

SOUTH AFRICA / JUDGMENT

Mohofe v Minister of Safety and Security (13078/03) [2005]

ZAGPHC 91 (15 September 2005)

[2005] ZAGPHC 91

COURT

High Courts - Gauteng

BEFORE

IW Schwartzman

CASE / FILE NUMBER

13078/03

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IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) CASE NUMBER:

03/13078 In the matter between: MATHUME MOHOFE OBS

Plaintiff and MINISTER OF SAFETY & SECURITY

Defendant _____ JUDGMENT _____

_____ SCHWARTZMAN J:1. At about 16h00 on 12 March 2001, Johannes Mohofe was a pedestrian walking in the vicinity of the corner of Rissik and Bree Streets, Johannesburg. At about the same time, Inspector Gerson Nemengaya of the South African Police Service was involved in a shoot out with three suspected robbers, one of whom was Banyana Sibeko. In the course of this shoot out, Mohofe was struck by a bullet. He fell to the ground at the corner of Rissik and Bree Street. He died in hospital later that day. The Plaintiff in this action is Selina Mohofe, the mother of Johannes Mohofe (the deceased). In her personal capacity and in her capacity as the guardian and grandmother of the deceased's two minor children, she is claiming damages from the Minister of Safety and Security. Her cause of action, on which I will elaborate

hereunder, is based on an allegation that Nemengaya, acting in the course and scope of his employment with the Defendant, was negligently responsible for the deceased's death. The Minister denies the Plaintiff's cause of action and her claim for damages. There is also a special plea in which it is alleged that in terms of the South African Police Services Act 68 of 1995 (the Act) the Plaintiff's claim has prescribed.² At the commencement of the trial, I separated the damages element of the Plaintiff's claim from the special plea and the merits.

This judgment is limited to these last two issues. THE SPECIAL PLEA³.¹ In terms of Section 57(1) of the Act (that has since been repealed), the Plaintiff's action had to be instituted "before the expiry of a period of 12 calendar months after the date on which the Plaintiff became aware of the alleged act or omission or after the date on which the claimant

might be reasonably expected to have become aware of the alleged act or omission". The deceased was shot and died on 12 March 2001. The Plaintiff's action was instituted on 10 July 2003 – 28 months after the deceased's death. The deceased's brother, Camfer Mohofe, was told of his death on 12 March 2001. On making inquiries from the police, Camfer Mohofe was initially told by the Investigating Officer that the deceased had been shot because he was a "tsotsi". In a subsequent report he was told that Sibeko had shot the deceased. Camfer Mohofe told the Plaintiff of the deceased's death. Because of the conflicting accounts of how the deceased had died, he instructed his attorney, Lulama Mqongozi, to make further inquiries of the police. What Mqongozi was told (by the police) was that a person had been arrested, who would be charged with, inter alia, robbery and the murder of the deceased. She then kept herself informed of what was happening in the trial of this man, who turned out to be Sibeko. On 2 September 2002 she was in court when Sibeko was acquitted of the murder of the deceased but convicted of robbery and other offences, for which he was sentenced to 20 years in prison. Sibeko has since died. Mqongozi told Camfer Mohofe of the outcome of the trial. Camfer Mohofe then discussed what he had been told with his family, including the Plaintiff, whereafter Mqongozi was instructed to sue the Defendant on behalf of the Plaintiff and the deceased's children.^{3.2} The Plaintiff knew of the deceased's death in March 2001. The full circumstances giving rise to his death would only have been known to her in September 2002 following Sibeko's trial. A letter of demand was sent on 18 November 2002. Action was instituted on 8 July 2003. This date is within 12 months of 9 September 2002, the date by which Mqongozi would reasonably have become aware of the magistrate's judgment and the circumstances giving rise to the deceased's death, which in turn indicated that the Plaintiff had a cause of action against the Defendant, based on Nemengaya having negligently shot the deceased. This is what was alleged in paragraph 4 of the Plaintiff's Particulars of Claim.⁴ Even if it could be said that the Plaintiff should have reasonably found out within 12 months of the act or omission giving rise to her cause of action I would, in terms of Section 57(5) of the Act, have found that the interests of justice required that the Plaintiff's action be decided on the merits of the claim. I would have done this because there was no unexplained delay on the part of the Plaintiff. It was reasonable for the Plaintiff to wait the result of the trial before deciding whether or not to institute an action. More importantly, I would have had regard to the reason for the Police Act effectively reducing the period of prescription to 12 months instead of the normal civilian period of three years. This reduction is premised on the prejudice the police may otherwise suffer. In this case there is no prejudice to the Defendant in that all the facts and circumstances giving rise to the Plaintiff's claim were investigated at the time of the robbery and the murder. Thereafter what happened was preserved in the evidence given at Sibeko's trial.⁵ For the above reasons, the special plea is dismissed. THE PLAINTIFF'S CAUSE OF ACTION⁶. In paragraph 4 of the Particulars of Claim it is alleged that on 12 March 2001 at the corner of Bree and Rissik Streets, Johannesburg, Members of the South African Police Service, acting in the course of their employment with the Defendant, wrongfully and negligently shot and killed the deceased. Nemengaya is the person who is alleged to have fired the shot that killed the deceased. In paragraph 4A and in an alternative, introduced by an amendment in August 2005, it is alleged that at the time and place referred to, members of the South African Police Service, acting as aforesaid, wrongfully and negligently caused the deceased to be killed during a shoot out with Sibeko. What this amendment introduced

was a claim against the Defendant based on Sibeko having shot the deceased.

