THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 514/2008

In the matter between:

DOLORA PETERSEN in her capacity as mother and natural guardian of

JUSTIN LEROY PETERSEN **APPELLANT**

and

THE MINISTER OF SAFETY & SECURITY **RESPONDENT**

Neutral citation: *Petersen v Minister of Safety & Security* (514/2008) [2009] ZASCA 88 (10 September 2009)

CORAM: **Brand, Heher, Snyders JJA *et* Hurt, Tshiqi AJJA**

HEARD: **28 August 2009**

DELIVERED: **10 September 2009**

SUMMARY: Delictual claim against the respondent for injuries sustained by the appellant's minor son through gunshot fired by police – finding that police action justified because shot had been fired in circumstances of necessity upheld on appeal.

ORDER

On appeal from: High Court Cape Town (Goso AJ with Dlodlo J concurring, sitting as a court of appeal from the Magistrates' Court)

1. The appeal is dismissed with costs.

JUDGMENT

BRAND JA (Heher, Snyders JJA *et* Hurt, Tshiqi AJJA concurring)

[1] On 19 July 2002 and at Gansbaai near Hermanus in the Western Cape, the appellant's minor son, Justin Petersen ('Justin') sustained gunshot wounds in his right leg. The appellant alleged that the shots had been fired by a policeman acting in the course and scope of his employment as a servant of the respondent. Although disputed at an earlier stage in the proceedings, the correctness of the allegation is accepted by the respondent on appeal. Departing from this premise, the appellant instituted action against the respondent in the Hermanus Magistrates' Court for the damages that Justin had suffered as a result of his injuries. The respondent raised the defence of justification in the form of self-defence, alternatively necessity. Pursuant to an agreement between the parties, the trial proceeded on the question of liability only while issues pertaining to quantum stood over for later determination. In the event a plea of necessity was upheld by the trial court, which led to the dismissal of the appellant's claim with costs. Her appeal against that judgment to the Cape High Court (Dlodlo J and Goso AJ) was unsuccessful. The further appeal to this court is with the leave of the court a quo.

[2] The issues on appeal will best be understood in the light of the background facts. In the trial court the matter was heard together with the case of one Agenbag who claimed damages from the respondent on the basis of an alleged wrongful arrest which occurred during the same incident on 19 July 2002. In answer to the respondent's case, the appellant therefore relied, not only on the evidence of Justin, but also on the evidence presented in the matter of Agenbag. For the sake of convenience I shall refer to all witnesses, apart from the policemen who testified on behalf of the respondent, as 'the defence witnesses'.

[3] As to what happened during the fateful incident, the police witnesses contradicted one another on various matters of detail. What they agreed upon in broad outline, however, may be simply summarised. On 19 July 2002 the police attempted to seize at least 20 bags of illegally harvested abalone or perlemoen in Blompark, a township near Gansbaai, ill-famed for perlemoen poaching. There were seven or eight officers, members of Operation Neptune, a task team formed specifically to stamp out the poaching of perlemoen which had become a threatened species. When the police arrived on the scene they found a Nissan 4 x 4 bakkie with a trailer. Openly exposed on the back of the bakkie and the trailer were at least 20 transparent bags containing shelled perlemoen. The police were surprised at finding such a large quantity of this much sought after commodity.

[4] Shortly after the arrival of the police, Agenbag appeared on the scene together with his friend, one Crause. At the same time a crowd started gathering. It grew to some 200 people. Crause then asked the crowd in Afrikaans whether they were again going to allow 'die boere' (ie the police) to take their perlemoen away from them – or something to that effect. Immediately following upon this incitement by Crause, the crowd began to stone the police, inter alia, striking an officer on the chest and damaging police vehicles. In an attempt to ward off the attack, the police fired rubber bullets from their shotguns. This had little effect on the crowd and the police were forced to retreat to the stoep of a house. While this was happening, members of the crowd took advantage of the situation to remove some bags

of perlemoen from the scene. When the police ran out of rubber bullets, they started shooting into the ground near the crowd with sharp point ammunition from their 9mm pistols. According to one of the policemen, he also fired two shots of sharp point ammunition at a member of the crowd who aimed a firearm at the police.

[5] Despite all this, the crowd was not deterred. They simply ran for cover when volleys were fired and then returned to continue stoning the police. This lasted for some time until Crause, who had left the scene, returned and ordered the crowd to stop. The stoning thereupon ceased briefly. This gave the police the opportunity to get into their vehicles and to flee from the scene. As they fled, the crowd continued to stone the police vehicles. The police regrouped at the entrance to Blompark where they waited for support from the police station at Hermanus. When the reinforcements arrived they went back into Blompark in a police armoured vehicle – known as a Casspir. Upon their return apparently only one bag of perlemoen had not been taken by the crowd. They arrested some persons, including Agenbag, who were believed to have been involved in the incident.

[6] On appeal much store was set by the appellant in the numerous contradictions between the police witnesses on matters of detail such as, for example, whether there were 50 or 20 bags of perlemoen; whether there were three or four police vehicles; whether there were seven or eight policemen; and so on and so forth. The conclusion the appellant asked this court to draw from all this is that, in the light of these contradictions, the version of the police witnesses could not be accepted. But, as I see it, such conclusion would amount to a *non sequitur*. As was pointed out by Nicholas J in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-D:

'Where the [contradicting] statements are made by different persons, the contradiction in itself proves only that one of them is erroneous: it does not prove which one. It follows that the mere fact of the contradiction does not support any conclusion as to the credibility of either person. It acquires probative value only if the contradicting witness is believed in preference to the first witness, that is, if the error of the first witness is established.

