

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

2120/2004

DATE:

7 MARCH 2008

5 In the matter between:

ALIDA OCTOBER

1ST Plaintiff

LYDIA MAKIMETSO MOROLONG

2ND Plaintiff

SARAH PETRONELLA ARENDSE

3RD Plaintiff

TRISIA CONSTANCE

4TH Plaintiff

10 NICOLENE ARENDSE

5TH Plaintiff

DANIEL JANUARY

6TH Plaintiff

JONATHAN HENDRICKS

7TH Plaintiff

HENRY J C STEENBERG

8TH Plaintiff

DENNIS BENJAMIN

9TH Plaintiff

15 and

MINISTER OF SAFETY & SECURITY

Defendant

J U D G M E N T

20 SALDANHA, AJ:

[1] The plaintiff's claim for damages arises out of an incident which occurred in the residential area of Stanford on the night of 16 March 2004. The first plaintiff, Ms Alida October, sues in her personal capacity, that is mother and natural guardian of three minor children for the death

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of her husband, Mr Joseph Johannes October, who died on 23 March 2003(?) as a result of the incident.

[2] The second plaintiff, Ms Lydia Makimetso Morolong also
5 sues in her capacity as mother and natural guardian of
 Jajabo Gabriel Setlemogo(?) who was at the time of the
 incident a minor.

[3] The third plaintiff, Ms Sarah Petronella Arendse, sues in
10 her capacity as mother and natural guardian of Noleen
 October who at the time of the incident was also a minor.

[4] The remaining plaintiffs, numbers 4-9, sue in their
 personal capacities as a result of injuries sustained by
15 them in the incident. For the purposes of this judgment,
 Setlobogo and Noleen October will be dealt with as if
 they are the second and third plaintiffs respectively.

[5] The plaintiffs claim in their particulars of claim that
20 members of the defendant, the Minister of Law and
 Order, acting in the course and scope of their
 employment, wrongfully, unlawfully and intentionally shot
 at members of a crowd which caused the death of Mr
 October and injured the remaining plaintiffs. In the

alternative, plaintiffs claim that the members of the defendant were negligent on shooting at the crowd.

[6] The defendant initially denied that its members had
5 caused the death and injuries as claimed and in
amplification of its denial claimed that its members at all
times had acted lawfully in the discharge of their duties.

[7] At the commencement of the trial the defendant amended
10 its plea and while maintaining that its members had acted
lawfully, claimed that their actions were justified on the
basis that:

1. Members of the defendant had acted out of
necessity as the crowd had unlawfully
15 threatened the lives and safety of the police
by throwing stones and other dangerous
objects at them and at their motor vehicles,
alternatively;

2. members of the defendant had acted in self-
20 defence as the crowd had unlawfully
threatened the lives and safety of the police
by throwing stones or other dangerous objects
at them and at the motor vehicle, further
alternatively;

3. the plaintiffs and the deceased had voluntarily assumed the risk of being injured when making common cause with members of the public were unlawfully threatened and/or assaulted the police by throwing stones and/or other dangerous objects at them and their motor vehicles.

[8] At the commencement of the proceedings the legal representatives for the plaintiffs and the defendant submitted that by agreement between the parties the determination of the merits of was to be separated from that of the *quantum*. Counsel for defendant, Mr van der Schyff, also confirmed that the defendant had abandoned its point *in limine* in which it had claimed that the plaintiffs had failed to comply with the provisions of section 3 of the Institution of Limit of Legal Proceedings Against Certain Organs of State, Act 40 of 2002.

20 Background

[9] During the evening of 16 March 2004, Inspector David Kolide (indistinct) while on patrol duty with Constable reservist Riccardo Mengel in the township of Hopland, Stanford, observed a red Mazda motor vehicle being driven recklessly through the streets. They gave chase

and directed the driver of the Mazda vehicle to stop. The driver failed to do so and also disobeyed a number of stop signs, with the police in pursuit. He eventually came to a standstill in the driveway of a house, No. 1543 Compacter Street, which belonged to one Sylvia and which was run as a shebeen.

5 [10] (Indistinct) pulled up immediately behind the red Mazda
10 and both he and Mengel alighted in order to effect the arrest of the driver. One of the passengers of the red Mazda vehicle, Ivan, a brother of Sylvia, got out of the vehicle and disappeared. At this stage it appeared that a crowd of onlookers had assembled in the yard at 1543. (Indistinct) attempted to arrest the driver of the motor vehicle, one Bastiaan, who had also appeared to have been under the influence of alcohol. He claimed that the crowd obstructed him while he attempted the arrest, as a result of which Bastiaan was able to get away.

20 [11] Mengel had at that stage disappeared amongst the crowd. (Indistinct) returned to the patrol vehicle and found that the keys had been removed from ignition by somebody. He immediately called the Stanford police station over the vehicle's radio for back-up. It was common cause
25 that a number of other police vehicles arrived at the

scene in response to the back-up call. The Stanford police station was also asked to send a spare key for (indistinct) patrol van.

5 [12] There were various versions with regard to the behaviour of the crowd. The police witnesses contended that the crowd was unruly, aggressive and had thrown stones at them and at their motor vehicles. Most of the plaintiffs who were on the scene disputed that the crowd was aggressive and most denied that any stones were thrown
10 at the police or at the vehicles.

[13] At some stage members of the Neptune Operation police squad arrived on the scene in two white motor vehicles.
15 (Indistinct), on finding the key to the patrol van, left the scene. After he had left, other members of the police of Gansbaai, Hermanus and Stanford also left the scene. Thereafter members of Neptune attempted to leave. It is at this stage that the shooting took place which resulted in the injuries to the various plaintiffs and the death of
20 Mr October.

[14] Two members of Neptune who testified claimed that as they drove from the scene their vehicles were stoned by
25 members of the crowd. They fired warning shots into the

ground and into the air to ward off the attack. Most of the plaintiffs on their part denied that there was any stone-throwing. Most appeared to have been fleeing the scene when shot as the injuries which they sustained were on the back of their bodies. The deceased, Mr October, appears to have been shot in the chest and died about a week later as a result of the injuries. Noleen October was shot in the head and face and lost complete sight in her left eye.

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The location of the incident

[15] At the commencement of the proceedings the parties requested that the Court conduct an inspection *in loco* to familiarise itself with the area. The defendant had also very helpfully taken a set of six aerial photographs of the scene which was used during the course of the trial. The area, known as Hopland, is made up of low-income state houses. Compacter Street in which the incident took place runs in the direction of Stanford to Gansbaai. Compacter Street is a narrow tarred road with a width of approximately three metres. The houses in Compacter Street are very close to one another and each erf is approximately 8.5 metres in width. The houses were brick built and at the time of the incident there was no zinc and iron structures attached to the houses.

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[16] House No. 1543 Compacter Street (Sylvia's house) is directly opposite house number 1575. The numbering of the houses on Sylvia's side ascends in the direction of Gansbaai while those on the opposite side descend in the direction of Stanford. At house number 1544 (next to Sylvia's house) approximately 52 shotgun pellets were observed on the inside wall of the house near the door and approximately 120 shotgun marks were observed on the outside wall near the door. There were also shotgun pellet marks on the steel frame of the door. The marks were approximately 1.9 metres from the ground. There were also shotgun pellets observed on the front top right hand side of the wall of house 1544.

15 [17] There were street lights in the area near 1547 on the side of Sylvia's house. There were none on the opposite side. The houses on Sylvia's side of the road were at a higher elevation than those on the opposite side. At the inspection *in loco* a number of plaintiffs pointed out to
20 the Court where the police vehicles had parked and where they had been standing at the time at which they were shot and injured.

