

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



CASE NO: 2019/11384

(1) Reportable No  
(2) Of interest to other Judges No  
(3) Revised: No

Date: 29/3/2022

A. Maier-Frawley

In the matter between:

**SIMON FONGOQA**

Applicant

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

First Respondent

**SINQOBILE EQUESTRIAN SECURITY SERVICES**

Second Respondent

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J U D G M E N T

(Handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 March 2022)

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**MAIER-FRAWLEY J:**

**Introduction**

1. The Plaintiff instituted an action for damages arising from bodily injuries sustained by him during a shooting incident that occurred on 21 January 2019 at the Vereeniging train station. As the unrefuted evidence at trial revealed, one of the security guards employed by the second defendant fired a shot (rubber bullet) at the plaintiff, which ultimately resulted in the loss of the Plaintiff's right eye.
2. The plaintiff sued the first and second defendants jointly and severally, the one paying the other to be absolved. The first defendant admitted its legal duty to ensure the safety and security of commuters both on its premises and on its trains. The second defendant was one of the companies contracted by the first defendant to render security services at the Vereeniging train station for purposes of discharging the first defendant's legal duty aforesaid. Both the first and second defendants disputed liability for the plaintiff's claim with all heads of damages remaining in dispute.
3. In terms of Rule 33(1) of the Rules of court, the issues of merits and quantum were separated with the trial proceeding only on the merits (liability).<sup>1</sup>
4. The second defendant raised a plethora of defences to the plaintiff's claim in its plea. At the conclusion of the evidence and during oral argument, the second defendant's counsel informed the court that it was pursuing only its

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<sup>1</sup> Including, in the first instance, issues concerning wrongfulness, negligence and causation, and in the second instance, the issue concerning vicarious liability by the first and second defendants for causal negligence and/or breach of a legal duty by employees (security guards) of the second defendant acting in the course and scope of their employment with the second defendant, with the second defendant acting as agent of the first defendant.

defence of necessity and contributory negligence on the part of the plaintiff. These defences are dealt with later in the judgment.

5. Five witnesses testified at the trial, including: the Plaintiff, two witnesses on behalf of the first defendant and two witnesses on behalf of the second defendant. Before summarising their evidence, it is worthwhile highlighting the pleaded cases for the parties.

### *Pleadings*

6. The plaintiff's pleaded case is, *inter alia*, the following:

"4. At all relevant times hereto, and in particular on the 21st day of January 2019, the Plaintiff was within the premises of the First Defendant, which is under the direct control of the First Defendant.

5. At all relevant times hereto and in particular on the 21st day of January 2019, the First Defendant:-

5.2. conducted its affairs through the actions and/ or omissions of its employees and/or contractors in the course and scope of their employment with the First Defendant;

...

5.6 in providing and operating...rail commuter services aforementioned, had a legal duty alternatively a duty of care (hereinafter included in any reference to "legal duty" ), to ensure the safety of the public including the Plaintiff making use of such services as passengers or otherwise, by *inter alia*:-

5.6.2 taking such reasonable steps and implementing reasonable policies, procedures, rules and operating instructions to be employed by its servants, agents and other person under its control;

6. At all relevant times and in particular on the 21st day of January 2019, the Second Defendant:-

6.2 conducted its affairs through the actions and/or omissions of its employees...in the course and scope of their contractual relationship with the First Defendant;

6.3 provided security services to[sic] under a contractual relationship with the First Defendant, the nature of which advanced the interests and the business conducted by the First Defendant.

7. The First and the Second Defendants are jointly and severally liable to pay to the Plaintiff for damages sustained by the plaintiff, in the circumstances and in the amount set out hereunder.

8. On the 21st day of January 2019, at approximately 18:30 pm, the plaintiff was waiting on a queue (line) to buy a train ticket at Vereeniging train station in Vereeniging.

9. While the Plaintiff was waiting for his turn to buy the train ticket, he heard people screaming and thereafter heard gunshots

10. When the Plaintiff looked around, he saw security guards shooting at the people and one particular security officer fired shots directly at him, with one bullet hitting his right eye.

11. The security officer that shot at the Plaintiff was wearing full camouflage security uniform in blue colour.

12 The Plaintiff subsequently fell down due to the excruciating pain on his right eye.

13 The aforesaid injuries were caused solely as a result of the negligence of the First and Second Defendants and/or its agents who were negligent in one or more of the following respects:

13.1 By failing to keep the premises under proper control;

13.2 By failing to properly ensure the safety of the commuters and/ or potential commuters, more particularly that of the Plaintiff.

13.3 By failing to safeguard the well-being of the commuters in general, and in particular the Plaintiff by exercise of due and reasonable care;

13.4 By failing to take any or adequate precautions to prevent the Plaintiff from being injured.

14. As a result of the foregoing, the Plaintiff sustained serious bodily injuries which injuries are as follows:

14.1 Complete Global Destruction to the right eye."

#### *First defendant's plea*

7. In its plea, the first defendant, *inter alia*, admitted that it had a security contract with the second defendant and did not dispute the legal duty alleged in paragraph 5.6 of the particulars of claim (read with the averments in para 5.6.2), namely, **'to ensure the safety of the public including the Plaintiff making use of such services as passengers or otherwise, by inter alia, taking such**

reasonable steps and implementing reasonable policies, procedures, rules and operating instructions to be employed by its servants, agents and other person under its control.'

8. The first defendant denied that:
  - 8.1. its contractors were employed by the first defendant or acted in the scope of their employment with the first defendant or that it conducted its affairs through them;
  - 8.2. it was jointly and severally liable to the plaintiff for payment of damages;
  - 8.3. the plaintiff was shot and injured whilst waiting in line to buy a train ticket, averring instead that on the day in question, the plaintiff was one of the people who were causing a commotion at the station and was not shot at by a security officer, rather, he collided with a pole;
  - 8.4. the alleged injuries sustained by the plaintiff in the incident were caused by any negligence on the part of the first defendant and/or its agents in the respects alleged in paragraph 13 of the particulars of claim.

*Second defendant's plea*

9. Relevant aspects of the second defendant's plea are the following:
  - 9.1. It denied that the incident occurred as alleged by the plaintiff and as a result of the negligence of the second defendant's employees, averring that the plaintiff formed part of a group of commuters standing at platform 1 and 3, seeking to unlawfully obtain entrance to platform 1 to access a train standing at platform 2 [later averring that the plaintiff illegally accessed 'the platform'.]
  - 9.2. It averred that it had a legal and contractual duty to ensure the safety of the first defendant's premises and commuters. This entailed it:

9.2.1. having to ensure the safety of visitors and commuters at the premises; and

9.2.2. having to take reasonable steps to prevent the occurrence of a potential violent and/or hazardous situation;

9.3. In paragraph 7.3 of its amended plea, the following was averred:

**"7.3 The plaintiff formed part of a group of commuters standing at platform 1 and 3 seeking to unlawfully obtain entrance to access a train standing at platform 2."**

9.4. If the court were to find that the incident occurred as pleaded by the plaintiff, then in the alternative, the second defendant averred that the plaintiff solely negligently caused the incident or alternatively, contributed to the incident by, *inter alia*, unlawfully entering onto the premises of the first defendant when it was unsafe and inopportune to do so and by partaking in unlawful activities with fellow commuters in accessing the platform or alternatively, failing to take adequate precautions when noticing the illegal activity occurring and the necessity of the second defendant's employees having to diffuse a dangerous situation.