"It is not the contradiction, but the truth of contradicting assertion as opposed to the first one, that constitutes the probative end."
(*Wigmore* [On Evidence Vol III] at 653.)'
And at 576G-H:
'Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.'

[7] As I see it, the contradictions between the police witnesses in this case bear the hallmarks of honest mistakes. They are patently immaterial in that they do not advance or prejudice the police case one way or the other. What is more, they are clearly of a kind that may result from erroneous observation in a confused situation – which this undoubtedly was – or which can be attributed to defective recollection over the period of almost two years that elapsed between the incident and the trial.

[8] What I find far more significant than these inconsequential differences between the police witnesses is that, on the material facts, they are not only corroborated inter se, but virtually in all respects by the defence witnesses. This is apart from Justin to whose version I shall presently return. The only difference of note between the defence witnesses and the police relates to a denial by the former of the police account that they only started shooting with rubber bullets after the commencement of the stoning by the crowd. Justin, incidentally, saw no stoning at all. He only saw shooting by the police. According to the other two defence witnesses, the sequence was as follows:

- After the incitement by Crause, members of the crowd started to remove bags of perlemoen from the scene.
- The police then started shooting in their direction with rubber bullets.
- Thereafter the crowd began to stone the police.
- Subsequent to that the police ran out of rubber bullets and started using their 9mm pistols.

[9] According to the rather terse judgment of the trial court, it seems to have preferred the police version. I tend to agree. On the probabilities it would take an extraordinarily brave person to remove the bags of perlemoen from eight armed policemen. Much more likely is the prospect that the crowd would first force the police to retreat so as to enable them to remove the perlemoen. That, after all, is the strategy that eventually succeeded. Moreover, the two defence witnesses, each for reasons of his own, hardly earned themselves any commendations for dependability. While Agenbag expressed his avid support for his friend Crause and the poachers in the crowd who wanted to remove 'their' perlemoen, the other witness, Inspector Robertson, contradicted himself at least four times on this very issue. But, be that as it may. On a proper analysis even the controversy on this aspect proves to be immaterial, in that the acceptance of any one version in preference to the other would, in my view, make no difference to the outcome of the case. I say that for the reasons that follow.

[10] By any standard, Justin was an unsatisfactory witness. His valiant attempt to disassociate himself from the obstreperous crowd drove him to deny even the most obvious, for example, that he had seen stones being thrown at the police. Nonetheless it is clear, even on his insupportable version, that his injuries must have been caused by sharp point ammunition aimed in the general direction of the crowd. By all accounts the police only started using sharp point ammunition – as opposed to rubber bullets – after the crowd had started throwing stones. Logic therefore dictates that Justin sustained his injuries through police action directed at the stone throwing crowd.

[11] Can it be said that in these circumstances the police action which caused Justin's injuries does not attract liability because it was justified in circumstances of necessity? Unlike self-defence – also referred to as private defence – the defence of necessity does not require that the defendant's action must be directed at a wrongful attacker. There was therefore no need for the respondent to establish that Justin was himself part of the attacking crowd. What the respondent had to prove in order to establish the justification

defence of necessity, appears, for example, in broad outline, from the following statements in 'Delict' 8(1) *Lawsa* (2ed) by J R Midgley and J C van der Walt, para 87:

'An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party . . . against a dangerous situation . . . .

Whether a situation of necessity existed is a factual question which must be determined objectively. . . .

A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger. . . .

The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case . . .'.

(See also eg:*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) paras 13 and 14; D Visser 'Delict' in F de Bois (ed); *Wille's Principles of South African Law* 9ed (2007) 1146; Neethling, Potgieter & Visser *Law of Delict* 5ed (2006) Chap 3 para 6.3.)

[12] It was not and could not be disputed that the police were protecting legal interests. It was, however, contended on behalf of the appellant that the police exaggerated the danger they were in. But both the trial court and the court a quo found otherwise and I agree with this finding. Even Agenbag who obviously held no brief for the police, explicitly admitted that the police were literally in danger of their lives at the time they started firing sharp point ammunition. The grievous nature of the situation is further objectively illustrated by the fact that the police were, by all accounts, only able to leave the scene when Crause ordered a cessation of the stoning and that they were only able to return when accompanied by reinforcements and in a police armoured vehicle. In the circumstances counsel for the appellant was unable to propose any realistic alternative means by which the police could avert the danger. And I can think of none. Before firing sharp point ammunition they had essentially tried everything else. The question which sometimes arises in matters of this kind, namely, whether the defendant should rather have fled, does not even occur. At the stage when the police started to fire live ammunition, their attackers simply did not allow them to flee.

[13] In the circumstances, I agree with the finding of both the trial court and the court a quo, that the respondent had discharged the onus of establishing that the conduct of the police officers which caused Justin's injuries, was not wrongful, in that their actions were justified by necessity.

[14] The appeal is dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

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