

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

REPORTABLE

Case Number : 36826/09

DATE:25/08/2011

In the matter between:

JOHANNES STEPHANUS KOTZE

PLAINTIFF

and

MINISTER OF SAFETY AND SECURITY

DEFENDANT

JUDGMENT

HARTFORD A J

A THE NATURE OF THE CLAIM

1. This is a delictual claim for damages brought by the Plaintiff, Mr Johannes Stephanus Kotze, against the Minister of Safety and Security arising out of the fact that the Plaintiff was shot by members of the South African Police Services on 28 August 2008 at 5 Isak De Villiers Street, Meyersdal (para 4, Particulars of Claim).

2. The allegations in the Particulars of Claim are that the incident was caused intentionally by the members of the South African Police Services (hereinafter referred to as “the Police”), alternatively was caused entirely by

the negligence of the Police, who were negligent in one or more of the following respects:

- “5.1 They failed to determine the identify of the Plaintiff before firing on him;*
- 5.2 They failed to exercise the necessary care and skill when given the circumstances they both could and should have done so;*
- 5.3 The failed to avoid the incident when by taking reasonable and proper care they both could and should have done so;*
- 5.4 They failed to give a warning shot and/or shots when they both could and should have done so;*
- 5.5 They failed to establish whether it was necessary to open fire on the Plaintiff given the circumstances when they both could and should have done so.” (para 5, Particulars of Claim)*

- 3. In the alternative to the above, the Plaintiff claims that the Defendant owed a legal duty and/or a duty of care to the Plaintiff to:

- “6.1 Take all reasonable and necessary steps to prevent injury or harm being caused to the Plaintiff;*
- 6.2 Take all reasonable and necessary steps to avoid the occurrence of the incident complained of, more specifically to avoid members of the South African Police Services to open fire (sic) on the Plaintiff.” (para 6, Particulars of Claim)*

4. The Plaintiff pleaded that he was severely injured and, *inter alia*, sustained eleven gunshot wounds as a direct consequence of the incident and was obliged to undergo medical treatment.
5. I was advised that the Plaintiff's wife, Mrs Kotze, had brought a separate action against the Minister of Safety and Security in a similar vein. She was a passenger in the vehicle and was also injured and sustained six gunshot wounds in the incident. The parties agreed that the outcome of this matter on the merits would also apply to the claim of Mrs Kotze.
6. It was further agreed that the issues of liability and quantum would be separated and an Order was granted by me separating the issues in terms of Rule 33(4) of the Rules of Court.
7. In response to the claim, the Defendant pleaded that, on 28 August 2008, at approximately 23h00 and at 5 Isak De Villiers Street, Meyersdal, members of the South African Police Services, acting in the course and scope of their duties with the Defendant, fired several shots at a vehicle, the occupants of which were believed at the time to be fleeing suspects in a reported house robbery in progress at the time and at the given address.
8. The said Police members "*acted bona fide in the circumstances and in terms of the provisions of section 49(1) of the Criminal Procedure Act, 51 of 1977, as amended. In the premises, the Defendant denied that the members acted negligently.*" (para 3, Defendant's Plea)

9. Section 49(1) was pleaded by the Defendant as its defence, and although the Plaintiff pointed out that section 49(1) contained only some definitions, it was made clear by the Defendant that he had meant to rely on section 49(2) during the trial, and not section 49(1). Although the Plea was not formally amended, I accept that the trial was conducted on the basis that section 49(2) was the intended defence of the Defendant.

10. Section 49(1) simply defines the meaning of “arrestor” and “suspect”. Section 49(2) reads as follows:

*“If any arrestor attempts to arrest a suspect and a suspect resists the attempt, or flees, or resists the attempt and flees, **when it is clear that an attempt to arrest him or her is being made**, (my emphasis) and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: provided that the arrestor is justified in terms of the section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds –*

- a) *that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;*

- b) *that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or*

- c) *that the offence for which the arrest is sought is in progress and is of a forceable and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.”*

11. In addition to the factors pleaded as its defence set out in section 49(2), the Defendant admitted at the pre-trial conference that the standing service orders and procedures current and in place at the time of the incident were those appearing from two circulars annexed to the further pre-trial minute.
12. The first circular, dated 24 May 2002, referred to the Constitutional Court judgment of ***Ex parte Minister of Safety and Security and Others: in re S v Walters and Another*** 2002 (4) SA 613 (CC) and stated that:

“Existing standing orders which are inconsistent with this judgment are hereby repealed to the extent that they are inconsistent therewith.” (para 6, p 3)

13. The first circular quoted extensively from this judgment as follows:

“In order to make perfectly clear what the law regarding this topic now is, I tabulate the main points:

- a) ...
- b) ...
- c) ...
- d) *Where arrest is called for, force may be used only where it is necessary in order to carry out the arrest.*

- e) *Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.*
- f) *In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances.*
- g) *Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.*
- h) *Ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later."*

14. The first circular then quotes further from the judgment that:

"The right – and indeed the duty – of police officers to protect their lives and personal safety and those of others is clearly endorsed and in no respect diminished."

15. Approximately fourteen months later, a second circular, dated 18 July 2003, was issued by the National Police Commissioner. This circular refers to the fact that section 49 of the Criminal Procedure Act has been amended and in a heading entitled *"Changes brought about by the new section"* the following is stated:

“In the interim, members must adhere to the following guidelines:

- (1) Force (such as the use of a firearm), which could result in the death or grievous bodily harm of the person to be arrested may only be used if the member believes on reasonable grounds –*
 - a) that the force is immediately necessary for the purposes of protecting the member, any person lawfully assisting the member or any other person from imminent or future death or grievous bodily harm;*
 - b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or*
 - c) that the offence for which the arrest is sought is in progress and is of a forceable and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.*
- (2) ...*
- (3) If a member believes on reasonable grounds (as set out in sub-paragraph 1 above) that the use of force (such as a firearm), which could result in the death or grievous bodily harm of the person to be arrested, will be necessary to effect an arrest, such member must, **where it is reasonable in the circumstances to do so, issue a clear warning to the person who is to be arrested that force will be used against him or her unless he or she submits himself or herself to custody. In such an event the said warning should inform the person to be arrested that lethal force will be used (e.g. that he or she will be shot at) unless he***

or she submits to the arrest (my emphasis). Furthermore, where a member reasonably believes that it will be necessary, in order to effect the arrest, to fire a shot at the person to be arrested, a warning shot must precede any shot fired at the person, unless the firing of a warning shot may endanger the lives of other people or could reasonably be expected to have the result that the person will escape the arrest. This does not apply to instances of private defence where the life of a member or of another person is in immediate danger and immediate action is necessary to ward off the danger.”

16. Paragraph 5 of the second circular states as follows:

“Existing standing orders which are inconsistent with the instructions contained in the circular, are hereby repealed to the extent that they are inconsistent therewith.”

17. At the second pre-trial conference held on 13 March 2011, a number of facts were recorded as constituting common cause facts between the parties. These appeared in paragraphs 4.1 to 4.19 of the second pre-trial minute. I quote only the more important ones herein:

“4.1 On 28 August 2008 at approximately 22h40 the SAPS received a telephone call from Fox Security Company that there was a robbery in progress at 5 Isak De Villiers Street, Meyersdal.

...

4.3 The control room operator informed the armed response supervisor, Barnett, that the people were held (by the

robbers) and that she could hear over the phone that they were being assaulted.

4.4 Two of the Fox Security Armed Response vehicles were first to arrive at the address.

4.5 Shortly thereafter at least three South African Police Reaction Unit motor vehicles also arrived at the scene but not all together.

4.6 The motor vehicles all stopped some distance away from the said address.

4.7 The security company and the SAPS members took up position along the street both to the east and the west of the address itself.

4.8 A shot was fired somewhere on the premises. The parties are in agreement that this shot was fired by one of the robbers at the Plaintiff's children who were then standing on the balcony in front of the main bedroom. The approximate position that the robber was standing in and the approximate trajectory of the shot fired at the children on the balcony are depicted on the site plan included in the Plaintiff's bundle of exhibits.

4.9 Approximately one minute later a second shot was fired on the premises. The parties are in agreement that the second shot was fired by a robber, standing on the outside of the house, into a bedroom and the shot was fired through the windowpane and through the bed into a door leading into the bathroom. The trajectory of this shot is depicted on the photographs included in the bundle of exhibits.

4.10 *The South African Police at the time did not know who had fired the shots and at who or what. Defendant will however contend that two further shots were also fired and will provide Plaintiff with details of the alleged further shots for consideration by Plaintiff.*

...

