



**Republic of South Africa  
IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case Number 6129/06**

In the matter between:

**MICHAEL JOHN ANDRIES**

Plaintiff

versus

**THE MINISTER OF SAFETY AND SECURITY**

First Defendant

**THE MINISTER OF JUSTICE &**

**CONSTITUTIONAL DEVELOPMENT**

Second Defendant

**ABRAHAM JOHANNES JACOBS**

Third Defendant

---

**JUDGMENT DATED THIS 10<sup>TH</sup> DAY OF OCTOBER 2011**

---

ZONDI, J:

**Introduction**

[1] In this action the plaintiff claims damages from the defendants he suffered as a result of bodily injury he sustained on 16 July 2005 when he was shot and wounded in the chest by the third defendant at a rugby field near Vlottenberg, Stellenbosch, Western Cape. As a result of the shooting the plaintiff was severely injured to the extent that he is now permanently paralysed.

[2] The plaintiff alleges that at the time of the shooting the third defendant was acting within the course and scope of his employment with the first defendant and/or the second defendant. It is common cause that at the time of the shooting the third defendant was a member of the South African Police Service and had been seconded to perform certain duties at the National Prosecuting Authority (“the NPA”) which falls under the second defendant. But whether the third defendant acted in that capacity at the time of the shooting incident is in dispute. The plaintiff’s claim is defended by all three defendants *inter alia* on the basis that the third defendant acted in self-defence in shooting the plaintiff.

[3] The quantum of the plaintiff’s claim is not relevant for the purposes of this judgment as the Court was requested by counsel for the parties at the commencement of the trial in terms of rule 33 (4) to separate the issues of liability and quantum of damages and to hear the merits and determine the issue of defendants’ liability first. As I was satisfied that there were good and sufficient grounds for the approach proposed by the parties I made an order in terms of rule 33 (4) to the effect that this Court will try and determine the issue of the defendants’ liability only and that issue relating to the quantum of the plaintiff’s claim will be determined at a later stage.

### **The pleadings**

[4] In the particulars of claim the plaintiff alleges that on about 16 July 2005 near Vlotenberg, Stellenbosch the plaintiff was unlawfully assaulted by being shot in the chest by the third defendant. The plaintiff further alleges that the third defendant was at all material time acting within the course and scope of his employment with the

first defendant and/or the second defendant, or in the furthering of the first defendant and/or second defendant's interest. The plaintiff further alleges that in shooting him the third defendant acted wrongfully, unlawfully and negligently.

[5] In its plea the first defendant denies that at the time of the shooting the third defendant was acting within the course and scope of his employment with the first defendant or was furthering its interest. Although the first defendant admits that at the time of the shooting incident the third defendant was a member of the South African Police Service it denies that the third defendant was on duty at the time of the shooting. It avers that he was and remained off duty. The first defendant alleges that the third defendant was seconded to the NPA in terms of section 39 (1) of the South African Police Service Act, 58 of 1995 and in terms of section 39 (3) of the said Act the third defendant was obliged in the performance of his functions to act in terms of the law applicable to the department of State or authority to which he was seconded; that the third defendant was issued with a firearm on the instructions of the director of Witness Protection Unit who does not fall under the auspices and/or control of the first defendant; that the third defendant acted in self-defence and his conduct in shooting the plaintiff was thus lawful, necessary and justifiable in circumstances where the plaintiff had stabbed the third defendant with a knife and threatened to do so again, necessitating that the third defendant discharge his firearm for his own protection.

[6] The second defendant also alleges in its plea that at the time of the shooting incident the third defendant was seconded to the Witness Protection Unit of the NPA; and was off duty. It denies that the third defendant acted within the course and scope

of his employment with the second defendant or acted in furthering the second defendant's interest at the relevant time. The second defendant contends that the third defendant acted in self-defence and his conduct in shooting the plaintiff was justifiable, lawful and reasonable in the circumstances.

[7] In his plea the third defendant denies that on 16 July 2005 he was acting within the course and scope of his employment with the first defendant and/or the second defendant or in the first or second defendant's interest when he shot and wounded the plaintiff. The third defendant alleges that on 16 July 2005 he was a member of the South African Police Service who had been seconded to the Witness Protection Unit of the NPA and further that although the members of the Witness Protection Unit are required to be on standby on a 24 hour 7 day per week basis the third defendant was and remained off duty at the time of the shooting incident which incident was done in self-defence.

### **The evidence**

[8] Various witnesses were called by and on behalf of the plaintiff to testify in support of the plaintiff's claim against the defendants. The third defendant also testified and called witnesses.

### **Plaintiff**

[9] The plaintiff ("Michael") testified that on 16 July 2005 he together with his two brothers attended a rugby match between the Evergreens of Stellenbosch and Temperance of Gouda. The match was at Vlottenberg in Stellenbosch. The plaintiff supported Evergreens and the third defendant at the field stood with the supporters

of Temperance. The match on the field became very physical and aggressive leading to a conflict on the rugby field between the players and the spectators which resulted in the referee stopping the match.

[10] The plaintiff testified that he observed some fighting on the field and he decided to get involved in the fight. He then proceeded to walk across the field to the other side at which the Temperance spectators were standing to partake in the fight against the spectators because according to the plaintiff *“hulle skel en vloek, hulle skel nou my team uit”*. At that point in time the third defendant together with his friend Le Fleur was standing on the other side of the field with Temperance supporters.

[11] The plaintiff testified that on reaching the other side of the field he smacked a person in the face. He could not recall who he had smacked. The plaintiff could not recall if the person he smacked retaliated. He testified that the next thing he could remember is when he was shot. He denied that on the day in question he had a knife. He stated that he never carries one. He also denied that he had stabbed the third defendant with a knife. The plaintiff could not recall how he was shot and what happened during the shooting. He stated that he could only recall falling to the ground and this is the time that he realised that he had been shot. He was unable to recall where he had fallen after the shooting. He, however, stated that he recalled that at some stage he was taken to hospital.

