



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 40039/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

11/01/2021
DATE

A handwritten signature in black ink, appearing to be "D. Singh", is written over a light blue rectangular stamp.

In the matter between: -

XOLANI SIPHIKA

Plaintiff

and

THE MINISTER OF POLICE

Defendant

J U D G M E N T

BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The plaintiff in this matter, Mr Xolani Siphika, claims damages from the defendant, The Minister of Police, for the plaintiff's alleged unjustified and unlawful assault¹ by a member of the South African Police Service ("SAPS").
- [2] The Minister is sued nominally as the political head of SAPS. Although not admitted on the pleadings², it is undisputed based on the evidence led at trial, that the police officers who were present at the time of the incident, were in the employ of SAPS and acted within the course and scope of their employment.
- [3] The plaintiff sustained injuries to his teeth and face³. The nature and extent of those injuries are not relevant for the present purposes, as I am called only to determine the issue of liability. The parties have agreed to a separation of issues in terms of s 33(4) of the Uniform Rules of Court.

THE PLEADINGS

- [4] The plaintiff's claim is founded on a breach of legal duty pleaded as follows in his particulars of claim⁴:

"The members of the South African Police Service failed to uphold

¹ Pleadings bundle (section A): Particulars of Claim: par. 5.1; p. 9

² Pleadings bundle (section A): Particulars of Claim: par. 5; p. 9; Defendant's Plea: par 4; p. 20

³ Pleadings bundle (section A): Particulars of Claim: par. 5.3; p. 10

⁴ Pleadings bundle (section A): Par. 5.1; p. 9

their legal duly (sic)⁵ of protecting members of the public, instead they put their lives in danger by firing gunshots without exercising caution and in the process assaulted the plaintiff."

[5] The plaintiff alleges further that: -

- [a] *"The members of the South African Police Service were negligent in that they failed to keep a proper lookout of who might get shot if they fired their guns, as a result of their negligence, the Plaintiff was hit by their bullet"* (paragraph 5.1.2);
- [b] *"The members of the South African Police Services should have foreseen that firing gunshots in the presence of members of the public will endanger the members of the public's lives, specifically the Plaintiff"* (paragraph 5.1.3);
- [c] *"The assault took place in public and within sight of members of the public and after the Plaintiff was shot at by one of the aforementioned members of the South African Police Services, the Plaintiff was abandoned and/or neglected by the said members of the South African Police Services at the scene of the incident"* (paragraph 5.2).

[6] In his plea (as amended) the defendant denies that the plaintiff was assaulted as averred: -

"7. AD PARAGRAPH 5.1, INCLUDING AD PARAGRAPHS 5.1.1 TO 5.1.3

5.1.1 The defendant denies the contents of these paragraphs.

⁵ Should read "duty"

5.1.2 In amplification thereof and in the alternative to paragraph 4.1 of the amended plea above, the defendant pleads self-defence as the justification in that –

5.1.2.1 Detective Rapoone had been unlawfully attacked in the line of his duty and that he had reasonable grounds for thinking that he was in danger of death or serious injury, and that the means he used were not excessive in relation to the danger, and that the means he used were the only or least less dangerous whereby he could have avoided the danger.

5.1.3 In further amplification thereof and in the alternative to sub-paragraph 8.2 above, the defendant pleads necessity as the justification in that –

5.1.3.1 there were reasonable grounds by Detective Rapoone in thinking that, because of the crowd's behaviour, there was such a danger (commenced or imminent) of injury to persons or damage to or destruction of property as to require his action complained off (sic), the means used in such endeavor to restore law and order and avert such danger, and resulting in one or more members of the crowd being injured, was not excessive having regard to all the circumstances, such as the nature and the extent of the danger, the likelihood of serious injury to persons, the value of the property threatened and life at risk."

[7] For the sake of completeness, I point out that there is no paragraph 4.1 or

paragraph 8.2 in the defendant's original or amended plea. It would appear to be a typographical error if regard is had to the defendant's Rule 28(1) notice. The correct paragraphs as they appear in the amended plea that ought to have been referred to are 4.6.1 and 5.1.2. Paragraph 4.6.1 reads:

"The defendant denies shooting the plaintiff."

- [8] Pleadings form the backbone of an action and serve a very specific purpose and that is to define the issues so as to enable the other party to know what case he or she is required to meet.⁶ In this regard, the state of the pleadings in this matter leaves much to be desired. This was no doubt brought about by substantial amendments effected by both parties at the eleventh hour. As a result, the pleadings are not as clear as they ought to have been. In many instances the case pleaded is at odds with the evidence advanced at trial, as I will indicate later in this judgment.

COMMON CAUSE FACTS

- [9] On the pleadings and on the basis of the evidence led at the trial, the following facts are common cause: -

[a] On the 4th of March 2017 a male by the name of Mawande ("the deceased"), was murdered at a tavern conducted at 505 Cosovo Squatter Camp, Extension 1, Thokoza.

[b] Members of the South African Police Service were summoned and

⁶ Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198

arrived on the scene to investigate.

- [c] Detective Rapoone, with his colleague, Constable Segage, met with a female, Mandiluve, who informed them that she knew where the suspect who stabbed the deceased, resided.
- [d] Mandiluve accompanied Detective Rapoone and Constable Segage in their marked double cab bakkie vehicle ("the vehicle") to point out the place of residence of the suspect.
- [e] Detective Rapoone and Constable Segage returned to the scene of the crime with the male suspect, Sipho, who was seated at the right rear passenger seat directly behind the driver's seat. Detective Rapoone was the driver and Constable Segage was seated to his left in the front passenger seat.
- [f] The purpose of them returning to the scene was to afford the suspect an opportunity to point out a woman to whom he had given the knife used to stab the deceased.
- [g] Detective Rapoone stopped the vehicle in front of the tavern an estimated 30 metres away from a crowd of approximately 100 community members who started gathering outside.
- [h] The suspect, still seated inside the vehicle, looked at the crowd but could not see the woman.
- [i] Detective Rapoone left the vehicle to inform the two officers in

attendance inside the tavern, that they were leaving the scene to take the suspect to the police station. The suspect and the Constable remained seated in the vehicle.

[j] As Detective Rapoone returned to the vehicle, the crowd was moving closer towards the vehicle.

[k] When Detective Rapoone climbed into the vehicle, he and Constable Segage attempted to leave the scene with the suspect and while reversing the vehicle, a male called Sphamandla ("Sphamandla"), opened the right rear passenger door where the suspect was seated, and pulled him out of the vehicle.

[l] Detective Rapoone, who was in the driver's seat at the time, alighted from the vehicle, and pushed the suspect back into the vehicle.

[m] Detective Rapoone returned to the driver's seat and again attempted to reverse the vehicle, Sphamandla opened the rear right passenger door once again and pulled the suspect out of the vehicle.

[n] Detective Rapoone again alighted from the vehicle, approached Sphamandla, slapped him with an open hand and pushed the suspect back into the vehicle.

[o] Members of the crowd started closing in on Detective Rapoone and pushed him away from the vehicle with the purpose of preventing

him from climbing back into the driver's seat.

[p] The crowd was angry and violent and demanded the release of the suspect into their custody so that they could kill him. They started attacking the vehicle.

[q] Detective Rapoone drew his firearm.

[r] Detective Rapoone was the only officer who had his firearm drawn and cocked before a shot was fired.

[s] No other drawn firearms were seen either before or after the shot was fired.

[t] The plaintiff was hit by the bullet.

DISPUTED FACTS

[10] The disputed facts as pleaded and advanced at trial, may be summarized as follows:

(a) The defendant disputes the plaintiff's version that he was shot by a police officer at the time and place in question.

(b) The defendant, more particularly Detective Rapoone, drew his firearm and cocked it to ward off the crowd. He was being attacked by the plaintiff with a knife and kicked and punched by two other males. The plaintiff denies any involvement in the attack.

- (c) Sphamandla restrained Detective Rapoone by holding his arms from the back. Sphamandla was wrestling Detective Rapoone for the firearm. The plaintiff has no knowledge of this as he maintains that he had walked away from the crowd by then.
- (d) The plaintiff walked away from the crowd shortly before he was shot. The defendant denies this and maintains that the plaintiff was one of the aggressors who was attacking Detective Rapoone.
- (e) Detective Rapoone lost his firearm during the scuffle. A shot was fired. The plaintiff denies this and states that when he walked away, the crowd shouted at him that the police was going to shoot him, shortly whereafter a shot was fired.
- (f) The defendant testified that the murder scene was secured shortly after the police first arrived at the tavern. The plaintiff denies this and avers that, on the Detective Rapoone's return to the tavern with the suspect, he left the crowd to follow the police inside the tavern to secure the scene.
- (g) The police summoned an ambulance to the scene to take the injured plaintiff to the hospital. The plaintiff denies this and states that he went home and took a taxi to the clinic where he was collected by the ambulance and taken to hospital.

ISSUES FOR DETERMINATION

[11] In their joint practice note⁷ dated the 20th of August 2020, the parties crystallised the triable issues as follows: -

"7.1 *Whether the member of the defendant shot the plaintiff during a scuffle whereby the community members sought to disarm the police officer;*

7.2 *Should the court find that the member of the defendant did shoot the plaintiff, whether such shooting was in self-defence, in the alternative;*

7.3 *Whether such shooting was out of necessity."*

[12] The case pleaded in advance by the plaintiff is that he was shot by a police officer. This is denied by the defendant. The plaintiff therefore bears the onus of satisfying the court on this issue. This is however not the end of the matter. The plaintiff relies on a legal duty owing by members of SAPS to protect members of the public and that a failure to do so, would constitute negligence on the part of the defendant.