9.5. In paragraphs 7.10 and 7.12 to 7.14 of the plea, further alternative pleas were averred in the following terms:

**"7.10 ... the second defendant pleads that its employees were subjected to an unlawful attack by a mob of commuters, to which the plaintiff was a party, which threat was real and imminent and **which on previous occasions, had escalated to the point where rocks were directly thrown at its employees.** The employees of the second defendant had reasonable grounds for believing that they, alternatively innocent commuters, further alternatively the property and premises of the first defendant, was in danger and **accordingly the force used was necessary in the circumstances to repel the unlawful attack and commensurate with the mobs aggression, of which plaintiff was a party.**"**

7.12 In the further alternative to the aforementioned and should it be found that the employees of the second defendant had in fact shot (assaulted) the plaintiff, which remains denied, the second defendant pleads that its employees acted lawfully on the premise that there was an active commission of an offence at the premises of the first defendant, on which grounds the employees of the defendant were by law, entitled to subdue and to arrest the parties whom included the plaintiff and that the force accordingly employed was reasonably necessary under the circumstances.

7.13 **The force utilised was necessary** on the premise that **only 4 security guards, employees of the second defendant, were to prevent the unlawful activity of between 1000 to 3000 individuals of which the plaintiff was one from removing a gate, illegally accessing the premises and alighting the train.**

7.14 The mob, inclusive of the plaintiff, posed a threat of violence to the employees of the second defendant, alternatively, premised on previous incidents of rock throwing and assaults, it was suspected on reasonable grounds that bodily harm would have resulted to the employees of the second defendant and/or other commuters and/or the property of the first defendant.” (own emphasis)

## **Evidence**

### *Plaintiff's evidence*

10. The plaintiff's oral evidence was consistent with his pleaded version. According to the plaintiff, on 21 January 2019 he went to the Vereening train station after work in order to board a train to travel home. He was standing in a line (queue) at the ticket office, being one of several other people who were waiting in line to purchase a train ticket, when he heard shots being fired and people screaming and running towards the exit of the station located near the ticket offices. He had not yet reached the front of the line at this stage, with about three people still being ahead of him in the

line. He recalled turning his head to the right to try and see what was happening<sup>2</sup> whilst still standing in line, at which point he noticed a uniformed Sinqobile security guard standing about 10 m away from him, pointing a shotgun directly at him and firing a shot. He fell to the ground after being struck in the right eye at which time he experienced excruciating pain in his right eye. He was bleeding profusely. He remained lying on the ground close to the ticket office until removed by ambulance to hospital. He recognised the guard who shot at him, having seen him on previous occasions at the station. He knew the guard in question to be Xhosa speaking and testified that he would be able to point him out if he were to see him again. The guard in question was wearing a blue camouflage uniform.

11. He was first taken to Kopanong hospital where he underwent radiological examination and later to Baragwanath hospital where he underwent surgery to the right eye, during which procedure a rubber bullet that was still lodged in his right eye was removed, leading to the loss of his right eye. He now wears an artificial eye. During cross-examination by the first defendant's counsel, he was challenged to point out, in the hospital records, any reference to the fact that a rubber bullet was removed from his eye in theatre. He pointed to a radiology report that confirmed a 'retained foreign body in the intra comal space of the right orbit' and a further note that recorded the removal of a rubber bullet from his right eye in theatre on 25 January 2019.<sup>3</sup>
12. The plaintiff also testified about the lay out of the station and the location of platforms 1, 2 and 3 at the station. Platform 1 is mainly used by trains that convey goods or undertake long distance journeys. Once in a while platform

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<sup>2</sup> In cross examination the plaintiff explained that he turned his head to see what the people were running from and who was shooting, where after he was struck. Some of the people who had been standing in the queue at the ticket office also started running towards the exit at this time.

<sup>3</sup> These respective records appear at p 3-26 and 3-29 on CaseLines.



1 is opened for use by local trains to ferry daily commuters. When that happens, an announcement is made to commuters through the station loud speakers. Platform 1 is located more than 12 meters from the ticket office section. Platform 1 is separated from the ticket office section by a steel palisade fence that is situated between the ticket office section and platform 1 i.e., the fence is situated on the outside of platform 1 but within the station grounds. The distance between the ticket office and the fence is approximately 11 to 12 metres. There is a gate situated within the framework of the fence through which commuters are able to gain entry to platform 1. Platform 2 is utilised for trains travelling to Johannesburg and platform 3 is utilised for trains travelling to Germiston.

13. Commuters from Vereeniging town gain access to and exit from the station grounds through an entrance/exit point that is situated close to and at the back of the ticket office section. Persons entering the station premises from the town side or exiting the station premises have to pass through the ticket office section. Commuters wishing to purchase a train ticket would ordinarily be required to stand in line outside one of three ticket offices that are housed within a discrete building. Commuters who already possess tickets would simply pass through the ticket office section, then turn left to access a staircase that leads to an overhead pedestrian bridge, which in turn provides passage to a ticket inspection point and a gate respectively each providing entry to platforms 2 and 3. These respective gates at platforms 2 and 3 are manned by ticket examiners and guards are deployed at such points to prevent commuters from gaining illegal access to the platforms if they are not able to produce a train ticket. The route leading to platforms 2 and 3 does not go via platform 1.
14. The staircase to the overhead pedestrian bridge leading to platforms 2 and 3 is situated to the left side of the ticket office section. The stairwell entrance

is not visible to commuters standing in line at the ticket office. On the day in question, the plaintiff could see part of the palisade fence and platform 1 from where he was standing in the line. He did not notice commuters accessing platform 1 that day. According to the plaintiff, the gate inside the fence was closed. During cross-examination, the stated that he did not notice commuters attempting to gain illegal access to platform 1, conceding, however, that he might not have seen it, had it occurred. He stated that he was unaware of any commotion until he heard 3 to 4 shots being fired and people screaming<sup>4</sup> and running towards the exit of the station located near the ticket office section. People were running towards the exit point from within the station yard and some who had been standing in line also started running towards the exit point.

*First defendant's witnesses*

*Mr T Matlowa – Station Manager at Vereeniging train station*

15. Mr Matlowa testified that he did not witness the shooting incident or any other incident that may have occurred at the Vereeniging train station on 21 January 2019. He was merely informed by others of what had transpired at the station that day.
16. Pursuant to an objection by the plaintiff's counsel regarding the inadmissibility of hearsay evidence, the first defendant abandoned pursuit of a version concerning what this witness had been told by a security supervisor (identified as B. Komako) employed by the second defendant.
17. According to this witness, a train had come in at platform 2. He was performing a 'stop and check' at platform 2 when he received a report of an incident that had taken place at the station that day. He went to the scene

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<sup>4</sup> The screaming was coming from the direction of the staircase.

and found the plaintiff lying between the ticket office and platform 1, leaning against the palisade fence beside a pole, being a distance of about 5m from the ticket office. He saw blood coming from the plaintiff's eye. He could not say whether the plaintiff had been moved to the point where he said he had found him lying before he (Mr Matlowa) arrived on the scene.