[12] When the plaintiff was asked whether he had consumed any liquor before going to the match or at the rugby field he admitted to have consumed beer but could not recall how many beers he had taken and when he was asked as to what

extent the consumption of alcohol had affected his sobriety he stated “*ek was nie soos opvallend dronk nie, ek was dronk maar ek nog kan onthou ek was nog by my volle positiewe gewees*”. He could not remember much of what happened either at Stellenbosch hospital or Tygerberg hospital to which he was taken two days after the shooting. He was later transferred to Groote Schuur hospital where the doctors advised him that he would not be able to walk again. He was paralysed. The plaintiff further stated that after his discharge from hospital he appeared at the Stellenbosch Magistrates Court on the allegation that he had stabbed somebody with a knife. He was told that the complainant was the person that had shot him but the charges against him were subsequently withdrawn.

[13] During cross-examination by Mr **Jaga** on behalf of the first defendant the plaintiff was asked why he could not recall what had happened on 16 July 2005 between the period that he assaulted a person until the period that he was shot. The plaintiff said he could not explain. He denied that he had a memory problem. He however, pointed out that following a shooting incident he had a memory loss for two months. The plaintiff was also cross-examined on the statement he made to the police on 11 November 2005 in which he *inter alia* had stated “*nog op die grond pad het ek met baie mense teenwoordig het ek net ‘sover wat ek kan onthou’ gesien ‘n bruinman rig ‘n pistool na my en ‘n skoot afvuur in my rigting*”. He admitted to have said this but this was based on what was conveyed to him by others. He did not see a coloured man shooting at him with a pistol. When the plaintiff was asked why he had acted aggressively on the day in question he stated that because of the conflict which was existing at the rugby field on the day in question. During the plaintiff’s cross-examination by Ms **Kusevitsky** for the third defendant the plaintiff said that he

could not remember how or where exactly on the road the shooting had occurred.

[14] Thereafter the plaintiff called his brother Abraham Andries to testify on his behalf. Abraham confirmed that on the day in question he was with the plaintiff at the rugby field. He also confirmed that at a certain stage during the match a commotion started on the rugby field and he together with some other spectators ran onto the field. At some stage he found himself between the two supporters of Temperance who were drinking beer and one of them commented badly regarding the manner in which the Evergreen players were playing rugby. Abraham responded by saying that that Temperance players were also playing badly. At that point in time Abraham saw a hand coming from behind his back smacking the person with whom he had an argument. When he turned around he realised that it was his brother, that is the plaintiff who had smacked the person. The person who was smacked walked away and the person who was with him indicated to Abraham that the person that they had just assaulted is the "*wetsman*". According to Abraham nothing happened on this day for the plaintiff to have intervened and assaulted the person. He further testified that the person who was smacked by the plaintiff walked to a Toyota Corolla and opened its boot. The person then removed an object from the boot which he thereafter closed. Thereafter the same person opened the vehicle door and got inside the vehicle. Abraham noticed that this person had a firearm in his hand. The person whom he identified as having been assaulted by the plaintiff was the third defendant. He saw the third defendant at the Court proceedings during May 2010. Abraham further stated that the third defendant then reversed the vehicle out of the parking area and Abraham tried to get at the third defendant while he was in his car. After reversing the vehicle out of the parking area the third defendant got out of the vehicle

and an unknown person got in and drove further. Abraham went on to say “*ek het nie gesien Mnr A (third defendant) klim terug nie*”. Abraham stated that he was very angry at that stage because the third defendant was the same man with whom he had had an argument earlier on.

[15] Steven Van Niekerk, one of Evergreens officials approached and took Abraham away from the third defendant's car. Thereafter a Toyota Corolla motor car travelled down the gravel road in the direction of the Stellenboschkloof Road. Abraham chased behind the motor vehicle as it slowly drove down the gravel road as he wanted to get at the driver of the vehicle. Whilst running behind the vehicle Abraham saw the third defendant on the grazing side of the gravel road. The third defendant thereafter turned around and fired a shot in the direction in which he had come from.

[16] According to Abraham he was approximately 10 meters away from the third defendant when the third defendant fired a shot. There was no one between him and the third defendant when the latter fired the shot. When the shot was fired he fell to the ground as he believed that he had been shot. Whilst on the ground he heard people screaming saying that the plaintiff had been shot. Plaintiff was at that stage approximately 7 meters behind him. Abraham further testified that after the shooting the third defendant got into the passenger side of a Toyota Corolla and thereafter the vehicle proceeded in the direction of Kuils River. At that stage he went back to the plaintiff and while at the plaintiff he noticed that the bus carrying Temperance supporters was about to leave the Stellenboschkloof Road. He went to stop the bus driver from leaving. When he got onto the bus he asked passengers to point out to



him the third defendant. One of the passengers asked him to leave which he did. Abraham went back to where the plaintiff lay. Whilst at the plaintiff he heard the bus starting up again. He was very angry and demanded the bus not to drive away while he walked to the plaintiff. On his way to the plaintiff the bus moved but before it got away he picked up a stone and threw it at the bus smashing its windscreen. He did not see anyone stabbing with a knife neither did he have a knife on the day in question.

[17] Abraham was also asked about the statement which he had made to the police regarding the occurrence of the incident. He admitted to have made a statement to the police which he thereafter signed. He denied that he saw the third defendant at the Stellenbosch Magistrates' Court. He denied to have accompanied the plaintiff to Stellenbosch Magistrates' Court. Abraham said each time that the plaintiff (Michael) had to attend Court his sister and his younger brother would always accompany him.

[18] During cross-examination by Mr **Jaga** Abraham denied that he had told the police that he was drunk on the day in question. He admitted that he walked towards a Toyota Corolla motor vehicle and grabbed at its occupant while it was still at the parking area because he had earlier argued with the occupant and he wanted to assault him. When he was asked why he had chased behind a Toyota Corolla vehicle as it was driving down the gravel road, he stated that he did so in order to assault its driver.

