

SOUTH AFRICA / JUDGMENT

Matebesi v Minister of Police (1313/2020) [2024] ZAFSHC 405 (13 December 2024)

[2024] ZAFSHC 405

COURT

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

1313/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable

/ Not reportable

CASE

No.:1313/2020

In

the matter between:

TUMELO
ISAAC MATEBESI
PLAINTIFF
And
THE
MINISTER OF POLICE
DEFENDANT

Coram:

Van Rhyn J

Heard:

26 and 27 February 2024, 1 March 2024, 13 and 14 August 2024
and 18 September
2024

Delivered:

13 December 2024

Summary:

Delict – claim for damages – issue of liability - assault upon plaintiff – shooting plaintiff in his back – by member of the SAPS – self-defence raised – onus – credibility of defence witnesses – onus of justification not discharged.

ORDER

1.

The Defendant is held liable for 100% of such damages, if any, as may be proven by the Plaintiff or agreed upon between the parties, in consequence of the shooting incident that occurred on 10 January 2019.

2.

The Defendant shall pay the Plaintiff's taxed or agreed party and party costs to date of this order which costs shall include the Plaintiff's counsel fees on Scale B as provided for in Rule 67A read with Rule 69.

JUDGMENT

[1] The plaintiff, Tumelo Isaac Matebesi, instituted action against the defendant, the Minister of Police, on 16 March 2020 for general and special damages in the amount of R2 634 400 arising from a shooting incident perpetrated by a member of the South African Police Service (the 'SAPS') acting within the course and scope of his employment with the defendant when the plaintiff was shot and injured.

[2] It is the plaintiff's pleaded case that on the 10th of January 2019 at Botshabelo, he was unlawfully assaulted by a police officer, Phehello Alfred Nyamane ('Sergeant Nyamane'),

who caused the injury by shooting him in his back. The action which is defended by the defendant proceeded on the merits only. The issue of quantum was separated from the merits in terms of the provisions of Rule 33(4) of the Uniform Rules of Court. The trial bundles, both the main and supplementary, were admitted into evidence by agreement between the parties. The defendant denies that Sergeant Nyamane acted unlawfully and specifically pleads that a warning shot was fired to the ground when the plaintiff attempted to attack Sergeant Nyamane with a dangerous object.

[3] The defendant adduced evidence of two witnesses, Sergeant Nyamane and Sergeant Motseki Lesimola ('Sergeant Lesimola') in defending the action. The plaintiff testified in support of his claim. The plaintiff testified that he resides at Section F, Botshabelo. On 10 January 2019, when he arrived at Botshabelo after visiting Bloemfontein, he went to Matsidi's Tavern where he purchased two Pine Twist alcoholic beverages. After having consumed some of the

contents of the first bottle, he decided to go on foot to Fairways Mall. On his way there he met up with his former girlfriend,

Palesa. He spoke to her, but his attempts to engage her in conversation were futile as she avoided him and returned to her home

which is situated nearby. Her father, Mr Limo, subsequently appeared from their home while holding a walking stick. Mr Limo accused the plaintiff of blocking his daughter's way as she was on her way to work when she encountered the plaintiff.

[4] The plaintiff, being afraid of Mr Limo, then ran away in the direction of Fourways Mall. He was informed by bystanders that a police vehicle is following him. He turned back and saw Mr Limo standing next to a police vehicle, approximately 100 metres away from where he was standing. He threw away the empty liquor bottle and opened the second bottle. He then proceeded to a road in between

houses which leads to a passage or walkway. The passage or walkway leads the way to an open field situated in between different sections within Botshabelo. He became frightened when he realised that a police officer, which later appeared to be Sergeant Nyamane, continued to follow him on foot. He started running. According to his observation, Sergeant Nyamane was approximately 40 to 50 meters behind him. He was holding on to the liquor bottle and had spilled some of the contents because the cap was not screwed on.

[5] While running away from Sergeant Nyamane he heard a gunshot. He became terrified and kept on running. He heard a second gunshot and started feeling weak. He realised that he had been shot. He was running away from Sergeant Nyamane and was not facing him when he heard the shots. He ran into an erf to his right and collapsed. He still had the liquor bottle in his hand when he fell to the ground. Sergeant Nyamane caught up with him. While he was lying on the ground, Sergeant Nyamane kicked him. His hands were tied behind his back with the laces of his 'tekkies'. He was not informed that he is being arrested on any charge. He questioned Sergeant Nyamane regarding the reason for shooting at him. Sergeant Nyamane denied that he shot at him and informed him that he threw a stone at him. The plaintiff was put into the back of the police vehicle and transported to the road leading to Fourways Mall where he was instructed to alight from the police vehicle and not to cause any further trouble. At the time three police officers were in the police vehicle, being Sergeant Nyamane, another male officer as well as a female officer.