The onus

[18] The defendant accepted that it carried the *onus* on proving the various defences that it had raised (see Mbasa v Felix 1981(3) SA 685 (A) and Hoffmann & Zeffert: South African Law of Evidence (4th ed.) pages 501). Mr Heunis, who appeared on behalf of the plaintiffs, submitted that the defendant also carried the duty to lead evidence first as a result of its plea. This submission was opposed by Mr van der Schyff on behalf of the defendant. The Court ruled that the plaintiffs in the circumstances were required to lead evidence first.

The evidence

[19] Ms Alida October is the mother of two daughters and a son of which the deceased, Mr October, was the father. She was not on the scene of the incident and had heard from others that the deceased had been injured in the shooting. A report of a postmortem which had been conducted by Dr Isabella Bower on 19 June 2003 was handed in as evidence, although the pathologist was not called to testify. It was accepted by the defendant that the deceased had died as a result of the shooting incident.

[20] The postmortem report describes various injuries to the deceased, in particular, a number of shotgun wounds to the chest of the deceased. Shotgun pellets had penetrated the chest of the deceased at "the left liver lobe and the left kidney and the heart". There are also shotgun wounds on the deceased's front upper thigh.

[21] Mr Gabriel Setlebogo, the second plaintiff, was 15 years old at the time of the incident and a scholar in Standard

8. He claims that he had been visiting a friend at house 1573 Compacter Street where they had been watching television. They heard a commotion outside and went out to the yard what was taking place. He at some stage decided to cross Compacter Street to go home. While

15 walking through the yards between house 1546 and 1547 he was shot in the back of the head and on his back. He had seen one stone thrown from the back of Sylvia's house but maintained that it had been thrown long before the shooting by Neptune had taken place. He had heard

20 Ivan's mother shouting and the crowd had made a lot of noise near the red Mazda vehicle. It was put to him under cross-examination that most of the stones had come from the direction of the left hand side of Compacter Street in the area near house 1573. He denied it.

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[22] Noleen October, the third plaintiff, was 14 years old at the time of the incident. She testified that on the night in question she was in the company of Petra Masias and had been sent to buy a cooldrink at the house of Sylvia. She had been told by Sylvia to wait for the cooldrink. She could not recall anything further with regard to the incident or as to how she sustained the injuries. She testified that she still felt three pellets under her skull and had completely lost sight in her left eye. At the time of the incident she was a scholar in Standard 4.

[23] A report by Dr Chris Liaart who had examined Noleen on 17 March 2004 was handed in as an Exhibit. Dr Liaart was also not called as a witness and the contents of his report was not disputed by the defendant. The report records:

“Three intra-cranial pellets, diffused brain swelling and effacement of basal systems”.

The report also records pellet wounds to the skull and the head.

[24] Petra Masias, a cousin of Noleen October, confirmed that she had accompanied her to buy a cooldrink at Sylvia's house. At the time of the incident she was also 14 years old. She also confirmed that Sylvia had told them to wait

outside for the cooldrink. She saw a red car being chased by a police van which pulled up into the driveway of Sylvia. She saw Sylvia's brother, Ivan, get out of the vehicle. She, together with Noleen and a third person, climbed on and stood on a fridge which had laid on its side next to the wall of the house next door to that of Sylvia's. There was a lot of people at that stage in the yard of Sylvia and they did not want to be part of the crowd. They did however want to see what was going on.

10 She saw people throwing stones at the police vehicle and had heard the police calling for reinforcements over the police radio. Other police arrived.

[25] There were many people at that stage on the scene. She saw a white motor vehicle arrive and Stanford police subsequently leave the scene. She thereafter saw people from across the road falling down where she heard shots being fired. Noleen fell down from the fridge. She initially thought that Noleen was taking cover and fell over on top of her. She then noticed that Noleen was crying and that she was full of blood. Her face was also swollen. She maintained that neither she nor Noleen threw any stones at the police or at their vehicles.

[26] Ms Trisia Elisa Constance, the fourth plaintiff, testified that she was in the company of her friend, Nicolene Arendse, the fifth plaintiff on the night of the incident. They had been in conversation in front of Arendse's house in Compacter Street when they noticed that something appeared to be happening further up the street. Out of curiosity both she and Arendse walked up the road to see what was taking place. They found a large number of people in the area of Sylvia's house. She and Arendse stood in the yard of a family member's house, number 1573 Compacter Street, across the road from Sylvia's house.

[27] There was a number of people in front of them and as they were not able to see much they moved closer towards the pavement. She saw two white cars with guns sticking out of the windows slowly drive down the street. She decided to leave the scene at this stage. As they walked past, a blue Mazda vehicle which was parked in front of the house 1573, the occupants of the white car began shooting. She and Arendse fell to the ground and crawled behind the blue vehicle. She then noticed that Arendse was bleeding and felt that she had also been injured. She was shot with rubber bullets and sustained

injuries to her left arm and left side. The bullets were subsequently removed through surgery.

[28] She claimed that they had arrived on the scene when everything was almost over. She denied that there was any stone-throwing by the crowd. In cross-examination she conceded that she had thought that the crowd was "onsteld" and that they appeared to be angry. She, Arendse and others were taken by bakkie to the police station where they were subsequently taken by ambulance to the Hermanus hospital for treatment. She also denied that she and Arendse had stoned the police. She also maintained that it was out of sheer curiosity that she was on the scene.

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[29] Nicolene Arendse, the fifth plaintiff, confirmed that she was in the company of Constance and that they went to the scene out of curiosity. She described the lighting as very poor. She saw the patrol vehicle parked in Sylvia's yard and also saw the white motor vehicle come down the road just as she and Constance had walked past a blue Mazda motor vehicle when leaving the scene.

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[30] At this stage the police started shooting. She was shot on the left backside. A medical report which was handed

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in, indicated approximately 80 birdshot pellets on her backside. Photographs of the injuries to her backside was also handed in as evidence which depicted the size and extent of the wound. She had made a statement to the police in which she had stated that she had seen the police being stoned. In cross-examination she denied that she had said so to the police and denied that she had read her statement before signing it or that the policeman, Inspector du Toit who had taken it down, had read it to her prior to it being commissioned.

[31] Mr Jonathan Hendricks, the seventh plaintiff, testified that on the night of the incident he had been drinking at a shebeen in the company of Mr January, the sixth plaintiff. The shebeen is situated in a street next to Compacter Street. After having drunk a number of beers he, together with January, left and took a short-cut through the yard between houses 1545 and 1546 Compacter Street in order to get to their house which was situated in Dreyer Street, on the other side of Compacter Street.

[32] When in Compacter Street he saw the police vehicles and said to January that he anticipated trouble and that they should get away as soon as possible. As they walked past the blue Mazda vehicle he heard shots being fired

and felt a sudden burning sensation. At that stage he was on the pavement in front of the house 1573. He was shot on his left thigh from behind. He had seen guns sticking out of the window of the white vehicles driven by the Neptune squad. After being shot and while fleeing the scene, he saw the deceased Mr October lying near house 1573. He thereafter went to seek assistance for January who had also been shot.

10 [33] In a statement to the police after the incident he stated that he had seen half a brick being thrown at the police. In his testimony he denied having said so to the police. He also denied that the statement had been read out to him by the police officer who wrote it down or that he had
15 been given the opportunity of reading it. In the statement he also stated that he did not want an investigation into the shooting as he had been injured as a result of his own curiosity.

20 [34] Mr Daniel January, the sixth plaintiff, confirmed the version of Hendricks, the seventh plaintiff, in whose company he was. He was shot in his right thigh. He denied that there were any warning shots fired by the police. He had also made a statement to the police in
25 which he stated that the crowd was unruly and that

people had thrown stones. He denied having said so or that he was given the chance to read his statement or that it was read back to him by the policeman who had written it down.