I will deal hereafter with the grounds on which Nemengaya is said to have been negligent. In the plea, the Defendant admits that

the deceased was shot and killed at the time and place alleged. It is however denied that a policeman shot the deceased. What is alleged is that the deceased was shot by Sibeko, an armed robber, in circumstances that exclude negligence on the part of Nemengaya. THE ADMISSIONS AND EVIDENCE RELIED ON BY THE PARTIES⁷. In terms of Rule 37 (4) a number of admissions were sought by the parties. In addition to the responses thereto, the court had before

it Nemengaya's oral evidence. What follows are the facts on which the parties relied in

argument.^{8.1} On 12 March 2001 and at approximately 16h15 Nemengaya, a police officer, was on duty in Bree Street, walking from east to west towards Rissik Street. At the time he was in plain clothes but armed with a service pistol. The Rissik and Bree Streets pavements were crowded with people leaving their places of work. What Nemengaya saw as he walked towards the corner, and what aroused his suspicions, was people milling around a shop in the middle of the block. He then saw two men leaving

the shop. One of them had a firearm tucked into the waistband of his trousers. These men were followed by a third man, subsequently

identified as Sibeko, who was seen to leave the shop with a firearm in his hand. Sibeko then put the firearm in the waistband of his trousers. From what

he saw, Nemengaya drew the inference that the three men had just robbed the shop. The three men started to run. As they ran they had their backs to Nemengaya. They were then about seven to eight paces from Nemengaya.^{8.2} It was then that Nemengaya, who had drawn his firearm, called out that he was a policeman. He told the three of them to stop. They did not. What he saw was Sibeko move his arm to the front of his body, turn around and fire a shot towards him. As Sibeko was about to shoot Nemengaya dived to the ground. The gun shot missed him. The three men kept

running. Nemengaya got up and pursued the three men.^{8.3} As they ran he saw Sibeko turn, point the gun at him and pull the trigger – the gun did not fire. They were then approximately 12 paces apart. When they neared the corner of Loveday and Jeppe Streets – some three blocks from where Sibeko had shot at him – the streets were relatively empty and Nemengaya got an opportunity to shoot at Sibeko. He fired his first shot – a warning shot – into the air. Sibeko did not stop. Because there were no people between them, he fired his second shot at Sibeko. The bullet hit Sibeko in the leg. Sibeko dropped his gun but kept running. Nemengaya stopped to

pick up the gun. Inspector Mapoto, who had arrived on the scene and who was, I understand, meant to have been on duty with Nemengaya, caught Sibeko near the corner of Rissik and Loveday Streets. Sibeko was handcuffed with his hands behind his back.^{8.4} The two policemen then went back with Sibeko to the corner of Bree and Rissik Streets. There Nemengaya saw a person lying on the ground. It was the deceased. He was lying on his

back. He was bleeding from a bullet wound in the abdomen. A search was made for a spent bullet. It was not found. Nemengaya and Mapoto then examined Sibeko's firearm. It was a 9mm pistol. He found a spent cartridge lodged in the firearm. Nemengaya

said that this spent cartridge would prevent the gun from firing. The magazine that had a nine or ten round capacity had five live rounds in it. What Nemengaya also confirmed from the shopkeeper was that he had been robbed and that Sibeko was one of the armed robbers.^{8.5} At about 17h20 a Captain Morgan conducted a gun powder residue test on Sibeko's hands. The test samples taken by Captain Morgan were sent to a police laboratory for examination. On examination no gun powder residue was

found on Sibeko's hands. Although the Defendant gave a notice in terms of Rules 36 (9) (a) and (b), no evidence was led to explain the examination or the significance, if any, of the results.^{8.6} Nemengaya did not look for the two spent cartridges from the shots he fired at Sibeko. There is no independent evidence to corroborate the number of shots Nemengaya said he fired. There is similarly no independent evidence concerning the condition of Sibeko's firearm following his arrest. Neither firearm could be produced at the trial.^{9.1} Nemengaya's evidence is the only account the court has of what happened on the afternoon that the deceased was shot. Nemengaya, who has been a police officer for 12 years said that before arresting a person who is running from a suspected crime scene, it is standard procedure for a policeman to first identify himself and call on the suspect to stop. This is why he called out to Sibeko as he and the two others ran from the scene.^{9.2} Based on his experience, Nemengaya said that an armed suspect may stop and surrender. This he said happens in most instances. He however went on to say that the suspect may continue running or may turn around and shoot at the policeman who had called on him to stop. When he called on Sibeko to stop, there were people between him and Sibeko. Nemengaya cannot remember what these people did when he called out and Sibeko shot. Nemengaya said that in the situation he faced, and if Sibeko decided to shoot at him, he foresaw the possibility that the shot might miss him and hit one of the pedestrians in the vicinity at the time.^{9.3} There were some contradictions between Nemengaya's police statement and his evidence. Certain details of the incident that he gave in evidence were not included in his police statement. Neither of these flaws in his evidence materially affects the overall credibility of his account of what happened.^{10.} On Nemengaya's version, he fired two shots that afternoon. Both were fired some two blocks from where Sibeko had shot at him.

