55/92

Case No 337/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ABEL TSHABALALA Appellant

and

CITY COUNCIL OF LEKOA Respondent

CORAM: HOEXTER, E M GROSSKOPF, SMALBERGER, F H GROSSKOPF

GOLDSTONE, JJA

HEARD: 17 MARCH 1992

DELIVERED: 30 MARCH 1992

J U D G M E N T

E M GROSSKOPF, JA

The appellant sued the respondent, a local authority, for damages in the sum of R1 518 032,80 arising from personal injuries suffered in a shooting incident. In his particulars of claim the appellant alleged that, on or about 20 December 1986, and at or near a shebeen in the township of Residensia, he had been unlawfully shot in the back by one Leonard Oupa Kgabane. It was further alleged that Kgabane had acted intentionally, or, alternatively, negligently in shooting the appellant, and that Kgabane had at the time been acting in the course and scope of his employment as an employee of the respondent.

It is not necessary to refer to the respondent's plea, since prior to trial the matters in dispute were narrowed down substantially. In a pre-trial conference the respondent admitted that Kgabane was a constable in its

employ at the relevant date. Later, but still prior to trial, the respondent admitted that it was Kgabane who had shot the appellant, that he had done so with his service weapon which had been issued to him by, or on behalf of, the respondent, and that he had acted unlawfully in doing so. By implication it was also common cause that he had acted either intentionally or negligently, because the parties agreed that the only issue remaining, save for the determination of the quantum of damages, was whether the respondent was liable for the delict committed by Kgabane. The parties also agreed that this issue should be tried first, and the Court (FLEMMING J) ordered accordingly in terms of Rule of Court 33(4).

After hearing evidence and argument, the Court a quo found that the appellant had not proved that Kgabane had acted in the course or scope of his employment when he shot the appellant, and ordered absolution from the instance. Against this order the appellant now appeals with leave of

the Court a quo.

The evidence as to what happened on the night in question is very confused. Two witnesses testified in this regard: the appellant himself and one Mokhele, both called on behalf of the appellant. No evidence on this aspect was adduced by the respondent. Kgabane had died before the trial. For reasons of chronology I deal first with Mokhele's evidence. It may be summarized as follows.

Mokhele is a 31 year old man. On the night in question he went to Ma Tshabalala's shebeen in Residensia at about 7.30 p.m. After spending some time there he became, apparently, somewhat boisterous, and was told to leave the shebeen. He went to the outside toilet, intending afterwards to fetch his friends and leave. When turning around, however, he saw Kgabane and a friend. This friend accused Mokhele of bad behaviour against him, and slapped his face. Mokhele slapped him in return, and decided to leave immediately. However, Kgabane and his friend followed him.

Kgabane was saying that he was going to arrest Mokhele. While they were walking, Kgabane's friend pushed Mokhele from behind. Mokhele turned round, and a fist-fight ensued. As Mokhele was gaining the upper hand, Kgabane fired a shot in the air, and again threatened to arrest Mokhele. Mokhele ran away. After running about 70 metres he heard a second shot.

Under cross-examination Mokhele said that Kgabane was in civilian dress. Mokhele saw the appellant at the shebeen that night, but did not go there with him.

I turn now to the appellant's version. He is a 30 year old man who was unemployed at the time. On the night in question he went to the shebeen with Mokhele. They stayed there from 10 p.m. until 4 a.m., when he told Mokhele they should leave. However, Mokhele went out on his own, and after a while the appellant decided to go home. As he went outside, he saw three people next to the toilet. They seemed to be fighting. One of them ran away through the trees, and the other two followed the appellant. The appellant slowed

down, and one of the men reached him. The man took out an axe, and the appellant started running away. However, the man tripped him, and he fell. His assailant also fell down, and the appellant managed to wrest the axe from him. The appellant ran away, but after a short distance was shot in the back. He fell down. The person who had shot him (it is common cause that this was Kgabane) came to him with a firearm in his hand. Kgabane said that he would kill the appellant, and that he was going to detain him. The appellant asked what he had done, and Kgabane told him to keep quiet.

