



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 70310 /09

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	DATE DELIVERED: 24/04/15
(4)	SIGNATURE: 

30/4/2015

In the matter between:

DANIEL THABANG MAGEZA

Plaintiff

and

THE MINISTER OF SAFETY & SECURITY

Defendant

(now THE MINISTER OF POLICE)

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] The plaintiff ("Mageza") is a 36-year-old male cellphone technician who resides at Soshanguve Extension 4, Gauteng Province. He instituted an action against the Minister of Safety and Security, now Minister of

Police ("the defendant") and claimed payment of an amount of R490 000.00 (Four Hundred and Ninety Thousand Rand) for damages he suffered as a result of his arrest, assault and detention which according to him was unlawful.

[2] The trial commenced on 26 January and adjourned on 28 January 2015. Counsel agreed to submit written heads of argument and requested reasonable time to do so. I granted them until 20 February 2015. Judgment was according reserved.

THE PLEADINGS

Particulars of Claim

[3] In his particulars of claim, Mageza alleged that he was arrested by unknown members of the "South African Police Force" on 31 March 2009 at or near Total Garage, Transfer, Soshanguve Township, without a warrant.

He also alleged that in the process of the arrest, he was also shot at by the said unknown members of the defendant and was seriously injured. The bullet entered through the left side of his back and exited on the left front, *"causing severe internal injuries, including shattering plaintiff's ribs and perforating his left lung"*

After his arrest, he was detained at Soshanguve Police Station from 31 March 2009 and appeared at the Soshanguve Regional Court on 09 April

2009 and was remanded in custody until his release on bail on 21 April 2009.

Plea

[4] The defendant filed a plea and admitted firing shots at the Toyota Tazz vehicle ("the Tazz") in which plaintiff was an occupant, arresting and detaining him. However, it was denied that its members' conduct was unlawful.

I deem it necessary to reproduce the material parts of the plea in as far as the justification for the arrest and firing of shots at the Tazz is concerned.

"3. Ad Paragraph 3

The defendant denies that the arrest of the plaintiff took place at or near Total Garage Transfer.

The defendant pleads that the members of the South African Police Service received information that on the 31st of March there was going to be an armed robbery at a nearby shopping complex in Soshanguve.

The information contained the description of certain types of vehicle together with the plaintiff who was amongst the members who was part of a gang that was going to commit an armed robbery.

The members of the South African Police Service waited on the 31st of March 2009 for the identified vehicles and the identified members in order to prevent the armed robbery of cash in transit.

Whilst the members of the gang of which the plaintiff was part of, was waiting at the Total Garage, the members of the South African Police Service surrounded the two vehicles together with their occupants.

The vehicle, in which the plaintiff was an occupant, fled from the scene and nearly drove over one of the members of the South African Police Service. Whilst the vehicle was fleeing the scene, shots were being fired from the alleged vehicle at the members of the South African Police Service.

They chased and **suit (highlighted as meaning not clear)** for about 5 kilometers also and the vehicle, in which the plaintiff was an occupant in, was eventually cornered.

Whilst there was a chase the occupants were firing at the members of the South African Police Service who were in pursuit.

The plaintiff was arrested for committing an offence before members of the defendant".

[5] The defendant pleaded further that its members acted in self-defence as they were being shot at and that the vehicle in which the plaintiff was an occupant refused to stop after being ordered to do so.

[6] The duration of the detention was placed in issue. It was also admitted that plaintiff suffered injuries and was treated in hospital but the sequelae of such injuries were denied.

PRE-TRIAL: ADMISSIONS, CONCESSIONS AND ISSUES IN DISPUTE FOR DETERMINATION

[7] Pre-trial conferences were held on 14 December 2010, 13 August 2013 and 02 February 2014. Nothing material was agreed on. Surprisingly, and despite admitting the arrest, firing of shots and detaining the plaintiff, the defendant maintained that the onus of proof on all these aspects and the duty to begin "*should be argued and determined by the trial court*"

[8] On why the plaintiff was shot, the defendant's response was that the defendant "*fired back when he was shot at*"¹.

[9] The plaintiff served a request for further particulars for trial purposes on the defendant's attorneys on 12 December 2014. Mr. Minaar, for the defendant informed me when the trial commenced that the response he got was that the questions raised were matters of evidence. The questions raised and answers sought amongst others were whether: (a) the plaintiff

¹cartridges! Pretrial minute of 14 December 2010, paragraph 2.1.2 and 2.1.3

fired shots at members of the defendant, (b) any member of the defendant was struck by any bullet fired by occupants in the vehicle plaintiff was in; and (c) the members of the defendant were dressed in uniform.

[10] The only agreement between the parties was that issues of merits and quantum should be decided separately in terms of Rule 33(4).

CONSEQUENTLY, I granted an order to separate the merits from quantum and the trial proceeded on merits only.

TRIAL BUNDLES

[11] Other than the pleadings, Notices and Pre-trial bundles, the following trial bundles were handed in and I marked them as follows:

Exhibit A: Photo album and a sketch plan compiled by a member of the Local Criminal Record Centre, Warrant Officer, SS Moyane.

Exhibit B: Copy of docket 682/03/09 (continue from exhibit C)

Exhibit C: Copy of docket 682/03/09; and

Exhibit D: Copy of docket 116/04/09

EVIDENCE LED

Defendant

[12] When the trial commenced, the parties informed me that they had agreed that the defendant would begin to lead evidence. I did not

understand this to mean that the issue of onus of proof has been settled because at the end of the trial I was advised that it was still an issue that I should decide.

[13] The first witness was STEVEN **SOLOMON MOYANE**. He testified that he is a draughtsman, photographer and a forensic field worker. On 31 March 2009 at about 14:00 , he received a call that he should attend to a scene of crime at Soshanguve. He arrived there at about 14:45. He found one Warrant Officer Van Dyk who was in charge of the scene. He introduced him to other crime scene officers. He was shown some spent cartridges, a silver Toyota Tazz and Almera motor vehicles, two deceased persons, firearms and cellphones that were allegedly found at the scene as well as a third party motor vehicle (that was not involved) and a house that was shot at.

[14] He identified the photographs 1 to 8 in Exhibit A as those of the Toyota Tazz motor vehicle and photos 139 to 142 as those of the Almera motor vehicle. He also identified photos 45 to 63 in Exhibit A as the firearms that were found in the Toyota Tazz motor vehicle.

[15] He testified further that although he is not an expert in firearms, he was able to tell that the mechanism of one firearm that appears in photo 51 and 52 was jammed. The serial numbers in all three firearms were filed off. This according to him was done to prevent identification of the owner thereof.

[16] He also identified photos 91 to 94 as those of the items that were found in the motor vehicle. Photo 91 is a balaclava. Photo 92 is a jersey. Photo 93 is an umbrella and photo 94 (also appearing in photo 93) is an instrument that is used to break into motor vehicles.

[17] **He concluded his evidence** in chief by identifying the sketch plan that he drew. It is in page 100 of Exhibit A. It represents the crime scene.

[18] **Under cross examination;**

[19] Moyane confirmed that he took all the photographs and prepared the sketch plan and that he attended the scene of crime after some time. According to information he received, the incident took place at about 12 :00 and he only went there at about 14:45. He was not able to tell if the scene was tampered with. He found the firearms inside the motor vehicle. He took them outside the motor vehicle as it appears in photos 49 and 50. He does not know who placed the bullet next to photo 50. He does not know if the firearms were in working order.

[20] He identified the forensic statement he prepared in page 1 of Exhibit B. He marked the firearms exhibits A (photos 48-52) , B (photos 54-59) and C (photos 55,56,60,,61 ,62 and 63). The firearms were sealed in individual bags and put in one bag . The balaclava and jersey were marked Exhibits D and E respectively.

