

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

**CASE NO. 06/2008**

In the matter between:

**REGINALD EDGAR KELLY PHATLANE**

**PLAINTIFF**

*and*

**THE MINISTER OF SAFETY AND SECURITY**

**DEFENDANT**

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**CORAM:**

NAIDOO, AJ

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**HEARD ON:**

22, 23, 25 November 2011  
16 -19 January 2012

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**DELIVERED ON:**

1 MARCH 2012

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**NAIDOO AJ**

- [1] The plaintiff sued the defendant, inter alia, for damages in the amount of R509 300, arising out of injuries he suffered as a result of alleged assaults upon him by certain policemen in the course and scope of their employment with the defendant. The plaintiff was represented by Mr M Steenkamp and the defendant was represented by Mr SJ Reinders. The defendant did not

object to the plaintiff's application in terms of Rule 33(4) of the Uniform Rules of Court for separation of the merits and quantum and the application was granted. The matter accordingly proceeded only on the merits. In addition, the defendant did not object to the plaintiff's application for amendment of his Particulars of Claim, which were amended as follows:

- 1.1 Paragraph 5.1 – the substitution of “sewe (7)” by “ses (6)”, and “drie (3)” by “twee (2)”, so that it now reads “Inspekteur De La Hunt die Eiser ses(6) maal geskiet het, te wete twee (2) skote in die Eiser se linkerbeen and vier (4) skote in die Eiser se regterbeen”
  
- 1.2 The deletion, in its entirety, of paragraph 5.2, which reads “Daarna die Eiser aan sy klere by die kombuisdeur van die Eiser se woning uit te sleep; en”
  
- 1.3 Paragraphs 9.1 and 9.4.1 – the substitution of “sewe (7)” by “ses (6)”. Paragraph 9.1 now reads  
 “Reeds gelede mediese uitgawes:  
 Die Eiser is gehospitaliseer (in ‘n Staatshospitaal) en is mediese ingrepe aldaar op hom uitgevoer ten einde hom vernaam to behandelvir die ses (6) skietwonde. Eiser het R500.00 betaal ten aansien van die tersaaklike behandeling en vorder die Eiser derhalwe die tersaaklike bedrag onder hierdie eishoof.”

#### Paragraph 9.4.1 now reads

“Eiser het geweldige pyn en ongemak verduur as gevolg van die polisie se onregmatige optrede en spesifiek die feit dat hy ses (6) maal met ‘n handwapen geskiet is”

The defendant also requested, with no objection from the plaintiff, that paragraph 6 of its Plea be amended to reflect that it admits paragraph 10 of the plaintiff's Particulars of Claim, which reads

“Eiser het behoorlik kennis gegee aan die Verweerder ooreenkomstig en uit hoofde van die bepalings en voorskrifte van Wet 40 van 2002, het die voorgeskrewe tydperke wat moet verstryk alvorens dagvaarding kan uitgereik kan word, reeds verstryk. Eiser het die bepalings van Wet 40 van 2002 ten volle nagekom”

The amendments were accordingly granted.

- [2] The plaintiff called six witnesses and the defendant called four. It is necessary for me to traverse the evidence in some detail, as various aspects of the respective versions of the plaintiff and defendant contain material differences, which will become relevant when evaluating the totality of evidence in order to decide the probabilities of this case.

The plaintiff's version is that on the evening of 10 March

2006 he attended a party at the home of his brother, where he consumed a moderate amount of liquor. He was expected to report for duty as a bus driver at 3h00 the next morning, hence he did not consume too much liquor. He left the party with his wife, three year old daughter and sister, and returned home at about 22h00. On his arrival, he found that his younger son was not present, and in asking his older son where his brother was, the plaintiff shook the boy by the shoulders. This resulted in an argument between him and his wife, causing her to leave the home with the older son, and leaving the plaintiff with his three year old daughter.