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[35] Mr Henry Jerome Cornelius Steenberg, the eighth plaintiff, testified that on the night in question he had been drinking at the house of a police reservist, Hendricks. Hendricks had been called out to the scene at Sylvia's house. He and his brother, after finishing a few more beers, walked over to the scene where they stood directly in front of 1544 Compacter Street. At the scene the reservist Hendricks walked across to him and warned him that there was going to be trouble and that he should leave. Steenberg claimed that as he and his brother were about to walk away two white cars came down the road and the occupants (police) shot at the crowd. He immediately began running away and was shot on the left flank of his back and side. He had also made a statement to the police approximately a week after the incident in which he stated that the crowd was unruly and that he saw them throwing stones. He denied that he himself had thrown any stones and also maintained that he was on the scene out of curiosity.

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[36] Mr Dennis Benjamin, the ninth plaintiff, testified that he was in the company of a friend and that they had gone to a shebeen where they had bought a crate of beer. While walking back they saw the blue lights of a police van which was chasing a red Mazda vehicle around the streets of the township. He also saw that there was a half-naked person holding onto the bonnet of the vehicle and screaming as it was being pursued by the police. He saw the vehicle come to a standstill at 1543 (Sylvia's house) and the attempt by Chachabana(?) to arrest the driver Bastiaan.

[37] Bastiaan had grabbed the handcuffs from Chachabana and threw it away. He had also seen the reservist Mengel disappear into the crowd. At this stage he stood right across the house 1543 and heard Chachabana radio for reinforcements. He saw police officer Du Toit arrive at the scene. He also saw a stone being thrown at Chachabana's vehicle from behind Sylvia's house.

[38] In response Fourie fired a shot into the air. While standing there he heard from a friend who was also part of the crowd that Mengel had been given a "lekker klap of twee". He noticed a second stone coming from the direction of Sylvia's house and Fourie once again shot

into the air. He also saw police reservist Hendricks arrive at the scene. He had earlier seen reservist Hendricks drinking at his (Hendricks') house. He saw a third stone being flung from the direction of Sylvia's house at the police vehicle and Fourie fired a third warning shot into the air. He testified that he heard members of the crowd laughing at and teasing the Neptune police. As the Neptune squad left he bent forward to pick up the crate of beer which was on the ground in front of him. While doing so he was shot on the right hand. He subsequently received medical attention at the Hermanus hospital. He denied that the crowd had toyi-toyed or that they had been aggressive. He also denied that there was any other stone throwing other than the three stones he had seen flung. It was also put to him under cross-examination that most of the stones were thrown from the vicinity of the yard at 1573. Benjamin, like Setleboro, disputed this submission.

[39] On behalf of the defendant, Inspector Charl Coetzee who was stationed at the Hermanus police station, testified that he had received a radio report about the incident while out on patrol duty with Inspector Rust. It took them approximately 20 minutes to get to the scene where they found an unruly crowd that was singing and shouting. He

parked the patrol vehicle on the Gansbaai side of Sylvia's house, approximately three houses away, and he and Rust walked down to where Chachabana was standing in the yard of Sylvia's house. There were not stones thrown while he was present at the scene.

[40] Approximately 20 minutes later when Chachabana left, he and Rust returned to their vehicle to leave. As soon as they got into their vehicle the crowd began stoning the vehicle. The vehicle at that stage got stuck in loose sand. He leaned out of the window and shot three warning shots into the ground. This caused the crowd to disperse and they drove away. He did not think it necessary to shoot directly into the crowd, more especially since he had a 3mm handgun.

[41] While on the scene they had been approached by a reservist, August, of the Neptune police squad who had warned them that the police had shouted in Xhosa that as soon as the police drove away from the scene their vehicles would be stoned. When they drove away there was no crowd in front of them and they were able to drive away without any hindrance. He maintained that when they had arrived at the scene everything was under control and that there was no stoning at that stage. He

5 claimed that there was no direct threat to their lives on the scene and that no further reinforcements were called in as there was no perception that any of the officers
10 being in danger. The only damage to his vehicle was a mark on the windscreen and that he did not report any other damage at the police station. He did not see the incident in which the Neptune squad fired at the crowd or the stoning of Neptune.

10 [42] Chachabana described the background of the incident. He testified that when he realised that the keys of the motor vehicle had been removed the crowd had already become unruly. They began stoning him. He had to seek cover behind the patrol vehicle and he believed "I was
15 going to die on that day". The crowd had also toyi-toyed. He requested one of the elder persons in the crowd to calm them down but they would not listen to him and accused him of being a 'sell-out". At some stage he drew his pistol and fired a warning shot into the air. The crowd immediately stopped but thereafter continued with their stoning. The light was not very good and stones
20 had come from the darker areas.

[43] Fourie and Du Toit were the first to arrive in response to
25 his request for reinforcements. Shortly before reservist

Hendricks returned from the police station with the spare key he found the missing key laying in the sand near the patrol van. The Neptune squad was also on the scene at that stage. He reversed his vehicle out of Sylvia's yard and drove off in the direction of Gansbaai. As he drove off the crowd banged on the patrol vehicle with their hands and stoned it. He testified that there was lots of damage to the patrol vehicle but under cross-examination conceded that none of it had been recorded in the records of the police station.

[44] He described the curiosity of the crowd like being drawn to a bioscope scene. He maintained that it was not necessary for him to fire any further shots, despite the behaviour of the crowd. He explained that when the Neptune squad arrived, Captain Stroebel, the Neptune commander, was the most senior officer of the scene and therefore in charge of all of the police officers. Stroebel came up to him and informed him that as soon as he obtained the keys for the vehicle he should immediately leave the scene. As he left he did not hear any shooting but only the sound of stones and the banging on the patrol van. He did not see the shooting by Neptune and neither did he hear any shots being fired by them.

[45] Constable Riccardo Mengel was on patrol duty with Chachabane. He was armed with a 9mm pistol and confirmed Chachabane's account with regard to the background of the incident. He claimed that when they pulled up behind the red Mazda at 1543 and as they got out, the crowd was unruly and began stoning them. He was surrounded by about 20 people and was pushed down Compacter Street. He had his pistol in his hand but he did not find it necessary to use it. The crowd shouted threats at him and were very aggressive. Except for a slight injury to his finger he returned unharmed to the scene where Chachabane had remained. Upon Chachabane finding the key they left the scene and as they drove off there were stones thrown at the patrol vehicles from all sides. He did not hear any shooting.

[46] Under cross-examination he maintained that it was not necessary for him to have fired any warning shots on the scene or while driving off. He agreed with Chachabane's description of the crowd's curiosity as looking at "a bioscope". He claimed that not everybody in the crowd had thrown stones.

[47] Inspector Johannes Jacobus du Toit was stationed at the Stanford police station. He was at home when he

received a call to come out to the scene. He picked Inspector Fourie up at this house on the way. They were in private clothes and only he was armed with a Z88 pistol. At the scene they parked near house 1546 in Compacter Street and walked up to Sylvia's house where Chachabane was standing. The crowd was unruly and Chachabane tried to calm them but to no avail. Stones were thrown at them and they sought cover behind the patrol van. When Chachabane eventually found the key and drove off, the crowd banged on the vehicle and stoned it. He and Fourie waited until Chachabane had safely left the scene whereafter they walked down Compacter Street to the vehicle. They got in, made a U-turn and drove off in the direction of Stanford. There was no threat to them as they walked to their vehicle, nor as they drove away and, in particular, no stones were thrown at them. As they drove away they heard shooting from the Neptune vehicles, they did not turn back to investigate.

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[48] At the police station he was responsible for taking down the statements from a number of the plaintiffs. He had made photocopies of the statements and commissioned some of them in the absence of the deponents. He claimed that he did so because of the pressure he had

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worked under and the urgency of submitting copies of the statements to his headquarters. He maintained, however, that he had read the statements back to each of the deponents and that they had confirmed the versions which were set out in the statements. He conceded though that one of the deponents had not initialled any of the corrections that he had made on the statements. He claimed that a number of the people on the scene were drunk and that he knew that the police were not welcome in the area when people were in such a state. He claimed that there was no reason for him to use his gun or to fire a warning shot. There was no damage to the Mazda police vehicle in which he and Fourie had travelled in.