[21] He collected the cartridges and handed them over to Warrant Officer Tshabalala because he could not get the firearms of the police officers. The agreement was that the Investigating Officer would collect the firearms and take them to the ballistics laboratory.

[22] He was asked to explain what was happening in photos 57,58 and 59 that depict a firearm (B in the forensic report), a magazine and bullets. He explained that he took out the magazine and bullets as he wanted to take photos. He acknowledged that there were 13 bullets that he took out of the magazine, but was not able to tell whether the firearm would be full or not if it had such number of bullets because he is not a firearm expert. He put the bullets in one plastic bag, as he could not reload the magazine because it would not be safe to do so.

[23] He was asked why he did not mention the bullets in his forensic statement in page 1 of Exhibit B. His response was that he did not think it was necessary because the magazine was inside the bag with the firearms .

Photos 60 , 61 , 62 and 63 is another firearm (C in the forensic report). It had four bullets. The last firearm appears in photos 51 and 52. Its mechanism had jammed. He dismantled the firearm but forgot to take pictures. He also cannot recall how many bullets were in this firearm. This firearm also appears in photos 30 and 31 (at the feet of the driver) and appears

clearly in photos 47 and 48 that were taken after the deceased was removed.

[24] He confirmed that although he found bullets in the firearms, he did not find any spent cartridges inside the motor vehicle or outside that match the firearms.

[25] Photos 107 through to 117 depicts spent cartridges that he found on the road and photos 118-120 are cartridges he found outside the road (tarmac). Photo 152 depicts a house that was also shot at.

[26] He confirmed that the windows of the Tazz motor vehicle were closed as it is clearly depicted in photos 3 and 4 (two back windows), photo 5 (driver's window) and photo 6 (front passenger) as well as photos 7 and 8.

[27] When he arrived at the scene he only found the two deceased, but he could not dispute a suggestion that the plaintiff, whom he did not find, was seated in the front passenger seat. Photo 4 shows the back seat passenger (deceased). He confirmed that he found the other deceased (back seat) as he appears in photo 4; his body was outside the vehicle and his left hand was inside.

[28] He did not find the Task Force members or their vehicles when he arrived at the scene. He could not recall if one Mr. Van der Mersch was there because he was interacting with Inspector Van Dyk who was in charge of the scene. There were other police officers though.

He did not inspect any police vehicle.

[29] He cannot dispute that all spent cartridges were found in and outside the tarmac, and near the garage.

[30] He was referred to paragraph 7 of the statement of Inspector Simon Sipho Tshabalala , page 13 of Exhibit D wherein the following was stated:

"The only cartridges I seized or found at the scene were that of R5-rifles which are used by the police. I don't know who were involved from the police since A5 Capt Viljoen and Insp Van Der Merscht kept on saying they are from the Task Force. Inspector Van Dyk from SOCKS and Detective Capt Booyse who was a duty officer arrived and I handed the scene to Inspector Van Dyk"

[31] His attention was also drawn to a letter addressed to the Forensic Science Laboratory that appears in page 16 of Exhibit D wherein it is stated that 10 x R5 spent cartridges were being sent to "establish of which firearm the cartridges were used".

Moyane confirmed that indeed he handed the cartridges that appear from photos 107 in Exhibit A to Warrant Officer Tshabalala; however, there is no indication from the report of the forensic laboratory that the cartridges were tested.

[32] He did not lift fingerprints from the firearms, neither were residue tests done on the plaintiff or any of the deceased. He could not dispute that no tests were done to determine whether the firearms were fired prior to the ballistic testing.

[33] He confirmed that the blue Almera appearing at the bottom of his sketch plan in the area marked P is the same one that appears in photo 150 of exhibit A and that the Tazz vehicle ended at the top left of the sketch plan where he has marked ABC.

[34] The distance from where the Almera was parked when one goes through the frontcourt of the garage to where the Tazz vehicle ended up after crashing is between 200-300 metres. He would not agree with any person who would come to testify that the distance is 5 kilometres; as such a person would be lying.

[35] The whole incident took place within the confines of the sketch plan (page 100 of Exhibit A) and the distance calculated from the garage to where the Tazz crashed is 200-300 metres.

[36] The points marked J, K, L.M, N, H, G, F, E and D represent the 10 cartridges he found and collected. J is a live ammunition and the rest are spent cartridges.

[37] Photo 96 depicts the VW that belongs to a third party. Photo 108 was taken from where the Tazz ended up back towards the garage. It is not possible to see Total garage when standing at the STOP sign because the road bends.

[38] He was referred to the ballistic report as well as the section 212(4) and 212(a) statement of Peter Alvin Steyl in page 5 of Exhibit C, in

particular paragraphs 3.4 and 3.5 where reference is made to fired cartridges and cases.

Moyane was asked if he knew where the cartridges came from. His response was that they are not the ones that he sealed.

[39] He was also referred to paragraph 7.1 where Steyl stated that “ *The cartridge cases mentioned in 3.4 and 3.5 were not fired in the firearms mentioned in 3.1 and 3.3*”.

He confirmed that indeed they were not fired from the firearms he sealed.

[40] He inspected the entire Tazz vehicle but did not take photos of the foot area of the front passenger side because he concentrated on taking photos of places where he found exhibits. At first he could not see that there was a second firearm in photo 54, but only saw it when he moved the seat forward as it appears in photo 55 and photo 56. In photo 30 the deceased had been removed and seat moved back . In photo 46 the toilet paper had been moved forward and in photos 32 and 33 the cellphone had been moved. The balaclava and jersey were found in the boot.

[41] **Under re-examination**, he confirmed his counsel's suggestion that the fact that he did not find 9mm cartridges does not mean they were not there. It is possible that they were there but removed before he arrived.

[42] If he had lifted fingerprints, he could have obtained results with regard to the identity of the person to whom they belonged, provided such a person had been arrested before. The police keep a database of fingers of persons they arrest.

[43] The reason he did not uplift fingerprints or investigate if there were liftable prints is because the process would have damaged the firearm mechanism when sent for testing.

(Mr. Minnar rightly exclaimed that this was strange and enquired if this was police policy, to which the witness replied, yes.)

[44] The **second witness** was Warrant Officer SIBUSISO **JOSEPH SIBISI**, who testified that:

[45] He is the second investigating officer in this case that is recorded under Soshanguve SAS 682/03/2009.

[46] He was asked to explain the enquiries made by the police with regard to the ownership of vehicles as it appears in pages 31 to 38 of Exhibit C. He explained that the report in page 31 indicates that the owner of motor vehicle with registration letters and numbers JJT 043 GP is K. Smit. He did not obtain a statement from him. Page 32 is a description of a VW Volkswagen Beetle with registration JJT 043 GP. Photo 70, page 38 of Exhibit A shows the registration of the Tazz vehicle as JJT 013 GP. It belongs to one Motha.

[47] Tshabalala was not able to explain why the report of the enquiry into the Tazz (page 34, Exhibit C) indicated the registration as TTJ 013 GP. It is also indicated that the vehicle is a Land Rover Range Rover.

Defendant's counsel, assured me that the witness would explain the discrepancy in due course . However, all that the witness could say was that he does not know where the first investigating officer obtained all this information. This line of evidence was then abandoned. He also could not explain the link between the number plates affixed in the Tazz and the enquiries made by the police in pages 31 to 38 of Exhibit C. He said the enquiries were made by his predecessor, Mr. Tshabalala and he was unable to explain.

[48] The next issue Sibisi touched on was profiling of the plaintiff, but this line of evidence was also abandoned too.

[49] He was asked if there were any pending cases with regard to the two motor vehicles. According to him there is none with regard to the Tazz, but there was a hijacking case at Pretoria North with regard to the Almera. The case has since been withdrawn. He does not know if the vehicle has been returned to its owner.