4.12 *Plaintiff and his wife managed to escape from the robbers and sought to make good their escape in their Toyota Land Cruiser motor vehicle.*

4.13 *A white Toyota Land Cruiser (with Plaintiff and his wife being the occupants) then reversed out of the gate and continued to reverse west (that is up the street) into the street.*

4.14 *As the Toyota reversed into the street as aforesaid, the SAPS opened fire on the vehicle with R5 semi-automatic rifles and 9 mm pistols.*

4.15 *The vehicle reversed approximately 15 metres up the road before stopping in the vicinity of a storm water culvert and then proceeded to drive forward in an easterly direction down the road past the address while the SAPS continued firing.*

4.16 *The vehicle eventually came to a stop around a bend approximately 130 – 150 metres east of the address and in the immediate vicinity of a storm water culvert.*

4.17 *Plaintiff was the driver of the vehicle and his wife was sitting in the left front passenger seat.*

4.18 *Plaintiff sustained some ten gunshot wounds during the incident and his wife some six gunshot wounds.*

4.19 *The robbers all escaped.*"

18. Paragraph 5 of the second pre-trial minute also stated as follows:

"The parties are further in agreement that the Special Service Orders then current in the South African Police at the time of the incident were those appearing from the circulars dated 24 May 2002, a copy of which is annexed hereto and 18 July 2003, a copy of which is also annexed hereto."

19. An inspection in loco was held at 5 Isak De Villiers Street on 14 March 2011.

The minutes thereof recorded, *inter alia*,

"11. The culvert approximately 60 m from the middle of the gate in a westerly direction was pointed out;

...

13. The positions of where the Fox Security vehicles and the South African Police Service vehicles had stopped were pointed out.

14. The position of where the first Fox Security vehicle had stopped in Isak De Villiers Street was pointed out as being 70 m from the middle of the gate and west from the Plaintiff's residence.

15. It was pointed out that the first Fox Security vehicle had stopped on the left of the road and was facing in an easterly direction i.e. down hill.

16. *It was pointed out that a further Fox Security motor vehicle had stopped some distance behind the first Fox Security motor vehicle.*
17. *It was further pointed out that a police vehicle had stopped right next to the first Fox Security motor vehicle in the road, being approximately 70 m from the middle of the gate.*
18. *It was further pointed out that a SAPS motor vehicle had stopped behind the first Fox Security motor vehicle facing in an easterly direction.*
19. *The position of the culvert was pointed out as being approximately 60 m from the middle of the gate.*
20. *The positions where Inspector Heyns had stopped his SAPS motor vehicle and where Captain Jonck had stopped his motor vehicle were pointed out.*
21. *Inspector Heyns' motor vehicle was facing in a westerly direction and was stopped on the left hand side of the road, east of the Plaintiff's residence, approximately 70 m from the middle of the gate.*
22. *It was pointed out that Captain Jonck's vehicle was stopped diagonally across the road facing roughly in a south-westerly direction and occupying about two thirds of the width of the road.*
- ...
30. *The positions of the vehicles as described above are depicted on the sketch plan, a copy of which is annexed hereto as Annexure "A".*

20. The trial ran for approximately eleven Court days until 30 March 2011, and on the last day of the hearing, full argument was addressed to the Court, accompanied by written Heads of Argument.
21. A month after the conclusion of the trial and argument, the Defendant filed Supplementary Heads of Argument, attached to which was a Notice of Intention to Amend his Plea dated 29 April 2011. This introduced a new ground of defence, being a plea of contributory negligence on the part of the Plaintiff, and a plea that any damages should be apportioned in terms of section 1 of the Apportionment of Damages Act, 34 of 1956, to such an extent as the Court deems just and equitable.
22. A Notice of Intention to Oppose the Amendment was filed by the Plaintiff on 4 May 2011. In that Notice of Intention to Oppose, the Plaintiff did not set out the grounds on which he objected to the amendment. For another month, nothing further transpired and, only after I wrote to the parties enquiring as to whether any further steps were to be taken, were amended pages filed by the Defendant on 7 June 2011 to reflect the plea of contributory negligence.
23. Thereafter, in that it was entirely unclear as to what the status of the amended pages were, and after some correspondence from me to the parties, enquiring as to this, the Plaintiff agreed that the amendment could be effected. The Plaintiff declined to file a replication arising out of the amendment or to apply to reopen the hearing. The Defendant similarly advised that he did not wish to apply to reopen the hearing. A further month later, in July 2011, both parties filed further Supplementary Heads of Argument on the issue of contributory negligence. In the latter Heads of

Argument, the Defendant sought that there should be an apportionment of ninety percent against the Plaintiff in favour of the Defendant.

24. I will deal with the issue of contributory negligence towards the end of this Judgment.

B THE APPLICABLE PRINCIPLES

25. In that the Defendant admitted that the Police had shot the Plaintiff, the first question to be decided is whether the conduct of the Defendant was wrongful. If it was not wrongful, that is the end of the enquiry. If it was wrongful, the next enquiry is whether the Police were negligent. If the Police were negligent, the next enquiry is whether there was contributory negligence on the part of the Plaintiff.
26. The conduct would be wrongful if it could not be brought within the parameters of section 49(2) of the Criminal Procedure Act, 51 of 1977, as read with the standing service orders and procedures set out in the two circulars already quoted. The onus rests on the Defendant to establish this. An examination of the Police conduct must thus be made to see whether it fell strictly within the confines of section 49(2) and was therefore justifiable conduct and not wrongful. (***Malahe and Others v The Minister of Safety and Security and Others***, 1999 (1) SA 528 SCA at 542G-H.)
27. It is therefore necessary to give a brief analysis of the requirements of section 49(2).

28. In essence, there are four aspects that should be satisfied before the use of lethal force. First, there must be an attempt to arrest the suspect, and in this sense, there must first have been an attempt to deprive the suspect of his freedom in order to secure his presence in Court (*Wiesner v Molomo*, 1983 (3) 151 {A} at 158E). Secondly, there must have been resistance to the arrest by the suspect, or the suspect must have fled, or resisted the arrest and fled, when it was clear to him that an attempt was being made to arrest him. Thirdly, it must not have been possible to arrest the suspect without the use of force. Fourthly, once force was used, such force could only be used as was reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing. Thereafter, three further grounds are set out for the use of deadly force in section 49(2).
29. In order to assess whether the Police acted in accordance with the parameters of section 49(2) and the standing service orders and procedures in place at the time of the incident, I must examine the evidence and establish the facts that occurred, having regard to all the uncontested evidence, agreed facts (insofar as the evidence does not clearly show the agreed facts were wrong), the credibility of the witnesses and the probabilities.
30. The evidence of the parties extended over many days. The Plaintiff, his wife, Mrs Kotze, and his son-in-law, Mr Sinden, gave evidence for the Plaintiff. The Defendant called seven witnesses, being Mr Barnett, the security officer employed by Fox Security, and several policemen who attended the scene, being Captain Marais, Constable Rapetswa, Captain Simpson and Captain

Jonck. He also called Mr Nkosi, the Police photographer and Ginene Kotze, the Plaintiff's daughter.

C. ANALYSIS OF THE EVIDENCE AND THE RELEVANT FACTS

31. There were inconsistencies in the evidence of many of the witnesses and I have had to sift through much of the evidence to extract the salient features of the incident in order to establish what factors were relevant to the defence raised by the Defendant in terms of section 49(2). I shall start with an analysis of the evidence given by the Plaintiff's witnesses.

a) The evidence of Mr Kotze

32. The Plaintiff testified that he had been on holiday in the Western Cape and had left his daughter and his son, at their house at 5 Isak De Villiers Street, Meyersdal (hereinafter referred to as "the premises"). He was driving back with his wife, Mrs Kotze, in a white Toyota Land Cruiser, VX model, and, when in Bloemfontein, had telephoned his children to advise them to expect them within four hours. He arrived at the premises shortly before 11 pm and noticed that the right-hand sliding gate was open sufficiently for a car to enter. He opened the double garage door to the left with his remote and when he drove in, he realized immediately that something was wrong, as to his right he saw his son's car loaded with videos, tv's and hi-fi's. Mrs Kotze telephoned Fox Security, their armed response company, and while she was speaking, three armed robbers came down the stairs. She screamed "*come quickly*" and tried to run away whilst speaking on the phone. Certain events thereafter took place, which are not relevant, save that at some point the

robbers fled up the stairs leaving the Plaintiff and his wife unattended in the foyer. They jumped up from the floor and went to their Land Cruiser where the keys were still in the vehicle and the garage door was, according to the Plaintiff, still open.