[13] The defendant is quite alive to its duty to raise a defence or ground of justification notwithstanding its bare denial of the shooting. Despite its denial of the shooting, the defendant does plead facts that point in the direction of a justification for the shooting. Therefore, the onus rests on the defendant to prove a ground of justification.

⁷ Bundle Section D: Joint Practice note; p. 15

ONUS

[14] It is trite that every infringement of bodily integrity is *prima facie* unlawful and once the infringement is proved, the onus rests on the wrongdoer to prove a ground of justification.⁸

[15] The Supreme Court of Appeal ("SCA") in Mabaso v Felix⁹ laid down the general principles that apply in matters involving delicts affecting the bodily integrity of the claimant and in circumstances where the defendant raises a defence or ground of justification, such as self-defence. The Court held that ordinarily the defendant bears the overall onus of proving his/her justification for the otherwise unlawful conduct. It is not for the plaintiff who normally bears the overall onus of proof in a delictual action, to disprove the defendant's ground of justification, unless the particular pleadings in the case place this onus on the plaintiff.¹⁰

[16] The SCA cited Wigmore:¹¹-

"... So that the plaintiff put to the proof merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which, if they existed leave him without a claim, are put upon the defendant to prove."

THE WITNESSES

[17] Three witnesses gave evidence during a physical hearing in their mother tongue with the assistance of a sworn interpreter.

⁸ Benson & Simpson v Robinson 1917 WLD 126.

⁹ 1981 (3) SA 865 (A) 873E – 874E.

¹⁰ Mabaso v Felix (*supra*) 873F – 874B.

¹¹ Wigmore Evidence, 3rd edition, vol IX, paragraph 2486, cited at 873C-D.

EVIDENCE FOR THE PLAINTIFF

Examination-in-chief

[18] The plaintiff, Mr Siphika, testified first. The plaintiff did not call any other witnesses. I summarise the relevant aspects of the plaintiff's oral evidence.

[19] On the morning of the incident (4 March 2017 at 6h00), the plaintiff was at home. He intended to visit his brother, Zibele, who lived at the Mandela informal settlement. After he bathed and clothed himself, he left his home to meet Mawande¹² who would accompany the plaintiff to his brother. The plaintiff was supposed to meet Mawande at his home, but when the plaintiff called him, Mawande told him that he was at Doctor's Tavern ("*the tavern*"). The plaintiff therefore made his way to the tavern and upon his arrival, he started looking for Mawande.

[20] When the plaintiff was asked by his counsel what his relation to Mawande is, the plaintiff stated that Mawande was his cousin. The pleadings describe Mawande as the plaintiff's brother.¹³

[21] When the plaintiff could not find Mawande outside he started making enquiries. He encountered Sphamandla who informed the plaintiff that Mawande was inside the tavern. The plaintiff stated that he knew

¹² I interchangeably use "Mawande" and the "deceased" to refer to the same person within the appropriate context.

¹³ Pleadings Bundle Section A: Particulars of claim: par. 4.1; p.7

Sphamandla very well because they were cousins.¹⁴

[22] As the plaintiff went back inside the tavern, he noticed Mawande coming from the toilet. The plaintiff approached Mawande and told him: "*Let's go*". Mawande did not respond but walked closer to the plaintiff. The plaintiff repeated his instruction for them to leave the tavern, but still Mawande did not reply. Mawande went to sit on a beer crate and when the plaintiff requested Mawande for a third time to go with him, Mawande just looked at the plaintiff without giving any answer. Shortly thereafter, Mawande fell down and remained lying on the floor. He took out his cellphone and wallet and handed it to the plaintiff. The plaintiff tried to assist Mawande in standing up by taking him by his hand. Once the plaintiff took Mawande's hand, he looked into his face and noticed that Mawande was no longer breathing.

[23] Before the plaintiff was able to ascertain why Mawande was no longer breathing, he was approached by a certain lady who told the plaintiff that Mawande had been stabbed. When the plaintiff learned that his cousin had been stabbed, he turned to where Mawande was lying and took off a long jacket that he was wearing. The plaintiff then noticed a stab wound above Mawande's left collarbone, which he described as a small hole. It was the only wound the plaintiff could see. The plaintiff did not notice any blood on or around Mawande.

[24] Someone summoned the police who arrived at the tavern after 07:00. The plaintiff did not call the police as he was attending to his cousin. A police

¹⁴ The plaintiff described Sphamandla as the son of the plaintiff's uncle.

officer came to the plaintiff and he told them that the injured person was his "*brother*", Mawande. The plaintiff identified the police by the marked double cab bakkie vehicle they were driving. He stated that he was approached by a male police officer.

[25] The police officer asked the plaintiff who had injured Mawande, whereupon the plaintiff replied that he did not know as he himself had just arrived at the scene. The police asked if the person who had inflicted injury on Mawande was still around. The plaintiff informed them that a woman who was present at the tavern knew who stabbed Mawande. The plaintiff informed the police officer that this woman also knew where the suspect resided, but that she was afraid to be seen with the police as the friends of the suspect were still present at the tavern. The plaintiff brought the woman to the police.

[26] Two police officers thereupon invited the woman to get into the police vehicle, but she refused. The plaintiff therefore suggested that the police leave the scene and meet with the woman around the corner from the tavern so that those who were present at the tavern could not see her going with the police. The police agreed, left the scene, went around the corner and met the woman.

[27] The two police officers the plaintiff spoke to returned approximately ten minutes later, without the woman, but with a suspect seated at the back of the police vehicle. At the time, the plaintiff was approximately 15 to 20 metres away from the police vehicle.

[28] As the police stopped, members of the community ran towards the vehicle. They pulled the doors and demanded that the police officers let the suspect out of the vehicle so that they could kill him. At the time the driver of the vehicle was still behind the steering wheel and another police officer was seated next to him. The plaintiff, when asked where he was when the community gathered around the police vehicle, responded: *"I was around there. I was at a distance, there were many people"*.

[29] The community carried on pulling at the doors of the vehicle. Sphamandla joined the crowd and opened the door where the suspect was seated. The driver alighted from the vehicle and encountered Sphamandla at the door of the vehicle. The driver hit Sphamandla with an open hand on the side of his face.

[30] When the plaintiff was asked by counsel what Sphamandla had done to deserve the assault, the plaintiff replied: *"He was holding onto the handle, he was forcing open the door"*. Upon witnessing the slap, the plaintiff came closer to the vehicle and warned the police officer not to do that. The plaintiff told the officer to leave the scene with the culprit and not to hit members of the community.

[31] When asked by counsel how he felt when he saw his "brother" being assaulted, the plaintiff did not answer the question. When the plaintiff was asked to describe his own demeanour, he did not answer this question directly either. Instead, he testified that he also warned Sphamandla to leave the vehicle as the police had apprehended the suspect.

- [32] The driver of the vehicle wanted to assault someone else, but the plaintiff told him to go and as a result, the police officer opened the driver door and got back into the vehicle. At that moment the plaintiff was following the police to the scene inside the tavern where Mawande had died. Sphamandla remained at the vehicle.
- [33] The plaintiff was asked by counsel why he walked away. He replied that he was following the police as they had danger tape with them and he wanted to go and point out the scene to them.
- [34] As the plaintiff followed the other policemen, he heard people saying: *"He is going to shoot you"*. These people were members of the community who remained at the vehicle. The plaintiff then heard only one shot fired. The plaintiff saw that the police had firearms in their holsters.
- [35] The plaintiff did not know why the shot was fired, did not see it being fired but only heard it. He saw a person running away with a gun. He identified the person as the police officer who previously alighted from the vehicle. Members of the community were chasing the police officer and he was pointing a firearm at them.
- [36] Then the plaintiff heard the shot fired and saw the police officer running. He felt a blow on the bottom right side of his neck. The plaintiff thought that he was hit by a stone. Blood was coming out of the wound and running down his shoulder. The plaintiff then went home. The plaintiff was later informed that he had been shot. The bullet entered the bottom

right side of the neck and exited at the bottom right chin.

- [37] The plaintiff was asked by counsel why he decided to return home. His response was that he was in tears and decided to go home. He stated that an ambulance was called but because there was a delay, the plaintiff decided to hire a taxi to the clinic. The ambulance later arrived at the scene and was referred to the clinic where the plaintiff was collected and taken to Natalspruit Hospital in Vosloorus.
- [38] The plaintiff stated that his heart was sore when he learned that he had been shot by the police. He testified that he spent two weeks in hospital, but asked the doctors to release him as he was unable to eat. The doctors told the plaintiff not to go home, but to go to Wits to receive treatment for the loose and damaged teeth in his bottom jaw as well as the gap between his front teeth.
- [39] When the plaintiff was informed that he had been shot by the police, he went to Thokoza police station to report it. Since he reported the incident, he has never been asked to go to court. The plaintiff confirmed that the police took a written statement from him.
- [40] The plaintiff was requested to comment on certain allegations contained in the defendant's amended plea.¹⁵ At paragraph 4.4.7 of the defendant's plea it is alleged that Detective Rapoone came back to Constable Segage with a witness to the murder, a certain Ms Mandiluve who told him that the deceased had a quarrel with the suspect and that the suspect had

¹⁵ Pleadings bundle (section A), pp 24 to 26.

stabbed the deceased. The plaintiff's response was that he was the one who asked Mandiluve to accompany the police.