[19] He denied that he saw Mr Andries Le Fleur getting into his car and travelling towards the Stellenboschkloof Road. He described a person who accused Evergreen players of playing bad rugby as tall and bald-headed. However, in a police statement he described the person as short and dark in complexion. When he was asked whether Mr Krediet was in the vicinity of the shooting he stated that he did not see Mr Krediet. He, however, stated that Mr Krediet was one of the players who were playing on the day in question. He played for Evergreens. The last time he saw him was when he was on the field playing. During cross-examination by Ms **Kusevitsky** Abraham denied that the third defendant shot the plaintiff at a close range.

[20] Mr Winston Krediet also testified for the plaintiff. On the day in question he played for Evergreens in the position of a flank. He witnessed an altercation between players and spectators on and off the field. At one stage he saw Mr Van Niekerk who was a touch judge removing Abraham and the plaintiff from the area where an argument was in progress. Thereafter the plaintiff broke loose from Mr Van Niekerk and ran behind a Temperance spectator who was walking down the gravel road. Krediet followed the plaintiff. When Krediet was about 10 paces behind the plaintiff he noticed the plaintiff grabbing at the person who was in front of him and immediately thereafter a gun shot went off. According to Krediet the plaintiff "*gryp gryp aan die persoon wat voor hom is*" and wanted to grab at him. He denied that at the time of the shooting the plaintiff had a knife in his possession. He stated that if he had he would have seen it.

[21] Krediet also testified about the White Jetta vehicle which was stuck in the mud near the rugby field. The driver of the Jetta vehicle was confronted by Evergreen

supporters. He testified that the Temperance players assisted the driver to get it out of the mud. Eventually the Jetta vehicle managed to get out of the mud and slowly drove away down the road. At that point in time the crowd wanted to get at the driver and banged on the boot as he drove away.

[22] According to Krediet when the plaintiff attempted to grab at the defendant the two were standing face to face. It appeared to him that the plaintiff was attempting to grab the third defendant at his shoulder. Krediet further testified that when he asked the third defendant why he had shot the plaintiff the third defendant told him that the plaintiff had stabbed him.

[23] It was at that stage that he saw Abraham for the first time after the plaintiff was shot. According to him before the plaintiff was shot two vehicles, the Jetta and Toyota Corolla were already standing on Stellenboschkloof Road and the third defendant was walking briskly on the road towards Stellenboschkloof Road. The plaintiff was running behind the third defendant to get hold of him and probably assault him. He stated that the plaintiff at that stage was angry and wanted to assault the third defendant who at that stage had done nothing to the plaintiff. During cross-examination by Mr **Jaga** he conceded that if he was placed in the same situation as that the third defendant had found himself in he would have defended himself and this is what the third defendant did on the day in question. Krediet believed that the third defendant's life was in danger at that stage.

[24] Mr Krediet further testified that he had earlier requested the driver of the Toyota Corolla motor vehicle to drive away from the rugby field as he feared for his

life seeing that some spectators wanted to injure him. In his opinion had he not heeded his advice he probably would have been seriously injured. He said before the shooting there was no one between himself, the plaintiff and the third defendant.

[25] He disagreed with Abraham that the third defendant was about 15 to 20 paces away from the plaintiff when he fired a shot at the plaintiff. He stated that the plaintiff ran behind the third defendant at a distance of about 15 to 20 paces before the struggle between them ensued. Krediet testified that the reason why he ran behind the plaintiff on the gravel road on the day in question was to prevent the plaintiff from fighting.

[26] During cross-examination by Ms **Kusevitsky** Mr Krediet denied that after the shooting of the plaintiff by the third defendant Abraham confronted the third defendant with a knife demanding to know why he had shot the plaintiff. He, however, admitted that the plaintiff was very aggressive as he ran behind the third defendant.

[27] Mr Steve Van Niekerk also testified for the plaintiff. At the time of the incident Mr Van Niekerk was the secretary of Evergreens Rugby Club and he was one of the safety officers who were responsible for crowd control on the field. According to his observation the match was very physical and at some point a fight broke out between the players of the two teams with the result that their respective supporters invaded the pitch. The referee had to stop the match for a while, while an attempt was being made to clear the field of the spectators. Thereafter the match continued. However, shortly thereafter a fight erupted again in the field and this caused the

referee to finally call off the match. According to Van Niekerk at that stage the situation was restless and riotous. The people who were mainly involved in the fight were the plaintiff and his two brothers, the third defendant and his friend. Mr Van Niekerk did not witness any person being smacked on this day. He stated that the third defendant and his friend walked to a Jetta vehicle which was parked next to the field. On reaching the Jetta they opened the boot and both of them took out two black metal sticks and they thereafter walked back in the direction of the plaintiff and his brothers. The players prevented the plaintiff and his brother from coming into contact with the third defendant and his friend. He estimated the crowd to have been in the region of 100 people. He stated that Mr Krediet was one of the people who tried to bring the situation under control.

[28] Some few minutes later the third defendant together with his friend walked back to their respective motor vehicles. The third defendant's friend got into a Jetta motor vehicle while a lady got into a Toyota Corolla. The third defendant did not get into the motor vehicle. He walked along the Toyota Corolla as it was moving in the direction of Stellenboschkloof Road. The Toyota Corolla motor vehicle drove behind the Jetta and at that stage the plaintiff and his brothers followed the Toyota Corolla motor vehicle and the witness tried to prevent them from getting to the third defendant. As he was busy restraining the plaintiff and his brothers, the plaintiff broke loose and disappeared into the crowd. At that stage the third defendant was walking along the Toyota Corolla motor vehicle with his back facing the Stellenboschkloof Road, in other words he backtracked as he walked down the road. Michael approached the third defendant and at that stage the Toyota Corolla motor vehicle was in the Stellenboschkloof Road. The witness was about 10 paces behind

Michael and was trying to restrain him from confronting the third defendant. The third defendant turned around and pulled out a pistol out of his belt and fired a shot. Michael fell to the ground. According to the witness' observation the plaintiff was not armed and was some paces away from the third defendant. The witness approached the third defendant and told him to leave. It was at this stage that he saw Abraham running past him towards the third defendant. Thereafter the third defendant got into the Toyota Corolla and drove away. At that stage Abraham got onto the bus carrying Temperance supporters and looked for the third defendant. The witness followed Abraham.

