

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT, MBOMBELA)

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: YES |

SIGNATURE

15/03/2022
DATE

CASE NUMBER: **65/2018**

In the matter between: -

CHARLES NDLOVU

Plaintiff

and

MINISTER OF POLICE

Defendant

AND

CASE NUMBER: **180/2018**

In the matter between: -

ZWELAKHE SIMANGE NYAMBI

Plaintiff

and

MINISTER OF POLICE

Defendant

J U D G M E N T

DATES OF HEARING: 24, 25, 27 AND 28 JANUARY 2022; 2 AND 3 FEBRUARY 2022 AND 28 FEBRUARY 2022

DATE OF JUDGMENT: 15 MARCH 2022

SIEBERHAGEN AJ:

- [1] This consolidated¹ trial, served before me on the merits only.² I propose to refer to Mr Charles Ndlovu, the plaintiff in the action under case number 65/2018, as the first plaintiff and Mr Zwelakhe Semange Nyambi, the plaintiff in the action under case number 180/2018, as the second plaintiff.
- [2] The first plaintiff claims compensation for damages, having been unlawfully shot and wounded in his leg, below his right knee on the 23rd of April 2017 by Constable Mavuso, a member of the South African Police Service (“SAPS”), at his house in Tonga, Malelane District, Mpumalanga. The defendant’s (the Minister of Police, as cited) defence against the claim is that Constable Mavuso shot the first plaintiff in an act of self-defence, and thereby attracted the onus in respect of this claim.³

¹ Order by Mankge AJ, on 19 August 2019, consolidating the actions between Charles Ndlovu (plaintiff) and the Minister of Police (defendant), under case number 65/2018 of this Court, and between Zwelakhe Simange Nyambi (plaintiff) and Minister of Police (defendant), under case number 180/2018 of this Court.

² Order by Roelofse AJ, for separation of issues on 23 March 2020.

³ *Mabaso v Felix* 1981 (3) SA 865 (A) at 871H, 873E/F and 874C/D; [1981] 2 All SA 306 (A); *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at [25].

- [3] The second plaintiff claims on the basis of the *soi-disant* claim for emotional shock as a result of witnessing the shooting of the first plaintiff, his stepfather, and having directly thereafter been ordered by a police officer to handcuff the first plaintiff with cuffs given to him by one of the police officers on the scene. The defendant's defence to the second plaintiff's claim is, on the pleadings and from the evidence by the defendant's witnesses, a denial.
- [4] This trial, yet again, illustrated the importance of a sound knowledge of the substantive law, and the law of evidence and procedural law as a presupposition thereto. Moreover, the use of proper, in-depth cross-examination where apposite is undoubtedly of paramount importance. More about that further in this judgment.
- [5] At the outset, during his opening address on behalf of the plaintiffs, I enquired from Adv Lindhout whether he could refer me to authorities on the so-called claim for damages as a result of emotional shock, whereto he somewhat astonishingly answered that he "... *had a look* ...", but could not find any. As it turned out, there is ample authority, some of which Adv Lindhout referred to in his closing argument.

THE PLEADINGS

- [6] Although the pleadings of both the plaintiffs and the defendant leave much to be desired,⁴ I shall not unduly stress the importance of clear and precise pleadings, for the issues have been fully investigated during the trial.⁵

⁴ The defendant for instance, amongst others, pleaded evidence. In closing argument, Mr Lukhele, on behalf of the defendant, placed much emphasis on a defence of necessity. That has, however, not been covered by the pleadings.

⁵ *Wynberg Municipality v Dreyer* 1920 AD 443; *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 198; *Shill v Milner* 1937 AD 101 at 105.

THE EVIDENCE AND THE FACTS

- [7] The plaintiffs called the witnesses, in sequence, Mrs Lindiwe Sillinah Nyambi (the wife of the first plaintiff), the second plaintiff, and the first plaintiff. The defendant's witnesses were Sergeant Sibiya (F), Constable Mavuso and Constable Makwakwa, and it is common cause, both on the pleadings and by agreement between the parties, that these three witnesses, on the day of the incident which gave rise to these claims, 23 April 2017, were acting within the course and scope of their employment with the defendant. Except where necessary, I do not deal with the, respective, witnesses' evidence in detail.
- [8] Adv Lindhout, on behalf of the plaintiffs and Mr Lukhele, on behalf of the defendant, traversed the evidence at length and in detail.
- [9] The plaintiffs' version, testified to by Mrs Nyambi, the second plaintiff and the first plaintiff, is: -
- [i] During the evening of 23 April 2017 Mrs Nyambi and the first plaintiff had, at their house at Tonga, a severe argument when the first plaintiff in a drunken rage, because of his excessive drinking of Black Label beer, threatened to shoot her and himself.
 - [ii] She was concerned for her own safety and that of her children who had to be put to bed in preparation for their school attendance on the following day. She consulted a friend who suggested that she sought assistance from the social worker, Ms Nombulelo, who in turn advised her to seek assistance at the Tonga police station. Ms Nombulelo drove them in her red Volkswagen Golf motor vehicle to the said police station.
 - [iii] At the police station she had been immediately assisted by police officials who, due to the seriousness of the complaint which they regarded as a domestic violence issue involving the use of a firearm,

