



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 1211/2010

In the matter between:

NhlanhlaMagagula

Plaintiff

And

Terence Everzard Reilly

1st Defendant

James Weighton Reilly

2nd Defendant

Elizabeth Reilly

3rd Defendant

PetrosNgomane

4th Defendant

Neutral citation: *Nhlanhla Magagula vs Terence Everzard Reilly & Others*
(1211/2010) [2017] SZHC 211 (2nd November 2017)

Coram : **T. L. Dlamini J**

Date heard : 27-28 October 2015, 8-11 February 2016 (written submissions filed on 20 April and 06 June 2016 respectively)

Date of delivery : 02 November 2017

Summary: *Delict –Action for damages arising from an injury sustained from a gunshot – The plaintiff was shot by a game ranger, it being alleged that the plaintiff and two other men illegally hunted and killed five impalas – The defendants pleaded that the plaintiff was shot to subdue and arrest him as he and the two other men did not surrender when ordered to do so but escaped to avoid being arrested – The defendants further pleaded that they acted in terms of section 23 of the Game Act – Lawfulness of the shooting considered.*

Held: *That game rangers can lawfully shoot a person who is reasonably suspected to have contravened the Game Act and resists arrest by escaping.*

Held further: *That the shooting of the plaintiff is also justified under the common law powers vested in a person in the protection of his property, and that game rangers are under a contractual duty to secure game on behalf of their employer –Action dismissed with costs, including costs for counsel.*

JUDGMENT

The parties

- [1] The plaintiff is an adult male of Matsetsa area in Siteki, Lubombo District, and was born, according to the particulars of claim, on the 3rd July 1975.
- [2] The first to fourth defendants, namely; Terence Everzard Reilly, James Weighton Reilly, Elizabeth Reilly and Petros Ngomane, are cited in their capacities as Trustees of Big Game Parks and / or Game Parks Trust.

Plaintiff's claim

- [3] The plaintiff alleged that on the 29th of December 2006, about three kilometers away from the Hlane Game Reserve, he was unlawfully, wrongfully and intentionally shot by game rangers of the Hlane Game Reserve, one of whom he knows to be a Mr Maziya.
- [4] Consequent to the shooting, the plaintiff alleged that he suffered serious injuries on his left knee and the bullet was lodged in his leg. He was taken to Good Shepherd Hospital and was later transferred to Mbabane Government Hospital where he was admitted for over three months.
- [5] The plaintiff also alleged that due to the injury he sustained, he cannot walk properly and needs the support of crutches, and that he suffered a permanent

disability on the left knee and cannot perform a physical job expected of a man.

[6] He further alleged that the shooting was without any reasonable or probable cause. He stated that he was shot for no apparent reason as he was not at the Game Reserve nor was he in possession of any game or trespassing, and that he was not even charged for any criminal offence after the shooting. He therefore instituted this action wherein he claims damages from the defendants in respect of the following claims:

(a) General damages (Personal injury, pain and suffering – permanent)	E	750,000.00
(b) Future Medical and Hospital Expenses	E	250,000.00
(c) Cost of instructing attorneys	E	25,000.00
(d) Shock and stress (Post traumatic)	E	250,000.00
TOTAL	E	1 275,000.00

[7] In the pleadings the plaintiff states that at all material times the game rangers were acting within the course and scope of their employment with the defendants, and as such the defendants are vicariously liable for the injuries he sustained. He therefore seeks the following relief against the defendants:

(i) Payment of the sum of E1,275,000.00

(ii) Interest thereon at the rate of 9% per annum

(iii) Cost of suits

(iv) Further and / or alternative relief

Defendants' defence

[8] The defendants admit that the plaintiff was shot by a game ranger who was acting within the course and scope of his employment duties but deny that the shooting was unlawful. They contend that the game ranger fired the shots, one of which injured the plaintiff, in an attempt to subdue and arrest him. They pleaded that the plaintiff was reasonably suspected to have contravened section 12 of The Game Act of 1953 as amended. The plaintiff was reasonably suspected, according to the defendants, to have hunt and killed game in the form of impala and was resisting arrest and escaping from the rangers. The defendants therefore pleaded that they applied minimum force in order to subdue the plaintiff and arrest him, and that their conduct was in terms of section 23 (2) and (3) of the Game Act.

Issues for determination

[9] For determination is the question of whether or not the plaintiff was unlawfully, and without reasonable cause, shot by the rangers, and whether or not the conduct of the rangers is in terms of the Game Act and therefore justifiable.

[10] By agreement of the parties, with approval of the court, the first stage of the

trial is to determine the question of liability. The question of *quantum* is reserved for a later stage, in the event the court finds in favour of the plaintiff on the merits.

Inspection *in loco*

[11] On application and by agreement between the parties, an inspection *in loco* was conducted after the plaintiff gave his evidence in-chief. The plaintiff was therefore cross-examined thereafter.

[12] I will however first outline how the inspection *in loco* was conducted. This is meant to maintain a coherence of the evidence. That is, to avoid setting out the details of the inspection in between the evidence.

[13] The inspection took place on the 28th October 2015. In attendance were myself, the clerk Mr Magongo, police escort Mr Gamedze, the plaintiff Nhlanhla Magagula and his attorney Mr Msibi, Senior Counsel Adv. Paul Kennedy and his instructing attorney Mr. K. Motsa, the Hlane Game Reserve Manager Mr. George Mbhatha, game ranger Mkhambatsi Madonsela and a few other game rangers who assisted in accompanying the inspection party and driving in a game viewing motor vehicle.

- [14] Agreed minutes of the inspection were prepared, read in court and endorsed as correct when the matter reconvened for continuation of trial on the 8th February 2016. They were then declared to form part of the record.
- [15] The inspection party convened at the parking area of the game reserve camp offices. This was named point “A”. The party set off for the inspection at approximately 11:00 hrs. About seven areas were inspected and pictures of some of these areas were taken. The first stop point was on the fence of the game reserve at a place where the fence showed signs that the strands of wire had been cut at some stage and repaired. The wire strands at the base were slightly raised. This was named point “B”. At point B Mr Mbatha pointed towards the north, inside the game reserve, as the area where gunfire had been heard. On the other side of the fence there is a railway line that is approximately 20 metres away from the fence.
- [16] The inspection party then drove back a short distance and passed through a gate in the fence of the game reserve and turned right along a gravel road across the railway line. It drove for a short distance and stopped. This area has some thorn trees and other vegetation, as well as an area which has been dug up to extract sand for building houses. This is where the inspection party parked the game viewing motor vehicle it was using. This was named point “C”. The distance between point “B” and point “C” was measured using the motor vehicle’s odometer and it showed a distance of 1.7 km. The route from point “B” to “C” is not straight but is a winding road. A straight walk from point “B” to point “C” would therefore be a shorter distance.

[17] From point “C” the inspection party then proceeded on foot on a path between bushes and trees in a southerly direction for approximately 640 metres and stopped at an area that was named point “D”. This area (point “D”) was pointed at as the place where the plaintiff was shot. This information (pointing out) was confirmed by the plaintiff as correct. This place is outside the game reserve fence but within farm 704. The farm is owned by the owners of the Hlane Game Reserve, according to Mr. George Mbatha’s evidence. Mr Madonsela pointed to a spot where he and his colleagues crouched down to hide after seeing some men coming towards them from the direction where there is a railway line.

[18] From point “D” the inspection party walked back to point “C” where the motor vehicle was left. Halfway before reaching point “C”, the plaintiff pointed to a place that has an anthill and stated that it is where he finds and collects mashrooms.