33. He said that the quickest route out was to reverse far from the robbers and, as they reversed, they focused on the garage as they were worried about the robbers.
34. They reversed through the sliding gate and up into the road, in a westerly direction and, as they got into the road, automatic gunshots went off immediately. He testified that he could hear the gunshots hitting the vehicle from the back and they did not stop. He said that the stacked up luggage in the vehicle gave them protection and that, as they drove out, he expected a possible threat to come from the staircase in the house and that when the shooting started, he thought it was the robbers.
35. He testified that, once the shots went off, they lowered their heads and tried to duck as much as possible. He continued reversing up the street and the firing continued. He then got stuck. He did not see anything whilst reversing up the street and when the vehicle came to a standstill, he put it into forward gear to get away from the gunshots coming from the back. He thought it was the robbers shooting at him and that they were a big syndicate trying to take him out. As he put the car into forward drive, they lowered their heads and tried to go forward no matter what happened and get away from the gunshots. He did not see the street and, as he went forward, more shots came from both sides. He could feel the vehicle was hit from the side and

the noise inside the car was like explosions. The vehicle lost its power and he found it difficult to steer with the steering wheel becoming very hard. He could not really see where he was going. He did not see any vehicles in the front and more shots came through the front windscreen. Then the vehicle lost almost total power and came to a standstill. He jumped out immediately and the first thing he saw was a policeman. He then realized that the Police had shot them and screamed *"you are shooting at the wrong people"*.

36. He testified that, in reversing out of his garage, he heard nothing from the street side at all, saw nothing indicating that there was a Police presence in the street and that he would have stopped if he had known it was the Police. He did not hear any warning shots and he did not hear the words *"stop police"*. He did not see any blue lights flashing and there was automatic gunfire with no pause between them. The windows of the Land Cruiser were shot out at the back and sides and he was in ICU for thirty eight days.
37. He stated that the light that night was as usual in the street and you could see people and cars in the street. There were more lights in the house and there were garden wall lights on the houses. He did not hear any shots at all in the house and he was not aware of anything that disturbed the robbers. He was not aware of any shots fired at his car from the house as he reversed out. He did not hear the Police shouting *"here they come"* or anyone shouting *"Fox Alarms"*. Once the shots went off, he ducked as he could hear the bullets very close to his head. He was hit in his shoulder by two bullets and when asked whether he had been hit in the upper parts of his body, he stated that he had a scratch wound on his head but did not know the cause. The luggage from their holiday was stacked up quite high in the back of the

vehicle and they did not see the Fox vehicle or any Police vehicle up the road whilst reversing. He also did not see any vehicles whilst going forward and said that he did not swerve onto the sidewalk to avoid a Police vehicle. He said the first shots were fired from behind, he heard the metal and explosion from the first bullet and the bullets definitely came from higher than lower. He stated there were two burst tyres on the vehicle and scuff marks on the tyre and that it had definitely hit something like a storm water drain. He stated the firing had started as soon as he left the outside of the gate turning into the main road.

38. He was questioned about the report of a psychologist, one Prinsloo, whom he and his wife had seen. He said that he was advised of two gunshots that his children had told him about which were fired in the house, but he was not aware of a third gunshot at all. He, however, had not heard any shots himself.
39. An important issue is when the shots by the Police were first fired. Under cross examination, Mr Kotze testified that he heard the first hail of bullets as he reversed *"into the street into the main street"* (Record, p 81, line 24). Thereafter, he testified under re-examination in relation to where his vehicle was when the firing commenced that *"as soon as I have left the outside of the gates, turning into the main road, and the fire did not stop almost where the vehicle came to a standstill, continuously firing roughly fifteen to eighteen seconds"* (Record, p 100, line 25).
40. He further testified that when the first shots came through the back window *"it was parallel with the road going in the opposite direction in reverse gear"*

(Record, p 101, line 7-9,) and shortly thereafter stated *“I do not know if I was facing a hundred percent in line, reversing up. As soon as I have left the driveway of the house, bullets came from the back”* (Record, p 101, line 15). He also states *“I was turning, while I was turning. ... While I was turning into the ... the first shots came from the back”* (Record, p 101, lines 19-24).

41. Although the parties agreed, in the second pre-trial conference, that one of the common cause facts was that: *“As the Toyota reversed into the street as aforesaid the SAPS opened fire on the vehicle with R5 semi-automatic rifles and 9 mm pistols”* (para 4.14), the Plaintiff’s evidence itself is not entirely clear as to whether the first shots started as the Toyota reversed into the street, or when the car was already facing *“a hundred percent in line, reversing up”*. What does seem clear from the evidence of the Plaintiff is that the shots were fired at him either as he started turning into the street, or just as he had left the driveway of the house into the street so that he may already have been facing straight down or almost facing straight down in the road.

42. The Plaintiff’s counsel argued that any evidence in conflict with the agreed facts falls to be rejected. He referred to the Plaintiff’s evidence (Record, p 43, line 20), *“as I got into the road, automatic gunshots went off immediately”* and then submitted that the Plaintiff’s evidence was not disputed under cross examination at all (para 5.11, Heads of Argument). However, the Plaintiff’s evidence is not entirely clear, as set out above, and despite it being an agreed fact that the shots commenced as the Toyota reversed into the street, the evidence of the Plaintiff himself is inconclusive. As appears from ***Fourie v Sentrasure Bpk***, 1997 (4) SA 950 NCD: a court

can ignore an admission on the pleadings when it appears clearly, after full investigation of the facts, that the admission does not accord with the facts, and where injustice would result if the admission were given effect to (pg 973 I/J – 974 B/C).

43. Irrespective of whether the Plaintiff's vehicle was shot at as it touched the road, or as it was turning into the road, or as soon as it was facing straight downwards in the road, what is apparent is that the gunfire commenced in an extremely short space of time, in a matter of a couple of seconds, after the Plaintiff reversed through his open gate at high speed.
44. The Plaintiff's counsel submitted that, from the point where the Plaintiff's vehicle exited the gate, it only travelled some five metres before coming under fire. This, he said, was because it was five metres from the Plaintiff's gate to the point where the street started. He submitted it would probably have taken no more than one second to cover that distance of five metres, and that the necessary implication from the foregoing is that the Police opened fire within one second of the Plaintiff reversing out of the gate.
45. Irrespective of whether this submission is right or wrong, even if the Plaintiff had only first been fired at as his vehicle turned into the road and the vehicle was already facing straight down, only another few metres would have been covered and another very short period of time would have elapsed in addition to the brief period it took for his wheels to touch the street as he reversed five metres out of the gate.

46. The Plaintiff was not challenged on his evidence which, effectively, gave a maximum time for the commencement of the gunshots to have been that he was *"100% in line, reversing up"*. It was never put to the Plaintiff in cross examination that he was any further up the street when the first shots were fired. Thus, even taking the most prejudicial of the Plaintiff's versions, the window period before the shots commenced was extremely short, and must have been only a matter of a couple of seconds.

b) **The evidence of Mrs Kotze, who occupied the passenger seat of the vehicle**

47. She also described the events leading up to the shooting. In relation to the time that the shooting commenced, she stated that they ran to the car, reversed out and the moment they hit the street up the road, shots started coming from the back. The car then stopped. She told her husband to put the car in first gear and go forward as she thought there were other robbers in the street and she wanted to get away. She said that she ducked after the shots started and her husband told her to duck. As they went forward the shots kept coming and never stopped. She sustained six gunshot wounds, being wounds to her left upper arm, left breast, lower left leg, right arm and the back of her right hip.

48. She did not hear any shots in the house, no shouting from the Police or Fox Security, nor a purported shot through the roof of the car. She said that the shooting started the moment they went out of the driveway and that, as they reversed out, she sat upright as she wanted to watch the garage in case the robbers came. She started ducking for the first time the moment the car

reversed out and the shots started. She did not notice any persons outside as they were reversing and the first time she saw a person after the shooting started was after their car had stopped around the corner.

49. She stated that, after reversing out of the driveway, she never saw other vehicles in the street, never heard sirens and never saw blue lights. She said the luggage had been packed for the holiday and there was some in the boot and some in the middle row of seats. She confirmed the luggage was as appeared in photograph B4 number 5.
50. She stated that the report of Prinsloo, the psychologist, is incorrect in recording that the robbers had shot at them from the second storey and that there was a hole in the roof of their car, as it was the children who had told them afterwards that shots were fired. Neither she nor Mr Kotze heard the shots go off in their house.
51. In relation to the position of the car when the shooting commenced, her evidence, like that of Mr Kotze, varied as she then said the car had already reversed and was facing down the road when she heard the gunshots. She still had her head up until then and saw no Police as she exited the gate. She saw no vehicle further down eastward as there was no time to look, as the moment they reversed the shots started.
52. She said the windows were all closed in the car and she heard no shouting, saw no Police or Police vehicles and only saw Captain Jonck when the vehicle stopped. She said her side was partially obscured by the luggage, but if there were vehicles behind her as they reversed, she was sure she

would have been able to see them. Even when the vehicle stopped before Mr Kotze put the car into forward gear, she did not see any cars.