[50] **Cross-examination** yielded the following responses;

[51] The enquiry with regard to the vehicle with registration numbers and letters JJT 043 GP was made on 23 July 2011 and all the others during 2011. He took over the investigation of this case during June 2011.

[52] There is no statement from any member of the Task Force in the docket. This is despite repeated requests from the Public Prosecutors as well as police superiors that statements should be obtained. The previous investigating officer, Tshabalala also told him that he could not obtain the statements.

[53] He was referred to various entries in the Investigating Diary² (Exhibit C) where it is clear that instructions were given to obtain details of Task Force members, their statements and to conduct certain investigations.

[54] Sibisi agreed with Minnar's suggestion that indeed no real efforts were made to obtain the statements of the Task Force members. He justified this by saying that he is not the only one who failed, but the first investigating officer told him that his efforts were in vain too.

² page 43, paragraph 7 where Captain Viljoen was asked to obtain details of Task Force members who shot at the Tazz.

Page 47, line 11 is a request to get information as to whether any cartridges fired from the seized firearms were found, and if so, to send them for ballistic testing.

Page 50, paragraph 3 The accused (Plaintiff) was ultimately granted bail on 14 April 2014.

Page 51, there is an entry dated 24/06/09 to the effect that the Tazz car has no registration no. and that there was nothing to link the accused and how he was arrested.

Page 52, the entry dated 12/08/09 reads " As said earlier- I have nothing against this accused-but now I am thinking of the cameras at the garage where the incident took place. Please interview the owner of the garage to help in this regard"

Page 53, entry dated 27/08/09 that reads in part : " Witness for murder docket untraceable"

Page 66 where there is amongst others an entry of 13/03/13 that reads in part that : " Officer's instructions were not complied with "

[55] He was referred to page 15 of Exhibit D where there is a subpoena in terms of section 205 of the Criminal Procedure Act dated 22 May 2009 and directed at Inspector CP Van Der Mescht to *"supply the investigating officer with names of Task Force members involved in the shooting, the firearm, warning statements and the Commander in charge"*

The application for the subpoena appears to have been made by Tshabalala

[56] He refuted Mr. Minaar's suggestion that the fact that Tshabalala referred to the shooting as an "accident" and not "incident" in paragraph 2 of his statement was of some significance.

[57] He was also directed to paragraph 5, last line of Tshabalala's affidavit in page 12 of Exhibit D where he stated, *"The third one was seriously injured and was lying outside next to the front passenger's door"*.

[58] He was also asked about what Tshabalala wrote in paragraph 6 thereof that he also found a helmet and windbreaker in the boot. This is contrary to what the photographer, Moyane, testified. He did not find these items.

His answer was that he did not know anything about it and that these items did not feature in his investigations.

It was put to him that the plaintiff will testify that indeed there was a helmet and a windbreaker in the boot because the deceased (owner and driver of the Tazz) was a motorbike fanatic. He had no comment on

this. He also indicated that he would not know anything about the plaintiff's version that he would testify that he used the vehicle the previous day and there were no firearms.

[59] It was also put to him that page 12 of Tshabalala's statement in paragraph 6 (Exhibit D) contradicts the photos in that according to the photos, there was one firearm in front and two at the back seat of the vehicle.

[60] Sibisis could also not comment on the letter that was addressed to the Forensic Laboratory (page 16) wherein it is stated that 10 spent cartridges are being sent for examination. This is contrary to the evidence of the photographer, Moyane, that he found 10 cartridges, one live and the rest spent.

[61] He also had no comment on the suggestion by Minaar that the scene was tampered with and the three firearms were planted in the vehicle.

Furthermore, he could also not comment on the fact that there was no evidence that the firearms found in the Tazz were tested or connected to any spent cartridges.

[62] He could also not comment on whether there was any reason why the Task Team left the scene of crime.

[63] He admitted that he did not make any serious efforts to locate the members of the Task Force . This is because the first investigating officer, Tshabalala, had already failed. Tshabalala had noted the outstanding issues, and there was nothing more he could have done. He denied that the reason he did not make serious efforts to investigate the matter had anything to do with the fact that it involved his colleagues.

[[64] He was referred to an entry in the investigating diary dated 24/09/12 that reads as follows:

" (1) *When are you going to attend to this docket seriously?*

(2) *Your administration is very poor.*

He agreed that the entry was directed at him, but had no comment.

[65] He could not explain where the J88 form was as it appears to have been obtained as per entry dated 26/09/09 but is not in the docket.

[66] When asked if he ever talked to Van Der Mescht about the identity of the Task Force members, Sibisi replied that he did not. The reason he gave was that his predecessor had spoken to him , as such he did not see a need to do the same again.

When I asked if there was no obligation on him to make follow-ups where his predecessor had failed, his response was that he only had to attend to what has been indicated as outstanding matters, for instance; the ballistic results report, which he did .

[67] There was **no re-examination**.

[68] The **third witness** was Warrant Officer **DANIEL CHRISTIAANS PHILLIPUS VAN DER MESCHT** who testified about the events leading to the shooting of the vehicle in which Mageza was an occupant, how the shooting occurred as well as how the incident ended.

[69] He testified that on 30/03/2009, he was contacted by an unknown person who informed him that they were about to commit a robbery at Cashbuild in Soshanguve. He then contacted numerous police reaction units known as SOCKS, a unit that deals with cash-in transit heists and gave them the information. The unit went out but did not find the vehicles mentioned on that day.

[70] On the same day, he was again contacted by the same individual. He informed him that they were going to target G4 Security at Cashbuild the next day. He gave him details of two motor vehicles, a Toyota Tazz and a Nissan Almera. He then made contact with the Special Task Force and members of HITEC Project Unit. The planning started in the morning of 31st March and the Task Force was in charge of the operations. He also contacted G4 Security who gave them a rough estimate of when their vehicle would go to Cashbuild in Soshanguve. This information matched that of his informant.

[71] On the day in question, the Task Force members were not able to pick up the two motor vehicles in the vicinity of Cashbuild. He picked them up at the garage in Soshanguve at about 12:30. He relayed the information to the Special Task Force and they informed him that they would move in the area and secure the vehicles and the people.

The Task Force members moved in the garage. He also moved closer. He then saw three suspects jump into the Toyota Tazz with registration JJT 013 GP. He confirmed that this is the vehicle in photos 1-6 and that photo 70 is the registration numbers that were given to him.

The vehicle sped out, almost hitting one of the petrol pumps as well as members of the Task Force, his own vehicle and his colleagues.

[72] A shoot-out occurred. The Tazz drove to the southern direction. Some of the Task Force members secured the suspects standing close to the Almera vehicle. He turned and proceeded to the direction of the South and about 300-500 metres away he spotted the Tazz. He went there and found that the Task Force members had already secured the vehicle. Two suspects (the driver and one at the back) were lying motionless. The other one was in the left front seat and wounded. They arranged for an ambulance. Soon thereafter, members of the SAPS from Soshanguve arrived at the scene.

[73] He was referred to the sketchplan in page 100 of Exhibit B and asked to identify where the two motor vehicles were when he first picked them up. They were parked at the point marked P. He was parked across the road, facing the garage. He refuted Mageza's statement in paragraph 7 that the Tazz had already moved out when they entered. According to Van Der Mescht, the police had already moved in when the Tazz drove off.

[74] He agreed with Mageza's statement that someone shouted out "Stop". He maintained that they identified themselves as police officers and although their vehicles were not marked, they had sirens and blue lights. The police were not dressed in full uniform. Some members of the Task Force were in uniform and some were in civilian clothes. They had their bulletproof vests on.

He also agreed with Mageza's statement that the driver of their vehicle (Tazz) did not stop but accelerated. He qualified it though by saying that it was not accelerating in a normal way, but in an alarming speed.

