) It is improbable in the extreme that the police would have, without any warning, opened fire on Khehla Khoza and the Plaintiff, as contended for by them, in full view of members of the public walking along Vezi Road who would be able to see the unlawful conduct of the police and come to Court to testify about it. It is common cause that there were members of the public upon Vezi Road at the time.

[23] In these circumstances, I am not satisfied that the conduct of the police in acting as they did was unreasonable in the circumstances. Whether or not, the onus was upon them or not. I am satisfied that the police would not have acted as they did in the absence of Khehla Khoza and the Plaintiff being armed and having produced the firearms and having fired in their direction, as they testified. They were, therefore, an immediate threat to the safety of the two policemen who were trying to apprehend them and would continue to be a threat to the safety of members of the public for as long as they were allowed to escape with these firearms in their possession and, moreover, they had according to the complaint made to the police by Siboniselo Shangase, produced firearms in robbing him and the passengers in the bus. In these circumstances, it was reasonable for the police to have used deadly force in apprehending or trying to apprehend the Plaintiff and Khehla Khoza, and to prevent them from escaping and being a source of danger to other members of the public.

[24] In regard to the issue of the onus, and in the light of the evidence of Dr Perumal, I am of the view that it was more probable, in the circumstances for the Plaintiff to have been shot by Khehla Khoza, and not by the police. In this regard, as I have already stated, I am satisfied that Khehla Khoza was armed with a firearm and that he fired in the general direction of the police with that firearm at stages during his flight. Moreover, on the version of Dr Perumal, for a ricocheted or glanced off bullet from the gun of Khehla Khoza to have struck the Plaintiff as and

where it did, there had to be a distance of approximately one hundred and fifty metres between them at the time the shot was fired.

What is more when Dr Perumal was recalled he confirmed that the Plaintiff would have been immediately incapacitated. He was therefore in the swamp where Sergeant Nair apprehended him when he was shot, or he would have testified otherwise. In this regard the unchallenged police evidence is that they stopped firing at the suspects when they (the suspects) entered the swamp. The Plaintiff, himself, said he was felled where he was arrested, that is, in the swamp. On his version, although he had fallen upon reaching the bottom of the embankment, he got up and ran again. This he could not have done on the evidence of Dr Perumal, if he had already sustained the injury to his back.

Lo and Behold, on the version of Nair of the dog unit, the distance between Khehla Khoza and the Plaintiff in the swamp was approximately one hundred to one hundred and fifty metres, which he testified to without any knowledge of Dr Perumal's evidence in this regard. In these circumstances, it could not be excluded that the shot that struck the Plaintiff causing him to be injured as he was, came from the firearm of Khehla Khoza. However, in the light of Dr Perumal's evidence when he was recalled, it is more probable that the Plaintiff was struck by a bullet fired by Khehla Khoza. Putting it another way, it s more probable that the Plaintiff was shot and injured by a bullet emanating from the gun of Khehla Khoza than that of the police. In these circumstances alone, I would dismiss the

Plaintiff's claim. In relation to the issue of the onus, I accept the Argument of Ms Norman that such an acceptance was made under the mistaken belief that the shot that injured the Plaintiff most probably came from the firearm of the police, and that such an admission was made without sight of, or knowledge of the evidence of the expert, Dr Perumal in this regard. Moreover, had she known about the evidence of Dr Perumal at the stage that she admitted that the Defendant bore the onus, she would not have done so. Although the Defendant has not withdrawn it's admission, I cannot ignore the evidence before me. What appears to be the admission made by the Defendant in this regard is that it admitted that the police shot at the Plaintiff and Khehla Khoza on the occasion in question.

Finally in that regard, it is apparent from a perusal of the pleadings that nowhere did the Defendants admit that the Plaintiff was injured as a result of being shot by the policemen.

Even on the basis of accepting that the Defendant admitted that the police shot the Plaintiff and Khehla Khoza, and that the Defendant bore the onus, on the acceptance of the Defendant's version that they were armed and shooting at the policeman, which I have already indicated that I accept, the Plaintiff's claim must fail.

In all the circumstances of this case, I am not persuaded that the police had acted improperly or unreasonably in conducting themselves as they did in the circumstances of this case. Whether, in shooting at the Plaintiff, or arresting and detaining him.

Accordingly, the Plaintiff's claim is dismissed with costs.

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DATE OF JUDGMENT:	22 JUNE 2009
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