[41] At paragraph 4.5.2 of the amended plea the defendant alleges that the murder scene was secured and that no-one was inside the tavern, except for Constable Malatjie and Detective Thibela. The plaintiff replied that he was injured before the scene was secured.

[42] The defendant alleges at paragraph 4.6.7 of his plea that on the second occasion, Sphamandla opened the vehicle door again in an attempt to pull out the suspect and Detective Rapoone once more stepped out to stop him only when Mawande accosted Detective Rapoone and tried to disarm him when the plaintiff stabbed detective Rapoone on his right hand. The plaintiff's only reply was that Mawande was already dead.

[43] Finally, when the plaintiff was asked whether the community was attacking the police, he replied that they wanted the culprit and not the police.

Cross-examination

[44] During cross-examination the plaintiff was asked who had shot him. He replied that he did not know the person's name. The plaintiff admitted that he consumes alcohol, but denied that he had been drinking on the day of the incident.

[45] When asked how he felt when his "*brother*" (the deceased) was stabbed, the plaintiff replied: "*painful*". He was asked whether he was angry, to

which he replied "*I was worried that the suspect would disappear*". The plaintiff was asked whether he was angry after the suspect had been brought to the scene. The plaintiff said "*no*". The plaintiff was asked whether he was at any stage angry, to which he replied "*no*".

[46] The plaintiff was asked whether the members of the community were angry. He said "yes". It was put to the plaintiff that it was incredulous that members of the community would be angry, but not him. The plaintiff replied that the suspect had been caught and he was therefore not worried.

[47] The plaintiff was asked whether Sphamandla was angry to which the plaintiff replied "yes". Again, it was put to the plaintiff that everybody unrelated to the deceased was angry, but not the plaintiff who was related. The plaintiff replied that he was angry until the suspect had been apprehended.

[48] The plaintiff admitted that Sphamandla was part of the crowd who wanted revenge. However, when asked whether he wanted revenge, plaintiff said no.

[49] The plaintiff was questioned regarding the number of people in the crowd, to which he replied approximately 100. It was put to the plaintiff that a shot was fired to disperse members of the community. The plaintiff replied that he did not know as he only heard the gunshot. He did however state that he did not see anyone running away, but only the police officer holding a firearm.

- [50] The plaintiff was confronted with contradicting allegations contained in his own particulars of claim, more particularly the allegation that when he approached the police officer for the purpose of warning him not to hurt members of the community and to leave, the police officer had already removed his firearm from his holster and was holding it to the side. The plaintiff denied the correctness of this allegation and stated: "*The last time I saw him was when he pulled off. At the time I approached him after the slap, his gun was not in his hand*". When the plaintiff was told by counsel that this allegation is contained in his claim, he disagreed and again denied the correctness by stating: "*When I spoke to him, he did not have a firearm in his hand*".
- [51] It was put to the plaintiff that he was part of the angry community members. The plaintiff denied this and stated that he was standing outside alone.
- [52] The plaintiff was confronted with the version of the defendant, more particularly that Sphamandla held Detective Rapoone from the back and that the plaintiff stabbed the detective with a knife. In addition, that the plaintiff had laid charges of assault with the intent to commit grievous bodily harm and not attempted murder, but that the prosecutor issued a *nolle prosequi*. The plaintiff denied any knowledge.
- [53] The plaintiff was told that the defendant would give evidence that the deceased was lying in a pool of blood at the scene. The plaintiff denied this and stated that the deceased was not bleeding.

[54] On the issue of returning home after he was injured, the plaintiff was asked how it was possible that he managed to walk home after being shot. The plaintiff merely confirmed that he did. He was also asked how the ambulance knew to find him at the clinic. The plaintiff avoided the question and simply reiterated that the ambulance found him at the clinic with a referral letter to the hospital.

[55] It was pointed out to the plaintiff that his version in court was not in line with the allegations contained in his amended particulars of claim.¹⁶ The plaintiff alleged that he was taken to Thele Mogorane Hospital in Vosloorus by an ambulance which was on the scene attending to the deceased. In response, the plaintiff disagreed with the allegation in the particulars of claim and stated that it is not how it happened. At paragraph 4.7 (amended paragraph 4.9) of the particulars of claim the plaintiff alleged that the force of the bullet caused him to hit the ground lying on his back, whilst it was not his evidence during the trial. The plaintiff denied that he fell to the ground.

Re-examination

[56] During re-examination the plaintiff confirmed that there were many people surrounding the vehicle and that they were talking amongst themselves and threatened to kill the suspect if they saw him. On being asked about the defendant's suggestion that the plaintiff has a violent character and that he was part of the angry crowd, the plaintiff replied with a laugh. When asked why the plaintiff was standing alone when the

¹⁶ Pleadings bundle (section A), particulars of claim, paragraph 4.8, p 9.

community approached the police vehicle, the plaintiff replied: "*We came together. I still had people around me*".

[57] The plaintiff was again confronted with the version that the defendant's witnesses would give evidence that Sphamandla was holding Detective Rapoone from the back. The plaintiff replied: "*I did not see it*". It was further put to him that the defendant's witnesses would give evidence that the plaintiff stabbed the detective with a silver knife. The plaintiff replied: "*No. I use them in the kitchen*".

[58] The plaintiff reiterated during re-examination that he did not see any blood at all, even after he took off the deceased's overcoat.

[59] After re-examination was concluded, the plaintiff closed his case.

EVIDENCE FOR THE DEFENDANT

Constable Segage

Examination in chief

[60] Constable Segage was the first of two witnesses called on behalf of the defendant. He testified that he was based at Thokoza SAPS and held the rank of constable. Constable Segage stated that on the 4th of March 2017, a Saturday, they received a call from the charge office about a murder that had occurred at Mapeding Tavern ("the tavern").

[61] On arriving at the tavern, the ambulance was already there as well as

community members. The paramedics gave the police a declaration of death. Constable Segage noticed that the deceased was lying in a pool of blood. The paramedics informed them that the cause of death was a stab wound.

[62] Constable Segage thereafter contacted the relevant role players being the detective and forensic staff, more particularly Detective Rapoone and Detective Constable Thibela.

[63] When Detective Rapoone arrived at the scene, he told all the people to move away from the scene. He wanted to secure the scene by putting tape around to keep people out. Constable Segage showed Detective Rapoone the deceased and handed over the scene to him. Detective Rapoone commenced his investigations.

[64] After 10 minutes, Detective Rapoone returned to Constable Segage with a woman who said she knew the suspect and where he lived. She agreed to point out the suspects place of residence.

[65] Detective Rapoone and Constable Segage, accompanied by the woman, proceeded to the suspect's residence which was not far from the tavern. They collected the woman away from the tavern where the friends of the suspect could not see her get into the police vehicle. Constable Segage could not recall the exact or full address where the suspect resided, but confirmed that the woman showed them the house. Before she alighted from the vehicle, the woman provided them with a name of the suspect – Sipho.

- [66] Detective Rapoone and Constable Segage thereafter alighted from the vehicle and met another woman in the yard who identified herself as Sipho's mother. They informed her that they were looking for Sipho. She took them to the back room where Sipho was sleeping.
- [67] The police knocked on the door and Sipho opened. They introduced themselves and started questioning him. Sipho informed them that an argument ensued between him and the deceased and that he stabbed the deceased. Sipho's rights were explained to him, whereafter he was handcuffed and taken to the vehicle. He was seated behind the driver and the child locks were activated so as to prevent the doors from being opened from the inside.
- [68] Detective Rapoone asked the suspect what he did with the knife he used to stab the deceased. The suspect informed Detective Rapoone that he left the knife at the tavern and handed it to a certain woman. Constable Segage cannot recall whether the suspect gave a name for the woman. Detective Rapoone thereupon announced that they would first return to the scene to identify the woman and obtain the knife before proceeding to the police station.
- [69] Upon their arrival at the scene many people had gathered. Constable Segage estimated the number of people to be 50.
- [70] They stopped the vehicle a few paces away from the tavern where they could see the people. They did not want the suspect to get out of the vehicle but asked him to look whether the woman was amongst the crowd

of people. Constable Segage estimated the distance between the parked vehicle and the crowd of people to be 30 metres.

[71] When the suspect advised the police officers that he did not see the woman amongst the crowd, Detective Rapoone alighted from the vehicle to inform officers Thibela and Malatjie that they were leaving the scene to take the suspect to the police station.

[72] Upon Detective Rapoone's return he climbed back into the vehicle and switched on the engine. At that moment they were surrounded by a number of people, namely five on the side where Constable Segage was seated and six on the driver's side where Detective Rapoone was. Constable Segage confirmed that he was seated in the left passenger seat next to Detective Rapoone.

[73] As they were busy reversing, a young man with dreadlocks, later identified as Sphamandla, opened the rear right passenger door where the suspect was seated. Sphamandla grabbed the suspect and pulled him out of the vehicle. Detective Rapoone stopped the vehicle, alighted, placed the suspect back inside the vehicle and closed the door. Detective Rapoone warned Sphamandla not to do it again.