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[49] He contradicted his written statement in which he stated that he had seen Neptune shooting at the crowd. He ascribed the contradiction to his loss of memory as the incident had occurred almost four years since the trial. He recalled that when he and Fourie left, the road was not blocked and that they could leave the scene without any hindrance.

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[50] Inspector Widerow(?) Colin Fourie testified that when he and Du Toit stood with Chachabane at the scene the

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crowd was aggressive and threw stones at them. They took cover behind the van but it was not necessary for any of the police to use their firearms on the crowds. The stones had come from the direction of the Stanford side of Compacter Street. He confirmed that after Chachabane had "safely left the scene" he and Du Toit had walked to their vehicles and drove off without any hindrance. They did not see the shooting by Neptune but had heard shots from some distance from the scene. He was aware of the threats that the crowd had made and that they would stone the police upon leaving. He confirmed that some of the crowd appeared to be curious.

15 [51] He also recalls seeing the deceased in an injured state later at the police station. Both he and Du Toit claim that although they arrived first on the scene, they had not considered removing Chachabane from the scene as they feared that the crowd would torch the patrol van if it was left behind. He conceded though that they could very well have left the scene at that stage with Chachabane. He denied that he had fired three warning shots into the air, as claimed by Benjamin.

[52] Captain Petrus Johannes Stroebel was in charge of the Neptune operation squad. Neptune had been set up as a special operation task force to deal with the fight against poaching of perlemoen and other fish on the coastal areas. On the evening of 16 March he was at the operations base in Hermanus when he received a call from the Hermanus police station to assist at the scene in Stanford. He had nine members under his command, five of whom were on duty and four were off duty with him at the base. The four off-duty members accompanied him in a Volkswagen Golf whilst the five on-duty members rode in a white Mazda vehicle.

[53] He testified that they were all armed with shotguns and some in the Mazda had 9mm handguns. They reported in at the Stanford police station at approximately 22h00 where they were informed about the keys which had been removed from the patrol vehicle and the stoning by the crowd. They were directed to the scene at 1543 where they parked directly in front of the houses 1575 and 1576. There was approximately 150 people at that stage on the scene, which subsequently grew to about 300 people. At the scene he spoke to Chachabane who informed him that he was waiting for the spare key for

the patrol vehicle. The crowd began toyi-toying and he returned to his vehicle.

[54] Reservist August, one of the Neptune squad, came up to
5 him and informed him that he had heard the crowd in
Xhosa saying that they would stone the police as soon as
they drove away from the scene. He had also heard the
crowd shout abuse at the Neptune squad and demanded
that they leave the scene. He was scared for his life as
10 he was not familiar with the people nor the area. As
Chachabane reversed out of the driveway and drove off,
the crowd began stoning the patrol vehicle. He fired one
shot with rubber bullets into the ground as a warning. He
aimed in the direction of house 1543. As a result of the
15 shot the crowd briefly stopped throwing stones and
dispersed. As Chachabane drove away the crowd
continued stoning the patrol van. He fired another shot
of rubber bullets into the ground in the direction of
Gansbaai. The crowd again stopped stoning. He got into
20 his vehicle and drove off in the direction of Stanford.

[55] At this stage his vehicle was stoned from all directions.
He immediately stopped the vehicle and through the
window fired two further warning shots of rubber bullets,
25 but this time directed into the air. At this stage the rest

of the Neptune squad also began firing. As he fired he immediately drove off in the direction of the Stanford police station. He emphatically denied that he had fired with the intention of killing or injuring anybody and believed that his actions in firing the warning shots were lawful in the circumstances.

5 [56] Under cross-examination he denied that he had ordered
any of the other Neptune members to fire at the crowd or
10 to fire any warning shots. He said that he had left it to
their individual discretion as to the use of their weapons.
He also claimed that it would not have been appropriate
for him to have given any instructions to them about
when and how to use their weapons. He conceded that
15 the plaintiffs who were injured in the back could have
been shot "by accident" as they would have been fleeing.
He maintained that none of the shots he fired was
directed at the crowd and that he was therefore not
responsible for any of the injuries to any of the plaintiffs.
20 He also claimed that the damage to the Neptune vehicle
was insignificant and therefore did not warrant it being
recorded in the records of the police station. He
confirmed the contents of the occurrence book at the
Stanford police station that Officer Friesler had fired

three shots of rubber bullets and two shots of birdshot (donshael).

5 [57] Officer August had fired five rubber bullets and five
birdshot (donshael). Officer du Toit (of the Neptune
squad) had fired three rubber bullets and three birdshots
(donshael). Officer Le Fleur had fired six rubber bullets,
Officer Biggs fired five rubber bullets, Officer Julies fired
10 six rubber bullets. Le Fleur, Biggs and he were in the
same vehicle. (I have referred to the “donshael” simply
as birdshot as no description of the calibre of the
shotgun ammunition used was given in evidence).

15 [58] Stroebe! maintained throughout his testimony that it was
not necessary for him to have shot directly at the crowd
and that warning shots were sufficient and in fact had the
desired effect of dispersing the crowd. He also claimed
that no stones were thrown at his vehicle from the front
and that it was clear to drive away. He claimed,
20 however, that although he could have driven away, he
stopped and fired because of the stoning from all the
other sides.

[59] Reservist Liesel August was a member of the Neptune
25 squad which was on patrol duty with four others. They

had been informed by Stroebeel of the trouble in Stanford and immediately went to the operations base in Hermanus. There they armed themselves with shotguns and with birdshot and donshael and rubber bullets.

5 When they arrived at the scene in Compacter Street they found that the crowd was unruly and sang in Xhosa “panzi polisie ons gaan julle met klippe bestook”. He claimed that they, the Neptune squad, were instructed by Stroebeel that if the crowd threw stones at them when they
10 left they should fire warning shots into the ground or into the air “ons moet onself beskerm maar ons moet op die grond skiet of in die lug net om te kan uitkom”.

[60] While on the scene and prior to Chachabane leaving, he
15 claimed that the crowd was aggressive and had thrown stones at the police. However, he did not think it necessary at that stage to fire any shots at the crowd.

When Chachabane left the crowd stoned his vehicle. Stroebeel was the first to fire a warning shot into the air in
20 the direction of Gansbaai. He claimed that Stroebeel had also fired a second warning shot into the air and again in the direction of Gansbaai. He claimed “op daai stadium het ons nog nie iets wonders gedoen nie” and as they pulled way stones rained from all sides on them. He shot
25 five rubber bullets and five birdshot into the air and

ground. He shot in the direction of Gansbaai. He was seated at the left rear hand side of the vehicle which was behind that of Stroebebel's vehicle. The crowd did not disperse as a result of his first shot he therefore fired the remaining five shotgun bullets. He claimed that the other Neptune members in the vehicle also fired shots into the ground and into the air.

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[61] Under cross-examination he claimed that Stroebebel did not see the stoning while they were on the scene prior to Chachabane leaving because of Stroebebel's poor eyesight. He was not sure in what order he had fired the rubber bullets and the birdshot. He appeared to have done so interchangeably. He denied emphatically that he had shot directly into the crowd and maintained that it was not necessary for him to have done so. He claimed that if somebody shot directly at the crowd it would have been in disobedience of Stroebebel's instructions to fire only warning shots into the ground and the air. He claimed that the plaintiffs had falsely made claims that they had been shot and suggested that they had incurred the injuries by running into walls and that Mrs Arendse, the fifth plaintiff, could have tripped and fallen onto a stone which caused the injury to her backside. He explained

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that Neptune was not very popular in the area because of their methods of operation in containing poaching.

The defences of necessity and self-defence

5 [62] The defendant is required to discharge the *onus* of proving on a balance of probability that members of Neptune were justified in causing the death of Mr October and the injuries to all of the other plaintiffs. The defendant relied on the defence of necessity and the 10 alternative, that of self-defence. These two grounds of justification, although closely related, differ in that self-defence always stems from and is directed at an unlawful (human) attack, while necessity on the other hand stems from either an unlawful human attack or from chance 15 circumstances such as acts of nature (Footnote 1 Snyman:Criminal Law (5th ed.) page 91).