The deceased was found lying in the vicinity of the place where Sibeko had shot at Nemengaya. Apart from the shot fired by Sibeko, there is no evidence of any other shot having been fired in the vicinity of where the deceased was found.^{11.} The shots fired by Nemengaya could not have killed the deceased. The probability that was accepted by the parties is that the deceased, whom must have been in the vicinity at the time, was struck and killed by the bullet fired by Sibeko in Nemengaya's direction. The Plaintiff's main claim, which is that Nemengaya shot the deceased fails. I turn to deal with the alternative claim (see paragraph 6 hereof). Before doing so, it is necessary to deal with the law.

THE LAW^{12.} The cause of the damages the Plaintiff has suffered flow from Sibeko having shot the deceased. The Plaintiff wants to hold the Defendant liable because of an alleged wrongful act by Nemengaya at a time when, as a policeman, he was acting in the course and scope of his employment with the State. In order to succeed the Plaintiff must establish that:

^{12.1.} Nemengaya owed a legal duty to protect the deceased.^{12.2.} Nemengaya acted in breach of this duty and did act negligently.^{12.3.} There was a causal connection between such negligent breach of the duty and the damages suffered by the Plaintiff – (see *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC) at page 950 paragraph 25 (*Carmichele CC*) and *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 SCA at page 315, paragraph 15 (*Carmichele SCA (2)*)).^{13.} *Carmichele (CC)*, paragraph 44, held that the Constitution imposed a duty on the State and all of its organs – including the police – not to perform any act that infringes on entrenched rights, such as the right to life (Section 11 of the Constitution)

and the right to freedom and security of the person (Section 12 of the Constitution).¹⁴In paragraph 45 of Carmichele (CC) the court quoted,with apparent approval, a part of paragraph 115 of the decision in *Osman v United Kingdom* [1998] BHRC 293, a decision of the European Court of Human Rights. In Carmichele SCA (2) (at page 319 to 320 paragraphs 32 and 33) the court referred to the following extracts from paragraphs 115 and 116 of the *Osman* judgment: "[115].... the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is those accepted by those appearing before the Court that art 2 [which deals with the protection of the right to life] of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. (Insert and emphasis added by SCA) [116].... For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice... In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see para [115 above], it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk... For the Court, and having regard to the nature of the right protected by art 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case." (Emphasis added by SCA)¹⁵. Carmichele (CC) (paragraph 62) recognised that the police service is a primary agency of the State responsible for the protection of the public in general against the invasion of their fundamental rights by perpetrators of violent crime. See also Carmichele SCA (2), paragraph 36, where it is stated that the vicarious liability of the State for those of its employees who have to

exercise discretions is also well established.¹⁶In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at page 446 to 447, Nugent JA said the following “[21] When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political correctness or through one of the variety of other remedies that the courts are capable of granting... There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However, where the State’s failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. ... [22] Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed, ... We are not concerned in this case with the duties of the police generally in the investigation of crime. I accept (without deciding) that there might be particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence, but it does not follow that an action should be denied where those considerations do not arise”.¹⁷In *Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA) the following is said “[62] As was pointed out in both *Van Duivenboden* and in the most recent *Carmichele* (SCA) case, where there is no effective way to hold the State to account other than by way of a private law action for damages, and in the absence of any norm or consideration of public policy that outweighs it, a legal duty should be recognised unless there are public policy considerations which point in the other direction. [63] In my opinion, there are, in the circumstances of this case, compelling public policy considerations which militate against the imposing upon a policeman such as Becker any positive duty to save people from drowning or to administer CPR on near-drowning victims. As emphasised by this court in *Minister of Law and Order v Kadir*: ‘... The police force is first and foremost an agency employed by

the State for the maintenance of law and order and the prevention, detection and investigation of crime with a view to bringing criminals to justice.' Thus in terms of s 205 (3) of the 1996 Constitution: 'The objects of the police services are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.' So too, under the South African Police Services Act 68 of 1995, the functions of the police are in the main the maintenance of law and order and the prevention of crime.'¹⁸ What I am primarily concerned with is whether the public interest is best served by allowing or denying an action for negligence. This in turn involves deciding whether to do so would have the potential to disrupt the effective functioning of the police service. What I am also mindful of is that it is part of a policeman's "work to ensure the safety and security of all South Africans and to prevent crime. These obligations arise from the Constitution and are affirmed by the Police Act" – see *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (9) BCLR 835(CC) at page 843I to 844A.¹⁹ In deciding whether to impose liability of the Defendant, I will be balancing the competing interests and rights of the deceased (in the prime of his life) to his right to life; the deceased's children's right to be supported by their father so that they can fulfil their potential; the shop keeper (the victim of the robbery) who expects that the police will arrest the persons who have violated his rights and recover his property; the interest of the public at large who expect the police to reduce crime levels by arresting perpetrators of violent and life threatening crimes and, of equal importance, the need to ensure that police can effectively and efficiently perform their functions and duties so as to reduce the alarming levels of violent crime that bedevil our society.

