THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 269/10

In the matter between:

SAMUEL MAIMELA **First Appellant**

FRANCINA POPELA **Second Appellant**

and

THE MAKHADO MUNICIPALITY **First Respondent**

NGHAMULA WILSON NKUNA **Second Respondent**

Neutral citation: *Maimela v Makhado Municipality* (269/10) [2011] ZASCA 69 (20 May 2011)

Coram: MPATI P, CACHALIA and MAJIEDT JJA

Heard 23 February 2011

Delivered: 20 May 2011

Summary: Delict – action for damages – personal injury sustained in shooting incident – defence of necessity – conduct of firing shots to avert

murderous attack justified and thus not wrongful.

Delict – action for damages – dependants' claim – death of breadwinner from injury sustained in shooting incident – defence of necessity – elements of wrongfulness and fault part of ingredients of cause of action – conduct of firing shots to avert murderous attack justified and thus not wrongful.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Legodi J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MPATI P (CACHALIA and MAJIEDT JJA):

[1] On 15 July 2002 the first appellant and one Philip Davhana (Davhana), the late husband of the second appellant, were struck by live ammunition fired by the second respondent from a semi-automatic pistol. The first appellant survived the shooting while Davhana died from the injuries he had sustained. The appellants subsequently instituted action against the respondents, in the North Gauteng High Court, Pretoria, for damages suffered as a result of the injuries sustained (in the case of the first appellant) and the death of Davhana (in the case of the second appellant). At the time of the

shooting the second respondent was employed by the first respondent and the latter was sought to be held vicariously liable for the former's actions, it being alleged that when he fired the shots the second respondent was acting in the course and scope of his employment with the first respondent. In instituting her claims the second appellant acted in her personal capacity and in her capacity as mother and sole guardian of her four minor children born of the union between her and Davhana. Her claims were for damages for loss of support. I shall, for convenience, refer to the first appellant as 'Maimela'; to him and the second appellant collectively as 'the appellants' and to the second respondent as 'Nkuna'.

[2] To the appellants' claims the respondents pleaded, inter alia, that Nkuna 'fired shots in self- defence during an emergency situation'. In the pre-trial minute, however, the issue that the trial court was required to consider was formulated as follows:

'Whether, in discharging his firearm on 15 July 2002, [Nkuna] acted in self-defence, alternatively during a state of necessity.'

At the commencement of the trial the court (Legodi J) ordered, by agreement between the parties, that the matter proceed only on the merits, the issue of quantum standing over for later determination. After he had heard evidence the learned judge upheld the respondents' alternative defence of necessity and dismissed the claims with costs. This appeal is with his leave.

[3] The following common cause facts, as agreed between the parties, were recorded in the rule 37 minute:

'**6 COMMON CAUSE FACTS**

6.1 The parties have agreed that the following facts are common cause:

6.1.1 The first plaintiff and the late Mr Phillip Davhana ("Davhana") were at all material

times members of the South African Municipal Workers Union ("SAMWU") and employees of the first defendant.

6.1.2 The second defendant was at all material times employed by the first defendant as its Human Resources Manager.

6.1.3 During or about late June 2002, SAMWU called a protected strike over a wage dispute with the first defendant.

6.1.4 The protected strike commenced on or about 2 July 2002 and ended on or about 19 July 2002.

6.1.5 On 15 July 2002 the second defendant, acting within the course and scope of his duties, entered an area where striking workers were present.

6.1.6 In consequence of the second defendant entering the area where the striking workers were present, the second defendant was assaulted and sustained certain injuries as set out in the expert report of Dr. du Plessis.

6.1.7 The second defendant produced a firearm and fired several shots.

6.1.8 The firearm used by the second defendant was a 9mm parabellum calibre CZ model semi-automatic pistol, with serial number 161036, registered in the second defendant's name.

6.1.9 In consequence of the second defendant discharging his aforesaid firearm on 15 July 2002, the first plaintiff was shot in the face.

6.1.10 In consequence of the second defendant discharging his aforesaid firearm on 15 July 2002, Davhana was shot in the chest and died as a result thereof on 15 July 2002.'