Later two uniformed municipal policemen arrived on the scene in a van. They asked Kgabane what had happened. He replied that the appellant was making himself "as a person who is clever". He also said that the appellant was armed with an axe and wanted to rob some people. The uniformed municipal policemen took the appellant to hospital. He laid no charges against Kgabane, and no charge was preferred

against him.

The appellant was cross-examined at some length, mainly in regard to conflicts between his evidence and an affidavit made by him previously. He did, however, also add one further fact to his evidence in chief - he said that, after he had seen the people fighting next to the toilet, he walked away and then heard a shot. He turned around and saw that two of the men were in the same street as he was while the third was running away through the trees.

On behalf of the appellant a third witness was called, one Nienaber, who had been employed by the respondent in its municipal police force at the time. He identified the occurrence book of the Residensia municipal police station, where Kgabane was employed at the time. The occurrence book contains the following entry under the date 21 December 1986 and time 04h40:

> "SKIET VOORVAL: Kst L. Khabane 1096/2226 Rapporteer 'n skietvoorval. Hy kla dat hy het die persoon dood geskiet. Daar was klomp manne wat 'n swart man met 'n byl aangerand. Toe konstabel Khabane by die hoek kom het hy dit gesien en twee

(2) skoot was getref en een van die manne het geval."

A further entry concerning this incident appears under the same date against the time 06h00. It reads as follows:

"BESOEK: Luit Slabbert het die stasie besoek en hy het by die toneel waar die skiet voorval van Kst Leonard Khabane plaasgevind het ook gegaan. Die swart man wat Kst Khabane geskiet was kla (sic) by die hospitaal geneem. Die besonderheid van daardie swart man is Abel Tshabalala 26 jaar oud woonagtig te 2180 Residensia. Die pistool se nommer is L 48962 Z."

According to Nienaber these entries were made by the charge office sergeant, who would have received the information in the two entries from Kgabane and Lieut Slabbert respectively. Both these men had subsequently died. It would have been Lieut Slabbert's duty to visit the scene of any shooting incident involving a member of the respondent's police force, to prepare a summary, and to hand the matter over to the South African police.

Nienaber also gave evidence about the duties and

training of municipal policemen. Their duties were substantially the same as those of members of the South African police force and they received the same training. This included training in all facets of police work, including the use of firearms, and instruction on the rules regarding arrests and criminal procedure generally.

After an unsuccessful application for absolution from the instance at the end of the appellant's case, the respondent led only one witness, one Makebane, who established that Kgabane was off duty on the night in question.

The main difficulty in this case is to decide what inferences can reasonably be drawn from the evidence. The Court a quo held that Mokhele was a credible witness. The appellant, on the other hand, was held to be an unconvincing witness mainly because of the contradictions between his evidence and his previous affidavit, and those between his evidence and that of Mokhele. These findings as to

credibility were not attacked before us, and I consider that they were fully justified. They must be given full effect in any inference to be drawn from the facts.

The question then is whether the appellant has proved, on a balance of probabilities, that Kgabane acted within the course and scope of his employment when he shot the appellant.

The background against which the events of the night unfolded was common cause. Kgabane was a policeman, armed with his official firearm. Although he was off duty at the time and in private clothes, he was entitled, and may indeed be said to have been under a duty, to perform his functions if circumstances warranted or required it. See Minister of Police v. Rabie 1986(1) SA 117 (A) at p. 133 E. Section 6(1)(a) of the Regulations Relating to Law Enforcment Officers of Local Authorities, R 1900 of 31 August 1984 (GG 9401 of 31 August 1984) provided as follows:

> "The powers, functions and duties of a law enforcement officer shall ... include the taking of such steps as such officer may deem necessary -

(i) for ensuring the preservation of the safety of the residents in the area concerned;
(ii) for maintaining law and order in the area concerned;
(iii) for preventing crime in the area concerned.
....."

The events of the night occurred at approximately 4 a.m. The participants had spent some hours in a shebeen. It is reasonable to infer that none of them was entirely sober.

The imbroglio started with an altercation between Mokhele and Kgabane's companion. On Mokhele's accepted evidence, Kgabane twice threatened to arrest him. The first time was immediately after Mokhele and Kgabane's friend had slapped one another. The second was while the two men were fighting and Mokhele was, according to him, gaining the upper hand. On the second occasion the threat followed immediately after Kgabane had fired a shot in the air.