CONCLUSION²⁰ Before calling on Sibeko and the two others to stop, Nemengaya knew that he and the armed robbers were in an area crowded with pedestrians. He admitted knowing at the time that if he called out there was "a real and immediate risk to the life of an identified individual (sic the deceased) or individuals (sic other members of the public) from the criminal acts of a third party" – Sibeko, who might turn around and shoot. (See page 12, [116] in fin, supra). At the time, Sibeko did not pose a risk to anyone's life. By not calling on the wrongdoers to stop, they may have escaped the scene of their crime. By calling on them to stop, Nemengaya foresaw the risk of loss of life.²¹ The duty of the police to catch criminals and the public interest in having an effective police force militates against recognising an action for negligence when harm may result to an innocent bystander caught up in the process of the police performing their duties. However, when the constitutionally enshrined right to life of an innocent person is put at risk the public interest is, I believe, best served by allowing an action where, in the circumstances, negligence on the part of the police is established. (See in this regard Chaskalson P's observation in *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391(CC) at page 138 on the primacy of the innocent's right to life).²² In *Kruger v Coetzee* 1966 (2) SA 428(A) at page 430E to F it is said that "For purposes of liability culpa arises if – (a) a diligens paterfamilias in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps."²³ Applying this test to the facts, I find that Nemengaya foresaw the reasonable possibility of his conduct causing injury and patrimonial loss. That he

could have guarded against this injury by not calling out as he did. That his act caused the deceased's death. It follows that the Defendant is liable to the Plaintiff for such damages as she may in due course prove.²⁴In conclusion, I want to thank Plaintiff's Counsel, Advocate Weiner SC and Advocate Nemeng, and Defendant's Counsel, Advocate Sibuyi, for their thoroughly researched submissions that I found of

great assistance.²⁵The following order is made:¹The Defendant is liable for such damages as the Plaintiff may in due course prove.²The Defendant is liable to pay the Plaintiff's costs to date, including those occasioned by the employment of two Counsel. _____ IW
SCHWARTZMAN JUDGE OF THE HIGH COURT Attorneys for the Plaintiff:

L Mqongozi Mqongozi
Attorneys Advocates for
the Plaintiff:

Advocate S Weiner SC Advocate G Nameng Attorneys for the Defendant: N Hongo State
Attorney Advocate for the Defendant:
Adv Sibuyi
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JUDGMENT

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1.

At or about 16h00 on 12 March 2001, Johannes Mohofe was a pedestrian walking in the vicinity of the corner of Rissik and Bree Streets, Johannesburg. At about the same time, Inspector Gerson Nemengaya of the South African Police Service was involved in a shoot out with three suspected robbers, one of whom was Banyana Sibeko. In the course of this shoot out, Mohofe was struck by a bullet. He fell to the ground at the corner of Rissik and Bree Street. He died in hospital later that day. The Plaintiff in this action is Selina Mohofe, the mother of Johannes Mohofe (the deceased). In her personal capacity and in her capacity as the guardian and grandmother of the deceased's two minor children, she is claiming damages from the Minister of Safety and Security. Her cause of action, on which I will elaborate hereunder, is based on an allegation that Nemengaya, acting

in the course and scope of his employment with the Defendant, was negligently responsible for the deceased's death. The Minister denies the Plaintiff's cause of action and her claim for damages. There is also a special plea in which it is alleged that in terms of the South African Police Services Act 68 of 1995 (the Act) the Plaintiff's claim has prescribed.

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THE SPECIAL PLEA

3.1

In terms of Section 57(1) of the Act (that has since been repealed), the Plaintiff's action had to be instituted "before the expiry of a period of 12 calendar months after the date on which the Plaintiff became aware of the alleged act or omission or after the date on which the claimant might be reasonably expected to have become aware of the alleged act or omission". The deceased was shot and died on 12 March 2001. The Plaintiff's action was instituted on 10 July 2003 – 28 months after the deceased's death. The deceased's brother, Camfer Mohofe, was told of his death on 12 March 2001. On making inquiries from the police, Camfer Mohofe was initially told by the Investigating Officer that the deceased had been shot because he was a "tsotsi". In a subsequent report he was told that Sibeko had shot the deceased. Camfer Mohofe told the Plaintiff of the deceased's death. Because of the conflicting accounts of how the deceased had died, he instructed his attorney, Lulama Mqongozi, to make further inquiries of the police. What Mqongozi was told (by the police) was that a person had been arrested, who would be charged with, inter alia, robbery and the murder of the deceased. She then kept herself informed of what was happening in the trial of this man, who turned out to be Sibeko. On 2 September 2002 she was in court when Sibeko was acquitted of the murder of the deceased but convicted of robbery and other offences, for which he was sentenced to 20 years in prison. Sibeko has since died. Mqongozi told Camfer Mohofe of the outcome of the trial. Camfer Mohofe then discussed what he had been told with his family, including the Plaintiff, whereafter Mqongozi was instructed to sue the Defendant on behalf of the Plaintiff and the deceased's children.