53. She said they raced down the road, and she kept her head down all the way forward until the car came to a stop. She did not see two vehicles blocking the road as she was ducking and not looking outside. She could not remember if the Land Cruiser's headlights were on. She later stated that, as they were reversing, if there had been vehicles seventy metres away she would not have seen them and that when the vehicle stopped whilst reversing, if there had been cars twenty metres behind she would not have seen them. She thus conceded that the luggage may have played a part in her visibility. She also said that she did not concentrate at the back as she was looking at the house for the robbers and did not expect anything to come from behind.
54. In summary, in relation to the exact moment when the firing started, Mrs Kotze's evidence varied. In chief, it was that the vehicle was hit with automatic gunfire the moment the car hit the street up the road, but under cross examination it was that the car was already facing down the street, reversing up the street when the shooting started (Record, p 177, lines 13-18).
55. My comments in relation to the discrepancies in Mr Kotze's evidence apply equally to Mrs Kotze's evidence. Either way, the shooting started within a couple of seconds after they exited the gate.

56. This is borne out by the evidence of three policemen for the Defendant; Marais indicated that he could not dispute the Plaintiff's version that the shooting commenced as the Plaintiff turned into the street, (Marais, Record, p 402 and p 419); Simpson said that there were "*split seconds*" before there were a lot of shots (Record, p 534, line 27), and Constable Rapetswa agreed, under cross examination, that the firing from the Police started as the vehicle turned into the road and that he must have shouted before the vehicle got into the road (Record, p 490, line 19).
57. Only Barnett, the Fox Alarms Security Officer, who testified for the Defendant, suggested that the shooting started when the vehicle had travelled some distance up the road, but this version was not put under cross examination to either the Plaintiff or Mrs Kotze. I reject Barnett's evidence in this regard.
58. Having regard to this synopsis of the evidence as to the point in time when the shooting at the vehicle first commenced, I find that, on the probabilities, the Plaintiff's vehicle must have been shot at either as it touched the street, or immediately after it had straightened backwards into the street, and that this would have occurred within a couple of seconds of exiting the gate.

c) **The evidence of Mr Sinden, for the Plaintiff, as read together with the evidence of Mr Nkosi, the photographer for the Police**

59. Mr Sinden is the son-in-law of the Plaintiff and married to another daughter who was not present at the robbery. He arrived at the property between 1 am and 2 am in the morning after the shooting incident and inspected the

Plaintiff's car on arrival. All of the vehicle's windows were broken except for the front windscreen which had bullet holes in it. He inspected the tyres. He found three of the tyres were completely flat and one tyre was partially inflated. He did not find any bullet marks, or bullet holes in the tyres. He said he thought the tyres were flat from hitting the storm water culvert (Record, p 110, lines 4-15). He did not count the shots but estimated that there were approximately two hundred shots (Record, p 111, line 20). There were bullet holes in the side of the car.

60. Mr Sinden identified the 186 photographs that he took the day after the incident. These appeared in Bundle 4, pages 1-179. He also took the photographs handed in as exhibit "D" in Bundle 7.
61. The next day he found bullet holes in the houses next to 5 Isak De Villiers and opposite there were bullet holes in the house's doors and brickwork.
62. Importantly, in relation to the tyres, he testified that he inspected the right rear wheel for bullet hole damage. He found no sign of bullet marks on the tyre. There were no stickers or any other markings on the wheel affixed by the Police to mark bullet holes, and nor were there any stickers on any of the other wheels to mark bullet holes. He said the Police had affixed nothing to any of the wheels as part of their marking of bullet holes (Record, p 117, lines 7-15).
63. He witnessed the Police using cones to mark the cartridges, conceded that the right front and right rear wheels had not come near the culvert and that,

as per some of the photographs, the markings on the vehicle were in line with the tyre.

64. Mr Sinden's evidence, which related largely to the photographs of the vehicle that he had taken, was not contested in any material aspect. His photographs clearly displayed the little stickers placed by the Police on the vehicle to mark the position of every bullet hole on the vehicle. I must thus examine the position of these stickers in order to make findings on the manner in which the Police opened fire and the positions on the vehicle to which the shooting was directed.
65. On an examination of the numerous photographs that Mr Sinden took, particularly in relation to the position of the stickers placed by the Police to indicate bullet holes on the vehicle, it is significant that, on the photographs of the tyres taken by Mr Sinden, there are no Police markings or stickers of bullet holes at all. Rather, there are some bullet holes marked on the side of the vehicle at tyre level, both above and below the level of the tyres, but there are no markings of bullet holes on the actual tyres.
66. Further, in relation to the rear of the vehicle, there is only one bullet hole on the entire rear of the vehicle below the level of the rear window on the right hand side. The rear window is shot out. Photograph 43, Bundle 4 shows the rear left hand side of the vehicle and there are no stickers there, whilst photograph 50 is a close up of the rear of the vehicle and shows only one sticker on the right hand side of the vehicle over the writing "Land Cruiser" above the number plate. Photograph 51 also shows clearly that there are no

bullet holes around the rear left hand side of the vehicle, either above or below, or in the vicinity of the left rear light.

67. Mr Sinden's photographs become even more significant when looked at in conjunction with the photographs taken by Constable Nkosi on 28 August 2008, in his capacity as the official draftsman and photographer, attached to the Local Criminal Record Centre Germiston, for the Police.
68. Mr Nkosi's photographs, as appear in Bundle 5, numbered 1 to 209, also show no stickers indicating any bullet holes in the tyres. This is consistent with Mr Sinden's photographs. Out of a dossier of over two hundred photographs taken by Mr Nkosi, there were approximately twenty six photographs taken of the Plaintiff's vehicle. Only sixteen of these were taken close enough to see bullet holes in the vehicle and none of these photographs were taken of the vehicle's tyres at very close range. His photograph number 3 (p 203) showed the front right hand tyre as being flat.
69. In evidence, Mr Nkosi confirmed that it was possible that he could have found more than two hundred cartridges at the scene. In relation to the photographs he took of the vehicle, he stated that one Doubelle, who was on the task team, had focused him on the holes in the vehicle and told him they were bullet holes. Photographs of any bullet holes in the tyres were singularly absent from his large dossier of photographs, despite Doubelle having specifically focussed him on the bullet holes in the vehicle when he was taking the photographs.

70. Mr Sinden was never challenged by the Defendant in cross examination as to his observation that he inspected all the wheels of the tyres and could see no bullet holes in them. He further testified that stickers were placed by the Police on all the bullet holes on the vehicle and that no stickers were placed on any of the tyres. His photographs of the tyres confirm that no stickers appear on the tyres. Mr Nkosi's photographs also confirm that there were no bullet holes on the tyres.
71. Thus, arising from the combined photographs taken by both Mr Sinden and Mr Nkosi, not a single photograph evidences even one bullet hole in the tyres. All that is evidenced is that some of the tyres were flat. The photographs did show a culvert over which the vehicle had gone and it was suggested that this may have caused the damage to the tyres, but I can make no finding on this.
72. What is clear from the combination of photographs of Mr Sinden and Mr Nkosi is that there were numerous bullet holes peppered over the vehicle, and that nearly all the windows of the vehicle were shot out, except for the windscreen, which was itself replete with bullet holes, and the back tiny left hand window.
73. In relation to the right hand side of the vehicle, a large number of bullet holes appear directly on the driver's side door, whilst a lesser amount of bullet holes appear on the rear door. The rear window is shot out, but only one bullet hole below the level of the rear window is visible. But for this hole, there are seemingly no bullets on the back right hand panel of the vehicle (see photograph 25 of Mr Sinden).

74. In relation to the left hand side of the vehicle, numerous bullet holes are present on the left hand front passenger door and the left hand rear door, all largely above the beading of the vehicle at the level at which a person would be sitting. Only two holes appear on the back panel of the left hand side of the vehicle (Sinden photograph 32), and both the front left passenger seat window and rear left passenger seat window are shot out.
75. The front windscreen has at least ten bullet holes in it and the front of the vehicle has approximately four bullet holes in the section below the bonnet. Thus, in front, the vast majority of bullet holes are in the front windscreen, and are not below its level.
76. On a count of the bullet holes marked by the Police on the lower level of the car, with such "lower level" constituting from just in line with the tyres as well as below tyre level and a little above tyre level, I can count no more than eight bullet holes on the right hand side of the vehicle. All of these appear in the middle section of the car between the two sets of tyres and at least seven of these "lower level" bullet holes are in the vicinity of the driver's passenger door, albeit on the lower side of the driver's door area.
77. On the left hand side of the vehicle, on the passenger's side, a similar picture appears. If one looks at photograph 31, Bundle 4, the majority of the bullet holes are in the upper level of the vehicle in the vicinity of the passenger seat. Both front and rear door windows are shot out. The bullet holes appear to be largely around the crack where the front passenger door joins the rear left hand door. Once again, only three bullet holes appear to be at a level lower than the beading running across from the tyres. Significantly, as

appears from photograph 32, Bundle 4, in the left hand rear part of the vehicle, only two bullet holes appear, and these are somewhat higher than the tyre, and are closer to the rear window level. Photograph 34, Bundle 4, shows three bullet holes almost directly in line with the passenger seat and close to window level.