[74] Detective Rapoone returned to the driver seat and switched on the vehicle. At that moment, Sphamandla opened the door again, grabbed the suspect and pulled him out. Detective Rapoone alighted from the vehicle, took the suspect, placed him inside the vehicle, closed the door and slapped Sphamandla with an open hand. The group on the side of

Sphamandla pushed Detective Rapoone away and prevented him from getting back into the vehicle.

[75] The crowd asked Detective Rapoone why he slapped Sphamandla. As they were busy pushing Detective Rapoone, Constable Segage alighted from the vehicle and walked around to the suspect's door to protect him. Constable Segage stated that the group that was on his side of the vehicle was not violent and that they did not attempt to open the doors. He therefore went to guard the suspect's door. At that stage the crowd was still busy pushing Detective Rapoone. Constable Segage noticed that the five members who were initially on his side of the vehicle had now joined the crowd on the side of Detective Rapoone, which included Sphamandla.

[76] At that stage Detective Rapoone took his firearm from his holster and cocked it. Constable Segage testified that as he was focusing on the suspect's door, he only heard the sound of a gunshot. The group of six fell to the ground and the members who later joined them ran away.

[77] As Detective Rapoone's group stood up, they also ran away and Constable Segage saw blood on one of them. He stated that he did not see clearly who was bleeding.

[78] Constable Segage looked inside the vehicle and noticed that the key was still in the ignition. He jumped into the driver's seat, switched on the vehicle and started reversing. In the process of reversing, Detective Rapoone jumped back into the vehicle onto the front left passenger seat.

[79] Constable Segage noticed that Detective Rapoone's crime scene apron

was torn and that his right hand was bleeding. However, Constable Segage did not know whose blood it was.

[80] On their way to the police station, Constable Segage called the charge office to summons an ambulance to attend to the person who was injured.

[81] When Constable Segage was asked where the rest of the community members were, he gave evidence that during the process of securing the door of the suspect and members of the community pushing Detective Rapoone, the remaining number of community members joined the crowd at the vehicle. He estimated the number of people at the vehicle to be 70.

[82] Constable Segage stated that the group around the vehicle had been drinking alcohol as they smelled of liquor. Constable Segage gave evidence that the group that was initially not part of the crowd closest to the vehicle, stood approximately eight metres away. When the bigger group saw that Detective Rapoone wanted to pull off, they came closer the vehicle.

Cross-examination

[83] During cross-examination Constable Segage was asked about the crowd's demeanour. He replied that they wanted to know who killed the deceased and that they were angry.

[84] Constable Segage was confronted with the plaintiff's version that he was the one who informed Detective Rapoone of the woman who knew where

the suspect resided. Constable Segage replied that Detective Rapoone came over to him, accompanied by the woman, who knew where the suspect resided.

[85] He was asked whether it was imperative to return to the scene, to which Constable Segage replied that it was as the possibility existed that the woman who was the custodian of the murder weapon could still be in attendance. Constable Segage was asked why they did not go to the station for the processing of the suspect, to which Constable Segage replied that once they were informed by the suspect that he had given the knife to a woman at the tavern, they believed that they could still find her there.

[86] Constable Segage was asked whether there was a lesser crowd upon their return to the tavern. He stated in reply that there were many people. In the same vein, it was put to Constable Segage that he gave evidence in chief that his colleagues were already in the process of securing the scene. Importantly, his reply was that the scene was secured with tape when first they arrived on the scene. Constable Segage's response was not challenged any further.

[87] Constable Segage was cross-examined on the content of standing order G341 which deals with the processing of arrested persons and that the standing order states that it must be done as soon as possible. Constable Segage confirmed that he was familiar with the standing order after it was read to him. Constable Segage was asked why they still had to return to the scene if there were already colleagues in attendance. Constable

Segage replied that it was necessary in order to afford the suspect the opportunity to point out the woman who was in possession of the murder weapon.

[88] Constable Segage was asked what the group on the side of Detective Rapoone was doing. He reiterated that they were pushing him away from the vehicle. They were fighting with Detective Rapoone and asking him why he slapped Sphamandla. They wanted the suspect to remain with them.

[89] Constable Segage confirmed that he saw Detective Rapoone pulling out his firearm, but that he did not know for what reason. He was asked whether there were any other firearms within the vicinity, to which Constable Segage replied that it was only Detective Rapoone's firearm and his own which was still secured in its holster. Constable Segage confirmed that he only heard one gunshot. When it was put to him that the crowd dispersed, he agreed.

[90] Constable Segage testified that he did not see a knife during his interactions with Detective Rapoone's group.

[91] He also confirmed that the ambulance who declared the deceased dead left the scene and that he summonsed another ambulance to the scene after he noticed that someone in the crowd had been injured.

[92] It was suggested to Constable Segage that the altercation at the vehicle only occurred between the small six-member group of Detective Rapoone and Constable Segage's five-member group and that they had no

interaction with the larger group. Constable Segage replied by stating that they were violent and close-by and smelled of liquor. He could see that they were under the influence.

Re-examination

[93] In re-examination it was put to Constable Segage that the standing order stipulates as soon as possible and that it means that it must be done at the earliest possible moment. He was asked whether the suspect was taken to the police station at the earliest possible moment. Constable Segage replied yes.

Detective Rapoone

Examination-in-chief

[94] Detective Rapoone testified as the second and last witness for the defendant. He has been a police officer for 10 ½ years and promoted to the rank of detective 2 ½ years ago.

[95] Detective Rapoone gave evidence that on the 4th of March 2017 at 05:45 he reported for duty at the Thokoza SAPS and that he was stationed at the crime office as a detective on standby. He was working with Detective Constable Thibela.

[96] He was informed by Detective Constable Thibela that a murder had occurred at Phola Park. He immediately, in the company of Detective Constable Thibela, proceeded to the scene.

- [97] When they arrived at the scene, they encountered Constable Segage and Constable Malatjie from the uniformed branch who were the first to arrive. On his arrival Constable Malatjie pointed out to Detective Rapoone where the person died. As the standby detective, Detective Rapoone took over the scene. He placed tape around the scene and told members of the public to leave the tavern.
- [98] Detective Rapoone gave evidence that the people inside the tavern were talking and that one could see that they were drunk. One could also smell that they had taken liquor.
- [99] He thereafter cordoned off the scene and everyone, including the family of the deceased, proceeded to the outside of the tavern.
- [100] Detective Rapoone then questioned members of the deceased's family and asked them what had happened. No one answered him. He then asked other people outside, whereupon a woman who appeared to be alone came closer, identified herself as Mandiluve and told Detective Rapoone that a quarrel had occurred between the deceased and a man called Sipho. Mandiluve told Detective Rapoone that Sipho arrived with a knife but that she was not certain whether he stabbed the deceased. Detective Rapoone asked Mandiluve whether she knew where the suspect stayed, which she confirmed. She also agreed to accompany him to point out the suspect's place of residence.
- [101] Detective Rapoone, accompanied by Constable Segage and Mandiluve drove to the suspect's residence, which Mandiluve pointed out. She

thereafter alighted from the vehicle and returned to the tavern.

[102] Detective Rapoone recalls the number of the house to be 5313 painted in big numbers on the wall and situated at Khola Park Extension 1. It was an RDP house.

[103] Detective Rapoone and Constable Segage introduced themselves to the mother of Sipho and asked her where he stayed. She took them to the backyard and knocked on the door of the back room. Sipho opened. Sipho's mother told him that the police were looking for him. He was wearing jeans and a T-shirt. Detective Rapoone questioned Sipho regarding the quarrel that he had with Mawande and the stabbing.

[104] The suspect informed Detective Rapoone that when he left the tavern, the Mawande was still alive. Detective Rapoone informed the suspect that Mawande had died. Sipho seemed shocked. Detective Rapoone thereafter told him that he was arresting him, he touched him, placed him under arrest and read his rights to him in terms of section 35 of the Constitution.

[105] Detective Rapoone asked the suspect where the knife was. The suspect told him that he had left the knife with the woman who sat with them at the tavern.

[106] Constable Segage and Detective Rapoone thereafter took the suspect straight to the tavern. Upon their arrival they noticed a group of people outside the tavern. Detective Rapoone estimated there to be 80 people. They stopped approximately 30 metres away from the crowd. Constable

Segage asked the suspect to look for the woman and to point her out. The suspect confirmed that he did not see her.

[107] Detective Rapoone gave evidence that when he arrived at the scene the first occasion, he found the deceased lying on his back full of blood around the chest and on the floor. He was informed by the paramedics that the suspect had been stabbed with a sharp instrument in the chest.

[108] Detective Rapoone was asked why it was necessary to take the suspect to the scene of the crime. The response was that the suspect had left the weapon with a certain woman. The woman and the type of knife used to stab the deceased were unknown to the police. They therefore required the suspect to do the pointing out.

[109] After the suspect informed them that the woman was not there, Detective Rapoone informed Constable Segage that he was going to tell the other police officers, Thibela and Malatjie, on the scene that they were taking the suspect to the police station. Detective Rapoone was asked whether it was necessary to tell the other police officers, to which he responded that it was very important as they had to know their whereabouts.