18. The witness noticed that the palisade gate was on the ground but could not say what had caused this. From where he had been stationed at platform 2, he did not see any incident taking place on platform 1. When the plaintiff's version was put to him under cross-examination, namely that the plaintiff was shot whilst standing in line at the ticket office and that he fell down right there, the witness answered that *'I am not sure. I have no idea. I have no input regarding that.'*

*Mr A. Molefe – Shift supervisor for Protection Services at Vereeniging station, employed by Prasa*

19. Mr Molefe supervised the security guards of two separate companies that were contracted by Prasa as well as Prasa's own security company 'Brass' at the station. The security guards would report to him and he supervised their performance of their duties. He was informed by the Joint Operations Centre (JOC), which is Prasa's control, that a person had been injured at the station. He attended at the scene and found the plaintiff lying on the ground, leaning against the wall at the ticket office. He saw that the plaintiff's eye area was covered in blood but did not know how the injury occurred. By the time he arrived at the scene, he found the plaintiff together with the station manager and the supervisor of the second defendant. The station manager and supervisor furnished him with information of what had transpired.

20. Under cross-examination, he indicated that he arrived at the scene approximately 10 minutes after receiving information of an injured person at the station. He did not agree with Mr Matlowa's evidence about where the plaintiff was lying, stating that Mr Matlowa must have forgotten where the injured person was lying. He found the plaintiff where he saw him, i.e., at the ticket office passage.

*Witnesses for second defendant*

*Mr M Mphahlele*

21. Mr Mphahlele testified that he was in the employ of the second defendant on 21 January 2019 as a security guard, stationed at Vereeniging station.
22. He was not armed on the relevant day. He and other guards were deployed to Vereeniging station to safeguard against cable theft and to ensure that commuters did not access platforms through prohibited means. The guards would safeguard platform exits as ticket examiners are only stationed at the main entrance gates at the relevant platform, but not at platform ends or exits.
23. In his past experience, commuters had sometimes thrown stones at the guards stationed at entrance points in order to enter trains without tickets.
24. On 21 January 2019 he was stationed on the pedestrian bridge situated above the station leading to platforms 2 and 3. He could not see onto platform 3 but could see platforms 1 and 2 from where he was standing on the bridge. He saw '*chaos – people moving up and down from platform 1 to platform 2 and vice versa*'. He also saw people exiting the train that had arrived from Johannesburg on platform 2 throwing stones at guards who

were on platform 1 inside the station. He did not know how many guards were on platform 1. Initially, however, he stated that he saw commuters *'waiting for the train throwing stones.'* *The guards were on platform 1 and the people were coming through the gate where there is a fence dividing Prasa houses from platform 1. They were throwing stones at the guards and fighting them.'*

25. He later conceded that he did not actually see any of the guards because of the 'chaos'.
26. He heard gunshots but did not see who was shooting. Later, he stated that there were *'over 3 guards who had fired shots but he could not recall which is which.'* In the next breath, he stated that he was not sure that there were more than 3 guards who had fired shots.
27. He noticed at some stage that the gate in the palisade fence was 'down' but he did not see anyone actually pulling or breaking it down.
28. He confirmed that guards are obliged to carry pocket books in which they are to record all incidents that take place at the station. He could not recall whether he was carrying his pocket book on the day in question or whether he recorded the gun shooting incident therein. None of the pocket books of guards deployed at Vereeniging station on the day were requested to be produced for purposes of this trial.
29. He did not witness how the plaintiff got injured or shot. He could see the roof of the ticket office building from where he was standing on the pedestrian bridge but not the people standing in the line at the ticket office. He confirmed that he saw the plaintiff lying inside the ticket office section *'just further down the passage'* when he left work that evening.

30. He confirmed that commuters have to go past the ticket office to access platforms 2 and 3 by using a staircase that leads to the walkway bridge that eventually leads to the respective entrance gates positioned at platforms 2 and 3, where ticket examiners are stationed. Thus if a person arrives at the ticket examiner's gate without a ticket the gate would be locked and the person would be sent back to purchase a ticket.
31. A 'stop and check' operation is where people are stopped inside a train or at the train station and randomly searched for possession of train tickets.
32. As a guard employed by the second defendant, he did not receive any training on crowd management or how to control a crowd.
33. During questioning by the court with a view to obtain clarity about aspects of his evidence, the witness testified that he saw people coming out of the train on platform 2. They were walking up and down the station to go to platform 1. He stated that he did not know how the people would get from platform 2 to platform 1 but they went onto the railway tracks and picked up stones whilst they were inside the station. During further questioning by the second defendant's counsel pursuant to the court's questions, the witness stated that he could not see people entering through the gate outside platform 1. He only saw the gate being 'down'.

*Mr P Ratshilumela – regional manager in employ of second defendant*

34. The witness confirmed that he was in the employ of the second defendant on 21 January 2019, holding the position of regional manager, with responsibility for ensuring that the operations of the security guards run smoothly. The second defendant has been providing security services to the

first defendant since 2016. The services included the safeguarding of Prasa's buildings including commuters en route to their destinations and commuters at the station in general.

35. He was not present at Vereening station on the day of the incident on 21 January 2019. He was merely informed by the security team leader (Mr Kumako) and one, Mr Ditego, of how it came about that a person was shot in the eye with a rubber bullet. On a day sometime after the incident (which date he could not recall) he attended at the station and went to the ticket office where the victim was said to be seated after having been shot. On this occasion he did not see the palisade gate at all.
36. Guards employed by the second defendant receive firearm competency training through courses presented at various institutions. Guards are deployed at the station to safeguard access/exit points to prevent commuters from gaining access to board a train without a valid ticket. Vereening station is a main end point station that is ordinarily very busy.
37. Commuters with tickets pass through a passage at the ticket office section that directs them to a stairway which leads to a foot bridge above ground level. There is a palisade fence barricading the ticket office from the front of the platforms that has a gate with which to access platform 1. As a person walks out of the ticket office section such person would see the gate.
38. The second defendant's guards are placed at the access gates located at platforms 2 and 3 respectively as well as on the foot bridge and at the platform ends.

39. Three armed guards were deployed at the station on 21 January 2019, armed with rubber bullets. Before deployment, all the second defendant's guards are inducted by Prasa in respect of duties they are required to perform at the station.
40. The second defendant's guards are all required to carry pocket books in which they *inter alia* record all information of what had happened within the area of their deployment during their respective daily shifts. Once the pocket book is full, it is returned to and retained by Prasa, at which point the guard is issued with a new pocket book.
41. Under cross-examination the witness confirmed that all incidents occurring at the station are required to be recorded by the guards in their pocket books. Thus, if 10 guards were deployed at the station on 21 January 2019, all 10 of the guards should have recorded the incident in question, as all guards had pocket books on the day of the incident. Pocket books of the second defendant's guards were never requested to be produced at trial. The guards are duty bound to report any incident to JOL which is Prasa's control centre, and Prasa has its own occurrence book wherein it (Prasa) records all incidents that occur at the station.
42. When asked whether the second defendant trains its guards in the use of rubber bullets, the witness replied that such training is done by Prasa personnel during the induction training, although the second defendant also provides theoretical training to the guards.
43. Guards are trained not to fire at a crowd at close range. They ought to fire at a distance of at least 40 to 45 metres away from a crowd. The second defendant's guards are fully aware of this requirement. Firing a rubber bullet



from a shotgun at a distance of 10 metres from a crowd is not acceptable and would expose them to disciplinary action.

44. During re-examination the witness stated that an internal investigation was conducted by the second defendant in regard to the shooting incident. It was found that rounds were discharged from all three firearms of the three armed guards that were on duty on 21 January 2019, but they could not determine which of the three had shot the plaintiff. Security services were rendered by the second defendant, Royal Security and Prasa's own security personnel at the station although the witness could not say whether the security guards of Prasa or Royal Security were themselves armed.