78. As already indicated, not a single bullet mark has been marked on either the front right hand tyre, which was clearly flat in the photograph, or on the back right hand tyre, or on the other two tyres.

79. On the probabilities, it thus appears that the tyres were not flat due to being shot, that the vast majority of the fire on the right hand side of the vehicle was not directed at the tyres, but at the driver, and in the case of the left hand side of the vehicle, that the vast majority of the fire was not directed at the tyres but at the passenger.

80. I turn now to an analysis of the evidence given by the Defendant's other witnesses.

d) The evidence of Mark Barnett (the security officer)

81. He arrived first at the scene after being informed by the officer in the control room that a lady was shouting for help at 5 Isak De Villiers Street, that screaming could be heard and that there was assaulting taking place at the premises.

82. He stopped his car approximately seventy metres from the property on the western side. Later, in his evidence, he changed this to place it at forty eight metres from the property. He climbed out of the car, approached the gate, heard screaming from a female and noticed a suspect moving around the dustbin and the trailer parked in front of the gate with a long firearm in his hand. He noticed a car coming up past the driveway with policemen inside who drove past him and stopped in the top section where his car was. To the right he saw a police van coming from the Douglas Harris side with blue lights on. He saw to the right that the first Police vehicle had stopped and the other vehicle had joined it.
83. He noticed policemen coming down on the left and right side of the road and, on them approaching, he warned them there was a suspect standing at the open gate with a gun. Two policemen took cover where he was standing against the wall, one behind him and one across the road by the neighbour's driveway.
84. When a shot was fired, he heard a policeman shout on the left hand side that they are shooting the people inside. He got up to approach the gate and as he did so, the garage door started opening, and two shots were fired again which were coming from the house. He thus heard three shots in total.
85. After the sliding gate opened the vehicle reversed out of the garage into the driveway and up the street towards him. While the vehicle was reversing out of the gate he shouted *"its Fox, its Fox, its Fox Alarms"*. He moved one or two steps back into the side of the road and shouted again *"its Fox Alarms"*.

At that time he said numerous Police around were shouting *“get out of the car, it’s the police”*.

86. The vehicle kept on coming up the road in the same movement and speed and, after they shouted, they all returned to their places against the wall where they felt safe. He could not see who was in the vehicle. He got against the wall and made a decision to stop the vehicle getting closer. At the vehicle’s back section he fired eight shots.
87. At that stage there were numerous shots from the Police from the Douglas Harris side. There was also a projectile coming from the vehicle through the windows penetrating the walls behind them. The car veered off to the right hand side and rode into the neighbour’s driveway with the back right hand light of the vehicle against the wall. He moved into the road and approached the car from the front left door, asked the people to identify themselves and asked them to get out of the car. He heard the Police shout *“get out of the car”*.
88. The vehicle showed no movement inside, ignored the instructions and drove down the road at a higher speed than it reversed. He stated the halt between reversing and driving forward could have been 10 seconds or five seconds, as it was so quick.
89. As the vehicle passed him, he fired again at the tyres and back section of the vehicle. After it went past, he moved slightly into the road and there were shots fired from the bottom. He testified he thought it was the robbers in the car. He conceded that, as a security guard, if a suspect is fleeing from the

house, it is his duty to first arrest the suspect and to shoot and kill as a last resort. He stated that the Police who had come up from the Johan van der Merwe street side stopped at the top next to his vehicle and would effectively have blocked the road. He said that the second Police vehicle with blue lights on the roof stopped behind his vehicle and he could see the blue lights stopping three to four feet behind. He noticed another Fox vehicle that night.

90. He stated the robber keeping the look-out whom he had noticed, would have seen his vehicle and might have seen him as he drove past with his headlights and hazard lights on.
91. He stated that as the vehicle went past, he fired shots at the tyres to stop it. He stated that, from the tree, he had a bird's eye view of the opening gate and could see straight through the garage. Other policemen joined him behind the tree about twenty two metres away from the gate, and another Constable joined them in front of him.
92. He stated there were blue lights reflecting against the building that drew his attention to them, and that he was behind the tree when he heard the first shot. He did not know who fired it but it came from the property.
93. He said that, after the first shot, the policeman on the left shouted that they were shooting them in the house, and that it sounded like Murray Simpson.
94. When challenged as to whether he could see the garage door from the place where he was standing, he insisted that he could.

95. He was inconsistent as to when the shouting first started. He both stated that as the first wheel of the vehicle touched into the road, they started shouting (Record, p 267, line 22), and that the vehicle was actually moving up the road when the shouting started (Record, p 266, line 1).
96. His evidence as to how the shouting took place was also inconsistent. He testified that he first shouted "*Fox Alarms*" twice, moved towards the vehicle to try and see who was in the car, and then again screamed twice when the car was three to four metres in front of them. He said the Police shouted continuously.
97. He stated that when the vehicle stopped in reverse, it came to a stand still and that during that period, there was a pause and quietness. He shouted twice again when the vehicle was stationary, approached the car and the Police also shouted. He thus shouted six times in all over a period with intervals in it, according to his evidence.
98. Mr Barnett was invited in Court to show how it was physically possible to shout six times in the manner described by him, if the car was moving at thirty km, which meant it was covering eight metres per second, and he had only started shouting when the vehicle was less than twenty metres away from him, Barnett having estimated that he was standing twenty two metres from the gate. He had also testified the first shots were fired when the back tail lights of the vehicle were a metre diagonally to the left of him (Record, p 289, line 3). It was therefore put to him that it would have taken less than three seconds, or even five seconds, to cover that distance and Mr Barnett was invited to demonstrate that he could have shouted as described in his

evidence in less than three seconds, or favourably, less than five seconds. He declined to do so.

99. I conclude that it was not possible in the time available for Mr Barnett to have engaged in the shouting in the manner in which he described it to this Court. Furthermore, his version of when and how he and the policemen shouted changed during the course of his testimony. Little credence can therefore be given to this aspect of his evidence. Furthermore, both Jonck, Simpson and Mr and Mrs Kotze stated that there was no interruption or pause in the shooting when the vehicle hit the wall, and therefore, again he could not have shouted in the “*alleged*” pause and quietness when the vehicle hit the wall.
100. As stated earlier, his evidence of when the firing first started is also not borne out by the evidence of Mr and Mrs Kotze, Marais, Simpson or Rapetswa.
101. He said he fired at the back left rear tail light and that his intention was to stop the vehicle going further. He stated he only intended to fire at the tyre. I note again that there were no bullet marks anywhere near the back left rear tail light or tyre where Barnett stood. This was despite the fact that he testified that he had seventeen rounds in his pistol and used them all.
102. He further testified that the Plaintiff would have seen a Police vehicle as there were blue lights on, reflective off the buildings (p 195, line 8). He was adamant about the latter blue lights. This was not supported by the evidence of the Police themselves. Specifically, Captain Jonck stated it was not policy for the Police to have lights on when approaching such a scene and not a single Police Officer said that their blue lights were switched on.

103. There were a number of other serious problems with Mr Barnett's evidence.

He gave evidence that the suspect at the gate was holding a long gun and that he had informed the Police members on their arrival of such facts, although these allegations were never stated in his affidavit which was attested to less than a week after the incident. What Barnett did confirm, however, was that the Police vehicles that had stopped next to his vehicle would effectively have blocked the road (Record, p 218, line 9).

104. It became increasingly obvious through Mr Barnett's cross examination that he was becoming uncomfortable but was nevertheless determined to offer a version irrespective of the obvious fallacies in it. By way of example, in spite of all the photographic evidence relating to the height of the luggage stacked in the vehicle, he insisted that there had been much more luggage than the photographs recorded and even implied that the luggage must have been tampered with. There was no evidence from anyone else to this effect. There are other such examples which I shall not detail.

105. In conclusion, Mr Barnett's evidence was improbable and unsatisfactory in several respects and in many aspects did not accord with the evidence of the Police. I have attached little weight to his evidence when assessing the facts.

e) The evidence of Captain Riaan Marais

106. He testified that three shots were fired from the property and that he heard someone shouting "*here they come*" before the car reversed out of the gate. He said the shouting started when the vehicle's rear wheels touched the road

and, as it reversed, it came at high speed and he heard someone yell “*stop police stop police*”. Then “all hell” broke out and gunshots started ringing.