- [3] A while later he was awakened by two police officers, accompanied by his wife, who demanded the child. He handed over the child to his wife, and one of the police officers, a White male whom the plaintiff identified as Constable Bernardo (Bernardo), said to him in Afrikaans “Jy is verspot and parmantig”. [According to the dictionary “verspot” means “foolish”, and “parmantig” means, amongst other things, “cocky, cheeky, impertinent, impudent, obstreperous, brash, insolent”]

(Bilingual Dictionary, Bosman, Van der Merwe and Hiemstra, 8<sup>th</sup> Edition)]. The policeman thereafter slapped the plaintiff who retaliated by slapping the policeman back and saying he is not “verspot” and “parmantig”, resulting in a fist fight breaking out between the two. The other policeman, an African male who was identified as Reservist Sergeant Karedi Mahapela (Mahapela), joined in the fray and the fight then moved to the kitchen, where the plaintiff picked up a knife and was swinging his arms (seemingly wildly and randomly). Prior to this, they fought in his bedroom.

- [4] When they moved to the kitchen, Mahapela left the kitchen and went outside. Bernardo was retreating as the plaintiff swung the knife in front of the officer. When Bernardo reached the door, he fell outside the door. Mahapela was shouting at him (the plaintiff). The plaintiff also went outside, but thereafter went back into his house, the officers left, and he went to sleep in the children’s bedroom. I will refer to this as the first incident

[5] Some time later, he was awakened by a loud noise which sounded like gunshots and got out of bed, but felt what he describes as “powerless”. He went into the kitchen but fell immediately as he could not walk further. Then he noticed blood on himself but did not know where it came from. The shooting seemed to have stopped and he tried to crawl outside. He remembers seeing a White police officer whom he said was called De La Hunt (De la Hunt), and the latter was accompanied by Mahapela. De la Hunt placed his foot on the plaintiff’s neck as he crawled outside. The plaintiff called out to his sister to bring him some water but did not get any. He then lost consciousness and was later taken to hospital. I will refer to this as the second incident.

[6] The evidence of the plaintiff’s wife, Maria Phatlane, was the same as that of plaintiff up to the point when she left the house after the argument with the plaintiff. She later realised that the plaintiff will leave home around 2 o’clock in the morning for work and her young daughter would be left alone. She did not want to go back to the

house as she thought the argument would continue so she went to the house of Mrs Tsubela, but met her on the street and requested her to call the police to accompany her to fetch her daughter. She waited on the street for the police, who arrived and accompanied her into the house. The police requested the plaintiff to hand the child to his wife which he did. Mrs Phatlane's evidence is that at that point she left the room and the house, but that the police were still in the house. She did not hear or see what happened thereafter. She went to the house of Mrs Tsubela where she intended to spend the night. A while later, she was informed by her sister-in-law that the plaintiff had been shot. At this point, she returned to her home.

- [7] Aaron Mphore (Mphore), the plaintiff's neighbour, testified that he was awakened by the sound of people shouting at each other. He saw many people outside at the plaintiff's premises. He also saw Mahapela and the plaintiff shouting at each other. He noticed that Bernardo was there as well, and the latter shouted to Mahapela that they must leave. Mahapela responded to the

second request of Bernardo to leave, but not before threatening that they would return to shoot the plaintiff.

- [8] A few minutes later Mahapela returned with another White policeman whom the witness identified as De la Hunt . Mphore followed them into the plaintiff's yard and requested permission from De la Hunt to speak to the plaintiff, but was denied such permission and was asked to leave. He did not leave but followed them to the house and stood outside the kitchen door as they entered the house. He noticed De la Hunt opening the door of a bedroom which was dark, looking in for a few seconds and thereafter began shooting into the room, saying "you are fighting with the police". He fired four shots and with each shot he repeated these words. After the fourth shot was fired, Mphore heard someone screaming in agony. Thereafter De la Hunt and Mahapela retreated. Mphore left and went back into his own yard but could still see the plaintiff's kitchen door. He noticed Mahapela leave first and De la Hunt followed closing the door. A few seconds later the latter opened the door and fired two more shots, after which Mphore

heard a voice from inside the house asking “Minah”, one of the other witnesses for the plaintiff, for help. De la Hunt then ordered the person to come out. He came crawling out, and while doing so, De la Hunt grabbed him by his clothes and pulled him out of the house and thereafter placed his foot on this person’s neck. This person was the plaintiff, and De la Hunt again said “you are fighting with the police”.