offered to assist by accompanying her in collecting the children's clothes and to move them all to a place of safety. She and Ms Nombulelo drove back in Ms Nombulelo's car to her house, followed by members of the SAPS in their police vehicle. They stopped at the front of her house and Mrs Nyambi, and the police officials, alighted from the respective vehicles at which stage the second plaintiff, her son, was at the front of her house where the police officers asked him where the first plaintiff was, whereupon he replied that he was at the back of the house, and led them to the back of the house. Whilst in the front portion of the house, she heard two shots fired in rapid succession from the back of the house, and the first plaintiff screaming, whereupon she went to the back of the house where she saw police officials standing next to a window, the first plaintiff lying on the floor in a back room annexed to the house, wounded in his leg. She also saw the second plaintiff in the back room and one of the male police officials throwing handcuffs to him and ordering him to cuff the first plaintiff, which he did. An ambulance arrived, the first plaintiff was put on a stretcher and taken in the ambulance, accompanied by the second plaintiff, to the Tonga hospital.

[iv] When she attended to the hospital to see the first plaintiff, she was instructed by police officials to attend to the police station to register a case where a statement was taken from her by female sergeant Sibiya. As it turned out, during the trial, it was a point of contention between the parties whether Sergeant Sibiya took this statement before the police officials accompanied Mrs Nyambi to her house and before the shooting incident occurred or only took this statement later on, during the early morning hours of 24 April 2017 at approximately 03:00. Except for the material differences between the evidence of Mrs Nyambi and Sergeant Sibiya, it is not necessary to deal with this issue in detail.

[v] During cross-examination the defendant's version was put to

Mrs Nyambi, and the upshot thereof was that she adamantly claimed never to have stated to the police, when at first assisted by a Constable Shabangu, that the first plaintiff pointed a firearm at her. She only round about 03:00 on 24 April 2017, when advised to attend to the police station at Tonga, made the statement taken by Sergeant Sibiya who, then, noted the time and date of the deposing to the written statement as at 22:30 on 23 April 2017. She was also adamant that the first plaintiff was cuffed, as described, in the backroom to her house and, thereafter, she, when visiting him at the hospital, found him cuffed to the hospital bed.

Understandably, having been disconcerted by the severity of the situation and witnessing the first plaintiff lying wounded on the floor, Mrs Nyambi's evidence was not accurate in each and every detailed respect, but she struck me as a genuinely sincere person and witness, and I have no reason to reject her version. I am mindful thereof that she, and all the other witnesses, testified almost five years after the event. I accept her version of the events that led to the shooting incident and her witnessing of the cuffing of the first plaintiff by the second plaintiff acting on the instruction of or at the request of the police officers.

[10] The second plaintiff testified that: -

- [i] he resided with his mother, Mrs Nyambi, and the first plaintiff, his stepfather, in their "*RDP house*" at Tonga, and that on the 23rd of April 2017 he was sitting at the steps to the front door of the house when Mrs Nyambi arrived in a vehicle followed by a police vehicle wherefrom four police officials alighted.
- [ii] One of the officials asked him where the first plaintiff was and upon answering that he was at the back of the house, the officer requested

him to accompany them and point the first plaintiff out, which he did.