107. Mr Marais fired at the passenger side of the vehicle when it was reversing and he fired twenty rounds. When the vehicle came to a standstill, they were trying to approach it when the vehicle immediately sped forward. He stated that when he heard the shooting, he thought it was directed at the Police and that he thought the suspects were shooting at them. He was the only policeman who thought this. He said that the Police do not normally arrive with sirens and blue lights at a house robbery as they do not want to warn the robbers and he said his blue lights were not on, as alleged by Barnett. Like Barnett, he saw a man standing inside the small gate, but he made no mention of the long gun which Barnett had referred to. He stated the robbers would probably have heard the Police car and seen their headlights going past. He described the scene as “*chaotic*”. He could not recall a policeman shouting that “*they are shooting the people*”.

108. He stated that he could not dispute Mr Kotze’s testimony that, as he got out into the road, he was hit by automatic gunfire and the first bullets flew through the rear window (Record, p 402, line 9). Marais used his R5 rifle on single fire and not automatic.

109. Importantly, he stated that he directed his fire at the vehicle as it came parallel to him, that he directed his fire at the occupants and that it was his intention to shoot to kill them. He also fired at the back of the vehicle as it was going forward and tried to hit the occupants. He said he could not

dispute that someone else must have fired the first shots from the rear through the window as Mrs Kotze had testified.

110. He said the vehicle was on the other side of the road about ten metres away and that he was five to seven metres away from the left hand side on reversing. He said that the vehicle was reversing fast, that he kept shooting at the vehicle as it went forward and he shot at the back of the vehicle, also whilst trying to shoot the occupants.

111. He conceded that it was not difficult to direct fire at tyres at a distance of seven metres, and that in retrospect it would have been possible to shoot at the tyres. He heard Rapetswa yell "*stop police*" only once as far as he could remember and then conceded that in evidence the day before he had said they shouted "*stop police*" twice. In the end he said he was not certain how many times "*stop police*" was shouted. He only heard Rapetswa shout. It is noteworthy that he did not hear Barnett shout six times or at all, as testified by Barnett.

112. He said that he was unable to conclude that the occupants would have known they were the Police at that stage and could also not conclude that the driver would have heard the order to stop. Importantly, he stated that he could not dispute that there was no proper identification of the Police and contact from the Police on which the driver could react. He conceded that the steps taken in relation to alerting the driver of their presence may not have been known to the driver. He also conceded that he did not think the Police should have opened fire without first directing it at the tyres.

113. No evidence was given by Mr Marais that he believed the people in the vehicle would shoot at them and indeed no other witness testified to this effect.

114. He also stated that, if they had got the whole road blocked off, there would have been no excuse for killing the driver as he could not get away in any case (Record, p 378, line 11). Mr Marais agreed under cross examination that he had parked his vehicle next to Mr Barnett, as Mr Barnett alleged, and that they had effectively blocked off the road surface.

115. All in all, Marais confirmed my earlier findings that, on the probabilities, the shooting started almost instantly either as the vehicle reversed out of the gate or as it turned into the street, facing straight down. Furthermore, Marais stated that he had shot immediately to kill the occupants and not at the tyres. His evidence suggests too, that, on the probabilities, neither Barnett nor anyone else acted in a matter sufficiently to alert the Plaintiff of their presence.

f) The evidence of Constable Rapetswa

116. He testified he was alone in his position when he heard someone say "*here they come*" and then heard two shots. When the car reversed out he said he shouted "*police stop*" several times. The car did not stop and he shot at the wheels. He said it reversed, stopped on the other side of the road and he went again and shouted "*stop we are police stop we are police*" and it went forward. He stated he shot at the tyres at the back as it reversed so that he could stop it, and then shot at it again when it was going in an easterly

direction. He said the car was reversing at high speed and he saw luggage in the back.

117. He also said he parked his car in the middle of the road and not behind the two Fox vehicles and that the road was blocked off effectively so that the suspects could not escape.

118. Mr Rapetswa, importantly, agreed with Mr Marais that the firing from the Police started as the vehicle turned into the road and that he must have shouted before the vehicle got into the road (Record, p 490, line 20). He said he shouted before the shooting started, and when he realized the car was not stopping, he started the shooting (Record, p 491-492).

119. Mr Rapetswa's evidence on several issues was improbable and unsatisfactory, particularly having regard to the time frames which he gave. In essence, his evidence was unreliable and little weight could be placed thereon.

g) The evidence of Murray Simpson

120. Mr Simpson's evidence was of little assistance. He was further away down the road and very unclear about the sequence of events being put to him. His final version was that he saw lights reflecting, the gate opened, the car reversed, two of its wheels at least touched the road and two shots rang out. The shouting occurred probably once the vehicle had straightened up, or maybe even at forty five degrees after it had come out. He said there were *"split seconds before there were a lot of shots"* (Record, p 536, line 23). He

conceded that as he did not know who was firing the shots, it could “*definitively have been*” the Police firing through the rear window of his vehicle and that therefore what he was saying might be fully consistent with the Plaintiff’s evidence (Record, p 409).

121. Although Mr Simpson did not appear to be an evasive witness, his evidence was too unclear, probably arising out of his poor memory, to be of any cogent weight.

h) Evidence of Captain Jonck

122. He was on the eastern side at the time the incident happened, with poor vision towards the house. He heard a member shouting that “*the gate was opening and they are on their way out*”. He heard a vehicle moving in reverse and seconds later he heard automatic fire as well as hand guns. He stated that, on his side, the road was more or less blocked as his vehicle was parked skew in the street. Of significance, he states that other than hearing someone shouting that “*they are opening the gate*”, he did not hear anything else. He stated that the moment the vehicle came out, there was chaos and specifically, that if there had been shouting before the rapid gunfire, he would have heard it. He also said he could not dispute the evidence of the Plaintiff and Mrs Kotze when they said that they heard no shouting at all (Record, p 570, lines 1-16).

123. Captain Jonck’s evidence contradicts the evidence of Barnett and Rapetswa that there were warning shouts before the shooting. I have already found that Barnett and Rapetswa’s evidence was unreliable. It appears from

Jonck's evidence there were no warning shouts at all, as he said that if there had been warning shouts prior to the gunfire, they would have been heard by him. It thus seems that, on the probabilities, the gunfire must have commenced almost simultaneously with the shouts, thus effectively drowning out the warning shouts, if there were any.

i) **The evidence of Miss Ginene Kotze, the Plaintiff's daughter**

124. She confirmed there was a third shot whilst she was in the house some four or five seconds after the second shot while she was hopping back into the main bedroom. Having regard to what I state below, whether there were two or three shots within the house does not change the picture.

D. **FINDINGS ON THE PROBABLE FACTS ARISING FROM THE EVIDENCE PRESENTED**

125. It is not necessary for me to make findings of facts on what occurred prior to the Plaintiff's vehicle reversing out of the gate at high speed. It is common cause that there were at least two shots fired within the house, and probably three. The evidence of all the Police, save for one, suggested that they did not know who was firing at whom in the house and only one policeman said he thought the robbers might be firing at them. On a balance of probabilities it does not appear that the Police were under any immediate threat personally in terms of the shots being fired prior to the exit of the vehicle from the house, and nor did any of them testify that they felt threatened by the shots that had gone off in the house prior to the exit of the vehicle.

126. What is required, is to determine whether the conduct of the Police was justified and implemented in accordance with section 49(2) of the Criminal Procedure Act as well as the two circulars referred to, when the vehicle of the Plaintiff exited the property at high speed.

127. I am satisfied that the Police attempted to arrest the Plaintiff. The next enquiry is whether, as the Plaintiff reversed out of the gate and up the road, the attempt of the Police to arrest him was made clear to him. In **Macu v Du Toit en 'n Ander**, 1983 (4) 629 (A), Cillie J.A. stated at 633G-H:

“Met betrekking tot die toepassing van die bepalings van art 49(1)(b) van die Wet is die vraag gestel vir wie dit duidelik moet wees dat a poging aangewend word om ‘n inhegtenisneming uit te voer, is dit die arrestant of is dit die arresteerder? Dit is genoeg om hier te sê dat dit veral vir die arrestant duidelik moet wees ‘dat ‘n poging gedoen word om hom (die arrestant) in hegtenis te neem’.”