[29] During cross-examination by Mr **Jaga** Mr Van Niekerk testified that the plaintiff and his brother were under the influence of liquor which he blamed for their misbehaviour. Mr Van Niekerk conceded during cross-examination that there were discrepancies between his police statement and his oral evidence but blamed the contradictions on the time that had elapsed since making the police statement. He could not remember everything. He also explained that before he went to the police to make a statement a meeting was held between Evergreens management and certain players of his club. And what he told the police was based on his own observations on the day in question as well as what was conveyed to him by other people who were present at the scene.

[30] Mr Van Niekerk was also referred to the record of the disciplinary hearing which had been instituted against Evergreens following the shooting incident and in which he had told the panel that he had not seen the shooting but had heard it. He confirmed it. During cross-examination by Ms **Kusevitsky** regarding the stabbing of

the third defendant by the plaintiff, Mr Van Niekerk conceded that although he did not witness the stabbing he could not rule out the possibility that the third defendant might have been stabbed. Van Niekerk confirmed that at a certain point in time Michael ran past him and followed the third defendant who at that stage was walking along a Toyota Corolla motor vehicle as it was travelling down the gravel road, but denied that the plaintiff was in possession of a knife. He stated that at the time of the shooting he was walking in the middle of the gravel road while the plaintiff was on his right side and third defendant on his left side. He denied that the third defendant shot the plaintiff at a close range. He stated that there were about 18 – 25 paces apart from each other.

[31] Miss Miti, the plaintiff's girlfriend testified about the appearances the plaintiff made at the Stellenbosch Criminal Court, following the criminal charges the third defendant had brought against Michael as a result of the stabbing incident. She testified that she always accompanied the plaintiff to the Stellenbosch Criminal Court. She denied that Abraham ever accompanied him. She denied that while they were at the Stellenbosch Criminal Court the plaintiff and Abraham approached the third defendant and apologised for the stabbing.

[32] Thereafter the first and the second defendants applied for absolution from the instance on the ground that the plaintiff had failed to make out a *prima facie* case against them namely that at the time of the shooting and injury to the plaintiff the third defendant was acting within the course and scope of his employment with either the first defendant or the second defendant. I dismissed the application for absolution on the ground that it was not in the interest of justice to grant absolution

as the test for vicarious liability involves the question of subjective intention of the third defendant and whether there was a sufficiently close connection between the shooting and the purpose and the business of the first and/or the second defendants.

### **Defendants**

[33] The third defendant testified and called witnesses *inter alia* David Henry Charles Van Rooyen and Andries Le Fleur to testify on his behalf. The third defendant testified that on 16 July 2005 he attended the rugby match in Stellenbosch on the invitation of Mr Le Fleur his long time friend. He travelled in his Toyota Corolla motor vehicle to the rugby field which he parked next to the field with its front facing the gravel road. Le Fleur arrived in his own motor vehicle, a Jetta which he also parked next to the rugby field. He testified that he did not know anyone at the match other than Le Fleur and his sister Sophia. The match was very physical and at a certain stage the referee had to interrupt it in order to talk to the players. Fifteen minutes into the second half the match was stopped once more as there was a further fight on the field between the players which ultimately resulted in the match being called off by the referee. In consequence of the fight on the field the spectators invaded the pitch. While this occurred the third defendant together with Le Fleur remained on the side of the field.

[34] As he was standing with Le Fleur two persons climbed through the fence of the field. They walked past him and approached Le Fleur who was standing behind him. An argument ensued between the two persons and Le Fleur and one of the persons whom he identified as the plaintiff, smacked Le Fleur on the face. The third defendant then intervened between Le Fleur and the plaintiff and suggested to Le



Fleur that they leave the field which they then did. They walked to their respective vehicles and as they did so a group of people including two persons who had climbed through the fence, followed them.

[35] The third defendant got into his vehicle opened the boot and removed a black baton in order to defend himself against the group of people which was behind him. At that stage Le Fleur was battling to get his motor vehicle out of the parking area as it got stuck in the mud. The third defendant walked over to assist Le Fleur by pushing the car out of the muddy area. While Le Fleur was busy reversing out of the parking area the plaintiff approached him and punched Le Fleur through the open window of the vehicle. The third defendant removed the plaintiff from the area of the vehicle. Le Fleur managed to drive out and he drove down the gravel road. Thereafter the third defendant walked back to his vehicle. It was at this point in time that the third defendant saw the plaintiff and his brother both in possession of knives followed by the flank of Evergreens team passing him. When the three persons walked past him one of them said "*daar ry hy kom ons maak hom klaar*". Realising that Le Fleur was in danger the third defendant immediately threw his car keys in the direction of his girl friend and asked her to bring his vehicle. The third defendant ran towards Le Fleur's car passing the flank and Abraham. At that stage the plaintiff, who was running in front of the flank and Abraham, was about 3 paces away from Le Fleur's motor vehicle. The third defendant, as he approached the plaintiff from behind, grabbed the plaintiff with his left hand on his right shoulder. The third defendant pulled the plaintiff. The plaintiff then turned in a clockwise direction and stabbed at the third defendant with his knife. The third defendant ducked and the knife scraped him behind his neck. Thereafter the third defendant hit the plaintiff with a baton over

his left shoulder.

[36] The plaintiff grabbed the third defendant by his T-shirt and pulled him towards him and stabbed him with his right hand in his back with knife. The plaintiff then lifted his hand a third time to stab at the third defendant once more. The third defendant then took out his pistol and shot the plaintiff in the chest less than a distance of an arm's length. After the shooting the third defendant looked up and saw Abraham near him in possession of a knife and suspecting that he might stab him as well the third defendant pointed his firearm at Abraham. The flank was close to Abraham after which one of them asked him why he had shot the plaintiff to which the third defendant replied that the plaintiff had stabbed him.