[6] The members of the SAPS then transported him to the Botshabelo Hospital where he was informed by the medical staff that he had sustained a gunshot wound to his right shoulder blade. The plaintiff estimated that the shooting incident occurred at around 15h00 because he arrived at the hospital at around 16h30. He received medical attention and was subsequently transported to Pelonomi Hospital at Bloemfontein. He was admitted and the bullet was surgically removed. He was discharged from hospital on 11 January 2019. The plaintiff denied that he attacked or attempted to attack Sergeant Nyamane with a dangerous weapon.

- [7] During cross examination it was established that the plaintiff assumed that Sergeant Nyamane was following him because he was drinking alcohol in public. That is the reason proffered by him for running away from the members of the SAPS. At this stage of the proceedings the court adjourned and reconvened at Botshabelo for an inspection in loco. By agreement between the parties a plan marked Exhibit A, with different points marked A – J, including certain distances pointed out by the plaintiff and Sargeant Nymane, were handed in by agreement between the parties. It eventually became clear that many of the points indicated on Exhibit A were not in dispute and were not contentious.
- [8] It was put to the plaintiff that Mr Limo reported an assault perpetrated by the plaintiff upon Palesa during a previous encounter, where after the members of SAPS followed the plaintiff. The members of SAPS noticed the plaintiff running away and they followed him while travelling in the police vehicle. It was impossible for the police vehicle to enter the narrow passage and only then did Sergeant Nyamane alight from the police vehicle and started to follow the plaintiff on foot. According to the plaintiff, Sergeant Nyamane was talking to Mr Limo when he had already alighted from the police vehicle. The plaintiff thus denied the version put to him that Sergeant Nyamane followed him while being conveyed within the police vehicle.
- [9] It was put to the Plaintiff that Sergeant Nyamane was catching up with him after he entered the passage. Sergeant Nyamane's version is further that after the plaintiff exited the passage at point H on exhibit A, and when he was already in the open field area, the plaintiff ran further for approximately 70 meters, turned and looked back at Sergeant Nyamane. The plaintiff stopped and faced Sergeant Nyamane. The distance between them was approximately 6 to 7 meters. It was put to the plaintiff that he was waving a bottle towards Sergeant Nyamane. Sergeant Nyamane fired the first shot with the barrel facing upwards into the air. The plaintiff denied the statement and testified that the distance between them was actually increasing because his pace was faster than that of Sergeant Nyamane. According to the plaintiff he was approximately 50 metres away from Sergeant Nyamane when he heard the first shot. This was his version at the inspection in loco. During cross-examination the plaintiff however testified that he did not look back when the first shot was fired.
- [10] The plaintiff explained that the visit to the scene during the inspection in loco brought back memories of the incident and that is the reason why his version of the events during cross-examination differs, only in certain respects, from what he testified in his evidence in chief. He can recall that he did not look back immediately prior to the first shot being fired. It was put to the plaintiff that Sergeant Nyamane will testify that he retreated when the plaintiff waived the bottle at him. He then fired the first warning shot. Sergeant Nyamane retreated even further while the plaintiff kept on moving in his direction. The distance between them remained the same, being 6 to 7 meters. Sergeant Nyamane thereafter fired a second warning shot to the ground. After the second shot was fired the plaintiff turned and ran away. The plaintiff ran towards

the yard where he fell. Sergeant Nyamane thought that the plaintiff fell on a stone and got injured. It was put to the plaintiff that he tried to grab Sergeant Nyamane's firearm when he was apprehended. This was denied by the plaintiff.