- [9] . Jeminah Molete (Molete) is the plaintiff’s sister who left the party with him and his wife. A while after the plaintiff dropped her off at her home, his son Tebogo, arrived and informed her that his parents were fighting and told her the reason for the fight. She went to the plaintiff’s house and asked him what was going on and he said there was no problem. She thereafter left his home and a short while later encountered his wife on the street. The plaintiff’s wife repeated the story told by the plaintiff’s son and informed this witness that she had called the police to accompany her into the house to fetch her daughter. While they were on the street the police arrived and accompanied the plaintiff’s wife into

the house, while Molete stood at the kitchen door. The plaintiff's wife exited the house with her daughter and Molete remained at the house. She then saw Bernardo slap the plaintiff and say that he is "parmantig". The plaintiff slapped Bernardo back, saying he is not "parmantig". At this point Molete left the house and (presumably) stood outside. She observed Mahapela leave the house and then Bernardo. The latter hit the bottom door and fell. He then went to the police vehicle and called for Mahapela, who was at this stage engaged in a quarrel with the plaintiff. When Mahapela returned to the police vehicle, he said that they are coming back to shoot the plaintiff.

- [10] As regards the second incident, Molete testified that the police arrived a few minutes after the first incident had ended, and the police officers this time were Mahapela and De la Hunt. Mphore approached them and asked for permission to speak to the plaintiff but was refused permission. They asked him to leave but he followed them to the house. She then heard gunshots in the house. After a while Mahapela and De la Hunt came out

of the house. De la Hunt opened the door and fired two shots into the kitchen. Some time later the plaintiff came crawling out of the kitchen but De la Hunt placed his foot on the plaintiff's neck. The plaintiff asked Molette for water but De la Hunt prevented her from entering the house. The plaintiff was later taken to hospital by ambulance.

- [11] Doctor Leon Wagner, a Forensic Pathologist of many years' experience in pathology, including ballistics, testified that he examined the plaintiff on 7 December 2011. He was furnished with the report of the doctor who had initially attended to the plaintiff, but had no photographs of the plaintiff's wounds that were of any help in compiling his report. He consequently had to rely on the healed scars to make the conclusions he did. From the medical reports, and from the scars, he was unable to determine the entry and exit wounds. He was able to say that no bones were shattered, no vital organs were hit and no nerves were damaged when the plaintiff was shot. He determined that all the wounds were to the front of the plaintiff's legs, as there were no scars at the

back of plaintiff's legs. Doctor Wagner testified that many possibilities existed as to positions of the plaintiff and the shooter at the time of the shooting, for example the plaintiff could have been standing and the shooter lying on the ground, or both lying on the ground. It would appear that they were in close proximity to each other, and his view was that the shooter was to the side of the plaintiff at the time of the shooting. Another aspect that the doctor testified about was the ability of the plaintiff to move even after being shot. As a result of no bony structures or nerves being damaged, the plaintiff would have been able to continue walking and remain standing. He would also not have felt pain immediately, the delay in the sensation of pain being determined by the influence of alcohol and the level of aggression being shown by the plaintiff.

- [12] Matthias Johannes Willemse, the plaintiff's attorney, was the final witness for the plaintiff. He testified that apart from this matter, he also represented the plaintiff in a criminal matter arising from this incident, where the plaintiff was charged with attempted murder. He tried to

obtain a copy of the record in that matter but has been unsuccessful in doing so. He also testified that three weeks before the commencement of this trial, he took the photographs in Exhibit A, except photographs (c) and (d) on page 2 of Exhibit A, which were brought to him by the plaintiff.

- [13] The defendant's first witness, Inspector De la Hunt, was involved in the second incident between the plaintiff and the police. He received a call at the charge office alleging that the plaintiff had threatened to murder his wife and child with a knife. He relayed the message to Constable Bernardo and Reservist Sergeant Mahapelo who were on patrol duty and requested them to investigate. A few minutes later he received a radio report from Bernardo that he had been attacked with a knife and requested that an ambulance be called. When he arrived at the police station he was bleeding profusely from his head and was taken to hospital. Mahapelo had a stab wound on his hand and a scratch extending from his collar bone to his chest.