[110] Detective Rapoone alighted from the vehicle and went to inform his colleagues. The suspect and Constable Segage remained seated in the vehicle. The suspect's hands were handcuffed and the child locks at the rear doors were activated. When Detective Rapoone returned to the vehicle, he found a group approximately 4 metres away from the car. They were arguing amongst themselves as to whether or not the suspect

was the right one.

[111] Detective Rapoone explained that the path to the tavern consisted of a narrow street and that it did not allow enough space for the turning around of the vehicle. Therefore, the only way to leave the scene was to reverse the vehicle.

[112] Detective Rapoone climbed back into the vehicle, switched on the engine and started reversing. However, a group of people was standing behind the vehicle, preventing Detective Rapoone from reversing. The crowd thereafter broke up into two groups on both sides of the vehicle.

[113] Detective Rapoone noticed a male with dreadlocks amongst the group. Detective Rapoone saw the same male earlier amongst the family members when he was questioning them. Detective Rapoone was later informed that this person is Sphamandla.

[114] Sphamandla opened the rear door where the suspect was seated and pulled him out of the vehicle. Detective Rapoone alighted from the vehicle and approached Sphamandla, who asked him where they were taking the suspect. Detective Rapoone informed him that they were taking him to Thokoza police station to lock him up.

[115] Whilst Sphamandla was pulling the suspect out of the vehicle, the other members of the group were just standing there, not doing anything. Detective Rapoone explained to everyone that they were taking the suspect to the Thokoza police station. He put the suspect back into the vehicle. The people around the vehicle were smelling of alcohol, including

Sphamandla.

[116] Detective Rapoone, as he got back into the driver's seat, attempted to reverse for the second time, but Sphamandla came again and opened the door on the side where the suspect was seated. Sphamandla pulled him out of the vehicle again. Detective Rapoone got out of the vehicle, approached Sphamandla, slapped him and put the suspect back into the vehicle. Detective Rapoone was asked why he slapped Sphamandla. His response was: *"He did not want to listen"*.

[117] As Detective Rapoone was attempting to return to the driver's seat, a family member of the deceased came closer with a big silver knife in his right hand. He started questioning Detective Rapoone about where he was taking the suspect. Detective Rapoone reiterated that they were taking him to Thokoza police station. The family member said to Detective Rapoone: *"You will never go away with him"*. Detective Rapoone later learned that the family member was the plaintiff.

[118] The plaintiff pushed the door and insulted Detective Rapoone. They also started pushing the detective. There were three of them doing the pushing at the time. Detective Rapoone pushed back as he wanted to get back into the vehicle and take the suspect to the police station. He felt that the suspect was under threat. As Detective Rapoone was pushing back, he was stabbed with the knife on the little finger. Sphamandla and the plaintiff came closer and started assaulting Detective Rapoone. They were kicking and punching him. At that moment, Detective Rapoone took out his firearm, cocked it and faced it down to the ground at a 90-degree

angle.

[119] When Detective Rapoone was asked why he cocked his firearm, he stated that because of the manner in which they were attacking him, he only wanted to scare them and therefore cocked and pointed down the firearm. Someone was holding him from the back with both hands. They were fighting for the firearm, moving around. Detective Rapoone saw that it was Sphamandla. His hands holding the firearm were moving left to right as they were struggling for the firearm and in the process the firearm discharged. Everybody fell to the ground.

[120] When Detective Rapoone was asked who had fired the shot, he replied: "*I don't know*". He was asked who was in possession of the firearm, to which he replied: "*Both of us*".

[121] Detective Rapoone gave evidence that everyone, including him, fell down to the ground. Thereafter, Sphamandla ran away. The rest of the crowd stood up and moved away. Detective Rapoone found his firearm lying on the ground and picked it up. Detective Rapoone stated that during the firing of the shot and the struggle he lost the firearm.

[122] Just after Detective Rapoone picked up the firearm, he was informed that someone had been shot. When Detective Rapoone looked at the crowd and at the plaintiff, he saw blood in the centre of his chest.

[123] After the incident, Detective Rapoone climbed into the passenger seat of the vehicle, next to Constable Segage who managed to successfully reverse the vehicle away from the tavern. On their way to the police

station they encountered back-up police officers and swapped vehicles. Thereafter, he drove straight to the police station where the suspect was detained.

[124] Detective Rapoone stated that he laid charges against Sphamandla for pulling a suspect out of a police vehicle and interfering with police work. He also laid charges in relation to the stabbing. Both cases were centralised.

Cross-examination

[125] During cross-examination Detective Rapoone was asked about the demeanour of the crowd when he arrived at the tavern. He described them as inquisitive but not angry.

[126] He denied that it was the plaintiff who informed him of Mandiluve.

[127] Detective Rapoone was asked to explain the need for returning to the scene with the suspect. Detective Rapoone reiterated that they went to find the murder weapon. He was asked why he did not call his colleagues and informed them that they were leaving the scene instead of getting out of the vehicle to tell them. Detective Rapoone said that he did not think about doing that.

[128] Detective Rapoone was asked why he did not keep on reversing. Detective Rapoone replied that because the suspect was being taken out of the vehicle. He was also asked why he assaulted Sphamandla, to which Detective Rapoone replied: *"You cannot control a person who has*

taken liquor”.

[129] Detective Rapoone was asked what made him pull out his firearm. He replied that after he spoke to Sphamandla and slapped him, he tried to climb back into the vehicle. However, the plaintiff was right in front of him accompanied by two males. He pushed the plaintiff who then stabbed him with a knife. Two other males attacked him.

[130] It was put to Detective Rapoone that he pulled the trigger. He denied this. He was asked whether Sphamandla had pulled the trigger. Detective Rapoone replied by reiterating that he himself did not pull the trigger.

[131] Detective Rapoone was asked how far the crowd was from the shooting. He estimated it as five metres. He also stated that there were many people in the street.

[132] When he was asked where Constable Segage was, Detective Rapoone indicated that he was with the suspect. The plaintiff's counsel confronted Detective Rapoone with Constable Segage's version that he got out of the vehicle to protect the suspect's door. Detective Rapoone replied that he would not know.

[133] Detective Rapoone gave evidence that he identified the plaintiff by his height and stated that it is not the first time that the plaintiff was arrested as there was previously a case against him for domestic violence.

[134] Detective Rapoone admitted that the bullet that hit the plaintiff emanated

from his firearm. He however denied that he was the one who had fired the shot. It was also put to him that he intentionally shot the plaintiff. Detective Rapoone replied by stating that he did not aim at the plaintiff or point a firearm at him.

[135] It was put to Detective Rapoone that he shot the plaintiff by mistake. Detective Rapoone denied this. It was also put to him that Detective Rapoone intentionally drew his firearm. Detective Rapoone admitted this. Thereafter Detective Rapoone was asked whether he drew the firearm to use it. Detective Rapoone said no.

[136] The plaintiff's counsel asked Detective Rapoone whether he appreciated that someone could get injured, to which Detective Rapoone replied "no".

[137] Detective Rapoone was confronted with a statement that he made shortly after the incident. The only potentially material evidence that was elicited from this line of cross-examination is that in his statement he recorded that he was stabbed twice but at trial he gave evidence of only one stabbing. Detective Rapoone replied that he forgot.

[138] When Detective Rapoone was asked that if he did pull the trigger whether it was out of self-defence or necessity. Detective Rapoone replied that he did not, referring to the pulling of the trigger.

Re-examination

[139] During re-examination a number of questions, albeit leading (but not objected to) were put to Detective Rapoone. He was asked whether he

was scared, to which he replied "yes". He was asked whether he had reasonable grounds for thinking that his life was in danger, to which he replied "yes".

[140] Detective Rapoone was also asked whether he had reasonable grounds to believe that he could be killed, to which Detective Rapoone replied "yes, *shortly after I was stabbed*". He gave evidence that he had no reason to believe that his life was in danger before then, as he thought that once they had traced the suspect the community would be satisfied.

[141] Detective Rapoone was asked whether he believed that the pulling out of his firearm was less dangerous. He replied that the crowd was angry and that he could see that his life was in danger. He was also asked whether he thought that the cocked firearm at a 90-degree angle would avert the situation. Detective Rapoone replied that he did and that it was done just to frighten the group.

[142] Lastly, Detective Rapoone was asked whether it was necessary to protect Constable Segage and the suspect and to protect State property. Detective Rapoone replied that it was.

[143] I asked Detective Rapoone why the doors of the vehicle were not locked from the outside. He stated that it was a new vehicle that he drove for the first time that morning and that he was therefore not yet familiar with all of the features of the vehicle. His priority was to prevent the suspect from getting out of the vehicle and hence his focus was rather on the inside locks.

[144] The defendant thereafter closed his case.

[145] Counsel agreed to submit written closing argument, for which I am grateful.

ANALYSIS OF THE EVIDENCE

[146] There can be no question that the plaintiff was injured by a bullet fired from Detective Rapoone's firearm. This is plain from the evidence, not least of which is the fact that only one shot was fired and only Detective Rapoone's firearm was drawn at the time.

[147] However, even if this is accepted as a proven fact, it is not sufficient for plaintiff to meet the onus resting on him. The key issues remain whether the evidence established that on the probabilities, that Detective Rapoone fired the shot, and whether the drawing and cocking of the firearm and the shot resulting therefrom, were justified under the circumstances.

[148] Various inconsistencies and improbabilities exist in the plaintiff's testimony. In this regard there are a number of aspects of the plaintiff's evidence that warrant specific attention.