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3.2

The Plaintiff knew of the deceased's death in March 2001. The full circumstances giving rise to his death would only have been known to her in September 2002 following Sibeko's trial. A letter of demand was sent on 18 November 2002. Action was instituted on 8 July 2003. This date is within 12 months of 9 September 2002, the date by which Mqongozi would reasonably have become aware of the magistrate's judgment and the circumstances giving rise to the deceased's death, which in turn indicated that the Plaintiff had a cause of action against the Defendant, based on Nemengaya having negligently shot the deceased. This is what was alleged in paragraph 4 of the Plaintiff's Particulars of Claim.

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This is what was alleged in paragraph 4 of the Plaintiff's Particulars of Claim.

4.

Even if it could be said that the Plaintiff should have reasonably found out within 12 months of the act or omission giving rise to her cause of action I would, in terms of Section 57(5) of the Act, have found that the interests of justice required that the Plaintiff's action be decided on the merits of the claim. I would have done this because there was no unexplained delay on the part of the Plaintiff. It was reasonable for the Plaintiff to wait the result of the trial before deciding whether or not to institute an action. More importantly, I would have had regard to the reason for the Police Act effectively reducing the period of prescription to 12 months instead of the normal civilian period of three years. This reduction is premised on the prejudice the police may otherwise suffer. In this case there is no prejudice to the Defendant in that all the facts and circumstances giving rise to the Plaintiff's claim were investigated at the time of the robbery and the murder. Thereafter what happened was preserved in the evidence given at Sibeko's trial.

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(5)

of the Act, have

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. I would have done this because there was no unexplained delay on the part of the Plaintiff. It was reasonable for the Plaintiff to wait the result of the trial before deciding whether or not to institute an action. More importantly, I would have had regard to the reason for the Police Act effectively reducing the period of prescription to 12 months

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is premised on the prejudice the police may otherwise suffer. In this case there is no prejudice to the Defendant in that all the facts and circumstances

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were investigated at the time of the robbery and the murder. Thereafter what happened was preserved in the evidence given at Sibeko's trial.

5.

For the above reasons, the special plea is dismissed.

THE PLAINTIFF'S CAUSE OF ACTION

6.

In paragraph 4 of the Particulars of Claim it is alleged that on 12 March 2001 at the corner of Bree and Rissik Streets, Johannesburg, Members of the South African Police Service, acting in the course of their employment with the Defendant, wrongfully and negligently shot and killed the deceased. Nemengaya is the person who is alleged to have fired the shot that killed the deceased. In paragraph 4A and in an alternative, introduced by an amendment in August 2005, it is alleged that at the time and place referred to, members of the South African Police Service, acting as aforesaid, wrongfully and negligently caused the deceased to be killed during a shoot out with Sibeko. What this amendment introduced was a claim against the Defendant based on Sibeko having shot the deceased. I will deal hereafter with the grounds on which Nemengaya is said to have been negligent. In the plea, the Defendant admits that the deceased was shot and killed at the time and place alleged. It is however denied that a policeman shot the deceased. What is alleged is that the deceased was shot by Sibeko, an armed robber, in circumstances that exclude

negligence on the part of Nemengaya.

In paragraph 4 of the Particulars of Claim it is alleged that on 12 March 2001 at the corner of Bree and Rissik Streets, Johannesburg, Members of the South African Police Service, acting in the course of their employment with the

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Nemengaya is the person who is alleged to have fired the shot that killed the deceased.

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alternative, introduced by an amendment in August 2005, it is alleged that at the time and place referred to

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that a policeman shot the deceased

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that the deceased was shot by Sibeko, an armed robber, in circumstances that exclude negligence on the part of Nemengaya.

THE ADMISSIONS AND EVIDENCE RELIED ON BY THE PARTIES

7.

In terms of Rule 37 (4) a number of admissions were sought by the parties. In addition to the responses thereto, the court had before it Nemengaya's oral evidence. What follows are the facts on which the parties relied in argument.

8.1

On 12 March 2001 and at approximately 16h15 Nemengaya, a police officer, was on duty in Bree Street, walking from east to west towards Rissik Street. At the time he was in plain clothes but armed with a service pistol. The Rissik and Bree Streets pavements were crowded with people leaving their places of work. What Nemengaya saw as he walked towards the corner, and what aroused his suspicions, was people milling around a shop in the middle of the block. He then saw two men leaving the shop. One of them had a firearm tucked into the waistband of his trousers. These men were followed by a third man, subsequently identified as Sibeko, who was seen to leave the shop with a firearm in his hand. Sibeko then put the firearm in the waistband of his trousers. From what he saw, Nemengaya drew the inference that the three men had just robbed the shop. The three men started to run. As they ran they had their backs to Nemengaya. They were then about seven to eight paces from Nemengaya.

