

# CASES / VONNISSE

## WAS JUSTICE DONE?\*

**Ntamo v Minister of Safety & Security  
2001 1 SA 830 (Tk);  
Minister of Safety & Security v Ntamo  
2003 1 SA 547 (SCA)**

### 1 Introduction

*Minister of Safety and Security v Ntamo* 2003 1 SA 547 SCA is a case which turned on the issue of private defence. The respondent (plaintiffs), who had succeeded in the trial court (*Ntamo v Minister of Safety and Security* 2001 1 SA 830 (Tk)) in a dependant's action, comprised the wife and children of the deceased. The deceased had been shot dead by members of the South African Police Services.

The Supreme Court of Appeal (SCA) judgment (*Minister of Safety and Security v Ntamo* 2003 1 SA 547 (SCA)) is clearly more defensible than that of the trial court. Both judgments however require some comment: the trial court judgment for an observation of some difficulties in adjudicating upon private defence, particularly since the SCA judgment adopted a different route and did not engage with the difficulties encountered by the trial court, and as such issued no confirmation nor corrections. The SCA judgment is brief (four pages) but requires comment, briefly, on the burden of proof resting on the defendant who raises private defence.

### 2 The facts

The facts upon which there was consensus, were as follows. The deceased had been travelling by bus from Cape Town to Engcobo. While the deceased slept on the journey, the bus driver altered his route with the effect that the deceased was no longer directly en route to his destination. The bus driver

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made arrangements, as he altered his route, for those passengers who wished to remain on the original route to swap to another bus which would take that route. When the deceased awoke, he approached the driver, grasped him on the shoulder, causing the driver some pain, and told him that he was being driven astray. Other passengers reprimanded the deceased who then let go of the driver. The driver offered to arrange for a taxi to correct the problem whereupon the deceased turned on the passengers who had reprimanded him. He verbally abused them, took hold of one, and drew a pistol. At this point the bus reached a bus rank where the driver stopped. The deceased had begun slapping a passenger while pointing his pistol at him. He then cocked his pistol. The driver heard a shot fired as he rushed to the police station. He reported the matter to the police. Four police officers responded and went to the bus rank. At the bus rank the police officers shot dead the deceased. The appellant (defendant) admitted that its employee police officers had shot and killed the deceased, but argued that the deceased had shot at them first and that their conduct had been in defence of their own and the lives of members of the public and that the conduct of the officers was therefore justified and not wrongful. The appellant adduced the testimony of various police officers in support of its version, including three of the four officers who responded at the bus rank.

### **3 Analysis**

#### *3.1 Trial court*

Madlanga AJP accepted the argument submitted by counsel for the defendant, that the court could not reject the police version of what occurred in respect of the shooting since the plaintiffs had not suggested an alternative. The judge undertook therefore to rely on the version of the facts presented by the police [19] which, significantly, he described as follows:

“Sergeant Manana was clad in civilian clothes. Sergeants Mapongwana and Baninzi and Constable Msebi were in police uniform. Sergeant Manana was armed with a 9 mm pistol. The other three were each armed with an R5 automatic rifle. Of the three sergeants, Manana was the most senior (having attained the rank before the others). His plan was to approach the deceased, identify himself as a policeman and dispossess him of his pistol. He believed that the civilian clothes would make it easier for him to get close to the deceased. He was counting on the deceased mistaking him for a member of the public. True to plan, Manana manoeuvred his way to the deceased. The three uniformed policemen were standing in a semicircle about 16 paces away. The deceased had already disembarked from the bus. He had a pistol held aloft. Manana showed him his appointment certificate and told him that he was a policeman. He also showed him the other three policemen. He took the deceased’s arm that held the pistol, put it over his shoulder and instructed the deceased to drop the pistol behind him. The deceased did not heed this instruction. Instead, he pushed Manana aside. May I state here that Manana is a very small, short man. It is common cause that the deceased was a tall, big and well-built man. After being pushed, Manana staggered and ran away. The deceased fired in the direction of the police. All four policemen returned fire and continued shooting until the deceased fell. He died as a result of the shooting. The police claim that they shot and killed the deceased in self-defence and in defence of the other members of the public who were at the scene. None of the policemen were struck by the shots fired by the deceased” [10-12].