[75] He testified further that the weather was clear, although it rained after the shooting. He was not certain what time Moyane arrived at the scene but it could be the time he indicated, 14:45. He was there when he arrived. The scene was secured by putting barrier tapes around and only allowing access to police and medical personnel. The injured person was removed before the arrival of the photographer (Moyane). The suspect at

the back of the vehicle was removed before the photographer arrived too. This was to ensure that there were no firearms that they (the suspects) could use.

[76] He only knew about two firearms in the vehicle, but was informed about a third one. He did not check whether the serial numbers were filed off as he did not want to contaminate the scene. He was not present when the balaclava was found in the boot as he only cordoned off and secured the scene.

[77] He confirmed that Moyane collected spent cartridges from R5 –rifles that were used by the Task Force members. He could not account as to whether there were any spent cartridges from the firearms in the Tazz vehicle because he was only present when the scene was secured. The occupants of the Almera were searched and detained without injuries.

[78] On the veracity of the information he received on 30th March and steps taken to verify it, he testified that he tested it with the registration of the Tazz. It did not correspond with the Tazz. He confirmed the time with G4 Security and the information matched what he was told. He then felt he had a duty to inform the Task Force.

[79] He denied receiving the subpoena in terms of section 205 of the Criminal Procedure Act. He has been in contact with the investigating officer, Tshabalala. He provided him with names and contact details of the Task Force members that were in charge of the operation.

[80] On whether the shooting would have been prevented, he testified that yes, it would have, only if the occupants of the Tazz did what the ones in the Almera did and not put any person's life in danger by driving recklessly. The area was full with members of the public and the driving endangered their lives. The driver did not consider other road users as he just drove off from the garage into the street and did not stop at the stop sign.

[81] **Under cross-examination;** he testified that:

[82] He did not see the Tazz when the first shot was fired. The shouting "stop" took place as he arrived at the garage . He was in the vehicle. He did not see what happened before this.

[83] He consulted with the State Attorney twice, roughly a week before the trial commenced.

[84] The whole incident occurred in the 300-500metres radius within the garage and any suggestion that it is 5 kilometres is wrong. No one chased the Tazz for that distance.

[85] He was referred to page 38, photo 70 of Exhibit A and asked to confirm the registration plate numbers of the Tazz. He confirmed that it is JJT 013 GP. He confirmed that he checked the registration number a day before.

[86] Mr. Minaar asked him to look at his statement dated 04/02/09 in page 4 of Exhibit D wherein he stated that the registration number of the Tazz that was going to be used to commit the robbery was **JJT 043 GP**. Van Der Mescht confirmed that indeed the registration numbers were different and that the Tazz that was shot at is not the one that he was told would be involved in the commission of the robbery.

He also agreed that it was wrong for him to confirm in his evidence in chief that the registration numbers of the Tazz that was shot matched the registration numbers that he checked a day before the incident because they are not the same.

[87] He conceded that the registration numbers of the vehicle he saw at the garage that was subsequently shot at is not the same as the one that he was told would be used to commit robbery. They are very similar according to him as they differ with one letter and one number.

He also conceded that there is a possibility that there are hundreds of motor vehicles with similar numbers not only in Soshanguve, but the whole of South Africa.

[88] He was asked if the informant who called him was one of his usual informers to which he replied that he was not and that he would not say that he really trusted him .

This is the reason why on the first day he received a tipoff he called SOCKS , a unit that specializes in cash-in transit heists. He did not call them

the second day because they only confirm if information is correct or not. They only do investigations after cash in transit heists. He did not go to Soshanguve on the first day as he was in Johannesburg. On the second day he contacted the Task Force and HITEC . He also went there with his team. They were three, driving in a BMW vehicle. When the first shot was fired they were driving into the garage. He had a pistol and his crew had R5 rifles but they did not fire any shots.

[89] He confirmed that on the second day the G4 Security was supposed to visit Cashbuild at Rietgat Plaza that is close to Soshanguve Police Station and that the Task Force was still at Rietgat Plaza when he spotted the Tazz vehicles at the garage.

He also confirmed that at this stage the G4 Security vehicle had already left the Rietgat Plaza and no robbery had taken place.

[90] He confirmed that there were five people around the two vehicles and that they were not doing anything wrong at the stage he spotted them.

[91] He was asked to tell the court what he told the Task Force when he contacted them. According to him, he told them the he had just spotted the two motor vehicles and the people were standing outside talking. He did not tell them they were committing any offence. By this time he was standing across in another garage.

[92] The Task Force members moved in the garage without talking to him. He could see the Almera where it was parked and also points J and K where spent cartridges were found. It is possible that the first shot was fired after the words "Stop" were uttered.

He was not certain whether the sirens and blue lights were switched on before or after the first shot was fired as anything is possible. He admitted that many offences are committed by fake police officers nowadays.

[93] No crime was committed in his presence prior to the shooting.

[94] He does know of any reason why lifting fingerprint on a firearm would compromise ballistic testing as he is not a firearm expert, but believes it can be done.

[95] He only knew of two firearms that were found in the Tazz vehicle but he does not know where. He arrived at the scene approximately one minute after the Tazz had stopped. He only approached the vehicle about three minutes later after the scene was secured.

[96] He did not mention the firearms in his statement because he was only deposing about what was relevant to him at the time. He cannot recall seeing a cycle helmet , balaclava or clothes.

He also did not mention in his statement that any bystander or any person was in danger because it was not relevant for his purposes.

[97] He was standing at the BP garage across the Total garage where the Almera and Tazz were parked and he could see them. He cannot recall if they were parked close to each other or where the Tazz was pointed. He remembers that the Tazz exited by the butchery. He denied plaintiff's version that they exited on the left hand side of the petrol pumps.

[98] The distance between Rietgat Mall and the garage is about 5 kilometres.

[99] He cannot recall if he was there when the photos were taken as it happened five years ago.

[100] He does not believe plaintiff was arrested at the scene as he was injured.

[101] The reason he called the Task Force is because he was working at Cash in transit and Bank recovery reaction unit. The normal procedure is that if one has information about a motor vehicle, one is expected to go and search it before the incident happens.

[102] **Re-examination** questions were overruled as no basis was established. No foundation was laid regarding the various photos that depicted motor vehicle registration disks and number plates. Mr Manala sought to introduce this evidence through Van Der Mescht in re-examination. He did not take the photographs, neither did he make

enquiries about the ownership of the various motor vehicles. He also did not testify about this nor was he asked questions about it. The objections were rightly raised.

[103] The **fourth and last witness** for the defendant was Constable **NADIA SWANEPOEL**. She testified that she was working at Crime Prevention Unit at the time in question. She received information through the radio that there was shooting at Soshanguve involving SAPS members and two other vehicles that were hijacked. On arrival, the shooting was done. She and her Unit members cordoned off the scene. She saw a grey Tazz vehicle and people that had been shot. One was taken to hospital and was later detained by her.

[104] The reason she detained him is because he was inside the hijacked vehicle, there were unlicensed firearms, balaclava and house breaking equipment. The serial numbers of the firearms were filed off, that is why she says they were unlicensed.

[105] She was shown photos 54-63 in Exhibit in A and asked to comment if she saw the firearms depicted therein on the day in question.

Constable Swanepoel replied that she only saw one firearm on the day in question. She also saw one magazine, but she did not check it.

[106] She cannot recall any other relevant thing that happened on that day. She just recall that she ended up locking up the suspect.

[107] **Cross-examination** elicited the following responses;

[108] She did not see any firearm inside the vehicle, but saw one outside lying on the grass. It was just one firearm that she saw. She cannot recall if it was disassembled.

[109] No offence took place in her presence.

[110] She arrested Mageza at the hospital on the same day and detained him thereafter. No one pointed out Mageza to her. She used her discretion based on the available evidence as he was removed from the vehicle that she believed was hijacked.