Inconsistencies

[149] The plaintiff gave evidence under oath that after Detective Rapoone slapped Sphamandla, the plaintiff approached him with the purpose of telling the police officer not to hit members of the community and to leave the scene with the culprit. Before the police officer could assault someone

else, the plaintiff told him to leave, whereupon the police officer opened the door and climbed back into the vehicle. Thereafter, the plaintiff left the crowd and followed the police to the scene where the body of the deceased was lying.

[150] The allegations in the particulars of claim can however not be reconciled with the plaintiff's oral testimony. At paragraphs 4.6 and 4.7 of the amended particulars of claim, the plaintiff avers that after he saw the police officer slapping Sphamandla, the plaintiff approached the police officer, who had already drawn his firearm from his holster and was holding it to the side. No mention was made during the plaintiff's oral evidence of the fact that Detective Rapoone had already drawn his firearm when the plaintiff approached him after the assault on Sphamandla. In fact, it was the plaintiff's oral evidence that he only heard a shot fired. Only when he was directly asked by counsel to state whether he saw the shot being fired, did plaintiff state that he saw Detective Rapoone running away with a firearm.

[151] At paragraph 4.8 of the amended particulars of claim the plaintiff avers that he heard a gunshot which he assumed was in the aim of disbursing the members of the public. This statement is wholly inconsistent with the plaintiff's oral evidence that when he walked away and followed the police to the crime scene, he heard people saying that the police officer was going to shoot him and that shortly thereafter he heard a shot being fired. The plaintiff also stated when specifically asked whether the gunshot was fired with a view of dispersing members of the community, that he did not know and that he only heard the gunshot. Moreover, he gave evidence

that he did not see the crowd running away.

[152] At paragraph 4.9 of the particulars of claim the plaintiff avers that the force of the bullet caused him to hit the ground, lying on his back. No such evidence was led at the trial. In fact, it is the plaintiff's evidence that he thought that he was hit by a stone, and that after he noticed the blood running down his shoulder, he decided to walk home. In fact, during re-examination the plaintiff emphatically stated that he did not fall down on the ground, but that he walked.

[153] Under cross-examination, when confronted with the inconsistencies in his particulars of claim, the plaintiff testified that the version contained in the particulars of claim was incorrect.

[154] It was also put to Detective Rapoone during cross-examination that he intentionally shot the plaintiff, which was neither the oral evidence of the plaintiff nor the case made out on the pleadings.

[155] It is a well-known and long-established principle that it is the pleadings that define the issues so as to enable the other party to know what case he or she is required to meet¹⁷ and parties are therefore limited to their pleadings. A party can most certainly not direct the attention of the other party to one issue on the pleadings and then attempt to canvass another at trial.¹⁸ A Court is required to determine what the real and substantial

¹⁷ Rule 18(4) of the Uniform Rules of Court; Benson & Simpson v Robinson 1917 WLD 126; Erasmus: Superior Court Practice, B1-129, note 9.

¹⁸ Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107G - H.

issues are between the parties and decide the case on these issues.¹⁹

[156] When applying these principles to the present case, it is clear that there are material inconsistencies between plaintiff's evidence at trial and the factual allegations contained in his particulars of claim.

Improbabilities

[157] The plaintiff was a single witness.

[158] In Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others²⁰ it was held that when a Court is faced with two conflicting versions, the Court must make findings on the following: -

- "(a) *the credibility of the various factual witnesses;*
- (b) their reliability; and*
- (c) the probabilities.*

As to (a), the Court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as: -

- (i) the witness' candour and demeanour in the witness box,*
- (ii) his bias, latent and blatant,*
- (iii) internal contradictions in his evidence,*
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial*

¹⁹ Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 at 198; Shill v Milner 1937 AD 101 at 105.

²⁰ (427/01) [2002] ZASCA 98 (6 September 2002) at paragraph [5], pp 4-5.

statements or actions,

- (v) *the probability or improbability of particular aspects of his version,*
- (vi) *the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.*

As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (i) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the Court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case which will doubtless be the rare one, occurs when the Court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail."

[159] In Barring Eiendomme Bpk v Roux²¹ the SCA adopted the following passages in National Employers General Insurance Co Ltd v Jagers:²²-

"... Where there are two mutually destructive stories, [the plaintiff] can only succeed if he satisfied the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false and mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and

²¹ 2001 (1) All SA 399 (SCA) at paragraph [6].

²² 1984 (4) SA 437 (A) at 440E – 441A.

test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up by the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to be in general accordance with the views expressed by Coetzee J in Koster Koöperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens 1974 (4) SA 420 (W) and African Eagle Assurance Co Ltd v Cainer 1980 (2) SA 324. I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities, one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of the enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[160] During the plaintiff's evidence at trial, he testified that he did not find one drop of blood on or around the deceased where he was lying inside the tavern. In fact, his evidence is that even after he removed the jacket, he only noticed a small hole below the plaintiff's left shoulder bone. Even

during cross-examination, the plaintiff was adamant that there was no blood. In stark contrast, both witnesses for the defendant gave individual recollections of the deceased lying in a pool of blood. It is highly improbable that not one drop of blood would have been visible either on the body itself or within its immediate vicinity.

[161] The plaintiff testified that about 100 members of the community were angry and revengeful and demanded the handing over of the suspect so that they could kill him. The plaintiff gave evidence how they pulled at the doors and demanded vigilante justice. Yet, the plaintiff, a relative of the deceased, attempted to persuade the Court that he was neither angry, nor revengeful. Even after his cousin, Sphamandla, was slapped by the police, it is the plaintiff's evidence that he remained calm and requested the police to leave. If this is true, there would certainly have been no reason for a police officer to shoot him as the plaintiff alleged in oral evidence.

[162] Also, on the plaintiff's version the police failed to secure the murder scene which, if not done urgently, could lead to the destruction of critical forensic evidence, the consequence of which would be an unsuccessful prosecution and a murder suspect walking free. Under these circumstances I find it highly improbable that the plaintiff would remain calm and unaffected by the alleged dilatory conduct on the part of the police.

[163] In addition, Constable Segage's evidence that the scene was secured when first they arrived, was not challenged. It follows that there was no

reason for the plaintiff to return to the tavern shortly before the shooting. Also, it is the evidence of Detective Rapoone that no one was allowed back into the tavern. Two police officers, Thibela and Malatjie were guarding the scene. This evidence was not challenged either. I therefore find the plaintiff's evidence that he left the crowd to assist the police officers to secure the scene, improbable. The ineluctable conclusion is that the plaintiff did not leave the crowd, but remained until he was shot.

[164] The plaintiff gave evidence that after he spoke to Detective Rapoone and followed the police to the murder scene, Detective Rapoone climbed back into the police vehicle. However, the plaintiff gave evidence that he saw Detective Rapoone running away from the crowd holding his drawn firearm. Either Detective Rapoone did not climb back into the vehicle, or he did not run away from the crowd with a drawn firearm. Both scenarios cannot present at the same time.

[165] If Detective Rapoone climbed back into the vehicle, he certainly could not have shot the plaintiff. If he was running away from the crowd with a drawn firearm, it does not explain why the crowd would shout at the plaintiff that the police officer was going to shoot him. Such a scenario would in any event be at odds with the evidence of both Detective Rapoone and Constable Segage. Not only is the plaintiff's version in respect of both scenarios improbable, but his version that he walked away from the police vehicle before he was shot, becomes highly questionable.

[166] The plaintiff gave evidence that after he was hit by what he thought was a stone, he noticed blood running down his shoulder, cried and walked

home. He then called for a taxi which ferried him to the local clinic, whereafter the ambulance collected him from the clinic and took him to the Natalspruit Vosloorus Hospital.

[167] The plaintiff alleges in his particulars of claim²³ that he sustained severe injuries to his face and suffered permanent disfigurement. The plaintiff also testified that he was in hospital for two weeks and that he was unable to eat as a result of the injuries that he sustained. In his particulars of claim²⁴ the plaintiff alleges that the bullet hit him from the back and entered his neck, travelled through his jaw and proceeded out his chin. These injuries, on the plaintiff's own version, were severe and must have caused unbearable pain and bleeding. It is therefore highly improbable under the circumstances that the plaintiff would have been in a state to walk home, to call for a taxi, to first attend a clinic and to thereafter only be referred to a hospital. In addition, there is now way that the same ambulance that arrived at the scene would know that it would find the plaintiff at the clinic especially if on the plaintiff's version he told no one where he was going when he left the scene. This too renders the plaintiff's version improbable.

[168] I find it even more curious that the plaintiff on his version did not remain at the scene where he was shot by a police officer in the presence of various eye-witnesses and instead, chose to leave the scene where he was assaulted and to walk home. This behaviour is at odds with an innocent victim and bystander who alleges that he was unlawfully

²³ Pleadings bundle (section A), particulars of claim, paragraph 5.3, p 10.

²⁴ Pleadings bundle (section A), plaintiff's amended paragraphs, paragraph 5, p 31.

assaulted by the police. I therefore find the version of the plaintiff on this issue equally improbable.