128. P.J. Visser in his article entitled “Geweld en Doodslag by Inhegtenisneming” in De Jure 1987, p 123 (at pages 134-135), in commenting on the old article 49 which was couched in similar terms, states as follows:

*“Hierdie vereiste word nie uitdruklik in artikel 49(2) gestel nie, maar indien dit saamgelees word met artikel 49(1), is dit by noodwendige implikasie duidelik dat die arresteerder iets moes gedoen (of self gesê het) wat op die inbedwangstelling van die betrokke persoon se liggaam kon uitloop (dws die voltooide arrestasie). Hierdie vereiste word ook erken deur Regter Coetzee in **S v Barnard** (1) (hierbo 433H-I). Hiemstra (96) se stelling dat die arresteerder ‘van plan’ moes gewees het om die betrokke persoon te arresteer, is vaag en onakkuraat: die blote plan of voorneme is nog nie voldoende nie en*

die arresteerder moes iets sigbaars gedoen het om aan sy plan uiting te gee..."

129. As already stated, it seems probable that the vehicle was fired upon as its back wheels hit the road, or, at the very latest, as it had already turned into the road and was virtually straight in it or already straight. This would have occurred in a matter of a couple of seconds.
130. Thus, the window period for the Police to make it clear to the Plaintiff that an attempt to arrest him was being made prior to using force was extremely brief. Whether the attempted arrest was made clear to the Plaintiff should be determined objectively.
131. In regard to possible attempts to visually alert the Plaintiff to their presence, in that there were no blue lights flashing, and in that the Police vehicles were parked some metres up and down the road on either side of the premises, the Police presence was not overtly visible to the Plaintiff. It seems probable that the Plaintiff and his wife did not see them for these reasons and, in not being been alerted visibly to their presence, would have had no reason to believe it was the Police and not the robbers firing on them when the shots started moments after they exited the gate.
132. In regard to the auditory steps the Police took to alert the Plaintiff and his wife to their presence, no evidence was proffered of any warning shots being fired first. What the Police rely on is that they shouted first to the Plaintiff to stop. Neither the Plaintiff, his wife, nor Captain Jonck heard these shouts. Captain Jonck specifically stated that he would have heard the shouts if they had

occurred prior to the shooting commencing. I have also found above that the evidence of the witnesses for the Defendant who did engage in shouting, or hear shouting, was contradictory and unreliable. Certainly, on the probabilities, the shouting occurred so close in time to the opening of the gunfire as to be meaningless, even if the Plaintiff would or could have heard it. I find therefore that whatever auditory warnings occurred, they were not sufficiently clear enough to draw the attention of the Plaintiff and his wife to the fact that the Police were seeking to arrest them prior to the opening of the gunfire. There was also no evidence proffered of loud hailers or sirens being used.

133. Again, not being sufficiently alerted in an auditory manner to the presence of the Police, either by way of a warning shot or by way of shouting, loud hailers or sirens, the Plaintiff would have had no reason to believe it was the Police and not the robbers shooting at them when the shots started.
134. On an objective examination of the steps the Police took to alert the Plaintiff to the fact that an attempt to arrest him was being made, not only were the steps insufficient, but they occurred too close in time to the commencement of the gunfire to be of any worth to the Plaintiff in protecting him from being shot.
135. On a proper interpretation of section 49(2), even if it is made clear to a suspect that an attempt to arrest him is being made, the suspect must have had sufficient time to react to that clear attempt before force is utilised. If this were not so, the protection to civilians contained in section 49(2), prior to being subjected to lethal force, would be rendered nugatory. This is such a

case. Even, objectively, had the warnings by the Police been sufficiently clear to alert the Plaintiff to their intention to arrest him, the firing commenced within seconds of such warnings, if not simultaneously therewith, with the result that the Plaintiff was physically unable to react to those warnings prior to being shot at. There was simply no time in which he could react thereto.

136. That there should be sufficient time for a suspect to react to the clear warning is reinforced by the wording of paragraph 3 of the second circular which states that a member must, *“where it is reasonable in the circumstances to do so, issue a clear warning to the person who is to be arrested that force will be used against him or her unless he or she submits himself or herself to custody. In such an event the said warning should inform the person to be arrested that lethal force will be used (eg that he or she will be shot at) unless he or she submits to the arrest”* (my emphasis).

137. This contemplates that the suspect should be in a position to submit to the arrest arising out of the clear warning. In the present case, the Plaintiff was given no opportunity to submit to the arrest in the time available to him before he was fired on.

138. I thus find that the Police did not comply with the second requirement of section 49(2) before engaging in the use of force, namely to make it clear first to the suspects (here the Plaintiff and his wife) that an attempt to arrest them was being made. The conduct of the Police was therefore wrongful. That is the end of the enquiry in relation to wrongfulness. I nevertheless deal with the third and fourth requirements of section 49(2) for completeness.

139. In relation to the third requirement, namely that it should not have been possible to arrest the Plaintiff without the use of force, the evidence was that the road was effectively blocked off on the one side, and partially blocked off on the other side by the Police vehicles. The reality, though, is that the Plaintiff did manage to drive past the Police vehicles on his way forward, and ultimately only stopped around the corner after being shot at. Nevertheless, had the Police properly identified themselves to the Plaintiff in the first place before shooting at him, the Plaintiff, being an innocent party, would have stopped his vehicle. Force would never have been necessary at all.
140. Once the firing commenced, the fourth question is whether the Police used such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing. I have already found above, based on the photographic evidence, that minimal effort was made to shoot at the tyres, this conclusion being drawn by me as a result of the position of the majority of the bullets being in the region and at the height of the occupants of the vehicle on both sides, with not a single bullet marked on the tyres. This is further confirmed by a close look at the damage to the rear of the vehicle, which shows only one bullet on the right hand side below the window, whilst the rear window was shot out. One would have expected that the Police would have been astute to mark the bullet holes with their stickers on the tyres, as Mr Nkosi attended the scene the next day and testified that a certain Captain Doubelle pointed out the bullet holes to him for photographing. Marais also confirmed that he immediately shot to kill the occupants, and thus he had never even aimed at the tyres, although he was not the first person to shoot.

141. It is common cause that the incident happened in seconds, that there was chaos and that there were many persons shooting at the vehicle from different angles. In that there appeared to have been over two hundred shots fired at the vehicle, it is significant that not a single bullet hole found its way on to any of the tyres, despite the vehicle being at close range, and that the vast majority were at a much higher level than the tyres, in the vicinity of the driver and his passenger. I find that such force was not reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, as is required in terms of section 49(2).
142. In relation to the final requirements of section 49(2) that deadly force can only be used if the arrestor believes, on reasonable grounds, that either (a), (b) or (c) of the section applies, there was no evidence to suggest that force was necessary to protect the Police as, save for Simpson, none of the Police testified that they thought that the shots fired within the house were being fired at them. Neither did a single policeman testify that he felt under threat and nor was evidence given that there was any threatening action from within the vehicle. Its windows were, in any event, closed.
143. Thus, even had the Police satisfied the requirements pertaining to the use of force in accordance with the opening paragraph of section 49(2), which they did not, they were not entitled to use deadly force in the circumstances of this case.

144. I am aware that this incident occurred in the most unusual circumstances, and that the Police *bona fide* believed that it was the robbers they were shooting.
145. Nevertheless, whether they believed it was the robbers or not is irrelevant to the enquiry as to whether their conduct was justified in terms of section 49(2). The test applies to all persons being arrested, irrespective of whether they are the robbers or not.
146. Although I am mindful and most sympathetic to the stressful circumstances under which the Police work, the provisions of section 49(2) are clearly designed to impose restrictions on the actions of the Police when engaging in lethal force on our citizens. The law provides these safeguards for the rights of all citizens not to be shot at, injured or killed when being arrested, save in the most extreme cases. This protection applies to all citizens, whether they be criminals or innocent civilians alike.
147. The law must thus be applied to protect all citizens from extreme and unnecessary use of force in effecting their arrest. Irrespective of the gravity of the crime in which the alleged suspects might have engaged, they may still not be shot at and killed by the Police save in the circumstances set out in section 49(2).
148. It is essential that the rule of law be upheld in South Africa to prevent a disintegration into chaos and an untrammelled use of violence by the Police. It has not gone unnoticed that incidents have been reported where innocent parties have suffered as a result of a lack of discipline, and perhaps training,

in the Police force. It is thus important that the Police are constrained to obey the rules to the letter of the law and to use only lethal force in the circumstances permitted by section 49(2) and as reiterated in the Constitutional Court judgment of Walters referred to above.

149. This case is a classic example of why section 49(2) needs to be obeyed in every respect so as to ensure that no citizen is injured unduly. Had the Police followed the prescripts of section 49(2) in these circumstances, the Plaintiff and his wife would not have been shot. Their vehicle would either have found itself semi-blocked on both sides by the Police vehicles that were across the road, and, at the very least, if proper attempts had been made to shoot at the tyres, the probabilities are that the vehicle would not have been able to travel much further. Once the vehicle had ceased to travel, and in that the Plaintiff and his wife were not shooting at the Police, being innocent civilians, one would expect that the result of the incident would have been that the Plaintiff and his wife would have emerged from the vehicle relatively unscathed.