[37] The third defendant's girlfriend pulled up next to him. He asked her to continue driving as he feared for her life. He asked her to wait for him on the Stellenboschkloof Road whereafter he met her. He got into the vehicle driven by his girlfriend and they drove to Cloetesville police station where he reported the matter. Thereafter he proceeded to Stellenbosch Medical Centre for treatment. The third defendant sustained a six centimetre stab wound which was treated and for which he received 18 stitches. The third defendant testified that he had shot and injured the plaintiff in self defence after he had already hit the plaintiff with his baton to ward him off him but that did not succeed. The plaintiff had already stabbed at him twice and he would have stabbed him a third time had he not fired a shot at him. He stated that he could also not run away because by that time the plaintiff had already stabbed him and grabbed him by his T-shirt. The third defendant stated that he was off duty at the time of the incident.

[38] As far as the third defendant's employment is concerned he testified that on the day in question he was a member of the South African Police Service but had been seconded to the NPA since February 2004. He only became a permanent member of the NPA in 2008. He took his instructions from the NPA as his service related to the protection of witnesses. He stated that operationally he reported to the NPA as he was under the direct command of someone in the NPA. His salary, subsistence and travel allowance were paid by the South African Police Service. He stated that when he did work for the NPA in protecting witnesses the NPA did not have its own personnel who performed these duties. The third defendant further testified that on the day in question he was on standby and if something happened with a witness in an emergency situation then he would have to drive out with his vehicle. According to him he was on permanent standby duty. He stated that in the police force one worked shifts which were fixed hours. Any work performed beyond the normal shift hours in the police was regarded as overtime. As there were only 8 members present at the NPA who always travelled, the members at the NPA were at all times on standby and that they had to make themselves available at all time as and when they are requested. He stated that the vehicle which he used on 16 July 2005 was a state vehicle which he was authorised to use under the command of Captain Van Rooyen of the South African Police Service. However, the vehicle was used in carrying out his duties as a member seconded to the NPA. The third defendant stated that Mr Le Fleur reported the shooting incident to his commander, Captain Van Rooyen. He further stated that during his tenure of 17 months with the NPA he never during this time returned to the police service to carry out his functions as a policeman. The only connection or association he had with the South African Police Service was that he resided in their single quarters and received a salary from

them. He further stated that all his equipment including his motor vehicle was issued to him by the NPA. The firearm which he used during the shooting incident was issued to him by the NPA. He stated that while he was seconded to the NPA the South African Police Service had no control over his work at the NPA and he received training from the NPA. He stated that whilst on standby he would only assume duty once he received a call from the office. Until then he was free to carry out his personal duties. He stated that on 16 July 2005 he was not doing any witness protection duties on the rugby field nor was he called out to perform any witness protection duties nor was he performing witness protection duties when he fired the shot.

[39] Mr David Henry Charles Van Rooyen testified for the third defendant. He stated that on 16 July 2005 he was the couch of Temperance. He attended the match between his team and Evergreens. He testified that at the field he saw two persons one of whom was the plaintiff running across the field and creeping through a fence. One of them had a knife in his possession. Standing behind him were the third defendant and Mr Le Fleur. The persons walked directly towards the third defendant and Mr Le Fleur and on approaching them one of the persons smacked Mr Le Fleur. Mr Van Rooyen went to report this incident to the management of Evergreens. When he returned to his original place he saw the third defendant and Mr Le Fleur walking towards their vehicles. While Le Fleur was in his vehicle a person attempted to assault him through the window of his car. Le Fleur's vehicle got stuck in the mud as Le Fleur was driving out and he had to be assisted out of the muddy area. With the assistance of the people Le Fleur managed to drive out of the mud and slowly drove down the gravel road. As Le Fleur was driving down two

persons one of whom was the plaintiff ran behind the vehicle. The plaintiff was in possession of a knife. Van Rooyen further stated that he noticed the third defendant removing a baton from the side of his body and lifting it towards the plaintiff. When this occurred the third defendant was basically next to the plaintiff. The next moment he saw the plaintiff grabbing the third defendant by his shirt and stabbed at the third defendant. On the first occasion he missed and the second time the plaintiff struck the third defendant with his knife. This was followed by some hand movements from the plaintiff and thereafter a shot went off. When this occurred the witness noticed the plaintiff flying backward with a knife in his hand. The plaintiff fell to the ground and shouted to the person who was next to him "*up hom my broer*" which the witness understood to mean finish him off. Thereafter the witness got into the bus. While the witness was sitting in the bus Abraham walked in and threatened to stab the passengers. He described the plaintiff's knife as being 300 mm in length. In his view the plaintiff would have twice stabbed the third defendant had he not shot him. He further stated that on his way to the bus he noticed that the third defendant was bleeding. He advised the third defendant to go to hospital.

[40] Andries Le Fleur was called to testify for the third defendant. He was also at the rugby match. He was joined at the match by the third defendant his friend. He also testified about the fight which broke out on the rugby field as well as about the four persons who walked across the rugby field in the direction of where he was standing. He stated that one of the persons picked a fight with him and used foul language towards him as this person believed that Le Fleur was a Temperance supporter. The plaintiff then smacked him in his face with his fist.

[41] Some of the spectators then formed a circle around him with an intention to prevent the plaintiff from further assaulting him but the third defendant intervened by keeping the parties aside and advised him to leave the field which he did.

[42] As he walked to his vehicle a group of people followed Le Fleur. While he was in his vehicle a group of people confronted him and as he was trying to pull out of the parking lot his motor vehicle got stuck in the mud. The third defendant together with other people assisted him to push the car out of the mud. While this was happening the plaintiff assaulted him again on the side of his face through the window of his car.