- [11] It was put to the plaintiff that he was placed inside the police vehicle for him to be taken to the police station. When the police vehicle was brought to a stop at a certain point, the members of the SAPS noticed blood and it was decided not to take the plaintiff to the police station but to take him to the hospital for medical treatment. The plaintiff was extensively cross-examined on the content of a statement deposed to by him on 13 June 2019 regarding his different versions whether it was the first or the second shot that ultimately caused the injury to his back. The affidavit deposed to by the plaintiff is contained in the Trial Bundle. The plaintiff explained that the statement was not read back to him by the official who took down the statement and he did not read the statement. He merely signed the statement.
- [12] The plaintiff explained that he initially thought that he was struck by the first bullet and only later realised that it must have been the second bullet that struck him. The plaintiff furthermore denied the version put to him that he was in custody while in hospital or that he was being guarded by police officials while in hospital. This concluded the case presented by the plaintiff.
- [13] The defendant presented the testimony of two witnesses, Sergeant Nyamane and Sergeant Lesimola. Sergeant Nyamane was 37 years old at the time of the trial and is stationed at Boithuso Police Station at Botshabelo. He has been in the employment of the SAPS since January
2011. At the time of the incident, during January 2019, he was a constable in the SAPS. Sergeant Nyamane's evidence is that on 10 January 2019 he was on duty and was clothed in uniform. He was accompanied by two other police officers as well as Sergeant Lesimola while on patrol at J section, Botshabelo. Whilst pursuing the plaintiff with a police vehicle following information obtained from Mr Limo, the plaintiff turned into the narrow passage at point G where the vehicle could not enter. He alighted from the vehicle and followed the plaintiff on foot. He was running in an endeavour to catch up with the plaintiff. The plaintiff was also running. He did not call out to the plaintiff. The distance between him and the plaintiff was decreasing due to the fact that he was running faster than the plaintiff. The distance between them was approximately 8-10 meters.
- [14] The plaintiff then stopped and faced him. The plaintiff was holding a bottle of Pine Twist in an upright position, at shoulder height, next to his body. The plaintiff approached him with the bottle held up in his right hand and he looked as if he was in a 'fighting mood'. Sergeant Nyamane explained that he retreated and pulled out his service firearm from the holster. He cocked the firearm and instructed the plaintiff to lie down. The plaintiff came closer while Sergeant Nyamane retreated a few steps. He then fired a shot with the firearm pointed in an upright position. The distance between him and the plaintiff was approximately 4 meters at the time. The plaintiff told him that he (Sergeant Nyamane) will never shoot him and

advanced even further whereafter he fired the second shot towards the ground. He saw dust in the footpath approximately one and a half to two

meters in front of him. Sergeant Nymane was still retreating and turned to look behind him. When he faced forward to look at the

plaintiff, the plaintiff turned around and ran away.

[15] He placed the firearm in the holster and proceeded to chase the plaintiff. The plaintiff jumped a fence and ran into a yard. Sergeant Nyamane followed and proceeded around a house and encountered the plaintiff at the other side where he grabbed the plaintiff's hand in which he was still holding on to the bottle. He caused the plaintiff to fall and restrained him. The plaintiff was observing his firearm in the holster fastened to his thigh and made an attempt to grab the firearm. Sergeant Nyamane then kicked the plaintiff in his private parts whereafter he tied the plaintiff hands behind his back with shoe laces removed from the plaintiff's shoes. He then noticed blood on the plaintiff's T-shirt at the back. The plaintiff enquired for the reason for shooting at him.

[16] Sergeant Nyamane summoned his colleagues to collect them with the police vehicle whereafter they travelled to the police station. Once there one of his colleagues in the vehicle suggested they transport the plaintiff to the hospital to ascertain whether he had sustained a gunshot wound or not. The plaintiff was then taken to the hospital. A case was opened against Sergeant Nyamane for discharging a fire arm within a municipal area. Sergeant Nyamane explained that he fired the two shots because he became 'nervous' of the plaintiff's actions in that he was using the bottle as weapon. He fired the first shot to make the plaintiff aware that he should throw away the bottle. Subsequent to several questions put to Sergeant Nyamane by Mr Jonase, counsel for the defendant, whether he uttered any words to the plaintiff, Sergeant Nyamane responded as follows: 'I uttered those words.'

[17] During cross-examination Sergeant Nyamane testified that the reason why he decided to follow the plaintiff

subsequent to talking to Mr Limo, was to arrest the plaintiff. When questioned further, he explained that he actually only wanted to 'catch' the plaintiff and to take him to Mr Limo and not to arrest him or take him to the police station. The plaintiff was ultimately arrested for the assault perpetrated upon Sergeant Nyamane. Sergeant Nyamane confirmed during cross-examination that he was not assaulted by the plaintiff but the plaintiff attempted to assault him with the bottle. Sergeant Nyamane was furthermore

confronted with the contents of paragraph 10 of a statement deposed to by him on 10 January 2019, that the reason for him to fire the two shots was because he feared that the plaintiff could get hold of his service pistol as it seemed to be his intention at the time. At paragraph 5 of the said statement, he also stated that he fired the two shots because the plaintiff wanted to attack him with a bottle. Sergeant Nyamane explained that the version, as contained in the statement, does not reflect the correct facts pertaining to where the second shot hit the ground. The second shot

did not hit the ground next to the plaintiff. The second shot hit the ground to the side of the plaintiff approximately one and a half to two meters in front of him (Sergeant Nyamane).