[14] De la Hunt went to the plaintiff's house, accompanied by Mahapelo. He entered the house after receiving no response to his to his calls and announcement of the presence of the police. The kitchen light was on. In a room in front of him, he saw a figure spring up and stand in the doorway. As he approached he saw the person holding a knife in his raised hand and this person, who turned out to be the plaintiff, started stabbing at him. He fired a shot at the plaintiff's legs as he retreated, but the plaintiff kept advancing. As he reached the kitchen door he fired another shot at the plaintiff and thereafter fell backwards out of the door and landed on his buttocks. The plaintiff was advancing rapidly, so he fired three shots in quick succession as he sat on the ground. The plaintiff then turned around and went back into the house. De la Hunt went back to the kitchen and saw the plaintiff on the kitchen floor bleeding profusely. He called the ambulance and the plaintiff was taken to hospital.

[15] Sergeant Bernardo testified that while he was on patrol duty with Mahapelo, he received a call from De la Hunt instructing them to investigate a case of Domestic

Violence. On arrival, they were met by the plaintiff's wife who was the complainant. A few minutes later they entered the house with the assistance of the complainant, and found the plaintiff and the child in a bedroom. They requested him to release the child to her mother, which he did. He was wearing a bullet proof vest and was armed with his firearm, which was holstered. Thereafter the plaintiff took a knife out of a pair of trousers and started to stab at the two policemen. They retreated and Bernardo used pepper spray on the plaintiff but this had no effect on him. He thereafter stabbed Bernardo on the forehead, which caused him to bleed profusely. Thereafter Bernardo jumped backwards out of the kitchen door but he fell on his back outside the house. He went to the vehicle and he and Mahapelo went back to the police station.

- [16] Constable Karedi Mahapela was present when both the first and second incidents took place at the plaintiff's house. As regards the first incident, he corroborated Bernardo in all material respects regarding the manner in which the first incident took place. Mahapela

confirmed that he and Bernardo were stabbed by the plaintiff but they did not retaliate, even though both were armed. They left and a few minutes later he returned with De la Hunt. Once again they called out to the plaintiff, introduced themselves but got no response. They entered the house and as they approached the bedroom the plaintiff appeared and started to attack them with a knife. They retreated, but he kept advancing and De la Hunt fired at the plaintiff, who stabbed at De la Hunt. They retreated towards the door with the plaintiff advancing. De la Hunt fired another shot and as he exited the kitchen door he fell. Shots continued to be fired but he did not know how many as he was concentrating on the plaintiff who also came out of the house. Mahapela sprayed him with pepper spray and shortly thereafter the plaintiff turned and went back into the house. They noticed that the plaintiff was injured and called an ambulance.

- [17] Inspector James Morane Moeketsi (Moeketsi), the investigating officer was called to the scene after the plaintiff was removed to hospital. He found five spent

bullet cartridges on the premises. One was in the bedroom, one in the kitchen and three outside the house. He pointed out various aspects of the scene to the photographer who took the photos reflected in Exhibit C. One of the cartridges was pointed out to him by De la Hunt and he found the rest. In cross examination, he said a knife was recovered but he could not remember where on the premises. It was booked in as an exhibit, but he did not have the details with him.

- [18] As indicated, the versions of the plaintiff and defendant are materially different with regard to many important aspects. With regard to the first incident, it seems that the plaintiff offered no resistance when the police requested him to hand the child to his wife, and it is Bernardo's version that the plaintiff was cooperative, and when the child left the room, the plaintiff, for no rhyme or reason, suddenly set upon him and Mahapela with a knife. They retreated but the plaintiff continued to advance and stabbed both the police officials during the scuffle. Bernardo denies that there was any verbal or physical exchange between him and the plaintiff prior to

the plaintiff stabbing him. The injuries to the policemen are not denied by the plaintiff. It is also common cause that he succeeded in driving two armed policemen, wearing bullet proof vests, out of his house. On the plaintiff's version, he was stabbing randomly and cannot say whether he struck the policemen.