[169] The plaintiff gave evidence that his cousin, Sphamandla, was assaulted by Detective Rapoone. He denies that he assisted Sphamandla in assaulting and restraining Detective Rapoone. The plaintiff also testified that he knows Sphamandla very well. The plaintiff testified that when he walked away from the group gathered at the police vehicle, Sphamandla remained behind. Sphamandla would therefore have been within close proximity of Detective Rapoone and would have been in the ideal position to verify how the shooting happened. Sphamandla would be a key witness to refute Detective Rapoone's version that the plaintiff stabbed him with a knife and to confirm the plaintiff's version that he was not one of the aggressors. Yet, the plaintiff elected not to call Sphamandla as a witness. This in my view adds insult to injury to the plaintiff's case.

[170] It would have been a simple matter to call Sphamandla to corroborate the plaintiff's version and in the absence of Sphamandla's evidence, the plaintiff remains a single witness. The election not to call Sphamandla can in my view only mean one thing and that is that the evidence of Sphamandla would have supported a version but not necessarily that of the plaintiff.

[171] When considering the various inconsistencies and improbabilities in the evidence of the plaintiff, both when compared to the testimony of the two police officers as well as the internal inconsistencies in the testimony of the plaintiff himself when compared to the allegations contained in the

plaintiff's particulars of claim, I cannot accept the plaintiff's evidence as true and accurate.

Defendant's witnesses

[172] The defendant's evidence was not seriously challenged on material aspects as already indicated in the summary of evidence.

[173] The evidence of the defence was cogent and there were no material contradictions. My impression was that both witnesses tried as best they could to give a true and accurate account of what happened on the day. I find them both to be good witnesses and I accept their respective versions as true.

LEGAL DUTY

[174] In order to succeed with his claim, the plaintiff has to establish that there was a legal duty on the defendant's servants (the police), to protect the defendant as a member of the public within the context of this case. If that duty is established, and the police are found to have negligently breached that duty, the next enquiry is whether such negligence caused the plaintiff to suffer harm, which was reasonably foreseeable or not too remote. If all these are established, the police's omission would be wrongful and attract liability.

[175] There is a constitutional and public law duty on the State to protect its citizens and the State is liable for the failure to perform that duty, unless

it can be shown that there is compelling reason to deviate from that principle.²⁵

[176] This duty is often referred to as 'the duty of care' (which is a concept of English law). I will therefore also use the term guardedly as Makgoka J cautioned,²⁶ bearing in mind the remarks of Harms JA²⁷ (as he then was) that to formulate the issue in terms of the concept of 'duty of care' may lead one astray. The concept of 'duty of care' comprises two discrete enquiries. Milner *Negligence in Modern Law* (1967) at p.230 states:

"The duty of care concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and 'duty of care' in this sense is a convenient but dispensable concept. On the other hand, the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. 'Duty' in this sense is logically antecedent to 'duty' in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature."

[177] In Knop v Johannesburg City Council 1995 (2) SA 1 (A) Botha JA, at 27G-I, citing with approval the passage in Milner, said:

²⁵ Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA) para 43

²⁶ Ramushi v The Minister of Safety and Security 2012 JDR 1372 (GNP)

²⁷ Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) par 14

"The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry is stated in the well-known passage in Fleming The Law of Torts 4th ed at 136, quoted in the Administrateur, Natal case supra at 833 in fine 834A:

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'

The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court..."

[178] Whether to recognise a duty in a given situation as part of the enquiry, has been approved by the SCA²⁸ and was also relied on by the Full Bench of the Gauteng Division in the decision in Bowley Steels (Pty) Limited v Dalian Engineering (Pty) Limited.²⁹

[179] In the context of delictual damages, the test for determining wrongfulness or otherwise of an omission to act is as restated in Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus

²⁸ Mukheiber v Raath 1999 (3) SA 1065 (SCA)

²⁹ 1996 (2) SA 393 (T) at 398G-H

Curiae) 2003 (1) SA 389 (SCA):

'Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and in considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.'

[180] Within the context of how the events occurred on that fateful day, it was the police officers, and not the plaintiff, who were the victims of an attack. Given the evidence, I am not persuaded that the plaintiff was as innocent and uninvolved as he professes. In my view, the community would expect the police to protect members of the public who are law-abiding innocent bystanders, not aggressors. However, even if the police owed a legal duty to their aggressors simply because they are members of the public, a deviation from the duty was justified in the particular circumstances of this case.

[181] Accordingly, I find that the plaintiff has failed to establish a legal duty within the context of the facts of this case.

CAUSATION

[182] The fact that the plaintiff was hit and injured by a bullet discharged from the firearm of a police officer cannot be disputed. The question therefore still remains whether or not the return to the scene or the drawing and cocking of the firearm constitute negligence action on the part of the defendant.

[183] Critically, it is not the plaintiff's case on the pleadings that the police officers were negligent in returning to the scene and not going to the police station to process the suspect immediately after he was apprehended. This version was only put to the defendant during cross-examination. As already stated, a plaintiff is bound to the case he has pleaded. However, a court is expected to identify the real issues between the parties and assuming that this is a critical issue, I cannot find on the evidence before me that the police officers were negligent in returning to the scene.

[184] All that was suggested by the plaintiff is that the police officers did not abide by the standing order and that it was not necessary to return to the scene with the suspect. However, both police officers provided a plausible explanation for their return. Within hours after a murder had been committed, they apprehended the suspect who could positively identify the custodian of the murder weapon and the weapon itself at the scene of the crime. Without the suspect, a positive identification would have been impossible. I therefore find the action by the police by returning to the

scene in no way wrongful.

[185] Moreover, Detective Rapoone testified that he thought that the community would be happy if they saw that the suspect had been apprehended. I cannot fault his reason in this regard either and consider it to be reasonable. Surely, the community would expect the police to apprehend a suspect and to secure the murder weapon at the earliest possible opportunity. I find my support in Minister of Safety and Security v Duivenboden.³⁰ The SCA held that determining wrongfulness in these matters involves the balancing of identifiable norms, which include constitutional norms. An important constitutional norm that will factor in cases such as these is the norm of accountability.³¹ The Constitutional Court has approved this view.³²

[186] On the issue of drawing and cocking the firearm and the ultimate discharge of the bullet that hit and injured the plaintiff, the principle of causation and the presence of a wrongful act comes into play.

[187] It is settled that the establishment of negligence is not the end of the enquiry, and liability does not necessarily follow for the damages suffered. For liability to arise there must be a causal nexus between such negligence and the plaintiff's damages. In the leading case of Minister of

³⁰ 2002 (6) SA 431 (SCA) paras 20 and 21

³¹ Olitziki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) para 31.

³² Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) paras 73-78.

Police v Skosana³³ at 34F-H and 35A-D the SCA dealt with this principle as follows:

*"Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise and cadit quaestio. If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficient closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part."*³⁴

[188] In International Shipping Co. (Pty) Ltd v Bentley³⁵ Corbett CJ at 700E-H restated the general principles of causation as follows:

*"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's **wrongful act** was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the **wrongful conduct of the defendant**. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing*

³³ 1977 (1) SA 31 (A)

³⁴ See also Siman & Co (Pty) Ltd v Barclays National Bank 1984 (2) SA 888 (A) at 914C-918A; Tuck Commissioner for Inland Revenue 1988 (3) SA 819 (A) at 832F-G; and Silver v Premier, Gauteng Provincial Government 1998 (4) SA 569 (W) at 574D-G).

³⁵ 1990 (1) SA 680 (A)

of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this was not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently close or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote." (emphasis added)

[189] Therefore, in determining the presence of legal causation in this case, the question is whether the drawing and cocking of the firearm was linked sufficiently closely or directly to the loss suffered by the plaintiff for legal liability to arise, or whether the loss is too remote. The test applied in such an enquiry is trite and settled: it is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all come into consideration.³⁶

[190] Turning to the facts of this case, the plaintiff himself conceded in evidence that the crowd was revengeful and angry. It is common cause that the crowd consisted of approximately 80 members of the community. It is also common cause that the crowd demanded to know who killed the deceased and wanted vigilante justice. It is also not disputed that the crowd attempted to prevent Detective Rapoone from leaving the scene

³⁶ *S v Mokgethi en Andere* 1990 (1) SA 32 (A); above, at 700E-701G; *Smit v Abrahams* 1994 (4) SA 1 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I-J and 765A-B and *Delphisure Insurance Brokers v Dippenaar* 2010 (5) SA 499 (SCA) para 25.

with the suspect. In this regard, the evidence speaks for itself – the opening of the vehicle door, the standing of crowd members behind the vehicle, and the crowd members surrounding the vehicle.

[191] It was even put by the plaintiff's counsel to Constable Segage that the crowd was provoked by the assault on Sphamandla. The very fact that Constable Segage found it necessary to assist Detective Rapoone in protecting the suspect is indicative of the fact that the crowd was out of control and Detective Rapoone was in no position to manage them on his own.

[192] It is furthermore not disputed that the crowd smelled of alcohol, which is highly probable given the fact that the incident occurred at a tavern.

[193] Detective Rapoone first warned Sphamandla when he opened the door of the suspect and thereafter slapped him when he did it for the second time. Detective Rapoone explained to Sphamandla and to the crowd that it was the intention to take the suspect to the police station. If the crowd was reasonable and sober, one would have expected them to accept the explanation and to allow the police to do their work. However, this was not what Detective Rapoone and Constable Segage was confronted with.