*Oral Submissions of Counsel*

*Plaintiff:*

45. The plaintiff's evidence of how he was shot and injured on the day of the incident stands unrefuted. None of the defendants' witnesses were eye witnesses to the shooting incident itself and hence could not effectively dispute the plaintiff's account of the shooting.
46. During cross-examination of the plaintiff, the first defendant expressly abandoned reliance on its pleaded version, namely, that the plaintiff was injured by colliding with a pole, and not because he was shot by a security guard who was attempting to manage a crowd intent on accessing Prasa's trains illegally i.e., outside of access controlled entry points. The abandoned version was in any event wholly inconsistent with a rubber bullet having remained lodged in the plaintiff's eye and which was ultimately surgically removed from his eye.

47. The evidence of Mr *Ratshilumela* for the second defendant was that Prasa (first defendant) retained a supervisory role at the station over the second defendant's guards in respect of duties carried out by such guards, as entrusted to such guards by Prasa, which duties were being performed on behalf of Prasa at Vereeniging station. Moreover, Prasa, by means of its induction training of guards deployed by the second defendant at the station, retained oversight and responsibility of the way in which the second defendant's guards carried out their admitted duties, which included the duty to safeguard the safety and security of commuters, including would be commuters (particularly innocent parties), on its property, inter alia, by use of the firing of rubber bullets to disperse an allegedly violent crowd intent on illegally accessing its trains. The unrefuted evidence established a principal/agent relationship as between the first and second defendant, with the consequence that Prasa is jointly and severally liable for any damages sustained by the plaintiff as a result of the loss of his right eye consequent upon the shooting. Furthermore, the failure by the second respondent's guards to maintain a shooting distance of between 40 -45 metres when firing rubber bullet/s into a crowd or crowded space was negligent in the extreme and this directly resulted in the plaintiff's injuries and the resultant loss of his right eye.

*First defendant:*

48. The first defendant submits that the plaintiff has failed to establish liability on the part of the first defendant for the consequences of the shooting incident to which the plaintiff fell victim.
49. The abandonment by the first defendant of its version, namely, that the plaintiff collided with a pole (as opposed to having been shot in his right eye at close range) does not per se mean that the first defendant is liable. There

was no evidence of what its contractual relationship with the second defendant entailed or that based on such contractual relationship, the first defendant ought to have foreseen that the second defendant's guards would react in a certain way when faced with an unruly mob. Prasa actually provided security at the station and guards were trying to stem some chaos that had ensued between commuters and the security guards. There was no evidence that the first defendant ought to have foreseen harm befalling to the plaintiff or if it ought to have done so, what steps it could and should have taken to guard against such harm eventuating.

50. In the event that the court finds that the first defendant is liable, its liability should be limited to 20%.

*Second defendant:*

51. If the first defendant seeks an indemnification pertaining to a 20% apportionment in its favour, it was incumbent upon it to utilise the mechanisms of Rule 13, which it failed to do. If Plaintiff succeeds in proving liability, he must succeed jointly and severally against both the first and second defendants.
52. Reliance was placed on cases such as *Petersen*<sup>5</sup> and *Mandhlaami*<sup>6</sup> to support a finding in favour of the second defendant on its plea of necessity.

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<sup>5</sup> *Peterson v Minister of Safety and Security* [2010] 1 All SA 19 (SCA); Case No. 514/08 where the following was said::

"[11]...the defence of necessity does not require that the defendant's action must be directed at a wrongful attacker. There was therefore no need for the respondent to establish that Justin was himself part of the attacking crowd. What the respondent had to prove in order to establish the justification defence of necessity appears, for example, in broad outline, from the following statements in 'Delict' volume 8(1) LAWSA (2ed) by JR Midgley and JC van der Walt, paragraph 87:

*'An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a 3<sup>rd</sup> party... against a dangerous situation...Whether a situation of necessity existed is a factual question which must be determined objectively...A person may inflict harm in a situation of necessity only if the danger existed, or was imminent, and he or she has no other reasonable means of averting the danger...The means used and measures taken to*

53. The court should find that there was an incident of disorderly conduct and illegal activity involving the breaking open of a gate at the station which necessitated intervention by the guards for the protection of life, limb or property. The firing of rubber bullets was necessary to restore law and order and was not excessive when regard is had to the nature and extent of the danger that manifested at the station and the value of property involved.

### **Relevant legal principles**

54. It is trite that the first defendant has a public legal duty to ensure the safety and security of commuters both on its premises and on its trains.<sup>7</sup> This duty encapsulates a positive obligation to ensure that reasonable measures are put in place to provide for the security of rail commuters, regardless of who might be implementing them. Thus the overriding obligation to ensure compliance with its legal duties remainss with the first defendant. It cannot contract out of its constitutional obligations.
55. The test for liability of an employer for the unlawful conduct of its chosen independent contractor was formulated by Goldstone AJA in *Langley Fox*<sup>8</sup> as follows:
- (I) Would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,
  - (II) Would a reasonable man have taken steps to guard against the danger? If so,

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*avert the danger of harm must not have been excessive, having regard to all the circumstances of the case...*'

<sup>6</sup> Cited in fn 25 below

<sup>7</sup> *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC), para 20; *Rail Commuters Action Group and Others v Transnet t/a Metrorail and others* 2005 (2) SA 359 (CC) , par 84.

<sup>8</sup> *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A), par 12.

(III) Were such steps taken in the case in question?

56. The aforesaid test is akin to the test for negligence as enunciated in *Kruger v Coetzee*<sup>9</sup> as follows:

‘For the purpose of liability **culpa** arises if-

(a) A diligens paterfamilias in the position of the defendant –

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.’

57. It is well established that a delictual claim comprises of three distinct elements, namely, wrongfulness, negligence and causation, all of which must be proven for liability to ensue. Causation involves a dual enquiry.<sup>10</sup>

<sup>9</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-G.

<sup>10</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-H and 35A-D, where the following was said: “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 of 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 sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This basically is a juridical problem in which considerations of a legal policy may play a part.”

See too: *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* [1999] ZASCA 87; 2000 (1) SA 827 at [19], where the following was said:

“It should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue... It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case... [I]t has been recognised that while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable.”

And

*Pitzer v Eskom* [2012] ZASCA 44; JOL [2012] 29007 (SCA) at [ 24] where the court stated:

“What is or is not reasonably foreseeable in any particular case is a fact bound enquiry...Where questions that fall to be answered are fact bound there is seldom any assistance to be had from other cases that do not share all the same facts.”

58. In *AN v Mec for Health, Eastern Cape*, supra,<sup>11</sup> the test for causation was stated as follows:

“The test for factual causation is whether the act of omission of the defendant has been proved to have caused or materially contributed to the harm suffered. Where the defendant has negligently breached a legal duty and the plaintiff has suffered harm, it must still be proved that the breach is what caused the harm suffered.”

59. In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at [25], the court observed:

“A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.”

60. In *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at [33] the SCA held:

“Application of the ‘but-for’ test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person’s mind works against the background of everyday life experiences.”

61. As regards the defence of necessity: In order to constitute a lawful defence, any necessity must involve a threat to some legal interest, for instance, a threat to life or limb or of damage to property. In *Chetty*,<sup>12</sup> the plaintiff had been bitten by a police dog while the police were endeavouring to control an

<sup>11</sup> Cited in fn 20 above, at para [4].