- [iii] At the back room under construction, consisting of a kitchen, a passage and a further room, they entered through the outside doorway, saw the first plaintiff standing approximately 3.5 metres from where they were standing, whereafter the officer on his right side upon the appearance of the first plaintiff fired two shots in rapid succession at him with his firearm, one of the shots hitting him and causing him to fall to the floor screaming.
- [iv] None of the police officers shouted a warning or communicated with the first plaintiff before he was shot. After the shooting of the first plaintiff, the police officers “... *took cover against the walls*”. One of the police officers handed him an open set of handcuffs and instructed him to cuff the first plaintiff, which he did by moving towards the first plaintiff and, when close to him, saying to him to allow him to be cuffed in order to alleviate the situation.
- [v] He found an old school jersey on the floor with which he dressed the wound on the first plaintiff’s leg, whereafter an ambulance arrived, paramedics carried the first plaintiff on a stretcher to the ambulance and he, the second plaintiff, accompanied the first plaintiff in the ambulance to the Tonga hospital where he opened a hospital file on behalf of the first plaintiff.
- [vi] He denies the evidence by the police officers Constable Mavuso and Constable Makwakwa that: -
 - [a] He was not present during the shooting incident;
 - [b] They found the backroom by themselves and called for the first plaintiff;

- [c] The first plaintiff charged Constables Mavuso and Makwakwa with his right hand raised and holding a broken bottle with the intent to stab them with it;
- [d] Constable Mavuso first warned the first plaintiff before shooting him;
- [e] There was a broken green Amstel Lager beer bottle at the scene or in the vicinity where the first plaintiff fell after being shot.

The distinct impression that I gained from the evidence of the second plaintiff is that he had not been upset with the request by the police officers to handcuff the first plaintiff and that he did so in order to assist to subdue the first plaintiff as calmly as possible and that the first plaintiff, indeed, acquiesced in being cuffed by him. No convincing evidence was adduced by, or on behalf of, the second plaintiff that the witnessing of the shooting of the first plaintiff and the subsequent order and/or request to cuff him left him, the second plaintiff, with an emotional injury to the extent that it can be found thereon that he suffered or is suffering from a detectable psychiatric injury as a result thereof.

- [11] The first plaintiff testified that he could not remember the incident, as he had been drinking heavily on the day of the incident, had an argument with his wife (Mrs Nyambi), got extremely drunk, and he can only recall that he first came to his senses when he woke up in ward 1 of Tonga Hospital realising that he had been cuffed with his left leg at the ankle to the hospital bed and that he had a wound on his leg below the right knee.
- [12] Sergeant Sibiya, on behalf of the defendant, testified that she was on duty at the SAPS Criminal Service Centre, Tonga, on 23 April 2017, where Mrs Nyambi arrived with a complaint that her husband, Mr Ndlovu (the first plaintiff) threatened her and, also, threatened to shoot her with a firearm. She,

Sergeant Sibiya, opened a case docket, took Mrs Nyambi's statement, explained to her the process of obtaining a domestic violence interdict and arranged with police officers Constables Sambo, Mavuso, Makwakwa, Khoza (F) and Singwane (F) to assist Mrs Nyambi to collect clothing and her children at Mrs Nyambi's house and to take them to a place of safety. She testified that this process took approximately two hours from 20:30 until 22:30 on 23 April 2017, the time and date when Mrs Nyambi was read to and signed her statement taken by her. When Sergeant Sibiya was confronted during cross-examination with the times noted on the official J88 forms and the hospital records which were completed at 22:22 on 23 April 2017, evidently after the shooting incident, and that it would therefore have been impossible to have taken the statement at 22:30, she was not able to answer to this apparent improbability and persisted to state that she noted the correct time and did not, only, take the statement later on during the early morning hours of 24 April 2017.

[13] It is necessary to interpose, for not dealing with the evidence of each witness in the finest detail, to observe that Sergeant Sibiya on the assessment of her evidence from her demeanour and presentation of her evidence presented herself as a strong unshaken witness, but that her version gets trumped by the contradictions and probabilities when considered against the matrix of the evidence.

[14] Constable Mavuso testified that he, Constables Makwakwa and Sambo were informed on the 23rd of April 2017 by Sergeant Sibiya that Mrs Nyambi laid a complaint involving a firearm and that they had to accompany Mrs Nyambi to her home to fetch her children and clothing in order to take them to a place of safety. He stated that his intention with the task was to assist Mrs Nyambi, as requested, and to arrest Mr Ndlovu, the first plaintiff, because he as the result of the opening and registering of a case docket, had become a suspect. For that reason they escorted Mrs Nyambi and Ms Nombulelo, travelling in one of

their police vehicles, to Mrs Nyambi's house.