[63] Self-defence is defined as:

20 “Noodweer is aanwesig wanneer die dader hom op redelike wyse teen iemand anders se onregmatige of dreigende, onregmatige handeling rig, om sy eie of ’n ander geregverdigde regserkende belange te beskerm.”

(Footnote 2 Neethling:Persoonlikheidsreg 117 quoted in 25 (onduidelik) Neethling, Potgieter en Visser, bladsy 38...:

“The principle that right does not have to yield to wrong has been a touchstone of civilised legal systems through the ages. The victim of an unlawful attack has been entitled to defend his person or property by virtue of the rule of law which has existed in all familiar legal systems for many centuries”. (Ntsomi v Minister of Law & Order 1990(1) SA 512 (C) at 526)

The Court in that matter also surveyed a number of decisions and authorities on the law of self-defence and stated as follows:

“In terms of these authorities the requirements to be satisfied before a plea of self-defence will be upheld may be summarised as follows:

There must have been an unlawful attack or threatened attack and the victim must have had reasonable grounds for believing that he was in physical danger. The means of defence must have been commensurate with the danger and the means of defence must not have been adopted when the threatened injury could have been avoided in some or other reasonable way”.

[64] (Indistinct): Law of Delict (7th ed.) at 74 puts it as follows:

“The defendant must show that there was an action
presence of imminent danger and a reasonably
apparent necessity for taking such actions as was
taken. Selman (*op cit*) it is lawful for any person to
use a reasonable degree of force for the protection
of himself or any other person against any unlawful
use of force. Force is not reasonable if it is either:

1. Unnecessary, that is greater than is requisite
for the purpose, or
2. Disproportionate to the evil to be prevented”.

(Footnote Ntsomi v Minister of Law and Order

1990(1) SA 512 (C) at 526.

[65] The defendant must prove on a balance of probability
that “die noodweerhandeling aan die ander kant moet
eerstens teen die aanvaller self gerig wees.” (Footnote
Neethling:Persoonlikheidsreg bl. 117-118).
Snyman:Criminal Law (5th ed.) page 91 refers to this
requirement as:

“It must be directed against the attacker. If Y
attacks X, X cannot direct his act in private defence
against Z. However, an attack by X may, in certain
circumstances, be justified by necessity”.

[66] Mr Heunis submitted that the defendant had failed in evidence to identify any of the plaintiffs or the deceased as having unlawfully attacked the police and as such the defendant could not rely on self-defence as a justification for the shooting of the plaintiffs and the deceased. A further requisite for self-defence:

“Die handelings moet noodsaaklik wees om die aanval af te weer.”

places the *onus* on the defendant to prove that the means used to avert the attack must have been commensurate with the force used in the attack. This is often referred to as the test of proportionality. In Ntamo v Minister of Safety & Security 2001(1) SA 830 (TK) at 839, Matlanga, AJP considered the proportionality of use of lethal force by the police in circumstances of that case. He referred to “in re v Molifi 1940 AD 2002 and 2004 where Watermeyer, JA had the following to say:

“Homicide in self-defence is only excusable under certain strictly limited conditions. The means of defence must be commensurate with the danger. Dangerous means the defence must not be adopted where the threatened injury can be avoided in some other reasonable way”.

Also see R v Atwood 1946 AD 331 and 340.

[67] In the matter of Ntamo, the police had shot and killed a person whom they believed had posed a life-threatening situation to them by the use of a firearm. The Court held that the police had to justify their resorting to lethal force. In this regard examples of factors that may be relevant are:

- “(i) The imminence of danger;
- (ii) how threatening the danger is to life or limb;
- (iii) the nature of the instrument, if any, the attackers use in waging the unlawful attack;
- (iv) the proximity of the attacker and the attacked;
- (v) the mobility of the attacker and the celerity of his/her movement;
- (vi) how easy or difficult it would be to apply force to a less delicate part of the body.

The particular facts of each case will determine which of these and other factors are relevant”.

[68] The Court, more importantly, have to make the assessment of the relevant factors on the basis of the new constitutional order where the right to life, to human dignity and bodily integrity is enshrined. In Ex parte: Minister of Safety & Security & Others in re S v Walters & Another 2002(7) BCLR 663 (CC), Kriegler, J states that:

“The Constitution commands the State and all its organs to respect, promote, protect and fulfil all the rights protected by the Bill of Rights”.

Langa, J in the matter of S v Mokojana & Seven Others
1995(3) SA 391 (CC) 138 at 448h-449a states as follows:

“The emphasis I place on the right to life is, in part, influenced by the recent experience of our people in this country. The history of past decades has been such that the value of life and human dignity has been demeaned. Political, social and other factors create a climate of violence resulting in a culture of retaliation and vengeance, in the process respect for life and the inherent dignity of every person became the main casualties. The State has been part of this disintegration not only because of its role in the conflicts of the past, but also because retaining punishments which are not (indistinct) to a high regard for the dignity of the person and the value of human life”.

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[69] In Mokojana, Chaskalson, P at 448H-449A makes the following comments with regard to a defence of self-defence:

“Self-defence is recognised by all legal systems.

Where a choice has to be made between the lives

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of two or more people, the life of the innocent is given preference over the life of the aggressor, this is consistent with section 33(1). To deny the innocent person the right to act in self-defence would deny to the individual his or her rights to life. The same is true where lethal force is used against the hostage-taker who threatens the life of the hostage. It is permissible to kill a hostage-taker to save the life of the innocent hostage but only if the hostage is in real danger.

The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim and favouring the life or lives of innocents over the lives of the guilty. But there are strict limits to the taking of life, even in circumstances that have been described and the law insists upon these limits being adhered to”.

Chaskalson, P further states at 449H:

“Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgment to determine the limits of private defence. Until now our law has allowed killings in defence of life but has also allowed killings in defence of property or other legitimate

interested circumstances where it is reasonable and necessary to do so”.

[70] In Ex parte: Minister of Justice in re S v Van Wyk 1967(1)

5 SA 4 at 88:

“Whether this is consistent with the values of our new legal order is not a matter which arises for consideration in the present case. What is material is that the law applies a proportionality test weighing the interest protected against the interest of the wrongdoer. The interests must now be weighed in the light of the Constitution”.

10 Matlanga, AJP also referred to the decisions of the European Court of Human Rights in McCann & Others v The United Kingdom 19969(21) EHRR 97 in which the Court dealt with the interpretation of section 2 of the European Convention on Human Rights and in the matter of Andronico & Another v Cyprus 1998(25) EHRR 491 at 545.

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[71] Matlanga, AJP found that the police had exercised disproportionate force to that required in the circumstances. The decision was upheld by the Supreme Court of Appeal on the basis that the police had failed to discharge the *onus* of proving that the fatal shooting was 25

justified in the circumstances. (Footnote 9 Minister of Safety & Security (SCA) 389/2001)

[72] The authors Neethling Potgieter and Visser define the
5 defence of necessity as:

“Nood toestand is aanwesig wanneer die dader deur
oormag in so ’n posisie geplaas word dat hy sy
geregverdigde belange of die van ander slegs kan
beveilig deur ’n redelike aantasting van die reg of
10 die goed van ’n andere.” Dit is Deliktereg, b 93-94.

The following guidelines are given with regard to the
determination as to whether a situation of necessity
exists or not:

- 15 (a) The question is whether an emergency exists
in reality is either caused through human or
animal or other natural cause; and
(b) whether an emergency exists must be
objectively determined.