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Madlanga AJP thus identified the defence raised by the defendant as private defence and noted that, for the present purposes, two requirements for such a defence had to be addressed:

“The view that I take of the facts of this case is that what needs to be determined is whether the use of force was necessary at all and, if it was necessary, whether the force used was not excessive (ie was it proportional to, or commensurate with, the threatened harm)” [21].

The judge discussed each of these two requirements in turn. He dwelt for some time on the matter of whether lethal force was necessary in the circumstances confronting the police.

Madlanga AJP was clear that the police had a reasonable basis for fearing that the deceased might shoot someone [22]. However, he considered that the objectively reasonable approach in the circumstances would have been to follow the “easier” method for disarming the deceased of, from a distance, giving loud instructions to the deceased to disarm and watching his response. In the absence of an immediate and favourable response, a warning shot could have been fired [23-24].

This approach, the court considered, was preferable not on the basis that it was better than the one actually adopted, but on the basis that the actual method adopted was unjustified irrespective of the alternatives:

“I am not merely comparing the two possible methods of averting the danger which are under discussion here with the method actually employed by the police and adjudging the latter method worse than the first two ... What I am in effect finding is that the method adopted by the police was completely unjustified. The manner in which the police approached the crisis was characterised by a lack of professionalism, absence of proper planning and general bungling” [24-25].

However, conduct is only justified relative to what the circumstances permit so that in some circumstances one course is better than another. The very question of whether force was necessary begs a question of comparison: was there nothing else that could be done? Burchell and Milton (*Principles of Criminal Law* 2ed (1997) 139) explain the requirement of necessariness thus: “A person is justified in acting in defence only if the attack cannot be averted in any *other way*” (emphasis added). No course can ever simply be completely unjustified irrespective of the alternatives. Skeen (LAWSA, vol 6 1<sup>st</sup> reissue (1996) 42) describes the relativity of the question of necessariness well: “The use of force in private defence is justified only where it is necessary to protect a threatened legal interest which *cannot effectively be protected in another way*” (emphasis added).

These matters are relative. If the only possible method for protecting life open to the police was the imputed method, it would then most certainly have been necessary. Hence it cannot be that the alternative method is determined to be the right method on the basis that the other is “simply

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unjustified”. Instead, the right method must be a function of a choice of preference of alternative methods.

Further, Madlanga AJP demonstrates something similar to versarian reasoning (though it is conceded that this matter is not a true problem of versari in which fault is assumed, from conduct in respect of which it exists to all unlawful consequences; the court’s approach here does resemble the versari doctrine in the sense that it holds that if you are liable in respect of some wrongful conduct, you will be liable for all wrongful consequences). Madlanga AJP accepts that “[i]t may be argued with some force that, at the exact stage when the deceased started shooting at the police, they could not reasonably be expected not to shoot back and thus to sacrifice themselves” [27].

Yet he asserts that this is not the point, on the basis that the police had supposedly engaged in some wrongful prior conduct:

“The point of the matter is that, if the police had not acted wrongfully in the first place ... for all we know there might not have been any life-threatening shooting at all. One cannot simply ignore this fact and, so to speak, start on a clean slate” [27].

However, even if one assumes for the moment that the police officers had unlawfully conducted themselves at some time prior to the actual shooting, Madlanga AJP’s conclusion does not seem to follow. His reasoning is that if you wrong someone, you may never defend yourself against their response, no matter how excessive that response may be (Roederer and Grant *Annual Survey of South African Law* (2001)). Madlanga AJP fails to distinguish the two stages of the incident and that there had been an escalation of force from the first to the second. At first, the aggressor posed an imminent threat to life, which the court recognised [22]. At this point the police were entitled to resort to necessary and reasonable force to avert the threat (Burchell *Principles of Delict* (1993); and Neethling, Potgieter, Visser, and Knobel *Law of Delict* 4ed (2001)). Even if the police intervention was wrongful at that point, it was not the cause of the deceased’s death. That is, confronting the deceased as the police did, as opposed to shouting to him from a distance and firing a warning shot should he be defiant, did not kill the deceased. If that conduct (of confronting the deceased as the police did) was not justified, the question of their liability must turn on their conduct at that stage, not on their subsequent conduct. The deceased was killed only when he escalated his aggression to the actual use of lethal force. This escalation took the incident into its second stage and the question concerning the use of lethal force in self-defence must address itself to what happened at this stage. Our law is clear in such matters of escalation that the new stages are to be addressed as new and distinct phases. Snyman (*Criminal Law* 4ed (2002) 103) explains that “[one] can ... rely on private defence even if one was the original aggressor” (see also Burchell and Milton 143-144).