- [15] Constable Mavuso further testified that he, Constables Sambo and Makwakwa upon arrival at Mrs Nyambi's house at first searched the main house, but could not find the first plaintiff in the house, whereafter he went around to the back of the house with his fellow officers. He denied that he encountered the second plaintiff at the front of the house or that anyone of them required him to point out the first plaintiff. He stated that he, Constables Sambo and Makwakwa entered the back portion (an annex under construction) of the house with him leading, followed by Constable Sambo with Constable Makwakwa behind Constable Sambo. They found the first plaintiff lying on his back with his eyes closed and holding a broken bottle in his right hand. He called out at the first plaintiff by the name Charles, which caused the first plaintiff to wake up, disappear for a moment behind a canvas sheet, stand up and charge him and Constable Sambo with the broken bottle in his raised right hand. He and the other officers tried to flee from the attack, but he was trapped and only Constable Sambo had been able to flee through the doorway and Makwaka managed to escape by jumping through an open window. Because the first plaintiff did not stop, after he called out to him that they were the police, he fired a warning shot at a 45 ° angle into the floor in front of the first plaintiff, but he still did not stop, whereafter he attempted to discharge a second warning shot, still at a 45 ° angle into the floor, but at that stage the first plaintiff was too close to him, resulting in him being shot in the right leg below the knee. He intended the second shot, also, as a warning shot. It needs to be observed that this evidence contradicts the defendant's plea, in that the shooting of the first plaintiff in his leg is admitted in the plea as an action in self-defence. The relevant portion of the plea reads: -

"AD PARAGRAPH 6.1

13.1 Save for admitting that the member of the Tonga SAPS shot the

plaintiff on the leg with live ammunition, the contents hereof are denied and the plaintiff is put to the proof thereof.

13.2 The member shot the plaintiff on the leg as a means of defending himself from an imminent attack from the plaintiff.

13.3 The defendant pleads that its member was justified under the circumstances to fire a shot at the leg of the plaintiff as a means of defending himself from an imminent attack.” (sic)

[16] He, further, testified that the first plaintiff fell to the floor, swore at them and screamed that it would have been better had he been shot in the head so that he could be dead. It was not necessary to cuff the incapacitated first plaintiff. They called for an ambulance, cordoned off the scene and guarded the first plaintiff until he was taken away by ambulance to the Tonga Hospital. Under cross-examination, he had great difficulty with, and did not succeed in, answering questions as to why they, three police officers, had not been able to detain a person lying asleep on the floor to whom they advanced within one metre without, and before, waking him. One of his answers, that he was scared that the first plaintiff had been hiding a firearm with which they could be shot, is singularly unconvincing, particularly in the light of his earlier evidence that the first plaintiff was lying asleep on his back clutching a broken bottle in his right hand.

[17] Constable Mavuso testified that he was charged by the first defendant with a broken green Amstel bottle, which broken bottle he, subsequent to the shooting of the first plaintiff, moved away from the first plaintiff and, thereafter, ultimately booked into the SAP13 store and SAP13 register as evidence.⁶ Although

⁶ The “SAP13 store” derives its name from the register, designated as a “SAP13” register under and in terms of the relevant governing regulations, kept by and at all the police stations, and wherein exhibits relating to a registered case number are registered and locked into for safekeeping and purposes of further use as exhibits in a given case.

Constable Mavuso alleged that he could present the relevant SAP13 register, and despite my invitation to Mr Lukhele, on behalf of the defendant, to deal with it in accordance with the prescripts of procedural rules and the law of evidence for it not having been discovered by the stage of Constable's Mavuso's evidence in chief and cross-examination, no attempt was made during the further course of the trial to have it admitted into evidence. On this important aspect there is, therefore, no corroboration of Constable Mavuso's evidence. He, further, testified that he did not enter the hospital himself, because he was a suspect in an attempted murder case for having shot the first plaintiff, but when confronted in cross-examination with the fact that it was put to the second plaintiff in cross-examination that he, Constable Mavuso, would testify that it was him who cuffed the first plaintiff at the hospital, he was not able to explain the contradiction and merely stated that he did not give his attorney such instructions.

[18] Constable Makwakwa sought to, and did to some measure, corroborate the evidence of Constable Mavuso, but contradicted Constable Mavuso's evidence in the following material respects: -

[i] He stated that he drove Mrs Nyambi to her house in his double cab police vehicle and that she alighted from that vehicle at the front gate, whilst Constable Mavuso testified that Mrs Nyambi never⁷ alighted from the vehicle prior to the shooting and was held inside it for her own safety (both their versions are, of course, contrary to that of Mrs Nyambi, who testified that she travelled to her house in the private vehicle of Ms Nombulelo, the social worker, followed by one police vehicle);

[ii] He testified that it was only him and Constable Mavuso in the room where the first plaintiff woke up and not in a passage, whilst Constable Mavuso