It seems to me to be a very strong inference that, in acting as he did, Kgabane was not only purporting to perform his duties as a policeman, but also intended to

perform them. A policeman, when in the presence of a fight, is clearly entitled and expected to restore order, and this is in essence what Kgabane did in the present case. (cf. Minister van Polisie v. Ewels 1975(3) SA 590 (A) at p. 597 F in fin.) It is true that in Mokhele's view he waited unnecessarily long in doing so, but this does not in my view detract from the fact that he was doing what he was supposed to do as a policeman. And while it is true that any other bystander might also have tried to stop the fight, Kgabane went further. He fired a warning shot, and threatened to arrest one of the combatants. Now it may also be true, as the learned judge a quo held, that even a non-policeman might, if he had been armed, have fired a shot to warn off a person fighting with his friend. The learned judge did not, however, specifically consider the effect of the threats to arrest. If one takes all the facts in combination, viz., a policeman being present where two persons are fighting, the firing by the policeman of a shot with his service firearm to

cause the persons to stop, and his threat to arrest one of them, the inference is in my view irresistible that he was acting in his capacity as a policeman. The facts that one of the combatants was a friend of his, and that he was not acting with complete impartiality, do not in my view affect this conclusion. These facts indicate that he may not have been performing his duties properly. They do not, however, suggest that he was acting completely outside the scope of his duties.

The next and more difficult part of the enquiry is whether Kgabane was also acting as a policeman when he shot the appellant. Now the shooting of the appellant must have followed closely upon the incident with Mokhele. It has been accepted by all parties that the people whom the appellant saw fighting next to the toilet must have been Mokhele and Kgabane's friend. Mokhele's evidence was that he had run a distance, subsequently measured as 72 m., when he heard the second shot. This must have been the shot that struck the

appellant. While these estimates must not be taken too literally, it nevertheless seems clear that only a brief period of time elapsed between the ending of the fight between Kgabane's friend and Mokhele and the shooting of the appellant.

Now it is significant that Kgabane used no undue force to stop the fight, even though his friend was getting the worse of it. Why would he then immediately afterwards shoot a complete stranger in the back for no reason whatever? It is tempting to think that he may have mistaken the appellant for Mokhele, but it is difficult to reconcile the appellant's evidence with this possibility.

The more likely explanation, in my view, is that the appellant's evidence was largely correct; that he became engaged in a fight in which an axe featured; that Kgabane saw the appellant leaving the scene of the fight with the axe in his hand; and that he shot him under the mistaken impression that he was an aggressor making his escape. This would also

tie in to some extent with the statement made by Kgabane to the two municipal policemen who arrived on the scene later, as also with his statement recorded in the occurrence register.

Of course this version would not be entirely consistent with the appellant's suggestion in his evidence that it was Kgabane's friend who attacked him. However, at that time in the morning, when visibility was probably poor, and when the appellant was probably not sober, such a mistake could easily be made.

It is also noteworthy that there is no suggestion in Mokhele's evidence that his antagonist was armed with an axe, whereas an axe is mentioned not only by the appellant, but also by Kgabane in his statement to the policemen who arrived on the scene, and in the report which was recorded in the occurrence book. It seems probable, therefore, that the appellant was in possession of an axe, and if it is accepted as likely that Kgabane's friend did not have one, the

appellant must have gained it from somebody else.

On this reconstruction it seems likely that Kgabane, who acted as a policeman in stopping the fight between his friend and Mokhele, continued doing so when he shot the appellant while in possession of an axe.

Kgabane's further conduct also supports the inference that he was acting as a policeman. When he came to the appellant, he threatened to kill him, and then said he would detain him. This is an important feature of the case, and I must spend some time on it.

In regard to the evidence of these statements the judge a quo said:

> "The first statement was: 'I will kill you.' That negatives, to my mind, any idea of police action. A man saying to a man shot to the point where he cannot get up, 'I will kill you' is so foreign to police action that I think the argument cannot hold. If it is thereafter added: 'I will detain you ', it is not permissible to select merely one set of words and assess that in isolation from the preceding threat to kill. The overall impression is 'I will get at you', whether it is by way of killing or by way of detention, is something different, but it is a man in a state of upheaval making continued threats to his victim. I find

> that essentially in the main compatible with the idea of a private fight.
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> On this issue one should not be unmindful of the fact, as stressed by plaintiff's counsel, that Kgabane was a man with training. What he threatened to do in this case, as contrasted with the witness Mokhele, was not an arrest. He threatened to detain him. One should not ignore the difference in words and from there postulate that perhaps, after all, an arrest in the ordinary sense of the criminal law was meant, and because that is mostly germane to the police actions that this was also a police action."