[111] She does know that he was injured but does not know how the injuries came about. She does not know if he was operated on. She does not know where he was seated in the vehicle but she found him close to it, sitting on the grass. She did not find him in possession of the firearm, but because he was inside the vehicle where they were, she arrested him for possession of unlicensed firearms.

[112] She conceded that it could be that Mageza fainted after he was taken out of the vehicle and that he woke up at the hospital, but she does not agree that he has never seen her in his life. She read him his

rights before effecting the arrest. If he does not recall seeing her, he was probably confused.

[113] She cannot remember speaking to Van Dyk as there were many police officers. She does not remember who was there.

[114] There was no re-examination. This **concluded the case for the defendant.**

Plaintiff

[115] **Mageza** testified that he borrowed the Tazz from his friend, Trevor, a day before the incident . He took it back on the day in question and the two of them decided to go to Total garage to have it washed. Trevor drove the car. On their way there, they met and gave a lift to Noga, Trevor's friend who was also going there to meet some friends. They did not find the car washers. Mageza suggested that they go and buy some food as he was hungry. As they were about to leave, Trevor phoned his friends who were in Rustenburg and they told him they were on their way there. Noga's friends were also not coming as they promised. Trevor's friends arrived as they were about to leave. They were driving a blue Nissan Almera. Mageza knew one of them as Thabo. They were from court in Rustenburg . They informed Mageza's party that their case had been withdrawn and the group rejoiced on the news.

[116] Mageza reminded Trevor that they had to leave to buy food. The three of them got in their vehicle. Trevor was in the driver's seat, Mageza in the front passenger seat and Noga sat at the back. He cannot remember which side.

[117] Trevor started the ignition and moved the vehicle forward. Before he could move a short distance of about 5 metres, some vehicles entered the garage precinct and blocked their way. It was a BMW and a double cab Colt. He cannot recall their colours. A white male in trousers with side pockets alighted from the Colt with a firearm and pointed it at them shouting "Stop, Stop, Stop". He was not dressed in police uniform. The vehicles had no sirens or blue lights. He did not identify himself as a police officer.

[118] Trevor did not stop. He accelerated and continued driving. About 15 to 20 metres away, a shot rang out. Mageza felt some wetness on his stomach. He put a hand on it and saw blood. He was shot. (He showed the scar in court. It is about 10 inches underneath the left shoulder blade.) He told Trevor to stop as he had been shot. Trevor just accelerated. Mageza bent his head and hid near the gear lever. No one shot from the Tazz and they did not have firearms.

[119] He could not see the direction to which the Tazz was moving. He could tell they were being pursued because he could hear gunshots. The Tazz then crashed against some object and came to a standstill. After a

while, he heard a voice directing them to come out with their hands raised. He was unable to raise his left arm as it was painful. His door was flung open and he was pulled out of the vehicle by the same man who alighted from the Colt at the garage . He identified the person as the third witness for the defence; Van der Mescht.

[120] The whole incident from the garage to where the Tazz crashed lasted about two minutes.

[121] He saw Trevor bleeding from the mouth. After he (Mageza) was pulled out, he managed to send a message to his attorney through his cellphone that he had on his right hand that was at that time under the vehicle. He told his attorney that he had been arrested at Soshanguve. Although he had not yet been told he was being arrested, he just thought so because there were many police officers as he identified one that was known to him.

[122] The uniformed police were not at the scene yet when he was pulled out of the vehicle. He was conscious, though his eyes were closed. He heard a woman shouting that " *this person is alive*". An ambulance was then called. It arrived shortly thereafter and they removed his trousers and sneakers. He then fell into a state of unconsciousness because the next thing he remembers is when he woke up and found himself in hospital . He felt pain on his stomach and when he removed the hospital clothes to check what was happening , he realized that he had been

operated on. He also realized that his right hand had been handcuffed and he was under police guard. He was hospitalized for four days. On release he was taken to Soshanguve Police Station holding cells. Later on, he appeared in court and the matter was postponed for further investigations. He was then detained at New Lock (Kgoshi Mampuri Correctional Facility) in Pretoria. He was held in an ordinary cell with other inmates for three days. His wound became septic and he requested to be transferred to the hospital section. He was taken there for treatment only and brought back to the cell.

[123] He cannot recall how long he was detained. He went back to court after some time and he was told that his case was being withdrawn. He does not know what happened to the persons in the Almera vehicle as he was the only one attending court until the case was withdrawn.

[124] He confirmed that the Tazz was parked at point P in the sketchplan before they drove out . It was facing the petrol pumps and they went out between the pumps and the shops. They were still between the pumps and the shops when the first shot was fired. They were close to pump 2.

[125] When asked about the items allegedly found in the Tazz, he indicated that he only saw a balaclava. He did not see the tool to break into vehicles. The balaclava belonged to Trevor.

[126] Under **cross examination**;

[127] Mageza confirmed the suggestion by Mr. Manala that he was unlucky because he found himself at the wrong place at the wrong time and that he ended up being shot by the police.

[128] He could not dispute the sequence of events as described by Van der Merscht about how he received the information from his informer about certain vehicles that were going to commit robbery and how he went out looking for them . He had no knowledge of it.

[129] He confirmed that indeed their vehicle and the Almera were at the garage on the day in question..

[130] He denied the suggestion that he was an evasive witness and that he was not credible.

[131] He confirmed that he would not know what happened between the time that he was his hiding under the gear lever and when the Tazz crash-stopped.

[132] He also could not comment on the evidence that the Tazz was being driven in a manner that placed lives at risk as he was not looking but hiding under the gear lever.

[133] Although his hand was not fully stretched out, he could still manage to send a short message. His elbow was bent.

[134] He does not remember which side Noga was sitting at the back seat.

[135] After being pulled out he was on the left front door. He does not recall being moved from this position before the ambulance arrived.

[136] He confirmed what he stated in his written statement that he thought that Trevor panicked after being told to stop. He agreed with the suggestion that Trevor drove the vehicle in a panicked state.

[137] Although there were people in and around the garage, there were not many. He could not comment on the suggestion that Trevor drove the vehicle in a manner that placed peoples lives, including his, at risk or that a reasonable man confronted by Task Force members should have acted differently from what Trevor did.

[138] He was not able to comment on why certain things he testified about were not put to the defendant's witnesses. For example, Moyane was not told that the firearms were planted in the Tazz as was suggested to the second witness, Sibiya. Van der Mescht was not told that he was the first person to jump out of the Colt and that he is the person that took Mageza out of the Tazz.

[139] Under **re-examination**, he confirmed that he lost blood.

[140] He first saw the balaclava in court in the pictures and he identified it as Trevor's. Trevor was a biker , and bikers generally wear balaclavas underneath helmets or on their own for warmth.

[141] Mageza closed his case.

THE LEGAL FRAMEWORK AND PRINCIPLES

[142] The defendant admitted having arrested Mageza without a warrant and having shot him prior to such arrest. The reason given in the plea is that ; (a) he committed an offence in the presence of the police officers, (b) the police officers acted in self-defence as they were being shot at by the occupants of the vehicle in which Mageza was travelling in, and (c) the shooting was necessary.

[143] Counsel for the plaintiff, Mr. Minaar urged me to *"keep in mind that the Defendant did not rely in its plea on the protection of section 49, nor prove it"*³

Whilst this submission is technically correct it was referred to in the heads of argument submitted by counsel for the defendant, Mr. Manala to justify the claim of assault⁴ . My view is that section 49 is a statutory justification that would arise in any event as long as the police officers would be able to prove that they were authorised to arrest the plaintiff in terms of the Act.