[19] From point “C” the inspection party then drove in a gravel path and joined the main gravel road in a southerly direction. Along the way two stops were made where Mr Mbatha pointed out beacons that mark the southern boundary of Farm 704. The beacons were named points E and F respectively. Outside the boundary marked by the two beacons are a number of homesteads belonging to the local people.

- [20] From point F the inspection party proceeded to the south bound direction and then west, to an area where a dipping tank was pointed out by Mr Mbatha. This dipping tank area was named point “H”.
- [21] From point “H” the inspection party proceeded along the gravel road, for a short distance, to a dam. This place (with dam) was named point “G”.
- [22] From point “G” the inspection party drove back along the gravel road for a short distance whereupon the plaintiff pointed out his homestead. The place with the plaintiff’s homestead was named point “J”.
- [23] Thereafter the inspection proceeded along the gravel road going north, went across the railway line and rejoined the tarred road and returned to the main camp at Hlane Game Reserve, arriving at approximately 13:00hrs.

Plaintiff’s evidence

- [24] The plaintiff’s case is based on evidence of two witnesses. The first witness (PW1) is Nhlanhla Magagula (the plaintiff) whilst the second witness (PW2) is Bhekinkhosi Ndzinisa.
- [25] PW1 testified that in the morning of 29 December 2006 he woke up at around 06:00hrs and went to pick mushrooms. He went to pick the

mushrooms at a cattle grazing area near his homestead. While on his way to pick the mushrooms he heard a gunshot that hit him on the knee of his left leg. He fell down and was seriously injured (by the gunshot). He was injured slightly below the knee. A gaping hole, according to his evidence, was caused below the knee.

[26] PW1 also testified that he then noticed certain gentlemen who were about four in number although he doesn't correctly recall how many they were as he was in a terrified state of mind. The gentlemen were coming towards him and he heard them calling their boss on their walkie talkie radio. It was his evidence that he heard them telling their boss that they have accidentally injured a person. In his own words he stated that he heard them saying that "*sebalinyalelwe ngumuntfu*". Thereafter their boss arrived, after about an hour.

[27] PW1 further testified that their boss told them that they have committed an offence. This was in reference to shooting the plaintiff. He then heard one ranger saying "*take this suspect and put him into the van*". The ranger was telling someone who came with them but was not himself a ranger.

[28] PW1 was then asked by his attorney, Mr Msibi, if he was able to see the faces of the people (rangers) and his first answer was that he did not. He explained that he was in excruciating pain and could not see clearly. When PW1 was further led in – chief on this question, he then admitted that he did

see the faces. He also stated that he then heard the rangers saying that he (PW1) should be taken to hospital.

[29] He was then driven to Simunye Police Station in the game rangers' motor vehicle (a van). While in the back of the van on the way to Simunye he heard one of the rangers saying that he wishes that the spare tyre could fall on him (PW1) and he dies so that the evidence can be destroyed.

[30] It was his evidence that on arrival at the Simunye Police Station he was taken out of the van and rushed to Good Shepherd Hospital using a police motor vehicle. Given the seriousness of the injury, PW1 testified that he was referred by the doctor to Mbabane Government Hospital on that same day.

[31] He arrived at the Mbabane Government Hospital at around 13:00hrs. He was taken to the theatre and his leg was cast in plaster. According to his evidence, he was admitted in this hospital for about two to three months.

[32] PW1 denied that he was hunting game on the day he was shot. He testified that he was not carrying any game or hunted on that day. All that he carried was a plastic paper that he intended to use to carry the mushrooms. He denied that a warning shot was first fired. He testified that only one shot was fired and he was injured by that shot.

[33] He also testified that he was shot whilst outside the game reserve by a distance of about three (3) kilometers. He was shot whilst on Swazi Nation Land, according to his evidence. He further testified that he was never charged for having hunt or killed game after his release from hospital, and that no statement was recorded from him by the police. He has not been contacted even to date by the police or the game rangers.

[34] When cross-examined, PW1 confirmed that after having been shot and whilst lying down, the people who came to him were game rangers. It is common cause that the boss who was called by the rangers after the plaintiff had been shot is Mr George Mbatha who is the Game Reserve Manager. Leave was sought and granted for Mr Mbatha to stand up in court and the plaintiff confirmed that he is the person who came after having been called on the walkie talkie radio.

[35] It was PW1's evidence during cross – examination that he did not know Mr Mbatha before the shooting incident but first saw him on that day. He also testified that on board the motor vehicle that took him to the police station there were other people but he doesn't know, even to date, who were these people. On further questioning he confirmed that none of them was his friend or from the village where he resides.

[36] He was asked if Sifiso Shongwe was in the vehicle and his answer was that he doesn't recall. He was also asked if Sifiso Shongwe is his friend or

someone that he knows. He denied that they were friends and stated that he doesn't even know him. He however later changed tune and admitted that he knows Sifiso Shongwe. When asked about why he earlier on lied under oath that he doesn't know Sifiso, he was unable to explain. He however confirmed that they reside in the same village and that Sifiso has lived there for some years.

[37] PW1 was also asked about Bhekinkhosi Ndzinisa and he confirmed to know him. He testified that they reside in the same village. PW1 was further asked if Mr. Ndzinisa was not one of those who were on board the car that took him to Simunye Police Station. His answer was that he doesn't recall owing to the excruciating pain he was experiencing after being shot. When asked if Sifiso and Ndzinisa were present at the scene where he was shot, his answer was the same; that he doesn't recall. When it was put to him that the evidence of the rangers will be that they were present on board that same motor vehicle, his response was that he can't deny that.

[38] PW1 was also asked whether or not there were any killed game in the form of impalas that were loaded into the motor vehicle that drove him to the police station after he had been shot. His answer was still the same; that he doesn't recall and blamed his state of mind at the time to the excruciating pain that was caused by the gunshot injury.

[39] The defence counsel further asked PW1 if he was alone when he went to pick the mushrooms and his response was to the affirmative. PW1 was also asked if he knows Lenny Maziya. His answer was that he knows him. He stated that Lenny Maziya is a relative and that they work together. He added that Lenny resides at Mhlumeni. When it was put to PW1 that he was with Lenny Maziya when he went to pick the mushrooms and got shot, PW1 categorically denied and maintained that he was alone.

[40] The defence counsel then referred PW1 and the court to a letter dated 6 May 2010 by which further particulars were sought from the plaintiff. Defendants' attorneys asked the following question:

“ 3.1 when the plaintiff was shot, what time was it?”

[41] The plaintiff's attorneys answered by letter dated 24 May 2010 in the following words:

“AD PARAGRAPH 3.1 THERETO

Plaintiff was shot at about 08:30 hrs and was in the company of one Lenny Maziya.”

[42] When asked about the truthfulness of this response, PW1 stated that it is incorrect and that he doesn't know where his attorneys got this information from. It was put to PW1 that he is not telling the truth but he maintained that he is truthful.

[43] PW1 also maintained, when cross-examined, that no warning shot was fired before he was shot. He stated that only one gunshot that injured him was fired. When asked about why he was shot, his response was that maybe he was suspected of coming from the game reserve. It was put to PW1 that he was one of three poachers who were seen carrying five illegally killed impalas but ran away when they were ordered by the rangers to stop. PW1 denied this and stated that he was not part of the poachers who were seen by the rangers. It was further put to PW1 that one of the poachers by the name of Bhekinkhosi Ndzinisa was caught and during his trial he pleaded guilty to illegally hunting game on the day. PW1 testified that such evidence is not to his knowledge.

[44] It was also put to PW1 that he was asked about the other poacher who ran away and his answer was that he is Sifiso Shongwe. PW1 denied and stated that he never gave such information to the rangers.