⁷ This version was not dealt with in the pleadings.

testified that Constable Sambo was also present and that they found the first plaintiff in a passage between the two rooms. Constable Makwakwa, under cross-examination, conceded that Constable Mavuso was correct in his version that they found the first plaintiff in the passage;

[iii] He testified that when the first plaintiff woke up, he first got to his knees from the lying position and thereafter stood up, which is in direct contrast with the evidence of Constable Mavuso who could not explain how the first plaintiff got to his feet, despite having been only one metre away from him;

[iv] He testified that the first plaintiff could be observed at all times and, contrary to the evidence by Constable Mavuso, that he did not disappear behind the canvas sheet at all, and stated under cross-examination that Constable Mavuso was wrong about this “*disappearance*”;

[v] He testified that Constable Mavuso also followed the ambulance with them to the hospital, and had to change his evidence, when confronted under cross-examination in regard to the presence of Constable Mavuso at the hospital.

[19] Moreover, Constable Makwakwa’s description of his witnessing of the actual shooting of the first plaintiff, including his ability to have witnessed it in the circumstances that he described, is not only improbable but so far-fetched that it cannot be accepted, in that his evidence was that he at the moment of the shooting dived through an open window leading with his right shoulder and simultaneously turning his head towards the inside of the room and seeing the actual shooting.

[20] On a conspectus, the inference is irresistible that Constable Mavuso acted in panic when discharging the first warning shot and, thereafter, shooting the first plaintiff in his right leg. While that may be understandable, given his

predisposition as to the expectance to encounter a drunken furious man armed with a firearm, it cannot justify his shooting of the first plaintiff in the circumstances.

THE LAW

- [21] Mr Lukhele, on behalf of the defendant, correctly, submitted in his argument, supported with written heads of argument, that in respect of the first plaintiff's claim the onus rested on the defendant. I do not agree with his submission that there are two mutually destructive versions, for his submission seems to be predicated on a misunderstanding of the judgment of the Full Court in *National Employers General Insurance Co Ltd v Jagers*⁸ and the test laid down thus therein at 440G - I: -

"If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

*This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Kooperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about the plaintiff having discharged the onus which rested upon him on a balance of probabilities, one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable."*

- [22] In addition, such submission can only be predicated on a belief that there are no probabilities whereon a matter can be decided and would, further, be based

⁸ 1984 (4) SA 432 (ECD), incorrectly cited by Mr Lukhele in his written heads of argument as an Appellate Division judgment (citation at footnote 3 of the written heads of argument).

on ignorance of or a misconception of the explanation by Coetzee J in *African Eagle Life Assurance Co Ltd v Cainer*⁹ of his judgment in the *Koster* judgment,¹⁰ where he stated thus: -

“... Where there are no probabilities - where, for instance, the factum probandum was whether a particular thing was white or black, with not the slightest evidence as to the preponderance of white or black things in that particular community, there are clearly no probabilities of any sort. And when the testimony of witnesses is in conflict, the one merely saying the thing was white and the other black, it does not matter logically what the measure of proof is, whether it is on a balance of probabilities or beyond a reasonable doubt. The position is simply that there is no proof, by any criterium, unless one is satisfied that one witness’ evidence is true and that of the other is false.”

In any event, on the submission, and should I have found that the versions of the first plaintiff and the defendant are mutually destructive, which I don’t, then the defendant should also fail for having failed to acquit the onus.

[23] On the facts before me, I am able, without making a finding as to credibility of any of the witnesses, to find that the version of the first plaintiff is more probable than that of the defendant, wherefore I find that the defendant did not succeed in discharging the onus resting on the police to prove on a preponderance of probabilities that the shooting of the first plaintiff was justifiable.¹¹

[24] In my view, the evidence did not establish that the first plaintiff was indeed charging Constables Mavuso, Sambo and Makwakwa with a broken bottle held in his raised right hand, and a reasonable person in the position of Constable Mavuso would not have believed that his or Constables Sambo and

⁹ 1980 (2) SA 234 (W) at 237.

¹⁰ *Koster Kooperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens* 1974 (4) SA 420 (W).

¹¹ *Mabaso v Felix (supra)* at 871H, 873E/F and 874C/D; *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at [25].

Makwakwa's lives or bodily integrity were in imminent danger. Everything that Constable Mavuso relied on is not supportive of the fact that he, Constable Sambo or Constable Makwakwa were in danger of imminent attack and his belief, to the contrary, was not reasonably held. The overwhelming probability is, that he, acting in panic and whilst being predisposed as to the situation that they could be facing, overreacted when shooting the first plaintiff.