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8.2

It was then that Nemengaya, who had drawn his firearm, called out that he was a policeman. He told the three of them to stop. They did not. What he saw was Sibeko move his arm to the front of his body, turn around and fire a shot towards him. As Sibeko was about to shoot Nemengaya dived to the ground. The gun shot missed him. The three men kept running. Nemengaya got up and pursued the three men.

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Nemengaya dived to the ground. The gun shot missed him. The three men kept running

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8.3

As they ran he saw Sibeko turn, point the gun at him and pull the trigger – the gun did not fire. They were then approximately 12 paces apart. When they neared the corner of Loveday and Jeppe Streets – some three blocks from where Sibeko had shot at him – the streets were relatively empty and Nemengaya got an opportunity to shoot at Sibeko. He fired his first shot – a warning shot – into the air. Sibeko did not stop. Because there were no people between them, he fired his second shot at Sibeko. The bullet hit Sibeko in the leg. Sibeko dropped his gun but kept running. Nemengaya stopped to pick up the gun. Inspector Mapoto, who had arrived on the scene and who was, I understand, meant to have been on duty with Nemengaya, caught Sibeko near the corner of Rissik and Loveday Streets. Sibeko was handcuffed with his hands behind his back.

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beko was handcuffed with his hands behind his back.

8.4

The two policemen then went back with Sibeko to the corner of Bree and Rissik Streets. There Nemengaya saw a person lying on the ground. It was the deceased. He was lying on his back. He was bleeding from a bullet wound in the abdomen. A search was made for a spent bullet. It was not found. Nemengaya and Mapoto then examined Sibeko's firearm. It was a 9mm pistol. He found a spent cartridge lodged in the firearm. Nemengaya said that this spent cartridge would prevent the gun from firing. The magazine that had a nine or ten round capacity had five live rounds in it. What Nemengaya also confirmed from the shopkeeper was that he had been robbed and that Sibeko was one of the armed robbers.

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8.5

At about 17h20 a Captain Morgan conducted a gun powder residue test on Sibeko's hands. The test samples taken by Captain Morgan were sent to a police laboratory for examination. On examination no gun powder residue was found on Sibeko's hands. Although the Defendant gave a notice in terms of Rules 36 (9) (a) and (b), no evidence was led to explain the examination or the significance, if any, of the results.

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8.6

Nemengaya did not look for the two spent cartridges from the shots he fired at Sibeko. There is no independent evidence to corroborate the number of shots Nemengaya said he fired. There is similarly no independent evidence concerning the condition of Sibeko's firearm following his arrest. Neither firearm could be produced at the trial.

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beko's firearm following his arrest. Neither firearm could be produced at the trial.

9.1

Nemengaya's evidence is the only account the court has of what happened on the afternoon that the deceased was shot. Nemengaya, who has been a police officer for 12 years said that before arresting a person who is running from a suspected crime scene, it is standard procedure for a policeman to first identify himself and call on the suspect to stop. This is why he called out to Sibeko as he and the two others ran from the scene.

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suspect to stop. This is why he called out to Sibeko as he and the two others ran from the scene.

9.2

Based on his experience, Nemengaya said that an armed suspect may stop and surrender. This he said happens in most instances. He however went on to say that the suspect may continue running or may turn around and shoot at the policeman who had called on him to stop. When he called on Sibeko to stop, there were people between him and Sibeko. Nemengaya cannot remember what these people did when he called out and Sibeko shot. Nemengaya said that in the situation he faced, and if Sibeko decided to shoot at him, he foresaw the possibility that the shot might miss him and hit one of the pedestrians in the vicinity at the time.

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he foresaw the possibility that the shot might miss him and hit one of the pedestrians in the vicinity at the time.

9.3

There were some contradictions between Nemengaya's police statement and his evidence. Certain details of the incident that he gave in evidence were not included in his police statement. Neither of these flaws in his evidence materially affects the overall credibility of his account of what happened.

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10.

On Nemengaya's version, he fired two shots that afternoon. Both were fired some two blocks from where Sibeko had shot at him. The deceased was found lying in the vicinity of the place where Sibeko had shot at Nemengaya. Apart from the shot fired by Sibeko, there is no evidence of any other shot having been fired in the vicinity of where the deceased was found.

11.

The shots fired by Nemengaya could not have killed the deceased. The probability that was accepted by the parties is that the deceased, who must have been in the vicinity at the time, was struck and killed by the bullet fired by Sibeko in Nemengaya's direction. The Plaintiff's main claim, which is that Nemengaya shot the deceased fails. I turn to deal with the alternative claim (see paragraph 6 hereof). Before doing so, it is necessary to deal with the law.

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THE LAW¹².

THE LAW

12.