The learned judge then continued by saying that the appellant was an unconvincing witness, and he did not accept that the words regarding detention were proved to have been used.

These findings call for some comment. Of course, the mere fact that the appellant's evidence was not controverted does not mean that it must necessarily be accepted. However, the Court a quo did not hold that the appellant's evidence was a complete tissue of lies. Much of it was clearly and obviously true. What reason is there then to doubt that Kgabane threatened to "detain" him? If one

accepts that Kgabane's actions did not amount to a wanton and unprovoked assault, but had their origin in some belief that the appellant was doing wrong, it would be the normal thing for Kgabane to express an intention to "detain" the appellant. After all, a short while before he had threatened to arrest Mokhele. And the mere fact that the threat to "detain" was coupled with a threat to kill, is not important in my view. If Kgabane really wanted to kill the appellant he could easily have done so. The threat to kill was clearly a rhetorical outburst in the circumstances. The fact that it was made does not in my view render it unlikely that he would also have expressed an intention to detain the appellant. I consider therefore that the Court a quo erred in not accepting the appellant's evidence that Kgabane had threatened to detain him.

The learned judge's finding on this aspect calls for comment in a further respect. The judge makes some point of the difference between the word "detain" used

towards the appellant, and "arrest" used towards Mokhele. Now the appellant did not give evidence in English. His evidence was interpreted. The judge did not investigate whether there was in fact any difference in the word used in the original language. But in any event, if a policeman threatens to detain a person it is difficult to imagine that he could have anything other than an arrest in mind. In argument before us Mr. Johnson for the respondent also readily conceded that no distinction could in the circumstances be drawn between "arrest" and "detain". I revert to this matter when dealing with the question of costs.

In the result the appellant's case is in my view substantially supported by the evidence that Kgabane threatened to detain him. This is an indication that Kgabane was performing his duties as a policeman.

To revert to the narrative: after shooting the appellant Kgabane stayed with him until the police van

arrived. This is not the conduct one would expect of a person who has wantonly shot a stranger. His statement to his colleagues suggested that in his mind he had been acting against a dangerous axe-wielding robber. This is also the effect of his report contained in the occurrence book. Now it is conceivable, as found by the Court a quo, that a private person, after shooting a person, would stay with him for humanitarian reasons, that he would then be asked for an explanation, and would proffer some exculpatory statement along the lines of those made by Kgabane. These things are certainly possible, but if one has regard to Kgabane's whole course of conduct it is much more likely that his actions were dictated by what he considered was required of him as a policeman.

I come now more specifically to the entry in the occurrence book. This almost illiterate entry is clearly far from the truth. For one thing, the appellant was not shot dead, and Kgabane knew this. The reference to "'n klomp

manne" who attacked somebody with an axe also seems suspect. But be that as it may, what seems clear is that Kgabane reported the incident so that it could be investigated in the usual way by Lieut. Slabbert. The fact and nature of the report indicate that Kgabane was, in his own mind, following proper police procedures, and had done so during the shooting incident.

Some point was made by the respondent of the fact that no prosecution was instituted against the appellant. In my view nothing turns on this. The appellant was taken from the scene to the hospital, and Kgabane made his report to the charge office sergeant. Within hours Lieut. Slabbert investigated the occurrence. It would seem that the matter was then out of Kgabane's hands. The failure to prosecute therefore throws no light on his state of mind. It may suggest that he was found not to have been justified in shooting the appellant, but it is in any event common cause that he acted unlawfully.

My conclusion from the evidence as a whole is accordingly that Kgabane was, from the time of the incident with Mokhele, purporting to act as a policeman. Since his intention can in the present case only be deduced from his actions, and since there is nothing to suggest that his conduct was a mere charade designed to conceal ulterior motives (as was the position in Rabie's case, supra) it seems to me that we should infer that, as a fact, he also intended to act as a policeman. This would then mean that, in shooting the appellant, he acted in the course and scope of his duties as a servant of the respondent, and that the respondent would be vicariously liable for his delict.