<sup>12</sup> *Chetty v Minister of Police* 1976 (2) SA 450 (N) at 452F-453A. See too Delict 8(1) LAWSA (2<sup>ND</sup> ED BY Midgley and JC Van der Walt, par 87 where the requirements for a defence of necessity summarized as follows: “An act of necessity can be described as lawful conduct directed against an innocent person for the purpose of protecting an interest of the actor or a third party...against a dangerous situation... Whether a situation of necessity existed, is a factual question which must be determined objectively... A person may inflict harm in a situation of necessity, only if the danger existed, or was imminent and he or she has no other reasonable means of averting the danger... The means used and measures to avert the danger of harm must not have been excessive, having regard to all the circumstances.” (own emphasis)

unruly crowd of people outside a shop at which a sale was being held. The court held as follows:

“In the present context I consider that the police can only escape liability for harm caused by them if the following requirements are satisfied:

1. There must have been reasonable grounds for 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 action. Whether or not such a situation existed, must be considered objectively, the question being whether a reasonable man in the position of the police (Reed security guard) would have believed that there was such a danger...this is the approach in relation to the requirements of the defence of necessity.
2. The means used in an endeavour to restore order and avert such danger, and resulting in one or more members of the crowd being injured, were not excessive, having regard to all the circumstances, such as the extent of danger, the likelihood of serious injury to persons, the value of the property threatened etc.”

62. The learned authors Neethling Potgieter and Visser<sup>13</sup> describe vicarious liability in the following manner:

“Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a particular relationship between two persons...namely, that of employer-employee, principal -agent and motor car owner - motor car driver.”

63. When it comes to the evaluation of evidence, I bear in mind the principles to be applied where a conclusion on disputed issues is required, as enunciated in the case of *Stellenbosh Farmers Winery*.<sup>14</sup> In so far as the parties argue that there is a dispute between the plaintiff’s version and the defendants’ respective versions regarding the existence of a commotion or involving an aggressive mob of commuters partaking in alleged unlawful actions or

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<sup>13</sup> The Law of Delict, 5<sup>th</sup> ed.

<sup>14</sup> *Stellenbosch Farmers Winery group v Martel Et Cie* 2003 (1) 11 (SCA, par 5).

activities, which allegedly precipitated the shooting, I shall analyse each party's version on the disputed issues in reference to the credibility of the factual witnesses, their reliability and the probabilities. It is to that exercise that I now turn.

### **Discussion**

64. It is important to bear in mind that none of the witnesses who testified on behalf of the first and second defendants witnessed the shooting incident that occurred at Vereening station on 21 January 2019 during which the plaintiff was shot and injured. The Plaintiff's account of how he sustained an injury to his eye during the shooting incident thus remained wholly unrefuted in evidence. The plaintiff's version was that he was shot whilst standing in line to buy a train ticket. His version was corroborated by two other witnesses (Mr Molefe and Mr Mphahlele) who both testified that the plaintiff was lying injured against a wall at the ticket office after the incident. In so far as Mr Matlowa's evidence differed therefrom, I conclude that he was mistaken in that regard. The first defendant abandoned its pleaded version, namely, that the plaintiff had collided with a pole during the course of the trial. The plea of necessity relied on by the second defendant presupposes the use of force (in this case, the shooting) against an innocent party for purposes of protecting the interest of another party against a dangerous situation.<sup>15</sup> I therefore accept that the plaintiff's version that he was shot, and of how and where he was shot, was proven in evidence.

65. No evidence whatsoever was presented by either the first and second defendants to support their respective pleaded versions that the plaintiff was one of the people who were causing a commotion at the station [first defendant's plea] or was part of a group of commuters who were standing

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<sup>15</sup> Crown Chickens (Pty) Ltd v Rocklands Poultry 2007 (2) SA 118 (SCA)



at platform 1 and platform 3, seeking to obtain unlawful entrance to platform 2; or was part of a mob of aggressive commuters who had subjected the second defendant's guards to an unlawful attack and who had been involved in the active commission of an offence; or was part of unlawful activity involving between 1000 to 3000 individuals (of which the plaintiff was one) in removing a gate, illegally accessing the premises and alighting a train [second defendant's amended plea]. The plaintiff's own evidence was that he was not part of any group, let alone a large group of between 1000 and 3000 people who were seeking to illegally board a train or who succeeded in alighting same without a ticket. He was standing in line at the ticket office precisely because he wanted to purchase a train ticket in order to access a train legally. He was not either running away from any guards, having done nothing wrong.

66. Mr Mphahlele's evidence aside (whose evidence I deal with later in the judgment), neither the plaintiff nor any of the other witnesses called by the first and second defendants themselves witnessed any activities (whether lawful or unlawful) by commuters that preceded shots being fired by guards at the station on the day. They could therefore not state and indeed did not testify as to whether or not any unlawful activity on the part of commuters (or guards) had in fact taken place at the station on the day before the plaintiff was shot.
67. Mr Maphahlele, who was standing on the pedestrian bridge, was a single witness concerning his observation of a commotion involving commuters<sup>16</sup> (other than the plaintiff) at the station on the day in question. The plaintiff testified that he was not aware of any alleged commotion taking place at the station whereby other commuters were either damaging property belonging

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<sup>16</sup> He could not identify guards amongst the group, let alone the plaintiff.

to the first defendant or throwing stones at guards. He became aware that something was happening only when he heard shots being fired and heard people screaming and running towards the ticket office section in order to exit the station grounds. He had turned his head to the right in order to see what the people were running away from and who was shooting when he was suddenly shot by a guard whilst still standing in line at the ticket office. His evidence remained consistent throughout that he did not know what had caused the shooting. During cross-examination, the plaintiff was questioned about why he did not see people trying to access the train platform or break the fencing situated between the ticket offices and platform 1. He stated that *'I did not see people break the fencing or people trying to access the train station but I might not have seen it. I would expect guards to prevent those seeking illegal access or seeking to enter forcefully but not to (sic) those not doing anything wrong.'*

68. The second defendant's counsel submitted that that the plaintiff changed his version three times<sup>17</sup> and that this impugned his credibility. I do not agree. Nit-picking about the use of different words that were used by the plaintiff (testifying through the use of an interpreter) to convey the same message is akin to semantic debate,<sup>18</sup> if not sophistry, which is ultimately of little benefit in assessing the evidence. I found the plaintiff to be a credible witness. His version that he was shot at a time when people were already running towards the exit on the station grounds after gunshots were heard, was

<sup>17</sup> At first, so it was submitted in the second defendant's heads of argument, the plaintiff said that he looked what was happening when he heard gunshots and people scream; that this 'changed' when he said that he was curious about what was happening; that the version changed from him being 'curious' and 'looking' to the incident happening very fast by him merely turning his head and people coming running around the corner.

<sup>18</sup> A semantic dispute is a disagreement that arises if the parties involved disagree about the definition of a word or phrase, not because they disagree on material facts, but rather because they disagree on the definitions of a word (or several words) essential to formulating the claim at issue. ([https://en.wikipedia.org/wiki/Semantic\\_dispute#:~:text=A%20semantic%20dispute%20is%20a,formulating%20the%20claim%20at%20issue.](https://en.wikipedia.org/wiki/Semantic_dispute#:~:text=A%20semantic%20dispute%20is%20a,formulating%20the%20claim%20at%20issue.))

corroborated by other witnesses who confirmed that he was lying at the wall of the passage in which he was queuing at the ticket office. This evidence belies his involvement in any activities that may have taken place inside the station on the platforms and away from the ticket office section located outside the station platforms.