[45] The defence counsel also put to PW1 that Mr Mbatha will deny that he ever told the rangers that they have committed an offence by shooting him (plaintiff), and that Mr Mbatha will tell the court that the rangers found a gun and a torch that he (plaintiff), Mr Ndzinisa and the other poacher who escaped were using to kill game illegally, and five impalas that they killed.

- [46] On re-examination PW1 was asked to clarify how he knows Sifiso Shongwe. His answer was that he knows him from the village where they both reside. He was also asked about how long it will take to walk from his home to the place at which he was shot. His answer was that it would depend on the route one takes but it can take about an hour to one hour and thirty minutes.
- [47] PW2 is Bhekinkhosi Ndzinisa. He testified that he resides at Matsetsa and that he knows the plaintiff as they both reside in the same village. He also testified in-chief that he became aware that the plaintiff has a lawsuit against the Hlane Game Reserve when he was called to come and testify before this court.
- [48] PW2 testified that on the 29th December 2006 he went hunting in the game reserve. It was his evidence that he left home at around 20:00hrs of the night preceding the morning of 29th December 2006. He entered the game reserve using an opening underneath the game reserve fence where pigs go through. With him was Sifiso Shongwe and they shot five impalas. Two of them were small and three were big ones.
- [49] PW2 further testified that he carried two impalas while Sifiso carried the other three. They found an opening on the fence through which they exited the game reserve and dragged the killed game underneath. His evidence was that they spent the whole night inside the game reserve and only left at around 06:00hrs when the sun was about to come out. They returned to their

homesteads. They used a pathway in the forest. On their arrival at a place where sand is dug (point “C” of the inspection), they then rested for about 15 minutes. Whilst relaxing, they heard a gunshot in front of them.

[50] It was PW2’s testimony that they then left and avoided the direction from where the gun shot came. They then saw two game rangers in uniform and threw down the game they killed and ran away. The rangers pursued them and they caught him while his friend Sifiso outpaced them and they did not catch him. It was PW2’s further evidence that the rangers fastened him with handcuffs and then took him to a place that was about 30 metres away whereupon he found the plaintiff lying down and bleeding. Next to the plaintiff was another ranger who was carrying a gun.

[51] PW2 testified that he was made to sit down and he then heard one of the rangers saying that “*an offence has been committed*” whilst another ranger said “*do not say that*”. The ranger, according to PW2, then called their boss using a walkie talkie radio. The boss thereafter came and arrived after about an hour.

[52] PW2 further testified that he was told by the rangers to carry the injured person and put him inside the rangers’ van. He however protested that he did not have gloves and the man was bleeding, but the rangers called him a prisoner and insisted that he should lift the injured person and put him in the van.

[53] It was also his evidence that the killed impalas were fetched by the rangers and brought to where they were and were also loaded into the van. They were then driven to Simunye Police Station. The plaintiff and PW2 were then taken to Good Shepherd Hospital using a police motor vehicle. It was PW2's evidence that he was found to have not been seriously injured and was confirmed fit to appear in court. Consequently, he was discharged from the hospital and he appeared before a Magistrates' Court on the same day whilst the plaintiff remained in hospital. He was convicted by the magistrate for illegal hunting and he paid a fine plus the replacement value of the killed game.

[54] It was PW2's further evidence that in the morning when the plaintiff was shot, more than 10 gun shots were fired. He testified that the two rangers who caught him introduced themselves, but he doesn't know if the ranger who shot the plaintiff did the same. He however denied that the plaintiff was with them when they went hunting.

[55] When cross-examined PW2 testified that the gun shots that killed the five impalas were fired by Sifiso but he (PW2) is the one who was carrying the gun. He explained that the gun is owned by Johannes Mkhabela who is Sifiso's grandfather. He confirmed that he carried two impalas plus the gun and the torch while Sifiso carried the other three impalas. It was however put to this witness that one person cannot carry three impalas but the witness maintained that Sifiso was carrying three impalas.

[56] PW2 was informed that according to the plaintiff's evidence Sifiso Shongwe did not go hunting but only heard gun shots. The witness responded by stating that his version that Sifiso had gone with him to hunt is correct.

[57] It was PW2's further evidence that he never talked to the plaintiff after the shooting of 29 December 2006 although they reside in the same community. When asked if he has ever met the plaintiff and his attorney after the shooting incident, PW2 denied and stated that he only met them yesterday when they informed him that he is needed to testify in court. This evidence was given by PW2 on the 9 February 2016.

[58] Surprisingly, at the commencement of cross-examination, PW2 confirmed that he was in court when the trial started in October 2015. He even confirmed that he listened to the plaintiff's evidence in-chief. In my opinion, his attendance in court when the trial commenced is evidence that PW2 and the plaintiff met and discussed about this matter. It was their evidence earlier on that they both reside in the same community of Matsetsa. The denial by PW2 that they met and talked following the shooting incident has a high probability of being untrue in my view.

[59] PW2 was informed that according to the plaintiff's evidence, it is Mr. Mbatha who said that an offence has been committed. PW2's response was that Mr Mbatha was saying so for the second time as that had also been said

by another ranger earlier on. It was however put to this witness that he is fabricating the evidence. PW2 stated that what he is saying is the truth. The plaintiff thereafter closed its case without a re-examining PW2.

The defence's evidence

[60] The first defence's witness (DW1) is Jahamnyama Mazibuko. He was present when the plaintiff was shot and was one of the game rangers.

[61] DW1 commenced his testimony by confirming as true a statement that he recorded at the Simunye Police Station in the morning of 29 December 2006, and signed it at 08:05hrs. His evidence is that at around midnight they were detailed by their boss Mr George Mbatha to go out and look for poachers at the game reserve. It was his evidence that it was reported to Mr Mbatha that sounds of gun shots were heard inside the game reserve.

[62] While patrolling and looking for the poachers, they saw game hair and blood passing through the fence where an opening was observed (point B of the inspection *in loco*). They then determined that the poachers have exited the game reserve. Mr Mbatha then ordered them to patrol and search through the pathways that poachers use. This witness testified that he was with Elliot Maziya who is now deceased and Mkhambatsi Kunene. Mr Mbatha drove them by car and dropped them off near the dipping tank (point H of the inspection *in loco*).

[63] It was DW1's evidence that while patrolling they saw three men coming from the bushes carrying game and were coming towards them. It was his further evidence that they then crouched down. These three men, according to DW1's evidence, were carrying five impalas. They were also carrying a gun and a torch. When the three men were close, they (game rangers) then emerged and Mr Madonsela ordered them to stop and informed them that they are game rangers.

[64] I must mention early that the name "Madonsela" is used in reference to the surname of Kunene in *siSwati*, hence a reference to Madonsela *in casu* is a reference to Mkhambatsi Kunene.

[65] The three men however, did not comply with Madonsela's order to stop but ran to different directions. Mr Madonsela then fired a warning shot but still they did not stop. It was DW1's evidence that the plaintiff was then shot by Madonsela. DW1 pursued one of the men and was able to catch him. This is the man who was giving evidence yesterday, according to DW1. This is none other than Bhekinkhosi Ndzinisa who is PW2.

[66] DW1 also testified that it is untrue that Ndzinisa was only hunting with Sifiso Shongwe and that the plaintiff was not involved. He maintained that the plaintiff was with Ndzinisa and Sifiso Shongwe and were all seen carrying the killed game. He testified that after catching Ndzinisa, he

handcuffed him with the assistance of Elliot Maziya and they took him to where the plaintiff was lying after he had been shot.

[67] This witness denied the evidence of Ndzinisa and stated that it is untrue that one ranger said that an offence has been committed. He further denied that Mr Mbatha made that comment as well.

[68] It was DW1's evidence that after the plaintiff had been shot they then called Mr. Mbatha who arrived, whereafter they picked the plaintiff and loaded him into the rangers' van. They also loaded the five killed impalas and the gun that was used. It was also his evidence that Ndzinisa was seated down and they instructed him to get into the van as well. They all went to Simunye Police Station.