- [19] To my mind, his actions are indicative of aggressive, possibly angry behaviour. Even if the slapping and punching incident did occur a few minutes earlier as he alleges (during which he appears to have retaliated blow for blow), the subsequent action of the plaintiff in arming himself with a knife, indicates not only a lack of respect for the officers of the law but an intention to assert himself in a way designed to "teach them a lesson". This is clear from his evidence that they slapped him in his own house instead of reprimanding him, which seems to imply that he was justified in attacking them the way he did. I also find it improbable that he would not know if he struck both policemen, especially Bernardo, who was bleeding profusely. The light in the kitchen was switched on, yet the plaintiff says he did not see Bernardo

bleeding. The fact that the policemen did not, there and then, draw their firearms seems somewhat strange, but it does serve to corroborate their version that, apart from the fact that the incident happened very quickly, it was not their intention to hurt the plaintiff as they were intent on using minimum force against him. This is particularly so in the light of the evidence elicited in the cross examination of Bernardo that, in his experience, it is not uncommon for police officials to be attacked and the police are trained to expect this.

- [20] The impression one gains from the evidence of the plaintiff's witnesses, overall, is that they were intent on downplaying the severity of the plaintiff's actions and highlighting the actions of the police during the first and second incidents, in that they seemed quite unobservant of happenings that may have cast the plaintiff in a bad light. An example of this for instance, is that the plaintiff, his wife and Molete persisted in referring to the altercation between the plaintiff and his wife as an argument and steadfastly refused to admit that it must have been quite serious for the plaintiff's wife to have left

the house and sought the assistance of the police to fetch her daughter. When viewed against the evidence of the police that they received a complaint of Domestic Violence from one Mrs Tsubela where the suspect was threatening to kill a woman and child with a knife (which is denied by the plaintiff), it is surprising that Mrs Tsubela was not called to confirm the plaintiff's version that she did not in fact so inform the police. Another example is where Molete alleges that she followed the police to the house during the first incident specifically to see what was going on with her brother, but inexplicably left the house just after she allegedly saw the Bernardo and plaintiff slap each other. According to the plaintiff, it was shortly after this that the "fight" between him and the policemen intensified. Molete conveniently, therefore, did not witness the wild and aggressive behaviour of the plaintiff during which both policemen were injured, Bernardo seriously so. When the policeman left the premises after the first incident Molete and Mphore were in close proximity. It would have been difficult to miss the sight of Bernardo bleeding profusely, yet both denied witnessing this. It may be argued that Mphore did not

make a statement to the police at the time of the incidents and it is possible that due to the great time lapse before he testified, he may have forgotten this observation. No such explanation was tendered in respect of Molete and the cumulative effect of this denial on the part of these two witnesses is that they were not being truthful. If the policemen were the aggressors during the first incident, it is strange that they did no more than retreat, in spite of being armed. Taking into account the versions of the plaintiff and the defendant, it is more probable that the plaintiff was the aggressor and did not act in self defence during the first incident.

- [21] The respective versions, especially with regard to the manner in which the second incident unfolded are materially different. The plaintiff himself does not know how he sustained the gunshot wounds that he did. This has to be inferred from the evidence of Mphore who alleges he was at the kitchen door and saw De la Hunt fire four shots into a darkened bedroom and after the fourth shot, he heard an anguished scream from someone in the bedroom. There is no evidence to

suggest that there was anyone else in the house except the plaintiff when the police entered for the second time, so this scream could only have come from the plaintiff. This aspect of Mphore's evidence is difficult to reconcile with the evidence of the plaintiff who says he was awakened by the sound of gunshots and he thereafter stumbled into the kitchen where he fell. He did not say that he screamed, or even that he felt pain which could have caused him to scream. This would suggest that either Mphore was mistaken about hearing a scream, or that the plaintiff was not shot while he was asleep. The lack of any evidence regarding the bed linen which may have had bullet holes or blood stains is also telling with regard to the probability of the plaintiff's version. If De la Hunt did indeed shoot into a darkened bedroom, it is indeed a wonder that the plaintiff suffered injuries only to the front of his legs. My impression of Mphore's evidence with regard to the shooting is that he places himself on the scene merely to lend credibility to the plaintiff's version. He also appears to be selective in his recollection of certain important aspects in the manner in which the incidents unfolded, for example his failure to

notice that Bernardo was bleeding. Other aspects of his evidence, one of which I will deal with later in this judgment, are also problematic and reinforce the impression that his evidence is contrived.