69. Mr Maphahlele was a single witness in regard to the events that preceded the shooting incident. He did not witness the actual shooting of the plaintiff himself. In order to evaluate his evidence, it is convenient to first point out what Mr Mapahlele did *not* testify about. He did not state in his evidence how many commuters were involved in the 'chaos' that he observed on platforms 1 and 2. He did not say whether warning shots were fired by guards on the day – indeed, he could not, as he did not even see where the guards were standing or moving on the day on which shots were fired. He did not observe commuters break down palisade gate but only saw that it was 'down'. Nor did he state whether he knew if the palisade gate had in fact been locked or was closed and upright before the 'chaos' that he observed ensued. He only stated that at the time that he observed the station below from the vantage point of the pedestrian bridge, he noticed that the palisade gate was on the ground, but he did not know how it came to be down or when this may have occurred.
70. Mr Maphahlele's evidence was inconsistent on pivotal issues at times. By way of example, during his evidence in chief, he stated that at 6h30 pm on 21 January 2019 he saw alot of 'chaos' which he described in vague and general terms as 'people inside trains, outside trains and on the platforms. He was then asked specifically what chaos he saw. He stated that people coming from platform 1 were throwing stones at the security guards. The people came from outside platform 1 through a small gate on platform 1.

They ‘crashed’ the gate, which was locked, in order to get onto platform 1. Later he stated that he never actually saw what had happened but that he only saw the gate ‘down’ from where it was before. During cross-examination, he stated that he could not see people pulling the gate down. During re-examination he stated that he could not see people entering through the gate to platform 1. Returning to the ‘chaos’ issue, during re-examination he stated that he ‘could not see clearly – there were guards and people and there was chaos’. When questioned further about whether he saw the guards ‘down there with the people’ he stated that he just heard gunshots and only saw the guards after the people had cleared the station and were inside the train. When asked how commuters would get from platform 2 to platform 1, he first stated that he did not know but in the next breath stated that they went onto the railway tracks and picked up stones whilst inside the station. When asked a while later where the people on the tracks were going to, he answered that they came through the small gate at platform 1, going to ‘the train.’ When asked how the people were getting through the gate, he stated that he could not see them entering but only saw the small gate when it was ‘down’. At first he suggested that it was the group of people who entered platform 1 through the gate who picked up stones and threw them at the guards. Later in his testimony he identified a second group who had disembarked from a train at platform 2 who picked up and threw stones. I agree with counsel for the plaintiff that it begs the question: why would commuters disembarking from a train need to drive guards away with stones? Such a version is implausible and indefensible. Significantly, Mr Matlowa had been present on platform 2 where he was performing certain duties prior to the shooting incident. Had any stone throwing occurred at platform 2, he would undoubtedly have seen it. Yet he did not testify about such an incident. He did however testify that he did not observe any incident occurring on platform 1. Mr Matlowa appeared to me to be honest albeit

that he was mistaken about where he encountered the plaintiff after the shooting incident.

71. Although Mr Maphahlele testified through the aid of an interpreter, he was evasive several times during the course of his testimony. Questions left unanswered had to be repeated on several occasions during the course of his testimony. On more than one occasion, an answer provided by him did not relate to the question asked, as demonstrated above, which then had to be repeated.
72. There is a further difficulty with Mr Maphahlele's testimony, assuming for a moment, its reliability. His evidence was materially incongruent with the second defendant's pleaded case, *inter alia*, the highlighted portions in paras 7.10 and 7.13 thereof quoted above. The plea contains no averment of stone throwing by commuters (including the plaintiff) on the 21<sup>st</sup> January 2019. It is telling that no amendment to the plea was sought to accord with the evidence of Mr Maphahlele. I am mindful that Mr Maphahlele could not remember whether he had carried his pocket book on the day in question or whether he had recorded the incidents that led to the shooting incident therein, despite this being part of his required daily duties and routine. As the second defendant's counsel argued, if he could not remember fulfilling a basic duty, how could he remember specific details of the events on the day in question? It was no surprise therefore that when he testified about the events some three years after the fact, he vacillated in recalling and describing the events in logical order and leaving much of what he said he observed in doubt as to its accuracy and cogency.

73. The vast array of internal contradictions in Mr Maphahlele's testimony,<sup>19</sup> coupled with the overt material contradiction between his version and the second defendant's pleaded case, leads me to conclude that he was not a reliable or trustworthy witness concerning what precipitated the shooting at the station on 21 January 2019. It is not without reason that counsel for the plaintiff and the first defendant both argued that his evidence was 'bad' and cannot be relied on. Having pegged its case to the evidential mast of such factual witness, the second defendant cannot be said to have discharged its onus of proving the alleged justification for the force used by its guards on the ground of necessity apropos the shooting of the plaintiff. Mr Maphahlele's testimony does not sustain a finding that a crowd of aggressive commuters actually broke down, let alone removed the palisade gate outside platform 1 in seeking to unlawfully obtain entrance to access a train standing at platform 2.<sup>20</sup> Nor did it establish that the armed guard who shot at the plaintiff was subjected to an unlawful attack<sup>21</sup> by an aggressive mob of commuters (including the plaintiff) who had sought to unlawfully obtain entrance to access a train standing at platform 2 or that unlawful activity or the active commission of an offence had been committed by a crowd of between 1000 to 3000 individuals (Including the plaintiff) when they allegedly *removed* a gate, illegally accessed the first defendant's premises or alighted a train (as averred in the second defendant's amended plea) or that

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<sup>19</sup> Not all the internal contradictions in Mr Maphahlele's evidence have been recounted in the judgment but they are on record.

<sup>20</sup> Par 7.3 - second defendant's amended plea.

<sup>21</sup> The unlawful attack being premised in the second defendant's plea on:

- (i) an aggressive mob removing a gate, illegally accessing the premises and alighting the train; or
- (ii) the mob posing a threat of violence or a *suspicion*, on reasonable grounds that bodily harm to the guards and/or other commuters and/or the property of the first defendant would result, premised on *previous* incidents of rock throwing and assaults at the station;

Juxtaposed against:

The unlawful attack being premised in Mr Maphahlele's evidence on stone throwing [at guards] by different groups of commuters on platforms 1 and at platform 2 (even though did not see the guards or what they were doing).