[4] The circumstances leading up to Nkuna entering the area where the striking workers were present, which are largely undisputed, are briefly these: Nkuna, who was

the acting Municipal Manager of the first respondent at the time, in addition to his normal position as Head of Human Resources, was approached in his office by a Captain Sibola from the office of the Area Commissioner of Police. She informed him that the striking workers were throwing around trash and intimidating members of the public. She expressed an intention to take action against them but said that she first wanted to discuss the matter with him. He arranged a meeting with all departmental heads and sent a letter to the 'striking committee', a body representing the striking workers and through which management communicated with the workers, inviting them to the meeting. The letter was handed to a Mr Luus, one of the first respondent's chief traffic officers, to deliver to the chairman of the striking committee, Mr James Sekware. When Mr Luus failed to return another official, Mr Peter Mulaya (Mulaya),[1] who was both spokesperson for management and secretary of the South African Municipal Workers Union (SAMWU), was dispatched to ascertain what was happening. When Mulaya also did not return Nkuna requested a co-manager, Mr Peter Mawgala (Mawgala), to accompany him to where the striking workers were. His intention was to ask the members of the striking committee to attend the meeting.

[5] As the two proceeded in the direction of the workers they saw Mulaya, who, until then, had been with the workers, walk towards them. Upon meeting them he told them that the workers wanted to be addressed by Nkuna. According to Nkuna, the three then walked together towards the workers. When they were close to them the workers encircled them. Mawgala, however, testified that when Nkuna and Mulaya walked towards the workers he was talking to another person and only joined the other two when they had already been encircled by the workers. It appears that the crowd was hostile towards the three officials and Mulaya tried to calm them down by loudly chanting the slogan 'Viva SAMWU, Viva SAMWU'. Mawgala said while they were standing in the middle of the crowd he was struck on the head by what he believed was a knob-kierie. He then saw workers assault Nkuna with fists and knob-kieries. He managed to escape by running away through an opening in the crowd. While he was running he 'heard a sound just like a gunshot', after which he saw some workers

1 The record gives two other variations of the spelling of the surname: 'Molaia' and 'Mwule'.

running. He jumped over a gate and observed the scene from ‘the other side of the gate’. From that vantage point he saw Nkuna stand

up, his body covered with blood. Mawgala testified further that while Nkuna was trying to stand up he (Mawgala) 'saw a big stone which hit him [Nkuna] on the head and then he fell down'. He was there attended to by a nurse and some traffic officers. Mawgala confirmed in cross examination that when he and Nkuna could not get an audience with the workers, they tried to move away but did not manage to do so. He disputed what was put to him by counsel for the appellants that Nkuna fired shots before he was assaulted. He could not say, however, whether Nkuna was lying down or was up on his feet when he discharged his firearm.

[6] Nkuna testified that while Mulaya was trying to calm the workers Sekware shouted:

'What are these people looking for here, who called them here, why are they here?' He was then struck on the head with a knob-kierie and thereafter assaulted by members of the crowd. They kicked and beat him with fists until he fell to the ground. He was assaulted continuously with knob-kieries and kicked repeatedly. When he realized that his life was in danger he struggled to draw his firearm and when he ultimately succeeded he cocked it and 'fired two or three shots without aiming anywhere', while he was still on the ground. The workers scattered. He was bleeding all over and his clothes were torn off. As he struggled to his feet a man approached him. At that stage he was holding his firearm by its barrel. He thought this person was coming to assist him, but, instead, the man hit him on the head with what appeared to be a rock. They struggled over the firearm, but he collapsed onto the ground, unconscious. When he regained consciousness he discovered that he was at Louis Trichardt Memorial Hospital, from where he was airlifted to Unitas Hospital in Pretoria.

[7] When asked why he fired the shots Nkuna replied:

'I fired the shots because my life was in danger . . . they were in the process of killing me.'