[69] DW1 testified that he personally saw that the plaintiff carried two (2) impalas and Ndzinisa carried one (1) impala. He maintained this evidence even during cross-examination.

[70] When cross-examined DW1 confirmed and maintained that the plaintiff was shot at around 06:00hrs. When it was put to him that the plaintiff was shot by mistake hence no charges were preferred against him by the Director of the Public Prosecutions (DPP), his response was that they handed over the

plaintiff together with the exhibits to the responsible law enforcement officers (police).

[71] Under cross-examination, DW1 denied that one person can carry a total of three impalas simultaneously. His evidence was that on this morning Ndzinisa was carrying one big impala, plus the gun and the torch, while Sifiso Shongwe carried one big impala on his shoulders and one by his hands, and the plaintiff likewise.

[72] The second witness for the defence (DW2) is George Mashungwane Mbatha. According to his evidence he is the manager for Hlane Game Reserve and has worked there for 30 years. He however started as a game ranger.

[73] DW2 testified that at around 01:00hrs it was reported to him that gunshots were heard inside the game reserve. He then called the other game rangers and deployed them to look for the poachers because to his knowledge no person had been granted authority to hunt game in the reserve. It was his evidence that he is a gazetted game ranger and that these other rangers acted under his instruction and authority. It was his further evidence that he drove together with Jahamnyama Mazibuko, Mkhambatsi Madonsela and Elliot Maziya who is now deceased. He gave to Madonsela an R5 rifle.

[74] DW2 testified that Madonsela is trained in using a gun and that a gun is to be used when necessary. He testified that at the place where an opening was observed during the inspection *in loco* (point B), signs were discovered showing that the poachers used that opening to exit the game reserve. There was animal hair, blood stains, signs that the killed game was dragged there, and foot prints as well. The foot prints went towards the railway line.

[75] DW2 also testified that he knew that the pathways within the game reserve farm meet somewhere ahead. He then drove the three above named rangers to the dam near the Luhhwahhweni dip tank. The time was around the early morning hours and it was still a little dark.

[76] Mr. Mbatha (DW2) then drove back to the place where the gunshots were heard. His testimony is that he went back in order to become part of a backup and that some game rangers were left within the game reserve because there was a likelihood that the poachers did not all exit the game reserve.

[77] DW2 further testified that just after 06:00hrs but before 06:30hrs he received information that three men have been seen carrying five killed impalas and one of them was shot while escaping, while one was caught and the third one ran away. He therefore went to where these rangers and the two arrested men were. It was his evidence that he arrived there in about twenty minutes

and was in the company of rangers Dumisa Sibandze and Ndiphethe Dlamini.

[78] On arrival, DW2 found one man fastened on handcuffs, and was with the plaintiff, who had been shot, plus five killed impalas, a gun and a torch. Bhekinkhosi Ndzinisa is the one who was on handcuffs whilst the plaintiff was lying down injured by the gunshot.

[79] It was the evidence of DW2 that he talked to the two arrested men and they even gave him their names. He denied that the plaintiff was in such excruciating pain that he could not hear most of what was said. He testified that the plaintiff talked to him and was even looking at him. This witness vehemently denied that he ever said that the rangers have committed an offence.

[80] DW2 further testified that he then called the police who told him to rush the two men to the police station. According to this witness, two rangers held the plaintiff by his arms while three held him on the legs and the body when putting him inside the motor vehicle. He denied that Mr. Ndzinisa was ordered to lift and carry the plaintiff into the motor vehicle. He testified that Ndzinisa was on handcuffs and could not assist them in any way.

[81] DW2 testified that it took them about 40 to 45 minutes to arrive at Simunye police station. When informed by counsel for the defence that the plaintiff's evidence is that he was shot at around 08:00hrs to 08:30hrs and later said at around 07:30hrs, DW2 denied and stated that they were already at the police station during these times.

[82] It was also the evidence of DW2 that Mr Ndzinisa never mentioned to him or the police that the plaintiff is innocent and was not with them when they went to hunt in the game reserve

[83] DW2 further testified that the plaintiff could not have gone to pick mushrooms because the time for mushrooms in that area is from mid-January to February and not in December. He testified that this knowledge is based on his 30 years of working experience in the area, and also because he also collect mushrooms for himself.

[84] It was the evidence of DW2 that one man can only carry one big impala and one small one but cannot carry two big ones at the same time. Each big impala weighs around 50 kg whilst a small one weighs between 20kg and 25 kg. It was the evidence of this witness that the two smaller impalas were already a year old and would have been ready to produce their offspring the following year. He testified, with emphasis, that the three impalas alleged to have been carried by Sifiso Shongwe cannot even be lifted up by one man. It was his evidence that in his 30 years experience as a game ranger he has

caught poachers on countless occasions and it has never happened that one man carried over two impalas. It was also his evidence that the plaintiff and his colleagues in crime had a long way to travel back home, and that one man cannot possible carry the three impalas whose total weight is around 125 kg.

[85] In cross-examination DW2 was asked if he is aware that for a person to possess a gun, that person must also possess a licence. He was therefore questioned if Madonsela does possess a licence to carry a gun. DW2's response was that he is fully aware about the licence requirements but stated that game rangers who patrol the game reserve do not need to possess a licence in terms of **section 23 (2) of the Game Protection Amendment Act**. It was also his evidence that the gun which Madonsela used is licenced.

[86] DW2 was also asked why they use big guns such as the R5 rifle when police, for example, use pistols. His answer was that game rangers work in a forest and confront poachers who are well armed and hunt big game such as rhinos and carry even bigger guns such as the AK 47. He was also questioned about why they prefer to hire ex- soldiers as game rangers and his answer was that they do not hire ex-soldiers only but even ordinary citizens.

[87] It was then put to this witness that if they wanted the plaintiff to be prosecuted for poaching on the day he was shot they would have put pressure on the desk officer at the police station. DW2 answered by stating that they are still putting pressure on the desk officer so that the plaintiff may be prosecuted but these officers are unfortunately not directed by them. They still want the prosecution of the plaintiff to proceed. DW2 mentioned that they still bother and call the desk officer even though he was transferred to Big Bend.

[88] The defence's third witness (DW3) is Mkhambatsi Mfanawempi Madonsela. He is the game ranger who was carrying the gun and shot the plaintiff. His evidence is that after gun shots had been heard inside the game reserve and evidence having been seen that killed game had been dragged out of the reserve through the opening on the fence (point B), he was taken and dropped off at a place where there is a dipping tank and a dam by their boss Mr Mbatha. He was dropped there with Elliot Maziya and a Mr Mazibuko whose name he has forgotten.

[89] DW3 testified that Mr Mbatha instructed them to patrol and look for the poachers and go towards the game reserve. Mr Mbatha then drove away after giving them the instructions for patrolling. While doing the patrol towards the game reserve they saw three men coming towards them and they then crouched down. As the men got closer, the rangers saw that the men were carrying five killed game in the form of impalas.