*such* conduct posed a risk of harm to or a threat of violence against the armed guards and/or other commuters, necessitating the firing of rubber bullets into a crowd at a close range of approximately 10 metres so that innocent persons such as the plaintiff, who was entirely removed from such activities whilst standing *outside* the station at the ticket office, ended up getting shot and injured.<sup>22</sup>

74. Accepting that the probabilities favour a finding that something must have precipitated the initial shooting inside the station, and assuming for purposes of argument, that stones were thrown by commuters on platform 1, the difficulty remains that identified guards who had discharged rubber bullets on the day in question were not called to testify at the trial. They were, after all, the very persons who would have had first-hand knowledge of events in which they were directly involved. They were also the only persons who could have testified about whether and why (or not) they believed a danger to life or limb or property was real or imminent and that the shooting of rubber bullets was the only reasonable way to avert the danger, whether reasonably suspected based on *previous* incidents of stone throwing at the station, or whether real for some other reason. No reasons were furnished by the second defendant for failing to call the guards in question. They were easily identifiable. They had, after all, been subjected to an internal disciplinary process by the second defendant.
75. But perhaps the most glaring lacuna in the second defendant's case (based on Mr Maphahlele's factual account of what precipitated the shooting by armed guards at the station) is that Mr Maphahlele did not testify about what the crowd who allegedly threw stones on platforms located inside the

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<sup>22</sup> As averred in paras 7.10 read with 7.12 to 7.14 of the second defendant's amended plea.

station did or where they went after gunshots were fired.<sup>23</sup> On the plaintiff's undisputed evidence, commuters were screaming and running towards the exit located outside the station after he heard three or four gunshots being fired. The fleeing commuters emerged from around the corner of the ticket office passage on the plaintiff's left side (and not the right side where platform 1 was located). In firing shots, Mr Maphahlele assumed that the guards were trying to protect themselves and to disperse a crowd of commuters who were throwing stones on platforms 1 and 2. On the probabilities, had an aggressive mob gained access to platform 1 through a prostrate gate outside platform 1, thereafter picking up and throwing stones to stave off guards on platform 1, such that it necessitated the firing of bullets by armed guards inside the station, such mob would likely have exited platform 1 at the closest point, being the point where they had allegedly accessed platform 1, when they started to run away from the shooting. Yet this was not the evidence presented at trial.

76. Moreover, why a guard continued shooting at close range into a crowd of people who had dispersed or who were busy dispersing by running away from the station platforms located inside the station towards the exit point near the ticket office located on the outside of the station, was left wholly unexplained. It begs the question: why the need for force (in *casu*, shooting) in the direction of and towards a group of people who were busy running away towards the exit point (town side), to ward off an alleged attack that had already allegedly occurred but which had abated by reason of the crowd dispersing by running away? Stated differently, if the crowd was already fleeing (and there was no evidence that the plaintiff was part of a fleeing crowd), what threat did they then pose to the guard who was shooting? Why then shoot towards an already fleeing crowd? The indelible conclusion is that

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<sup>23</sup> The plaintiff's evidence was that the people who were running towards the station exit had emerged from around the corner of the ticket office (i.e from the left side of the ticket office) moments before he was shot. This evidence remained undisputed.



there was no threat to the second defendant's employees or the property of the first defendant that warranted the use of force such as the shooting of rubber bullets at a time when people were fleeing towards the exit, let alone being proportional to any threat, either real or imminent, at that stage. There would have been no threat at that stage and in any event, no evidence was produced to substantiate that there was a prevailing threat at that stage. The plaintiff himself certainly posed no threat to any guards, commuters or station property. There was also no evidence that the fleeing crowd either posed a threat to any guard and/or fellow commuter and/or property belonging to the first defendant.

77. On the plaintiff's version, which I find neither to be improbable nor incredible, there was nothing unusual happening when he arrived at the station at approximately 18h20 and proceeded to stand in line at the ticket office. He did not put himself in a dangerous situation in so doing. It was after shots were fired at approximately 18h30 that people started running towards the exit point located near the ticket office section. Whilst turning his head to try and see what was going on, he saw a guard standing about 10 metres from him, pointing a shotgun in his direction when another shot was fired and he was struck and fell to the ground, injured and bleeding. It all happened very quickly.
78. Lastly, it is telling that the second defendant's witnesses did not testify about what counsel for the second defendant had put to the plaintiff would be their version. On the first day of cross-examining the plaintiff, counsel put to the plaintiff that the second defendant's witnesses would testify that a group of commuters had accessed platform 1 by breaking down the fence that separated the ticket offices from platform 1. The plaintiff replied stating that it would not have been possible for them to break a welded steel structure

of that nature. When cross-examination continued the following day, it was put to the plaintiff that the crowd had broken a small gate situated inside the palisade fence and that guards had been moved to a point in between platform 1 and the palisade fence in order to stop people from entering the station through such access point. Ironically, neither Mr Maphahlele nor Mr Ratshilumela presented such evidence at trial. It is also telling that the second defendant chose not to call the guards who were armed on the day in question to testify at the trial. They were directly involved in the shooting and would have had first-hand knowledge of what had happened prior to the shooting, at the time of the shooting and thereafter. Nor were the pocket books of any guards discovered or introduced into evidence. The first defendant's occurrence book and investigation report was likewise also not introduced into evidence. It is not unreasonable to infer in such circumstances that such evidence would not have corroborated the pleaded versions of the defendants.

79. I remain unpersuaded that the evidence presented by the second defendant was either adequate or sufficiently cogent or reliable to sustain the defence of necessity. As such, this defence must fail. The cases relied on by the second defendant to justify a finding in its favour on its defence of necessity do not assist it, being wholly distinguishable on the facts.
80. In *Mandhlaami v Minister of Police*,<sup>24</sup> a case in which the plaintiff in that matter was shot and injured during police action involving *inter alia*, the discharge of rubber bullets aimed at quelling attacks by a crowd of violent and angry protesters, the police involved in the shooting testified at the trial as to the means employed by them to avert a real and imminent danger to life and limb. In the present case, the guards involved did not testify and no danger, whether real or imminent, was posed by a fleeing crowd, as

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<sup>24</sup> *Mandhlaami v Minister of Police* (7279/2013) [2017] ZAWCHC 33 (29 March 2017).

indicated earlier. In *Petersen*,<sup>25</sup> a case in which the police were attacked and stoned by an angry crowd which had gathered while they were arresting people for the illegal possession of abalone. In the process the police had initially fired rubber bullets from their shotguns (to no avail) and then resorted to the use of sharp point ammunition (aiming at the ground) when they ran out of rubber bullets. In the process a young man called Justin Petersen was injured and his mother sought damages from the police in the local magistrates' court. The respondent raised the defence of justification in the form of self-defence, alternatively necessity. The plea of necessity was upheld by the trial court, which led to the dismissal of the appellant's claim, with costs. On appeal, the court agreed that the respondent had discharged the onus of establishing that the conduct of the police officers, which caused the complainant's injuries, was not wrongful, as their actions were justified by necessity. Again, what distinguishes this case from the present case is that the police involved in the shooting testified at the trial and a conclusion was reached based on the facts found proven in evidence.

81. The second defendant persisted with its plea of contributory negligence on the part of the plaintiff.<sup>26</sup> None of the witnesses who testified on behalf of the defendants saw the plaintiff being part of commuters who illegally entered the station platforms or who were posing a threat to the guards at the station or who were fleeing from the guards after the shooting started. The plaintiff stood in line to buy a train ticket as any law abiding citizen would do. On his version, he was doing nothing wrong and therefor had nothing to fear. He saw no reason to run away upon hearing shots being

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<sup>25</sup> *Petersen v Minister of Safety and Security* [2010] 1 All SA 19 (SCA) at 23.