[144] The question of statutory justification in terms of section 49 was considered in the matter of **Janse Van Rensburg and Another 2009 (2) SACR 216 (C)** . **Moosa J** and **Le Grange J** concurring, had this to say at

³ Paragraph 17 of plaintiff's heads of argument

⁴ paragraph 51-59

paragraphs 21 and 22

"[21] Counsel suggested that we consider whether or not first defendant forfeited the protection afforded him in terms of s 49 of the Act on his own version. I do not agree. It is common cause that complainant sustained certain injuries as a result of dog bites. The medical described the injuries as 'multiple dog bites on both hands, both legs, between eyes'. There are two conflicting versions as to the circumstances under which these injuries were sustained. Because of the conflicting versions and the quality of the evidence as a whole, we cannot make a finding on which version is beyond reasonable doubt true and which version is beyond reasonable doubt false. In my view the State has not passed the threshold of proof beyond reasonable doubt in respect of the assault with intent to do grievous bodily harm, to put first appellant to his defence in terms of s 49 of the Act. The evidential burden to show on a balance of probabilities that those factors (which excuse him in terms of s 49 of the Act) were present, therefore does not arise.

[22] I am supported in this conclusion by the dictum of Du Toit et al in Commentary on the Criminal Procedure Act at page 5-25, to the effect that where a police official is charged with assault with intent to do grievous bodily harm, on the ground that more force than necessary was used to prevent a suspect from escaping, it is the duty of the State to prove beyond reasonable doubt that he committed the offence. Once the State has discharged such onus, the accused will have to prove on a balance of probability that he complied with the requirements of s 49 of the Act before his conduct may be statutorily justified. (See also Hiemstra Suid-Afrikaanse Strafproses (6 ed) at page 110.)

[145] The dictum in paragraph 22 was applied by **Madondo J** in the matter of **Ngubane v Chief Executive Director of Emergency Services,**

Ethekwini Metropolitan Services and Another⁵

"[12] Before a conduct maybe statutorily justified, the accused must prove on the balance of probabilities that he complied with the following requirements (*S v Janse Van Ransburg and another* 2009(2) SACR 216(C) at 224 paragraph 22):

[13] In *S v Govender* 2001 (2) SACR 197 (SCA) (2001 (4) SA 273; A 2001 (11) BCLR 1197) at 204 – 205, the Supreme Court of Appeal introduced the threat or danger posed by the fugitive to the arrestor, to others or to society, as an important additional factor whereby the proportionality of the force to be permitted in arresting a fugitive had to be determined. In *Ex parte: Minister of Safety and Security: In re S v Wallis* 2002 (2) SACR 105 (CC) (2002 (4) SA 613; 2002 (7) BCLR 663) B at 127 – 138 the seriousness of the relevant offence was rejected as the only criterion determining proportionality.

[14] In the *Govender* case, *supra* at 205d – e, in applying the constitutional standard of reasonableness, the court expanded the test of proportionality, between the seriousness of the offence and the force used, to include a consideration of proportionality between the nature and degree of force used, and the threat posed by the fugitive to the safety of the security of police officers, other individuals and society"

[146] Section 40 (1)(a) of the Criminal Procedure Act (Act 51 of 1977), ("the Act") reads as follows

"(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence;

⁵ **(14847/2005) [2011] ZAKZDHC 61; 2013 (1) SACR 49 (KZD) (1 December 2011)**

[147] Section 49 of the Act, (as it was when the events in question took place) reads as follows:

"Use of force in effecting arrest

(1) For the purposes of this section-

(a) "Arrestor" means any person authorised under this Act to arrest or to assist in arresting a suspect; and

(b) "Suspect" means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this Section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—

(a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm"

FAILURE TO CALL ESSENTIAL WITNESSES

[162] Counsel for the plaintiff urged me to make a negative inference from defendant's failure to call the Task Force members to testify. They are essential witnesses who would have assisted the defendant to discharge the onus that it bears to justify its defences.

[163] I agree with this submission.

In the matter of **Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 44** Beadle CJ stated the following:

'If the defendant closes his case without giving evidence, in a proper case, an inference may always be drawn against him from his failure to give evidence contradicting that of the plaintiff . . . the fact that the defendant has not given evidence at all to refute what appears in the plaintiff's evidence is often a cogent factor to be taken into account.'

[164] The other challenge for the defendant is that it bears the onus of proof with regard to the defences pleaded.

No one has testified that the plaintiff or his co-occupants in the car committed an offence in their presence. To prove the defence of self-defence and or necessity, there must be evidence from the person who shot at the plaintiff to explain the kind of danger they were faced with and how they perceived it as a threat to them or the bystanders. Van Der Mescht did not witness the circumstances under which the first shot (or all other shots) was fired.

The evidence of Mageza, which stands uncontroverted is that he was hit on the stomach by the first shot, and this happened as their vehicle was about to leave the garage premises..

[165] Van Der Mescht and his team did not deem it fit to fire any shot, despite the fact that they were armed according to his evidence. Although he was there, he could not explain if any shots were fired from by the occupants of the Tazz vehicle.

There is no evidence that any cartridges were found from the alleged firearms. There is no evidence that any of the Task Force members was hit by any bullet.

WHOSE VERSION IS CORRECT?

[166] The versions presented before me with regard to the circumstances surrounding the shooting and subsequent arrest and detention of the plaintiff are totally irreconcilable and thus mutually destructive. Both counsel are in agreement in this regard.

[167] With regard to irreconcilable versions, the approach is stated in the matter of ***Stellenbosch Farmers Winery Group & Another v Martell & Others***⁶. The court summarized the technique generally employed to resolve factual disputes in order to come to a conclusion. The court is required to

⁶ 2003(1) SCA 11 at

make findings on (a) the credibility of the various factual witnesses;(b) their reliability; and (c) the probabilities.

[168] On the question of onus, the Supreme Court of Appeal, per Mhlanta JA had this to say in the matter of the **City of Johannesburg metropolitan Council v Patric Ngobeni**⁷ :

"[50] It is trite that a party who asserts has a duty to discharge the onus of proof. In African Eagle Life Assurance Co Ltd v Cainer,¹¹ Coetzee J applied the principle set out in National Employers' General Insurance Association v Gany 1931 AD 187 as follows:

'Where there are two stories mutually destructive, before the onus is discharged the Court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version'

[51] The approach to be adopted when dealing with the question of onus and the probabilities was outlined by Eksteen JP in *National Employers' General v Jagers*,¹² as follows:

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only

⁷ supra

succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. 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."

[169] In the matter before me, the defendant has admitted that Mageza was arrested and in the process of the arrest was shot at, and that he was detained. This is all that the plaintiff was required to plead and prove. The onus⁸ is then on the defendant to justify the lawfulness of the arrest, assault and deprivation of freedom.

ALLEGED FLIGHT OF MAGEZA AND ATTEMPT TO ARREST HIM

[170] I have already reproduced the defendant's plea, however, I deem it necessary to refer to the last sentence of paragraph 3 which reads as follows " *The plaintiff was arrested for committing an offence before*

⁸ See: *Minister of Order v Hurley* 1986(3) SA 568 (A) AT 589 E-F

members of the defendant"

[171] In the context of the plea, the defendant relies on section 40(1)(a) of the Act which reads as follows: "(1) A peace officer may without warrant arrest any person- (a) who commits or attempts to commit any offence in his presence"

[172] Section 40(1)(b) was not pleaded. As such I do not think it is even necessary for me to consider the issue of reasonable suspicion⁹ that Swanepoel apparently had that Mageza committed a Schedule 1 offence.