Kriegler, J in Chetty v Minister of Police 1976(2) SA 490
20 (N) in reference to necessity states:

“If, in the performance of his duty, the police inflict
harm, even upon a person who is not himself guilty
of any unlawful conduct, then they are not
answerable to that person for any damage suffered
25 by him in consequence of the action taken subject

only to the limitations stated by Rumpff, J (as he then was) in the Mobe case, *supra*, at page 93:

“Wanneer die polisie hulle pligte vervul van die voorkoming van misdaad mag hulle nie inbreek maak op die regte van die individueel behalwe vir dit sover dit uitdruklik of by afleiding ekstatoeteringmagting blyk, tensy dit nodig is weens die aard en erns van die verwagte misdaad en dan alleen tot so 'n mate as wat redelik is in die omstandighede. Ek wil uitdruklik herhaal dat die geldigheid van eerder inbreuk van regte deur polisie indien dit nie deur 'n statutêre gemagtig word nie sal afhang van die feit en dat die Hof met die grootste reg die regte van die individueel teen willekeurige handeling van die polisie sal beskerm.”

[73] The test to determine the reasonableness of the actions of the police must be objectively determined. It is therefore appropriate for this Court to be reminded of the *dicta* of Van Winsen, J in Intanjana v Foster & Minister of Justice 1950(4) SA 398 at 406 AD:

“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 and at the time he acted. The Court must be careful to avoid the role of an armchair critic, wise after the event, weighing the matter in the secluded security of the courtroom.

Furthermore, in judging the matter it must be ever-present in the mind of the judge that at any rate in the particular circumstances of the case the person claiming to act in self-defence does so in an emergency the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in the situation of imminent peril".

Men faced in moments of crisis with the choice of alternatives are not to be judged as if they had both the time and the opportunity to weigh the pros and the cons per Innes, JA in Union Government v Berg 1940 AD 274 at 286.

[74] In a recent appeal in this Division, Pietersen v Minister of Safety & Security 2007(2) SA 1997 (C) the Court was rather interestingly faced with a situation in which the

police also raised a defence of necessity for the shooting of the appellant's minor child. Members of Neptune were involved in a shootout with a crowd that was resistant to the confiscation of illegally harvested abalone which had been loaded onto the back of a stationary bakkie in Gansbaai. It was common cause that the crowd of approximately 200 people were hostile to the police and that some members of the crowd had thrown stones at the police. The police also claimed that some members of the crowd had fired shots at them.

[75] The Court accepted the version of the police and found that the police were entitled to resort to the use of live ammunition to protect their lives. The appellant's son, who was part of the crowd, was injured. The Court found that the actions of the police was reasonable and justified insofar as a sudden decision had to be made as to how to respond to the shooting from members of the crowd by returning fire.

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The defence of consent

[76] The defendant in its plea raised as their third alternative the defence of consent. Mr van der Schyff, however, presented little or no argument in support of this defence. The defence, which is also known as "volenti

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non fit iniuria" is defined by McKarren:Law of Delict (4th ed.) at 95-96 in a footnote Lampert v Heever & Another 1955(2) AD at 512:

"No man can complain of an act which he has expressly or impliedly assented to. This principle, which was well known to the Roman and Roman-Dutch law, is commonly expressed by the maxim *volenti non fit iniuria*.

Literally interpreted, the maxim is applicable only to cases where a person has consented to suffer something which would otherwise be an intentional wrong, e.g. consent to undergo a medical operation or consent to the publication of a defamatory statement. But maxim is used in the wider sense and is applied to cases where a person has consented to run the risk of unintentional harm which would otherwise be actionable or attributable to the negligence of the person who caused it".

[77] Fagan, JA in Lampert v Heever & Another 1955(2) AD 507 at 512 states:

"One of the authorities relied on by the author in the passage referred to above (McKerran & Salmond (9th ed.) section 8 page 37 who says this maxim *volenti non fit iniuria* has a double

application. It applies in the first place to intention or acts which would otherwise be tortious and in the second place, to consent to run the risk of accidental harm which would otherwise be actionable as due to negligence of him who caused it".

In CJN Warren v Gillow Ltd v Sherbourne(?) 1904 TS 340 at 344, Innes, CJ states:

"It must be clearly shown that the risk of injury was known but it was realised and it was voluntarily undertaken. Knowledge, appreciation and consent, these are the essential elements but knowledge does not invariably imply appreciation and both together are not necessarily equivalent to consent".

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Assessment of the evidence

[78] Mr van der Schyff in his written argument submitted with regard to the defences of self-defence and necessity:

"A prior aggressor is a *sine qua non* for the raising of the abovementioned defence. However, in view of the fact that the plaintiffs deny any form of aggression at all towards the SAPS the versions are mutually exclusive".

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I must, however, consider whether the defendant, on a balance of probabilities, has proved the various grounds

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of justification it has raised. The quality of the evidence submitted both by the plaintiffs' and the defendant's witnesses, in particular with regard to the stoning and the intensity thereof during the incident, was not altogether satisfactory. On the other hand, it was not disputed that any of plaintiffs and the deceased were injured in the incident and the Court accepts that the injuries sustained by them and the death of Mr October was caused directly as a result of the shooting, in particular by the Neptune squad.

[79] Further, none of the defendant's witnesses identified any of the plaintiffs, including the deceased, as having thrown stones at the police. Mr van der Schyff in cross-examination of Mr Benjamin did, however, suggest to him that the reason why he was shot on his hand was that he may have been picking up a stone to throw at the police. However, this contention was not supported by any of the policemen who testified on behalf of the defendant and as such lacks any cogency.

[80] Both Mr Heunis and Mr van der Schyff in argument submitted that the incident should be seen in two phases. The first phase ends when the policemen from Stanford, Gansbaai and Hermanus leave the scene and the second

phase is the stoning of the Neptune police as they leave the scene and the shooting of the plaintiffs and the deceased. Inasmuch as the two phases may be distinguished in terms of the responsibility of the different contingents, the two phases are nonetheless linked by the behaviour and the conduct of the crowd, both at the time of the incident which commenced with the arrival of Chachabane and the subsequent arrival of the Neptune squad and the shooting by them.

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[81] Although most of the plaintiffs eschewed any knowledge about the aggressive behaviour of the crowd or that they were loud in taunting, I am satisfied on a totality of all the evidence that the version of the various police witnesses in this regard is more probable as they, with a greater measure of consistency and plausibility, described the behaviour of the crowd. It appears though that some members of the police witnesses may have exaggerated the behaviour of the crowd but that does not detract from their overall description of the conduct of the crowd. I am mindful that Coetzee, Du Toit, Fourie and Stroebeel did not understand Xhosa which was used by part of the crowd when singing and toyi-toying and merely assumed that they were aggressive by virtue of such behaviour.

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[82] Most of the plaintiffs who were on the scene, except for Benjamin, Setlebogo and the witness Petrus Masias (the cousin of Noleen October) maintained that there was no stone-throwing at all despite some of them having
5 deposed to incidents of stoning in their statements to the police. Benjamin in particular was an impressive witness who was both articulate and appeared to have had a clear recollection of the overall incident than most of the witnesses. Masias for her part had no direct interest in
10 the outcome of the proceedings save for supporting her cousin Noleen.

[83] I am unable to rely on the veracity of what is contained in the statements by the various plaintiffs to the police
15 given the circumstances under which it was taken and commissioned. The plaintiffs concerned went to the police station after being shot and in need of medical care and not for the purposes of making statements to the police. In court they denied that they said that there
20 was any stone-throwing or that the crowd was aggressive and denied having read the statements before signing it, or that it was read back to them.

[84] Du Toit, the policeman concerned, described the
25 circumstances in the police station at the time at which

the statements were taken. He was under tremendous pressure and he had not properly commissioned some of the statements. The version of the plaintiffs that they had not been given the opportunity of reading through their statements or that Du Toit himself had not read it back to them cannot simply be dismissed. More so when it appears that one of them states in the statement that he desired no further police investigation despite being injured.