He said he fired the shots 'to scare them away'. He denied in cross examination that he was assaulted after he had fired shots and said he only fired while he was lying on the

ground and 'being hit by the mob'. He testified that he fired the shots into the ground, but when asked why one of the bullets found on the scene was not damaged, which meant that he could not have fired into the ground (tarmac), he responded:

'When I fired the bullets I was on the ground and there were more than 300 people trying to hit me with something at the same time . . . As much as I was intending to shoot at the ground . . . it might happen that a bullet never hit the ground.'

It was put to him that the person he said approached him after he had fired shots was a Mr Abraham Tshirupfe, who would testify that at that stage he (Nkuna) had not as yet been assaulted; that he approached Tshirupfe, pointing a firearm at him; that Tshirupfe struggled to take the firearm from him; that he (Nkuna) hit Tshirupfe on the head with the butt of the firearm; that Tshirupfe disarmed him, after which he (Nkuna) pulled a second firearm 'out of your sock or your shoe', but was disarmed of that firearm as well. Nkuna denied all this and claimed that he owned only one firearm.

[8] Mr Martin Tobie Luus (Luus), an assistant manager: Traffic and Licensing at first respondent municipality, also testified. He was 'about 25 to 30 yards' from the group of striking workers when Nkuna, Mawgala and Mulaya walked into the group. He said he could hear that there were hectic arguments and immediately after that the group 'started to club down and kick and hit with the "knob-kieries" and sticks, somebody'. He could not see who was being attacked. He then heard three shots and the crowd immediately dispersed. To his surprise he saw Nkuna lying on the ground. He noticed that Nkuna was without shoes, his shirt was torn off and he was bleeding profusely. He said as Nkuna tried to stand up he saw someone from the crowd go towards him (Nkuna). This person picked up 'a sizeable stone'- the size of a rugby ball - and hit Nkuna on the head with it. In cross examination Luus gave the sequence of events as follows:

'They went into the crowd, then arguments started, then the assault thereafter, then the shots were fired, then the crowd dispersed.'

[9] Five witnesses testified on behalf of the appellants, namely the first and second appellants, Messrs Elvis Tlou, a driver employed by the first respondent and a member of SAMWU, Peter Masia and Tshirupfe, both employees of the first respondent and members of SAMWU. It is unnecessary to set out in detail the testimony of Tshirupfe, which was mainly in line with what was put to Nkuna in cross-examination. His version as to when the shots were fired was rejected by the trial court, correctly so, in my view. The court held that the version of the respondents 'is more probable than that of the appellants'.

[10] Tlou testified that he was standing on the outside of a 'danger tape' with which the area where the striking workers were gathered was demarcated when he saw Nkuna, Mawgala and Mulaya walk towards the workers. He heard Sekwari when the latter asked them where they were going. When they were in the crowd he heard someone shouting the words 'viva SAMWU viva'. After a while he heard a gunshot and 'people started to disperse, running'. One of the workers approached him and reported that another person had fallen, pointing in a particular direction. He followed the direction pointed to him and found Davhana. Another person told him about someone else who was bleeding. He ascertained thereafter that the person who was bleeding was the first appellant. He then conveyed his two injured colleagues to hospital in his vehicle.

[11] Masia was among the striking workers when Nkuna, Mawgala and Mulaya walked into the group. He said that when Mulaya shouted the words 'viva, viva' and 'down with the destruction of municipality properties and littering' the crowd screamed at him. A lady drew his attention to Nkuna who had a firearm in his hand. While the crowd was still screaming at Mulaya he heard a gunshot. Masia's testimony proceeded as follows:

'[W]hen I heard, when we heard a gunshot, we then dispersed, we started to run.'

And:

'While we were still running we heard another two gunshots, now, from the first one, another two, then there were three now'.

According to him he saw that Nkuna was pointing the firearm at the dispersing crowd when he fired the last two shots. On what transpired after the shots were fired Masia supported Tshirupfe's testimony. On his version Nkuna fired the shots for no reason whatsoever. However, the court a quo rejected his version that he saw Nkuna with a firearm in his hand while in the crowd. It held that it was improbable that Nkuna 'could have approached the strikers, entered the area of picketing, stood in the middle of them and then held a firearm in his hand'. I agree.