150. Thus, had the Police followed the requirements of section 49(2) before opening fire on the Plaintiff and his wife, their injuries could have been avoided. It is not an answer for the Police to say that they thought they were shooting at the robbers, as, even had it been the robbers themselves in the vehicle, they too were entitled by law not to have been shot at in the manner in which the Plaintiff and his wife were shot at.

151. Arising from the aforesaid, I find that the Police failed to act justifiably in the circumstances of this particular case and I accordingly find that their conduct was wrongful.

152. Flowing from my analysis of the evidence above, I also find that the Police acted negligently in shooting at the Plaintiff and his wife as they did.

153. The test for negligence has been authoritatively set out in **Kruger v Coetzee** 1996 (2) SA 428 (A) at page 430 as follows:

“For the purposes of liability, culpa arises if –

a) a diligens pater familias in the position of the defendant –

i) would foresee the reasonable possibility of his conduct injuring another and his personal property and causing him patrimonial loss; and

ii) would take reasonable steps to guard against such occurrence; and

b) the defendant failed to take such steps.

This has been constantly stated by this Court for some fifty years. Requirement a(ii) is sometimes overlooked. Whether a diligens pater familias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.”

154. It was without doubt foreseeable by the Police that, if they fired upon the vehicle in these circumstances, their conduct could cause injury to the Plaintiff and his wife. Indeed, Marais went so far as to state that he shot to kill immediately. On the facts of this case the Police were negligent.

E. THE QUESTION OF CONTRIBUTORY NEGLIGENCE BY THE PLAINTIFF

155. I turn now to the question of whether the Plaintiff's actions amounted to contributory negligence, calling for an apportionment of the damages in terms of the Apportionment of Damages Act, 34 of 1956.

156. The entire trial was conducted and concluded over a period of two and a half weeks on the basis that the only defence to be determined was whether the Police had acted justifiably in terms of section 49(2).

157. It was only some four weeks after the conclusion of the argument, when Supplementary Heads were filed by the Defendant, that a Notice of Intention to Amend was attached to those Heads introducing a new plea of contributory negligence on the part of the Plaintiff. The Notice of Intention to Amend was itself in draft form, having tracked changes on the document furnished to me. Only on enquiry by myself was a further Notice of Intention to Amend filed which was in a proper form.

158. Although the Plaintiff initially objected to the proposed amendment, he ultimately decided neither to oppose the amendment nor to replicate to the amended plea. He also declined to apply to reopen the case, as did the

Defendant. Both parties filed further Heads of Argument dealing with the issue in July 2011.

159. In that the trial was conducted throughout on the basis of a defence of justification only being canvassed, neither the Plaintiff nor his wife had the opportunity of defending the suggestion that they had acted negligently, as no questions were ever put to them on this score by either party. In similar vein, the Defendant never led any evidence to suggest that the Plaintiff and his wife contributed to the plight in which they found themselves. It was only several weeks after the conclusion of the trial that the Defendant filed an amendment to plead contributory negligence.

160. The onus is on the Defendant to satisfy this Court that there was contributory negligence on the part of the Plaintiff.

161. The Defendant has pleaded that the Plaintiff was negligent in the respects set out in paragraphs 3.2.1 to 3.2.13 of his amended plea. Several of these grounds overlap and I shall deal with them together.

162. In relation to the grounds pleaded at 3.2.1, 3.2.2, 3.2.4, (there is no 3.2.3) 3.2.6, 3.2.7, 3.2.8 and 3.2.9, in essence they accumulatively amount to allegations that the Plaintiff was negligent in that he failed to keep a proper lookout for the Fox Security company officers and the Police officers in the vicinity of, or outside, his premises after having called for their assistance. This includes an allegation that the visibility was good.

163. I have already made a finding that the Police, neither visually, nor auditorily, nor timeously, identified themselves sufficiently to the Plaintiff and his wife to enable them to discern that it was the Police and not the robbers shooting at them. Although the visibility in the street was fair, it being late at night, the luggage in the back of their vehicle blocked their view to some extent, the Police vehicles had no sirens blaring, or blue lights on, and the apparent shouts to stop were not heard by the Plaintiff or his wife or even Captain Jonck. As already indicated, it appears more probable that the shouting occurred after the shooting as Captain Jonck testified he would most definitely have heard the shouting if it had occurred before the shooting. Indeed, far from being alerted to the presence of the Police and an attempted arrest by visual or auditory indications from the Police, the rude awakening that the Plaintiff had to the fact that any people were outside his gate was when he came under gunfire as he exited his gate. There was not even a warning shot.

164. The firing commenced too quickly, as found by me, to have given the Plaintiff or his wife any opportunity to establish whether the fire was coming from robbers as opposed to the Police. He was therefore not negligent in not observing the Police presence.

165. In relation to the ground pleaded in 3.2.11 that the Plaintiff failed to indicate and/or show to the Police by any means that he and his wife and not the robbers were the occupants of the vehicle when given the circumstances, he should have done so, and in relation to the ground pleaded in 3.2.5 that he failed to stop his vehicle given the circumstances that the Police announced themselves several times, in that I have found that the Police had not

sufficiently visually, auditorily, or timeously identified themselves to the Plaintiff before firing on him, he was not in the circumstances required to indicate that he was not the robber. This is particularly so as he believed that the robbers themselves were firing at him and not the Police. He did not have any duty to identify himself to the Police in circumstances where the Police had not made it clear that it was them who were present, and where, in any event, he had no time to react to their identification.

166. In relation to the allegations in paragraphs 3.2.12 and 3.2.13 that he failed to avoid the happening of the shooting incident on the night in question when, given the circumstances that his behaviour caused and/or contributed to such incident and that he could have done so, I find that, in that the Plaintiff was shot at within seconds of reversing out of his driveway, with no warning shots and with insufficient visual and auditory warnings from the Police, he was in no position to take any steps to prevent or avoid the shooting incident.

167. It must surely be reasonable and compatible with human nature to have attempted to flee gunshots in circumstances where the Plaintiff reasonably believed it was the robbers firing upon him and wherein he had been given insufficient reasons or indications from the Police to believe otherwise. I also do not find that it was reasonably foreseeable by the Plaintiff whilst reversing out of his driveway that he would be shot at by the Police without compliance with the law before they opened fire.

168. In all these circumstances, and having regard to the conduct of the Police, I find that there was no contributory negligence on the part of the Plaintiff and the Defendant has accordingly not discharged the onus.

F. COSTS

169. The Plaintiff has sought the costs of this trial on the attorney and client scale, such costs to include the costs of the employment of two counsel. The Plaintiff's counsel submitted that the Plaintiff was entitled to costs on this scale as the Defendant should not have persisted with its opposition on the merits and the Defendant's conduct in opposing the action was grossly unreasonable.

170. Having regard to the extremely unusual circumstances in which this incident occurred, and having regard to the complexity of all the evidence which was presented, I do not find that it was unreasonable for the Defendant to oppose the action. It was an unfortunate set of circumstances which resulted in very unfortunate consequences.

171. The Defendant did, nevertheless, cause several delays in the conduct of the trial by not having witnesses present timeously. He also caused additional costs to be incurred in filing an amendment to his pleadings over a month after the conclusion of the entire trial, which resulted in additional costs being incurred by the Plaintiff to deal with the issue of contributory negligence *ex post facto*. The plea of contributory negligence should have been filed right at the commencement of the action, and certainly, at the latest, by the conclusion of the leading of evidence. This would have enabled the Plaintiff to deal with the newly raised defence fully in argument on the last day of the hearing, as all issues were dealt with on that day. Instead, the Plaintiff had to incur the costs of having to prepare further Heads of Argument over three months after the trial had ended. This would have resulted in much

additional and belated work on the part of the Plaintiff's legal representatives, with a reperusal of the Record having become necessary to address the additional plea raised. In these circumstances, there is no reason why the costs arising out of the amendment to the plea should not be paid on the attorney and client scale by the Defendant.

172. I accordingly make the following orders:

G. ORDER

1. The Defendant is found to be liable for all such damages as may be proven by the Plaintiff, or as agreed between the Plaintiff and the Defendant, arising out of the incident that occurred on 28 August 2008 in the vicinity of 5 Isak de Villiers Street, Meyersdal, Kempton Park.
2. Save as provided in the Order in paragraph below, the Defendant is ordered to pay the costs of this action on the party and party scale, such costs to include the costs of two counsel.
3. The Defendant is ordered to pay all the costs of the Plaintiff arising out of and incidental to the amended plea of contributory negligence on the attorney and client scale, such costs to include the costs of two counsel.

C HARTFORD AJ

Signed: 25 August 2011

Delivered: 30th August 2011