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[85] Nonetheless, I am satisfied that on all the evidence that some members of the crowd did in fact and at various instances during the course of the incident throw stones at the police and at their vehicles. The intensity of the stone-throwing appears to have differed from time to time. This may explain why some of the police witnesses contradicted one another about when stones were thrown. In this regard Coetzee testified that while he was on the scene there was no stone-throwing at all. It was only when he left that there was stone-throwing and he was forced to fire three shots into the ground in order to disperse the crowd. So too was Stroebeel emphatic that while he was on the scene there was no stones thrown prior to Chachabane driving off. Their versions in

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this respect does not accord with that of the other police witnesses.

5 [86] It is common cause that the shooting of the plaintiffs and the deceased was not as a result of the shot fired by Chachabane or those fired by Coetzee. It is necessary to bear in mind that the area in which the incident took place was poorly lit and that it would have been dark in most of the yards in Compacter Street. The street lights and that from the houses appears to have afforded very poor lighting. It is also apparent that the area in which the entire incident took place was not very large and that the police would have at all times been in close proximity to the crowd.

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[87] A part of the crowd that had been drawn to the scene of the incident that Sunday night appears to have done so out of sheer curiosity and merely to observe what was taking place outside the shebeen at Sylvia's house. No doubt, the car chase by the police with its flashing blue lights in a relatively small township would have attracted the attention and the curiosity of a number of people. Chachabane himself described the scene as people drawn to "a bioscope". The unfolding drama however took the tragic turn in which a member of the community

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lost his life and a number of others were injured, one of whom has lost her sight in one eye and still has shotgun pellets in her head. It is also apparent that some members of the crowd appeared to have been under the influence of alcohol as described by one of the police witnesses, as also the plaintiffs themselves who admitted to having been drinking that night. The incident also occurred in close proximity to a number of shebeens.

10 [88] It is not exactly clear why the crowd had become aggressive towards Chachabane while he attempted to effect the arrest of Bastiaan. It is not a matter in which people had assembled for a particular reason or protest. It appears though that the attempt to arrest Bastiaan had

15 triggered the excitement which developed into the aggressive behaviour by some members of the public towards the police. Chachabane described the aggression and stoning by members of the crowd and that he had been fearful of his life and thought that he

20 was "going to die".

[89] However, despite harbouring such fear, he did not find it necessary to use his firearm to directly ward off any attack by members of the crowd. At some stage he did

25 fire one warning shot into the air which appears to have

had the desired effect of dispersing the crowd. None of the other policemen, in particular Du Toit, Fourie and Coetzee who were also in close proximity to Chachabane, found it necessary to take any direct action against the crowd. In fact Du Toit, who was armed, did not even deem it necessary to remove his gun from its holster. Mengal for his part, although having been pushed around by the crowd, also did not deem it necessary to fire any shots either directly at the crowd or to fire any warning shots. When leaving the scene Chachabane testified that his vehicle had been stoned and members of the crowd had banged on it. Even at that stage he did not deem it necessary to have fired any warning shots to have enabled them to leave the scene.

15 So too for Mengal.

[90] Du Toit and Fourie testified that they saw Chachabane leave the scene "safely" after which they walked through the crowd to their vehicle which was parked further down in Compacter Street. They got into their vehicle, made a U-turn and drove away in the direction of the Stanford police station. They were not stoned. Only at a distance of approximately 50 metres and near the stop street did they hear shots being fired by the Neptune squad. Even

at that stage they did not think it necessary to return to the scene to provide any assistance to Neptune.

[91] It is necessary to examine more closely the
5 circumstances under which the shooting took place by the Neptune squad. August testified that as he understood Xhosa he heard the crowd saying in Xhosa that they would stone the police upon them driving away from the scene. He conveyed this warning to both his
10 commanding officer Stroebel and some of the other police on the scene. It is clear that Chachabane and the Neptune squad (and all the other police) knew prior to leaving the scene that the crowd had threatened to stone their vehicles upon their departure. In response to this
15 warning Stroebel, who was the most senior officer on the scene, instructed Chachabane to immediately leave the scene upon him retrieving the keys. Stroebel had also informed the rest of the Neptune squad about the warning from August. He maintained that he had
20 instructed the Neptune squad merely to protect themselves as they left the scene. He denies emphatically that he gave them an instruction to fire any warning shots.

[92] The defendant in its reply to the plaintiffs' request for further particulars for trial, specifically states:

5 "An instruction was issued to shoot in defence of the members' lives and protection of police vehicles".

10 This assertion is, however, not supported by the evidence of Stroebel. It appears from the testimony of Benjamin and August that when Neptune arrived on the scene they were taunted and laughed at by members of the crowd. Stroebel claimed that members of the crowd swore at them and demanded that they leave the scene. Both Stroebel and August testified that Neptune was not very popular amongst the people in the fishing villages. August testified that members of the fishing communities 15 disliked Neptune because of the method of their operation and that they (Neptune) were regarded as a threat to the livelihood of the fishing communities. Stroebel testified that Neptune had previously been involved in other shootings in the fishing villages. It appears that Neptune had a poor reputation in these communities and were not very popular. With the benefit of hindsight I find it rather difficult to understand why Neptune was used in crowd control given this reputation. 20

[93] With regard to the actual shooting of the plaintiffs and the deceased, both Stroebel and August disavowed any responsibility therefor. In fact they emphatically denied that the warning shots which they had fired were directed at the crowd. Stroebel testified that he initially fired two warning shots, one in the direction of house 1543 into the ground and the second warning shot into the ground in the direction of Gansbaai. The other two warning shots were directed into the air. Stroebel was only armed with rubber bullets. He was also emphatic that it was not necessary for him to direct shots at any member of the crowd and that it sufficed merely to fire warning shots into the ground and into the air.

15 [94] August for his part testified that all six shots that he had fired was directed either into the ground or into the air. Likewise, he maintained that it was not necessary for him to have fired directly at the crowd to ward off the attack. Both Stroebel and August explained that they had fired because of the stoning by the crowd and because they believed that their lives were in imminent danger. However, despite this fear of their lives being in danger, they did not deem it necessary to fire directly at their attackers with their shotguns, either with the use of rubber bullets or birdshot.

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[95] The defendant called none of the other Neptune policemen who had fired their shotguns as they drove away from the scene, this notwithstanding that the policemen were apparently available to testify. It was simply deemed not necessary by the defendant to call any further witnesses. In the absence of the evidence by the other witnesses it is difficult for the Court to discern how it came about that the plaintiffs were injured and that the deceased was directly shot, given the versions by both Stroebel and August .

[96] With regard to the situation of the deceased there is no evidence before the Court as to exactly where he was at the time at which he was shot or what he was doing. All that the Court is able to assume is that he was part of the crowd at which the members of Neptune had shot at. He was shot in the chest and would therefore have been facing them as they drove by. As none of the policemen in the vehicle in which Stroebel were armed with birdshot but only rubber bullets, none of them would have been responsible for the shooting of the deceased. August denied any responsibility for shooting directly at the crowd and therefore disavowed any responsibility for shooting the deceased.

[97] One of the other policemen in the vehicle in which August was travelling must therefore have shot directly at October. The exact circumstances under which this person or persons shot is not known except for that described by Stroebel and August when they fired. Noleen October had been standing on the fridge next to house 1544 together with two others. Likewise there is no evidence of any of the policemen as to how it came about that she was shot. The injuries she sustained could only have occurred as a result of a shot being fired from the vehicle in which August was travelling. Although Noleen had stood elevated from the ground there is no direct evidence that she was injured while any of the policemen had fired a warning shot. None of the other policemen in the Mazda vehicle in which August rode had been called to testify with regard to this aspect.

[98] No expert evidence was given as to the trajectory of the shots fired by the policemen as warning shots. The defendant, having given notice that it intended calling an expert, failed to do so.