[22] The defendant's version is that the plaintiff was aggressive and unstoppable during the second incident, having sprung upon the policemen with a knife. The plaintiff denies this but does not dispute that De La Hunt's shirt was torn in two places, which De la Hunt says was sustained when the plaintiff stabbed at him with the knife. No evidence was offered by the plaintiff to gainsay this aspect of De la Hunt's evidence.

[23] Mr Steenkamp introduced into evidence the statement that Mahapela made shortly after the incident and pointed out that what he said in that statement differed from his *viva voce* evidence and in fact contradicted De la Hunt's evidence. Mahapela had stated (in the statement) that De La Hunt first fired a warning shot when the plaintiff attacked them and two more shots thereafter. This differed from his testimony in court,

during which Mahapela said he was not sure of how many shots were fired in total because he was concentrating on the plaintiff.

[24] In this regard the evidence of Moeketsi becomes relevant. He said that a bullet point was found in the bedroom, one cartridge was found in the kitchen, while the other three were found outside the house, indicating that at least five shots were fired. This accords with De la Hunt's evidence. Mr Steenkamp suggested that the bullet point was found too far into the room to lend support to De la Hunt's version that he fired the first shot while he was outside the bedroom. From the evidence led, this was clearly a very small house, where the kitchen was estimated to be two metres by two metres. It is also clear that a few steps from the kitchen would lead one very close to the bedroom, or conversely, a few steps from the bedroom would lead one into the kitchen. In the absence of evidence to the contrary, I do not agree that the position in which the bullet point was found renders improbable De la Hunt's evidence with regard to his position when he fired at the plaintiff.

[25] The incident undoubtedly unfolded very rapidly and the policemen found themselves under attack. Another factor to be taken into account was that all witnesses (both for the plaintiff and defendant) testified some six years after the incidents happened. It is to be expected that there would be some lapses in memory. It also cannot be expected that the statements submitted to the police would contain every detail pertinent to the matter. It is usually the case that such statements would broadly record the events in question. Another aspect that has been well canvassed in our case law is that no two witnesses will observe and process an incident in the same way. Much depends on the circumstances prevailing at the time, so it is to be expected that there will be some differences in their testimony. I cannot find that the discrepancies in the evidence of Mahapela and De la Hunt are fatal to the defendant's case. De la Hunt was the shooter and would be in a better position to say how many shots he fired, where, when and in what order they were fired. Even if Mahapela is wrong on this aspect, there is other acceptable evidence, namely that of Moeketsi, to confirm De la Hunt's version, making the

latter's version acceptable. The rest of Mahapela's evidence cannot, therefore, simply be rejected. It appears that his evidence in all other respects is reliable and may accepted. See **Johannes v South West Transport (Pty) Ltd Namibia High Court 1994(1) SA 200 (NM) at 202 C-G**

- [26] The task of the court is to assess the probabilities of each version based on the evidence presented in court. It is common cause that all the wounds sustained by the plaintiff were to the front of his legs. Dr Wagner's evidence is that no major organs, no nerves or bony structures were hit. As indicated he was not able to say which scars represented entry wounds and which represented exit wounds. Therefore much of what he said with regard to the position of the plaintiff and that of the shooter is conjecture, and this would have to be assessed from the evidence as a whole. Dr Wagner's evidence is, however, significant with regard to the impact of these wounds on the plaintiff. He said that because nerves and bones were not injured, the plaintiff may not have felt pain immediately and would still have

been able to walk. His further evidence was that if the plaintiff was aggressive, and alcohol contributed to the aggression, the plaintiff would continue to act aggressively and mechanically, in spite of being shot. De la Hunt testified that in spite of his having fired shots at the plaintiff inside the house, the latter continued to advance, as result of which he fired three further shots at him when he was outside the house. Mahapela's evidence was that he sprayed pepper spray at the plaintiff as he was advancing on the policemen, and this too had no effect on him. In the light of Dr Wagner's evidence, it appears to me entirely probable that the plaintiff was in fact aggressively advancing on the police officials, knife in hand, in the manner that they describe.