### **The statement of the issues**

[43] There are two issues to be determined in this matter. The first one is whether the third defendant was acting within the course and scope of his employment with the first and/or second defendant or in furthering the first and/or second defendant's interest in shooting and injuring the plaintiff on 16 July 2005. The second is whether the third defendant acted in self-defence when he shot and injured the plaintiff.

[44] The first question is whether the first and/or second defendants were vicariously liable for injuries caused to the plaintiff by the third defendant when the latter shot and wounded him. In other words, the question is whether the third defendant was acting within the course and scope of his employment with the first and/or second defendants when he shot and wounded the plaintiff. The Supreme Court of Appeal pointed out in the *Minister of Safety and Security v F* 2011 (3) SA 487 SCA at paragraph 15 that vicarious liability is the liability that one person incurs for a delict that is committed by another, by virtue of the relationship that exists

between them. It arises by reason of a relationship between the parties and that it is a secondary liability. It is also true that as long as the employee is acting within the course and scope of his employment or is engaged with the affairs of his master the employer will be held liable for the delict committed by employee even in circumstances where an employer deviated from his duties. (See *Feldman (Pty) Ltd v Mall* 1945 AD 733). In determining the employer's liability for the delicts committed by the employee whilst he deviated from his duties, there are two questions to be considered. The first one is whether the wrongful act was done solely for the purpose of the employee and this question requires a subjective consideration of the employee's state of mind and is a factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. The second question is whether even though the acts done have been done solely for the employee there is nevertheless a sufficiently close link between the employee's act for his own interest and the purpose and the business of the employer. The second question does not raise purely factual questions but mixed questions of fact and law (see *K v Minister of Safety and Security* 2005 (6) SA 419 CC at paragraph 32; *Minister of Police v Rabie* 1986 (1) 117 (A) at 134 C – K).

[45] It was submitted on behalf of the plaintiff that the plaintiff had established on a balance of probabilities that at the time of the shooting the third defendant was acting within the course and scope of his employment with the first and/or second defendants. In support of this submission Mr **Möller** sought to rely on these facts: firstly, that the third defendant was present at the scene of the incident by virtue of his use of an official vehicle; secondly, he used an official firearm issued to him by

the second defendant to shoot the plaintiff; thirdly, on his own version the third defendant assaulted the plaintiff with a baton supplied to him by the National Prosecuting Authority which falls under the second defendant; fourthly, it was clear that on the third defendant's own version he was on permanent standby duty in the sense that he had to be prepared at all times to attend to any request by a witness in respect of whom he was the appointed protector which then meant that the third defendant could at any time be called upon to perform his witness protection duties. On the basis of these facts it was accordingly submitted on behalf of the plaintiff that there is a sufficiently close link between the business of the employer that the third defendant was engaged upon and in respect of which he was on permanent standby and the ensuing act to render the employer liable for the delict.

[46] Mr **Möller** argued that if the third defendant had not had at his disposal an official vehicle and firearm he would not have committed the delict. He further argued that an employer who entrusts an employee with a weapon or other equipment that can cause harm must at the very least be held responsible for any failure to adequately control the person in charge of the firearm or the dangerous equipment when it causes damages to another. But this argument assumes that the third defendant had in the past used the vehicle and the firearm to commit unlawful acts unrelated to his police functions and that his employers were aware of that conduct but notwithstanding that knowledge his employers continued to make the vehicle and the firearm available to him without exercising sufficient control. This is not the case in the present matter.



[47] It was further argued on behalf of the plaintiff that it was clear that at the time of the shooting the third defendant although he was on standby he subjectively placed himself on duty when he followed the plaintiff to stop him from assaulting Le Fleur. There is no legal basis for this contention. The third defendant was not performing police duties when he followed the plaintiff. The third defendant could, in the exercise of his powers under the Criminal Procedure Act 51 of 1977, arrest the plaintiff. But the fact that he could do so provides no basis for the contention that when the third defendant followed the plaintiff intended to arrest him. He was not legally obliged to do so.

[48] In response to Mr **Möller's** argument Mr **Jaga** submitted that although the third defendant was a member of the South African Police Service at the time of the shooting incident he was not acting within the course and scope of his employment with the first defendant. He advanced two reasons for this submission. The first one was that at the time of the shooting incident the third defendant was carrying out his duties and functions at the NPA which falls under the second defendant. The second one was that the first defendant was not vicariously liable for the delict committed by the third defendant because at the time of the incident the third defendant was not exercising police powers. He was going about his private business by attending a rugby match and by meeting up with Mr Le Fleur which was unconnected to the business of the first defendant. Ms **Pillay** who appeared for the second defendant associated herself with Mr **Jaga's** submissions in this regard but also emphasised that although the third defendant had been seconded to the NPA during the time of the incident the third defendant was off duty at the time of the shooting.

[49] For the purposes of determining the issue of vicarious liability it is not necessary in my view to decide which of the two defendants was the employer of the third defendant as it is clear to me that although the third defendant was permanently employed by the first defendant who paid his salary and provided him with accommodation he nevertheless performed duties of the special nature on behalf of the second defendant. Both defendants supplied him with tools with which to perform his duties. The firearm and baton as well as the motor vehicle in which he travelled to the rugby field on the day in question had been issued to the third defendant by the second defendant. Thus the question is whether the first and second defendants were vicariously liable for the delict committed by the third defendant when he shot and wounded the plaintiff on 16 July 2005.

[50] Essentially there are two main grounds upon which it is contended by the plaintiff the defendants are vicariously liable for the bodily injuries caused to the plaintiff by the third defendant when he shot him. The first ground is based on the fact that the property he used mainly a motor vehicle, baton and a firearm belonging to the defendants. But the fact that an employee commits a delictual act with property belonging to his employer is not decisive that at the time of the delict the employee was acting within the course and scope of his employment. In my view the question of liability of the defendants for the wrongful act of the third defendant must be determined in accordance the approach as set out in *K v Minister of Safety and Security* supra at paragraph 32 and the first question is whether the shooting was done solely for the purpose of the third defendant and this question requires a subjective consideration of the third defendant's state of mind at the time of the incident. There is no reason to reject the third defendant's version that at the time of

the incident he was off duty and that he had acted for his own benefit namely in self-defence when the shooting occurred. There is no evidence to gainsay that on the day of the incident the third defendant was off duty. In my view if that evidence stands it means that third defendant was free to go about his personal affairs until such time as he was called upon to resume duty or he places himself on duty by performing an act which is casually connected with his duty as a police officer. In my view there is no evidence from the plaintiff that at the time of the actual shooting the third defendant's actions were anything other than self-directed.