<sup>26</sup> The issue of contributory negligence was pleaded as follows by the second defendant:

"The plaintiff solely negligently caused the incident or alternatively, contributed to the incident by, *inter alia*, unlawfully entering onto the premises of the first defendant when it was unsafe and inopportune to do so and by partaking in unlawful activities with fellow commuters in accessing the platform or alternatively, failing to take adequate precautions when noticing the illegal activity occurring and the necessity of the second defendant's employees having to diffuse a dangerous situation.

fired as he did not know what had caused the shooting or where the shots were coming from. At the risk of repetition, his version was that he remained standing in line at the ticket office and only turned his head after hearing screaming and gunshots, to see what was going on, at which time he saw a guard standing about 10 metre away from him, pointing a shotgun in his direction, where after he was shot in the eye. It cannot reasonably be contended that he put himself in harm's way by not immediately trying to flee even though others standing in in line opted to do so, because his version was that he did not know what was happening or why shots had been fired. Moreover, all this happened very quickly. It is not improbable that he had insufficient time to react when suddenly being confronted with a guard pointing a shotgun at him (plaintiff) and firing a further shot. For these reasons, I find that the plaintiff was not contributorily negligent. There was no evidence that the plaintiff entered onto the premises of the first defendant when it was unsafe and inopportune to do so, or that he did so unlawfully. Nor was any evidence presented that he partook in any unlawful activities with fellow commuters in accessing the platform or that he indeed even accessed any platforms. He did not notice any alleged illegal activity occurring and therefore could not have been alive to any need to take adequate precautions. The plaintiff's version was not gainsaid in evidence and in any event, the allegations in the second defendant's amended plea were not supported by evidence tendered by the second defendant at trial.

82. Both the first and second defendants accept that they had a legal duty to ensure the safety and security of persons such as the plaintiff at the station. The only other basis on which the second defendant could have assumed the first defendant's constitutional legal duty, if same was not contractually imposed, was in terms of a principal-agent relationship, given the denial by the first defendant that the second defendant's guards were employed by it

in terms of its contract with the second defendant.<sup>27</sup> A principal-agent relationship is an arrangement in which one entity legally appoints another to act on its behalf. The law of agency establishes guidelines for such a relationship if a contract concluded between such parties contract does not. In the context of the present case, the first defendant was responsible for induction training of the second defendant's guards in relation to the duties they were required by the first defendant to perform on its behalf. I cannot imagine a clearer example of a principal-agent relationship. That carries the consequence that if the second defendant is held vicariously liable for the actions of its employees - based on its admission that they were acting in the course and scope of their employment with the second defendant – and based on a finding that such guards acted unlawfully when shooting the plaintiff (assuming the other elements of the delict are proven), then so too would the first defendant attract vicarious liability for any negligent breach by the guards of the legal duty they assumed and undertook to perform on behalf of the first defendant.

83. The undisputed evidence was all the second defendant's guards knew that they were not allowed to shoot into a crowd of people at a range of less than 40-45 metres, precisely because it was dangerous to do so (as the events of the day proved true when the plaintiff was shot at a close range of 10 metres and thereby severely injured). The shooting towards a fleeing crowd at a close range of approximately 10 metres was in the circumstances wrongful and unlawful. Was this negligent?
84. The plaintiff's counsel submitted in his heads and during oral argument that the first defendant's negligence lies in the fact that armed guards were

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<sup>27</sup> In addition, the second defendant pleaded that it also had a contractual duty to ensure the safety of commuters, without, however, pleading what its contractual duties entailed. This contract was not produced by either the first or second defendants' at trial.

brought on site at the instance of the first defendant who retained the responsibility for training all guards deployed at the station, *inter alia*, in the use of rubber bullets. The first defendant also retained a supervisory role over the execution by the guards of their duties (as per the evidence of Mr Ramatshilane, who I consider to be an honest and credible witness). The evidence revealed that the armed guards in the employ of the second defendant were only subjected to theoretical training in the use and handling of shotguns. No practical training in shotgun use or crowd control/management was provided to such guards by the first defendant. No shotgun competency certificates were either discovered at trial.<sup>28</sup> Applying the test propounded in the case of *Langley Fox supra*, the first defendant ought to have foreseen a risk of danger occurring to commuters in unleashing improperly trained or untrained guards onto unsuspecting commuters or members of the public at its premises. It ought to have guarded against such risk by providing proper practical training to the guards, both in respect of crowd management and control and the firing of rubber bullets into a crowd or crowded space, at a safe distance, which steps it failed to take.

85. Seen from a different perspective, the guard who fired the shot that injured the plaintiff and caused him harm, breached his duty to protect commuters such as the plaintiff, when doing so when it was unsafe to do i.e., when shooting into a crowd at close range. He ought reasonably to have foreseen that firing of a rubber bullet at a person or into a crowd at close range would likely strike and injure a person, but did so regardless, in wanton disregard of

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<sup>28</sup> Mr Ramatshilane's evidence was that the second defendant would not have deployed armed guards unless the guards were possessed of competency training certificates. This statement amounts to nothing more than conjecture (a conclusion or opinion formed on the basis of incomplete information) and as such, falls short in establishing that the guard who fired the shot that caused irreparable harm to the plaintiff (permanent loss of right eye and eyesight) had in fact undergone proper training in the use of shotguns prior to being deployed at the station. The primary facts underlying the witness's opinion or conclusion could have been established by the production of documentary proof that the armed guards had the requisite firearm training or through the testimony of the armed guards themselves concerning the specific training they underwent and what it entailed.

the consequences of such action, as opposed to taking steps to guard against such occurrence. His actions in so doing so did not safeguard the security of the plaintiff – it put the plaintiff in harm's way, in negligent breach of the legal duty he was meant to perform.

86. That the guard who shot at or in the direction of the plaintiff was at fault permits of no dispute. He shot the plaintiff directly and at an impermissible close range. He either did so intentionally or negligently. If it was not intentional, then he ought reasonably to have foreseen that a shot directed at a person or persons at a range of 10 m carried the risk of such person/s being struck and injured and he therefore ought to have guarded against a risk of injury occurring, which he failed to do.
87. On the peculiar facts of this matter, but for the shooting of the plaintiff at close range by a trigger happy guard,<sup>29</sup> the plaintiff would not have lost his eye. The indisputable facts are that the plaintiff arrived at the station with a perfectly functional eye and left the station with a severe eye injury that culminated in the loss of his right eye. The evidence revealed that both the employees of the first and second defendant were aware of previous incidents at the station where unlawful activities committed by unruly crowds had escalated to violence and hence the need to manage such crowds in a safe and lawful. The guard's action in shooting at the plaintiff, who was standing without warning amidst an unexpected fleeing group, when it was unsafe to shoot, was linked sufficiently closely to the harm sustained by the plaintiff. As such, both legal and factual causation has in my view been established.


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<sup>29</sup> This, in circumstances where the consequence of such action ought to have been reasonably foreseeable and guarded against, particularly where the shot that struck the plaintiff was fired at a time when there was no real or imminent threat to the life or limb of the guard or commuters or the first defendant's property

88. For all the reasons given, I conclude that the first and second defendants are jointly and severally liable for the plaintiff's proven or agreed damages. There are no circumstances in this matter that call for a deviation from the general rule that costs follow the result. Accordingly, I grant the following order:

**ORDER:**

1. The first and second defendants are jointly and severally liable for payment of the plaintiff's agreed or proven damages.
2. The first and second defendants are jointly and severally liable to pay the plaintiff's costs of the hearing on the merits.

  
 AVRILLE MAIER-FRAWLEY  
 JUDGE OF THE HIGH COURT,  
 GAUTENG DIVISION, JOHANNESBURG

Dates of hearing:	8 to 11 November 2021 & 13 December 2021
Judgment delivered	29 March 2022

**APPEARANCES:**

Counsel for Applicant:	Adv. M. Mthombeni
Instructed by:	Mongwe Attorneys
Counsel for First Defendant:	Adv. J. Magodi
Instructed by:	Kekana Hlatshwayo Radebe Inc Attorneys
Counsel for second Defendant:	Adv. PA Venter
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