- [90] When the three men were close, at a distance of about six metres away, DW3 stood up and ordered them to stop and also told them that they are game rangers protecting animals. The three men did not stop but ran away and threw down the killed impalas and the gun.
- [91] It was DW3's further evidence that he then fired a warning shot but still the men did not stop. He then shot the plaintiff in an attempt to incapacitate him from running away in order to arrest him. Whilst led in-chief, he was asked about the number of bullets that he fired. He testified that he fired seven gun shots because the other poacher was then running back to get the gun.
- [92] It was the evidence of DW3 that they ended up arresting the plaintiff who had then been shot and Mr. Ndzinisa who gave evidence the previous day. Having arrested them, they first greeted them and asked for their surnames and residential places. The man provided this information and also told the rangers that they reside at Luhhwahweni. It was DW3's further evidence that they also asked these men about the third person who ran away and their response was that his name is Sifiso Shongwe.
- [93] DW3 also testified that the two arrested men (Ndzinisa and the plaintiff) conceded that the game they carried was killed inside the game reserve. He strongly denied that any of the rangers said that an offence has been committed by shooting at the plaintiff. His evidence was that the plaintiff carried two impalas (one big and one small), with Mr Ndzinisa carrying one

impala and the gun and torch whilst the third man who ran away carried one big impala plus a smaller one. The plaintiff carried the big impala like a school bag and also carried the smaller one with his hands.

- [94] It was also the evidence of DW3 that it is untrue that Ndzinisa was ordered to carry the injured plaintiff and put him inside the rangers' motor vehicle. He testified that the plaintiff was carried into the motor vehicle by the rangers and Mr Ndzinisa was on handcuffs.

The law applicable

- [95] The defendants admit that the plaintiff was shot by a game ranger during the course and scope of his employment by the Hlane Game Reserve and was injured as a result. They however plead, in their defence, that the plaintiff was shot in an attempt to subdue and arrest him as he was reasonably suspected to have contravened section 12 of the Game Act as amended, in that he killed game in the form of impala and was resisting arrest and escaping.
- [96] It is trite that where the act complained of involves an interference with the plaintiff's body such as an assault, once the interference is established or admitted, the defendant bears the onus of proving that such interference was lawful. See: **Prince Khumalo v Terence Everzard Reilly NO and 3 Others (244/2007) [2011] SZHC 111 (28th April 2011), paragraph 18** and

Makhosazane Dlamini v Radio Shop (3118/2005) [2011] SZHC 112 (28th April 2011).

[97] The defendants base their defence on section 23 (2) and (3) of the Game Act No.51 of 1953.

Evaluation of the evidence

[98] It is common cause that Mkhambatsi Madonsela who carried the gun and shot the plaintiff was acting on the instructions of a game ranger Mr. George Mbatha. In his evidence in-chief Mr. Mbatha testified that he is a gazetted game ranger and that these game rangers acted on his instructions and authority. He also testified that Madonsela and Mazibuko were given instructions by him. They were with Mr. Elliot Maziya who is now deceased. This evidence was not disputed, and was not challenged.

[99] Mr. Msibi submitted however, on behalf of the plaintiff that no evidence was placed before court to prove that Mr Mbatha is a gazetted game ranger. This submission, with due respect, is incorrect. To the contrary, Legal Notice No. 138 of 1997 made under section 23 of the Game Act of 1953 was included in the Book of Authorities filed on 6 June 2016. *Ex facie* the Legal Notice, Mr. George Mbatha was appointed and gazetted as a game ranger with effect from 14 January 1991. No evidence has been placed before court to show that this Legal Notice was revoked. It is therefore my finding that Mr. Mbatha is a lawfully appointed and gazetted game ranger.

[100] Mr. Msibi also submitted on behalf of the plaintiff that the firearm used to shoot the plaintiff was not licensed. The plaintiff's argument is that the defendants have failed to show that the firearm used was licensed and therefore was in the lawful possession and use of Mr. Madonsela.

[101] Mr. Mbatha's evidence was that he gave Mr. Madonsela the R5 rifle. He gave it to him so that he can use it when it becomes necessary. It was his further evidence that this firearm (gun) is owned by the Hlane Royal National Park. When Cross-examined, it was his evidence that the R5 rifle is licensed. Thereafter counsel for the defendants objected to that line of questioning and stated that the issue of whether or not the firearm was licensed was not pleaded anywhere, and he therefore did not seek instructions about it when preparing for the trial. This question was therefore not pursued by Mr. Msibi for the plaintiff.

[102] Mr. Mbatha did however answer the question and testified that the firearm is licensed. He was not requested to produce proof of the licence. In my opinion and finding, there is no basis for me to believe that the Hlane Royal National Park would own and use an unlicensed firearm. I am satisfied that the R5 rifle which Mr. Madonsela used to shoot the plaintiff was licensed.

[103] Plaintiff's version about the events of the morning when he was shot is that he had not gone to hunt game but went to pick mushrooms. He brought Mr.

Ndzinisa as his witness. Mr. Ndzinisa was arrested together with the plaintiff on the day the plaintiff was shot. It was Ndzinisa's evidence that the plaintiff is innocent and was not hunting with him during that night. Ndzinisa testified that he was only hunting with Sifiso Shongwe who was able to outrun the game rangers.

[104] It is common cause that the illegally killed game are five impalas. Three were big impalas and two were small ones. Pictures of the impalas were taken at the Simunye Police Station and were submitted as part of the discovered documents. The two small impalas had grown to about the size of a goat. It was the evidence of Mr. Mbatha that the small impalas were already a year old and weighed between 20 and 25 kg each. The three big impalas weighed about 50kg each. This evidence was not assailed by the plaintiff.

[105] Evidence of the two rangers who were also at the scene when the plaintiff was shot is that they saw three men carrying five impalas coming towards them. The rangers then crouched down and waited for the three men. When the men were very close, the rangers confronted them and Mr. Madonsela who carried the gun ordered them to stop and also informed them that they were being stopped by game rangers who are protecting the animals. Instead of stopping and surrender, the three men ran away and went different directions.

[106] The evidence of these two rangers corroborated each other. Even the evidence of Mr Mbatha who was immediately called after the plaintiff had been shot, corroborated their evidence as reported to him at the scene.

[107] Both game rangers testified that the plaintiff was carrying two impalas, whilst Sifiso Shongwe carried two, with Mr. Ndzinisa carrying one impala plus the gun that they used and a torch. Mr. Ndzinisa on the other hand testified that he was carrying two impalas plus the gun and torch while Sifiso Shongwe carried three impalas.

[108] Mr. Mbatha, whose undisputed experience as a game ranger is 30 years, testified that on the countless occasions when poachers were found, it has not happened that one man carried three impalas simultaneously. He testified that if the evidence of Ndzinisa is true, then Mr. Sifiso Shongwe was carrying game that weighed about 125 kg. It was Mbatha's evidence that this is impossible. This weight cannot even be lifted up by one man, let alone carrying it the long distance that Sifiso had to travel back home.

[109] Having seen from the pictures of the discovered documents how big the impalas were, I find on a balance of probabilities unlikely that Sifiso Shongwe could have carried three of the impalas at the same time. This is particularly true when regard is given to the long distance that these poachers had to travel back to their homesteads.

[110] According to his own evidence, Ndzinisa was carrying two impalas plus the gun and a torch. On a balance of probabilities, the version of the game rangers is most probable and true than that of Ndzinisa.

[111] Ndzinisa further testified that from where he was caught by the rangers up to where the plaintiff was lying after having been shot is a distance of about 30 metres. The evidence submitted in court is that when the rangers ordered the men who carried the killed game to stop, none of them stopped. The men escaped. In my analysis of the evidence, the 30 metres distance from where Ndzinisa was caught to where the plaintiff was lying is consistent with the alleged conduct of splitting up by the three men and running away. I find it more probable than not that the plaintiff was shot while he was with Ndzinisa and Shongwe carrying the illegally hunted game.

[112] I am therefore satisfied on the evidence, and I find on a balance of probabilities, that the plaintiff illegally hunted game and was found by the game rangers carrying illegally killed game. He was shot while resisting arrest by escaping from the rangers after he had been ordered to stop.

[113] I have to mention that the plaintiff and his witness Mr. Ndzinisa did not impress me as truthful witnesses when giving their evidence. In my view their evidence is untruthful, fabricated and tailored to favour the plaintiff's case.