[51] The second question is whether even though the shooting might have been done solely for the purpose of the third defendant there is nevertheless objectively a sufficiently close link between the third defendant's act for his own interest and the purpose and the business of the defendants. It is clear from the third defendant's evidence that at the time of the shooting incident he had not been engaged in protecting a witness at the rugby field or that when he shot the plaintiff he did so in order to overpower him for the purpose of arresting him. I agree with Ms **Pillay** that the third defendant did not place himself on duty. In other words in shooting the plaintiff the third defendant was not exercising the police powers which might render the defendants vicariously liable for delictual harm committed in the cause of shooting (*Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC)). In the result I find that the plaintiff has failed to prove upon the balance of probabilities that the first and/or second defendants are vicariously liable for the injuries he sustained when he was shoot and wounded by the third defendant.

[52] The second question is whether the third defendant acted in self-defence when he shot and injured the plaintiff on 16 July 2005. For a plea of self-defence to succeed the *onus* is on the defendant to show that there was an unlawful attack or threatened attack and that he had reasonable grounds for believing that he was in physical danger and that the means he employed in self defence were commensurate with the danger and the dangerous means of defence must not have been adopted and the threatened injury could not have been avoided in some other reasonable way. (see *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 526 G-H. The constitutionality of self-defence was also considered by the Constitutional Court in the *S v Makwanyane* 1995(2) SACR 1(CC). At paragraph 138 the Court had this to say in this regard:

*“[138] Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the 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 life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to. In any event, there are material respects in which killing in self-defence or necessity differs from the execution of a criminal by the State. Self-defence takes place at the time of the threat to the victim's life, at the moment of the emergency which gave rise to the necessity and, traditionally, under circumstances in which no less severe alternative is readily available to the potential victim. Killing by the State takes place long after the crime was committed, at a time when there is no emergency and under circumstances*

*which permit the careful consideration of alternative punishment.”*

[53] The test whether a person acted in self-defence is an objective one which means that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors operating at the time he acted (*Nsomi v Ministers of Law and Order* supra at 528 G). The legal position on this issue was succinctly set out in *Kgaleng v Minister of Safety and Security and Another* 2001 (4) SA 854 (W). At 865 D – E the Court had this to say:

*“A plea of defence is aimed at showing that the attack by the defendant was not wrongful. For that very reason, the test is objective. The legal position is thus summarised by Boberg The Law of Delict vol 1 (1984) at 788:*

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

[54] The first leg of the enquiry is whether the third defendant had reason to consider himself to be in danger of serious injury at the time of the shooting. The picture which the third defendant wanted to paint is that on the day in question he together with his friend Le Fleur were confronted by a hostile group of persons which

included the plaintiff. Le Fleur was first assaulted at the rugby field and in order to avoid further confrontation the third defendant and Le Fleur walked to their respective vehicles and that while they were at their vehicles they were confronted by these people. According to the evidence of Mr Van Rooyen the plaintiff had tried to assault Le Fleur while he was busy reversing his vehicle out of the parking area. According to the third defendant and Mr Van Rooyen the plaintiff together with other people followed Le Fleur as he slowly drove down the gravel road. Le Fleur was not aware that he was being followed by the plaintiff and Abraham. There is a dispute whether the plaintiff and Abraham were armed with knives as they followed Le Fleur. I will however accept the evidence of the third defendant in this regard as it is corroborated by Van Rooyen. It was the third defendant's evidence that when he noticed that the plaintiff and his brother were running behind Le Fleur and the latter was not aware that he was being followed he followed them. At that stage the third defendant had a baton in his hand. On approaching the plaintiff he grabbed him on his right shoulder as at that stage the plaintiff was about three paces away from Le Fleur's motor vehicle. The plaintiff who was armed with a knife turned around and stabbed at the third defendant. On the first occasion the plaintiff did not succeed in stabbing the third defendant as the latter took evasive action. The third defendant thereupon hit the plaintiff with a baton over his left shoulder. The plaintiff stabbed at the third defendant again and on this occasion he succeeded to stab him. When he was about to stab him again the third defendant pulled out a firearm and fired a shot at the plaintiff and wounded him.

[55] There is a dispute as to where the third defendant and the plaintiff were standing in relation to each other at the time of the shooting. The plaintiff for some

unknown reason is unable to testify regarding the shooting and stabbing incident. He does not remember how he was shot and what he was doing at the time of the shooting. According to him he did not stab the third defendant on the day in question because he did not have a knife on him. He said that he never carries a knife. His evidence cannot assist in resolving the dispute about where he stood in relation to the third defendant at the time of the shooting.

[56] Van Niekerk and Abraham testified about the distance. According to Van Niekerk and Abraham the third defendant was about 15 – 18 paces away from the plaintiff when he fired a shot at him and both of them deny that the plaintiff had stabbed the third defendant. It is the third defendant's case that he had shot the defendant at a close range because at the time of the stabbing the plaintiff had grabbed him by his T-shirt. Mr Krediet, the plaintiff's witness, corroborates the third defendant's evidence in so far as it relates to the position of the plaintiff in relation to the third defendant at the time of the shooting. According to Mr Krediet the plaintiff and the third defendant were very close to each other and they were grabbing each other. This fact is also corroborated by Mr Van Rooyen who testified for the third defendant. The only material difference between Krediet and Van Rooyen's evidence is that according to Krediet the stabbing never occurred. He did not witness it.