[173] Even if I were to characterize the whole incident (pursuing the plaintiff's vehicle until the arrest) to be justified on the basis of a suspicion that the plaintiff and his crew had committed a schedule 1 offence, the enquiry would be futile because that too was not pleaded. In line 7 of paginated page 13 of the plea the defendant stated that ***"The members of the South African Police Service waited on 31st of March 2009 for the identified vehicles and the identified members in order to prevent the armed robbery of cash in transit"*** (highlighted for emphasis)

[174] Section 40(1)(b) reads as follows "A peace officer may without

⁹ paragraphs 44 and 45 of defendant's heads of argument.

warrant arrest any person-

(a)

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

[175] The discretion to arrest only arises after the jurisdictional factors have been established. The test whether a suspect committed or attempted to commit an offence in the presence of a peace officer is a factual one. The question here will be whether on the evidence before me there is any evidence that Mageza committed or attempted to commit **any offence** (highlighted to indicate that there is no exclusion of the nature of offences) in the presence of a peace officer .

[176] It does not have to be Constable Swanepoel who harbors a suspicion It would be enough if another police officer harbored a suspicion based on reasonable grounds and exercised a discretion to arrest the suspect, but then directs another to effect it. Swanepoel does not remember talking to Van Dyk whom we were told was in charge of the scene. No one gave her a report.

She gave contradictory reasons why she arrested Mageza.

In her evidence in chief she said that she arrested him because he was in a hijacked vehicle and there were firearms, balaclava and some car breaking instruments in that vehicle.

Under cross-examination she conceded that no offence was committed in her presence. She also testified that she saw one firearm, not in the vehicle, but on the grass.

[177] In my view, Swanepoel did not apply her mind as to why she should arrest Mageza. She did not attempt to enquire from the police officers in the scene as to what items were found in possession of Mageza or what he was alleged to have done. This is the reason she tried in her evidence to incorporate every possible reason to justify the arrest. Ultimately she said that she used her discretion based on the prevailing circumstances to arrest him. Possible offences according to her testimony were being in a hijacked car, possession of the firearms, the car breaking instruments and balaclava.

[178] There must be an indication from the facts that the plaintiff shared the same intention with the driver to flee from the police and he must know that the police are trying to arrest him

Counsel for the Plaintiff, Mr. Minaar referred me to the matter of **Msomi v Minister of Law & Order and others 1992(2) SACR 557 (W)**. The facts were

similar to this matter because the plaintiff was a passenger too, though in the back seat.

Levy J considered the issue of whether the plaintiff was trying to flee and whether the police were trying to arrest him. The Honourable judge referred to **S v Barnard 1986 (3) SA 1 (A) at 7** where Van Heerden JA said that:

'... dit vir die persoon wat gearresteer staan te word duidelik moet wees dat die gemagtigde poog om hom te arresteer (Macu se saak op 633 en 644). Hy moet dan vlug met die opset om die poging te fnuik.'

And further:

'(d) Die oorledene moes met daardie bewussyn gevlug het, dws gepoog het om inhegtenisneming te ontduik deur ontvlugting.'

SELF DEFENCE

[179] In the matter of **Andries v Minister of Safety and Security and Others**¹⁰ Zondi J held that to succeed in a plea of self-defence, the defendant must plead and prove that:

".....there was an unlawful attack or threatened attack and that he had reasonable grounds for believing that he was in physical danger and that the means he employed in self defence were commensurate with the danger and

¹⁰ 10(6129/06) [2011] ZAWCHC 389 (10 October 2011)

the dangerous means of defence must not have been adopted and the threatened injury could not have been avoided in some other reasonable way. (see *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 526 G-H. The constitutionality of self-defence was also considered by the Constitutional Court in the *S v Makwanyane* 1995(2) SACR 1(CC). At paragraph 138 the Court had this to say in this regard:

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

[53] The test whether a person acted in self-defence is an objective one which means that when the Court comes to decide whether there was a necessity to act in self defence it must place itself in the position of the person claiming to have acted in self defence and consider all the surrounding factors operating at the time he acted (*Nsomi v Ministers of Law and Order supra* at 528 G). The legal position on this issue was succinctly set out in *Kgaleng v Minister of Safety and Security and Another 20M (4) SA 854 (W)*. At 865 D - E the Court had this to say:

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

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

THE NECESSITY TO SHOOT

[180] The Supreme Court of Appeal¹¹ considered this defence in the matter of **Maimela v Makhado Municipality**¹²

The defence is invoked not only when the threat is directed at the perpetrator, but also at an innocent person or third party.

In paragraph [17], the court stated the following:

" Professor Jonathan Burchell³ suggests that for an act to be justified on the ground of necessity the following requirements must be satisfied:

„(a) [A] legal interest of the defendant must have been endangered, (b) by a threat which had commenced or was imminent but which was (c) not caused by the defendant's fault, and, in addition, it must have been (d) necessary for the defendant to avert the danger, and (e) the means used for this purpose must have been reasonable in the circumstances."

FINDINGS ON SUBMISSIONS

[181] I am grateful to counsel for the heads of argument and the extensive research on the relevant issues in this matter. Mr. Minaar's extensive submissions on Sections 40 and 49 of the Act, the legal background thereof as well as case law were helpful. His heads of

¹¹ Mpati P

¹² **12** (269/10) [2011] ZASCA 69 (20 May 2011)

argument also dealt, with the constitutional challenge to section 49¹³ that precipitated the 2012 amendment as well as case law on the application of the section.

I agree with Mr Manala though that the applicable version of section 49 is as it was on 31 March 2009 as the amendments do not have retrospective application.

I have already referred to some of the cases that counsel referred me to, as such I will not repeat the principles arising from those cases.

Counsel for the Defendant contends that:

[182] The plaintiff knew that the persons that stopped their vehicle and subsequently shot and arrested him were police. The submission is based on the fact that Mageza, even though in pain, managed to send a message to his attorney to tell him that he was being arrested.

In my view this assumption does not accord with the evidence of the plaintiff. He testified that he recognized one person that he knew to be a police officer and from they're assumed that the rest were and he would be arrested even though he had not been told so at the time.

[183] The plaintiff was not a credible witness because he was rude to defendant's counsel and refused to accept objective propositions that were put to him such as whether there were many people at the petrol

¹³ Ex parte Minister of Safety & Security & Others: In re: Staat v Walters 2002 (2) SACR 105 (CC)

station and whether the Tazz was being driven in a manner that endangered the lives of other road users. He also lied under oath and his evidence was tailored and self-contradictory.

The criticism of Mageza in this regard is not justified. A large chunk of the cross examination was legal propositions on what counsel for the defendant said he would argue at the end of the case. The only setback for Mageza was when he was asked about things that were not put to the witnesses by his counsel.

[184] On the issue of arrest and detention, counsel for the defendant argued that this was justifiable because the police found firearms in the Tazz , a balaclava and an instrument to break into vehicles.

This argument seems to suggest that the means justify the end. Furthermore, it also loses sight of the fact the plea and the jurisdictional facts that need to be present in terms of section 40(1)(a). Both Van Der Mescht and Swanepoel testified that Mageza did not commit any offence in their presence.

[185] It was also argued on behalf of the defendant that Swanepoel was entitled to arrest the plaintiff because she suspected him of having committed a schedule 1 offence. The presence of unlicensed firearms and ammunition in a vehicle creates a reasonable suspicion of a commission of an offence. A discretion to arrest was exercised because the jurisdictional facts were there. Whether or not the discretion

was exercised correctly or not does not arise in this case. The court should not interfere with the exercise of an administrative discretion . Reference was made to the cases of Minister of Safety and **Security v Sekhoto and Another [2011] 2 ALL SA 157 (SCA)** and **Minister of Law and Order [1986] 2 ALL SA 241** in this regard. Swanepoel arrested plaintiff for possession of unlicensed firearms and ammunition.

I have already dealt with what has been pleaded in the preceding paragraphs, in particular the fact that Section 40(1) (b) was not pleaded. Even if it had been pleaded , the question of a discretion only arises if the jurisdictional factors had been satisfied.