- [18] The second and last witness for the defendant was Sergeant Lesimola. At the time of the incident during 2019 Sergeant Lesimola was a member of the SAPS with the rank of constable and stationed at the Boithuso Police Station at Botshabelo. Sergeant Lesimola confirmed the version presented by Sergeant Nyamane that they received information from Mr Limo regarding the plaintiff and noticed the plaintiff running down the street whereafter they chased the plaintiff. Sergeant Nyamane requested the driver to stop the vehicle whereafter he alighted and followed the plaintiff on foot. Sergeant Lesimola later received news that the plaintiff was apprehended and arrested by Sergeant Nyamane whereafter they proceeded with the police vehicle to a certain point where they met up with Sergeant Nyamane and the plaintiff. The plaintiff was seated on the pavement and already handcuffed. Sergeant Nyamane informed them that he had arrested the plaintiff. According to Sergeant Lesimola, Sergeant Nyamane informed them that the plaintiff came towards him holding a bottle as if attacking him whereafter he fired two shots, one into the air and one to the ground and eventually ended up arresting the plaintiff.
- [19] During his testimony in chief Sergeant Lesimola explained that he noticed blood on the plaintiffs' shoulder blade and a decision was made to take the plaintiff to the hospital for medical treatment. Sergeant Nyamane informed his colleagues that the bleeding was caused by a gunshot wound and that the plaintiff had informed him that he, Sergeant Nyamane, had shot him. At the hospital the witness guarded the suspect because of his attempt to attack a member of the police.
- [20] During cross examination Sergeant Lesimola explained that Sergeant Nyamane informed his colleagues on the day in question that he arrested the plaintiff for the attempt to attack him. Sergeant Lesimola then expanded upon the explanation and testified that Sergeant Nyamane arrested the plaintiff for attacking him with the bottle. Sergeant Lesimola furthermore testified that Sergeant Nyamane informed him that the plaintiff was injured when he 'jumped' a fence.
- [21] It is trite that, every infringement of bodily integrity is prima facie unlawful and once the infringement is proved, the onus rests upon the wrongdoer (the defendant) to prove a ground of justification.[1] The plaintiff must allege and prove the fact of physical interference.[2] The plaintiff testified that he was running away from Sergeant Nyamane when he heard two gun shots. Following the firing of these

two shots, the plaintiff was injured on his right shoulder blade. The plaintiff was subsequently hospitalised and a bullet was removed from his shoulder blade. It is furthermore common cause that the defendant is vicariously liable for the actions of his members and in this particular matter, for the actions of Sergeant Nyamane.

[22] In the plea the defendant denied the allegation that the plaintiff was unlawfully assaulted by a member of the SAPS by shooting the plaintiff in his back with a firearm. The effect of the defendant's plea in this regard was that the plaintiff was saddled with the onus to prove, in the first place, that he was struck by a bullet fired by Sergeant Nyamane. During the Rule 37 meeting the plaintiff accepted the onus to prove all the elements of his claim and the duty to begin. Sergeant Nyamane, during his evidence, conceded that the plaintiff was struck by a bullet fired from the firearm issued to him. It is common cause that a projectile, which was surgically removed from the plaintiff's shoulder blade at the Pelonomi Hospital at Bloemfontein, was fired from a Beretta Pistol with serial number P45260L issued to Sergeant Nyamane. It can therefore safely be concluded that the plaintiff was shot by Sergeant Nyamane. The parties have presented mutually destructive versions with regard to the circumstances under which the plaintiff was injured.

[23] The onus of alleging and proving an excuse or justification for the assault upon the plaintiff rests on the defendant. Grounds of justification are special circumstances in which conduct, that appears to be wrongful because of an actual violation of interests, is rendered lawful. A ground of justification therefore excludes wrongfulness by eliminating the apparent wrongfulness of the defendant's conduct. Grounds of justification are still concerned with the basic question of whether the member of the SAPS's violation of the plaintiff's interest was reasonable in the particular circumstances and therefore lawful.[3] Both the alleged attack upon Sergeant Nyamane by the plaintiff and the defensive conduct by Sergeant Nyamane must meet certain

requirements for the defence to be applicable. The version of Sergeant Nyamane is that he did not shoot the plaintiff intentionally. The issue to be determined is therefore whether Sergeant Nyamane shot the plaintiff intentionally, and if so, whether he was legally justified to do so.