[57] The evidence of Van Niekerk regarding the position of the plaintiff in relation to the third defendant immediately before the shooting is not entirely reliable. He conceded under cross-examination that the evidence which he gave regarding the shooting incident was based on his own observation as well as what was told to him by other people at the meeting which was held immediately subsequent to the

shooting. He also conceded that he did not see the shooting but heard the gunshot.

[58] Abraham's evidence regarding the identity of a motor vehicle which was stuck in the mud is incorrect. He says it was a Toyota Corolla. He further says after driving the vehicle out of a muddy area the third defendant got out and an unknown person got into the vehicle and drove away. Abraham says he followed the vehicle "*omdat ek die persoon wil uitkom. Ek, A (third defendant) uit wil kom*". This does not make sense because according to his evidence at that stage the third defendant was no longer in the vehicle. On Abraham's version the third defendant got into the vehicle after the shooting.

[59] There is no reason to reject the evidence of the third defendant. He gave his evidence in a coherent manner and answered all the questions put to him. There is no doubt that the third defendant sustained a stab wound on the day in question for which he had to be treated at Stellenbosch hospital. He received 18 stitches. That the third defendant sustained a stab wound is also corroborated by Van Rooyen who testified that when he saw that the third defendant was bleeding he advised him to go to hospital. This finding, however, does not assist the Court in establishing why the third defendant shot the plaintiff in light of the denial of the stabbing by the plaintiff and his witnesses. It is, however, clear from the third defendant's evidence that he did not sustain a stab wound while he was either at the rugby field or while he was assisting Le Fleur to get his motor vehicle out of the muddy area. There is also no evidence that while the third defendant followed the plaintiff and his brother as they ran behind Le Fleur's vehicle someone stabbed the third defendant. The only person with whom he had some physical contact at the time of the shooting on the



evidence of Van Rooyen and Krediet is the plaintiff who on the third defendant and Van Rooyen's evidence carried a knife.

[60] The evidence of the third defendant and Van Rooyen regarding the stabbing and shooting incident is more plausible than that of the plaintiff and his witnesses and should accordingly be accepted. The third defendant testified that he shot the plaintiff because the plaintiff was stabbing him. Van Rooyen noticed that the third defendant was bleeding immediately after the shooting and advised the third defendant to go to hospital. The third defendant was treated for a stab wound at Stellenbosch hospital. In the light of these objective facts the plaintiff's denial of stabbing is far-fetched and has no factual basis and his denial that the third defendant was acting in self-defence when he shot him must also be rejected.

[61] Mr **Möller** also submitted that the third defendant failed to show on the balance of probabilities that he was stabbed by the plaintiff. He pointed out that besides the fact that Van Rooyen and third defendant were the only witnesses who saw the knives, no knives were confiscated or found by the police at the scene and not a single person who was on the bus was called to corroborate Mr Van Rooyen's evidence regarding what transpired at or in the bus. He contended that an unfavourable inference should be drawn from the third defendant's failure to corroborate Van Rooyen's evidence regarding what happened at the bus and for this proposition he referred to the matter of *Munster Estate (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624.

[62] It is correct that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before a trial Court such failure leads naturally to the inference that he fears that such evidence will expose such facts unfavourable to him. The effect to be given to the failure of a party to call an available witness depends on the particular circumstances of each case.

[63] In my view the third defendant's failure to call a witness to corroborate Mr Van Rooyen's evidence regarding the incident which occurred on the bus does not affect the sufficiency of the third defendant's evidence regarding the shooting and the stabbing incident. It was the third defendant's version that the plaintiff was in possession of a knife and that he had shot and wounded the plaintiff after he had stabbed him. The third defendant's version regarding the presence of the knife is corroborated by Van Rooyen and in my view in the circumstances calling further witnesses to testify on this aspect of the case would have served merely to corroborate the evidence which is already on record and I am therefore not prepared to draw an unfavourable inference from the third defendant's failure to call a witness to corroborate Van Rooyen's evidence regarding the bus incident.

[64] The next leg of the enquiry is whether the third defendant should have fled from the plaintiff and whether the use of firearm was reasonably commensurate with the threatened danger.

[65] In response to the question whether it was necessary for him to shoot and injure the plaintiff the third defendant testified as follows: "*op daai oomblik weet ek nie of ek enige iets anders kon gedoen het om hom te keer nie, as om te skiet nie, ek*

*het hom geslaan met die baton dit het absoluut geen uitwerking gehad nie, twee keer gesteek, hy so my die derde keer gesteek het en ek weet nie hoeveel keer na dit nie, as ek hom nie so geskiet het nie, maar het so my definitief weer gesteek het”* and when he was asked whether he could have fled the scene he stated that he could not because at that stage the plaintiff had grabbed him by his T-shirt as he stabbed him.

[66] His evidence regarding the manner in which the shooting and the stabbing occurred is corroborated by Van Rooyen. The third defendant testified that when the plaintiff stabbed at him he took out a baton and hit him on his left arm but he did not succeed to keep the plaintiff at bay as the plaintiff again stabbed at him and on this occasion wounded him. It was at this stage that the third defendant pulled out the firearm and shot at the plaintiff. It is clear from the third defendant's evidence that he used the firearm after his attempt to overpower the plaintiff by using a baton had failed and in the circumstances I find that the means of defence which the third defendant employed were commensurate with the danger and the use of a firearm was resorted to when other means to avoid harm to the third defendant had failed.

[67] In the circumstances I find the third defendant has succeeded to show on the balance of probabilities that when he shot and wounded the plaintiff he acted in self-defence and that the means he employed were not unreasonable. To sum up, I find that when the third defendant shot and wounded the plaintiff he did not do so whilst he was within the course and scope of his employment with the defendants. He was off duty. I also find that when the third defendant shot and wounded the plaintiff he acted in self-defence.

**The Order**

[68] In the result the plaintiff's claim is dismissed with costs.

A handwritten signature in black ink, appearing to read 'D H Zondi', is written over a horizontal line.

**D H ZONDI  
HIGH COURT JUDGE**