[12] The second appellant's testimony related to her customary union with Davhana. Her evidence that she was married to him by customary union and that four minor children were born of that union was not challenged.

[13] The first appellant testified that he never saw the three officials when they walked into the crowd of striking workers because, although he had been part of the crowd, he had gone to the toilet. When he walked back towards the crowd he was shot on the side of his mouth. The bullet penetrated his left cheek and appears to have damaged his eyesight.

[14] Counsel for the appellants did not seek to persuade us to disturb the factual findings made by the trial court. Indeed, counsel's argument proceeded on the assumption that this court will not overturn the trial court's finding that Nkuna was the victim of an attack before he fired the shots. There is, however, one aspect of the judgment of the court a quo that requires attention. It relates to the court's reasoning in rejecting Masia's evidence that Nkuna was assaulted after he had fired shots. The court reasoned that because Masia could not see Nkuna in the crowd as he was concentrating on Mulaya and the crowd, and because, according to him, the crowd dispersed and ran away after the first shot, Masia 'cannot say whether Nkuna was

assaulted before the first shot was fired'. The learned judge assumed that Masia also ran away after the first shot and concluded that he could therefore not have seen Nkuna firing a gun while he was amongst several hundred people who were running away. I raise this because counsel for the appellants submitted that the court below appeared to have accepted that after the first shot had been fired the crowd immediately dispersed. This is incorrect. It was Masia who had testified that the crowd dispersed after the first shot. And he was the only one to give that evidence. Tshirupfe testified that after the three officials had entered the crowd he heard three gun shots '[w]ithin the twinkle of an eye' and then people started to disperse. In a statement he deposed to before a police captain in Louis Trichardt on 17 July 2002, Nkuna stated that he fired a shot into the ground and saw that the crowd was still around. He then fired another shot into the ground. I accordingly disagree with counsel's contention that, even if it cannot be said that the trial court made a specific finding that the crowd dispersed after the first shot had been fired, the evidence and the probabilities support such a conclusion. In fact, the opposite appears to be true, in my view.

[15] As has been mentioned above, the court below was called upon to consider the respondents' plea of self-defence, alternatively necessity, in relation to the facts of the case. It decided to consider the alternative plea of necessity, reasoning that 'for the purpose of these proceedings it does not matter whether the defence of self-defence is proved or not if the defence of necessity is found to be justified'. The court found that the actions of Nkuna in firing the shots he did were justified.

[16] In view of the conclusion reached by the court a quo and the arguments on behalf of the appellants, with which I agree, that in the absence of any evidence to show that Davhana and Maimela participated in the assault the defence of self-defence was not available to Nkuna, I do not propose to embark on an elaborate exposition on the differences between the defences of self-defence and necessity. It suffices to say that necessity, unlike self-defence, does not require the defendant's action to have

been directed at the perpetrator of an unlawful attack. It is invoked where the action, or conduct, of the defendant was ‘directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous

situation'.[2] And whether or not the defendant's conduct would be covered by the defence of necessity will depend on all the circumstances of the case.

[17] Professor Jonathan Burchell[3] suggests that for an act to be justified on the ground of necessity the following requirements must be satisfied:

'(a) [A] legal interest of the defendant must have been endangered, (b) by a threat which had commenced or was imminent but which was (c) not caused by the defendant's fault, and, in addition, it must have been (d) necessary for the defendant to avert the danger, and (e) the means used for this purpose must have been reasonable in the circumstances.'

The crux of counsel's argument was that the respondents failed to show that it was reasonable for Nkuna to have fired shots in the direction of Maimela and Davhana, particularly the shots that struck them. It was therefore submitted that the last element of the requirements as formulated by Professor Burchell was not established, because it was not reasonable for Nkuna to have fired randomly in the direction of the crowd, most of whom were not participating in the attack upon him. Counsel's further contention was that even if it was reasonable for Nkuna to have fired randomly into the crowd it was not reasonable for him to have continued firing after the first shot.