In view of the factual findings made above, it is not necessary to consider certain reservations about the majority judgment in the Rabie case (supra) expressed by the learned Judge a quo in his judgment. The facts of the present case establish vicarious liability whichever of the two judgments in Rabie's case is applied. In saying this I

do not, of course, cast any doubts on the correctness of the majority judgment, which was not attacked before us and need therefore not be considered.

On the question of costs there is one further matter with which I should deal. I have already referred to the word "detain" which was, according to the appellant, used by Kgabane after he had shot him. At the trial no point was made of the use of this word. No cross-examination was directed to this question. During the argument on the application for absolution from the instance at the conclusion of the appellant's case, the learned judge himself translated the evidence as "Ek gaan jou arresteer". Clearly at that stage he did not consider the difference between "detain" and "arrest" significant. However, in his judgment there appears the passage which I have quoted above, in which some importance is attached to the difference. A similar passage appears later. In view of these references the appellant filed a petition asking leave to lead evidence as

to the actual language used by the appellant. This evidence was that of an attorney (who was at the time of the trial a candidate attorney) Miss Refilae Mokoena, who attended the trial. In her affidavit attached to the petition she states that the appellant gave his evidence in Southern Sotho, which is also her home language. The word used by the appellant and which was interpreted as "detain" was "tshwara". This word means both "detain" and "arrest".

In view of the attitude adopted by Mr. Johnson for the respondent to which reference was made above, viz., that he did not rely on any distinction between "detain" and "arrest", the petition was not moved. The question now arises whether the appellant is entitled to its costs.

The parties have not been able to refer us to any precedent for this petition, and I am not aware of any. In S v. Naidoo 1962(2) SA 625 (A) at p. 632 G WILLIAMSON JA accepted, on the strength of Wigmore, that an interpreter is "a kind of witness". WILLIAMSON JA then went on:

"That, on analysis, is what he really is. The

> witness being examined is saying something not perhaps understood by the Court or the Court recorder; a species of expert witness is telling the Court in a language understood by the Court (and by any recorder) what it is the witness is actually saying. What the expert or interpreter tells the Court becomes the actual evidence in the case put before the Court and recorded."

See also S v. Mpopo 1978(2) SA 424 (A) at p. 426 F-H.

Now the purpose of the present petition is to qualify what the interpreter said. If the interpreter is regarded as a type of witness, the petition in effect seeks to lead further evidence on a matter on which the interpreter has testified. Although an interpreter is of course not a witness in the ordinary sense, it seems to me that a Court should be as loath to allow a party to challenge the interpreter's version of what a witness said as it would be to allow further evidence in the strict sense to be led on appeal. The principles set out in the latter regard were discussed in Staatspresident en 'n Ander v.Lefuo 1990(2) SA 679 (A) at pp. 690 J to 692 F and previous cases there set out, and I need not repeat them. Applying them by analogy, I

consider that the appellant had, in the circumstances, reasonable grounds for not challenging the interpretation in the Court a quo; that the evidence of Miss Mokoena is acceptable, and, indeed, is not disputed; that the interpreter's rendering of the evidence was apt to be misleading and in fact misled the trial judge; that the use of the word "detain" rather than "arrest" was regarded as important by the trial judge, and that it could accordingly be expected that Miss Mokoena's evidence could make a substantial difference to the outcome of the case. In these exceptional circumstances it seems to me that the appellant was entitled to bring the petition, and although in the result it was not moved, that he is entitled to the costs thereof.

In the result the following order is made.

1. The appeal is allowed with costs, including the costs of the petition dated 27 August 1991.

2. The order of the Court a quo is set aside and the

following substituted:

"(a) The Court finds that the defendant is vicariously liable to compensate the plaintiff arising out of the delict committed by Constable Kgabane, to which reference is made in the pleadings; and

(b) The defendant is ordered to pay the costs of the action up to the date of this Order."

E M GROSSKOPF, JA

HOEXTER, JA
SMALBERGER, JA
F H GROSSKOPF, JA
GOLDSTONE, JA Concur