The cause of the damages the Plaintiff has suffered flow from Sibeko having shot the deceased. The Plaintiff wants to hold the Defendant liable because of an alleged wrongful act by Nemengaya at a time when, as a policeman, he was acting in the course and scope of his employment with the State. In order to succeed the Plaintiff must establish that:

The cause of the damages the Plaintiff has suffered flow from Sibeko having shot the deceased. The Plaintiff wants to hold the Defendant liable because of

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was acting in the course and scope of his employment with the State. In order to succeed the Plaintiff must establish that:

12.1.

Nemengaya owed a legal duty to protect the deceased.

12.2.

Nemengaya acted in breach of this duty and did act negligently.

12.3.

There was a causal connection between such negligent breach of the duty and the damages suffered by the Plaintiff– (see *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938(CC) at page 950 paragraph 25 (Carmichele CC) and *Minister of Safety and Security v Carmichele* 2004 (3) SA 305(SCA) at page 315, paragraph 15 (Carmichele SCA (2))).

There was a causal connection between such negligent breach of the duty and the damages suffered by the Plaintiff

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Carmichele v Minister of Safety and Security[2001] ZACC 22;2001 (4) SA 938(CC)

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at page 950 paragraph 25 (Carmichele CC) and

Minister of Safety and Security v Carmichele2004 (3) SA 305SCA

2004 (3) SA 305

at page 315, paragraph 15 (Carmichele SCA (2)).

13.

Carmichele (CC), paragraph 44, held that the Constitution imposed a duty on the State and all of its organs – including the police – not to perform any act that infringes on entrenched rights, such as the right to life (Section 11 of the Constitution) and the right to freedom and security of the person (Section 12 of the Constitution).

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14.

In paragraph 45 of Carmichele (CC) the court quoted,with apparentapproval, a part of paragraph 115 of the decision inOsman vUnited Kingdom[1998] BHRC 293, a decision of the European Court of Human Rights. In Carmichele SCA (2)(at page 319to 320paragraphs32and 33)the court referred tothe followingextracts fromparagraphs 115 and 116 of the Osman judgment:

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to 320

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32

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"[115].

... the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is those accepted by those appearing before the Court that art 2 [which deals with the protection of the right to life] of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. (Insert and emphasis added by SCA)

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[116].

... For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice... In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see para [115 above]), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk... For the Court, and having regard to the nature of the right protected by art 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.” (Emphasis added by SCA)

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15.

Carmichele (CC) (paragraph 62) recognised that the police service is a primary agency of the State responsible for the protection of the public in general against the invasion of their fundamental rights by perpetrators of violent crime. See also Carmichele SCA (2), paragraph 36, where it is stated that the vicarious liability of the State for those of its employees who have to exercise discretions is also well established.

Carmichele (CC) (paragraph 62)

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16.

In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at page 446 to 447, Nugent JA said the following

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“[21] When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an

important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political correctness or through one of the variety of other remedies that the courts are capable of granting... There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However, where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. ...[22] Where there is a potential threat of the kind that is now in issue the constitutionally protected rights to human dignity, to life and to security of the person are all placed in peril and the State, represented by its officials, has a constitutional duty to protect them. It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed, ... We are not concerned in this case with the duties of the police generally in the investigation of crime. I accept (without deciding) that there might be particular aspects of police activity in respect of which the public interest is best served by denying an action for negligence, but it does not follow that an action should be denied where those considerations do not arise".

[21]

When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not

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17.

In *Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA) the following is said

Minister of Safety and S

curity v Rudman 2005 (2) SA 16 (SCA)

2005 (2) SA 16

the following is said

“[62] As was pointed out in both Van Duivenboden and in the most recent Carmichele (SCA) case, where there is no effective way to hold the State to account other than by way of a private law action for damages, and in the absence of any norm or consideration of public policy that outweighs it, a legal duty should be recognised unless there are public policy considerations which point in the other direction.[63] In my opinion, there are, in the circumstances of this case, compelling public policy considerations which militate against the imposing upon a policeman such as Becker any positive duty to save people from drowning or to administer CPR on near-drowning victims. As emphasised by this court in Minister of Law and Order v Kadir: ‘... The police force is first and foremost an agency employed by the State for the maintenance of law and order and the prevention, detection and investigation of crime with a view to bringing criminals to justice.’ Thus in terms of s 205 (3) of the 1996 Constitution: ‘The objects of the police services are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.’ So too, under the South African Police Services Act 68 of 1995, the functions of the police are in the main the maintenance of law and order and the prevention of crime.”

[

62

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considerations which militate against the imposing upon a policeman such as Becker any positive duty to save people from drowning or to administer CPR on near-drowning victims. As emphasised

by this court in *Minister of Law and Order v Kadir*:

‘... The police force is first and foremost an agency employed by the State for the maintenance of law and order and the prevention, detection and investigation of crime with a view to bringing criminals to justice.’

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So too, under the South African Police Services Act 68 of 1995, the functions of the police are in the main the maintenance of law and order and the

prevention of crime

18.