[27] Exhibit C, depicting the positions where the spent cartridges were found by Moeketsi, was introduced into evidence after De la Hunt testified, so it is accepted that, for that reason, this aspect was not canvassed with him. When Moeketsi testified, the defence sought an admission from him that the integrity of the crime scene was compromised prior to his arrival and therefore the

positions in which he found the cartridges were not their original positions. Moeketsi could take the matter no further than to concede this point. This was canvassed with Mahapela, who testified that after the plaintiff was shot, neither he, De la Hunt nor any other person entered the house. In the absence of any other evidence to the contrary, I accept that the positions in which Moeketsi found the various cartridges is where they originally came to rest, and that they were not tampered with.

- [28] Having said that, I am in agreement with Mr Steenkamp that Moeketsi's investigation, or his recordal of what he did, was shoddy. The discovery of the knife was an important piece of evidence, yet he either did not record where it was found or could not remember. He was also justifiably criticised by Mr Steenkamp for not having made a greater attempt to ascertain if there were bullet markings on the walls, especially outside the house. This would also have assisted in assessing where De la Hunt was at the time the various shots were fired and may well have afforded corroboration for either his

version or that of the plaintiff. In the circumstances, I will have to decide the matter on the evidence that is before the court in this regard.

[29] I turn to another aspect of Mphore's evidence that appears not to be true. The plaintiff amended his particulars of claim at the commencement of the trial by, inter alia, deleting paragraph 5.2 in its entirety. In that paragraph, the plaintiff had alleged that he was dragged out of his kitchen door by his clothes. Mphore testified that this is what he saw, and when confronted with the amendment to the particulars of claim, he insisted that he did in fact witness the plaintiff being dragged out of the kitchen by his clothes. The overall impression of this witness is that he is not reliable, firstly because he appears to have placed himself on the scene to afford an eye witness account of the shooting of the plaintiff and secondly because he insists on witnessing something the plaintiff himself excised from his particulars of claim. It is difficult to avoid the perception that this witness was schooled as to the plaintiff's version, but was, unfortunately for him, not told of the

amendment to the summons. It is entirely probable that he was present with others outside, in the vicinity of the plaintiff's house, but I am constrained to accept that he witnessed the events that happened inside the plaintiff's house or that they happened as he says they did.

- [30] The plaintiff bears the onus to prove, on a balance of probabilities, that his version is more natural and plausible than that of the defendant. He must convince the court to find in his favour. See **Jordaan v Bloemfontein Transitional Local Authority and Another 2004(3) SA 371 (SCA)** where Farlam J cited with approval the case of **Govan v Skidmore 1952(1) SA 732 (N)**, in which it was held that the court may “by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one” The **Govan** case was also cited with approval in **Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A)**. In the case of **National Employers' General Insurance Co Ltd v Jagers 1984(4) SA 437 (EC)** Ecksteen AJP, in deciding whether the plaintiff has discharged the *onus* of proof, held at

p440, that “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”

In the circumstances of the present case, I find that there is no credible support for the plaintiff’s version that in all probability, he was shot while he was asleep in the bedroom and only discovered later that he was injured. To my mind, the probabilities of this case do not favour the plaintiff’s version.

- [31] I accept that the police officials found themselves under attack and believed that they were in danger of physical harm during the second incident. The damage that De la Hunt suffered to his shirt as a result of the plaintiff’s attack on him, the plaintiff’s relentless advance on them while he was armed with a knife, the speed with which the incident occurred and the short space of time they

had to react, left De la Hunt with no option but to shoot at the plaintiff. The fact that he suffered muscle injuries only is indicative of the fact that De la Hunt intended only to stop the plaintiff and repel the attack on him and Mahapela. In the circumstances, I am satisfied that the policeman acted in self defence during the second incident, and that the plaintiff has, consequently, failed to establish a case for the relief he seeks.

[32] I, accordingly, make the following order:

The plaintiff's claim is dismissed with costs.

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**NAIDOO, AJ**

**Counsel for Plaintiff:  
Instructed by:**

**Adv M Steenkamp**  
Naudes Attorneys  
Naudes Building  
Corner Markgraaf and  
Kellner Streets  
Bloemfontein

**Counsel for Defendant:  
Instructed by:**

**Adv SJ Reinders**  
State Attorney  
11<sup>th</sup> Floor Fedsure  
Building  
49 Maitland Street  
Bloemfontein