[114] When the plaintiff was asked during cross-examination if Sifiso Shongwe is his friend, he denied and stated that he is not. He was further asked if he knows Sifiso Shongwe and he said that he doesn't know him. Counsel for the defence then informed him that on the first day of the trial Sifiso Shongwe was present and sitting behind the plaintiff's attorney. The plaintiff then changed tune and stated that all he recalls is that Sifiso Shongwe told him that he heard the gunshot when the plaintiff was shot. He however denied that Sifiso Shongwe was present in court on the first day of the trial. This denial is inconsistent with his earlier version that he doesn't know Sifiso Shongwe.

[115] In addition to the above, no reason was given by the plaintiff why he first denied that he knows Sifiso Shongwe but later on conceded that he knows him. The only most probable inference and conclusion that I make is that the plaintiff denied knowledge of Sifiso Shongwe because Sifiso has been proved on the evidence of Ndzinisa to be a person who was also illegally hunting game when the plaintiff was shot. The denial is to disassociate himself with Sifiso.

[116] When the plaintiff was asked in cross-examination if Mr. Ndzinisa was also in the car that drove him to the police station after he had been shot, he answered and stated that he doesn't recall and attributed his non-recollection to the excruciating pain that he was feeling.

[117] The plaintiff was also asked if the five killed impalas were also loaded into the motor vehicle that drove him to the police station. His answer was the same, that he doesn't recall due to the pain that he was going through. What boggles the mind however, is that the plaintiff recalls very well that after he had been shot the rangers first called their boss Mr. Mbatha. He took notice that Mr. Mbatha arrived after about an hour. He testified that he clearly recalls that after arrival Mbatha stated that "*an offence has been committed*". He also recalls that from the scene where he was shot he was taken to Simunye Police Station. At the police station he was then removed from the game rangers' motor vehicle and placed into a police motor vehicle that rushed him to Good Shepherd Hospital. He further recalls that the doctor who attended him at Good Shepherd Hospital immediately referred him to Mbabane Government Hospital because of the seriousness of the injury that he sustained, and that he arrived at the Mbabane hospital at around 13:00hrs.

[118] The plaintiff's evidence that he doesn't recall if Mr. Ndzinisa and the five killed impalas were also in the motor vehicle that took him to the police station is on a balance of probabilities untrue. Mr. Ndzinisa is someone who is known to the plaintiff. It was the plaintiff's evidence that he knows Ndzinisa and that they both reside in the same village. It is difficult to understand why the plaintiff could not recognize Mr. Ndzinisa who was brought next to him immediately he had been shot yet he testified that he recognized rangers who were about four in number coming immediately after he was shot and that Mr. Mbatha arrived at the scene about an hour later. The plaintiff ought to have seen, in my opinion, Mr. Ndzinisa when brought to where the plaintiff was lying, and when they boarded the game

rangers' motor vehicle at the scene, or on their arrival at the police station. Mr. Ndzinisa is someone who is known to the plaintiff, per the plaintiff's evidence.

[119] The most probable inference and conclusion I make concerning the plaintiff's evidence that he doesn't recall the presence of Mr. Ndzinisa is that he doesn't wish to be associated with him. Ndzinisa admitted in court that he was illegally hunting game on the day the plaintiff was shot. He also conceded that he was convicted of poaching and paid a fine, including the replacement value of the killed game.

[120] The plaintiff was also asked during cross-examination if he knows Lenny Maziya. He answered that he knows him and stated that they work together. He further stated that Lenny is a relative and that they both reside at Mhlumeni.

[121] In a letter dated 6 May 2010 the defendants sought further particulars and asked what time was it when the plaintiff was shot and who was accompanying him. Through a letter dated 24 May 2010 the plaintiff's attorneys furnished further particulars and stated that the plaintiff was shot at about 08:30hrs and that the plaintiff was in the company of Lenny Maziya.

[122] However, during cross-examination the plaintiff denied that he was with Lenny Maziya when he was shot. When asked why his attorneys would come up with such information, his answer was that he doesn't know. The evidence shows however, that Lenny Maziya works with the plaintiff and that they are related, and both reside at Mhlumeni. No reason was given about why the plaintiff's attorneys mentioned the name of Lenny Maziya and how they got to know him.

[123] In terms of the letter dated 24 May 2010 the plaintiff was shot at around 08:30hrs. During cross-examination the plaintiff confirmed this time. When it was shown that it could not be around that time as statements had already been recorded at the police station, the plaintiff then stated that he heard about this time when the rangers were telling the police.

[124] The approximate time when the plaintiff was shot, according to the plaintiff's evidence in court is between 07:00hrs and 07:30 hrs. What is not reconcilable is that after having been shot, according to the plaintiff's evidence, the rangers then called their boss Mr. Mbatha who arrived after about an hour. Mr. Mbatha's arrival can therefore be between 08:00hrs and 08:30hrs if the plaintiff's evidence is correct.

[125] The version of the defendants' witnesses is that the plaintiff was shot at around 06:00hrs. This is disputed by the plaintiff who maintains his own version concerning the time of being shot.

[126] In my opinion, if the time estimated by the plaintiff is correct, taking into account the hour that the plaintiff alleged to have taken Mr. Mbatha to arrive at the scene, and the time on the road to Simunye Police Station, the arrival at the police station could not be earlier than 09:00hrs.

[127] Statements that were recorded at the police station were discovered. The statement of Elliot Maziya was recorded at 07:39hrs. That of Mkhambatsi Madonsela at 07:40hrs whilst that of Jahamnyama Mazibuko at 08:05hrs. From this information and evidence, the version of the defendants' witnesses is more probably true than that of the plaintiff in my opinion, and I make that finding.

[128] Coming to the evidence of Ndzinisa, he testified that whilst relaxing with Sifiso Shongwe, they had a gun shot in front of them. They then walked away and diverted from the route they were following. Then two men who were dressed like game rangers emerged and stopped them. They however did not stop but dropped down the game they carried and ran away. It was Ndzinisa's evidence that the rangers caught up with him and fastened him using handcuffs. He also testified that the rangers were hitting him using a knobkerrie. The rangers, according to Ndzinisa's evidence, walked with him a distance that is about 30 metres and that is where he found the plaintiff lying down and bleeding.

[129] Ndzinisa further testified that one of the rangers said that “*an offence has been committed*” and was making reference to the shooting of the plaintiff. The rangers thereafter called their boss (Mr. Mbatha).

[130] According to evidence given by the plaintiff, Mr. Mbatha is the ranger who said that “*an offence has been committed*”. The evidence of Ndzinisa points to another ranger as the person who said “*an offence has been committed*”. According to Ndzinisa’s evidence, this was said by the ranger before Mr. Mbatha arrived. The evidence in support of the plaintiff’s case is therefore contradictory on this allegation.

[131] It was put to Ndzinisa that according to the plaintiff’s evidence it is Mr. Mbatha who said that “*an offence has been committed*”. Ndzinisa’s response was that this was said by one of the rangers who were present at the scene when the plaintiff was shot, and that Mr. Mbatha also said it on his arrival.

[132] Ndzinisa testified that the rangers ordered him to carry the plaintiff who had been injured and place him into the rangers’ motor vehicle. He however did not agree because there were no hand gloves and the plaintiff was bleeding. This was denied by the rangers. Their evidence was that Ndzinisa was fastened using handcuffs and was seated down. There is no way he could be instructed to carry the plaintiff whilst also handcuffed.