[24] It is clear from the summary of the evidence presented by the plaintiff and Sergeant Nyamane that, as far as their positions when the two shots were fired are concerned, are mutually destructive. The court in Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others[4] held that when a court is faced with two conflicting versions, the court must make findings on the following: -

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

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

- (i) the witness' candour and demeanour in the witness box,
- (ii) his bias, latent and blatant,

- (iii) internal contradictions in his evidence,
- (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions,
- (v) the probability or improbability of particular aspects of his version,
- (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.

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

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

[25] Sergeant Nyamane was unable to explain how it came about that a bullet fired from his firearm was retrieved from the plaintiff's back when, on his version, the plaintiff was facing him and moving towards him when he fired both shots, one into the air and the second to the ground. He did not make an effort to provide an explanation. This however did not deter Mr Jonase to argue that it is readily understood and logical that '... a bullet that was fired into the air must come down. . . ' with the result that only inference to be drawn is that the bullet that was fired into the air, caused the injury to the plaintiff. Mr Jonase did not take into consideration that it was Sergeant Nyamane's version that the second shot, fired into the ground, must have penetrated the plaintiff's body and not the shot fired into the air. However, the defendant has not provided any explanation how it is possible for the second bullet to penetrate the plaintiff's back when he was facing Sergeant Nyamane when the shot was fired into the ground. I agree with the contention on behalf of the plaintiff that the version

of the plaintiff, namely that he was running away from Sergeant Nyamane when the shots were fired, are more probable. The plaintiff

gave a detailed account of how, when and where he was when both shots were fired.

[26] Sergeant Nyamane's version that he fired the second shot to the ground, one and a half metres away from him and more to the side of the plaintiff, who was approximately, either 6 to 7 metres or 4 metres away from him, is in contradiction to his version contained in his affidavit made on the day of the incident that he fired the shot into the ground next to the plaintiff. The version of the defendant that Sergeant Nyamane was approximately 6 to 7

metres away from the plaintiff when he fired the first shot was put to the plaintiff during cross-examination. This was also the distance indicated by Sergeant Nyamane during the inspection in loco to be the distance between himself and the plaintiff when he fired both shots. However, when Sergeant Nyamane testified, he adjusted his version by testifying that the distance between himself and the plaintiff was approximately 4 meters when he fired the first shot upwards. He furthermore testified that he instructed the plaintiff to lie down, which version was not put to the plaintiff during cross-examination.

[27] During cross-examination it was put to the plaintiff that Sergeant Nyamane was unaware of the fact that the plaintiff was wounded subsequent to firing the two shots. The version presented by the defendant that the plaintiff was injured due to the fact that he jumped a fence and was injured by the wire or that he fell on a stone or struck by a stone do not correspond with the version presented by Sergeant Lesimola that Sergeant Nyamane informed him, when meeting up with him on the day of the incident, that the plaintiff sustained a bullet wound. The evidence presented by the defendant is riddled with contradictions and improbabilities. Sergeant Nyamane appeared uneasy in the witness stand and experienced difficulty in explaining why he became anxious of the plaintiff and what the plaintiff did which made him believe that the plaintiff was attacking him. His version of the events is not credible. The version that Sergeant Nyamane noticed how the plaintiff waived the bottle at him is contradicted by his testimony that the plaintiff merely held the bottle by its neck at shoulder height. Sergeant Nyamane's version that the plaintiff kept on approaching him notwithstanding his instruction to lie down and while holding a firearm, is highly improbable. I am of the view

that Sergeant Nyamane's version of how he retreated, kept on looking behind him while the so-called danger was facing him, and how and when exactly he took out the firearm from the holster appears extremely vague and tailored to suit his defence.

[28] As to the issue whether Sergeant Nyamane was legally justified in shooting the plaintiff the defence is a mixture of denying that the plaintiff was shot by Sergeant Nyamane and self-defence. For the defendant to succeed, the defendant must plead and prove:

- (a) a real or threatened attack by the plaintiff;
- (b) reasonable grounds for believing that Sergeant Nyamane was in danger; and
- (c) that the force used was necessary in the circumstances to repel the attack and commensurate with the plaintiff's aggression.[5]

[29] The defendant did not raise use of force under section 49 of the Criminal procedure Act, 51 of 1977 as a defence. The test for self-defence is an objective one. [6] The question to be answered is whether a reasonable person in the position of Sergeant Nyamane would have considered that there was a real risk that death or serious injury was imminent. In my view the plaintiff was an honest witness with regard to the circumstances

pertaining to the shooting incident. He conceded that he made a mistake regarding when exactly he turned to look how far Sergeant

Nyamane was during the pursuit and whether it happened before or after the first shot. He explained that he cannot recall, in precise

detail, the events. This, to my mind, is reasonable and understandable. He furthermore conceded that there might have been four police officials in the vehicle and not three as per his evidence in chief.