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In *Rex v N'thauling* ((1943) AD 649, cited with approval in *R v Ndara* 1955 4 SA 182 (A) 184) Greenberg JA (Watermeyer CJ and Centlivres JA concurring) stated that the view “that the plea of self-defence was only available to a person who was not the aggressor ... is wrong. There can be no doubt that events may take such a turn after the initial assault by the aggressor as to entitle him to the benefit of the plea ...” (654).

In essence the conduct of the defender must be considered on a clean slate. Were it not this way, then if X slapped Y and Y exceeded the extent of force he was entitled to in terms of self defence in that he responded unreasonably, by say, drawing a knife and launching a mortal attack on X, on the reasoning of Madlanga AJP, X would have to endure the attack. On the judge’s reasoning, even if X responded reasonably against the unreasonable response of Y by inflicting a lethal wound on Y, he would incur liability for wrongful death and a possible dependant's actions in delict; or a murder or culpable homicide conviction in criminal law. Not only can the conduct of the police officers *in casu* not be considered as an unlawful attack – as the slap is an unlawful attack in the above scenario – but even assuming that to be the case, they would nevertheless have been entitled to resort to lethal force against a lethal attack upon them, if the deceased (as Y did in the above scenario) had unreasonably exceeded the force that he was entitled to employ, which he clearly did.

After explaining the point of the matter, Madlanga AJP made a rather perplexing remark: “The preceding unreasonable conduct of the police cannot provide an acceptable excuse for the subsequent use of lethal force” [27].

It is submitted that the judge is quite correct in this regard. The previous conduct cannot excuse the subsequent use of lethal force. However, the reason for this is not that the previous conduct was unreasonable, but that the original intervention (however unreasonable) is irrelevant to an adjudication of the use of lethal force by the officers after the escalation to the use of lethal force by the deceased. Furthermore, to reject the preceding unreasonable conduct as an acceptable excuse implies that it had been cited in defence, which would have been a rather peculiar tactic: it would have required counsel for the defence to argue that the police officers were entitled to use lethal force *because* they had initially conducted themselves unreasonably. It does not appear from the judgment that counsel for the defendant made such an odd submission. Perhaps the best that can be made of this comment is that it reflects the conflation of what ought to have been independent enquiries, directed at each of the two distinct stages of the deceased’s aggression.

Madlanga AJP went on to consider whether the police officials had used reasonable force in case he had been wrong in finding that the employment

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of any force was unnecessary. He questioned whether the police officers had caused more harm than the circumstances required, such that the force used could be considered unreasonable. The judge observed that the location of gun shot wounds on the deceased's body appeared to show that the police shot to kill. He noted that the defendant had not countered this inference [31]. Madlanga AJP held that the defendant had failed to justify the police's use of lethal force since, he noted, the defendant had failed to explain why the police had not shot at the deceased's legs:

"No facts were placed before me explaining why the police did not shoot at the deceased's legs. There was no suggestion that shooting at the deceased's legs would not have neutralised him. Even if this was an emergency and the police had to act swiftly, they still could have shot at the legs and, for all we know, that might have yielded the desired result. In doing so, they could have used the exact same time they used in shooting at the torso. They have failed to explain why they did not do so" [33].

Yet, this remark that the police offered no explanation follows upon the judge paraphrasing counsel for the defendant's submission to the effect that the lives of the officers were under attack, that time was of the essence and that they had to act swiftly [32]. It seems therefore that the defendant had explained why the officers shot to kill.

But addressing Madlanga AJP's argument that the officers could have used less force, two propositions arise. Firstly, as alluded to above, there appears some incoherence in the judgment as to the time at which the court considers lethal force to have been inappropriate. The defendant was claiming self-defence on behalf of his officers for resorting to lethal force *after* the deceased had begun firing on them. Madlanga AJP seems unclear on this vital point.