[133] The evidence of Ndzinisa confirmed that after he was caught, the rangers fastened him using handcuffs. No evidence was given to show that the handcuffs were removed from Ndzinisa whilst at the scene where the plaintiff was lying down after having been shot. His evidence that the rangers ordered him to carry the plaintiff and place him inside the motor vehicle whilst on handcuffs is untruthful in my opinion. On a balance of probabilities the evidence of the rangers that Ndzinisa could not be ordered to carry the plaintiff because he was handcuffed and sitting down is more probable and truthful, in my view, than the version of Ndzinisa's evidence. This portion of Ndzinisa's evidence is therefore rejected as the scales of probability tilt in favour of the rangers' evidence.

[134] Ndzinisa was asked during cross-examination and he conceded that he comes from the same village with the plaintiff and that they know each other. He was then asked if he talked to the plaintiff at the scene or when they were driven to the police station. His answer was that he did not because the plaintiff was more like a dead person. He however did not substantiate and give reasons why in his opinion the plaintiff was more like a dead person.

[135] The evidence shows that the plaintiff was aware about what transpired from the moment he was shot up to the point when he was at the Good Shepherd Hospital and the Mbabane Government Hospital. The plaintiff testified that soon after being shot, Mr. Mbatha was called. He took notice and estimated that Mbatha arrived after about an hour. He heard Mbatha saying that an

offence has been committed. He is aware that from the scene he was taken to Simunye police station. He is also aware that he was driven from Simunye police station using a police motor vehicle and that he was rushed to Good Shepherd Hospital. He is further aware that he was transferred from Good Shepherd Hospital soon thereafter to Mbabane Government Hospital where he arrived at around 13:00hrs.

[136] On the basis of the plaintiff's knowledge and recollection of these events, I do not understand and accept why Ndzinisa described the plaintiff as someone who was more like a dead person.

[137] In view of the findings made in the foregoing paragraphs, it is my conclusion that the plaintiff's case is premised on fabricated and untruthful evidence that has been tailored to favour and support the lawsuit. On a balance of probabilities, the defendants' version is more truthful and probable than that of the plaintiff, hence I accept the defendants' evidence and reject that of the plaintiff. In other words, it is my conclusion and finding that on a balance of probabilities, the plaintiff was shot whilst resisting arrest and escaping from the rangers after he had been caught carrying illegally hunted game with Bhekinkhosi Ndzinisa and Sifiso Shongwe.

[138] In submissions the plaintiff's attorney stated that the plaintiff's name is not mentioned in the recorded statements of Mr. Maziya, Lonkelemba Mamba

and Mr. Madonsela. His argument is that these people never mentioned his name because he was not caught poaching. The only person who is said to have mentioned it is Mr. Mbatha and it was argued that he did so in order to protect his employer from civil lawsuit.

[139] I point out that this submission is incorrect. The statements do make reference to how the plaintiff was shot and why. Plaintiff is the only person who was shot during this incident. The statements were part of the discovered documents. The one recorded by Mr. Maziya *inter alia* states what I quote below:

“Along the way we met three (3) men with the Impala on their back 2 of them were carrying two (2) and one was carrying one (1). Immediately we took cover to the forest the time was about 0600 hrs. When the culprits were near we stopped them, but they resisted and ran away. Mkhambatsi fired 7 gun shots and only one was shot on the left knee and he is Nhlanhla.” (own emphasis)

[140] The statement recorded by Mr. Madonsela *inter alia* states what I quote below:

“While proceeding we then saw three men carrying impalas coming towards us at about 10 metres away. We then hid just near the pathway making sure that they don’t see us. When they were about 5 metres from us, I (Mkhambatsi Madonsela) came out of our place because I was the only one carrying a R5 rifle and told them to stop where they were while pointing at them with the R5.

They did not listen at what I was saying to them and they dropped the impalas they were carrying and tried to escape. Also with them was a shot gun which they also dropped on the ground except one of them who was carrying two of the impalas, he did not drop the impalas he was carrying. I then shot a warning shot on the ground telling them to stop but they proceed trying to escape. I then shot the one who did not drop the impalas while trying to escape with them on the left leg near the knee and he fell down with the impalas he was carrying.” (own emphasis)

[141] There is no doubt that the person who was shot on the left leg near the knee is the plaintiff and that this part of the statement refers to him.

[142] The statement of Robert Jahamnyama Mazibuko *inter alia* states what is quoted below:

“We remained at that place until at about 0600 hrs. At about 0600hrs we saw three men appearing from the bushes and they were carrying five (5) impalas. We clearly saw them as it had already dawned. The men came towards our direction. We decided to hide to make sure that they did not see us. They did not see us until they reached the place where we were hidden.

When they were about to pass us we appeared and told them that we were game rangers and they must not escape. They did not comply with the order instead they ran away. Actually, it was Kunene who was giving that order. Realizing that the poachers were escaping, Kunene shot in the air six (6) times but still they could not stop.

They took different directions. Kunene with his seventh shot was able to hit one of the poachers. Seeing that the other one was shot I then decided to pursue the other one who was within my sight. I eventually caught up with him with the assistance of Elliot Maziya and we arrested him. The third one out-ran us and eventually disappeared into the bushes.” (own emphasis)

[143] The above quoted statement of Mr. Mazibuko clearly makes mention of how and why the plaintiff was shot. The statements do, and with certainty, refer to the plaintiff by recording that one of the three men was shot in his attempt to escape arrest.

[144] I therefore find, with due respect to Mr. Msibi, no substance in the submission that there is no mention of the plaintiff in the statements that were recorded at the police station.

[145] It was also submitted on behalf of the plaintiff that the failure to prosecute the plaintiff for poaching is evidence that he did not do so. Mr Msibi’s argument is that the attitude of the police and the Director of Public Prosecutions leads to one conclusion; viz, the plaintiff has no *prima facie* case to answer.

[146] I wish to mention that no evidence was placed before court in support of this conclusion by the plaintiff’s attorney. Mr. Mbatha testified that they still

want to see the plaintiff prosecuted for the December 2006 illegal hunting. He also testified that they are still making a follow-up by calling the desk officer of that time even though he has been transferred to Big Bend. He emphasized that they played their part and performed what is within their powers by handing over the plaintiff to the responsible law enforcement officers. Unfortunately, they do not direct the police or the prosecutions' office on when to prosecute, if they so decide.

[147] On the evidence, my finding is that it has not been sufficiently shown that the plaintiff has not been prosecuted because, *prima facie*, there is no case for him to answer. The conclusion arrived at by Mr. Msibi is not supported by the evidence before court.

[148] In addition to the above, a prosecution for any offence, except for Murder, lapse and becomes barred after 20 years. See **Section 20 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.**

[149] The prosecution for an offence that was committed in 2006 is not time barred yet, and can still be executed. It has not been proved that a firm decision not to prosecute the plaintiff has been taken by the relevant authority, hence I reject Mr. Msibi's conclusion.

Section 23 of Game Act

[150] In interpreting section 23 of the Game Act, Mr. Msibi implored this court to follow a decision of the Supreme Court of Appeal of South Africa in the cases of **Govender v Minister of Safety and Security 2001 (4) SA 273 (SCA) 24** and **Ex Parte Minister of Safety and Security: In re: S v Walters 2002 (4) SA 273 (SCA) 24**.

[151] Mr. Msibi's submission and argument is that the Supreme Court was called upon to interpret **section 49** of the **South African Criminal Procedure and Evidence Act 51/1977**. He submitted that section 49 uses similar phrases that are used in **section 23 of the Game Act**. He therefore argued that the finding of the South African Supreme Court of Appeal is to be adopted for guidance purposes by this court. He further submitted that the overall object of sections 49 and 23 are similar.