[30] However, the plaintiff was indeed vague and unpersuasive regarding the reason why Palesa avoided contact with him, which is, in my view, an indication that he is not telling the truth regarding what occurred when he met with her on a previous occasion. His explanation that he was under the impression that Sergeant Nyamane was following him because he was drinking alcohol in public is therefore not convincing. This explains why the report received from Mr Limo regarding an alleged assault by the plaintiff upon Palesa, caused him to run away when he noticed Mr Limo talking to the members of the SAPS. While I accept that there were certain contradictions and discrepancies in his testimony, I do not consider same to be material to warrant the rejection of his version of the events pertaining to the shooting incident as such. Mr Jonase argued that the plaintiff's

initial version that he was wounded as a result of the first gunshot, which he subsequently altered in that he was actually hit by the second bullet, leads to an inference that he is untruthful and his version ought to be rejected. On the plaintiff's version that he was not facing Sergeant Nyamane when he was struck by the bullet, he can only speculate whether he was hit by the first or the second bullet. This does not alter the fact that he was shot in his back. During cross-examination the plaintiff testified that Sergeant Nyamane had no reason to shoot him. I agree with this contention.

[31] It is common cause that a docket had not been opened pertaining to any complaint or charge by Mr Limo or Palesa. When Sergeant Nyamane received information from Mr Limo, he had not consulted with Palesa. Sergeant Nyamane did not inform the plaintiff that he was busy investigating a crime or a complaint and he did not instruct or request the plaintiff to hand himself over to the police. It was not put to the plaintiff that he was requested to lie down on the ground. The version by Sergeant Nyamane that he requested the plaintiff to lie down on the ground only emerged when he testified in chief. In any event, Sergeant Nyamane did not inform the plaintiff that he was about to arrest him. It appears as if no instructions regarding the first shot was provided when the plea was drafted. The plaintiff never mentioned that he saw Sergeant Nyamane's firearm. He only heard the gunshots. The evidence tendered by the defendant does not accord with the probabilities as it seems improbable that the plaintiff would proceed to confront Sergeant Nyamane with a bottle in his hand while pointed with a firearm and even more so after the first shot was fired. The version of the defendant is merely a fabrication solely invented to avoid liability. It is more probable that Sergeant Nyamane became irritated and furious with the plaintiff, who was

running away from him, which lead to the shooting incident. The defendant's version is accordingly rejected as false. The only conclusion that I can come to is that Sergeant Nyamane and Sergeant Lesimola were not being truthful.

[32] I am not persuaded that Sergeant Nyamane acted in self-defence and therefore the defendant has failed to discharge the onus of proving that Sergeant Nyamane's actions were justified under the prevailing circumstances. I therefore find that the conduct of Sergeant Nyamane was wrongful and unlawful. Consequently, the defendant is vicariously liable for the injuries sustained by the plaintiff. There is no reason why costs should not follow the result.

ORDER:

[33] In the result I make the following order:

I VAN RHYN

JUDGE OF THE HIGH COURT,

On behalf of the Plaintiff: ADV. M S MAZIBUKO Instructed by: MAZIBUKO AND WESI
INCORPORATED BLOEMFONTEIN On behalf of the defendant: ADV. S S JONASE Instructed by:
STATE ATTORNEYS BLOEMFONTEIN

[1] Moghamat v Centre Guards CC [2004] 1 All SA 221 (C) at [7], citing Mabaso v Felix 1981

(3) SA 865 (A) at 873E – 874E.

[2] Bennet v Minister of Police 1980

(3) SA 24 (C) at 34-35.

[3] Van der Walt JC and Midgley JR, Principles of Delict

(2005) at 125.

[4] Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Cie SA and Others [2002] ZASCA 98 (6 September 2002) at para [5], pp 4-5.

[5] S v Makwanyane [1995] ZACC 3; 1995

(3) SA 391 (CC) at para 38.

[6] Mugwena and Another v Minister of Safety and Security [2006] 2 All SA 126 (SCA) at [21].

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