[99] Gabriel Setlebogo was shot in the back of his head and his back while walking away through the yard at 1546. Likewise, no explanation was tendered by the defendant

with regard to him being shot. The plaintiffs Constance, Arendse, Hendricks and January were all shot near the blue Mazda vehicle. All of them appeared to have been fleeing and there is no direct explanation by the defendant as to how the injuries to them were caused. Benjamin appeared to bending down to pick up a crate of beer and was shot on the hand. Save for the unsubstantiated suggestion to him by Mr van der Schyff that he was attempting to pick up a stone, there is no explanation as to the reason for him being shot. So too with Steenberg who was also shot in the back with birdshot.

[100] It had also been put to both Setlebogo and Benjamin in cross-examination that the evidence of the defendant would be that most of the stoning had come from the direction of yard 1573. However, these submissions were not supported by the evidence of either August or Stroebel.

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[101] Before proceeding further it is necessary to comment on the testimony of both Stroebel and August. Stroebel was the captain in charge of all the other police during the incident. At the time of testifying he had already retired from the police force. In his testimony he displayed an

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aloofness to the incident and eschewed any responsibility for the actions of the men over whom he was in charge of. His denial of the instruction to shoot appears to be less than credible and that he had simply left it to each of the policemen to decide for themselves what action to take under the circumstances. He certainly did not impress as a witness. He took no responsibility for the injuries which were sustained to any of the plaintiffs and the deceased. I am mindful though that when Stroebel testified he had just recovered from a heart attack and he did not understandably wish to incur any stress. However, there was nothing in his demeanour in evidence that demonstrated a sense of responsibility by him for the shooting by the members of his squad.

[102] August was a particularly poor witness. His version in some respects was absolutely implausible and, like Stroebel, he also took no responsibility for what had taken place on the night in question. His ridiculous explanation as to the possible cause of the injuries to the plaintiffs was also an indication of the almost flippant attitude with which he treated the seriousness and the consequences of the shooting.

[103] Despite the stoning of the Neptune vehicles, Stroebel remained steadfast under cross-examination that the path in front of him was clear in order for him to drive off. The stoning had come from the other sides and after firing the first two shots he got into his vehicle and drove off. When driving off the stoning was directed at his vehicle. He stopped, took up his shotgun and fired two further warning shots. This appeared to have been a signal to the rest of the Neptune squad to open fire, this notwithstanding that the road ahead was clear for him to make a getaway. Mr Heunis submitted that in the circumstances it was not necessary for Stroebel and the other police to have fired as they did as they could have driven away.

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[104] Mr van der Schyff in relying on the decision of Ntsoenze v Minister of Law & Order, *supra*, submitted that it was incumbent on the police when faced with such a situation not to flee but to carry out their police duties. However, neither Stroebel nor August claimed that it was their intention to effect the arrest of any members of the crowd. They simply wanted to get away. It was also not their intention to bring the crowd under control by the firing of the shots as it did not appear that the crowd would have continued with the stone-throwing after the

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police had left the scene. In fact, that was the very nature of the threat August had overheard. It appeared that the sole reason as to why they had shot was because they had been stoned while driving away. However, given the reliability of both Stroebe's and August's testimony, it is difficult to discern the actual intensity of the stoning as they drove off which necessitated a volley of almost 43 shots from the police.

10 [105] Mr Heunis submitted that regard must be had to the damage to the vehicles of Neptune as a measure of the appropriate force used in retaliation. Stroebe testified that it had not been necessary for him to record any of the damage to the two Neptune vehicles in the records of the police station both at Stanford and at Hermanus because the damage was not regarded as serious. It is also apparent that none of the members of Neptune were injured during the stone-throwing, either while they were outside the vehicle, or while they had fired the 43 shotgun rounds. Mr Heunis submitted that the fact that none of the policemen who had left the scene had been injured by any of the stone-throwing, if anything gives some indication of the intensity and the consistency of the attack by the crowd. He submitted that the direct

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shooting by Neptune at the crowd was wholly disproportionate to the attack.

[106] In applying the defences of necessity and self-defence,
5 the Court has to consider the requirements referred to earlier:

1. The question arises as to whether a situation
of necessity had actually existed. In this
regard the defendant carries the *onus* of
proving on a balance of probabilities that it
10 did in fact exist. With regard to the shooting
of the plaintiffs the only evidence submitted
was that of Stroebel and August. On
Stroebel's own evidence there was a clear
path ahead of him in order for him to drive off
15 and he could in fact have done so given that
the other vehicle was immediately behind him
that would also have enabled that vehicle to
have left the scene. None of the police
officers of Neptune were caught by surprise or
20 that the attack placed them in sudden peril.
They had been warned by members of the
crowd that they would be stoned upon them
leaving the scene. In the circumstances, they
knew that when driving off they were going to
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be subjected to stone-throwing. It appears though that this knowledge had led them to position their guns out of the windows of the vehicles as they drove down Compacter Street. As I have already indicated it is not clear what the intensity of the stoning by the crowd was at this stage given the reliability of Stroebel and August's testimony and the lack of any objective evidence with regard to the damage to the police vehicles.

2. With regard to the second requirement of the test of necessity I am particularly mindful of the caution expressed in the matter of Ntaniana referred to above, that a court should not *ex post facto* and with hindsight consider what ought to have been the more appropriate course of action the police should have taken under the circumstances. However, given the evidence before the Court and more so the lack of it by the other members of Neptune, I am left with no other conclusion to draw but that some members of Neptune must have fired directly into the crowd. Others may well have shot into the ground or into the air. There was no expert

evidence placed before the Court with regard to whether any of the shotgun pellets could have ricocheted from the ground and I am therefore not able to make any finding with regard to that aspect. It appears that shots must have been fired directly at the crowd, in particular at a height that caused the death of one of them. In the absence of direct evidence by the police who shot, it is not for the Court to speculate as to the situation of necessity or self-defence in which they found themselves.

I have already referred to the decisions of the Constitutional Court which emphasises the foundational rights of life and dignity. The defendant carries the burden of justifying the actions of its members in circumstances where a life has been taken and where others are seriously injured, such as Noleen and Mrs Arendse.

3. With regard to the defence of consent, as already indicated, the defendant did not seem to press this in argument. Chachabane himself testified as to the attraction that the incident had excited in members of the

community. It is therefore to be expected that there would have been a number of innocent bystanders at the scene in front of Sylvia's house. Mr Heunis submitted that as the policemen themselves testified that it was not necessary for them to fire directly at the crowd it could therefore not have been expected of any members of the crowd, in particular the plaintiffs, that they should have known that they could have been shot at directly by the police.

It is so that on a daily basis innocent bystanders are attracted to scenes of police arrests, shootings and street protests. It can hardly be countenanced that everyone who is an innocent bystander and who is injured in such situations could simply be regarded as having consented to such injury merely because of their curiosity and presence at such scenes. It is human nature to be curious and more so when such curiosity is excited very often by the actions of the police. It cannot be expected of members of a crowd to have consciously consented to the risk of being shot. In the circumstances I am not

satisfied that the defence of consent has been proved.

[107] In conclusion the Court finds that the defendant has
5 failed to satisfy on a balance of probability that it was
justified in the shooting which caused the death of Mr
October and the injuries to each of the other plaintiffs,
either on the basis of necessity or self-defence or that of
consent.

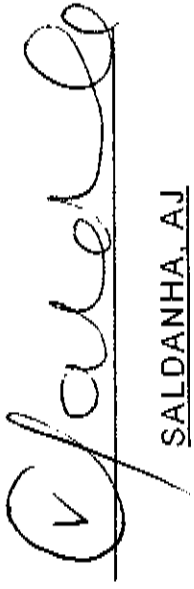
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[108] I accordingly make the following order:

1. The defendant is liable for the damages
suffered by the plaintiffs.
2. The defendant is liable for the costs incurred
15 by the plaintiffs in proving the merits of their
claim.

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SALDANHA, AJ

A handwritten signature in cursive script, appearing to read "Carlos A. Saldanha", is written over a horizontal line.

SALDANHA, AJ