[18] It may well be that Davhana was not participating in the attack upon Nkuna when he was struck by a bullet – Maimela's testimony that he was not has to be accepted in the absence of evidence to the contrary – hence the defence of necessity. But to escape liability for Nkuna's actions the respondents were not required to establish that Maimela and Davhana were part of the attacking crowd.[4] It could not be argued in this case, in my view, that it was not necessary for Nkuna to avert the

2 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) para 10, quoting with approval J C van der Walt and J R Midgley *Principles of Delict* 3 ed para 87.
3 *Principles of Delict* (1993) 75.
4 *Petersen v Minister of Safety and Security* [2010] 1 All SA 19 (SCA) para 11.

murderous attack upon him by members of the crowd. It is not in dispute that while he was lying on the ground, helpless, after he had been struck by a knob-kierie and felled by fist blows and kicks, Nkuna was assaulted so severely that when the assault stopped he was bleeding profusely barely with any clothes left on his body. I agree with the view of the court below that had he not fired the shots Nkuna would, in all probability, have been killed.

[19] It was not suggested before us that it was not reasonable for Nkuna to have averted the danger of being killed by a murderous crowd by firing shots with his firearm. Nor was it argued that the use of his firearm by Nkuna was not the only reasonably possible means of averting the danger.[5] In these circumstances, I fail to see how it could be argued that it was not reasonable for him to have fired randomly in the direction of the crowd, if indeed he did, when people in that very crowd were perpetrating the murderous attack on him. It may well be, and in all probability is so, that most of the crowd were not close enough to physically participate in the assault. But it is precisely these situations that the defence of necessity seeks to cover.

[20] Counsel for the appellant submitted, however, that a court should be extremely hesitant to accept, without the most compelling evidence and circumstances, that it is lawful to kill an innocent person. In this regard, counsel contended, due regard must be had to 'the right to life' of the innocent victim as provided for in s 11 of the Constitution. This is so, but, as was stated by the Constitutional Court, '[t]o deny the innocent person the right to act in self-defence would be to deny to that individual his or her right to life'.[6] The same is true where an innocent person acts in circumstances of necessity. Thus, where a defendant is able to show that his conduct in causing the death of an innocent person was objectively reasonable in the particular circumstances, he will be exonerated. Of course, in determining whether the conduct of the defendant was

5 This is one of the considerations a court must take account of in determining the reasonableness of a defendant's conduct. See *Crown Chickens,* para 13, where Nugent JA quotes from Van der Walt and Midgley *Principles of Delict* para 87.
6 S v Makwanyana & another 1995 (3) SA 391 (CC) para 138.

reasonable a court will consider questions of proportionality. As was said in *Crown Chickens*[7], 'the greater the harm that was threatened, and the fewer the options available to prevent it, the greater the risk that a reasonable person would be justified in taking, and *vice versa*'. I have mentioned above that the crowd perpetrated a murderous attack on Nkuna. In my view, there can be no greater harm than a threat to one's life.

[21] Admittedly, there were apparent inconsistencies in Nkuna's evidence. He testified in chief that when he was being assaulted while on the ground he was covering his head; he struggled to reach for his pistol and struggled to cock it. He said that while he was on the ground he fired two or three shots without aiming anywhere. When he was confronted in cross examination with the contents of his police statement in which he stated that all the shots he fired were 'pointed on the tar', he confirmed what he said in his statement as being correct. He was then referred to the appellants' expert notice in respect of the evidence that would be tendered by a ballistics expert, to the effect that a 9mm calibre undamaged fired bullet found near the scene had no markings, which indicated that the bullet had not ricocheted off a tarred surface. To this he responded that as much as he was 'intending to shoot at the ground', it 'might happen that a bullet never hit the ground'. Elsewhere in his testimony he said that he never intended to kill anyone, but rather wanted to ward off his attackers. Counsel accordingly submitted that if, as Nkuna impliedly conceded, the circumstances were such that he thought it appropriate to try to ward off his attackers rather than to kill them that showed that it was not objectively reasonable for him to simply shoot into the crowd. The prospect that his shooting would cause death or injury to innocent third parties was overwhelming, so the argument continued. The alternative, said counsel, was to fire in the air once, twice or thrice, or into the tarmac, or once into the crowd. But I think the stance adopted by counsel is that of an arm-chair critic.