That he addressed himself to the reasonableness of lethal force at a time *before* the deceased began shooting is evidenced by his remark: "It can never be that any person who whips out a firearm and threateningly points it at the police apparently intent on shooting them is fair game to be shot and killed by the police" [33]. It is notable that Scott ("Noodweer – Beoordeling van Afweershandeling" 2001 *De Jure* 404-413) renders this sentence "onverklaarbaar" (inexplicable (author's translation)).

The second proposition to be addressed is the argument contained in the judgment of Madlanga AJP, quoted above, that had the officers fired at the legs of the deceased during the period when they were shooting at his torso to kill "for all we know, that *might* have yielded the desired result" [33] (emphasis added). Despite expressing the view that it was aware of the caution against adopting the approach of an armchair critic, wise *ex post facto* [27], the court seemed to do just that. Surely it is armchair criticism to suggest that when one is being shot at one should shoot the assailant in the legs on the chance that it may neutralise the assailant and save one's life.

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Our courts appear to be careful to take account of the desperation and urgency of the circumstances, rather than adopting the attitude of armchair critics, when inquiring into whether a ground of justification exists.

In *S v Ntuli* (1975 1 SA 429 (A)) Holmes JA, in a unanimous judgment (Hofmeyr JA and Van Zijl AJA concurring), emphasized that a court must take account of the circumstances on the ground at the time, rather than analysing the circumstances with cold logic, as follows:

“In applying these formulations to the flesh-and-blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death” (437D-F).

Furthermore, we should be careful not to expect people to gamble with their lives when in mortal danger. In the case of *R v Zikalala* (1953 2 SA 568 (AD)) the appellant had been attacked in a crowded beer hall by a man, supported by others, wielding a “long business-like knife”. The attacker had made several attempts to stab the accused whereupon the accused responded with a small penknife with which he stabbed and killed the attacker. On appeal, Van den Heever JA for a unanimous court (Schreiner JA and Centlivres CJ concurring) noted that in convicting the accused in the Witwatersrand Local Division, De Villiers J had observed: “I have great difficulty in this case in holding that the accused could not get away and that he did not have a reasonable chance to get away if he wanted to” (573A).

In rejecting the observation of De Villiers J, Van den Heever JA explained:

“[T]he evidence is that the hall was packed and that movement therein was difficult. But the observation places a risk upon the appellant that he was not obliged to bear. He was not called upon to stake his life upon ‘a reasonable chance to get away’. If he had done so he may well have figured as the deceased at the trial, instead of as the accused person” (573A-B).

Madlanga AJP’s view that had the officers shot at the aggressor’s legs “for all we know, that *might* have yielded the desired result” is to require that the police officers gambled with their lives. Had they done so, they may well have figured as deceased at the trial.

Finally, the import of the right to and sanctity of life requires some discussion. Correctly, it is submitted, Madlanga AJP notes that a determination relating to the legal convictions of the community is informed by the Constitution of the Republic of South Africa Act 108 of 1996, particularly the right to and the sanctity of life [35]. Having regard to the Constitution, and the right to life in particular, Madlanga AJP concludes: “Reverting to the instant case, the bungling of the police, their lack of professionalism in approaching the deceased and their planning (or lack thereof) sink the defendant even further if we import, as we must do, the dictates of the Constitution to the notion of legal convictions of the community” [38].

Yet throughout his discussion of the implications of the Constitution, it is not apparent how the deceased's – the aggressor's – right to life should be attributed any more weight than that of the police and the public, whose lives Madlanga AJP accepted were in mortal danger [22].

In criticising the judgment of Madlanga AJP on this point, Scott (2001 *De Jure*) observes that one may blind oneself by overemphasising the right to life:

“Die gevaar verbonde aan die oorbeklemtoning van die reg op lewe as beskermingswaardige objek is dat mens jou begin blindstaar teen die dood van die aggressor in 'n geval soos die onderhawige, sonder om in oorweging te neem dat sy optrede uit die staanspoor 'n bedreiging ingehou het vir die lewens van andere.” (The danger associated with over-emphasising the right to life as a legal object worthy of protection is that one begins to blindly focus on the death of the aggressor in a situation such as the present, without considering that his conduct threatened the lives of others to begin with. (Author's translation.))