[194] It was also Detective Rapoone's uncontested evidence that he had no intention to shoot anyone and that the reason for drawing his firearm and cocking it was to frighten the crowd and to force them to move away. Detective Rapoone pointed the firearm to the ground at a 90-degree

angle. It was not his evidence, nor was it suggested that firing warning shots in the air was a reasonable alternative. In fact, no other reasonable alternatives were suggested to Detective Rapoone during cross-examination.

[195] Considering all the circumstances of this case, I am not persuaded that the plaintiff has proven wrongfulness on the part of the defendant as there was no other positive measures that Detective Rapoone could have taken to prevent the harm suffered by the plaintiff.

FORESEEABILITY

[196] When it comes to the issue of foreseeability, it is to be borne in mind when considering this aspect that the precise or exact manner in which harm occurs need not be foreseeable: only the general manner of its occurrence. In Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Storage (Pty) and Another³⁷, Scott JA stated the following at 840 D-E:

"The problem is always to decide where to draw the line, particularly in those cases where the result is readily foreseeable but not the cause. This is more likely to arise in situations where, for example, one is dealing with a genus of potential danger which is extensive, such as fire, or where it is common cause there is another person whose wrongdoing is more obvious than that of the chosen defendant. It is here that a degree of flexibility is called for. Just where the inquiry as to culpability ends and the inquiry as to remoteness (or legal causation) begins — both of which may involve

³⁷ 2000 (1) SA 827 (SCA)

the question of foreseeability — must therefore to some extent depend on the circumstances.... In many cases the facts will be such as to render the distinction clear, but not always. Too rigid an approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence "in the air".'

[197] It was emphasised in Kruger v Coetzee³⁸ that the reasonable foreseeability of harm, by itself, does not require action to be taken to avert it. Action to avert reasonably foreseeable harm is required only if, in the particular circumstances, the person concerned ought reasonably to have acted.

[198] The plaintiff pleaded that the defendant could have foreseen that firing gunshots in the presence of members of the public will endanger the members of the public's lives, specifically the plaintiff. Curiously, the evidence does support the allegation, but not in the manner plaintiff had hoped for.

[199] Ironically, Detective Rapoone did foresee the danger in firing a shot amongst members of a crowd in such close proximity to him. This is borne out of the fact that Detective Rapoone's evidence is that he did not have any intention to fire his gun. He merely wanted to scare away the attacking crowd by drawing his firearm and cocking it. He also pointed the firearm towards the ground at a 90-degree angle. He did not fire any shots in the air, nor did he at any stage warn the crowd that he was going to shoot.

³⁸ *supra* at 430F - G

[200] In any event, even if it was suggested to Detective Rapoone that he ought to have fired a warning shot, the fact remains that it was not his intention to shoot and in these urgent circumstances and given his proximity in relation to the crowd, he was justified in giving no warning of any kind. This all points to the fact that Detective Rapoone did consider the foreseeability of harm and therefore applied the least dangerous means of warding off the crowd.

SELF-DEFENCE

[201] Even if I am wrong in finding that there was no wrongful act, the evidence before me confirms that the actions of Detective Rapoone were justified. In this regard, the defendant bore the onus to prove self-defence, alternatively necessity to justify the drawing and cocking of the firearm and the resultant discharge of the bullet.

[202] The test whether a person acted in self-defence is an objective one, which means that when the Court comes to decide whether there was a necessity to act in self-defence, it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating at the time he acted.³⁹ The legal position on this issue was succinctly set out in Kgaleng v Minister of Safety and Security and Another⁴⁰ as follows:-

³⁹ Ntsomi v Minister of Law and Order 1990 (1) SA 512 (C).
⁴⁰ 2001 (4) SA 854 (W) at 856D - E.

"... The test is objective. The legal position is thus summarised by Boberg *The Law of Delict*, vol 1 (1984) at 788:

'The enquiry is factual, and – since the issue is wrongfulness, not fault – the test is objective. Thus the question is not whether the defendant believed his conduct to be justified, but whether the law considers it so. This, in turn, depends on whether it was a reasonable response for the defendant to make to the situation, judged objectively and even with hindsight – although not without regard to the individual defendant's resources, motives and circumstances, for no test can be applied in a vacuum. If the test is satisfied the defendant escapes liability because he acted lawfully in a situation of necessity or defence. If the test is not satisfied the defendant cannot invoke necessity or defence to justify his conduct, which therefore remains wrongful'."

[203] In the matter of Mugwena and Another v Minister of Safety and Security⁴¹

the following *dictum* appears: -

"[21] Self-defence, which is treated in our law as a species of private defence, is recognised by all legal systems. Given the inestimable value that attaches to human life, there are strict limits to the taking of life and the law insists upon these limits being adhered to.

'Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim.'

(Per Chaskalson P in S v Makwanyane and Another 1995 (3) SA 391 (CC) paragraph 138)."

⁴¹ (303/2003) [2005] ZASCA 117; [2006] 2 All SA 126 (SCA) (29 November 2005) at paragraph [21].

[204] In R v Attwood⁴² the Court stated as follows:-

"Homicide in self-defence is justified if the person concerned ... had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that the means he used were the only or least dangerous whereby he could have avoided the danger."

[205] The defendant can only escape liability for harm caused by him if it is proven that there were reasonable grounds for thinking that, because of the crowd's behaviour, there was such a danger (commenced or imminent), injury to persons or damage to or destruction to property as to require police action, and in addition, the means used in an endeavour to restore order and avert such danger were not excessive having regard to all the circumstances.

[206] It is apposite to note in this regard that whilst the Courts will be astute to protect the public from high-handed action on the part of the police: -

"The very objectivity of the test, however demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic, after the event, weighing the matter in the scheduled security of the courtroom."

The law requires of the police no higher and no lesser

⁴²

1946 AD 331 at 340.

standard of duty than is required of any member of the public placed in a similar situation, viz, that standard to which the ordinary and reasonable man in the street is required to conform."⁴³

[207] The evidence presented to Court demonstrates that the police acted in pursuance of their duty to protect themselves and the suspect from violent action to uphold justice by not allowing the community to take the law into their own hands and defend themselves from the threat of a revengeful crowd. The evidence also indicates that the actions of the police were proportionate to the danger posed by the crowd to the suspect and to the police. I have already dealt in detail with the evidence adduced in support.

NECESSITY

[208] Professor Jonathan Burchell⁴⁴ suggests that for an act to be justified on the ground of necessity the following requirements must be satisfied:

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

⁴³ Ntanjana v Vorster and Minister of Justice 1950 (4) SA 398 (C) at 406 and 410; see also Maimela and Another v Makhado Municipality and Another 2011 (6) SA 533 (SCA) at par. 21B

⁴⁴ *Principles of Delict* (1993) at 75.

[209] Necessity, unlike self-defense, does not require the defendant's action to have been directed at the perpetrator of an unlawful attack. It is invoked where the action, or conduct, of the defendant was 'directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation'.⁴⁵

[210] In my view the defendant also established the pleaded alternative defence. Detective Rapoone's life was in danger and he knew, reasonably so, that it was. He was acutely aware of his duty to protect his colleague, the suspect and himself on the one hand and to prevent unnecessary harm to members of the public on the other. However, he was trapped and his only means of defence was his firearm. In the circumstances, I find that Detective Rapoone acted out of necessity and acted reasonably.

[211] Therefore, the most probable explanation for the plaintiff's injury on the evidence is that either he was part of the unruly crowd or he was unfortunately hit by a bullet that ricocheted during the scuffle between Detective Rapoone and Sphamandla.

⁴⁵ Maimela and Another v Makhado Municipality and Another 2011 (6) SA 533 (SCA) par 19; see also Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck 2007 (2) SA 118 (SCA) para 10, quoting with approval JC van der Walt & JR Midgley *Principles of Delict* 3 ed para 87.

CONCLUSION

[212] Although due regard must be had to 'the right to life' as provided for in section 11 of the Constitution, it relates to the innocent victim's right to life. The Constitutional Court has also stated that "*(t)o deny the innocent person the right to act in self-defence would be to deny to that individual his or her right to life*" and "*Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim*".⁴⁶ Of course, who the innocent person is, depends on the facts.

[213] The same is true where an innocent person acts in circumstances of necessity. Thus, where a defendant is able to show that his conduct in causing the death or injury to an innocent person was objectively reasonable in the particular circumstances, he will be exonerated. In determining whether the conduct of the defendant was reasonable a court will consider questions of proportionality. As was said in Crown Chickens, "*the greater the harm that was threatened, and the fewer the options available to prevent it, the greater the risk that a reasonable person would be justified in taking, and vice versa*".⁴⁷

[214] In view of the circumstances, I am satisfied that the defendant has demonstrated that the police officer's conduct under the circumstances and hence the injury resulting therefrom was justified and hence was not

⁴⁶ S v Makwanyane and Another 1995 (3) SA 391 (CC) at par 138

⁴⁷ Crown Chickens (Pty) Limited t/a Rocklands Poultry v Rieck 2007 (2) SA 118 (SCA) at par. 14

wrongful or unlawful.

[215] I therefore find that the plaintiff has failed to establish that he was injured as a result of an unlawful and wrongful assault by a police officer.

ORDER

[216] I make the following order: -

[a] The plaintiff's claim is dismissed;

[b] The plaintiff is to pay the defendant's costs.



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

Date of Hearing: 25 and 26 August 2020

Heads of Argument: 4 September 2020

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