[188] On Section 49 of the Act, counsel for the defendant submitted that the relevant version is the one as it was on 31 March 2009 because even if it has been amended, it has no retrospective application.

As I have indicated above, I agree with Mr Manala in this regard. However, the defendant bears the onus of proof.

[189] On the objective assessment of the prevailing circumstances at the garage on the day in question, the police officers were confronted with a situation of danger because there was a conspiracy to commit robbery, the driver of the Tazz refused to stop when ordered to do so, and he drove off in a manner that endangered other lives . Reference was made to the cases of **Chetty v Minister of Police 1976 2 SA 450 (N) 452, Rv Mohamed**

1938 AD 30 at para 36; S v Mnguni 1966 3 SA 776 (T) 778; Ex Parte Dire Minister van Justisie: In re S v Van Wyk 1967 1 SA 488 (A) 509

[190] The shooting of the plaintiff was unavoidable. It happened as of necessity. Reference was made to several cases such as **Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck 2007 (2) SA 118 (SCA)** at paragraph [13].

Finally, Mr. Manala submitted the plaintiff's claims should be dismissed with costs.

Counsel for the plaintiff submitted that :

[191] It is clear from the evidence of Moyane that crime scene was handled shoddily and disturbed by him. There is also a probability that it was tampered with before Moyane's arrival. This is evident from the fact that some items like the motor cycle helmet were missing, objects such as cellphones were moved around and firearms moved and one was even dismantled by Moyane, magazines were emptied and no residue tests were done on the occupants of the vehicles.

[192] It is highly probable that no shots were fired from the firearms that were allegedly found in the Tazz because;

- (a) Three windows of the Tazz were completely closed ,
- (b) There were no spent cartridges from the firearms allegedly found in the Tazz. All cartridges in the scene were fired from R5 rifles.

(c) The driver's window appears to be open but there is no indication that it was shot out;

(d) There is no evidence that any of the firearms were touched or used by any of the occupants of the Tazz because no tests were done.

[193] It is also highly probable that the firearms were planted in the Tazz by members of the Task Force to cover up their actions as they had shot and killed two persons and wounded one without reasonable cause.

I tend to agree with these assertions because no one has testified about seeing these firearms before they were photographed. Van Der Mescht arrived at the place where the Tazz crash-stopped within a minute and approached the vehicle within three minutes thereof. Although he testified about helping to secure the scene, he does not place himself where he actually sees what is in the Tazz.

According to him, he only saw two firearms , but was told about a third. He did not see the items such as the car breaking instrument and clothing. When it comes to what he could have actually seen, he hid behind the excuse that he only secured the scene.

Swanepoel only saw one firearm and a magazine on the grass. She arrived before the photographer because she and her unit secured the scene immediately after the incident.

[194] Lastly, if the defence that the police were acting in self-defence is to be believed, why are there no spent cartridges from the firearms in the Tazz?

[195] With reference to the evidence of Sibisis, counsel for the plaintiff submitted that the fact that the investigation was deliberately messed up to protect the Task Force members who had acted in an unreasonable manner.

[196] Van Der Mescht's evidence was contradictory and his testimony was not recorded in his written statement. He did not hear members of the Task Force identify themselves to the driver of the Tazz, he was not aware if any shots were fired from the Tazz. He was the first to arrive where the Tazz was, but he did not deem it fit to fire at the vehicle.

[197] Furthermore, it turned out that the details of the Tazz that Mageza was travelling in differ from those that were given to him by his informant. There was no justification to shoot, arrest or detain the plaintiff on the basis of evidence presented by Van Der Mescht.

[198] The evidence presented by Constable Swanepoel does not satisfy the requirements of section 40 of the Act. She did not give a satisfactory explanation why she arrested the plaintiff. She did not arrest him for the offence she heard on the radio (hijacking of a motor vehicle. Plaintiff did not commit an offence in the presence of Swanepoel and there is no

evidence that she could have suspected him of having committed a Schedule 1 offence.

[199] On section 49, counsel for the plaintiff submitted that there was no evidence that there were reasonable grounds to believe that the force was immediately necessary for the purpose of protecting the arrestee and any other person from imminent or future death or grievous bodily harm, that the force could not be delayed or that the offence was in progress and was of a serious nature involving life threatening violence or that it was likely to cause grievous bodily harm.

[200] Defendant must plead and allege an unlawful attack, threatened or real, reasonable grounds for believing that he was in danger and that the force used was reasonable and commensurate with the plaintiff's alleged aggression.

CONCLUSION : CREDIBILITY OF THE FACTS AND WITNESSES

[201] In my view, there was no reason for Van Der Mescht to set in motion the events that led to the confrontation between the Members of the Task Force and the driver of the Tazz vehicle because the G4 Security vehicle had come and gone where it was supposed to have been robbed, about 5 kilometres away from where the Tazz and Almera vehicles were, in a crowded garage parking.

The plaintiff and others were standing near these vehicles, talking. They were not doing anything untoward.

[202] There is no evidence to suggest that the Members of the Task Force tried less lethal means to stop the Tazz vehicle from fleeing, such as shooting the tyres.

In fact, the first shot fired went straight into the abdomen of the plaintiff. This was soon after the two vehicles met. The vehicle of the Task Force members blocked the way of the Tazz.

[203] There is no evidence to suggest that a single shot was fired from the Tazz vehicle. All cartridges found were fired from the R5 rifles that belonged to the Task Force members.

In fact, the Task Force members are the ones who put the lives of innocent persons at risk because there is evidence that a third party vehicle and a nearby house were shot at.

[204] In less than two minutes, and within a distance of about 200-300 metres, the bodies of two of the occupants of the Tazz vehicle lay dead, riddled with horrible, multiple bullet wounds. The photographs are testimony to a brutal attack. The fact that to date the identity of the Task Force members has not been revealed leads to an inescapable conclusion that they had no reason to act in the manner they did. The deliberate shoddy investigation of the matters adds to this conclusion.

[205] On these facts, the pleas filed by the defendant cannot succeed.

[206] The only witness that could have given life to the pleas was Van Der Mescht. He failed. Swanepoel arrived after the whole action. Moyane arrived at the scene almost three hours later. Sibisi and his predecessor failed to do the basic investigations or even obtain names of the police officers who the defendant alleges acted in self-defence and were compelled to shoot after being shot at. Van Der Mescht knows who they are, but did not reveal their identity even though he was served with a Section 205 subpoena that he alleges he did not receive. Why did he not mention their identities in his written statement?

[207] Mageza was, in my view a truthful witness. He did not hide the fact that the driver of the vehicle he was in refused to stop even when he told him to do so. His explanation for asking the driver to stop was because he (Mageza) had been shot. The whole incident lasted about two minutes and in a stretch of about 200-300 metres. There is not much to tell. He did not see where the vehicle was heading because he hid himself under the gear lever. He did not exaggerate his injuries. He was shot once. It is clear from the photographs that his co-occupants were shot several times. His injury is consistent with his evidence that he was shot once. The only reason he was not shot again is most likely that he hid under the gear lever. He did not testify about seeing his co-occupants being shot. He did

not see anything. The next time he saw Trevor was after the Tazz crashed. He (Trevor) was bleeding from the mouth.

[208] Under the circumstances, I do not see any reason why the conduct of members of the defendant should not be declared unlawful and that it be held liable to compensate Mageza for the damages arising from his arrest, assault and detention.

I make the following order:

- (a) The claims of the plaintiff succeed with costs; and
- (b) The defendant is liable to compensate the plaintiff with 100% of his proven or agreed damages.



TAN MAKHUBELE

Acting Judge of the High Court

Date heard:	26-28 January 2015
Heads of argument submitted on:	23 & 24 February 2015 respectively
Judgment delivered on:	24 April 2015

APPEARANCES:

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