At every point in his constitutional analysis, recognition that the lives of the officers and of the public were under threat, impels one to a conclusion that either the right to life of the respective parties cancels each other out so that it takes the judgment no further; alternatively the right to life of the innocents involved (the police and the public), trumps that of the aggressor. This latter alternative (that the right to life of the aggressor is trumped by that of the innocents) appears clearly from the quote of Chaskalson P's judgment in *S v Makwanyane* (1995 3 SA 391 (CC)) which Madlanga AJP cites at length:

“Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty”[35].

At best, therefore, the effect of the Constitution is nil, at worst, it counters the judgment of Madlanga AJP and the plaintiff's claim.

### 3 2 *Supreme Court of Appeal*

As noted, Mpati JA (for a unanimous court: Hefer AP, Farlam JA, Navsa JA, and Jones AJA concurring) did not engage with the difficulties encountered by the trial court and so we are not instructed as to whether the SCA would have deviated from the reasoning of Madlanga AJP. Yet a concern must be expressed at the reasoning employed by Mpati JA in rejecting the version of the appellant as not discharging the “*onus* resting on him to prove that the fatal shooting of the deceased was justified” [par 12; original emphasis].



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The SCA rejected the appellant's version by seizing on contradictions in the appellant's evidence [par 8, 9 and 11]. Yet the contradictions all emanate from one of the appellant's police witnesses (Mapongwana) and to a degree may be considered immaterial: going to whether the deceased had fired only one or two shots at the police, and whether the shot/shots had been directed at one or another police officer [par 8 and 9]. It is of course trite that private defence is not illegitimate by virtue only of the number of shots fired in an unlawful attack and the identity of the person at whom an unlawful attack is directed. These contradictions may be categorised as being as immaterial as a contradiction about the colour of an attacker's shirt.

However a further contradiction which may be considered material registered with the court. Mapongwana also testified that only one cartridge from the deceased's firearm was found at the scene. This evidence contradicted the evidence of the station commander that two cartridges had been found and provides for the possibility that the police had not been fired upon at all since it was uncontroverted that the deceased had fired one shot before the arrival of the police on the scene [par 11]. The court concluded from the evidence as follows: "On the evidence of these three policemen there is *uncertainty* as to whether the deceased fired one or two shots, *if he fired at all ...*" [par 11 (author's emphasis)].

Clearly the possibility indicated by the material contradiction provides for uncertainty and thus the conclusion seems to follow "that the appellant failed to discharge the *onus* resting on him to prove that the fatal shooting of the deceased was justified" [par 12 (original emphasis)]. But there is a problem which resides in Mpati JA's use of the word "uncertainty" [par 11 above] in concluding from the evidence. The problem is that the court may have lost sight of the weight of the burden which the appellant bore: a balance of probabilities. The appellant was not required to establish anything with certainty. It is with this in mind that the judgment may be observed to have possibly been misconceived. Certainty is too much to have required of the appellant when the burden he bore required not even a lesser onus than proof beyond a reasonable doubt (the criminal onus), but only the establishment that the police version was probably true. In the absence of any evidence on the matter from the respondent, that the contradictions emanated from one witness of the appellant and only manifested in one material, though controverted, respect, it seems difficult to regard the appellant's version as improbable or unlikely to be true.

#### **4 Conclusion**

In the trial court, Madlanga AJP fails to appreciate the relative nature of interventions in self defence; fails to recognise that the incident comprised two distinct phases in which an escalation of force took place, and that he ought to have directed his enquiry to the second phase in which the

deceased's use of lethal force drew a lethal response from the police; adjudicates the matter as an armchair critic with the luxury of cold logic and the wisdom of hindsight; requires the police officers to have gambled with their lives and those of the public; and finally invokes a constitutional argument which is either void or self-defeating. The SCA averts the problems of the trial court and does not engage with whether the police version stands up to the requirements of private defence by simply rejecting the appellant's version. It would appear though that it may have misdirected itself on the burden of proof it required of the appellant, and hence issued a judgment that is unfortunately questionable on that ground. It would appear therefore that the Minister perhaps did not get justice.

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