What I am primarily concerned with is whether the public interest is best served by allowing or denying an action for negligence. This in turn involves deciding whether to do so would have the potential to disrupt the effective functioning of the police service. What I am also mindful of is that it is part of a policeman’s “work to ensure the safety and security of all South Africans and to prevent crime. These obligations arise from the Constitution and are affirmed by the Police Act” – see *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (9) BCLR 835(CC) at page 843I to 844A.

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K v Minister of Safety and Security [2005] ZACC 8; 2005 (9) BCLR 835(CC)

[2005] ZACC 8

2005 (9) BCLR 835

at page 843I to 844A.

19.

In deciding whether to impose liability of the Defendant, I will be balancing the competing interests and rights of the deceased (in the prime of his life) to his right to life; the deceased's children's right to be supported by their father so that they can fulfil their potential; the shop keeper (the victim of the robbery) who expects that the police will arrest the persons who have violated his rights and recover his property; the interest of the public at large who expect the police to reduce crime levels by arresting perpetrators of violent and life threatening crimes and, of equal importance, the need to ensure that police can effectively and efficiently perform their functions and duties so as to reduce the alarming levels of violent crime that bedevil our society.

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can effectively and efficiently perform their functions and duties so as to reduce the alarming levels of violent crime that bedevil our society.

CONCLUSION

20.

Before calling on Sibeko and the two others to stop, Nemengaya knew that he and the armed robbers were in an area crowded with pedestrians. He admitted knowing at the time that if he called out there was “a real and immediate risk to the life of an identified individual (sic the deceased) or individuals (sic other members of the public) from the criminal acts of a third party” – Sibeko, who might turn around and shoot. (See page 12, [116] in fin, supra). At the time, Sibeko did not pose a risk to anyone’s life. By not calling on the wrongdoer to stop, they may have escaped the scene of their crime. By calling on them to stop, Nemengaya foresaw the risk of loss of life.

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At the time, Sibeko did not pose a risk to anyone’s life. By not calling on the wrongdoer

to stop, they may have escaped the scene of their crime. By calling on them to stop, Nemengaya foresaw the risk of loss of life.

21.

The duty of the police to catch criminals and the public interest in having an effective police force militates against recognising an action for negligence when harm may result to an innocent bystander caught up in the process of the police performing their duties. However, when the constitutionally enshrined right to life of an innocent person is put at risk the public interest is, I believe, best served by allowing an action where, in the circumstances, negligence on the part of the police is established. (See in this regard Chaskalson P's observation in *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) at page 138 on the primacy of the innocent's right to life).

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[1995] ZACC 3

1995 (3) SA 391

at page 138

on the primacy of the innocent's right to life)

22.

In *Kruger v Coetzee* 1966 (2) SA 428 (A) at page 430 E to F it is said that

Kruger v Coetzee 1966 (2) SA 428(A)

1966 (2) SA 428

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“For purposes of liability culpa arises if – (a)

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f –

(a)

a diligens paterfamilias in the position of the defendant- (i)

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(i)

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

would

foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii)

would take reasonable steps to guard against such occurrence; and

(b)

the defendant failed to take such steps.”

the defendant failed to take such steps.

23.

Applying this test to the facts, I find that Nemengaya foresaw the reasonable possibility of his conduct causing injury and patrimonial loss. That he could have guarded against this injury by not calling out as he did. That his act caused the deceased's death. It follows that the Defendant is liable to the Plaintiff for such damages as she may in due course prove.

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to the facts, I find that Nemengaya foresaw the reasonable possibility of his conduct causing injury and patrimonial loss. That he could have guarded against this injury by not calling out as he did. That his act caused the

deceased's death

. It follows that the Defendant is liable to the Plaintiff for such damages as she may in due course prove.

24.

In conclusion, I want to thank Plaintiff's Counsel, Advocate Weiner SC and Advocate Nemeng, and Defendant's Counsel, Advocate Sibuyi, for their thoroughly researched submissions that I found of great assistance.

In conclusion, I want to thank Plaintiff's Counsel, Advocate

Weiner

SC

and Advocate Nemeng, and Defendant's Counsel, Advocate Sibuyi, for their thoroughly researched submissions that I found of great assistance.

25.

The following order is made:

The Defendant is liable for such damages as the Plaintiff may in due course prove.

The Defendant is liable to pay the Plaintiff's costs to date, including those occasioned by the employment of two Counsel.

____IW SCHWARTZMAN JUDGE OF THE HIGH COURT
Attorneys for the Plaintiff: L Mqongozi
Mqongozi Attorneys Advocates for the Plaintiff: Advocate S Weiner SC
Advocate G Nameng Attorneys for the Defendant: N Hongo
State Attorney Advocate for the Defendant: Adv Sibuyi

____I

W SCHWARTZMAN

JUDGE OF THE HIGH COURT

Attorneys for the Plaintiff: L Mqongozi

Mqongozi Attorneys Advocates for the Plaintiff: Advocate

S Weiner

SC Advocate G Nameng Attorneys for the Defendant:

N Hongo

State Attorney Advocate for the Defendant: Adv Sibuyi

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Prepared on 14 October 2026 · Esheria