7 Para 14.

[22] First, the postulated alternatives were never canvassed with Nkuna during the trial. Second, his evidence, which was accepted by the trial court, was that when he fired the shots he was on the ground with members of the crowd assaulting him while he was trying to cover his head. In my view, it would be unreasonable to have expected him, in these circumstances, to have looked up and carefully observed whether he could fire a warning shot. In light of the evidence it is hardly surprising that, even though he may have intended to fire into the ground as he thought he had done, he may not have.

[23] Lastly, counsel submitted that the respondents did not show how many shots were fired and that the respondents have not excluded as a reasonable possibility that five shots were fired. The question that has to be answered, counsel contended, was whether, if the object was to ward off the attackers (and not to kill any of them), it was reasonable to have fired as many times. In my view, a reference to the evidence will answer this question. It is true that in his statement to the police Luus said that five shots were fired. However, during his evidence at the trial he testified that only three shots were fired. Nkuna said he fired two or three shots. He said: 'then I fired those shots to scare them away . . . And then they have scattered'. Masia, the appellants' own witness, confirmed this. The difference between his version on this aspect and that of Nkuna was that he testified that the crowd dispersed after the first shot. That part of his evidence was rejected by the court below. In my view, Nkuna's conduct was objectively reasonable and his defence of necessity was thus correctly upheld by the court a quo.

[24] As to the second appellant's claim in her representative capacity, counsel submitted that even if it should be found that Nkuna acted reasonably, there was still a valid dependant's claim. Counsel derived support for his argument from the following passage in Professor Burchell's work:

'However, if an innocent person has been killed by another under compulsion, no conflict with the existing law in South Africa would result if the deceased's dependants were able to sue the killer for damages for loss of support. As we have seen, the dependants sue in their own right and the fact that the killer's conduct might be justified by compulsion (i.e. lawful) vis-à-vis the innocent victim does not impair the right of the dependants of the victim to recover damages for loss of support from the person who has deprived them of this support. The deprivation of support remains unlawful even though the killing of the breadwinner is lawful.'[8]

To the extent that this passage suggests that no wrongful act on the part of the defendant need be proved in a dependent's claim for loss of support, I disagree. In the *Crown Chickens* case Nugent JA said the following:

'But, while it is clear that there is no liability for harmful conduct that occurs in circumstances of necessity, and that the standard for assessing the conduct is objective, it has yet to be authoritatively determined where necessity fits in the jurisprudential scheme of delictual liability. The weight of academic opinion is that necessity operates to justify conduct that would otherwise be wrongful, thus taking it outside the class of conduct that is susceptible to an action for damages, a view that seems largely to draw upon analogous principles that have been developed in criminal law. On the other hand, it also seems at times to have been suggested that it might operate instead to avoid a finding of negligence.'[9]

[25] The basic ingredients of a claimant's cause of action in a claim for damages for loss of support were summarized by Corbett JA as follows in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839B-C:

'(a) [A] wrongful act by the defendant causing the death of the deceased, (b) concomitant *culpa* (or *dolus*) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) *damnum*, in the sense of a real deprivation of anticipated support.'

8 *Principles of Delict*, above fn 3 p77.
9 Para 11. (Footnotes omitted.)

Thus, questions of wrongfulness and fault come into the picture, as they do in Maimela's claim based on the bodily injury he sustained. And, as the learned Judge of Appeal continued, the *facta probanda* would relate to these matters (the basic ingredients) and 'no cause of action would arise until they had all occurred'. Put simply, without a wrongful act there can be no cause of action for loss of support. It follows that the dependents' claim brought by the second appellant on behalf of Davhana's minor children could not succeed.

[26] The appeal is dismissed with costs.

L Mpati
President

APPEARANCES

APPELLANTS:	A J Freund SC Instructed by Cheadle Thompson & Haysom, Pretoria; McIntyre & van der Post., Bloemfontein
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