[152] In the above mentioned cases, the Supreme Court of Appeal held that in today's constitutional era, section 49 which justifies killing in the process of effecting an arrest is unconstitutional. Mr. Msibi therefore submitted that if killing is unconstitutional, an attempt to kill is likewise unlawful. He implored this court to also find that section 23 of the Game Act is unconstitutional and therefore declare the shooting of the plaintiff as unlawful. He further submitted that there are no judgments from this Kingdom which are in all four with this case after the Kingdom's new constitutional era.

[153] I wish to point out that Mr Msibi has not made reference to any specific provisions of the South African Constitution which the Supreme Court based its decision on. I am not therefore placed in a position that enables me to find guidance from the South African constitutional law based decision. The South African Constitution is not the same as the Kingdom's Constitution. A comparison of the similarities of the provisions of the two constitutions is important and necessary in my opinion. Mr Msibi ought to have made reference to specific sections that the Supreme Court of Appeal based its decision on. I am not therefore persuaded to follow the decision of the South African Supreme Court of Appeal without being referred to specific provisions that it considered and relied upon.

[154] I point out that there are judgments of this court that are in all fours with this case and were decided after the coming into force of the Kingdom's Constitution of 2005. See **Mfan'mpela Motsa v Mduduzi Ndlangamandla and Bushland Farms, High Court Case No. 2788/2206** (unreported), judgment was delivered on 28 September 2010; **Logiyela Sibandze v Big Game Parks and 3 Others (2393/2010) [2013] SZHC 2223 (9th October 2013)** and **Khumalo v Reilly NO and Others (244/07) [2011] SZHC 111 (28 April 2011)**.

[155] The last issue that I must determine is the question of whether or not the shooting of the plaintiff is justified in terms of section 23 of the Game Act. The section provides as quoted below:

“ 23. (1) ...

(2) Any game ranger or person acting on the instructions of a game ranger shall have the powers and the right:

(a) to carry and use firearms in the execution of his official duty provided such firearms are licensed;
properly

(b) to use firearms in self defence or if he has reason to believe that his life , or the life of any of his colleagues, is threatened or is in danger;

(c) to arrest without a warrant any person suspected upon reasonable grounds of having contravened any regulations made of the provisions of this Act or thereunder;

(d) to use reasonable force necessary to effect the arrest of or to overpower any person who resists arrest and who is suspected on reasonable grounds of having contravened any of the provisions of this Act;

(e) to carry out searches without a warrant under section 22 of this Act.

(3) A game ranger or person acting on the instructions of a game ranger shall not be liable to prosecution in respect of any act or omission done in the exercise of his powers and rights under subsection (2) of this section.”
(own emphasis)

[156] In terms of the above quoted section, game rangers or persons acting under the instructions of a game ranger have the right to carry and use firearms in the execution of their duties provided that such firearms are licensed.

[157] Mr Madonsela’s evidence that was corroborated by DW1 (Mr Mazibuko) and found by this court to be the acceptable version is that the plaintiff together with his two friends who have been identified as Bhekinkhosi

Ndzinisa and Sifiso Shongwe carried game that they illegally hunted and killed. When they were ordered to stop and further informed that they were being stopped by game rangers who protect animals, the plaintiff and his two friends escaped and ran to different directions. It was the evidence of the rangers that they wanted to arrest the plaintiff and his two friends after reasonably suspecting them to have contravened the Game Act.

[158] Madonsela fired a warning shot but they still did not stop, and then he fired at the plaintiff in an attempt to subdue him. Madonsela had to fire more gun shots, according to the evidence, as Mr Ndzinisa was coming back to pick the gun he had dropped down. This evidence was maintained even during cross-examination.

[159] In the matter of **Mfan'mpela Motsa v Mduduzi Ndlangamandla and Another (supra)**, the plaintiff was shot and injured by a gunshot on his left front side close to his waist. He had to undergo medical treatment. He was shot inside a Tibiyo farm by game rangers who were on patrol. He then filed a lawsuit, claiming an amount of **E1,970, 000.00**. He alleged that the shooting was unlawful and that it was without a just cause as he was not armed at the time.

[160] The court held that the rangers acted in defence of the property of their employer regarding a situation that was within the scope of their employment.

[161] The court also stated that under common law a man is entitled in the defence of his property to use reasonable force in order to effect an arrest. The court went on to state that game rangers are under a contractual duty to secure game on behalf of their employer, and are undoubtedly authorized to use such force in the pursuit of their employer's business.

[162] The court further stated that a person, including a private person, who is empowered to effect an arrest in terms of section 41 of the Criminal Procedure and Evidence Act 67/1938, is justified, in the use of force, to the point of killing, where the perpetrator or suspect flees and cannot be apprehended and prevented from escaping.

[163] Section 23 of the Game Act is worded in similar terms with section 41 of the Criminal Procedure and Evidence Act and is to be construed similarly. The plaintiff is also of the same view that section 23 of the Game Act is to be given a similar interpretation to section 41 of the Criminal Procedure and Evidence Act. This is apparent from the plaintiff's paragraph 6 (xv) of its written submissions where it states as follows:

"...I submit that the purpose of section 23 of the Game Act of 1953 is much in line with the broader purpose of the Criminal Procedure and Evidence Act of 1938 which authorizes the Police to shoot and incapacitate a suspect who is fleeing from lawful arrest."

[164] **Agymang J** in the **Mfan’mpela Motsa (supra)** case states what I quote below:

“It was enough that the first defendant perceived that game he was employed to secure was in the act of being stolen and indicated to the plaintiff that he was going to effect an arrest, first by shouting for him to stop and then firing warning shots. ... It is my view that in these circumstances, even if the first defendant in his bid to apprehend the fleeing plaintiff who was in flight to avoid arrest, had aimed the gun at him injuring him, the harm caused to the plaintiff would have been justifiable.” (p. 16- 17)

[165] In the case of **Khumalo v Reilly NO and Others (supra)**, the plaintiff was shot and injured by three gun shots on the left shoulder. He was shot by game rangers of the Hlane Game Reserve and was taken to Good Shepherd Hospital for medical attention. From there he was transferred to Mbabane Government Hospital and later to Chris Hani Baragwanath Hospital where he was hospitalized for six weeks. The defence’s case was based on the right to effect an arrest, grounded on a reasonable belief that the plaintiff targeted to be arrested contravened one or more of the provisions of the Game Act.

[166] The court, in paragraph [22], stated as quoted below:

“The next question is whether the force used by the rangers was reasonably necessary to effect the intended arrest of the plaintiff. Whilst it is important to note that a firearm was used in wounding the plaintiff, it has to be remembered that the game ranger who actually shot the plaintiff did not go out of his way to arm himself with the gun in order to deal with the situation at hand. The situation found him armed with that R5, so to say. He was in a game park and looking after game. It is a matter of common notoriety for

which this court may legitimately take judicial notice that armed poaching is rife in our game parks. Consequently rangers have to be armed with appropriate weaponry to protect themselves and the game under their guard. ... In the result I hold that the force used herein was reasonable to effect an arrest of the plaintiff and his companion.” (own emphasis)

[167] Similarly, I hold that the force used was reasonable to effect the arrest of the plaintiff who was fleeing from being arrested.

[168] For the foregoing, I find that the shooting of the plaintiff by the game ranger is not unlawful and is justified in terms of section 23 of the Game Act. The shooting is also justified in terms of the common law powers vested in a person acting in the protection of his property. Game rangers are under a contractual duty to secure game on behalf of their employer.

[169] I therefore make the following order:

1. The action is dismissed.
2. Plaintiff is to pay costs, including certified costs of Senior Counsel.

T.L. Dlamini

T.L. DLAMINI J

JUDGE OF THE HIGH COURT

For Plaintiff : Mr. P.K. Msibi

For Defendants : Senior Counsel Paul Kennedy (Instructed by Mr. K. Motsa
of Robinson Bertram)