[25] It is now settled law that the so-called claim for nervous or emotional shock is recognised in this country where the plaintiff shows that the nervous shock is associated with a detectable psychiatric injury.¹²

[26] In *Komape and Others v Minister of Basic Education and Others*¹³ Mr Justice of Appeal Leach, in the Supreme Court of Appeal's unanimous judgment, after consideration of the legal position in English and Scottish jurisdictions, and the historic treatment of claims for so-called nervous or emotional shock by the common law countries, stated:¹⁴ -

"[25] However, for many years now, such a claim has been recognised in this country where the claimant shows that the nervous shock is associated with a detectable psychiatric injury. Thus, in Bester v Commercial Union⁶ this court, seemingly influenced to an extent by developments in England,⁷ held a psychological or psychiatric injury to constitute a 'bodily injury' for the purposes of delictual liability, and that there was no reason in our law why a claimant who suffered such an injury as the result of the negligent act of another should not be entitled to receive compensation.

[26] In Barnard v Santam,⁸ this court subsequently confirmed the existence of a remedy where a plaintiff sustained 'nervous shock', although Van Heerden ACJ pointed out that the term was outmoded and misleading as the only question should be whether the plaintiff sustained

¹² *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A); *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA); *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA); *Komape and Others v Minister of Basic Education and Others* (*infra*) at [25].

¹³ 2020 (2) SA 347 (SCA).

¹⁴ At [25] - [27].

a detectable psychiatric injury. Significantly Van Heerden ACJ declined to follow the restrictions applicable in the United Kingdom as laid down in cases such as McLaughlin and Alcock, referred to below, that such a claim was not available to a person who suffered psychiatric injury in consequence of a report of harm to a near relative (in that case a mother being told of her son's death in a motor accident). Such a 'hearsay' claimant is entitled to recover damages for psychiatric injury whether they are in proximity to, or come upon, the victim of the accident or are told about it later. The test for a liability is far more dependent upon the relationship between the claimant and the victim.

[27] *The same approach was followed by this court in Road Accident Fund v Sauls.⁹ In that matter a plaintiff witnessed his [sic] fiancé being struck by a motor vehicle in his near vicinity. She thought he had been killed or seriously injured (fortunately neither was the case) and was left in a condition of shock and confusion. She was subsequently diagnosed with a post-traumatic stress disorder which became chronic and unlikely to improve. As was summed up in this court, 'her case is that as a consequence of her witnessing the injury to [her fiancé] she suffered severe emotional shock and trauma which gave rise to a recognised and detectable psychiatric injury ...' In holding the defendant liable, Olivier JA explained:¹⁰*

'It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so is, in my view, a necessary and reasonable limitation to a plaintiff's claim... I can find no general, 'public policy' limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the onus of proof'."

[27] Simply no evidence was adduced by, or on behalf of, the second plaintiff that he sustained a detectable psychiatric injury as a result of having been ordered and/or requested by one of the police officers to cuff the first plaintiff after being shot and wounded (own emphasis). I pertinently refer to the "order" to cuff the first plaintiff as "*an order or request...*", as the evidence was not clear on whether it had been an order or a request. Given the second plaintiff's evidence

that he performed the cuffing willingly and in an attempt to subdue the first plaintiff peacefully, the inference is unavoidable that it was a request. Indeed, I am not able to find that the “*order or request*” had been directed negligently. I, therefore, find that the second plaintiff failed to prove the requisite elements to sustain a claim of delictual liability against the defendant, i.e. a negligent act by the defendant and that such negligent act caused the second plaintiff a detectible psychiatric injury. The second plaintiff’s claim must fail.

ORDER

[28] In the result, it is ordered that: -

- [i] The defendant is held liable for the damages that the first plaintiff might be able to prove, suffered in consequence of him being shot by Constable Mavuso on 23 April 2017.
- [ii] The defendant is ordered to pay the first plaintiff’s costs.
- [iii] The trial on quantum is postponed *sine die* and any re-enrolment thereof shall be by following the case management process in accordance with this division’s practice directive of 16 September 2021, § 3.18 read with § 15 of this division’s directive dated 9 January 2020.
- [iv] The second plaintiff’s claim is dismissed, with costs.

P SIEBERHAGEN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MAIN SEAT, MBOMBELA)

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 16 March 2022 at 10:00.

APPEARANCES:

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Counsel for the defendant: Mr Z L Lukhele (attorney)
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